CNMV
Comisión Nacional del Mercado de Valores

Attention to Complaints and Enquiries by investors
2019 Annual Report

Attention to Complaints and Enquiries by investors

2019 Annual Report

Comisión Nacional del Mercado de Valores
Edison, 4
28006 Madrid

Passeig de Gràcia, 19
08007 Barcelona

All of the CNMV's regular reports and publications can be found on the Internet at www.cnmv.es

Layout: Cálamo y Cran
ISSN: 1989-2071

Table of contents

Index of figures

Index of tables

Abbreviations

AA. PP.	Public administration service
ABS	Asset-Backed Security
AIAF	Spanish Market in Fixed-income Securities
AIF	Alternative Investment Fund
ANCV	Spanish National Numbering Agency
APA	Approved Publication Arrangement
APR	Annual Percentage Rate
ASCRI	Spanish Venture Capital & Private Equity Association
AV	Broker
BIS	Bank for International Settlements
BME	Spanish Stock Markets and Financial Systems
CADE	Public Debt Book-entry Trading System
CC. AA.	Autonomous regions
CCP	Central Counterparty
CDS	Credit Default Swap
CFA	Atypical financial contract
CFD	Contract For Differences
CISMC	CIS Management Company
CNMV	(Spanish) National Securities Market Commission
CP	Crowdfunding Platform
CS	Customer Service
CSD	Central Securities Depository
CSRD	Central Securities Depositories Regulation
DLT	Distributed Ledger Technology
EAF	Financial advisory firm
EBA	European Banking Authority
EBITDA	Earnings Before Interest Taxes, Depreciation and Amortisation
EC	European Commission
ECA	Credit and savings institution
ECB	European Central Bank
ECR	Venture capital firm
EFAMA	European Fund and Asset Management Association
EFSM	European Financial Stabilisation Mechanism
EICC	Closed-ended collective investment company
EIOPA	Occupational Pensions Authority
EIP	Public interest entity
EMIR	European Market Infrastructure Regulation
EMU	Economic and Monetary Union
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETF	Exchange Traded Fund
EU	European Union
EUSEF	European Social Entrepreneurship Fund
FICC	Closed-ended collective investment fund
FII	Real estate investment fund
FIN-NET	Financial Dispute Resolution Network
FINTECH	Financial Technology

FOGAIN	Investment Guarantee Fund
FRA	Forward Rate Agreement
FROB	Fund for Orderly Bank Restructuring
FSB	Financial Stability Board
FTA	Asset securitisation fund
FTH	Mortgage securitisation fund
GDP	Gross Domestic Product
HF	Hedge Fund
HFT	High Frequency Trading
IAGC	Annual corporate governance report
IARC	Annual report on director remuneration
IAS	International Accounting Standards
ICIS	Collective investment company/scheme
ICO	Initial Coin Offering
IF	Investment Firm / Investment Fund
IFRS	International Financial Reporting Standards
IIMV	Ibero-American Securities Market Institute
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IPO	Initial Public Offering (for sale/subscription of securities)
IPP	Periodic public information
IRR	Internal Rate of Return
ISIN	International Securities Identification Number
KIID/KID	Key Investor Information Document
Latibex	Market of Latin American Securities
LEI	Legal Entity Identifier
LIIC	Spanish Collective Investment Companies Act
LMV	Spanish Securities Market Act
MAB	Alternative Stock Market
MAD	Market Abuse Directive
MAR	Market Abuse Regulation
MARF	Alternative Fixed-Income Market
MBS	Mortgage Backed Securities
MEFF	Spanish Financial Futures Market
MFP	Maximum Fee Prospectus
MiFID	Markets in Financial Instruments Directive
MiFIR	Markets in Financial Instruments Regulation
MOU	Memorandum Of Understanding
MREL	Minimum Requirement for Own Funds and Eligible Liabilities
MTF	Multilateral Trading Facility
MTS	Market for Treasury Securities
NCA	National Competent Authority
NDP	National Domestic Product
OECD	Organisation for Economic Cooperation and Development
OIS	Overnight Indexed Swaps
OTC	Over The Counter
OTF	Organised Trading Facility
PER	Price-to-Earnings Ratio
PRIIP	Packaged Retail and Insurance Based Investment Product
PUI	Loan of last resort
RAROC	Risk-Adjusted Return On Capital
REIT	Real Estate Investment Trust
RENADE	Spanish National Registry for Greenhouse Gas Emission Allowances
RFQ	Request For Quote
ROA	Return On Assets
ROE	Return On Equity
SAMMS	Advanced Secondary Market Tracking System

SAREB	Asset Management Company for Assets Arising from Bank Restructuring
SENAF	Electronic Trading Platform for Spanish Government Bonds
SEND	Electronic Debt Trading System
SEPBLAC	The Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences
SGC	Portfolio management company
SGECR	Venture capital firm management company
SGEIC	Closed-ended investment scheme management company
SGFT	Asset securitisation fund management company
SIBE	Electronic Spanish Stock Market Interconnection System
SICAV	Open-ended collective investment company
SICC	Closed-ended collective investment company
SII	Real estate investment company
SIL	Hedge fund with legal personality
SME	Small and Medium Enterprise
SNCE	National Electronic Clearing System
SPV/SFV	Special purpose/financial vehicle
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
STOR	Suspicious Transaction and Order Report
SV	Broker-dealer
T2S	Target2-Securities
TER	Total Expense Ratio
TOB	Takeover Bid
TRLMV	Recast text of the Spanish Securities Market Act
TVR	Theoretical Value of the Right
UCITS	Undertaking for Collective Investment in Transferable Securities
VCF	Venture Capital Firm / Venture Capital Fund
XBRL	Extensible Business Reporting Language

1 Introduction

1 Introduction

This Annual Report on Complaints shows the actions taken by the National Securities Market Commission (CNMV) in dealing with claims, complaints and enquiries made by investors in 2019 through the Complaints Service.

In this regard, the legal obligation to prepare an annual report was established in Article 30.4 of Law 44/2002, of 22 November, on Financial System Reform Measures, according to which: "The Bank of Spain, the CNMV and the Directorate-General for Insurance and Pension Funds shall publish an annual report on their respective complaints services which must include, at least, the statistical summary of the inquiries and complaints handled and the criteria applied by said services, in relation to the matters on which the complaints filed are based, as well as the respondent entities, indicating, where appropriate, whether the findings were in favour of or against the complainant".

This Annual Report has been prepared under said legal obligation and includes information on how the CNMV handled claims, complaints and enquiries in 2019.

Investors can file complaints when they feel their interests or rights have been harmed by the performance of an entity that provides investment services. With the intention of obtaining a favourable report, investors may file a formal complaint with the Complaints Service with regard to material incidents arising from actions or omissions of the financial institutions against which the complaint is made, which may result in the entity's actions being declared contrary to the rules of transparency and customer protection or good financial customs and practices. This declaration may facilitate the subsequent exercise of their judicial or extra-judicial claims aimed at reinstating their interests or rights. They may also make enquiries or request information on matters of general interest affecting the rights of financial services users in terms of customer transparency and protection or on the legal channels available for the exercise of such rights.

The resolution of the complaints entails the issue, by the CNMV, of a reasoned report that pronounces on the issues raised in the claim, but is not binding on the entities against which complaints are lodged or on the complainants. This report is not considered an administrative act subject to appeal.

Regarding the supporting legislation of this function, the procedure for filing complaints and enquiries was set out in Order ECC/2502/2012, of 16 November, which regulates the procedure for filing complaints before the complaints services of the Bank of Spain, the CNMV and the Directorate-General for Insurance and Pension Funds, which have been in force since 22 May 2013.

This procedure is specified in CNMV Circular 7/2013, of 25 September, which was issued in development of the aforementioned Order ECC/2502/2012, on the resolution procedure for complaints against companies that provide investment services and address enquiries in the field of the securities market.

However, Law 7/2017, of 2 November, incorporating Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes into the Spanish legal system, was published in the *BOE* (Official State Gazette) on 4 November 2017. In line with its first additional provision, the Complaints Service had to accommodate its operation and procedure to the provisions of Law 7/2017. The manner in which this accommodation took place was reported in detail in the Annual Report last year.

The Investors Department of the CNMV is in charge of processing claims, complaints and enquiries based on the aforementioned regulation. The Investors Department consists of two areas: Complaints and Enquiries.

This Annual Report is divided into four chapters and one annex. Chapter 1 is this introduction; Chapter 2 reports the activity of the Complaints Service in 2019; Chapter 3 sets out the issues and criteria applied to resolve complaints; Chapter 4 deals with the most significant issues that have been the subject of enquiries during the year; and the Annex includes a detailed analysis of the criteria applied to resolving complaints.

Chapter 2 reports on the activities performed by the Complaints Service during the 2019 financial year. In line with the structure of recent years' Annual Reports, data relating to the processing of complaints are shown in more detail and figures and diagrams are included to facilitate understanding of the Service's complaint procedure. In this regard, and as is usual, statistical data is provided on the documents submitted to the Complaints Service with a detailed explanation of the processing of the written complaints received, indicating the different stages through which they pass. Accordingly, individualised information is provided on the written complaints processed in each of the stages in 2019. Thus, the Report establishes the number of proceedings and the reasons giving rise to the pre-processing stage (including cases in which the documents submitted by the investor fail to comply with one or more of the conditions required by law for them to be admitted, and others where there is a legal cause for non-admission), to the resolution stage (in which the documents filed are decided on either as complaints or as non-admissions) and to the follow-up stage (which includes the actions of the entities after the issue of a report in favour of the complainant or the responses by complainants to the non-admissions or to reports unfavourable to their complaints).

As in previous years, the Report includes a series of entity rankings according to various criteria: by number of complaints resolved; by reading and response deadlines to requests for comments sent by the Complaints Service to entities; by percentage of final reports in favour of complainants; by number of acceptances and mutual agreements concluded; and by percentages of answers and acceptance of criteria after the issue of a report in favour of the complainant.

In line with the new way of presenting the data of the last three Annual Reports, the rankings differentiate between the entity against which the complaint is filed and the entity responsible for the incidents giving rise to the complaint, which may or may not be the same. They would not be the same in cases in which the entity responsible for the incident had merged with or transferred its securities market business to the entity against which the complaint was filed.

In general, and according to the data provided by the 17 entities that were approached for information, the percentage of complaints that are attended to first by

the Customer Service Departments and subsequently processed by the Complaints Service is very low. On average, it is below 4%, indicating that the system is working properly, whereby customers first go to the entity and if the case cannot be resolved, they turn to the CNMV Complaints Service. In exercising this function, the Complaints Service receives more than 1,000 letters per year, of which around 350 do not meet the admission requirements and almost 700 are admitted and processed as complaints.

In relation to the 686 documents processed, the Complaints Service issues a reasoned report establishing whether the entity has acted incorrectly (41.5% of cases) or correctly (39.7% of cases). The Complaints Service therefore acts as an independent expert and issues a report that can be very useful for the complainant, as it can be used before judicial bodies if favourable to their interests. It is also worth mentioning the 16.3% of cases opened with the CNMV that were resolved in favour of the complainant or where an agreement was reached with the entity.

It should also be noted that in recent years the percentage of acceptances or rectifications made by entities following the issue of a report in favour of the complainant by the CNMV's Complaints Service has increased significantly. The last few years' Annual Reports on Complaints published show an increasing percentage of acceptances or rectifications: 7.3% in 2014, 31.3% in 2015, 45.8% in 2016, 58% in 2017 and 2018, and 80.2% in 2019.

In order to provide details in this Annual Report of the work carried out by the Customer Service Departments (CSD) of the entities supervised by the CNMV in processing the complaints received on issues that fall within the purview of the Complaints Service, specific information about the complaints they receive has been requested from entities. This Annual Report includes the data provided by entities on complaints relating to the securities market filed with their CSDs or with the Customer Ombudsman (CO) in 2019, as well as complaints not admitted or those admitted and resolved by these bodies in the year.

Regarding international cooperation mechanisms, the activity of FIN-NET (the Financial Dispute Resolution Network) is included. This is a network for the out-of-court settlement of cross-border financial disputes between consumers and service providers in the European Economic Area, which the CNMV joined in 2008. The Complaints Service took part in the two plenary meetings that were held in 2019 (April and November) in Brussels.

Further, since September 2018, the Complaints Service has been a member of the FIN-NET Steering Committee, consisting of 12 members and in charge of the FIN-NET work programme that is discussed in plenary meetings.

Since 2017, the Investors Department has also been a member of the International Network of Financial Services Ombudsman Schemes (INFO Network), which has the broad aim of working together on the development of dispute resolution, exchanging experiences and information in various areas. In 2019, it held its annual conference in South Africa. Webinars are also held regularly to present topics of interest to the members of the organisation, and the Complaints Service participates in these.

Chapter 3 gives an overview of the issues and criteria applied in the resolution of complaints in the 2019 financial year and Annex 1 analyses these issues and criteria

in detail. This chapter aims to provide a complete, systematised and practical guide, which includes the criteria followed in all complaints concluded with a final reasoned report in 2019. By including both the complaints concluding in a favourable report and those on which an unfavourable report was issued, it is possible to identify not only the actions that have been considered bad practice by the entity, but also those that were considered correct.

However, it should be noted that the criteria indicated in this chapter relate to the specific times and circumstances analysed in each of the proceedings resolved in 2019, and that future regulatory changes or variations in the circumstances described in each case could lead to modifications to those criteria. In short, the publication of these criteria is intended to be a catalogue that is current at the date of publication and does not prevent said criteria from being modified or clarified at a later date.

The issues are classified according to the following criteria: i) analysis of the product suitability for the client's investment profile in cases of simple order execution, provision of advisory services or portfolio management; ii) product information, which must be provided before and after entering into the contract; iii) order execution; iv) fees; v) wills; vi) ownership of the securities; and vii) the functioning of the CSD. If necessary, due to the particular characteristics of the product or issue, sometimes a more detailed breakdown is made to deal with issues related to collective investment companies or other securities, complex or non-complex financial instruments, etc.

Chapter 4 addresses the activities carried out by the Enquiries Area, collecting statistical data of the enquiries received broken down by communication channel (either through the electronic office, by telephone or by mail), as well as the main issues that were the subject of enquiries in 2019, with a special section on the most significant issues.

In 2019, 7,560 enquiries were dealt with, the majority of which were made by telephone. Excluding enquiries received by telephone, which are answered on the same day, the average response time in 2019 was 22 calendar days.

The following issues raised in 2019 should be highlighted:

i) The detection of two possible types of fraud relating to the performance of reserved activities, although these are outside the scope of supervision of the CNMV. We refer to the activity carried out by entities known as "recovery rooms" and funded trading accounts. As a result of the cases detected and their seriousness, the CNMV published separate press releases on 22 May and 29 July 2019, warning about this type of fraudulent activity.

ii) Enquiries about administration and custody fees for delisted securities, where the good practice that should be employed by depositories of not charging these fees for shares of delisted and inactive companies was highlighted.

iii) Enquires and complaints regarding the voluntary takeover bid of for Distribuidora Internacional de Alimentación, S.A. (DIA), and its possible delisting.

iv) Enquiries about the implementation of minimum lot trading requirements for sales of certain listed securities.

v) Enquiries and complaints deriving from the financial information published by Banco Popular, S.A., after the resolution of the entity in June 2017.

2 Activity in 2019

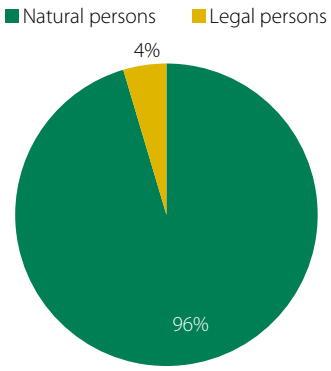
2 Activity in 2019

2.1 Documents filed with the CNMV Complaints Service

In 2019 the Complaints Service received 1,077 investor documents that, due to their characteristics, could be processed as complaints.

These documents were submitted mainly by natural persons. In 142 cases, the investor acted through a representative. In nine of these cases, the representatives were consumer and user associations and in one case it was a Municipal Office for Consumer Information.

Types of investors applying to the Complaints Service FIGURE 1



Source: CNMV.

The complaints procedure applying to natural person investors and not-for-profit organisations is set forth in Order ECC/2502/2012, adapted to the provisions of Law 7/2017 of 2 November incorporating Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes into the Spanish legal system. On the other hand, investors that are legal persons must follow the order procedure without any adaptation or accommodation whatsoever.

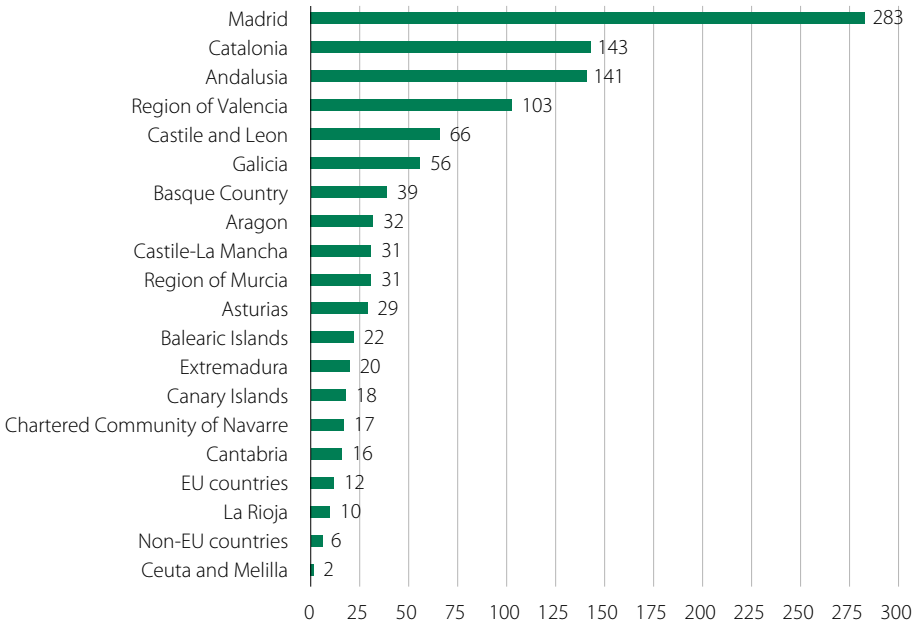
The differences between the two procedures were set out in detail in the 2017 and 2018 Annual Reports on Complaints.

Of the 43 documents submitted by legal entities, two were from foundations, that is, not-for-profit organisations to which the adapted procedure was applied accordingly.

Investors applying to the Complaints Service were mostly resident in Madrid (283), followed at some distance by residents of Catalonia, Andalusia and the Region of Valencia.

Origin of investors applying to the Complaints Service

FIGURE 2

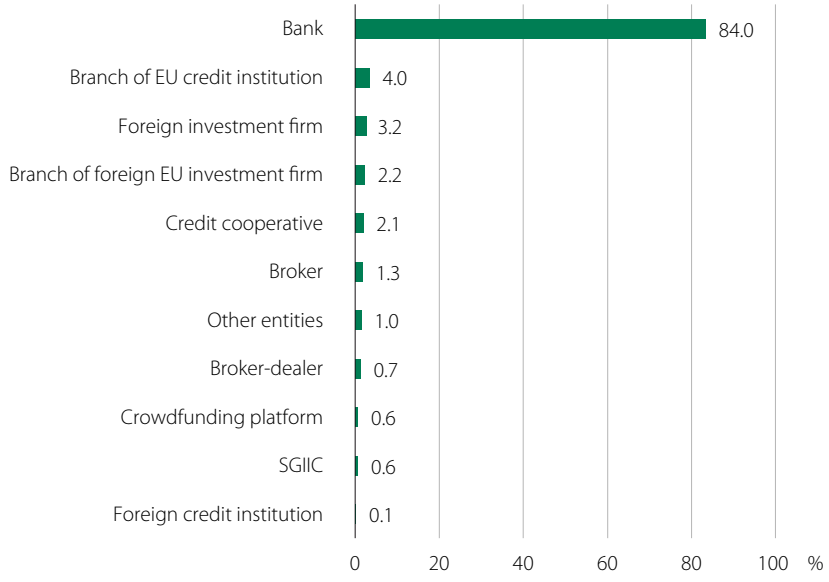


Source: CNMV.

The types of entities subject[1] to investors' complaints were the following:

Type of entities

FIGURE 3



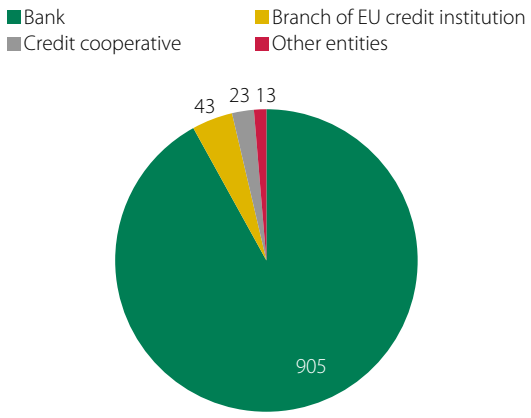
Source: CNMV.

As shown in Figure 3, the type of entity about which investors mostly made complaints were national credit institutions: 86.1% (84% of which were banks and 2.1% credit cooperatives). Another 4.1% corresponding to foreign credit institutions must be added to this percentage: 4% corresponding to branches of EU credit institutions and 0.1% where the complaint was filed against foreign credit institutions operating from their country of origin.

1 1,025 entities were affected by investor documents, since some documents concerned more than one entity.

Complaints against credit institutions

FIGURE 4

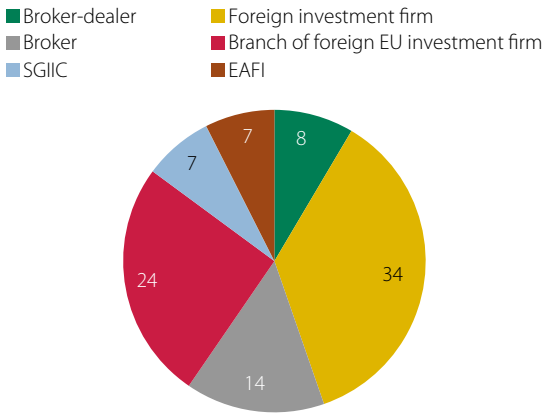


Source: CNMV.

Regarding investment firms (IFs), in only 2% of the documents was the company against which the complaint was filed a Spanish investment firm (1.3% referred to broker-dealers and 0.7% to brokers) or a collective investment scheme management company (CISMC) (0.6% of cases). In 5.4% of the documents filed by investors with the Complaints Service, the entity against which said complaint was addressed was a foreign IF. A distinction is made between those directed against foreign IFs acting from their country of origin (3.2%) and those directed against branches of EU IFs (2.2%).

Complaints against IFs and management companies

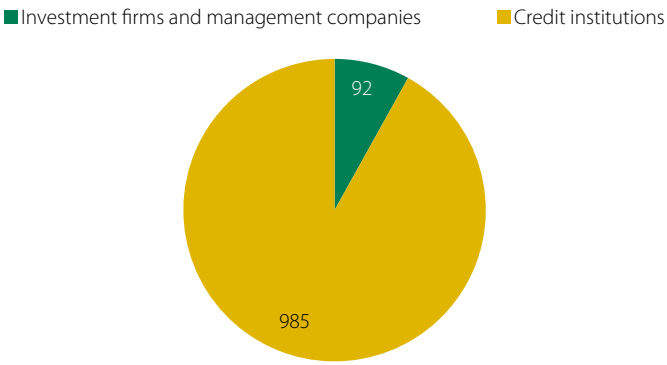
FIGURE 5



Source: CNMV.

Consequently, credit institutions (banks in particular) are the entities against which investors mainly addressed their complaints, while those made against IFs and CISMCs account for only a small proportion, in relative terms, of the total number of documents filed.

Complaints against IFs and CISMCs compared with credit institutions FIGURE 6



Source: CNMV.

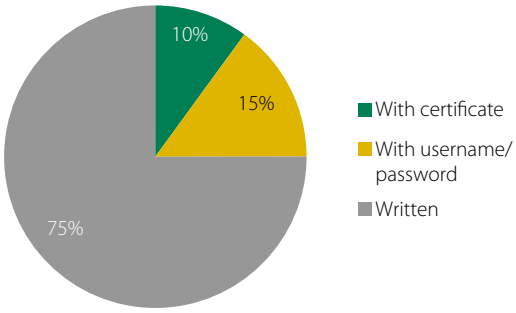
Regarding the way in which investors addressed the Complaints Service, the majority did so on paper, although the number of electronically registered documents is gradually increasing. In regard to the second system, there was an increase both in the number of documents registered with user name and password (from 118, representing 12% of the total, in 2018 to 161, representing 15% of the total, in 2019) and in the number of those registered using a digital certificate (from 86, representing 12% of the total in 2018, to 108, representing 10% of the total, in 2019).

Manner of presentation TABLE 1

Number of documents	
With digital certificate	108
With user name/password	161
Paper	808
Total	**1,077**

Source: CNMV.

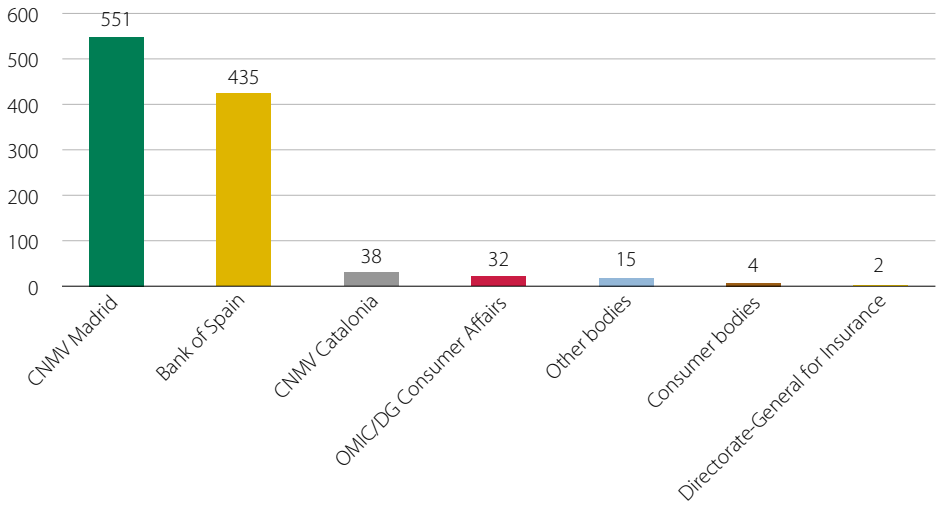
Percentage distribution FIGURE 7



Source: CNMV.

Lastly, the majority of the documents were filed at the CNMV headquarters in Madrid (551), although it is worth mentioning that a significant number of documents referring to issues related to the securities markets were filed directly with the Bank of Spain (435), which forwarded them to the Complaints Service. It is also worth mentioning the cases in which complainants filed their documents with entities related to consumer services, both private (four documents) and public (32 documents).

Place of filing FIGURE 8



Source: CNMV.

2.2 Processing of the documents

Once an investor files a document to open complaint proceedings, the Complaints Service analyses two issues: on the one hand, whether the document meets all the requirements established in the regulations to be admitted as a complaint and, on the other, whether any of the causes of legally-based non-admission apply. Consequently, the documents filed by investors with the CNMV requesting the opening of complaint proceedings might, as applicable, go through different stages.

2.2.1 Pre-processing stage

This pre-processing stage only begins when the Complaints Service concludes that the document does not meet all the requirements established in the regulations to be admitted as a complaint or that any of the legally established grounds for non-admission applies. In these cases, the complainant is informed of this circumstance and a period of 14 calendar days is granted to natural persons or non-for-profit entities (or 10 business days to legal entities) to provide the necessary documentation in order to admit the complaint if the non-compliance can be rectified (petition for rectification or PR) or to allege about the cause of non-admission detected (petition for pleas or PP).

This stage would conclude with the receipt of the answer from the investor and its corresponding analysis or, if applicable, when the term granted for that purpose has elapsed, after which the processing and resolution stage or final stage would begin.

2.2.2 Processing and resolution stage

➢ Non-admissions

In the cases in which, in spite of having requested the complainant to present a rectification or pleas, the complainant does not answer (non-admission due to lack of response), does so insufficiently (non-admission due to lack of rectification) or its pleas do not discredit the cause of non-admission detected (non-admission after pleas), the non-admission of the document will be agreed and its processing will be terminated.

Likewise, proceedings that do not comply with admission requirements that are not susceptible to pleas or rectification by the complainant, will be terminated. This would be the case of the *direct non-admissions* – for example, owing to the Complaints Service's lack of jurisdiction to resolve the issue raised.

If, after the non-admission of the document, the complainant rectifies the deficiencies initially detected, complaint proceedings will be initiated.

➢ Complaints

In contrast, if it is verified that the document filed by the complainant meets all the admission requirements either from the start (direct complaints) or after the deficiencies have been rectified or the grounds for non-admission have been invalidated, the document will be admitted as a complaint thus giving rise to the start of the actual complaint proceedings.

The written complaint and documentation presented by the complainant are then submitted to the respondent entity, which is asked to submit pleas on the merits of the case brought by the complainant within 21 calendar days or 15 business days according to the type of complainant:

– Submit pleas on the merits of the case, as requested.

– Report that some type of agreement has been reached to the complainant's satisfaction. In this case, the entity must prove, either on its own initiative or at the request of the Complaints Service that the agreement has materialised.

– Provide an acceptance or mutual agreement together with a document from the complainant withdrawing the complaint.

– State and demonstrate any grounds for non-admission not reported by the complainant, for example, the existence of litigation pending on the same facts that are the subject of the complaint. This response, once it has been properly analysed by the Complaints Service, could result in the *ex post facto* non-admission of the complaint.

In the usual case that the entity submits pleas on the merits of the case raised by the complainant in the written complaint document, the processing of the case continues. In contrast, if some kind of agreement is reached and accepted by the parties, once its materialisation has been demonstrated by the entity or the client's acceptance obtained, the proceedings will be closed or dismissed without any further formalities.

Continuing with the ordinary processing of the complaint proceedings, the entity has the obligation to submit its pleas to both the Complaints Service and the complainant so that that latter, within 21 calendar days (if a natural person or a non-profit entity) or 15 business days (if a legal person) from the day after the notification is received, may formulate and submit to the Complaints Service the comments deemed appropriate in respect of the entity's pleas. If the complainant's comments provide new information on the subject matter of the complaint, they are sent back to the respondent entity, which is granted a period of time to submit pleas equivalent to the first period granted.

The Complaints Service may carry out any additional actions it deems appropriate to obtain more information on which to base its judgement of the disputed facts under analysis. For more complex complaints, the Service will request additional information either from the respondent entity or from third parties involved in the events.

Once the complaint processing has concluded, the resolution stage begins. This involves the issue of a reasoned report analysing all the facts subject to the complaints (provided that they are not subject to any other circumstance that prevents said analysis) and a final pronouncement on whether the respondent entity's actions were aligned with standards of transparency and customer protection and good financial practices and uses. This final report is sent to the complainant and the respondent entity, thereby concluding the complaint proceedings.

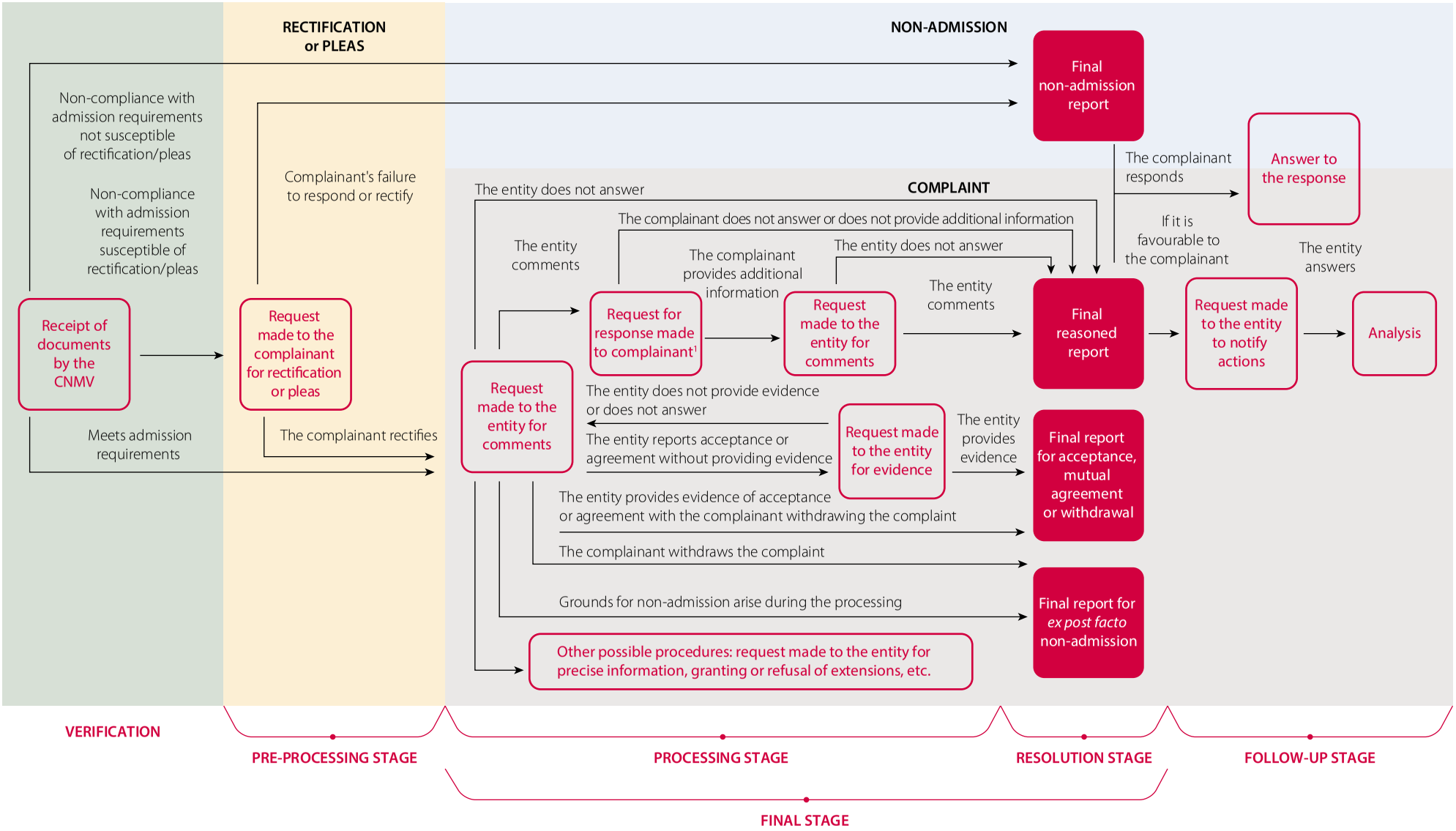
2.2.3 Follow-up stage

Once the non-admission or complaint proceedings have been completed, the follow-up stage begins, which is basically determined by the type of resolution adopted by the Complaints Service.

In those cases in which the Service has issued a reasoned report in favour of the complainant, in addition to sending the final report to the respondent entity, the latter is requested to inform the Service, within one month, of whether or not it accepts the criteria applied in the complaint resolution and, in the event that the entity has rectified the situation with the complainant, to provide documentary evidence of this rectification.

The Complaints Service assesses these communications, as well as any failure to respond. In accordance with the relevant regulations, failure to respond would imply that the entity does not accept the criteria contained in the report.

In those cases in which the Complaints Service has not admitted the complaint for processing (non-admission) or, having admitted it, has issued a reasoned report that is unfavourable to the complainant, it is relatively common for the latter to submit subsequent documents for clarification on certain aspects relating to the conclusion of the proceedings or expressing disagreement with the resolution adopted. The Complaints Service will respond to both types of documents to try to resolve all doubts raised by the complainant.



1 The entity itself sends the comments to the complainant, whom it informs of the deadline for presenting pleas to the CNMV Complaints Service.

2.3 Complaints resolved in 2019

Complaints resolved in 2019This chapter analyses how the documents received by the Complaints Service in 2019 were processed, differentiating among each of the aforementioned stages.

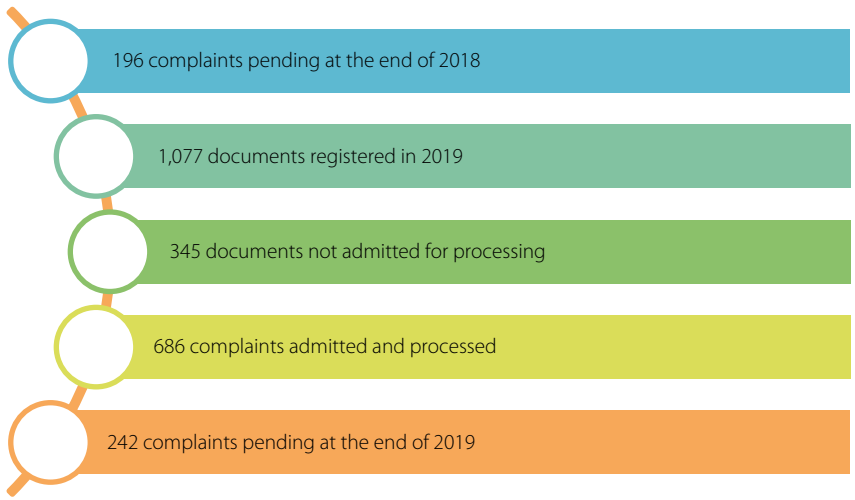
Complaints processed in full in 2019

TABLE 2

Number of documents

	No.
+ Documents outstanding at year-end 2018	**196**
Outstanding non-admissions	0
Outstanding complaints	153
Outstanding petitions for rectifications or pleas	43
Outstanding petitions for rectification or pleas that resulted in complaints	11
Outstanding petitions for rectifications or pleas that resulted in non-admissions	32
+ Documents submitted in 2019	**1,077**
Direct non-admissions	104
Direct complaints	448
Petitions for rectifications or pleas	525
Petitions for rectification or pleas that resulted in complaints	284
Petitions for rectifications or pleas that resulted in non-admissions	241
- Outstanding documents at year-end 2019	**242**
Outstanding non-admissions	2
Outstanding complaints	193
Outstanding petitions for rectification or pleas	47
Outstanding petitions for rectification or pleas that resulted in complaints	17
Outstanding petitions for rectifications or pleas that resulted in non-admissions	30
= Documents completed in 2019	**1,031**

Source: CNMV.



2.3.1 Pre-processing stage

As indicated above, documents that do not meet all the legally established requirements to be admitted as complaints or to which one of the legal reasons for non-admission applies pass through this stage. The former are subject to a petition for rectification and the latter to a petition for pleas.

Of the 196 complaints outstanding at 31 December 2018, 43 were in this pre-processing stage of petitions for rectification or pleas (30 for rectification and 13 for pleas).

In addition, of the 1,077 complaints filed with the Complaints Service in 2019, the pre-processing stage was initiated in 525 cases (446 petitions for rectification and 79 for pleas).

Lastly, at 31 December 2019, 47 complaints were in this pre-processing stage (41 petitions for rectification and six for pleas).

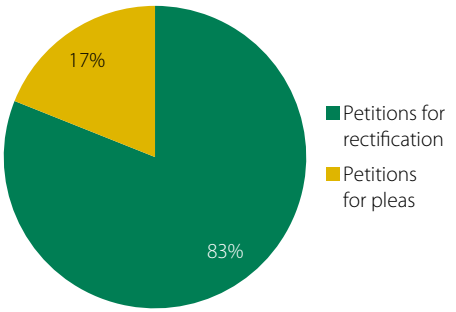
Consequently, in 2019 the pre-processing stage was concluded for 521 complaints submitted by investors (43 initiated in 2018 and 478 in 2019).

Petitions for rectification/pleas concluded in 2019 TABLE 3

Number of complaints	
+ Outstanding petitions for rectification/pleas at year-end 2018	**43**
Petitions for rectification	30
Petitions for pleas	13
+ Petitions for rectification/pleas made in 2019	**525**
Petitions for rectification	446
Petitions for pleas	79
- Outstanding petitions for rectification/pleas in 2019	**47**
Petitions for rectification	41
Petitions for pleas	6
= Petitions for rectification/pleas concluded in 2019	**521**

Source: CNMV.

Breakdown of petitions for rectification/pleas concluded in 2019 FIGURE 9

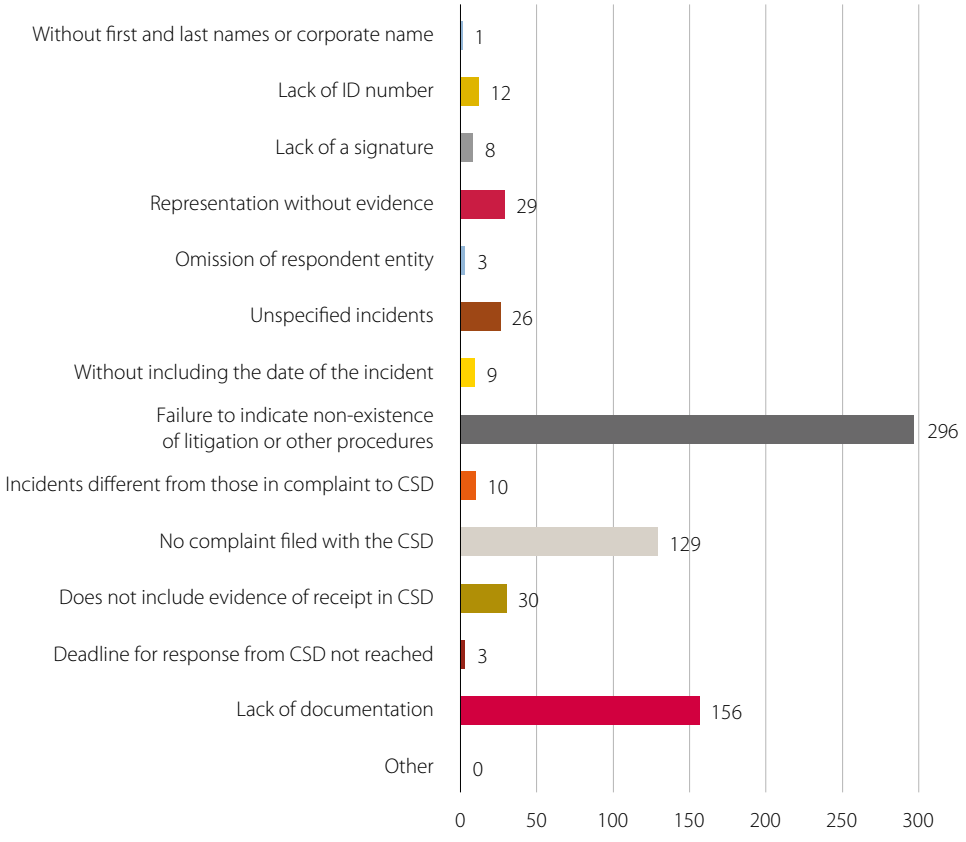


Source: CNMV.

A petition for rectification was made for 435 of the 521 documents for which the pre-processing stage was concluded in 2019.

The main reasons for requesting rectifications from complainants are as follows:

Grounds for petitions for rectification[1] FIGURE 10



Source: CNMV.

[1] It is usual for a petition for rectification to be for more than one reason, which is why the number of reasons (712) is greater than the number of petitions for rectification processed.

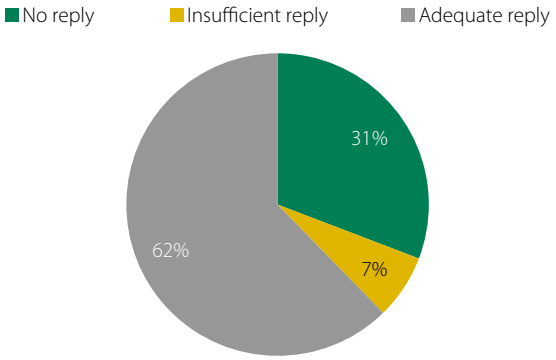
As can be seen in Figure 10, the most frequent cause for rectification is failure to provide information on simultaneous judicial, administrative or arbitration proceedings concerning the same events or facts as those forming the subject of the complaint (296 cases). To facilitate compliance with this requirement, the Complaints Service sends a pre-printed form along with the petition for rectification. Returning this form duly completed is sufficient to resolve this deficiency.

The second most frequent reason for rectification (156 cases) is failure to provide documentation supporting the incidents referred to in the complaint. The third

most frequent reason (129 cases) is failure to demonstrate that the complainant had previously contacted the Customer Service Department of the respondent entity. Compliance with this last requirement, together with the other three reasons linked to the CSD (43 cases) is very important, given that the complaint procedure is designed so that the respondent entity has the opportunity to attempt to resolve its clients' problems prior to the intervention of the public authorities. If this process is omitted, the entities do not have the opportunity to review their actions, and, where appropriate, correct them beforehand. Entities must also help their clients comply with this requirement by sending them the corresponding acknowledgements of receipt after receiving their complaints so that they can easily demonstrate to the Complaints Service that they have contacted the entity's Customer Service Department, particularly in those cases in which this department has not replied to the complainant by the established deadline.

Although in most cases the complainant satisfactorily makes the rectification requested (62%), there are also a significant number of cases in which the complainant does not answer the request (31%) or provides an inadequate response (7%), as shown in Figure 11.

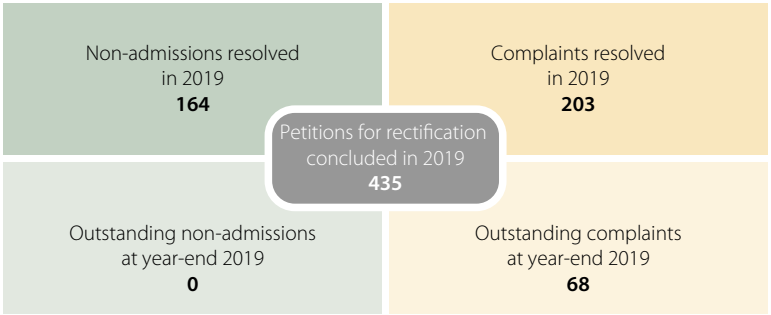
Response to petitions for rectification FIGURE 11



Source: CNMV.

The final classification of the 435 complaints for which a petition for rectification was issued is shown below:

Likewise, it should be noted that at the end of 2019, there were 41 petitions for rectification outstanding, of which 17 have been processed as complaints and 24 as non-admissions during the current year.

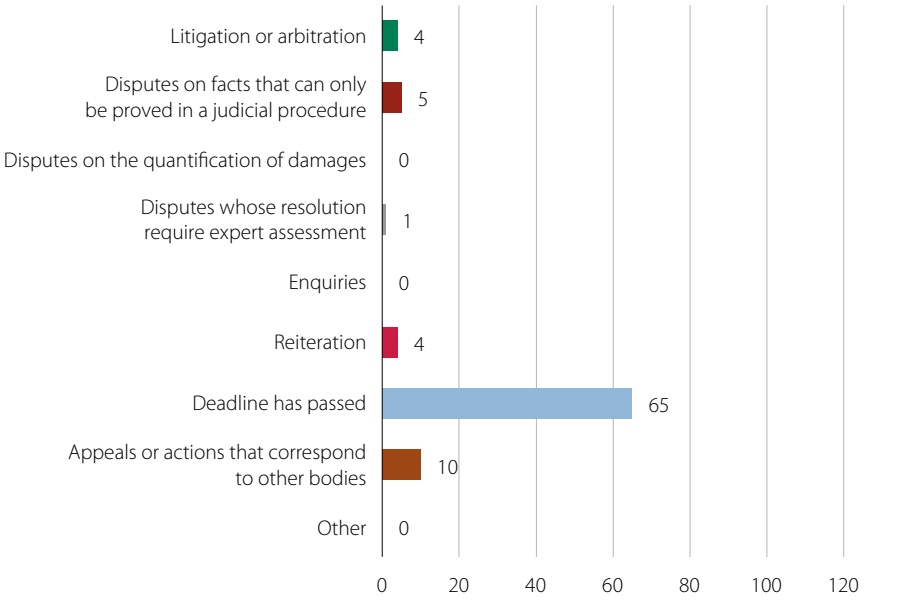


In cases in which the Complaints Service observes that one of the legal reasons set out in the rules applies, it is required to inform the party involved of the reason for non-admission in a reasoned report, granting a period of 14 calendar days (if a natural person or a not-for-profit organisation) or ten business days (if a legal person) in which to submit the pleas considered appropriate. If the party involved does not answer or if the pleas submitted in response do not refute the cause for non-admission, that party will be notified of the closure and filing of the complaint. If on the other hand the pleas received refute the cause for non-admission, the complaint will be admitted.

A petitions for pleas was made in the case of 86 of the 521 complaints for which the pre-processing or PRP stage was concluded in 2019.

The main reasons for requesting pleas from complainants are as follows:

Grounds for petitions for pleas FIGURE 12



Source: CNMV.

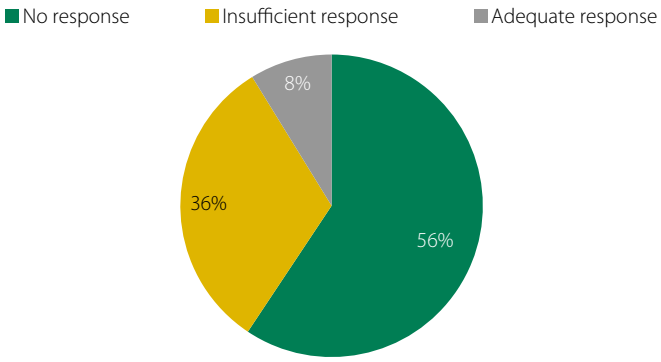
The difference between the number of reasons and the number of complaints processed is smaller in the case of PP than in the case of the petitions for rectification as it is common for there to be one single reason for non-admission. Therefore, the number of reasons for which pleas are requested (86) is very similar to the number of petitions for pleas processed (89).

In the case of petitions for pleas, the most common reason for non-admission is that the period available to the complainant to file their complaint from the date on

which the events occurred has elapsed (65). Other noteworthy reasons for non-admission, although with much lower numbers, are the repetition of complaints that have already been resolved (four), disputes about the financial quantification of the loss and damage that may have been caused to the investor (five) and the existence of other procedures on the facts subject to dispute (four).

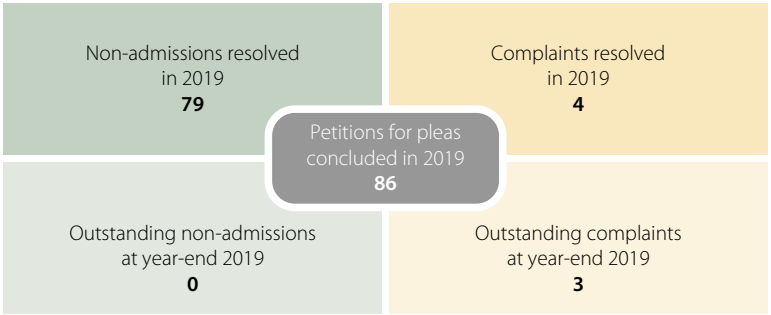
Complainants responded to less than half of the petitions for pleas formulated and only in 8% of them did the complainants manage to discredit the reason for non-admission, and for their complaint therefore to be admitted.

Response to petitions for pleas FIGURE 13



Source: CNMV.

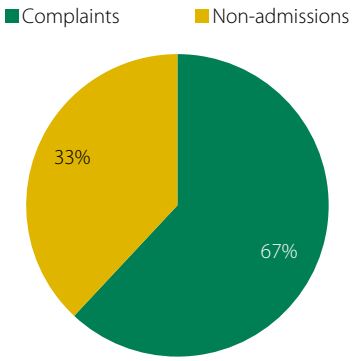
The final classification of these 86 complaints is as shown below:



At 31 December 2019, there were 6 unclosed petitions for pleas and all of these were processed as non-admissions in 2019.

In 2019, the Complaints Service concluded 1,031 proceedings, of which 345 were not admitted and 686 were processed as complaints with the issue of a final report.

Complaints concluded in 2019 FIGURE 14



Source: CNMV.

➢ Non-admissions

In 2019, the Complaints Service resolved not to admit 345 to open complaint proceedings.

Non-admitted complaints concluded in 2019 TABLE 4

Number of complaints

	No.
+ Non-admitted complaints outstanding at year-end 2018	0
+ Non-admitted complaints in 2019	347
- Non-admitted complaints outstanding at year-end 2019	2
= Non-admitted complaints concluded in 2019	345

Source: CNMV.

The complaints submitted by investors may be directly non-admitted (104 proceedings) or non-admitted after the previous stage explained in the foregoing point (241 proceedings).

Types of non-admissions

TABLE 5

Number of complaints

	No.	%
Direct non-admissions	**104**	**30.1**
Bank of Spain	45	13.0
Directorate-General for Insurance and Pension Funds	16	4.6
Against entities operating under freedom to provide services from FIN-NET member countries	14	4.1
Against entities operating under freedom to provide services from non FIN-NET member countries	22	6.4
Other	7	2.0
Non-admission following request to complainant for rectification/pleas	**241**	**69.9**
No response	181	52.5
Inadequate response	60	17.4
Total non-admissions	**345**	**100.0**

Source: CNMV.

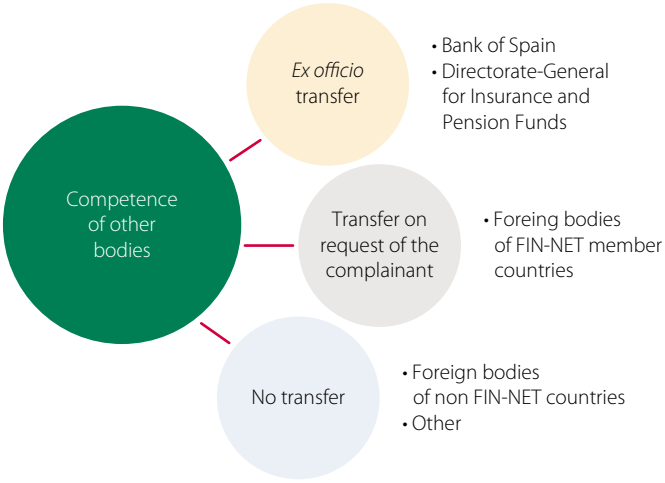
Direct non-admissions occur in two cases:

– When having analysed the issues raised in the complaint filed by the complainant with the Complaints Service, either because of the product or the type of service to which the incidents refer, they do not fall within the jurisdiction of the CNMV, and another national supervisor is responsible for assessing the incident (65 cases).

– In three cases, although the CNMV Complaints Service was the competent body, there were direct non-admissions because the complainant did not provide an address or telephone number in the document submitted, which made it impossible to contact them to request a rectification of the complaint.

– When the issues raised by the complainant refer to products or services related to the securities market, but the supervision of the entity against which the complaint is filed corresponds to a foreign body (36 cases).

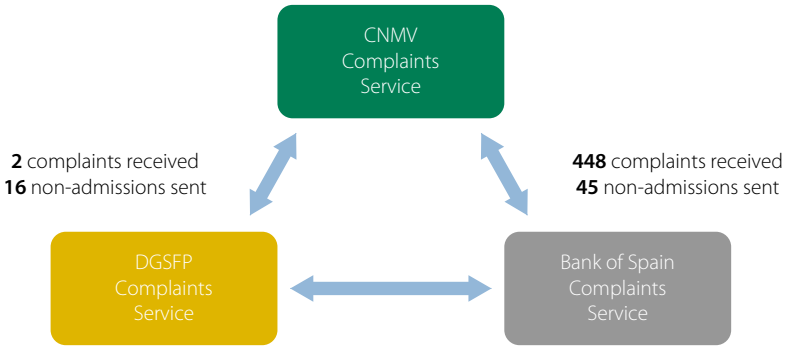
In the case of direct non-admissions, the Complaints Service may transfer the proceedings (*ex officio* or at the request of the complainant) or not, depending on the competent national or foreign body, as shown below:



With regard to national bodies, complaints relating to banking products or services correspond to the Bank of Spain and those relating to insurance and pension plans correspond to the Directorate-General for Insurance and Pension Funds (DGSFP). In accordance with current legislation, complaints may be filed with any of these three bodies, regardless of their subject and if the complaints service receiving the complaint does not have jurisdiction to process it, it will forward it to the appropriate complaints service.

Consequently, when, after the mandatory analysis of the complaint submitted, the Complaints Service concludes that the issues in question do not fall within its purview but fall to either of the other two services, it will not admit the complaint and will send it *ex officio* to the competent complaints service, informing the complainant of both points.

Non-admissions and transfers to complaints services of the Bank of Spain and the DGSFP accounted for 13% and 4.6% respectively of total non-admissions, and 4.1% and 1.4% respectively of the total number of complaints submitted.



The Complaints Service also receives complaints regarding alleged breaches of rules of conduct by foreign entities that operate in Spain under the freedom to provide financial services. The jurisdiction to hear these facts corresponds to the country of origin of the respondent entity.

However, that country of origin may or may not be a member of the FIN-NET network, which is responsible for settling out-of-court cross-border conflicts in the area of financial services in the European Economic Area.[2]

In the event that the country of origin of a respondent entity freely providing financial services belongs to the FIN-NET network, the Complaints Service informs the complainant that it is not competent to process the complaint. It also informs the complainant about the applicable legislation in this regard, the contact data of the competent complaints service in the country of origin (in case the complainant wishes to file the complaint directly in said country) and the possibility, if requested, that the CNMV's Complaints Service itself could transfer the complaint to the complaints service of the competent country.

In 2019, 14 complaints (4.1% of total non-admissions) were filed against foreign entities operating under the freedom to provide services, whose country of origin

2 The purpose of the FIN-NET network is to ensure that the different systems responsible for resolving out-of-court complaints cooperate with each other, so that the consumer can obtain a faster response

belonged to the FIN-NET network. Complainants chose to use the possibility offered by the Complaints Service to transfer their complaint to the competent body in only seven cases.

With regard to the complaints filed against foreign entities operating under the freedom to provide services whose country of origin is not a member of the FIN-NET network, the actions of the Complaints Service are limited to informing the complainant of the fact that it is not competent to process the complaint, of the applicable regulations and of the contact details of the body that is competent to hear the complaint, without offering the investor in this case the possibility of its sending the complaint to the corresponding supervisor.

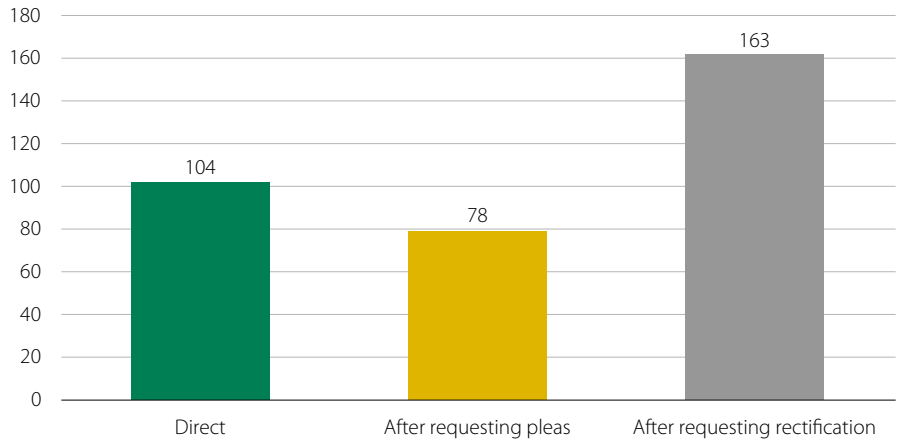
In 2019, 22 cross-border complaints were received outside the scope of FIN-NET (6.4% of the total non-admissions concluded).

1 Orey Financial – Instituição Financeira de Crédito, S.A., Sucursal en España was removed from the Companies Register on 4 July 2019 following its liquidation and ceased to provide investment services in Spain. Therefore, from that date onward it has had no physical representation in Spain. However, the entity's Portuguese parent company, Orey Financial – Instituição Financeira de Crédito, S.A., remained on the register and continued to provide investment services in its country of origin. Therefore, as this was the entity in whose name and on behalf of which the branch in Spain had acted, the complainants were informed that they should contact the Portuguese securities market authorities to submit their complaints, offering them the possibility of transferring them through the FIN-NET network.

In addition to direct non-admissions, complaints filed by complainants that have passed through the pre-processing stage due to the detection of reasons for non-admission (78) or rectification (163) may eventually not be admitted.

Types of non-admissions

FIGURE 15



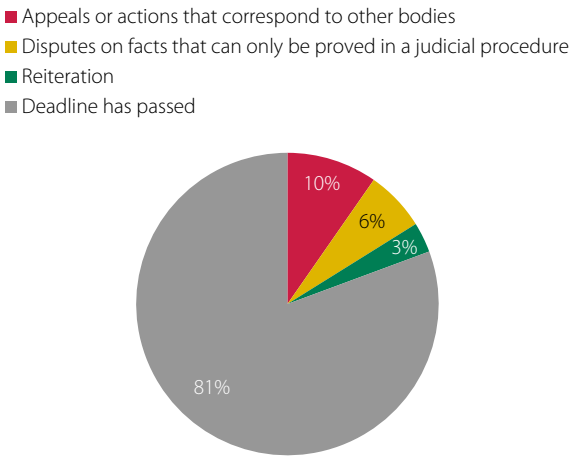
Source: CNMV.

Of the 78 proceedings in which pleas had been requested at the pre-processing stage and which were ultimately rejected, 48 received no response within the period granted for that purpose, while in the remaining 30 proceedings the plea provided by the complainant did not discredit the reason for non-admission initially detected.

The main definitive cause for non-admission[3] was failure to meet the deadline for submitting the complaint, the period that runs from the moment the incident occurs to the submission of the first complaint (25 cases), followed by appeals or proceedings that corresponds to other jurisdictional bodies (3 cases), disputes over incidents that can only be resolved in a legal suit (2) and the repetition of complaints that had already been resolved (1). In all cases, the complainant was duly notified in a reasoned report.

Grounds for non-admission after petition for pleas

FIGURE 16



Source: CNMV.

Of the 163 complaints not admitted after the petition for rectification, in 132 the complainant did not answer within the specific period granted for this purpose and

3 There was a single reason for non-admission in all cases except two, which each involved two reasons for non-admission.

in 31 cases a partial response was provided (with 1 requirement not rectified in 22 cases, 2 in 7 cases, 3 in 1 case and 4 in 1 case).

The admission requirements that were not rectified by the complainants, despite their having responded to the petition for rectification, were:[4]

i) Deficiencies in providing evidence that a prior complaint had been filed with the entity's CSD (26).

ii) Lack of documentation (9).

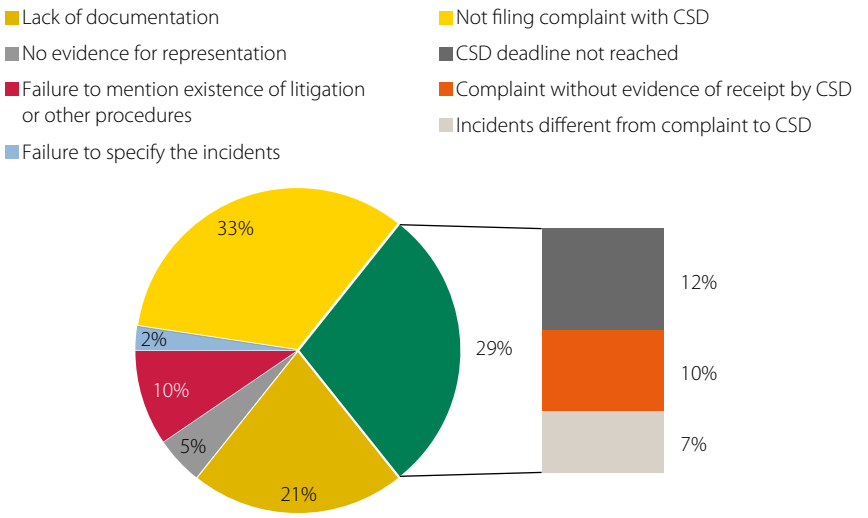
iii) Failure to provide evidence of representation (2).

iv) Lack of a declaration that the incident was not subject to resolution or litigation before administrative, judicial or arbitration bodies (4).

v) Failure to specify the facts (1).

vi) Facts not specified (1).

Reasons for non-admission not rectified after response FIGURE 17

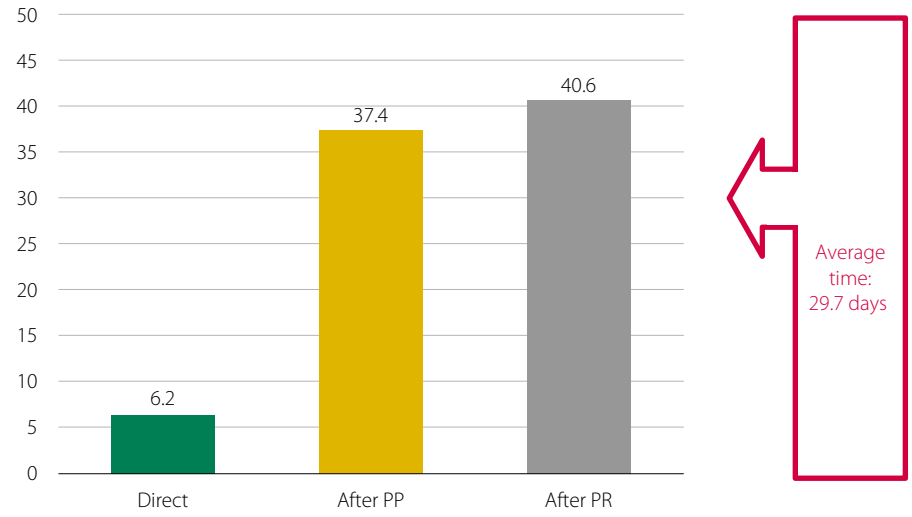


Source: CNMV.

Direct non-admissions were on average closed fastest (6.2 days), followed by non-admission deriving from petitions for pleas (37.4 days) and from petitions for rectification (40.6 days), since in these last two cases the number of procedures that has to be performed prior to non-admission is higher.

4 In some cases, several requirements were not rectified.

Time to completion by type of non-admission FIGURE 18



Source: CNMV.

The average time to completion for non-admissions was 29.7 days, compared with 29.8 days in 2018.

➢ Complaints

In 2019, 686 complaints that had been admitted for processing by the Complaints Service were resolved.

Complaints concluded in 2019 TABLE 6

Number of complaints

	No.
+ Outstanding complaints in 2018	153
+ Complaints initiated in 2019	726
- Outstanding complaints in 2019	193
= Complaints concluded in 2019	686

Source: CNMV.

Even when they are accepted, complaints may be terminated early without the CNMV issuing a final reasoned report in the following cases: i) acceptance by the entity, ii) withdrawal by the complainant, iii) mutual agreement between the parties, or iv) *ex post facto* non-admission: normally the entity, in the processing stage of the complaint proceedings, reveals a reason for non-admission that existed prior to the admission and had not been reported by the complainant, such as judicial proceedings – in process or already concluded – for the incidents in the complaint).

In the remaining cases, the processing ends with the issue of a reasoned report in which the Complaints Service concludes whether the entity has complied with transparency and investor protection regulations and with good financial practices and uses.

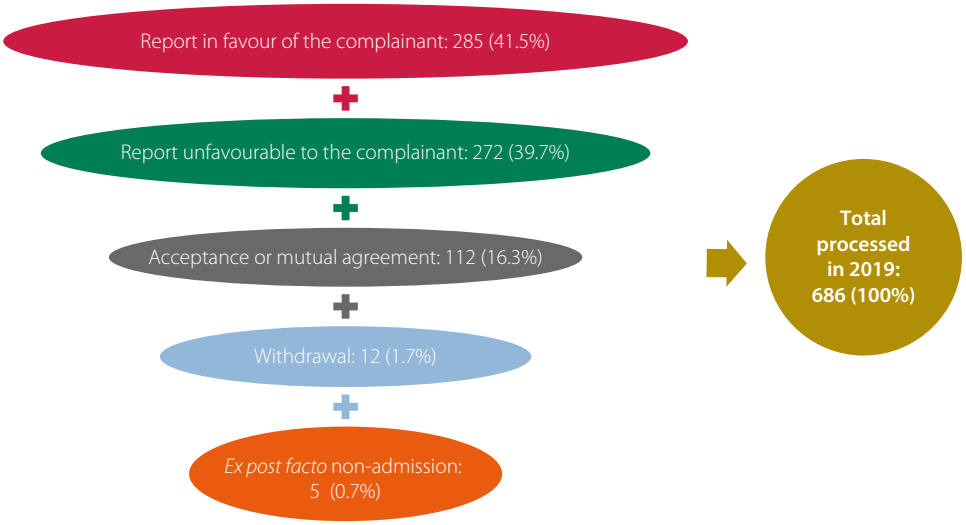
Resolution of complaints concluded in 2019

TABLE 7

Number of claims and complaints

	2017		2018		2019		% change
	No.	%	No.	%	No.	%	19/18
Processed without final reasoned report	**108**	**16.3**	**107**	**15.4**	**129**	**18.8**	**3.4**
Acceptance or mutual agreement	73	11.0	97	13.9	112	16.3	2.4
Withdrawal	21	3.2	7	1.0	12	1.7	0.7
Ex post facto non-admission	14	2.1	3	0.4	5	0.7	0.3
Processed with final reasoned report	**555**	**83.7**	**590**	**84.6**	**557**	**81.2**	**-3.4**
Report in favour of the complainant	301	45.4	353	50.6	285	41.5	-9.1
Report unfavourable to the complainant	254	38.3	237	34.0	272	39.7	5.7
Total processed	**663**	**100.0**	**697**	**100.0**	**686**	**100.0**	

Source: CNMV.

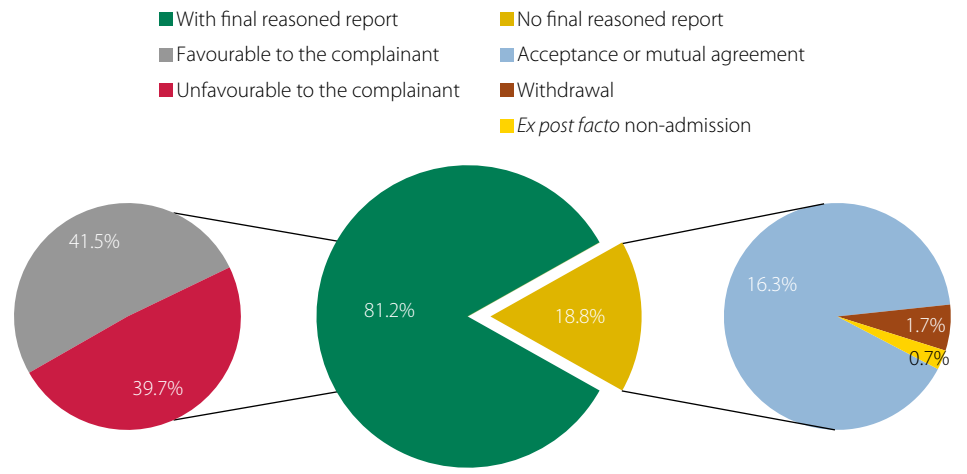


18.8% of the complaints concluded in 2019 did not require the issue of a final reasoned report: 16.3% because the entity accepted the complainant's requests or a mutual agreement was reached between the two parties, 1.7% due to the complainant's withdrawing the complaint and 0.7% due to *ex post facto* non-admission.

Of the 557 complaints that concluded with a final reasoned report (81.2% of those processed), the complainant obtained a report favourable to their complaint in 51.2% of cases and an unfavourable report in the remaining 48.8%.

Distribution of types of complaint resolution

FIGURE 19

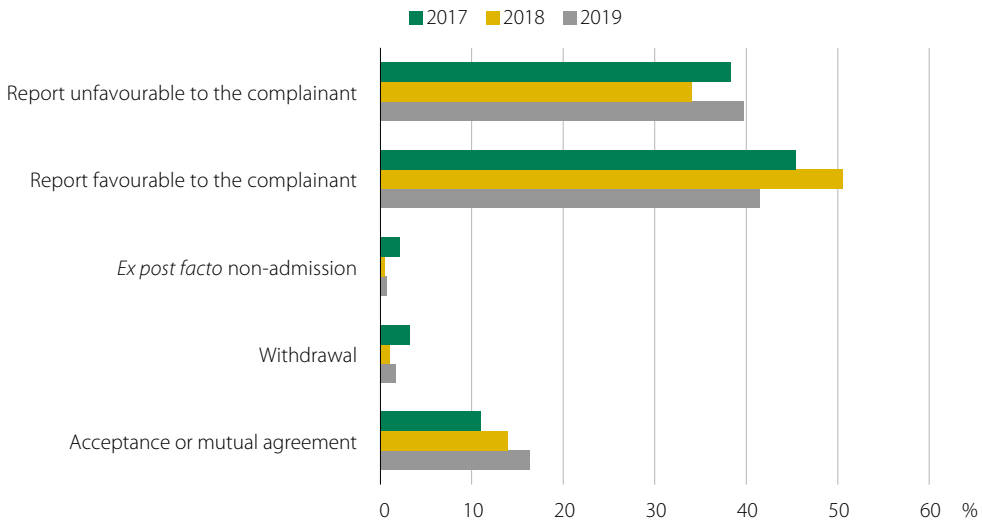


Source: CNMV.

Figure 20 shows the percentages of the type of resolution as a portion of total complaints concluded in the last three years. In this comparison, it can be observed that in 2019 the percentage of reports unfavourable to the complainant has increased, while the percentage of reports in favour of the complainant has decreased in this past year, breaking the recent trend.

Percentage changes in type of resolution[1]

FIGURE 20



Source: CNMV.

1 Percentage calculated as a portion of the total number of resolutions processed.

Complainants state in their complaints that they are not happy with the respondent entity for various different reasons, and therefore one single complaint proceeding may include various reasons for complaint. The Complaints Service must study, analyse and provide an *ad hoc* decision in the final reasoned report issued on each one.

In the 686 complaints concluded in 2019 there were 1,046 reasons for complaint. In terms of the type of product, almost one third of the complaints resolved related to CIS, while the rest referred to other types of securities, such as equity instruments, medium- or long-term bonds and financial derivatives. The largest number of complaints related to subsequent information requested from entities (21%), fees

charged by entities (18.0%) and prior information to the marketing of the financial instrument (16.5%).

Reasons for complaints concluded in 2019 TABLE 8

Investment service/reason	Reason	Securities	CIS	Total
Marketing/execution Advice Portfolio management	Appropriateness/suitability	33	117	**150**
	Prior information	50	122	**172**
	Purchase/sale orders	68	52	**120**
	Fees	107	81	**188**
	Transfers	19	41	**60**
	Subsequent information	132	88	**220**
	Ownership	6	7	**13**
Acquisition *mortis causa*	Appropriateness/suitability	2	1	**3**
	Prior information	2	1	**3**
	Purchase/sale orders	7	3	**10**
	Fees	6	2	**8**
	Transfers	3	1	**4**
	Subsequent information	19	15	**34**
	Ownership	23	18	**41**
CSD operation		**13**	**7**	**20**
Total		**490**	**556**	**1,046**

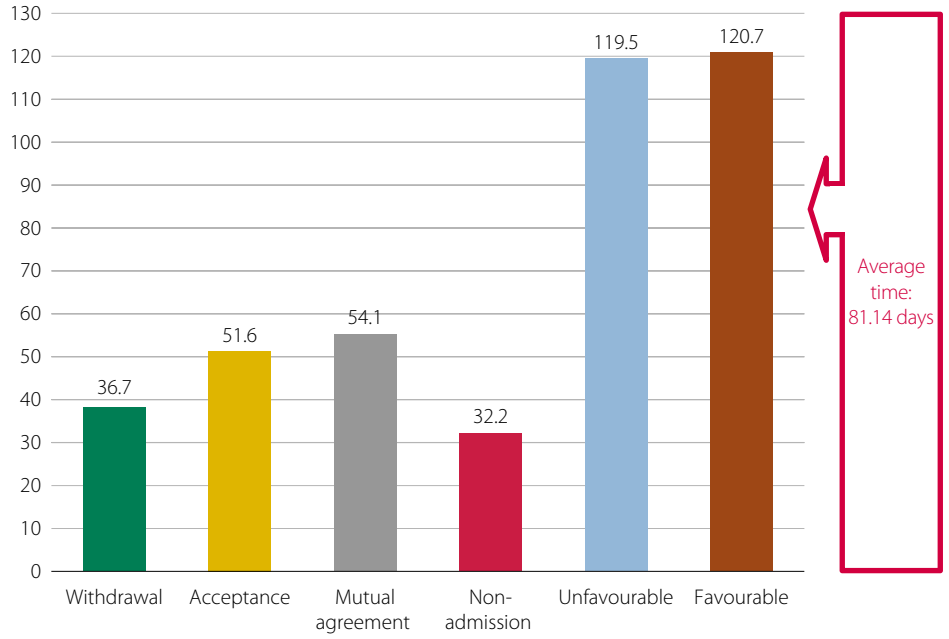
Source: CNMV.

The time taken to process complaints without a final reasoned report was shorter than for complaints where a reasoned report was attached. On average, complainants withdrew in 36.7 days, entities fully accepted the complainant's request in 51.6 days, agreements were reached to the satisfaction of the complainant (mutual agreement) in 54.1 days and proceedings were closed as a result of *ex post facto* non-admission in 32.2 days. Complaints in which a final reasoned report was issued were resolved, on average, in 119.5 days (in the case of a report unfavourable to the complainant) and 120.7 days (in the case of a favourable report).

In this regard, it should be noted that the issue of a final reasoned report requires a thorough study of all the documentation in the proceedings, as well as the documents contained in the CNMV's registers that the Complaints Service considers necessary to obtain a global view of the issue or issues raised by the complainant. This requires the use of sufficient and necessary time and effort in order to be able to issue a decision in accordance with the circumstances of the case, which concludes whether or not the practice carried out by the entity complies with the regulations on transparency and customer protection and financial good practices and uses.

Time to completion by complaint type

FIGURE 21



Source: CNMV.

The average time to completion of the complaints processed with a final reasoned report (favourable or unfavourable) was 120.12 days, compared with 106.4 days in 2018 and 121.5 days in 2017. In the case of complaints resolved with no final reasoned report (withdrawals, acceptance, mutual agreement and *ex post facto* non-admissions), the average time was 50.17 days, in line with the declining trend market in prior years: 52.5 days in 2018 and 67.5 days in 2017.

It should be taken into account that the aforementioned time periods have not been reduced by any suspension periods that may have occurred as a result of the time between notification of any request or requirement made of the entity or the complainant other than the mandatory process of pleas, up to their completion or, failing that, up to the deadline granted for responding to said request or requirement. For example, entities sometimes send communications to the Complaints Service in which they report that they are currently negotiating with the complainant in order to find a solution that is satisfactory to their interests although they do not state the content of these negotiations or whether or not they have materialised. The Complaints Service believes that improved investor protection involves facilitating, as far as possible, agreements between the complainant and the respondent entity. Therefore, in these cases, it requires the entity to submit documentation providing evidence both of the result of the negotiations and that they have effectively taken place, within 30 days, informing: i) that the term granted suspends the total term for processing the complaint and ii) that if within the term granted it does not provide the requested information, the complaints procedure will continue with no further formalities.

2.3.3 Follow-up stage

➢ Follow-up actions for reports in favour of the complainant

The reasoned report that resolves complaint proceedings is not binding. However, if this report is in favour of the complainant, the Complaints Service requires the respondent entity to state whether or not it accepts the criteria contained in the report and, where appropriate, that they provide documentation demonstrating that the situation referred to by the complainant has been rectified. The entity has one month to respond to this requirement; if it does not, it will be considered that it does not accept the criteria contained in the report and therefore will not rectify the conduct shown therein.

It should be noted that in some of the 285 complaints resolved in 2019 with a report in favour of the complainant, there was more than one respondent entity. In these cases, an individual assessment of the performance of each of the entities participating in the events is carried out, so that it is possible that the decision is in favour of the complainant with regard to the actions of all the entities or only of some of them. This is communicated to each of the respondent entities so that they may individually confirm their acceptance of the criteria, if applicable, and, where appropriate, the rectification of the complainant's situation. Factoring in this situation, 288 resolutions in favour of the complainant were issued.

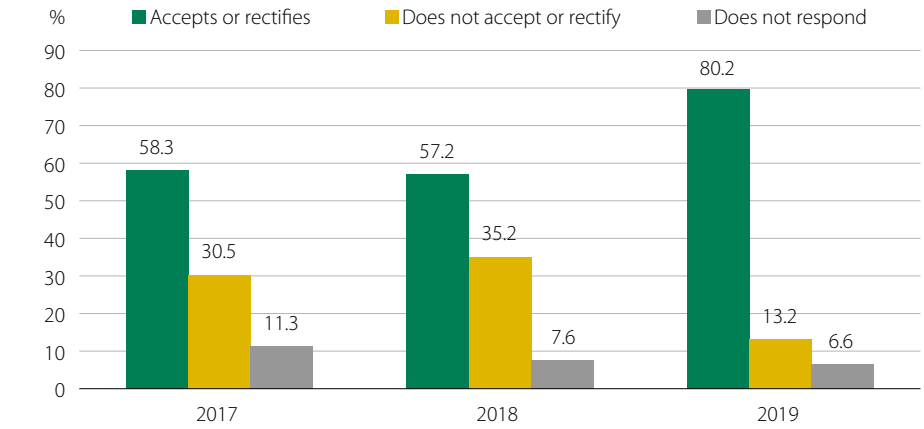
Follow-up actions for reports in favour of the complainant TABLE 9

	Follow-up actions reported by the entity						
	Accepts criteria or rectifies		Does not accept or rectify			Entities not reporting follow-up actions	
Year	No.	%	No.	%	Total	No.	%
2017	176	58.3	92	30.5	268	34	11.3
2018	203	57.2	125	35.2	328	27	7.6
2019	231	80.2	38	13.2	269	19	6.6

Source: CNMV.

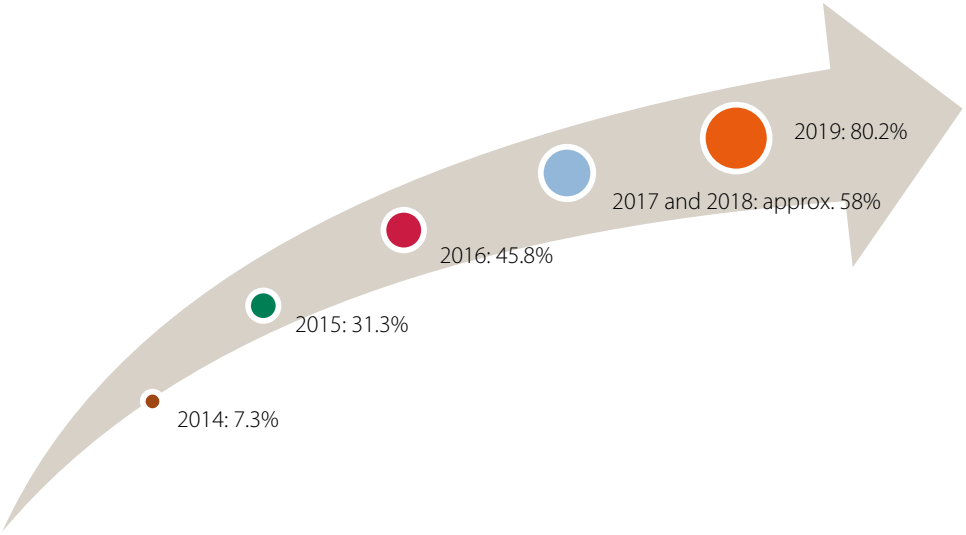
In 80.2% of the cases, respondent entities stated that they accepted the criteria and rectification of the situation referred to in the report.

Follow-up actions FIGURE 22



Source: CNMV.

In recent years, the percentage of acceptances or rectifications reported by entities after the Complaints Services has issued a report in favour of the complainant has increased significantly.

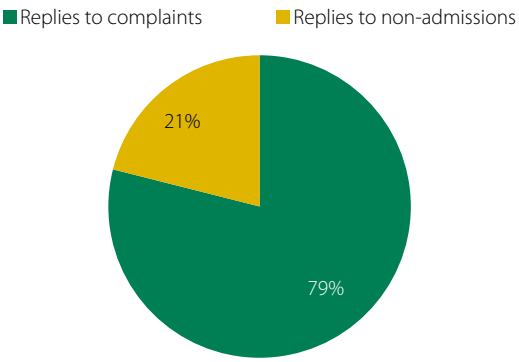


➢ Replies to non-admissions and complaints

Some complainants expressed their disagreement or sought clarification in cases in which, after having carried out the relevant procedures, the Complaints Service informed them that their application for the opening of complaint proceedings had not been admitted or resolved the complaint with an unfavourable report as it did not detect any improper actions by the entity. The Complaints Service responds to these complaints to try to resolve all doubts raised by the complainant.

In 2019, 12 replies to non-admissions and 45 replies to complaints were received, to which the Complaints Service responded to try to clarify in detail the issues on which the complainants had requested clarification or expressed their disagreement. However, complainants are always informed that the decisions of the Complaints Service cannot be appealed.

Replies from complainants FIGURE 23



Source: CNMV.

2.3.4 Entity rankings

Presented below are some rankings of respondent entities based on the following criteria: i) number of complaints resolved (excluding *ex post facto* non-admissions); ii) time taken to read the request for comments sent by the Complaints Service to the entity; iii) time taken to reply to the request for comments; iv) percentage of complaints with decisions in favour of the complainant; v) number of acceptances and mutual agreements; vi) percentage of responses to follow-up actions; and vii) percentage of acceptance of criteria.

In cases in which the complaint refers to several entities, this section sets out the decision included about each one of them in each final reasoned report and the number of decisions is therefore higher than the number of complaint proceedings with a final report favourable or unfavourable to the complainant.

On the other hand, the entity responsible for the incidents does not always match the entity against which the complaint is processed, because the latter has needed to address complaints filed for alleged irregularities committed by other entities that they have fully or partially acquired, either through a merger by absorption or by full or partial spin-off of a business area. Therefore, the tables included in the rankings distinguish between the entity against which the complaint is being processed and the entity responsible for the incidents that are the object of the complaint.

Likewise, the evolution by entity over the last three years with regard to the percentage of complaints with decisions in favour of the complainant and the percentage of acceptances and mutual agreements is also shown.

➢ Ranking of entities by number of complaints resolved

The initiation of complaints proceedings by the Complaints Service indicates the client's disagreement with the performance of the entity, which has not been resolved in the earlier stage of the complaint with the Customer Service Department or the Customer Ombudsman and that justifies the processing of the complaints provided that there is no cause for subsequent non-admission.

Table 10 shows the entities in order of the number of complaints admitted in which there was no *ex post facto* reason for non-admission. It should be noted that, al-

though there are 19 entities against which at least 8 complaints were processed, the top 8 positions are held by the entities with the highest market capitalisations in the Spanish market: Banco Santander, S.A. (168); Bankia, S.A. (85); Banco Bilbao Vizcaya Argentaria, S.A. (79); CaixaBank, S.A. (72); Banco de Sabadell, S.A. (40); Unicaja Banco, S.A. (31); Ibercaja (27) and Bankinter, S.A. (22).

Ranking of entities by number of complaints resolved

TABLE 10

Entity with which the complaint is processed	Total	Entity responsible for the incidents	Total
1. BANCO SANTANDER, S.A.	168	BANCO SANTANDER, S.A.	145
		BANCO POPULAR ESPAÑOL, S.A.	15
		POPULAR BANCA PRIVADA, S.A.	5
		BANCO PASTOR, S.A.U.	3
2. BANKIA, S.A.	85	BANKIA, S.A.	82
		BANCO MARE NOSTRUM, S.A.	3
3. BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	79		
4. CAIXABANK, S.A.	72		
5. BANCO DE SABADELL, S.A.	40		
6. UNICAJA BANCO, S.A.	31		
7. IBERCAJA BANCO, S.A.	27		
8. BANKINTER, S.A.	22		
9. LIBERBANK, S.A.	15	LIBERBANK, S.A.	13
		BANCO DE CASTILLA-LA MANCHA, S.A.	2
10. ANDBANK ESPAÑA, S.A.	15		
11. KUTXABANK, S.A.	13		
12. ING BANK N.V., SUCURSAL EN ESPAÑA	11		
13. EVO BANCO S.A.	10		
14. OPENBANK, S.A.	9		
15. RENTA 4 BANCO, S.A.	9		
16. DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	9		
17. Q-RENTA, A.V.AV, S.A.	8		
18. NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	8		
Other entities[1]	59		
Total	**690**		

Source: CNMV.

1 36 entities with fewer than 8 complaints.

➢ Ranking of entities by time taken to read

Once a complaint is admitted for processing, the complainant is notified of the start of the proceedings and the respondent entity is asked to provide comments. This request must always be sent electronically using the CNMV's CIFRADOC system (ALR procedure), so that the date of submission of the notification is the date on which the notification is read. This notification is considered to have been rejected if, 10 calendar days after it has been made available, the entity has not accessed its content.[5]

Table 11 ranks the entities by the average number of calendar days used to read the request for comments.

Ranking of entities by time taken to read the notification of opening complaint procedures

TABLE 11

Entity with which the complaint is processed	Calendar days
1. RENTA 4 BANCO, S.A.	9.7
2. NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	8.6
3. Q-RENTA, AV, S.A.	7.1
4. BANKIA, S.A.	5.1
5. LIBERBANK, S.A.	4.0
6. BANKINTER, S.A.	2.0
7. EVO BANCO S.A.	1.9
8. DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	1.3
9. BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	1.2
10. BANCO DE SABADELL, S.A.	1.0
11. BANCO SANTANDER, S.A.	1.0
12. CAIXABANK, S.A.	0.9
13. IBERCAJA BANCO, S.A.	0.8
14. ANDBANK ESPAÑA, S.A.	0.7
15. KUTXABANK, S.A.	0.7
16. UNICAJA BANCO, S.A.	0.3
17. OPENBANK, S.A.	0.2
18. ING BANK N.V., SUCURSAL EN ESPAÑA	0.2
Other entities[1]	1.1
Average	**1.9**

Source: CNMV.

1 36 entities with fewer than 8 complaints.

5 Article 43 of Law 39/2015, of 1 October, on the Common Administrative Procedure for Public Administrations.

Six entities took more than the average 1.9 calendar days to read notifications (Renta 4 Banco, S.A.; Novo Banco, S.A., Sucursal en España; Q-Renta, AV, S.A.; Bankia, S.A.; Liberbank, S.A.; Bankinter, S.A.), one read the notifications in the average time of 1.9 days (Evo Banco, S.A.) and 11 did so in less than the average time (Deutsche Bank, Sociedad Anónima Española; Banco Bilbao Vizcaya Argentaria, S.A.; Banco de Sabadell, S.A.; Banco Santander, S.A.; CaixaBank, S.A.; Ibercaja Banco, S.A.; Andbank España, S.A. Kutxabank, S.A.; Unicaja Banco, S.A.; Openbank, S.A. and ING Bank N.V., Sucursal en España).

➢ Ranking of entities by time taken to respond

From the day following the date on which the entity accesses the notification, it has 21 calendar days (if the procedure provided for natural persons or not-for-profit entities is applied) or 15 business days (if the procedure for legal persons applies), to submit pleas on the issues raised by the complainant. These periods may be extended by half of the period initially granted if requested before the end of that period.

In Table 12, the entities are ranked by the number of calendar days they take to send the information and documentation requested in the request for comments, with the corresponding adjustments when an extension has been granted.

On average, the entities responded to the initial petitions for pleas in 18 calendar days. 7 entities took longer to respond (Q-Renta, AV, S.A.; Open Bank, S.A.; Renta 4 Banco, S.A.; CaixaBank, S.A.; Unicaja Banco, S.A.; Bankia, S.A.; and Novo Banco, S.A., Sucursal en España), 5 did so within the average time (Banco Santander, S.A.; Ibercaja Banco, S.A.; Liberbank, S.A.; Banco Bilbao Vizcaya Argentaria, S.A., and Evo Banco S.A.) and 6 responded in a shorter period (Deutsche Bank, Sociedad Anónima Española; Bankinter, S.A.; Andbank España, S.A.; ING Bank NV, Sucursal en España; Banco de Sabadell, S.A., and Kutxabank, S.A.).

Ranking of entities by time taken to respond to the initial petition for pleas

TABLE 12

Entity with which the complaint is processed	Calendar days
1. Q-RENTA, AV, S.A.	23
2. OPEN BANK, S.A.	22
3. RENTA 4 BANCO, S.A.	21
4. CAIXABANK, S.A.	21
5. UNICAJA BANCO, S.A.	20
6. BANKIA, S.A.	19
7. NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	19
8. BANCO SANTANDER, S.A.	18
9. IBERCAJA BANCO, S.A.	18
10. LIBERBANK, S.A.	18
11. BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	18
12. EVO BANCO, S.A.	18
13. DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	17
14. BANKINTER, S.A.	16
15. ANDBANK ESPAÑA, S.A.	16
16. ING BANK N.V., SUCURSAL EN ESPAÑA	14
17. BANCO DE SABADELL, S.A.	14
18. KUTXABANK, S.A.	9
Other entities[1]	19
Average	**18**

Source: CNMV.

1 36 entities with fewer than 8 complaints.

The entities requested extensions to present pleas on 110 occasions. Of these, 109 were granted and 1 was denied. In the latter case, the entity requested a second extension to respond to a request for comments that had previously been extended. The Complaints Service denied the additional request, as regulations do not permit the granting of additional extensions to previously extended deadlines. The entities requesting extensions were Banco Santander, S.A. (42); Banco Bilbao Vizcaya Argentaria, S.A. (21); CaixaBank, S.A. (20); Unicaja Banco, S.A. (9); Bankia, S.A. (7); Evo Banco S.A. (3); Q-Renta, AV, S.A. (2); Bankinter, S.A. (2); Open Bank, S.A. (1); Caixa de Credit dels Enginyers – Caja de Crédito de los Ingenieros, S. Coop. de Crédito (1); Novo Banco, S.A., Sucursal en España (1), and Liberbank, S.A. (1).

➢ Ranking of entities by percentage of complaints with decisions in favour of the complainant

The final reasoned reports may be favourable or unfavourable to the complainant. In the former case, it is always concluded that there has been an incorrect action by the respondent entity and there is an indication of the specific reasons why the Complaints Service considers that the entity has not complied with the regulations on transparency and customer protection or good financial practices and uses.

Table 13 ranks the entities by the percentage of reports in favour of the complainant, calculated as a portion of the total number of decisions (favourable and unfavourable). Five entities have percentages of reports in favour of the complainant that are higher than the general average of 59.4% (Q-Renta, AV, SA; Andbank España, S.A.; ING Bank N.V, Sucursal en España; Ibercaja Banco, S.A.; Liberbank, S.A.) and nine have percentages that are lower than the average (Banco Santander, S.A.; Novo Banco S.A., Sucursal en España; Unicaja Banco, S.A.; Kutxabank, S.A.; Banco de Sabadell, S.A.; Banco Bilbao Vizcaya Argentaria, S.A.; Renta 4 Banco, S.A. and Bankinter, S.A.). If only the complaints in which the respondent entity is responsible for the incident were taken into account, the order of the ranking would be altered, since Unicaja Banco, S.A. would move to the last position.

Ranking of entities by percentage of decisions in favour of the complainant

TABLE 13

Entity against which the complaint is processed	% favourable	Entity responsible for the incidents	Unfavourable	Favourable	% favourable
1. Q-RENTA, AV, S.A.	100.0		0	8	100.0
2. ANDBANK ESPAÑA, S.A.	92.3		1	12	92.3
3. ING BANK N.V., SUCURSAL EN ESPAÑA	66.7		3	6	66.7
4. IBERCAJA BANCO, S.A.	66.7		8	16	66.7
5. OPENBANK, S.A.	62.5		3	5	62.5
6. LIBERBANK, S.A.	61.5	LIBERBANK, S.A.	5	6	54.5
		BANCO DE CASTILLA-LA MANCHA, S.A.		2	
7. EVO BANCO S.A.	57.1		3	4	57.1
8. DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	57.1		3	4	57.1
9. BANKIA, S.A.	56.3	BANKIA, S.A.	31	37	54.4
		BANCO MARE NOSTRUM, S.A.	0	3	
10. CAIXABANK, S.A.	54.9		23	28	54.9
11. BANCO SANTANDER, S.A.	50.3	BANCO SANTANDER, S.A.	62	67	51.9
		BANCO POPULAR ESPAÑOL, S.A.	10	4	28.6
		POPULAR BANCA PRIVADA, S.A.	1	4	80.0
		BANCO PASTOR, S.A.U.	2	1	33.3
12. NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	50.0		4	4	50.0
13. UNICAJA BANCO, S.A.	44.4		10	8	44.4
14. KUTXABANK, S.A.	41.7		7	5	41.7
15. BANCO DE SABADELL, S.A.	40.6		19	13	40.6
16. BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	34.6		34	18	34.6
17. RENTA 4 BANCO, S.A.	22.2		7	2	22.2
18. BANKINTER, S.A.	21.1		15	4	21.1
Other entities[1]	56.3		21	27	56.3
Total	**51.4**		**272**	**288**	**51.4**

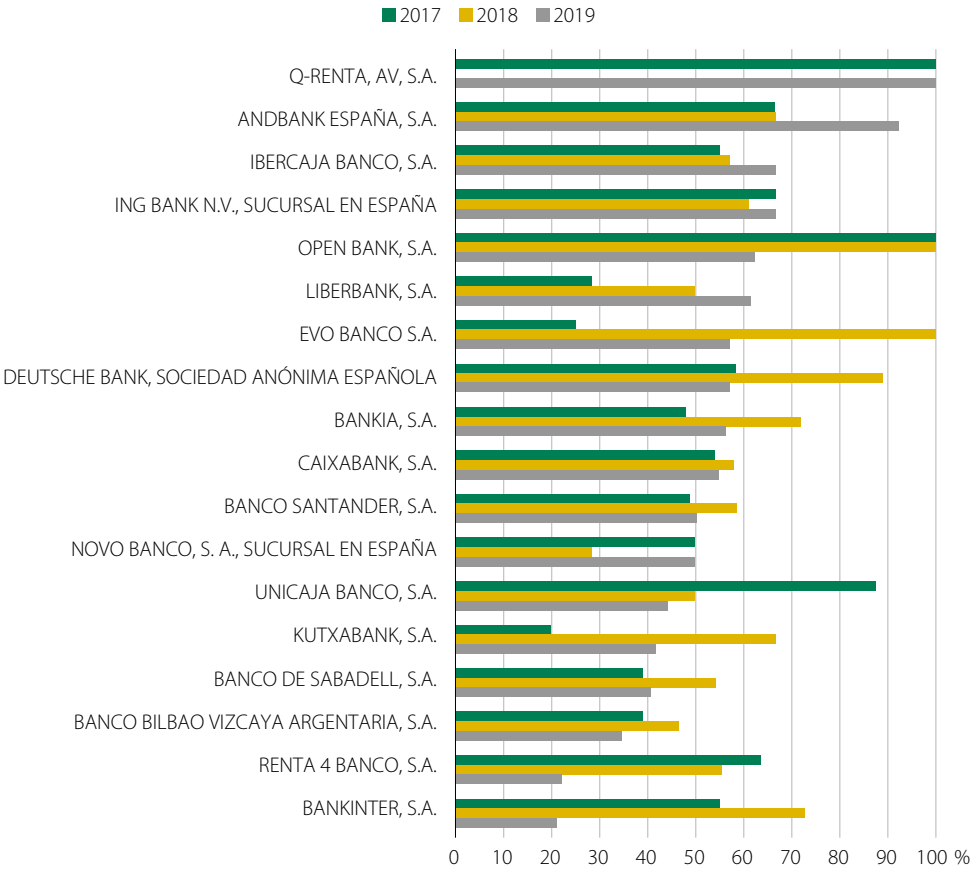
Source: CNMV.

1 36 entities with fewer than 8 complaints.

Figure 24 shows variations by entity in the percentage of complaints resulting in a decision in favour of the complainant in the last three years. It shows how the percentage falls below 40% in Renta 4 Banco, S.A., Bankinter, S.A. and Banco Bilbao Vizcaya Argentaria, S.A. and increases in 3 entities (Andbank, S.A., Ibercaja Banco, S.A. and ING Bank N.V, Sucursal en España).

Trends in the percentage[1] of decisions in favour of the complainant by entity

FIGURE 24



Source: CNMV.

1 The percentage is calculated on the annual total of favourable and unfavourable decisions to the complainant by entity.

➢ Ranking of entities by number of acceptances and mutual agreements

In some cases, complaints may be concluded because the entity decides to accept the complaint made by the complainant (acceptance) or because the entity and the complainant reach an agreement (mutual agreement). In these cases, the Complaints Service considers that the complainant's interests have been satisfied and, consequently, the complaint is closed without a decision on the merits of the case being raised.

Table 14 ranks the entities by number of acceptances and mutual agreements reached with the complainant. Banco Bilbao Vizcaya Argentaria, S.A.; CaixaBank, S.A.; Banco Santander, S.A. And Bankia, S.A. reported the highest number of acceptances, while Openbank, S.A.; Q-Renta, AV, S.A.; Novo Banco, Sucursal en España and Renta 4 Banco, S.A., saw no acceptances or mutual agreements with their clients in this period.

Ranking of entities by number of acceptances and mutual agreements

TABLE 14

Entity against which the complaint is processed	Total	Entity responsible for the incidents	Acceptance	Mutual agreement	Total
1. BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	26		16	10	26
2. CAIXABANK, S.A.	15		10	5	15
3. BANCO SANTANDER, S.A.	15	BANCO SANTANDER, S.A.	10	4	14
		BANCO POPULAR ESPAÑOL, S.A.	1	0	1
4. BANKIA, S.A.	12		11	1	12
5. UNICAJA BANCO, S.A.	9		5	4	9
6. BANCO DE SABADELL, S.A.	8		5	3	8
7. IBERCAJA BANCO, S.A.	3		2	1	3
8. BANKINTER, S.A.	3		3	0	3
9. ING BANK N.V., SUCURSAL EN ESPAÑA	2		2	0	2
10. EVO BANCO S.A.	2		2	0	2
11. DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	2		1	1	2
12. ANDBANK ESPAÑA, S.A.	2		0	2	2
13. KUTXABANK, S.A.	1		1	0	1
14. LIBERBANK, S.A.	1		0	1	1
15. OPENBANK, S.A.	0		0	0	0
16. RENTA 4 BANCO, S.A.	0		0	0	0
17. Q-RENTA, AV, S.A.	0		0	0	0
18. NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	0		0	0	0
Other entities[1]	11		8	3	11
Total	**112**		**77**	**35**	**112**

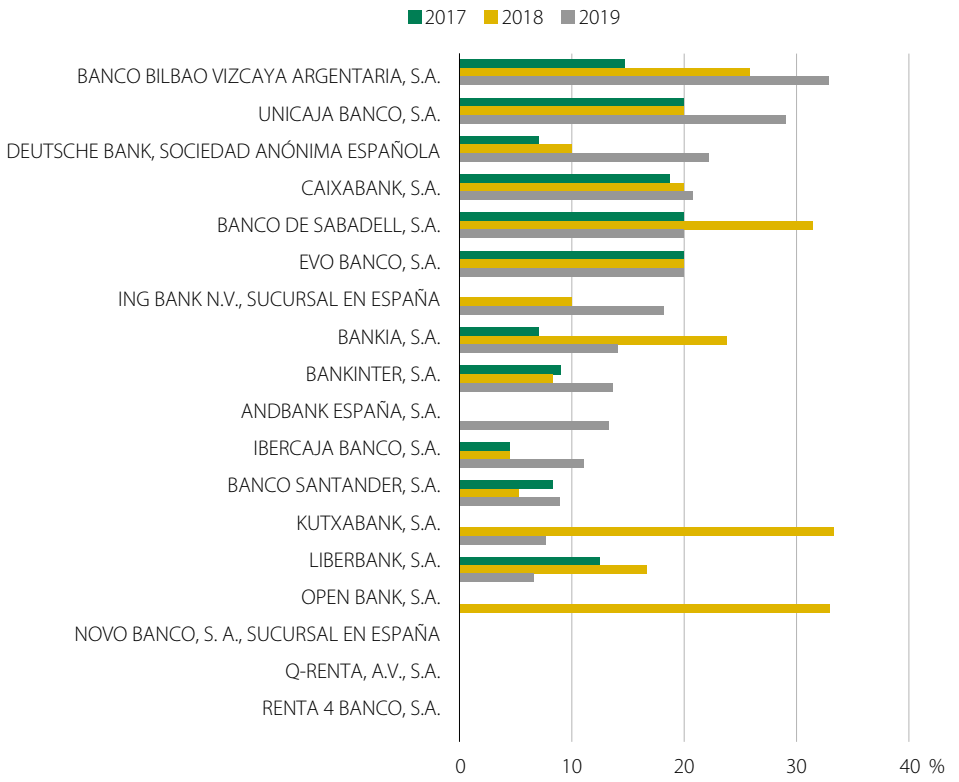
Source: CNMV.

1 36 entities with fewer than 8 complaints.

Figure 25 ranks the entities by percentage of acceptances/mutual agreements reached in 2019, presenting a comparison with the two previous years. Banco Bilbao Vizcaya Argentaria, S.A. is the only entity with a percentage of acceptances/mutual agreements of over 30% of the total number of complaints resolved, followed by Unicaja Banco, S.A.; Deutsche Bank, Sociedad Anónima Española, and CaixaBank, S.A., with between 30% and 20%, and Banco de Sabadell, S.A.; Evo Banco, S.A.; ING Bank NV, Sucursal en España; Bankia, S.A.; Bankinter, S.A.; Andbank España, S.A., and Ibercaja Banco, S. A., with between 20% and 10%. Banco Santander, S.A.; Kutxabank, S.A. and Liberbank, S.A. had a percentage of less than 10%. As previously mentioned, Openbank, S.A.; Novo Banco, S.A., Sucursal en España; Q-Renta, AV, S.A., and Renta 4 Banco, S.A. had no acceptances/mutual agreements with their complainants.

Looking at movements between 2018 and 2019, an upward trend is noted in Banco Bilbao Vizcaya Argentaria, S.A.; Deutsche Bank, Sociedad Anónima Española; ING Bank NV, Sucursal en España, and Unicaja Banco, S.A. while Novo Banco, S.A., Sucursal en España; Q-Renta, AV, S.A., and Renta 4 Banco, S.A. reported zero movements. CaixaBank, S.A.; Banco Santander, S.A., and Evo Banco, S.A. maintained the same percentage or increased slightly. In contrast, Banco de Sabadell, S.A. and Bankia, S.A. posted lower percentages compared with the previous year.

Trends in the percentage of acceptances/mutual agreements[1] by entity FIGURE 25



Source: CNMV.

1 Percentages are calculated based on the annual number of complaints resolved by entity (*ex post facto* non-admissions are not included).

➢ Ranking of entities by percentage of response to follow-up actions

Usually, complaint proceedings conclude with the Complaints Service issuing a final reasoned report, the complainant being notified and the report passed on to the entity. When this report is in favour of the complainant, it is transferred to the entity accompanied by a request for information so that the entity may state, within a period of one month, whether or not it accepts the assumptions and criteria expressed in the report, and also, if applicable, provide documentary evidence that it has rectified the situation with the complainant.

Table 15 shows that on average the entities responded to this request for information in 93.4% of the cases.

The response rate of 12 of the entities listed in the table was above average, and in 6 cases it was below average.

Ranking of entities by percentage of follow-up actions reported after a report in favour of the complainant

TABLE 15

Entity against which the complaint is processed	% yes	Entity responsible for the incidents	No	Yes	Total	% yes
1. ANDBANK ESPAÑA, S.A.	100.0			12	12	100.0
2. BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	100.0			18	18	100.0
3. BANCO DE SABADELL, S.A.	100.0			13	13	100.0
4. BANKIA, S.A.	100.0	BANKIA, S.A.		37	37	100.0
		BANCO MARE NOSTRUM, S.A.		3	3	100.0
5. CAIXABANK, S.A.	100.0			28	28	100.0
6. DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	100.0			4	4	100.0
7. EVO BANCO S.A.	100.0			4	4	100.0
8. ING BANK N.V., SUCURSAL EN ESPAÑA	100.0			6	6	100.0
9. LIBERBANK, S.A.	100.0	LIBERBANK, S.A.		6	6	100.0
		BANCO DE CASTILLA-LA MANCHA, S.A.		2	2	100.0
10. NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	100.0			4	4	100.0
11. RENTA 4 BANCO, S.A.	100.0			2	2	100.0
12. BANCO SANTANDER, S.A.	96.1	POPULAR BANCA PRIVADA, S.A.		4	4	100.0
		BANCO POPULAR ESPAÑOL, S.A.		4	4	100.0
		BANCO PASTOR, S.A.U.		1	1	100.0
		BANCO SANTANDER, S.A.	3	64	67	95.5
13. IBERCAJA BANCO, S.A.	87.5		2	14	16	87.5
14. Q-RENTA, AV, S.A.	87.5		1	7	8	87.5
15. OPENBANK, S.A.	80.0		1	4	5	80.0
16. UNICAJA BANCO, S.A.	75.0		2	6	8	75.0
17. BANKINTER, S.A.	50.0		2	2	4	50.0
18. KUTXABANK, S.A.	40.0		3	2	5	40.0
Other entities[1]	81.5		5	22	27	81.5
Total	**93.4**		**19**	**269**	**288**	**93.4**

Source: CNMV.

1 36 entities with fewer than 8 complaints.

➢ Ranking of entities by percentage of acceptance of criteria

As noted above, while respondent entities must expressly report their acceptance of the criteria or the rectification of the complainant's situation in the response to the form previously sent by the Complaints Service, they may or may not expressly notify their non-acceptance of the criteria. If they do so, this is referred to as explicit non-acceptance and if they do not do so, the corresponding legislation establishes that the entity is deemed not to have accepted the criteria (implicit non-acceptance).

Table 16 ranks the entities by the percentage of acceptance of criteria or rectification of the complainant's situation and includes both the information contained in the responses submitted by the entities and the consequences that would result from their failure to respond (non-acceptance of criteria).

The average percentage of acceptance of criteria or rectification of the complainant's situation in 2019 was 80.2%; 9 entities are above this average and 8 fall short of it.

Ranking of entities by percentage of acceptance of criteria or rectification after a report in favour of the complainant in favour of the complainant

TABLE 16

Entity against which the complaint is processed	% acceptance	Entity responsible for the incidents	Acceptance or mutual agreement/ rectification	No acceptance or mutual agreement/ rectification	No response	Total	% acceptance
BANCO DE SABADELL, S.A.	100.0		13			13	100.0
CAIXABANK, S.A.	100.0		28			28	100.0
DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	100.0		4			4	100.0
ING BANK N.V., SUCURSAL EN ESPAÑA	100.0		6			6	100.0
NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	100.0		4			4	100.0
BANKIA, S.A.	97.5	BANCO MARE NOSTRUM, S.A.	3			3	100.0
		BANKIA, S.A.	36	1		37	97.3
BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	88.9		16	2		18	88.9
BANCO SANTANDER, S.A.	85.5	BANCO PASTOR, S.A.U.	1			1	100.0
		BANCO POPULAR ESPAÑOL, S.A.	4			4	100.0
		POPULAR BANCA PRIVADA, S.A.	4			4	100.0
		BANCO SANTANDER, S.A.	56	8	3	67	83.6
IBERCAJA BANCO, S.A.	81.3		13	1	2	16	81.3
OPENBANK, S.A.	80.0		4		1	5	80.0
EVO BANCO S.A.	75.0		3	1		4	75.0
UNICAJA BANCO, S.A.	75.0		6		2	8	75.0
LIBERBANK, S.A.	62.5	LIBERBANK, S.A.	4	2		6	66.7
		BANCO DE CASTILLA-LA MANCHA, S.A.	1	1		2	50.0
BANKINTER, S.A.	50.0		2		2	4	50.0
ANDBANK ESPAÑA, S.A.	41.7		5	7		12	41.7
KUTXABANK, S.A.	40.0		2		3	5	40.0
Q-RENTA, AV, S.A.	0.0			7	1	8	0.0
RENTA 4 BANCO, S.A.	0.0			2		2	0.0
Other entities[1]	59.3		16	6	5	27	59.2
Total	**80.2**		**231**	**38**	**19**	**288**	**80.2**

Source: CNMV.

1 36 entities with fewer than 8 complaints.

2.4 Information provided by the entities

As in previous years, prior to the preparation of this Annual Report, the CSDs of the entities against which six or more complaints had been processed were requested to supply information on certain issues. The aim of this request is for the report to continue reflecting, with first-hand data, the effort being made by Customer Service Departments to improve their procedures, adapt to new legislative requirements and to solve their clients' problems ever more effectively.

The information requested from the CSDs was divided into two categories:

– Action carried out regarding complaints filed with the CSD before they are filed with the Complaints Service. This information is intended to analyse how CSDs respond to their clients in the first instance.

– Action carried out once the complaints have already been submitted to the Complaints Service. The purpose of this information is to ascertain the number of investors per entity that go on to this second stage to try to obtain satisfaction.

The information provided by the CSDs of the entities is assessed in detail below.[6] The aim of this analysis is to provide an approximate overview of the actions carried out by these Customer Service Departments. However, the data and results obtained must be viewed with some caution as it is not possible to know whether the entities use the same criteria to obtain and provide the requested information, even though this year clearer guidelines have been given about what should be included or not in the information provided.

The following details were obtained from the data provided by the entities, as shown in Table 17:

– The CSDs that received the most complaints in 2019 were: Banco Santander, S.A. (11,474); Banco Bilbao Vizcaya Argentaria, S.A. (1,532); CaixaBank, S.A. (866); Bankia, S.A. (649); Bankinter, S.A. (604), and Banco de Sabadell, S.A. (505).

– With regard to data for the customer ombudsman, Banco Bilbao Vizcaya Argentaria, S.A. was the entity that processed the most complaints through this channel (170, 6.6% of the complaints received by the entity); followed by Banco Santander, S.A. (97 complainants, 1.3%); Banco de Sabadell, S.A. (48 complainants, 6.0%); Bankinter, S.A. (43 complainants, 4.3%), and Deutsche Bank, Sociedad Anónima Española (34 complainants, 7.3%). The rest of the entities that were asked for information do not have a customer ombudsman.

– In general, and according to the data provided by the entities, the percentage of complaints that are attended to first by the Customer Service Departments and subsequently processed by the Complaints Service is very low. This average is less than 4% of the complaints filed in the entities in the same year, although 3 entities present much higher percentages, equal to or greater than 20%: Renta 4 Banco, S.A. (14 complaints, 56% of the total); Novo Banco, S.A.,

6 All entities responded to the request for information.

Sucursal en España (9 complaints, 34.6% of the total), and Ibercaja Banco, S.A. (25 complaints, 32.9% of the total). In this regard, it should be noted that the number of complaints received or processed by the CNMV in 2019 is much higher than the number reported by entities, since it is fairly common for complainants, after having received a response from the Customer Service Department, to take some time before deciding to file a complaint with the CNMV's Complaints Service. This means that the complaints processed by the CNMV in 2019 may have originated in incidents resolved by the CSDs or the customer ombudsman in that year or in incidents resolved in the previous year, which would justify the difference in the data processed.

Complaints filed relating to the securities market

TABLE 17

	No. of complaints relating to securities market issues received in 2019			No. of complaints received by the CNMV Complaints Service in 2019	%[1]
	By the CSD	By the CO	By the CSD or CO		
ANDBANK ESPAÑA, S.A.	152	0	152	19	12.5
BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	1,532	170	1,702	113	6.6
BANCO DE SABADELL, S.A.	505	48	553	33	6.0
BANCO SANTANDER, S.A.[2]	11,474	97	11,571	154	1.3
BANKIA, S.A.	649	0	649	93	14.3
BANKINTER, S.A.	604	43	647	28	4.3
CAIXABANK, S.A.	866	0	866	40	4.6
DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	185	34	219	16	7.3
EVO BANCO S.A.	54	0	54	7	13.0
IBERCAJA BANCO, S.A.	76	0	76	25	32.9
ING BANK N.V., SUCURSAL EN ESPAÑA	463	0	463	11	2.4
KUTXABANK, S.A.	66	0	66	13	19.7
LIBERBANK, S.A.	165	0	165	8	4.8
NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	26	0	26	9	34.6
OPENBANK, S.A.	70	0	70	7	10.0
RENTA 4 BANCO, S.A.	25	0	25	14	56.0
UNICAJA BANCO, S.A.	299	0	299	34	11.4
Total	**17,211**	**392**	**17,603**	**624**	**3.5**

Source: Data provided by the entities.

1 Complaints handled by the CSD or CO for which the entity has proof that they were referred to the CNMV Complaints Service in 2019 as a percentage of complaints relating to securities market issues received by the CSD or the CO in the same year.

2 Banco Santander reports that 9,929 complaints submitted to its CSD and 35 submitted to its CO were attributable to Banco Popular Español, S.A. Of the complaints submitted to the CNMV's Complaints Service, 39 correspond to Banco Popular Español, S.A.

Number for complaints relating to securities market issues received by the CSD or CO in 2019

17,603

By the CSD: 17,211 By the CO: 392

Number of complaints referred to the CNMV Complaints Service in 2019

624

Once the complaint is filed with the CSD or the entity's customer ombudsman, they have to decide whether it meets all the requirements for admission. Based on the relevant information provided by the entities, the following conclusions can be drawn:[7]

– There were more than 100 non-admissions by the CSDs in the 3 entities against which the highest number of complaints were registered: Banco Bilbao Vizcaya Argentaria, S.A. (202 of 1,532); Banco Santander, S.A. (125 of 11,474), and CaixaBank, S.A. (111 of 866).

  However, as a percentage – number of non-admissions with respect to the number of complaints filed with the CSD – it would be equal to or greater than 15% for: Novo Banco, S.A., Sucursal en España (23.1%) and Liberbank, S.A. (20.6%).

  In contrast, some entities did not have any non-admissions: Banco de Caja España, S.A.; Kutxabank, S.A.; Openbank, S.A.; Renta 4 Banco, S.A., and Unicaja Banco, S.A.

– Regarding non-admissions decided on by the entities' customer ombudsman, Banco de Sabadell, S.A. did not admit 16 complaints of the 48 presented (33.3%); Deutsche Bank, Sociedad Anónima Española, did not admit 4 of the 34 complaints filed (11.8%), and Banco Bilbao Vizcaya Argentaria, S.A. rejected 9 complaints out of 170 filed (5.3%).

7 It should be borne in mind that data obtained take as their starting point that the non-admissions reported referred to complaints filed in 2019, while it is possible that in that year some complaints were rejected that had been filed at the end of the previous year.

Complaints relating to the securities markets not admitted by entities in 2019

TABLE 18

	CSD			CO		
	Not admitted	Received	%[1]	Not admitted	Received	%[1]
ANDBANK ESPAÑA, S.A.	2	152	1.3	0	0	–
BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	202	1,532	13.2	9	170	5.3
BANCO DE SABADELL, S.A.	51	505	10.1	16	48	33.3
BANCO SANTANDER, S.A.[2]	125	11,474	1.1	0	97	0.0
BANKIA, S.A.	20	649	3.1	0	0	–
BANKINTER, S.A.	5	604	0.8	0	43	0.0
CAIXABANK, S.A.	111	866	12.8	0	0	–
DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	15	185	8.1	4	34	11.8
EVO BANCO S.A.	4	54	7.4	0	0	–
IBERCAJA BANCO, S.A.	7	76	9.2	0	0	–
ING BANK N.V., SUCURSAL EN ESPAÑA	3	463	0.6	0	0	–
KUTXABANK, S.A.	0	66	0.0	0	0	–
LIBERBANK, S.A.	34	165	20.6	0	0	–
NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	6	26	23.1	0	0	–
OPENBANK, S.A.	0	70	0.0	0	0	–
RENTA 4 BANCO, S.A.	0	25	0.0	0	0	–
UNICAJA BANCO, S.A.	0	299	0.0	0	0	–
Total	**585**	**17,211**	**3.4**	**29**	**392**	**7.4**

Source: Data provided by the entities.

1 Percentage of complaints not admitted as a portion of complaints received.

2 Banco Santander reports that 35 complaints not admitted related to Banco Popular Español, S.A.

Regarding the result obtained by the complainant (favourable or unfavourable) in the resolution decided on by the CSD, the following observations can be made:

– In relation to the number of complaints presented, the CSDs that resolved the most complaints corresponded to: Banco Santander, S.A. (11,376) and Banco Bilbao Vizcaya Argentaria, S.A. (1,321). They were followed by the CSDs of CaixaBank, S.A. (766); Bankinter, S.A. (610); Banco de Sabadell, S.A. (478), and Bankia, S.A. (472).

– CSDs with percentages of resolutions in favour of their clients of over 45% were those of Openbank, S.A. (81.2%); Unicaja Banco, S.A. (60.2%); Andbank España, S.A. (56.8%); ING Bank NV, Sucursal en España (52.4%); Liberbank, S.A. (48.0%); Banco Bilbao Vizcaya Argentaria, S.A. (45.0%), and Deutsche Bank, Sociedad Anónima Española (41.5%). Entities reporting percentages of resolutions in favour of the complainant of less than 20% were Kutxabank, S.A. (19.4%); Bankia, S.A. (17.2%); Banco Santander, S.A. (5.4%), and Novo Banco S.A., Sucursal en España, which did not issue resolutions in favour of its clients.

– In regard to the customer ombudsman channel, the entity resolving the most complaints in the period covered by this report was Banco Bilbao Vizcaya Argentaria, S.A. (55), followed by Banco Santander, S.A. (30); Banco de Sabadell, S.A. (17); Bankinter, S.A. (9), and Deutsche Bank, Sociedad Anónima Española (9). The customer ombudsman resolving the largest percentage of

complaints in favour of the client was that of Banco de Sabadell, S.A. (47.2%), followed by Banco Bilbao Vizcaya Argentaria, S.A. (33.5%); Deutsche Bank, Sociedad Anónima Española (32.1%); Banco Santander, S.A. (31.3%), and Bankinter, S. A. (28.1%).

Complaints relating to the securities market admitted and resolved by entities in 2019 TABLE 19

	CSD			CO		
	Favourable	Unfavourable	%[1]	Favourable	Unfavourable	%[1]
ANDBANK ESPAÑA, S.A.	92	70	56.8	0	0	–
BANCO BILBAO VIZCAYA ARGENTARIA, S.A.	595	726	45.0	55	109	33.5
BANCO DE SABADELL, S.A.	171	307	35.8	17	19	47.2
BANCO SANTANDER, S.A.[2]	616	10,760	5.4	30	66	31.3
BANKIA, S.A.	81	391	17.2	0	0	–
BANKINTER, S.A.	241	369	39.5	9	23	28.1
CAIXABANK, S.A.	295	471	38.5	0	0	–
DEUTSCHE BANK, SOCIEDAD ANÓNIMA ESPAÑOLA	66	93	41.5	9	19	32.1
EVO BANCO S.A.	22	35	38.6	0	0	–
IBERCAJA BANCO, S.A.	19	50	27.5	0	0	–
ING BANK N.V., SUCURSAL EN ESPAÑA	215	195	52.4	0	0	–
KUTXABANK, S.A.	14	58	19.4	0	0	–
LIBERBANK, S.A.	49	53	48.0	0	0	–
NOVO BANCO, S.A., SUCURSAL EN ESPAÑA	0	21	0.0	0	0	–
OPENBANK, S.A.	56	13	81.2	0	1	0.0
RENTA 4 BANCO, S.A.	8	17	32.0	0	0	–
UNICAJA BANCO, S.A.	133	88	60.2	0	0	–
Total	**2,673**	**13,717**	**16.3**	**120**	**237**	**33.6**

Source: Data provided by the entities.

1 Percentage of complaints in favour of the complainant as a portion of total complaints resolved (i.e. both favourable and unfavourable to the complainant).

2 Banco Santander reports that 61 resolutions in favour of the claimant out of the 616 submitted through the CSD and 4 submitted through the Customer Ombudsman related to Banco Popular Español, S.A. In contrast, 9,939 resolutions unfavourable to the complainant submitted through the CSD and 39 submitted through the CO were attributable to Banco Popular Español, S.A.

2.5 International cooperation mechanisms

2.5.1 Financial Dispute Resolution Network (FIN-NET)

The Financial Dispute Resolution Network (FIN-NET) is the network for the out-of-court settlement of cross-border disputes between consumers and financial service providers in the European Economic Area.[8] FIN-NET was created through Commission Recommendation 98/257/EC of 30 March, on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. It was set up by the European Commission in 2001 and its purpose is to provide access to out-of-court settlement procedures in cross-border financial disputes within the European Economic Area. The CNMV joined FIN-NET in 2008.

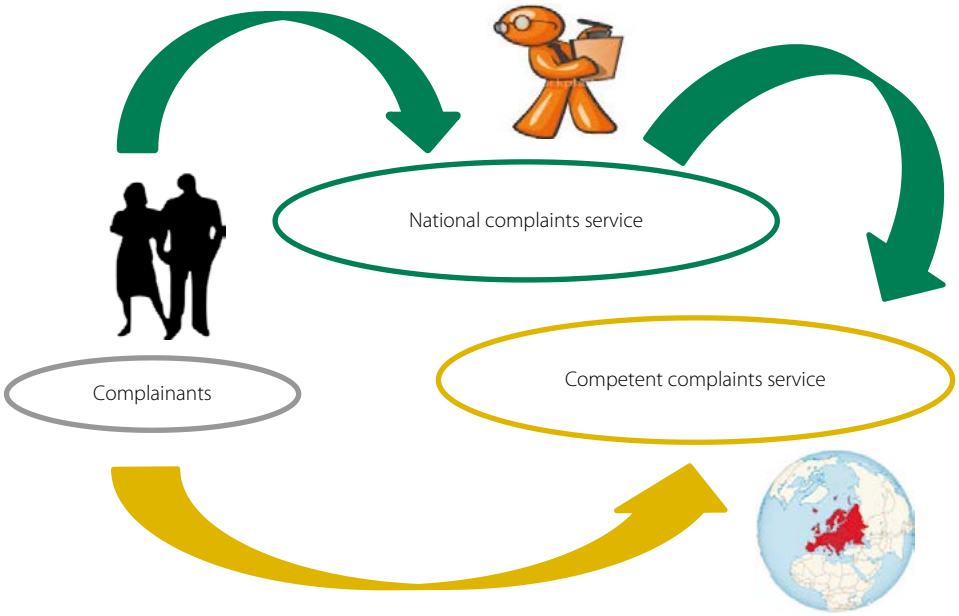
8 FIN-NET has members in most countries of the European Economic Area (EEA), i.e., the European Union, Iceland, Liechtenstein and Norway.

According to the data published on its website at the date of formulation of this Annual Report, FIN-NET has 60 members drawn from 27 countries of the European Economic Area.

In this way, any person wishing to complain about a foreign provider with its domicile elsewhere within the area can approach the out-of-court complaints settlement bodies in their home country, which will help them identify the relevant complaints service in the foreign service provider's country and indicate the next steps that they should follow. Once the consumer has all the information, he or she can contact the foreign complaints service directly or submit the complaint to his or her home country complaints service, which will pass it on to the complaints service of the service provider's country.

The entities belonging to FIN-NET are dispute resolution bodies of European countries or territories that are not part of the European Economic Area, and where the ADR (alternative dispute resolution) Directive is not applicable.

Up until now, the United Kingdom has been one of the most active FIN-NET members. However, due to Brexit, it has now become an associated entity, together with Switzerland and the Channel Islands. They all collaborate with FIN-NET and respect the essential principles of the European Union regulations on alternative dispute resolution.



The members of this network undertake to comply with a memorandum of understanding[9] (MOU), which includes the mechanisms and conditions of cooperation to facilitate the resolution of cross-border disputes. Although the provisions of the MOU are not legally binding on the parties, the CNMV has made a commitment to comply with them. The document was revised in May 2016 to adapt to the ADR Directive.[10]

9 Memorandum of Understanding (MOU).

10 Directive 2013/11/EU of the European Parliament and of the Council, of 21 May 2013, on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC.

Since September 2018, the Complaints Service has been a member of the FIN-NET Steering Committee, consisting of 12 members and in charge of the FIN-NET work programme that is discussed in plenary meetings. The term of office of Steering Committee members is two years. Steering Committee members meet twice a year.

➢ Plenary meetings

FIN-NET meets twice a year in plenary meeting, mainly to inform on the regulatory developments in the European Union in the area of alternative dispute resolution[11] and financial services, on the regulatory developments specific to each Member State and on the developments that affect their respective areas of alternative dispute resolution, as well as to exchange and share specific examples of complaints both on a national and cross-border level.

The Complaints Service participated in the two plenary meetings that were held in 2019 (April and November) in Brussels. This year a new group chairman was appointed, in addition to a new director of the Directorate-General for FISMA.[12]

In the April 2019 plenary session, the CNMV Complaints Service made a presentation on its complaints resolution procedure, the organisation of the department and other features.

The main topics discussed in the plenary meetings were:

– The possible implications of Brexit in the field of civil justice and private international law.

– New projects being developed in the European Union such as the Single Digital Gateway, a portal for citizens and companies that will allow all information available at European level to be consulted. The first level will be for European institutions. The launch is scheduled for the fourth quarter of 2020.

– A new format has been proposed for FIN-NET meetings, sharing the plenaries with other European working groups, such as the Financial Services User Group[13] (FSUG). This group was present at the plenary meeting in November 2019.

– Cross-border complaints, in which the competences of each ADR member in the processing of complaints were clarified when the service provider is regulated by the laws of another Member State (competent scheme). The position of each of the Member States is specific and differs according to its respective legal obligations. In the next plenary sessions, the topic of competence will be discussed further with the objective of standardising the processing of this type of complaint, especially when acting through branches or under the freedom to provide services.

---

11 An alternative dispute resolution (ADR) entity is any type of agency or department that provides out-of-court settlement of disagreements between investors and the entities that provide investment services.

12 Directorate-General for Financial Stability, Financial Services and Capital Markets Union.

13 A financial services user group created by the Commission in 2010, representing the interests of consumers, retail investors and micro-enterprises.

– Artificial intelligence applicable to complaints resolution in the financial sector. A presentation was made analysing the transparency and responsibility requirements that every artificial intelligence system must satisfy in order to be reliable.

2.5.2 International Network of Financial Services Ombudsman Schemes (INFO Network)

In 2017, the Investors Department joined the International Network of Financial Services Ombudsman Schemes (INFO Network). This body was created in 2007 with the broad aim of working together in the development of dispute resolution, exchanging experiences and information in different areas: management schemes, functions and models; codes of conduct; use of information technology; management of systemic aspects; processing of cross-border complaints; in addition to training for employees and continuing education.

INFO Network members are entities operating as independent out-of-court bodies that resolve disputes in the financial sector. Depending on their powers, these entities provide litigation resolution services to consumers who have not been able to resolve the matter directly with the company providing financial services in the following areas: banking, investment, insurance, credit, financial advice and pensions/retirement.

Its annual conference was held in South Africa in September 2019.

Webinars are held regularly to discuss topics of interest to members of the organisation. The Complaints Service took part in these webinars:

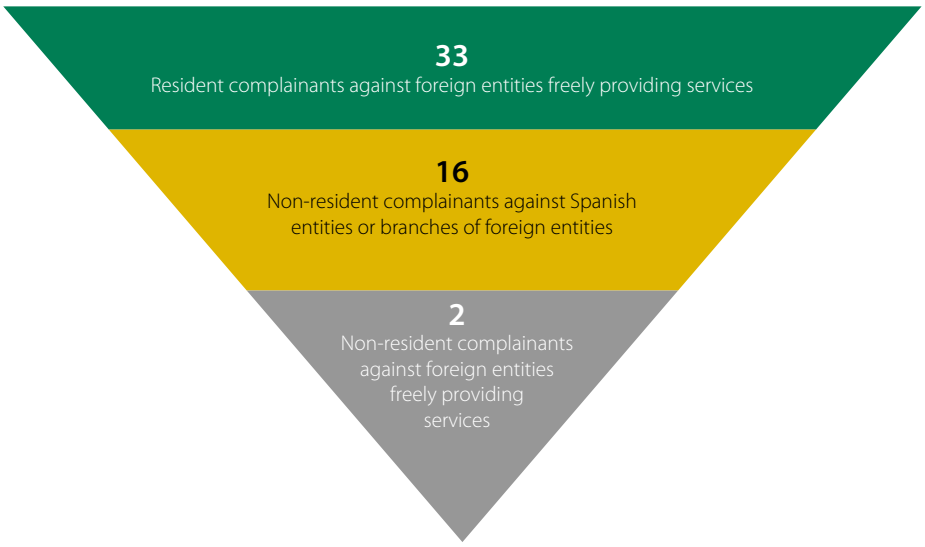
– June 2019. Presentation made by the Channel Islands ombudsman regarding the first judicial appeal received following the issue of a binding decision. The court considered that the decision of the ombudsman was correct, in terms of substance and process.

– November 2019. Presentation of the computer tool used to process complaints by the United States Office of the Comptroller of the Currency (OCC), which provides access to aggregated information in real time and allows information to be classified using any of the defined variables, as well as *customised* reports and listings to be designed.

2.5.3 Cross-border complaints

In 2019, the Complaints Service received a total of 51 complaints in which the complainant or the respondent entity was established abroad, broken down as follows:

Number of cross-border complaints



Residents in Spain submitted complaints against foreign entities acting under the freedom to provide services in 31 cases. Given that the Complaints Service did not have the jurisdiction to process the complaint, it provided information on the bodies responsible for resolving out-of-court complaints in the countries where the companies were established. In the 12 complaints filed against entities established in FIN-NET member countries, the complainant was also offered the possibility of the Complaints Service relaying the complaint to the competent body, which was requested in 4 cases. The 21 complaints filed against entities established in non FIN-NET member countries related to entities established in Cyprus.

Also, 12 residents in other countries of the European Union and 4 residents outside the European Union submitted requests to open complaint proceedings against entities established in Spain or in other countries that operated in Spain through a branch. Of these complaints, 4 were not admitted (2 complaints because they were the responsibility of the Bank of Spain's Complaints Service, one case because it gave rise to disputes over the economic quantification of the damages, and one case because the complainant failed to respond to the petition for rectification relating to several admission requirements). Seven complaints were admitted and resolved with a final reasoned report (in five cases in favour of the complainant and in two cases unfavourable to the complainant). In both these cases the entity agreed to the complainant's demands.

Lastly, two complaints were received that had been filed against foreign entities that operated under the freedom to provide services regime, initiated by one complainant residing in Andorra, and another in Mexico. These complaints were not admitted, as they were directed against entities based in a non FIN-NET-member country. In these cases, information was provided to the complainants about the foreign agencies that could be used to process the corresponding complaint.

3 Criteria applied in the resolution of complaints

3 Criteria applied in the resolution of complaints

The complaints resolved in 2019 mostly related to incidents that occurred before the adaptation of Spanish regulations to the MiFID II Directive. The criteria applied in the resolution of complaints therefore refer to the regulations prior to this adaptation, although, for informative purposes only, the changes derived from the transposition of the Directive into Spanish law are noted in some sections.

Chapter 3 contains a general description of the criteria applied by the Complaints Service in the resolution of complaints. As a supplement to this chapter, Annex 1 details the criteria and circumstances considered in each of the complaints resolved in 2019.

3.1 Marketing/simple execution

– The **service of execution or receipt and transmission of client orders** does not require an appropriateness assessment if the following requirements are met: i) the order relates to a non-complex financial instrument, ii) the service is provided at the initiative of the client, iii) the entity clearly informs the client that it is not required to assess the appropriateness of the instrument and therefore the client does not enjoy the protection provided for by law, and iv) the entity complies with the requirements provided for in the standard to prevent, detect and manage any conflict of interests.

  This is limited to cases in which the entity exclusively provides services for the execution or reception and transmission of customer orders, with or without the provision of ancillary services. Following the adaptation of Spanish regulations to MiFID II, the granting of credits or loans that do not refer to existing credit limits on loans, current accounts and authorisations of client overdrafts is expressly excluded from these ancillary services.

– **Warnings:**

  - The entity must warn the client in the event that, although mandatory, **it is not possible to assess appropriateness** because the client has not provided the necessary information or because the information provided is insufficient. Additionally, if the transaction concerns a complex financial instrument, a handwritten declaration must be obtained from the client stating that it has not been possible to assess the appropriateness of the product due to a lack of information.

  - The entity must warn the client when the product is complex and the **result of the appropriateness test is negative** and in addition if the transaction concerns a complex financial instrument, a handwritten declaration must be obtained from the client stating that he or she has been warned of these circumstances.

– **Assessment of client knowledge and experience:**

  • In assessing the **appropriateness of a financial instrument or service**, the entity must take into account the client's **financial knowledge** (types of products with which they are familiar), their **investment experience** (nature, volume and frequency of transactions) and their **education and professional experience** (level of education or profession, both current and previous, if relevant for this purpose). The entity may obtain this information by any means it deems appropriate, although this is usually done through a specific document called the appropriateness test or through an analysis of the client information.

  • Previous **investment experience** may be sufficient to conclude that the product is appropriate. For the previous investment experience to be valid for these purposes, new transactions must be made on similar products to those previously acquired in terms of their nature and risk, two or more previous transactions must have been performed on these products, and no more than five years (non-complex products) or three years (complex products) may have elapsed since the client has held them in portfolio.

– The entity must be able to provide proof of the appropriateness test performed and keep a record containing the information or documentation used for this purpose and the warnings issued. The entity must provide the client with a copy of the document containing the result of the assessment made, and provide evidence of its receipt by the client. The entity must be **able to demonstrate compliance with this obligation regardless of the channel used to provide the service** (physical, telematic or telephone).

– **Request to be treated as a professional client.** Retail clients may ask to be treated as professional clients provided they comply with certain requirements with regard to the amount of their investments, volume and frequency of the transactions and their knowledge resulting from a professional position. This new treatment is dependent on an assessment performed by the entity, a written request from the client to be treated as a professional client, a written warning from the entity explaining the loss of rights and protections that this treatment will involve and a waiver signed by the client stating that he or she is aware of the effects of this waiver.

– **Complex financial instruments.** Entities must obtain information on the knowledge and experience of their clients wishing to contract complex products, assess this information and inform their clients of the result of the assessment. In no circumstances may they be exempted from compliance with these obligations, in clear contrast to the rules for non-complex financial instruments.

  In relation to these instruments, it should be noted that **non-harmonised CISs** are considered complex products following the transposition of MiFID II into Spanish law. Prior to the transposition, entities had to assess whether a non-harmonised CIS was complex or not on a case by case basis, and the product was not considered complex if it met the following requirements: there were frequent opportunities for redemption, they did not involve real or potential losses for the client exceeding the amount invested and there was sufficient public information on their features.

– **Non-complex financial instruments.** Entities do not have to perform an appropriateness test when the order refers to non-complex products, providing the service is provided at the initiative of the client and the entity has clearly informed the client that it is not required to assess the appropriateness of the instrument offered or the service provided and that the client therefore does not enjoy the protection established under the current regulations on appropriateness. Entities applying the exemption from the appropriateness test must prove that they have met each and every one of these requirements. If on the other hand entities do not avail themselves of the exemption, they must demonstrate that they have assessed the appropriateness of the non-complex product to the client's characteristics.

  The following products, among other, are considered to be non-complex:

  - **Pre-emptive subscription rights** when: i) they are assigned to the shareholder of a company because of that shareholder's status as such, or ii) the shareholder acquires them in the secondary market with the sole objective of rounding up the number of rights held in order to obtain one more share.

  - **Shares**, provided they do not incorporate an embedded derivative and are admitted to trading on a regulated market, on an equivalent market in a third country or, after the transposition of MiFID II, on a multilateral trading facility (MTF).

  - **Harmonised CISs** that are not structured CISs, as established by Spanish legislation after the adaptation to MiFID II.

  - **Bonds or other forms of securitised debt**, unless they incorporate an embedded derivative. In addition, after the transposition of MiFID II, for this type of product to be considered non-complex, it must be admitted to trading on a regulated market, on an equivalent market in a third country or on an MTF, while, in addition to products that incorporate an embedded derivative, products incorporating a structure that makes it difficult for the client to understand the risks incurred are also excluded from non-complex products.

3.2 Investment advice and client portfolio management

– Personalised investment advice may be on a **one-off or recurring basis** (if the client has an ongoing relationship with an advisor who regularly provides investment recommendations). This usually occurs in the private banking segment.

– If the entity wishes to include in the documentation to be signed by the investor a statement saying that **it has not provided any investment advice** in relation to a complex product, it must obtain, in addition to the client's signature, a handwritten declaration stating: "I have not been advised in this transaction".

– The provision of an advisory service has been demonstrated in some complaints, since an investment advice contract formalised with the client or a proposal made by the entity taking into account the client's characteristics and objectives was submitted.

In other cases, to establish that an investment advice relationship exists between the client and the entity, the CNMV Complaints Service analyses whether certain conditions are met simultaneously, which, when consistent with the facts and explanations received, make it possible to reach such a conclusion.

– Entities have the right to trust the information provided by their clients except when they know, or should know, either that it is clearly out of date or it is inaccurate or incomplete. Further, under MiFID II, investment firms must take reasonable measures to ensure that the information collected about their clients or potential clients is reliable. Among other actions, they must adopt **appropriate measures to ensure the consistency of the client information**, for example, checking whether there are obvious inaccuracies in the information provided.

– Entities that give advice to or manage portfolios of retail clients must take account of the client's **investment objectives, financial position and investment knowledge and experience**. Following the adaptation to MiFID II, it is specified that the financial situation must include the capacity to bear losses and the investment objectives must include risk tolerance, in order to recommend financial services and instruments that best fit the client's level of risk tolerance and capacity to bear losses. All this information is normally reflected in the *suitability test*.

  As regards clients' knowledge and investment experience, there are **differences depending on whether the service provided by the entity is considered investment advice or portfolio management**. Specifically, with investment advice the final decision is taken by the client (and it is the client who must understand the risks and the nature of the product), whereas with portfolio management it is the entity that makes the decision and monitors the investment, so that it is sufficient for the client to be familiar in a general sense with the financial instruments in which the entity invests.

– Entities must keep a **register of suitability assessments** enabling them to prove that they have fulfilled this obligation. This assessment is usually performed through a suitability test duly signed by the client, which contains the information obtained by the entity in relation to the client's investment profile, the results of the assessment carried out and the date of issue.

– With regard to the **period of validity** of prior suitability assessments, it should be pointed out that although there are certain circumstances that may not change over time (knowledge and experience), there are others (financial position or investment objectives) that can certainly do so. Therefore it is necessary to review suitability on a regular basis.

  For one-off advisory services, the suitability assessment is most likely to be limited to one specific transaction and it is not therefore generally reasonable to extrapolate the results obtained from one transaction to subsequent transactions.

  For the provision of longer-term services (recurrent advice or portfolio management), as the investment objectives may vary, the entity must periodically review these objectives to check whether they have been modified. MiFID II establishes that investment firms that have a continuous relationship with their clients must have appropriate policies and procedures to maintain

adequate and updated client information and must be able to demonstrate that they have such policies and procedures in place.

– When providing investment advice, the investment firm must provide the client, before the transaction is carried out, with a **statement on suitability** in a durable medium specifying the advice given and how that advice meets the preferences, objectives and other characteristics of the retail client. This suitability report provided to the client must be kept in the entity's records, along with information relating to the fact that investment advice has been provided, the time and date it was given and the financial instrument recommended.

  Consequently, the Complaints Service considers that the entity is engaging in bad practice when, despite providing proof of having performed an assessment, the assigned profile or the recommendation does not correspond to the information provided by the client, or when the entity makes a recommendation indicating how it is aligned with the preferences, characteristics and objectives of the client, but it has not been not signed, and therefore there is no proof of delivery.

– **Portfolio management decisions** must conform to the client's investment profile resulting from the suitability assessment, in addition to the contractual limits that determine the framework in which the portfolio management service is to be carried out.

  Therefore, the Complaints Service considers that the entity has acted incorrectly when the portfolio management contract or the investments made by the entity under this contract have a profile that is not consistent with the result of the client's test.

3.3 Prior information

3.3.1 Securities

– Entities must provide their clients (including potential clients), on a durable medium, with a **general description of the nature and risks of the financial instruments** that they intend to contract, paying particular attention to the client's classification as a retail or professional client, or, under MiFID II, an eligible counterparty. In addition, they must be able to prove that they have fulfilled this obligation.

  The description must include an explanation of the **features of the type of financial instrument and its inherent risks,** which must be sufficiently detailed to allow the client to make informed investment decisions.

  Where justified by the features of the financial instrument, special emphasis must be given to the implications of leverage, whereby a simple reference to its existence is not considered sufficient.

– Regardless of the type of document used to provide the information (*ad hoc* document, inclusion in the purchase order, contract, etc.), it must be guaranteed that with the information provided the client is able to understand the characteristics and risks assumed with the purchase of the product.

– The criterion of the Complaints Service is **not to accept** (as a method of demonstrating compliance by entities with this obligation) **clauses incorporated into purchase orders** through which the client acknowledges receipt of information on the product to be acquired, if the entity does not also provide proof that this information has actually been provided. In short, as indicated for the case of CISs, the Complaints Services considers that the existence of these kinds of clauses does not in itself reliably guarantee that the client has received the necessary documentation.

– Some securities are subject to Order ECC/2316/2015, which establishes a standardised information and classification system for financial products. In these cases, the general description of the nature and risks of the securities delivered to clients or potential clients before they acquire the securities must include **a risk indicator and, where appropriate, liquidity and complexity warnings,** with specific requirements relating to how they are formed and represented.

– Likewise, if other specific regulations are applicable at the time the product is contracted, the entity must demonstrate that it has previously provided the information required under these regulations. For example, the European regulation on packaged retail investment and insurance-based products (PRIIPS); the CNMV circular on particularly complex products and eligible liabilities for internal recapitalisation; the CNMV resolution on financial contracts for differences; the transposition of MiFID II regulations, etc.

3.3.2 Collective Investment Schemes (CIS)

– Sufficiently in advance of subscribing the units or shares, subscribers must be provided with the **latest half-yearly report and the key investor information document (KIID)** free of charge and, on request, the prospectus and the latest published annual and quarterly reports. After the entry into force of the regulatory amendments deriving from the adaptation to MiFID II, the costs and expenses of the product and service that have not been included in the KIID must also be reported.

  These documents may not be replaced by information that may appear in the advertising of the CIS or by information provided to the client orally or in summary form by the entity.

– However, there are cases that are exempt from this obligation, such as:

  • For **additional subscriptions to units or shares in the same CIS**, it is not necessary to provide these documents again since the obligation to deliver the information is required only for the first subscription.

  • There is no obligation to deliver the latest half-yearly report if the **CIS is acquired before the first half-yearly report has been issued**, or in **fund renewals with a specific target return to maturity, guaranteed or otherwise**.

– The entity must be able to demonstrate that the information has been delivered by keeping a copy, in a durable medium, of the **documentation signed by the unitholder or shareholder** for as long as they hold said status. The

declaration signed by the client confirming receipt of the mandatory documentation is not sufficient.

– The marketing of **funds with a non-guaranteed specific target return** has required the implementation of a series of measures to reinforce transparency so that the unitholder is fully aware that this investment product does not have a third party guarantee. For this purpose, the CNMV has required the inclusion of some warnings in the informative documentation for this type of CIS.

– The advertising given to the client **must not contradict or downplay** the information contained in the prospectus and the KIID.

– In cases in which the acquisition of a CIS involves certain advantages or **promotions**, the entity must provide, in addition to the mandatory information on the product's features and risks, full and clear information on the terms and conditions of the commercial offer.

3.3.3 Discretionary portfolio management

– Entities that provide investment services must provide their clients, **sufficiently in advance, with information about the investment firm and the services it offers**.

  Among other information, entities that offer discretionary portfolio management services must state the types of financial instruments that can be included in the client's portfolio, as well as the types of transactions that can be carried out with them, including any limits, investment objectives, the level of risk that should be reflected in the discretionary portfolio management and any specific limitations on these discretionary powers. They must also provide information on the method and frequency of the valuation of the financial instruments and the benchmark used to compare the results of the portfolio.

  The portfolio management service contract must include this information, as well as the details of the terms under which the service is provided.

– However, signing the portfolio management contract allows the entity to make the investments it deems to be most suitable for the client, within the agreed margins, without having to obtain instructions from the client or submit any prior communication. Accordingly, entities are not obliged to inform the client of the risks of each investment made by the manager.

3.4 Subsequent information

3.4.1 Securities

– Information provided to clients must be **unbiased, clear and not misleading.** Information addressed to retail and professional clients must, among other requirements, be accurate, sufficient and comprehensible to the average member of the group to which it is directed and not disguise, diminish or obscure any important aspect, statement or warning.

– The **holding of financial instruments or client funds** requires entities to send clients periodic statements of position of these instruments or funds, except when this information has already been provided in another periodic statement.

  Statements must be sent at least quarterly, as established by the MiFID II regulations, as opposed to annually under Spanish regulations prior to MiFID II. However, in either case the parties are free to agree on more frequent provision.

  The statement must include data on all financial instruments and funds held by the entity on behalf of the client at the end of the statement period, as well as other information related to securities financing transactions.

  MiFID II further requires that the statement include an indication of the assets or funds subject to this regulation and those that are not; an indication of the assets or funds subject to financial guarantee agreements with a change of ownership; an indication of which assets are affected by peculiarities in their ownership status (e.g. if they have a security interest over them), the market value (or where the market value is not available, estimated value) of the instruments together with a clear indication that the absence of a market price may be indicative of a lack of liquidity. In any case the Complaints Service already considered it to be good practice, prior to the implementation of MiFID II, to indicate the market value, or an estimated fair value of the instruments at the reference date of the information and, in the latter case, to indicate that this was an estimate.

– Depositories must inform their clients of any **corporate transactions or events that affect the financial instruments deposited with them**, regardless of whether the transaction or event requires precise instructions from the depositor. However, entities must act with special diligence when these transactions require precise instructions from the client that must be executed within a specified period. In these cases, it is considered good practice for entities to adopt agile and fast communication procedures with their clients that guarantee the timely receipt of communications. Fast communication is required in transactions such as scrip dividends or capital increases with called-up capital.

– Entities have the obligation to respond to **specific and one-off requests for information/documents** from their clients. However, this obligation is restricted to the time limit for the retention of information/documents required by law. In the case of contracts concluded with retail clients, this requirement to retain the contract is for five years after the contractual relationship has ended. In the case of supporting documents for orders, the minimum period is five years after the transaction is executed. In these cases, the entity must inform its client of the reasons why its request cannot be addressed (expiry of the requisite document storage period).

  Another restriction to the right to information arises in the case of requests that are manifestly unjustified, disproportionate or lacking in detail.

3.4.2 Collective Investment Schemes (CIS)

- The **annual and half-yearly reports** of the CIS must be sent to all unitholders and shareholders, unless they expressly waive the right to receive them. If requested, they must also be sent the **quarterly CIS report**. Following a regulatory amendment that entered into force on 30 December 2018, reports must be sent through electronic channels, unless the client does not provide the necessary information for this to be done or expresses in writing a preference to receive them in physical format, in which case a hard copy will be sent.

- Unitholders and shareholders of CISs must be sent a **statement of position** as a minimum on a monthly basis. If, during this period, there are no subscriptions or redemptions, the statement may be postponed to the following period and, in any case, it must be sent at the end of the year. The statement must be sent to the address provided by each unitholder or shareholder within one month from the reference date. When the investor so requests, the document may be sent using telematic channels, provided that the investor's consent is recorded on a durable medium.

- Without prejudice to the right of unitholders to obtain the aforementioned statements, **receipts** may be used as a management document to inform the unitholders or shareholders of their positions in the CIS after each transaction.

- In accordance with MiFID II, investment firms must provide **annual *ex post* information on all costs and expenses** related to financial instruments and investment and ancillary services when they have recommended or sold financial instruments, when they have provided the client with the key information document or KIID relating to the financial instruments and when they have or have had a continuous relationship with the client during the year. This information will be based on real costs and provided on a personalised basis.

  Investment firms may choose to send out aggregate information on the costs and expenses corresponding to the investment services and financial instruments together with the periodic information they present to clients.

- Unitholders and shareholders may **request documentation and information** on their investments in CISs from entities. These requests must be properly attended to, unless the entity does not have the documentation in question due to the expiry of the requisite storage period, the request for information is manifestly disproportionate and unjustified or special circumstances exist.

- **Changes in key features** of the CIS give unitholders the right of separation without fees or expenses and must be clearly communicated to them at least 30 days in advance of their entry into force.

  Pursuant to the **right of separation**, for the period of 30 calendar days immediately after the notification date, unitholders may opt for the total or partial redemption or transfer of their units at the net asset value on the last day of the 30 calendar days granted for this purpose, with no redemption fees or expenses applied. In general, failure to exercise the right of separation within the specified period automatically implies that the unitholder wishes to maintain the investment.

– Entities must submit in a timely manner full and detailed information on **mergers between sub-funds of foreign CIS**, as well as the associated tax effects. Specifically, as the tax effect in this type of transaction is a key factor, the entity must inform the client prior to the merger of how the transaction will be classified for tax purposes and, where appropriate, whether the corresponding tax withheld or not.

3.4.3 Discretionary portfolio management

– Investment firms that offer management services to clients must provide each of them with a **periodic statement**, on a durable medium, of the portfolio management activities carried out on behalf of the client. The statement must be sent out **quarterly** under MiFID II, whereas before this regulation it was sent out on a half-yearly basis unless the client requested to receive it quarterly.

– Investment firms that offer portfolio management services must inform their client when the global value of the portfolio, valued at the beginning of each reporting period, has decreased by 10% and, subsequently, by multiples of 10%, no later than the end of the business day on which the threshold is crossed, and if this occurs on a non-business day, at the close of the following business day. MiFID II prevails over the previous Spanish regulation, which had established a **loss threshold** of 25%.

– Regardless of the other causes that, legally or conventionally, may lead to the termination of a portfolio management contract, the client retains the **power to unilaterally resolve the agreement** at all times. Once the contract has been terminated, the portfolio manager has a maximum of 15 days to render the accounts.

3.5 Orders

3.5.1 Securities

– Complaints were received that queried the investments made. In such cases, the entity must demonstrate that there is an order for the transaction, or justify the execution of the transaction if there is no such order.

– Securities orders that contain the client's instructions must be completed in such a way that both the ordering party and the entity responsible for receiving and processing the order accurately and clearly know the scope and effects.

– There are complaints relating to the **various types of orders and their consequences** (market orders, limit orders, at-best orders and contingent orders).

– When it is **not possible to operate by electronic means for reasons attributable to the entity**, it must act diligently to restore the service, inform the client sufficiently in advance or, if not possible, as soon as the interruption to the service occurs, and make other alternative channels available.

– Complaints also arise deriving from the non-execution or incorrect execution of orders related to various corporate transactions.

– Entities should make as few **errors** as possible and they must therefore control and organise their resources responsibly. The Complaints Service welcomes those cases in which the respondent entity itself detects the error, corrects it, speedily informs clients and offers them a solution that financially compensates them for the damage resulting from unfortunate conduct by the entity.

– It might also be the case that the entity does not take into account its clients' instructions for performing certain transactions which, for various reasons, cannot be carried out, or it may be forced to **unilaterally close the positions opened by its clients** in certain financial instruments due to its operating rules. Before such an operation is carried out, the entity must inform the client of the reasons why it is entitled to act in this manner as stated in the contractual documentation that supports the investment signed between the parties. However, the Complaints Services considers it to be good practice if, before closing the position for any reason, the entity reports this circumstance to its client so that the latter may prevent the closure or minimise the consequences deriving from it to the extent possible.

3.5.2 Collective Investment Schemes (CIS)

– The **subscription and redemption** process for CIS units and shares must be set out in the information prospectus and in the KIID.

  The net asset value is that of the day of the request or the following business day depending on the fund prospectus. It is common practice to establish what are referred to as "cut-off times", such that requests received after this time are deemed to have been made on the following business day for the purposes of the applicable net asset value.

  In any case, the net asset value must always be unknown to the investor at the time of placing a subscription or redemption order.

– The subscription and redemption process must be recorded in an **order** that demonstrates the investor's decision to subscribe or redeem. This order must identify the CIS to be subscribed or redeemed, the amount or number of shares or units to be subscribed or redeemed and other relevant information on the transaction.

– **Transfers** must identify the source fund and the target fund. To avoid errors, it is advisable to provide the target entity with a position statement of the source fund as this contains all the information necessary to identify the fund from which the transfer is to be made.

  Likewise, it is important to take into account the characteristics and procedures attributable to the subscription and redemption of the source and target funds, and, where appropriate, the corresponding subscription and redemption fees and the legal deadlines for the transfer, to prevent any unpleasant surprises relating to the net asset value applied in the subscriptions and redemptions performed in the transfer, or to the total cost of the operation.

  However, in the event that the source and target funds are marketed or managed by the same entity, the deadlines provided in the regulations to carry out the necessary checks do not apply.

– **A change of distributor** is a separate operation from a transfer, since in this case the investment remains unchanged; i.e. the investor keeps the CIS it has already acquired and what changes is the entity that acts as distributor or custodian for the scheme.

– Entities may make the processing and execution of their clients' orders dependent on the customer's **providing the necessary funds** to cover the total amount of the transaction (including applicable fees).

3.6 Fees

3.6.1 Securities

– MiFID II establishes that all costs and expenses relating to the service and the financial instrument must be reported *ex ante* in such a way that they can be easily understood by clients. In addition, payments received from third parties in connection with the provision of customer services (incentives) must be itemised. In general, the *ex-ante* information on costs must refer to **the real fees applicable to each client in the specific transaction.**

– Before the transposition of MiFID II into Spanish law entered into force (17 April 2019), entities were obliged to draw up a maximum fee prospectus, which they had to publicise and communicate to the CNMV. In this regard it is appropriate to clarify that the fee prospectuses appearing on the CNMV website are the last ones presented by each entity in compliance with the former regulations.

– Clients should be aware of the fees that they will have to pay **before the start of the commercial relationship,** given that they affect the return on their investment. This information is usually included in the administration and custody contract for financial instruments. When entities were obliged to draw up a fee prospectus, the items, frequency and fee amounts were included in the contract itself if they were less than those established in the fee prospectus. Otherwise, the entity had to give the aforementioned prospectus to the client and keep a receipt of delivery.

– If **fees are increased,** the client must informed in advance and given a minimum period of one month in which to amend or cancel the contractual relationship, during which time the new fees will not be applied. However, if this right is exercised before the deadline, the fees previously charged will be applied, unless the entity decides not to charge any fees during the period. If the fees are decreased, the entity must also inform the client, without prejudice to the immediate application of the new fees.

  Although entities are not obliged to send their clients information using registered mail with acknowledgement of receipt, in other words, they are not obliged to prove delivery, they do have an obligation to demonstrate that the documents have been sent, for instance, by providing a copy of the personal message sent to the client at a valid notification address. Information on fee changes, both upwards and downwards, may be included in any periodic communication that the entity is obliged to submit to its clients or sent by any means of communication agreed by the parties in the contract.

– When a portion of the total price for the investment service provided is paid by the retail client in a **currency other than the euro** the entity receiving the order must inform the client, prior to the execution of the instructions or the conclusion of the contract, of the currency in question and of the applicable exchange rate and costs.

– When, as the result of a takeover bid for all securities, certain requirements concerning possession by the offeror and acceptance by the holders of the securities are met, the regulations provide that the offeror may require the holders of the remaining securities to sell them at an equitable price and the holders of the remaining securities may require the offeror to purchase their securities at an equitable price.

  In regard to expenses related to these transactions, it has been established that, in the event of a **sell-out**, all expenses deriving from the sale or exchange and settlement of the securities will be paid by the offeror and, in the event of a **squeeze-out,** the expenses deriving from the purchase/sale or exchange and settlement of the securities will be paid by the sellers.

– The CNMV Complaints Service considers that it is good practice for the depository to choose not to charge administration fees for securities when their issuer is **delisted** – without liquidity – and its securities are also unproductive, particularly in those cases in which it is not possible to apply any procedure whereby clients can remove the shares from their securities account.

– The **transfer of securities** is necessary for cancelling the contract/commercial relationship with the depository. Therefore, without prejudice to the freedom that entities have to set their fees, if the fee established for providing that service were to be excessive, it could constitute a breach of the rights recognised in favour of consumers by consumer and user legislation.

  A transfer fee that is too high might be an obstacle to the investor's right to terminate a service agreement and may even be considered an abusive clause. However, this hypothetical abusive nature can only be ruled on by an ordinary court of justice, not by the CNMV.

– Spanish legislation, adapted to MiFID II, establishes that when an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm must inform the client whether it is possible to buy the different components separately and provide separate evidence of the costs and charges of each component.

  In the fee prospectuses that entities were obliged to draw up under the previous regulations, custody and administration of financial instruments included both securities account maintenance and **cash account** maintenance fees, where this was merely **instrumental**, i.e., movements were linked exclusively to the securities account.

– MiFID II establishes the obligations that apply when **more than one entity provides** investment services to a client. The CNMV has clarified that the aggregate cost applicable under this regulation includes third-party charges and brokerage fees.

The fee prospectus required prior to the entry into force of MiFID II specified that entities that provided the service of execution or receipt and transmission of orders on equity securities in national markets had to establish a fee in their prospectus that included the full amount that had to be paid to the intermediary, while those deriving from the intervention of other entities could not be included as chargeable expenses, with the exception of market fees and fees for clearing and settlement services.

– The standard contracts for the custody and administration of financial instruments must establish, among other aspects, the form and terms in which the entity will make the deposited or book-entered financial instruments available to clients, as well as, where appropriate, their funds and the transfer procedure when the contract is **terminated**, expressly indicating the requirements for this, such as the **fees charged for transactions carried out pending** settlement at the time of termination of the contract and the **proportional fees accrued** in the current period at the time of completion.

3.6.2 Investment funds

– **Information on fees and expenses** of investment funds is included in the documentation that must be delivered to the investor before contracting the fund (i.e., the last half-yearly report and KIID, and on request, the prospectus and the most recent published annual and quarterly reports). After the entry into force of the regulatory amendments deriving from the adaptation to MiFID II, the costs and expenses of the product and service that have not been included in the KIID must also be reported.

  Some subscription and redemption orders include information on the fee applicable to the transaction to be executed. Unitholders must be informed individually of any changes in fund fees, in accordance with regulations.

– Some fund prospectuses include dates on which the unitholder may redeem units without being charged a redemption fee (**liquidity windows**). They also indicate whether orders issued by unitholders will be processed on the day of the order or whether there is a **cut-off time**, after which any orders received will be processed on the following business day.

– For **redemption orders,** the entity must not charge a redemption fee if the order is issued during the liquidity window in accordance with the procedure provided in the prospectus for this purpose (notice period, etc.).

– For **orders for transfers** between investment funds in which the liquidity window coincides with the day on which the order is received or one of the verification days available to the source management company, the redemption fee must not be charged, pursuant to the entity's duty to execute the orders on the best terms for the client (in this case, within the liquidity window).

  However, if the fund prospectus establishes a cut-off time, the redemption fee will be applicable when the source management company receives the transfer order on the day of the liquidity window, but after the cut-off time, as it is considered that the request has been made on the following business day.

3.6.3 Portfolio management

– Portfolio management clients and potential clients must be provided, well in advance, with appropriate information on **all associated costs and expenses**.

  The disclosure requirements for costs and expenses are listed in the delegated regulation of MiFID II and the particularities of this information in the case of discretionary portfolio management have been clarified in the FAQ documents on MiFID II published by ESMA and the CNMV.

  Before the transposition of MiFID II into Spanish law entered into force (17 April 2019), entities were obliged to draw up a maximum fee prospectus, which they had to publicise and communicate to the CNMV.

– **Contracts** signed with clients for portfolio management services usually include both the type of fee applicable and the calculation base and settlement period, as well as any discounts that may apply.

  When entities were obliged to draw up a fee prospectus, the items, frequency and fee amounts were included in the contract itself if they were less than those established in the fee prospectus. Otherwise, the entity had to give the aforementioned prospectus to the client and keep a receipt of delivery.

– The standard contract for portfolio management must establish the obligation to inform the client, prior to their application, of any **increase in the fees and expenses** applicable to the service provided, and that had been previously agreed with the client. In this case, the client must be given a minimum period of one month from the receipt of this information to modify or cancel the contractual relationship, during which time the new rates will not be applied. If the fees are decreased, the entity must also notify the client, without prejudice to the immediate application of the new fees.

  This information can be included in any periodic communication that the entity must submit to its clients or sent by any means of communication agreed by the parties in the contract.

– Discretionary portfolio management contracts usually establish provisions relating to fees applied if the service is not provided during the full settlement period (for instance, because the service has been contracted or cancelled within that period).

  The regulations governing the fee prospectus that entities had to prepare before the entry into force of MiFID II established that fees accrued for discretionary portfolio management had to be established in such a way that for **invoice periods shorter than the ordinary agreed settlement period,** they would be billed in proportion to the number of calendar days during which the service was provided.

3.7 Wills

– Heirs must inform the entity as soon as possible and in a reliable manner of the death of the deceased by providing the **death certificate,** which is

considered sufficient for this purpose. The entity must then block the securities accounts and financial instruments of the deceased so as to prevent other co-holders of the accounts or instruments from having access to them.

– It is then necessary to prove to the entity the **status of heir** or legitimate interested party by submitting: i) certificate of the General Registry of Last Wills and Testaments and ii) an authorised copy of the last will and testament or the declaration of heirs in intestate proceedings.

– Once this status has been demonstrated and the inheritance accepted, the **right of the heir to request information on the deceased's positions** in the financial institution is recognised, although with the same limits that would be applicable to the deceased (the period for keeping the documents required by law has not expired, the requests are not disproportionate and unjustified, and there are no exceptional circumstances in which the entity may object to handing over such information).

– The **unclaimed estate of the deceased person** is the estate without ownership until the heirs accept the inheritance.

– When the inheritance has been **accepted,** the heirs can request information on prior movements even when the account co-holder does not agree, because, on acceptance, the heirs are subrogated in the position of the deceased.

– Entities may refuse to allow persons who do not have the status of heir to receive information on the movements in the accounts during the life of the deceased.

– Similarly, the entity is obliged to issue **position certificates** that include all the securities of the deceased deposited with it, both individually and under shared ownership, in order to determine all the assets to be included in the deceased's estate and enable the heirs to pay the inheritance tax and start the process of executing the will.

– Following the death of one of the spouses and as a prior step to determining the estate of the deceased spouse, the community property, if it exists, must be liquidated. This liquidation must be carried out by means of a public or private agreement between the surviving spouse and the heirs, in which they must agree as to which assets and rights will be included in the estate of the deceased spouse and which will become the exclusive property of the surviving spouse.

– Once accepted by all the heirs, the **community of heirs** is established. While this community is maintained, the owners have an "abstract" (i.e. indeterminate until partition) right to all of the assets and no heir may sell the assets held by the community. However, it is possible that the community may sell one or more of the financial instruments making up the estate, although this requires the consent of all of the heirs. The partition and specific allocation of the assets terminates the community of heirs.

– In order to proceed with the allocation of the inheritance, the heirs must submit to the entity: i) the notarised instrument of partition of inheritance or a private partition document signed by all the heirs, and ii) the documents

demonstrating that all the successors are up-to-date with payments of inheritance tax. Once the adequacy of this documentation has been verified, the entity will proceed with the change of ownership without delay.

– If the will does not provide otherwise, all **legacies** must be delivered to the legatees by the heirs.

– The surviving spouse's **usufruct** can be **converted or commuted** using different forms of payment: through a life annuity, the allocation of the proceeds of certain assets or in cash.

– For securities to be allocated, a securities account must be opened or already exist, the holder or holders of which must be the beneficiary or beneficiaries (for *pro indiviso* cases) of the securities.

– The conduct of business rules of securities markets do not expressly provide for a **maximum time limit** for the processing of a will that leads to a change of ownership of the securities acquired. The speed with which these processes are carried out depends on diligent cooperation between the parties involved.

– The fee for processing the execution of the will includes the **fee for change of ownership** and therefore it is not possible to charge both fees.

  The heirs must be informed about the fee for change of ownership prior to the start of the execution process.

3.8 Ownership

– The purchase of securities requires the opening of a securities account by signing a custody and administration contract with a financial institution. The securities account must have an associated cash account.

– **The ownership of a financial instrument is assumed to be held by the holder of the securities account**, as established in the account opening contract.

– In those cases in which there is more than one holder of the securities account, the contract must include **rules for operation with regard to the financial instruments,** which may allow for joint and several access (the holders give their mutual authorisation to make use of the financial instruments) or joint access (which requires the prior consent of all of the holders for ordering transactions).

  Any of the co-holders may request a change in the rules from a joint and several basis to operating on a joint basis, although the entity must inform the other holder or holders prior to said change.

  If the initial rule of operation for the account is joint, it can only be modified with the joint consent of all the co-holders.

– As indicated above, the opening of a securities account requires the designation of an **associated cash account** against which all movements of money resulting from transactions with the financial instruments generated in the

securities account are debited or credited. However, the holders of both accounts (securities and cash) do not have to match. The ownership of financial instruments is assumed only with respect to the holders of the securities account.

– The holder of financial instruments may offer them as guarantee for payment for the successful completion of a financing transaction. The **pledging of securities** entails, from the outset, the blocking of the financial instruments designated for such purpose.

  Any use made of the pledged securities requires prior lifting of the pledge in accordance with the provisions of the clauses of the loan or prior extinction of the cause of the pledge, i.e., cancellation of the debt that gave rise to it.

3.9 Operation of the entities' CSDs

– The **operation** of entities' customer service departments and customer ombudsmen are regulated in Order ECO/734/2004, of 11 March, on the customer service departments and customer ombudsmen of financial institutions.

– Each entity or group approves a **Customer Protection Regulation**, which regulates the activity of the CSD and, where applicable, the customer ombudsman, as well as the relations between both.

– Order ECC/2502/2012, of 16 November, regulates the procedure for filing complaints with the CNMV Complaints Service.

– This Service maintains, *inter alia*, the following criteria:

  • The starting date for **calculating the period** for resolution is indicated on the acknowledgement of receipt of the complaint filed with the entity's customer service department or customer ombudsman. If the receipt has not been acknowledged, the period will start to run from the date stated in the document filed by the complainant in any of the places authorised for this purpose.

  • It is considered **bad practice** for entities to fail to respond to requests for comments, clarifications or cooperation that this Service may make during the processing of a complaint. This failure to cooperate makes it impossible to issue a suitable resolution on the issues raised by the complainant.

  • When the complaint relates to **requests for documentation** that have not been responded to, it is relatively frequent for entities not to submit to their clients the requested documentation in the first instance, but rather to postpone it until the time they present arguments to the CNMV's Complaints Service after the complaint proceedings have been initiated by the dissatisfied client.

  • In these cases, the reports resolving the complaints indicate that it is not considered appropriate that in order to obtain a copy of the documentation generated in their commercial transactions with the entity, clients are forced to file a complaint with the CNMV.

- However, it should also be noted that investors should request information from their bank office or branch and only if they are not properly attended in that instance should they approach the entity's CSD to complain that their request has not been properly addressed. At that time, the entity's CSD must, if possible, provide the documentation requested by the client, without waiting for the client to file a complaint with the Complaints Service.

- The **decisions taken by the entity's customer ombudsman** (if there is one) are binding on the entity and therefore it must also be understood that the commitments made by the entity to its ombudsman to resolve its client's complaint must also be deemed binding, and it is considered bad practice for the entity to breach these commitments. For this same reason, the resolutions adopted by the CSD in favour of the complainant must also be deemed binding on the entity, it being considered bad practice for the entity not to consider them as such.

4 Enquiries

4 Enquiries

The CNMV Investors Department, among other functions, handles investor enquiries on topics of general interest concerning the rights of financial service users and the legal channels available to defend these rights. These requests for information and advice are addressed in Article 2.3 of Order ECC/2502/2012, of 16 November, regulating the procedure for filing complaints with the Complaints Services of the Bank of Spain, the National Securities Market Commission and the Directorate-General for Insurance and Pension Funds.

In addition to the enquiries provided for in the aforementioned Order ECC/2502/2012, the Investors Department supports investors in searching for information contained in the CNMV's public official registers and in other public documents it discloses, and addresses any issues or queries that investors may raise relating to the securities markets.

It will also respond to written communications which are not enquiries as such, but which set forth opinions, complaints or suggestions on matters within the CNMV's supervisory purview.

Professional enquiries are also received requesting advice on specific issues affecting other areas of the CNMV. In these cases, either the enquiry is forwarded to the competent department depending on the matter in question, informing the interested party, or, in some circumstances, the interested parties are informed that the Investors Department only handles enquiries submitted by investors or users of financial services. In the latter case, they are in turn informed that, for professional issues, they should contact the relevant department of the CNMV, indicating the details of the transaction and identifying all the parties involved.

Written communications are also received that, due to their content, are outside the CNMV's area of competence. Prominent among those are enquiries related to banking products and services, or about insurance or pension funds. In these cases, the CNMV forwards the communications to the competent supervisory body, informing the sender accordingly.

Another set of enquiries outside the CNMV's purview concerns tax-related matters. In these cases, the parties are directed to the competent tax authority.

4.1 Enquiry volumes and channels

In 2019, 7,560 enquiries were dealt with. Most of the enquiries were made by telephone (85.6%) and were dealt with by call centre operators. These enquiries were limited to providing information contained on the website (www.cnmv.es). By volume, the second most used method was the electronic office form (10.6%) followed by submission through ordinary mail, or the general register (3.8%).

As shown in Table 20, the total number of enquiries during 2019 dealt with decreased by 29.8% compared with 2018. This reduction was mainly due to the lower number of telephone enquiries (3,088 down on 2018), and a reduction in enquiries submitted through ordinary mail or the general register (147 down on 2018).

The number of enquiries dealt with in 2019 was down again, in line with the trend seen in 2014, 2015 and 2016, after the rise in 2017 and 2018, due mainly to enquiries received after the resolution of Banco Popular Español, S.A. and its implications (especially in 2017) and enquiries received following the takeover bid for Abertis Infraestructura, S.A. (in 2018).

The average response time, apart from enquiries received by telephone and dealt with immediately, stood at 22 calendar days in 2019.

Number of enquiries by reception channel TABLE 20

	2017		2018		2019		% change
	No.	% total	No.	% total	No.	% total	19/18
Telephone	9,907	88.5	9,559	88.7	6,471	85.6	-32.3
Statement (written + other source)	399	3.6	436	4.0	289	3.8	-33.7
Form (user + certificate)	893	8.0	777	7.2	800	10.6	3.0
Total	**11,199**	**100.0**	**10,772**	**100.0**	**7,560**	**100.0**	**-29.8**

Fuente: CNMV.

The channels available for submitting enquiries to the CNMV are:

– Electronically through the CNMV Electronic Office (https://sede. cnmv.gob.es/sedecnmv/sedeelectronica.aspx), either using a digital certificate or electronic ID, or creating a user name and password.

– By writing to the CNMV Investors Department at Calle Edison, 4 - 28006 Madrid.

  A form is available for this purpose at www.cnmv.es, in the "Enquiries" section of the "Investors Website", in accordance with the model set out in Annex III of CNMV Circular 7/2013, of 25 September, regulating the resolution procedure for complaints and claims made against companies that provide investment services and for addressing enquiries regarding the securities markets.

– By calling the investor assistance office toll-free (900 535 015). This line is manned by call centre operators, and is confined to enquiries about information held in the CNMV's official registers or posted on its website (www.cnmv.es).

Finally, it is important to point out that the e-mail mailbox servicioderecla-macionesCNMV@cnmv.es is not authorised to admit new enquiries for processing, but only deals with issues relating to previously filed complaints or enquiries, in accordance with the appropriate procedures. Complainants or enquirers must identify themselves and provide the reference number assigned to the complaint or enquiry, which parties are informed of so that they may submit their enquiries through the appropriate channels.

4.2 Subjects of enquiries

Investors submitted enquiries relating to the markets as a whole or specific events, including:

- Enquires and complaints regarding the voluntary takeover bid for Distribuidora Internacional de Alimentación, S.A. (DIA), and its possible delisting.

- Enquiries related to a type of fraud carried out by firms known as "recovery rooms".

- Enquiries regarding a new kind of fraud known as funded trading accounts.

- Enquiries about the implementation of minimum lot trading requirements for sales of certain listed securities.

- Enquiries or complaints were also filed regarding the formulation of a takeover bid for AB-Biotics, S.A., the shares of which were traded on the Alternative Stock Market (MAB).

- Enquiries relating to Livemarkets, EAF, S.A., an entity that was delisted from the CNMV official registers on 3 July 2019.

- Enquiries and complaints relating to fees charged by financial intermediaries in certain securities transactions.

- Enquiries and complaints requesting the resumption of the process for the admission to trading of the shares deriving from the capital increase executed through a public deed signed on 6 August 2015 by Urbas Grupo Financiero, S.A.

- Enquiries and queries about the certification of knowledge and skills of marketing entity personnel, either to inform or to advise.

- Enquiries relating to unauthorised entities known as "boiler rooms".

- Other enquiries or queries submitted in 2019 and that have already been discussed in greater detail in previous Annual Reports and reports issued by the Investors Department are:

    - Enquiries relating to administration and custody fees for suspended and delisted securities.

    - Enquiries made by an heir relating to their wish to know where a deceased person's securities are deposited, in addition to information on acquisition dates and prices

    - Enquiries relating to the resolution of Banco Popular Español, S.A.

    - Enquiries relating to the price at which certain securities were purchased.

    - Enquiries relating to takeover bids authorised by the CNMV. Specifically, in relation to Bodegas Bilbaínas, S.A., General de Alquiler de Maquinaria, S.A. and Natra, S.A.

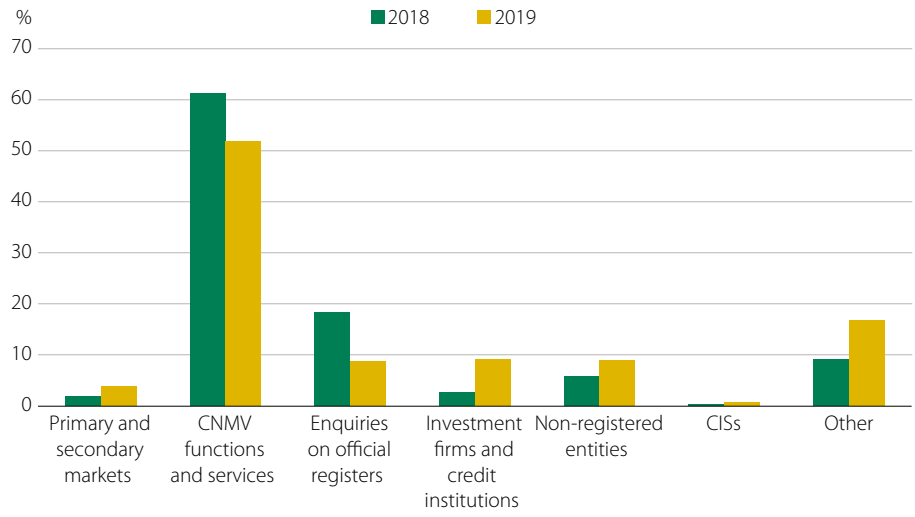
- Enquiries and incidents relating to Cypriot investment firms registered in the CNMV's official registers under the freedom to provide services regime (i.e. without a permanent establishment in Spain).

– Enquiries, that due to their content, are outside the CNMV's area of competence. Prominent among those are enquiries about banking products and services, or about insurance or pension funds. In these cases, the CNMV forwards the documents to the competent supervisory body, informing the sender accordingly. Other issues that do not fall within the purview of the CNMV are those of a tax nature, in which case the parties involved are informed that they should contact the competent tax authority.

Other enquiries recurring each year refer to the data available in the CNMV official registers: information on registered entities, fees for investment services, price-sensitive information disclosures, short positions, significant shareholdings, CNMV communications, statistics and publications and other content freely accessible to the public. In addition, and as in other years, there were enquiries about the functions and services of the CNMV.

The call centre has also provided interested parties with telephone numbers and contact details of other bodies in the event that the issues raised do not fall under the responsibility of the CNMV (these enquiries are recorded under "Other" in Figure 26 on subjects of enquiries).

Subjects of enquiries FIGURE 26



Source: CNMV.

4.3 Key subjects of enquiries

This section singles out enquiry subjects considered of particular importance.

4.3.1 Enquires and complaints regarding the voluntary takeover bid for Distribuidora Internacional de Alimentación, S.A. (DIA), and its possible delisting

The Investors Department informed interested parties that the voluntary takeover bid for DIA made by L1R Invest1 Holdings, S.à r.l. had been authorised on 28 March 2019, and that the amended terms had been authorised on 6 May 2019.

The amendment of the bid gave rise to a more favourable treatment for the recipients under the terms of Article 31 of Royal Decree 1066/2007, of 27 July, on takeover bids for the acquisition of securities, insofar as it eliminates the condition relating to the minimum limit of acceptances initially required by the offeror in order for the bid to be effective. In this specific case, the elimination of this condition also allowed each shareholder to freely decide whether or not to accept the offer without having to consider the decisions of the other shareholders and their effect on the result of the offer. The amendment of the bid also adhered to the principle of equal treatment for all recipients, which is required under Article 31 of the aforementioned Royal Decree.

The interested parties were also informed that the CNMV considered it to be clearly demonstrated that DIA was in serious financial difficulties, based, in particular, on the official information published by the company itself.

The bid price was considered to be equitable for the purposes of the provisions of Articles 9.4.f), and 10 of Royal Decree 1066/2007. In its analysis, the CNMV took into account the valuation report submitted by the offeror, which, applying the methods set down in the Royal Decree, resulted a lower valuation than the bid price. The CNMV commissioned a special report from a second external expert, which validated in all main points the conclusions set down in the offeror's report.

Interested parties were also informed that the details of the amendment made to the original prospectus were contained in the supplement to the prospectus submitted by L1R Invest1 Holdings, S.à r.l., in addition to the extension of the bid acceptance period until 13 May 2019 inclusive.

Lastly, they were informed that the bid prospectus and the accompanying documentation could be found in the CNMV's Register of Takeover Bids for the Acquisition of Securities, and the prospectus and announcement form were available on the CNMV website (www.cnmv.es) in the section "Registration files" under "Issues, trading and takeover bids".

With regard to the possibility of moving to have DIA delisted after the voluntary takeover bid, interested parties were informed that the ways in which a company can be delisted are set down in Articles 10 and 11 of Royal Decree 1066/2007. These articles describe the channels through which a company may delist its shares, in compliance with the legal requirements established for each case, and in particular with Article 9 of the aforementioned Royal Decree, which sets out the methods for establishing an equitable price.

With regard to DIA, the interested parties were told that Section 4.10 "Intentions with respect to the listing of the shares of the offeree company" of the bid prospectus, specified that: "The Offeror does not have any plan to delist the company by any other method other than by exercising the rights of sell-out, provided that the thresholds are reached, and in accordance with the provisions of Articles 47 and 48 of Royal Decree 1066/2007".

It was clarified that in order to exercise the right of sell-out, the offeror must hold securities accounting for at least 90% of the capital with voting rights of the offeree company, and the bid must be accepted by holders of securities accounting for at least 90% of the voting rights to which the bid referred, which in the case of DIA did not occur.

The same section of the prospectus also states: "In the event that the requirements for exercising the right of sell-out are not met, the offeror does not intend to take any steps to either maintain the listing of DIA shares or to delist them. If, in the future, the offeror were to consider delisting the offeree company, this would be carried out through a public delisting bid after obtaining the valuation report provided for in Article 10 of Royal Decree 1066/2007".

4.3.2 Enquiries related to a type of fraud carried out by companies known as "recovery rooms"

The interested/affected parties were informed that this is a new type of fraud whereby companies contact people who have been victims of unauthorised entities known as "boiler rooms" to recover losses or buy back shares or securities acquired through other unauthorised companies.

This type of action may come from the "boiler room" that carried out the initial fraud or from other people or companies acquiring the lists of affected parties. The Investors Department advised that the CNMV recommend any consumer receiving offers of this type without having requested them to be aware of the following points:

- That they may try to get them to invest money again, or even have their data sold to other companies.

- Identify new indications of fraud: If a person affected by the activity of a boiler room is contacted by a firm without having requested such contact and is asked for money in advance to cover the payment of taxes, fees or insurance policies as a prerequisite to providing the service, this is an indication of the firm's being a "recovery room".

- Be suspicious if contact purporting to be on behalf of the CNMV to recover losses suffered, since neither the CNMV nor its employees will directly contact any persons potentially affected, nor will they authorise the use of its identity, corporate image or domain, cnmv.es, for the purpose of recouping losses.

- Do not respond to offers to buy back shares or recover losses without first making sure that they come from companies with positive or trustworthy references, regardless of the fact that the activities of these recovery rooms are not supervised by the CNMV (the CNMV's competence over the activity of companies operating in the financial sector is linked to whether or not they carry out a re-

served activity in accordance with securities market regulations or subject to authorisation or registration with this body. Therefore, if investment services or other reserved activities included in the securities market regulations are not offered, they would not be companies subject to the supervision of the CNMV).

As a result of the cases detected and their seriousness, the CNMV published a press release on 22 May 2019, warning about this type of fraudulent activity.

Lastly, interested parties were reminded that the CNMV regularly publishes warnings about unauthorised entities ("boiler rooms"), entities that contact potential investors, often by telephone, offering to trade shares or other financial products without having the proper authorisation to do so, with a high probability that the money invested will be lost.

4.3.3 Enquiries regarding a new kind of fraud known as funded trading accounts

These services offer clients the possibility of accessing a securities account to carry out different types of transactions (stock market trades, CFDs, forex, etc.) with the particularity that users would not risk their own capital, but would apparently trade with the capital provided by the service, supposedly in exchange for a percentage of the profits obtained.

To be able to make use of these funded trading accounts, the user must take a course in which, among other subjects, the trading rules that must be followed are explained, and has to pass operational tests in a simulated environment and within certain operating parameters (maximum daily loss, level of risk, etc.).

This course requires the payment of a fee in advance, sometimes of several thousand euros.

The CNMV issued a press release on 29 July 2019 warning potential users of these accounts about the risks incurred by contracting the courses, including the risk of fraud or deception regarding the possibility of accessing the funded trading account.

Investors were also warned that the delivery of these courses or the opening of the aforementioned accounts do not fall within the CNMV's scope of action, according to the functions assigned to it by the Securities Market Act, although the supervision of the different activities that could be carried out from these accounts in the financial markets would fall within its supervisory purview.

4.3.4 Enquiries about the implementation of minimum lot trading requirements for sales of certain listed securities

This case relates to Vértice Trescientos Sesenta Grados, S.A., Abengoa Class B shares, to which the minimum lot requirement ceased to be applied for orders entered in the system on 10 April 2019 (although it was reapplied from 16 March 2020); shares of Duro Felguera, S.A., for which the minimum lot requirement was also waived from 2 April 2019, and Urbas Grupo Financiero, S.A.

This means that unless the financial intermediary aggregates its clients' orders until a certain number of shares are reached that is a multiple of the established mini-

mum lot (in which case it must comply with the requirements established in Article 68 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016), it is not possible for shareholders to trade odd or mixed lots on the Spanish Stock Market Interconnection System (SIBE).

In this situation, it is understood that the requirement established in Article 68.1.a) of the aforementioned Commission Delegated Regulation (EU) 2017/565 has been met, namely that "it is unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any client whose order is to be aggregated", as, otherwise, the transaction would not be executed.

Therefore, factoring in the obligation of entities to act in the best interests of their clients, as well as the provisions set down in the order execution policy of each entity on this subject, where applicable, in 2020 it was considered that in these cases, and in the absence of other relevant applicable circumstances, good securities market practice would entail entities aggregating and assigning their clients' orders, for which purposes they must comply with all the requirements established in Article 68 of Delegated Regulation (EU) 2017/565.

4.3.5 Enquiries relating to administration and custody fees for suspended and delisted securities

Each year, numerous enquiries are received in which investors with securities that have been suspended or delisted complain to the CNMV about the depository fees charged.

Firstly, the difference between suspension and delisting should be clarified. Unlike delisting, suspension from trading is a temporary measure that may lead to the definitive delisting of the securities or to the suspension being lifted when it is considered that the circumstances that gave rise to it no longer apply.

With regard to securities suspended from trading, the CNMV stated that there is no procedure to avoid these securities being held in custody by an authorised entity. This is due to the registration system for listed shares. Under current regulations, negotiable securities may be represented by book entries or by physical securities, although the former is a necessary condition for their admission to trading both on the stock market and on the MAB. It is therefore understood that the shares of a listed company are mandatorily represented by book entries, and the entity that keeps the book-entry register is Iberclear, together with the associated entities.

Given that securities custody, depository and administration services form part of the normal services provided by investment firms to their clients and are included in the fees and charges they apply, unless a commercial decision is taken, depositories may continue to require payment for the provision of depository and administration services.

For delisted shares, it is considered that regardless of their economic value, until the moment of delisting, when the corresponding entry is made in the Companies Registry, they remain outstanding securities and are represented by book entries, unless they are converted back into physical securities and, therefore, depositories may apply the fees they charge for this until the definitive delisting of the company, un-

less they decide, based on purely commercial criteria, to waive these fees for their clients.

If the shares have been effectively converted back into physical securities, holders may, if they wish, request the depository to send them the securities, and would therefore stop paying custody fees and the shareholders themselves would be responsible for the custody of their shares from that moment on.

However, Circular 7/2001 of 18 July of the Securities Compensation and Settlement Service regulates a procedure for the voluntary waiver of the obligation to keep book entries for inactive delisted companies. In order for this procedure to be applied, it must be verified, among other aspects, that a minimum period of four years has elapsed without any book entries being made in the sheet open for the issuer in the Companies Registry.

Within the group of companies for which this procedure is already applicable, Fergo Aisa, S.A. requires a special mention, as in 2019 Iberclear initiated the pertinent process to request the voluntary waiver of the obligation to keep book entries of the entity's shares (according to the notice published on 3 October).

In the first quarter of 2020 Iberclear reported that the obligation to keep book entries for these shares had been waived.

It should be noted that this procedure for waiving the obligation to register shares in the book entry system means that fees may no longer be payable, but it does not imply giving up ownership.

In these cases, it is recommended that the interested parties, prior to submitting a request to waive this obligation, inform themselves about the fees and expenses that may be applicable to processing and executing the request, according to the fees established in their securities contracts.

Enquires were also made about the following delisted companies: Martinsa-Fadesa, S.A. (in liquidation); Indo Internacional, S.A. (in liquidation); Reyal Urbis, S.A. (in liquidation); Let´s Gowex, S.A., and La Seda de Barcelona, S.A. (in liquidation). Enquiries were also received regarding Nissan Motor Ibérica, S.A., although in this case despite being delisted from the registry, the company continues to operate normally and therefore the aforementioned waiver procedure cannot be initiated.

In the case of Martinsa-Fadesa, S.A. (in liquidation), the CNMV authorised the conversion of the company's shares from book entries to physical securities.

This process of converting book entries back to physical securities allows holders to request that their securities be handed over to them, and from that time on they will be responsible for their custody, and thereby exempt from paying custody fees. They would also be able to close both their securities account and the associated current account.

However, it was also stated that there is no information in the CNMV's registers about the status of the conversion process for Martinsa-Fadesa, S.A. shares (in liquidation) from book entries to physical securities.

It was also stated, in relation to some enquiries received about the delay in the delivery of the physical securities of Martinsa-Fadesa to their holders, as part of the aforementioned conversion process, that the execution of that process and delivery of the physical shares to their holders are carried out by the company issuing the securities and the entity in charge of book entry record, while the issuer is tasked with issuing the physical securities.

Therefore, to ascertain the status of this process, and, in particular, of the delivery of the securities to their holders, interested parties may contact their depository, the company issuing the shares or the entity in charge of keeping the book entry record, which in the case of Martinsa-Fadesa, S.A. (in liquidation), is Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores, S.A. Unipersonal (Iberclear).

The case of Indo Internacional, S.A., also differs from others raised in the CNMV as according to the Central Companies Registry, the company is filed as delisted in an entry dated 14 October 2019 (published in the *Official Gazette of the Companies Registry* on 21 October 2019), which means that the shares no longer exist and, therefore, no fees can be charged.

Enquiries regarding the equity units of Caja de Ahorros del Mediterráneo (CAM) also require a separate mention. In this case, the interested parties were informed that the automatic transformation of the CAM into a foundation as required by law following the entry into force of Law 9/2013, of 4 July, also meant that the entity lost its status as an issuer of equity units of savings banks, and consequently, the cancellation of these instruments. Therefore, as these equity units have been cancelled, their holders should no longer be charged any custody or administration fees.

Lastly, regardless of the requirements set forth in the aforementioned Iberclear circular, the CNMV's Investors Department considers it to be good practice for depositories not to charge administration and custody fees for shares of delisted companies that are inactive, regardless of whether a procedure to waive these fees exists or has been enabled.

4.3.6 Enquiries relating to the formulation of a takeover bid for AB-Biotics, S.A., whose shares are traded on the Alternative Stock Market (MAB)

Interested parties were informed that, in accordance with Article 129 of the Recast Text of the Spanish Securities Market Act and Article 1 of Royal Decree 1066/2007, of 27 July, the CNMV's purview in matters pertaining to takeover bids remains limited to those companies with shares that are fully or partly admitted to trading on an official Spanish secondary market and have their registered office in Spain, and does not extend to shares of entities listed on multilateral trading facilities (such as the Alternative Stock Market, MAB) as in the case of AB-Biotics, S.A

4.3.7 Enquiries relating to the situation of Livemarkets EAF, S.A.

Interested parties were informed that Livemarkets EAF, S.A. had been removed from the CNMV registers as a financial advisory firm on 3 July 2019, and that from that date it was no longer authorised to provide investment advice on a professional or ongoing basis.

Previously, and since 28 May 2010, it had been authorised to provide these investment services in Spain.

Investors were informed that if they were dissatisfied with the conduct of Livemarkets EAF, S.A., they could file a complaint with the CNMV's Complaints Service so that this could be assessed for their particular case. This in accordance with the procedure and requirements established for this purpose.

Lastly, they were told, with respect to the scope of the complaints procedure, that the final resolution reports: i) contain clear, precise and reasoned conclusions about the conduct followed by the entity in the case presented; ii) are informative only and not binding on the parties – however, the entity must inform the supervisor of the actions carried out in relation to the complaints resolved in favour of the complainant; iii) are not considered to be administrative acts subject to appeal, so they cannot be appealed before administrative or judicial bodies, and iv) do not include economic assessments of the possible damages and losses caused to users of financial services, as only courts of law can recognise these types of requests.

4.3.8 Enquiries and complaints relating to fees charged by financial intermediaries in certain securities transactions

The CNMV Investors Department informed the interested parties that investment firms can freely set the fees or expenses they charge their clients for any service the entity effectively provides requested by the client. It should be noted that until 17 April 2019, entities were obliged to prepare a maximum fee prospectus, which they had to submit to the CNMV before these were applied. This prospectus is no longer mandatory.

4.3.9 Enquiries and incidents relating to Cypriot investment firms registered in the CNMV's official registers under the freedom to provide services regime (i.e. without a permanent establishment in Spain)

As in previous years, enquiries and incidents were processed relating to Cypriot investment firms registered in the CNMV's official registers under the freedom to provide services regime (i.e. without a permanent establishment in Spain).

All interested parties were informed that, in order to resolve their complaints, they should directly address the competent body in Cyprus, and that it is not possible for the CNMV to transfer their complaints to that authority because this service can only be provided in countries in the FIN-NET network, of which Cyprus is not a member.

Annex Detailed analysis of the criteria applied in the resolution of complaints

Annex Detailed analysis of the criteria applied in the resolution of complaints

The complaints resolved in 2019 mostly related to events that occurred before Spanish regulations were adapted to the MiFID II Directive. The criteria applied in the resolution of the complaints therefore refer to the regulations in place prior to this adaptation. However, for information purposes only, the changes deriving from the transposition of this directive into Spanish law are noted in some sections.

A.1 Marketing/simple execution

➢ Appropriateness assessment

The rules of conduct included in the securities market regulations mainly seek to protect the retail investor.

This goal is achieved, basically, with the inclusion in these regulations of a general duty to provide information from a dual standpoint. The information that entities have to provide to their clients about the services provided and the products marketed, in order to ensure that investors have all the necessary information to make their investment decisions and understand the nature and risks of the financial instruments and services acquired or provided (this issue is analysed in the section on prior information on these criteria). Additionally, the information that entities have to obtain from their clients, which falls within the general principle of "know your customer".

Therefore, entities that provide investment services must ensure that they have all the necessary information about their clients, including potential clients, and should request, when the service to be provided is different from investment advice or portfolio management (services that will be discussed in a separate section), information on their knowledge and experience in the field of investment corresponding to the specific type of product or service offered or requested, so that the entity can assess whether the investment service or product is suitable for them. This is known as an "appropriateness assessment" and is usually recorded in the "appropriateness test". In all cases, the entity must provide the client a copy of the document containing the assessment performed.[1]

The objective of analysing appropriateness is to determine whether, in the opinion of the entity that provides the investment service, the client has the knowledge and experience necessary to understand the nature and risks of the service or product offered or requested.

1 Article 214 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

However, the rule provides an exemption to the appropriateness analysis. Thus, if the client takes the decision to acquire a certain financial instrument or request the provision of an investment service, with regard to a product that is considered non-complex, the entity may adhere to this exemption and will not have the obligation to assess whether or not the product or service requested is appropriate. However, the entity must inform the client that it is not obliged to carry out the appropriateness assessment and that, in addition, the client will not have the protection established by law.[2]

Therefore, it is important to ascertain whether the decision in relation to a non-complex product has been taken at the initiative of the entity or of the client, which must be considered when analysing the complaints (again, it must be remembered that this exemption refers only to products classified as non-complex).

In cases where an appropriateness assessment is necessary, the scope of the analysis that the entities have to carry out must include the following data:

i) The types of financial instruments, transactions and services with which the client is familiar (financial knowledge).

ii) The nature, volume and frequency of the client's transactions with financial instruments and the period during which they were made (previous investment experience).

iii) The level of studies, current profession and, where relevant, the previous professions of the client (training and professional experience).[3]

Entities can carry out an appropriateness assessment either by means of a test or questionnaire prepared internally for this purpose, which must include a series of questions with the indicated scope, or based on the information on the client available to the entity.

In this regard, entities have the right to trust the information provided by the client, unless they know or should know that it is outdated, incomplete or inaccurate.[4]

In any case, when the analysis of the information obtained or available to the entity leads the latter to consider that the product is not appropriate for its client, the client must be informed. For complex products there will also be a requirement for the contractual document that includes the appropriateness assessment made by the entity to include a handwritten note in which the investor acknowledges having been advised that the product is not appropriate for him or her.

---

2 Article 216 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

3 Article 74.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 55.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

4 Article 74.3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 55.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

Similarly, if the client does not provide the required information or the information is insufficient, the entity must advise the client that it cannot conclude whether the investment product or service is appropriate,[5] and a handwritten note must be included in the duly signed and submitted contractual document in which the investor declares that it has not been possible to carry out an assessment when the product to be assessed is complex.

The following sections offer a detailed analysis of each of the issues highlighted in this introduction and give examples of the actions performed by entities with regard to the complaints resolved in 2019.

✓ *Exemption from the obligation to assess the appropriateness of non-complex products*

As indicated in the previous section, there are exceptional cases in which the entity is exempt and does not have to assess the appropriateness of a product or service for the client. For this exemption to apply, the following strict requirements must be met:[6]

i) The order must refer to a non-complex financial instrument.

ii) The service must be provided on the client's initiative.

iii) The entity must have clearly informed the client that it is not obliged to perform an appropriateness assessment on the instrument offered or the service provided and that, therefore, the client does not enjoy the protection established in the rules of conduct of legislation on the securities market. This warning may be issued in a standardised format.

iv) The entity must comply with the requirements established in the regulations to prevent, detect and manage possible conflicts of interest.

This provision is limited to cases in which the entity exclusively provides the service of execution or reception and transmission of client orders, with or without provision of ancillary services. Following the adaptation of Spanish regulations to MiFID II, exemptions of these ancillary services expressly exclude the granting of credits or loans[7] that do not refer to existing credit limits on loans, current accounts and authorised client overdrafts.

For complaints resolved in 2019 relating to non-complex financial instruments, the entities that decided to make use of this exemption submitted proof of compliance with these requirements through a signed document stating that the initiative was the client's and that information had been provided by the entity as to its not being obliged to assess the appropriateness of the product and the consequent lack of protection for the client. In some cases, this information was included in the purchase order and in others in a document attached to it (R/487/2018, R/650/2018, R/27/2019 and R/483/2019).

---

5 Article 214 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

6 Article 216 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

7 Article 141.b) of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

However, in other cases, the entity did not comply with all the regulatory requirements, and was considered to have acted incorrectly. For example, although the entity stated in the purchase order for a non-complex product that the transaction had been formalised at the client's initiative and informed the client that it was not required to perform an appropriateness assessment (first part of the content of the warning), it did not specify that as a result the client would not enjoy the protection established by law (second part of the content of the warning) (R/102/2019).

✓ *The client does not provide information or the information is insufficient*

In order for an investment firm to determine whether the specific type of product or service offered or requested is appropriate for its client, it must obtain information about the client's individual circumstances, in line with the aforementioned content. Investors are responsible for providing the information requested by the entity and must do so with the utmost rigour. The entity must under no circumstances encourage its clients not to provide such information.[8]

If the client does not provide the entity with the information necessary for the appropriateness assessment or if the information provided is insufficient for that purpose, the entity is obliged to inform the client that this decision prevents it from determining whether the investment service or product is suitable for the client.

The content of this warning must be as follows:[9]

> *We hereby inform you that, given the characteristics of this transaction XXX (the transaction must be identified), ZZZ (name of the entity providing the investment services) is obliged to assess the appropriateness of the product for you, i.e., to assess whether, in our opinion, you possess the necessary knowledge and experience to understand the nature and risks of the instrument subject to the transaction. By not providing the necessary data to perform such an assessment, you lose this protection established for retail investors. By not performing such an assessment evaluation, the entity cannot form an opinion with regard to whether or not the transaction is appropriate for you.*

When the transaction is carried out on a complex instrument, in addition to the above warning duly signed by the client (which must always be collected), the entity must obtain a handwritten declaration stating:[10]

> *This is a complex product and as a result of a lack of information, it has not been possible to assess whether it is appropriate for me.*

---

8 Article 74.2 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 55.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

9 Rule Four, Section 2, of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

10 Rule Four, Section 3, of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

The warning and the handwritten declaration will form part of the contractual documentation of the transaction, even when they are formalised in a document separate from the purchase order.

The entity must keep all the information or documentation in which the warnings issued or made in this regard have been implemented, as this is one of the minimum mandatory records to be kept by investment firms.[11]

Under the MiFID II Directive, records must be kept not only of warnings issued on the lack of information, but also of: i) whether the client asked to proceed with the transaction despite the warning and, if so ii) whether the entity accepted the client's request to proceed with the transaction.[12] The CNMV has clarified that in principle, it is considered that if the client issues an order and the entity processes this order, these two procedures have been duly recorded.[13]

In case R/641/2018 a situation in which the client did not provide sufficient information was analysed. On contracting a non-complex product, the entity correctly informed the client of the consequences of not having provided sufficient information of his knowledge and experience. Evidence of this was provided in a document signed by the client which stated the warning in the terms transcribed above.

✓ *The financial instrument is not appropriate*

When, based on the information available to the entity about the client's knowledge and experience, it considers that the investment product or service is not suitable, the entity must issue a warning to the client.[14]

In this case, the content of the warning must be as follows:[15]

> *We hereby inform you that, given the characteristics of this transaction XXX (the transaction must be identified), ZZZ (name of the entity providing the investment services) is obliged to assess the appropriateness of the product for you.*
>
> *In our opinion, this transaction is not appropriate for you. A transaction is not appropriate when the client lacks the necessary knowledge and experience to understand the nature and risks of the financial instrument forming the object of the transaction.*

---

11 CNMV Resolution of 7 October 2009, on the minimum records to be kept by investment firms.

12 Article 56.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

13 Question 16.2 of the CNMV document *Q&A on the application of the MiFID II Directive.*

14 Article 214 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

15 Rule Four, Section 4, of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

The entity must obtain the client's signature on the above text, and if the transaction is performed on a complex instrument, a handwritten declaration must be included, stating:[16]

This product is complex and is considered inappropriate for me.

As indicated with respect to the warning described above, in this case the warning and the handwritten declaration must also form part of the contractual documentation of the transaction.

In addition to the obligations related to the appropriateness assessment (which include keeping the documentation or information in which the warnings issued or made have been implemented),[17] entities must keep an updated record of the clients assessed and of unsuitable products that reflects, for each client, those products for which the appropriateness assessment has produced a negative result.[18]

Under the MiFID II Directive, records must be kept not only of warnings issued when the transaction is not considered inappropriate, but also of: i) whether the client asked to proceed with the transaction despite the warning, and if so ii) whether the entity accepted the client's request to proceed with the transaction.[19] The CNMV has clarified that in principle, it is considered that if the client issues an order and the entity processes this order, these two procedures have been duly recorded.[20]

As described in the section "Evidence (and submission) of the appropriateness assessment", entities must prove not only that all regulatory formalities and warnings have been performed in the event that a product is not appropriate, but also that the client information has been obtained and assessed (beforehand), providing the appropriateness test performed or the information analysed that led to the conclusion that the product or service was not appropriate for the client.

For contracts arranged prior to the entry into force of Circular 3/2013, some entities demonstrated compliance with these obligations, submitting the warning about the non-appropriateness of the product and the duly signed test (R/479/2018). However, one entity acted incorrectly in that, based on the client's responses in the test and investment experience, the transaction could have been considered appropriate, but the entity submitted a document signed by the client stating that it might not be appropriate for the client's level of knowledge and experience (R/559/2018).

In contracts arranged after the entry into force of Circular 3/2013, entities acted correctly when the product that was the subject of the complaints was not complex

16 Rule Four, Section 4, of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

17 CNMV Resolution of 7 October 2009, on the minimum records to be kept by investment firms.

18 Rule Five of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

19 Article 56.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

20 Question 16.2 of the CNMV document *Q&A on the application of the MiFID II Directive*.

and they submitted the duly signed test and the warning about its non-appropriateness in accordance with the regulatory content (R/576/2018, R/676/2018, R/12/2019, R/146/2019, R/162/2019, R/183/2019, R/211/2019, R/394/2019 and R/554/2019). In the case of complex products, entities that submitted the test, warning of non-appropriateness and handwritten declaration required under the regulation, all duly signed by the client (R/417/2019), also acted correctly.

However, in one case, an entity acted incorrectly in the contracting of a complex product after the entry into force of Circular 3/2013. It submitted an appropriateness assessment, which stated on the last page that the transaction was not appropriate for the client, and the client's signature was also obtained, although the handwritten declaration in which the client should have acknowledged the warning about the inappropriateness of the product was missing (R/300/2019).

➢ Irregularities in completion of the appropriateness test

Investors often disagree with the answers recorded in the appropriateness tests performed by the entities alleging certain irregularities in the completion of the test such as the tests being completed in advance by the entities or their questioning the truthfulness of certain answers.

In these cases, the CNMV Complaints Service considers that with the information available in the complaint proceedings it is not possible to determine whether the tests given to the complainant had already been completed or to determine the truthfulness or authenticity of the answers set out therein by the entities or by the investors themselves, due to the lack of sufficient elements with which to make a judgement on said facts. Therefore, it is for the courts to resolve these matters through the various evidence methods at their disposal (R/665/2018, R/203/2019, R/303/2019 and R/312/2019).

On 5 February 2019 the CNMV issued a statement on the obligation of entities to take measures to ensure the reliability of the information obtained from clients in order to assess the appropriateness or suitability of their investors. The statement establishes that while assessments must be carried out on a case-by-case basis, entities must also adopt measures and take reasonable steps to ensure that the information obtained from clients is generally reliable.

In this context, they would be responsible for identifying any potentially atypical situations, for instance:

- Whether the overall information on the level of education of the retail client is reasonable, taking into account the client's sociological characteristics.

- Whether the overall information on clients with a high degree of financial knowledge is reasonable, particularly for groups of clients who do not have prior professional or investment experience or a level of education consistent with this.

- Whether the overall information on retail clients with previous investment experience in complex instruments that are not commonly distributed to retail clients is reasonable, particular when clients' experience is not consistent with their transactions with the entity.

To properly identify and correct these situations, entities must have proper procedures in place to supervise the contracting process, periodically review the information obtained and correct incidents. If inconsistencies, discrepancies or a large volume of atypical situations are detected (situations that may arise for a variety of reasons, one of which could be that the client information has not been collected correctly), the proper steps must be taken to compare and validate the data using means other than simply checking that information matches that shown in the completed questionnaires.

In case R/487/2019, certain contradictions were identified in the answers given by the client in the appropriateness test. The client professed to have investing experience in a certain type of investment funds but also claimed to be unfamiliar with these funds, having knowledge only of bank accounts, deposits, public debt and pension plans. The Complaints Service ruled that the entity had behaved incorrectly as it did not highlight the contradiction in the answers to the appropriateness test.

➢ Assessment of client knowledge and experience

The scope[21] of the appropriateness assessment to be carried out by the entity, insofar as it is pertinent in view of the characteristics of the client, the nature of the service to be provided and the type of product or transaction envisaged, must include information on the client's previous investment experience, financial knowledge and training and professional experience.

The criteria applied in the resolution of complaints for each of these points are highlighted below:

✓ *Prior investment experience*

Prior investment experience may be sufficient in itself to consider the product or service provided appropriate, as long as the following conditions are met:[22]

i) The new transactions are performed on financial products that have the same or similar features with regard to nature and risk as those previously acquired.

ii) Two or more previous transactions have been carried out.

iii) No more than five years have elapsed since the financial instruments in question were held in the client's portfolio (for non-complex products) and three years (for complex products).

---

21 Article 74.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 55.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

22 Question 4 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

For products that are similar in terms of their nature and risks (family of instruments), the greater the complexity and potential risks, the greater the difficulty of finding other similar instruments; in other words the number of instruments in a family will decline as its risk and complexity increases.

Additionally, it is reasonable to consider a client's previous experience with a certain family of products as sufficient reason for a transaction on an instrument belonging to a different family of products to be considered appropriate, provided that the risks and complexity of the former provide reasonable grounds for thinking that the client can understand the risks and nature of the latter.

When the client's prior experience meets the aforementioned requirements, the new transaction would be considered appropriate without the need to analyse other factors (education, professional experience and financial knowledge). Otherwise, the other parameters must be assessed, in addition to previous investment experience.

✓ *Training and professional experience*

The information that the entity obtains from its clients with regard to their general level of education or other training, or with regard to their profession, can provide only a general idea of their knowledge, so it must be assessed together with the other answers taken as a whole.

Therefore, if the client does not have previous investment experience and is not familiar with any type of financial instrument, the general level of education and professional experience would allow only transactions performed on families of instruments with low complexity to be deemed appropriate.

✓ *Financial knowledge*

Financial knowledge refers to the types of financial instruments, transactions and services with which the client is familiar. For clients with no real investment or professional experience in the financial area and a low general level of education, complex products should not considered appropriate based solely on a positive assessment of their financial knowledge.[23]

The entity may obtain information about a client's knowledge and experience in the following manner:

– Clients' prior investment experience can be ascertained from the information provided in the appropriateness assessment by the clients themselves or from their previous transactions of which the entity had knowledge prior to marketing the product or providing the investment service concerned. However, the content of the test or the documentation on previous transactions must allow it to be determined whether this experience is adequate in terms of overlap and similarity of the products, the number of transactions and the date they were last in the client's portfolio.

23 Section 2.6 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

– Information on the clients' education, professional experience and financial knowledge is usually obtained from their answers to the questions in the appropriateness test.

The assessment of the client's knowledge and experience carried out by the entity may lead it to decide that:

– The client has not provided sufficient information to determine whether the product or service is appropriate, which is discussed in the section "The client does not provide information or the information is insufficient".

– The product or service is not appropriate for the client, which is analysed in the section "The financial instrument is not appropriate".

– The product or service is appropriate for the client, where the entities' decision must be based on sufficient information provided in the appropriateness questionnaire or documentation on the client's previous transactions.[24]

  However, the Complaints Service considered it incorrect for entities to conclude that a product was appropriate based on questionnaires in which the responses did not properly demonstrate the knowledge and experience of the client (R/479/2018, R/537/2018, R/621/2018 and R/153/2019) or where there were contradictions (R/487/2019), or when based on the client's previous experience with products with differing features, natures and risks to those of the product to be contracted (R/586/2018).

  It was also considered incorrect that: i) an entity informed its client of the investment profile assigned but did not include the information on the knowledge and experience of the client that it claimed to have collected (R/147/2019) and ii) conversely, an entity submitted the appropriateness test signed by the complainant but it did not reflect the result of the assessment carried out or any corresponding warnings (R/480/2019).

The entity must provide the information collected on the client's knowledge and experience and the proof that the client has been informed of the result of the assessment (see section "Evidence (and submission) of the appropriateness assessment"), unless, in the case of non-complex products contracted by the client on his or her own initiative, the entity has adhered to the exemption from the obligation to assess the appropriateness of these products and has provided evidence having complied with the requirements established for this purpose (see section "Exemption from the obligation to assess the appropriateness of non-complex products").

Cases in which the entities acted correctly and incorrectly in their assessment of the client's knowledge and experience are described, by type of security, in the sections "Complex financial instruments" and "Non-complex financial instruments" of this section.

---

24 R/533/2018, R/554/2018, R/572/2018, R/602/2018, R/625/2018, R/629/2018, R/633/2018, R/665/2018, R/8/2019, R/42/2019, R/55/2019, R/57/2019, R/75/2019, R/98/2019, R/110/2019, R/119/2019, R/122/2019, R/123/2019, R/139/2019, R/143/2019, R/144/2019, R/157/2019, R/170/2019, R/172/2019, R/174/2019, R/180/2019, R/188/2019, R/193/2019, R/203/2019, R/206/2019, R/207/2019, R/220/2019, R/241/2019, R/261/2019, R/282/2019, R/289/2019, R/291/2019, R/295/2019, R/297/2019, R/303/2019, R/312/2019, R/316/2019, R/346/2019, R/378/2019, R/380/2019, R/391/2019, R/403/2019, R/404/2019, R/425/2019, R/459/2019, R/508/2019 and R/569/2019.

➢ Validity period of prior appropriateness assessments

The entity must assess each transaction in terms of its appropriateness. This does not means that a full assessment must be carried out for each transaction that is processed. It may be reasonable to consider that a transaction is appropriate on the basis of a previous assessment which deemed it to be appropriate, provided that it was not carried out a long time beforehand. The degree of complexity and risk inherent to the financial instrument are key to establishing the period immediately prior to the new transaction during which previous appropriateness assessments may be taken into account.[25]

In regard to prior assessments made by entities, the criterion applied by the Complaints Service is to consider these assessments to determine the appropriateness of the product to be acquired or the service to be provided as valid, provided that they were not carried out a long time before (more than three years for complex products and five for non-complex) and refer to similar securities.

Accordingly, an entity that provided a test carried out six years before the transaction forming the subject of the complaint and also referring to products of a different nature was considered by the Complaints Service to have acted incorrectly (R/479/2018).

➢ Cases of joint ownership or representation

Some complainants expressed their dissatisfaction with the fact that the entity did not perform an appropriateness assessment of all the joint owners of the securities. Given the wide variety of cases that may arise, each entity must decide on the best way to resolve the situations that occur based on different variables.

In some cases, the co-owned accounts or contracts are governed by joint rules of operation, in which case an appropriateness assessment must be performed on the holder with the greatest knowledge and experience. In other cases, which are governed by the joint and several regime, the assessment must be performed on the ordering party (R/8/2019 and R/380/2019).

In some cases, the account holder (natural or legal person) may appoint a proxy or legal representative to act on his/her/its behalf, in which case the assessment must be performed on the proxy or representative when the proxy or representative is the operating party[26] (R/98/2019).

In financial contracts signed by two joint holders, in which the clauses are drawn up under the joint and several regime, the Complaints Service considered it reasonable for the appropriateness assessment carried out before the contract was signed to take into account the knowledge and experience of the ordering party with the greater knowledge (R/665/2018).

---

25 Section 2.8 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

26 Question 15 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

➢ Evidence (and submission) of the appropriateness assessment

In all cases, the entity must be able to provide evidence of the appropriateness assessment performed. For this purpose, entities must keep a record of the appropriateness assessment containing the information or documentation that was considered to determine whether a specific product or service was appropriate for the client or potential client based on his or her knowledge and experience, as well as the warnings issued if it was not considered appropriate or if the client failed to provide information or the information provided was insufficient.[27]

This documentation must be kept for five years from the date of the assessment. However, as described in the section "Subsequent information", entities must not destroy the supporting documents for any transactions subject to disagreement by the client before the end of the minimum retention period (or, if the disagreement was raised after the end of the minimum retention period, the documentation that has not yet been destroyed), until the disagreement has been resolved.

The entity must provide the client a copy of the document containing the assessment performed.[28] The entity must demonstrate compliance with this obligation, for which purpose it may obtain a copy of the document delivered, signed by the client, which must show the date on which delivery was made.[29]

If the assessment refers to a specific transaction, the appropriate procedures must be established so that the assessment refers unequivocally to the transaction in question.

Further, the appropriateness test or questionnaire must be duly completed, with no defects of form; it must be signed by the holder, the co-holder with the greatest knowledge or by the person giving the order or authorised party, depending on the arrangement of the account; the date on which it was completed must be recorded; and it must be valid at the time of the transaction. The lack of any of these elements could invalidate the assessment performed.

The entity must assess the client's prior experience of products of the same family as those to be acquired, and if said experience is not sufficient to deem the transaction appropriate, the entity must also assess the financial knowledge, training and professional experience of the client.

On the other hand, in accordance with current regulations,[30] entities have the right to trust the information provided by their clients except when they know, or should

---

27 CNMV Resolution of 7 October 2009, on the minimum records to be kept by investment firms.

28 Article 214 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

29 Rule Four, Section 1, of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

30 Article 74.3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force until 17 April 2019. Article 55.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

know, either that it is clearly out of date or it is inaccurate or incomplete. For this purpose, entities must take measures aimed at ensuring the reliability of the information obtained from clients in order to assess the appropriateness or suitability of their investors, as set down by the CNMV in its statement of 5 February 2019.

In order to provide evidence that the appropriateness assessment was performed and delivered to the client, entities generally provide:

– Documentation signed by the client that includes the questionnaire (questions asked by the entity and answers given by the client) and the result of the assessment performed (appropriateness or non-appropriateness of the product, together with any warnings or handwritten declarations required).[31]

– In some cases, supporting documentation of previous investment experience, together with a signed document informing the client of the appropriateness of the product.[32]

All this without prejudice to whether the Complaints Service has considered that the content of the questionnaire, the assessment made by the entity or the evidence of previous investment experience to be appropriate or non-appropriate, an issue that is analysed in the sections "Complex financial instruments" and "Non-complex financial instruments" of this section.

However, incorrect actions were identified in complaint proceedings relating to the evidence provided by the entity of having obtained and assessed the client's information or of having informed the complainant of the result of the assessment. For example:

– The entity did not provide evidence that it had obtained and assessed any information about the knowledge and investment experience of a complainant who acquired a complex product (R/559/2018).

– Although the entity proved that it had informed the complainant of the investor profile assigned through a document bearing his signature, it did not provide the information (test or supporting documentation of previous investment experience) that it should have used to assess whether the product was appropriate or not (R/147/2019).

– Even though the entity submitted an appropriateness test signed by the complainant that contained information about his investment experience, training and financial knowledge, it failed to demonstrate that it had provided him with a document that included the assessment of this information. Therefore,

---

31 R/479/2018, R/533/2018, R/537/2018, R/572/2018, R/576/2018, R/602/2018, R/621/2018, R/625/2018, R/629/2018, R/633/2018, R/665/2018, R/676/2018, R/8/2019, R/55/2019, R/57/2019, R/98/2019, R/110/2019, R/119/2019, R/122/2019, R/123/2019, R/139/2019, R/143/2019, R/144/2019, R/146/2019, R/153/2019, R/157/2019, R/162/2019, R/170/2019, R/172/2019, R/174/2019, R/180/2019, R/183/2019, R/188/2019, R/193/2019, R/203/2019, R/206/2019, R/207/2019, R/211/2019, R/220/2019, R/241/2019, R/261/2019, R/282/2019, R/289/2019, R/291/2019, R/295/2019, R/297/2019, R/303/2019, R/312/2019, R/316/2019, R/346/2019, R/378/2019, R/380/2019, R/391/2019, R/394/2019, R/404/2019, R/417/2019, R/425/2019, R/459/2019, R/487/2019, R/508/2019, R/554/2019 and R/569/2019.

32 R/554/2018, R/586/2018, R/42/2019 and R/75/2019.

the test did not reflect the result of the assessment or include any warnings that the entity is required to issue when the product is not suitable for the investor (R/480/2019).

➢ Method for obtaining information from clients when the service is provided electronically or by telephone

The same information about clients should be obtained regardless of the channel or means used to provide the investment service in question. Therefore, when the investment services are provided electronically or by telephone, effective procedures and measures must be put in place to prevent manipulation of the information.

As mentioned above, the client must be given certain warnings and make precisely defined written statements in the case of certain transactions involving complex products.

If the services are provided by telephone, the entity must keep a recording with the client's answers, as well as the corresponding statement (in this case oral rather than written) in the terms provided by law. The recording must be made available to the client if requested.

If the services are provided by data transmission, the entity must establish appropriate mechanisms to ensure that the client has properly completed the test. Where necessary, entities must ensure that the client can type the corresponding written statement, all prior to the execution of the order. The entity must be able to demonstrate that it is not possible to continue with the contracting process if these prior obligations have not been fulfilled.

In the complaints resolved in 2019 related to products contracted by data transmission, entities were able to prove that they had complied with their obligations in the area of appropriateness by providing the digitally signed documentation relating to the test, its result or the corresponding warnings (R/487/2018 and R/403/2019). For one non-complex financial instruments contract arranged by telephone, the entity proved that it had acted correctly by submitted a recording of the telephone conversation in which it informed the client that it had no obligation to make an appropriateness assessment and issued the corresponding warnings (R/273/2019).

➢ Request from a retail client to be treated as a professional client

Clients are classified according to the need to establish different protection mechanisms based on the client type, as not all of them are the same or need the same level of protection. For this purpose:

– Professional clients are considered to be those who can be presumed to have the experience, knowledge and qualifications required in order to reach their own investment decisions and properly assess their risks.[33]

33 Article 205.1 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

– Retail clients are considered to be those who are not professionals.[34]

Retail clients receive the highest level of protection and are served by the CNMV Complaints Service.

There are certain cases in which retail clients may wish to be classified as professional clients by the entity. This gives them access to products that are not available to retail clients, but they need to be aware that their level of protection will be lower than that which they enjoyed as retail clients.

If a retail client wishes to be treated as a professional, this must be done before the investment service is provided, and expressly waiving the right to be treated as a retail client.[35]

For this purpose, a series of formalities are established:[36]

– The client must send the entity a written request for classification as a professional client, either in general, or for a specific transaction or service, or for a specific transaction or product type.

– The entity must inform the client clearly in writing of the protections and potential rights of which he or she would be deprived if eventually classified as a professional client.

– The client must declare in writing, in a document other than the contract, that he or she is aware of the consequences deriving from waiving classification as a retail client.

Further, acceptance of the application and waiver is not automatic, but conditional upon the firm providing the investment service conducting an appropriateness assessment of the client's experience and knowledge of the transactions and services requested and making sure that the client is able to take his or her own investment decisions and understands the risks involved. In carrying out the aforementioned assessment, the firm must check that at least two of the following requirements are met:[37]

– That the client has carried out transactions of significant volume in the market corresponding to the financial instrument in question or to similar financial instruments, with an average frequency of ten per quarter over the previous four quarters.

---

34 Article 204 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

35 Article 206.1 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

36 Article 60.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force from 17 April 2019, although it was previously established in Article 61.3 of this same regulation.

37 Article 59 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force from 17 April 2019. The requirements were established in Article 206.2 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October, until an amendment to this article came into force replacing them with the possibility of their regulatory development.

– That the size of the client's financial instrument portfolio, including cash deposits and financial instruments, is over €500,000.

– That the client occupies or has occupied for at least one year, a professional position in the financial sector that requires knowledge about the transactions or services provided.

Entities must maintain a client register that includes: i) the identification details of each client; ii) the client classification and, where applicable, review or reclassification, which may include any prior classification that may be of interest for the entity; iii) the documentation on which the classification, review or reclassification of the client is based; and iv) client requests to be classified than they were originally classified and other necessary information.[38]

One complainant expressed disagreement with the entity's refusal to change his category from retail client to professional client, even though he claimed to meet the requirements relating to transactions performed and professional position. However, the transactions performed by the client with the entity in the previous year did not comply with regulatory requirements, since they were generally for amounts that were too small to be considered transactions with significant volume, and the client did not provide any other evidence of transactions of this type made through another entity. Further, the client was not able to provide proof of previous experience in a professional position that required knowledge of the transactions or services provided. Consequently, the Complaints Service considered that the entity had acted correctly by rejecting its client's request to be classified as a professional client (R/594/2018).

In one case, the Complaints Service considered it incorrect that a product aimed at professional investors had been marketed to an investor who was not registered as having been classified as such. In regard to the investor's wish not be treated as a retail client there was no evidence:

– That the required formalities had been met, as no written statements were provided showing the investor's request, there were no warnings issued by the entity and no declaration from the client that he was aware of the consequences of waiving his status as a retail client.

– Or that the entity had carried out the appropriate checks, since supporting documentation was not provided to demonstrate that at least two of the three requirements regarding the volume and frequency of transactions, the size of the financial investment portfolio and the professional position of the client had been met (R/567/2018).

In another case, the entity demonstrated that during an application process to be classified as a professional client made through an electronic platform – with at least six mandatory confirmation steps – the client had been informed about the consequences of becoming a professional client, the loss of certain protections corresponding to retail clients and the need to comply with at least two of the three necessary requirements in accordance with the regulations. The entity also provided a copy of the e-mail sent to the complainant confirming his new status and the record

38 CNMV Resolution of 7 October 2009, on the minimum records to be kept by investment firms.

of the ranges of income and savings declared by the client on four different dates, three of which were prior to the application. However, the Complaints Service did not consider that the entity had demonstrated compliance with the regulatory requirements, given that:

– Although the entity stated that the client had carried out significant transactions in the four quarters prior to the application, it did not provide evidence of this.

– Even though the client had declared both before and during the application process, income and savings of more than €500,000, these figures were only a self-assessment, and it was considered that the entity should have *verified* (in accordance with regulations in force on that date) that the requirements had been met (R/47/2019).

➢ Complex financial instruments

The features of some financial instruments mean that they are classified as complex. Due to this complexity, entities must obtain information on the knowledge and experience of their clients wishing to contract these products, assess this information and inform their clients of the result of the assessment. There is no possibility of exemption from compliance with these obligations, in clear contrast with what has already been indicated for non-complex financial instruments.

In addition, entities must issue specific warnings and collect certain handwritten statements from clients, as explained in previous sections.

✓ *Convertible/exchangeable medium- or long-term bonds*

In relation to the appropriateness of convertible bonds, the respondent entities provided evidence, through the corresponding signed documentation, that they had both assessed the knowledge and experience of the client and informed the client of the result of this assessment, either informing the client of the appropriateness of the product (R/391/2019) or issuing a warning of its inappropriateness (R/479/2018). The Complaints Service considered that the entities had acted correctly in these cases.

However, the Complaints Service considered the entity had acted incorrectly in an exchange of preferred shares for convertible bonds and another of exchangeable bonds for convertible bonds. In the first case, the entity informed the client that the product was not appropriate when the answers to the test and the client's investment experience indicated that it could be considered appropriate. In the subsequent exchange, the entity did not show that it had informed the complainant of the assessment made, nor that it had delivered a copy of the document providing evidence of the assessment, its result and the delivery date (R/559/2018).

✓ *Debt that can be redeemed in advance by the issuer*

The entities provided evidence of having fulfilled their obligations with regard to the appropriateness of debt instruments redeemable by the issuer before their

maturity date. In this regard, one entity provided the appropriateness test signed by the client, in which it had collected information on his knowledge and experience and informed him that the redeemable bonds were appropriate for him (R/282/2019).

✓ *Structured instruments in which the return repayment of capital invested are linked to the performance of an index or of one or more shares*

The Complaints Service concluded that entities had assessed and determined the appropriateness of a financial contract correctly in view of the documentation they provided in the complaint proceedings in the following cases:

– The entity provided a test that referred to the category of non-collateralised structured products. In the test, the client answered that he had carried out at least two transactions on products of this nature in the last three years and this investment experience was sufficient for the products to be considered appropriate (R/665/2018, R/123/2019 and R/144/2019).

– The entity based its decision on the information contained in its records on the client's professional and investment experience and this information was sufficient to determine that the product was appropriate to his knowledge and experience in the investment field (R/75/2019).

– The entity provided a signed appropriateness test, the result of which was that products of a certain complexity were not suitable for the investor. In addition, in the subscription order, the complainant signed both the non-appropriateness warning and the required handwritten statement (R/417/2019).

However, in other complaints resolved in 2019, the Complaints Service concluded that the respondent entities had acted incorrectly when contracting bonds and structured notes and financial contracts for the following reasons:

– The entity provided questionnaires the result of which indicated that the product was appropriate, although considering the client's responses it was not reasonable to assume a high level of financial knowledge and it did not appear that the client had sufficient investment experience to acquire a structured note, as was the case (R/537/2018).

– The entity provided a test on non-collateralised structured products, the result of which was that the product was appropriate. However, the test did not have sufficient information on the client's investment knowledge and experience to establish the appropriateness of signing a financial contract. Only two questions were answered: that the client had not held any professional position in the financial sector that allowed him to understand the risks of the instrument and that he had a graduate/postgraduate financial and economic academic qualification (R/621/2018).

– The entity provided a document that included the appropriateness assessment, on the last page of which it stated that a financial contract was not appropriate for the client. Although this page contained the client's signature, the Complaints Service considered it to be incorrect that the required handwritten declaration stating "This product is complex and is considered inappropriate for me" was missing (R/300/2019).

✓ *EU non-harmonised CIS*

When the collective investment schemes (CIS) to be marketed do not comply with Directive 2009/65/EC,[39] they are classified as non-harmonised CIS.

The adaptation of Spanish regulations to MiFID II establishes that non-harmonised CIS are complex products, as indicated by the European Securities and Markets Authority (ESMA) and the CNMV.[40]

However, before this adaptation, in order to determine whether a non-harmonised CIS was a complex product or not, a series of parameters had to be assessed, whereby: i) they were considered non-complex if certain liquidity requirements, limits on losses and public information were met and the entity could the exemption from the appropriateness assessment, provided that conditions had been met, or ii) otherwise, they were considered complex and the appropriateness assessment was obligatory, with no exemption for the entity.

In several complaints in which the investment product was a non-harmonised CIS, the entities requested the unitholder to complete an appropriateness assessment, which resulted in the product being considered appropriate. The client was informed of this result as evidenced in the signed documentation provided (R/55/2019, R/261/2019 and R/378/2019).

In case R/554/2019, the complainant subscribed to a non-harmonised CIS which, given its features and the regulations applicable at that time, was considered to be non-complex. The entity acted correctly as it provided the test carried out, the result of which was that the product was not appropriate and the subscription order in which it recorded the corresponding warning about the inappropriateness of the transaction.

However, another entity was considered to have acted incorrectly when even after providing several tests with a result that indicated that the product was appropriate, the responses given by the client were not sufficient to be able to conclude that the non-harmonised CIS was appropriate (R/537/2018). Another incorrect action occurred when the entity submitted a document signed by the complainants in which each of them was assigned a conservative profile but it was not able to demonstrate having collected information on their knowledge and experience in order to assess whether the non-harmonised investment fund was appropriate or not (R/147/2019).

➢ Non-complex financial instruments

As indicated above, entities do not have to follow the appropriateness assessment procedure when the order refers to non-complex products, as long as the service is provided at the initiative of the client and the entity has clearly informed the client that it is not required to assess the appropriateness of the instrument offered or the service provided and that the client therefore does not enjoy the protection established in current legislation on appropriateness.

---

39 Directive 2009/65/EC of the European Parliament and of the Council, of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

40 Question 17.1 of the CNMV document *Q&A on the application of the MiFID II Directive.*

Consequently, for the entity to claim exemption from the appropriateness analysis, it must show that it has met each and every one of the requirements set out in the legislation.[41]

✓ *Common shares of companies admitted to trading and preemptive rights for this type of shares automatically assigned in a capital increase*

Shares admitted to trading on a regulated market, on an equivalent market in a third country or, following the adaptation of Spanish regulations to MiFID II, on a multilateral trading facility (MTF) are considered non-complex products when they are shares in companies, excluding shares in non-harmonised CIS and shares with embedded derivatives.

The shares may have been acquired in a public offering for subscription or in a purchase transaction performed on the stock market.

Preemptive rights may be automatically allocated to shareholders in a capital increase, for example. In this case, the rights do not constitute financial instruments in themselves and must be considered as a component of the share when the instrument that can be subscribed by exercising the right is the same as that giving rise to the subscription right. This interpretation extends to the acquisition of subscription rights on the secondary market as strictly required for rounding up the number of rights already held and, by exercising these rights, acquire one more share in addition to those corresponding to the shareholder in his capacity as such.

With regard to these non-complex financial instruments, the respondent entities acted correctly in the following cases:

– The entities obtained information on the client's knowledge and experience through a test, as a result of which the contracting of the shares was deemed appropriate, and the client was duly notified (R/425/2019).

– The entities applied the exemption from the appropriateness assessment and demonstrated compliance with the requirements established to adhere to this option. In the case of a buy order for shares made by telephone, one entity provided the recording of the telephone conversation held with the client, in which the corresponding warnings were given (R/273/2019).

– The complainants were holders of some shares and as a result of a capital increase, they were assigned preemptive rights. The complainants issued instructions to the entity to subscribe a certain number of shares and, in some cases, to sell the remaining rights on the market and in others to round them up by acquiring those necessary to subscribe one more share. The entities provided the corresponding tests signed by the complainants, the results of which indicated that the product was appropriate based on their previous investment experience, as they had held more than one position in their portfolio or had made more than one investment for an amount of more than €3,000 in shares in the last two years. The notification of the test results was

41 Article 216 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

seen to have been signed by the complainants (R/170/2019, R/289/2019, R/291/2019 and R/295/2019).

– The entity considered it appropriate for the client to buy shares on a regulated market based on his experience (the client acknowledged having bought shares on several occasions in the previous year) and professional position (the client was CEO of a closed-ended investment scheme management company) (R/553/2018).

In contrast, bad practice was detected in the acquisition of shares and preemptive rights for non-complex products when:

– The entity provided an appropriateness test that was considered invalid by the Complaints Service as it had been carried out for the purchase of subordinated bonds, a product of a different nature to shares, and a long time before the shares were subscribed (six years previously) (R/479/2018).

– The entity decided that it was appropriate for the client to purchase the shares based on tests that did not contain sufficient concrete data to conclude that they were suitable for his investment profile (R/537/2018).

✓ *EU harmonised CIS*

EU harmonised CIS are legally classified as non-complex products. The adaptation of Spanish legislation to MiFID II also establishes as an additional requirement that harmonised CIS may not be structured CIS in order to be considered non-complex.[42]

In general, entities acted correctly and provided the duly signed appropriateness test, the result of which was communicated to the client. These results indicated that the contracting of harmonised CIS was considered appropriate in most of the complaints.[43]However, in some complaints[44] this product was not considered by the entity to be appropriate for its client, and in these cases, they provided, in addition to the test, the corresponding warning signed by the client.

The Complaints Service considered that the entity had acted correctly in the following cases:

– The entities had obtained information on the knowledge and experience of the clients, prior to contracting the harmonised fund, through an appropriateness assessment that was duly signed, warning them that more complex financial products were not a suitable investment option in their case. The contracted fund was non-complex, therefore, the Complaints Service considered that the transaction was suitable given the result of the assessment

42 Article 217.1.d) of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

43 R/533/2018, R/572/2018, R/625/2018, R/629/2018, R/8/2019, R/55/2019, R/57/2019, R/110/2019, R/119/2019, R/143/2019, R/172/2019, R/188/2019, R/193/2019, R/203/2019, R/206/2019, R/312/2019, R/316/2019, R/380/2019, R/404/2019, R/459/2019 and R/508/2019.

44 R/576/2018, R/676/2018, R/12/2019, R/162/2019, R/183/2019, R/211/2019 and R/394/2019.

indicated by the entity (R/602/2018, R/98/2019, R/122/2019, R/174/2019, R/207/2019, R/220/2019, R/241/2019, R/303/2019 and R/569/2019).

– The entities provided the duly signed appropriateness assessment in which it was stated that: i) the client had carried out two or more transactions in fixed income funds in the past three years (less than 30% in equity assets) and the contracting of a global mixed fixed income fund was appropriate (R/633/2018), and ii) the client had held more than one portfolio position in fixed income investment funds, open-ended collective investment companies or ETFs in the past two years, or had made more than one investment for an amount of more than €3,000 in these products, making it appropriate for him to subscribe to a euro fixed income fund (R/157/2019).

– Following a test taken by the client, the entity considered a harmonised fund to be an appropriate option. In view of the answers given in the appropriateness test, while it could not be concluded that the client had previous investment experience, taking into account his financial knowledge, familiarity with the product and the fund's low level of risk, the Complaints Service determined that the entity had collected sufficient information on the client's investor profile and that the level of risk assumed on acquiring the fund was consistent with the result of the assessment made (R/139/2019, R/180/2019 and R/346/2019).

– The entity provided proof of the client's previous investment experience by submitting a record of past investment funds to which he had subscribed. It also submitted an appropriateness test signed by the client, informing him of the appropriateness of the harmonised fund (R/554/2018 and R/42/2019).

In several other complaints, entities applied the exemption from the appropriateness assessment and suitably demonstrated compliance with the requirements established to adhere to this option, as follows:

– In some cases, entities provided a document signed by the client, attached to the purchase order, in which the client stated: i) that he or she had requested the transaction; ii) that the service to be provided by the entity was limited to the execution of orders on behalf of the client or the receipt and transmission of client orders; and iii) that the entity, prior to signing of the order, had informed the client that it was not obliged to assess his or her knowledge and experience or whether or not the product was appropriate. In the same document the entity also issued a warning stating that the client would not enjoy the protection established under the stock market regulations for products/services subject to appropriateness assessment (R/27/2019 and R/483/2019).

– In other cases, compliance with the regulatory requirements for the application of exemption from appropriateness testing was demonstrated in an annex to the remote purchase order which was signed electronically (R/487/2018 and R/650/2018).

In one case, given that it was not possible to carry out an appropriateness assessment because the client did not provide sufficient information, the entity issued a warning stating that due to the lack of information it was unable to determine whether the investment fund in question was appropriate and asked him to sign a warning with the literal expression required by law. The Complaints Service considered that the entity had acted correctly (R/641/2018).

In contrast, entities acted incorrectly in the following cases:

– One entity informed its client that the harmonised investment fund was appropriate based on an analysis of the records of transactions in deposits and securities carried out by the client, which the entity provided as part of the dossier. However, the Complaints Service considered that the experience demonstrated was insufficient to warrant the result obtained, since deposits and securities do not have the same features, nature or risks as investment funds (R/586/2018).

– One entity provided only an appropriateness test signed by the complainant, in which he acknowledged that he had no investment experience in financial instruments and stated that he had completed compulsory education and understood basic concepts such as stocks, investment funds, interest rates, coupons, etc. However, the test did not reflect the result of the assessment and did not include the corresponding warnings. The entity also failed to prove that it had provided the complainant with a document containing the assessment made (R/480/2019).

– One entity submitted an appropriateness assessment signed by the complainant, the result of which indicated that the product was appropriate. However, some contradictions were identified in the answers given by the client, which the entity had not taken into account when assessing the appropriateness of the product in question. On one hand, the client stated that he had investment experience in guaranteed, monetary, fixed income and equity funds, while on the other he claimed to be unfamiliar with these same guaranteed, monetary, fixed income and equity funds, and familiar only with bank accounts, deposits, public debt and pension plans (R/487/2019).

✓ *Bonds admitted to trading that do not incorporate an embedded derivative*

By law, securities bonds and other forms of securitised debt are considered non-complex, unless they incorporate an embedded derivative. Following the adaptation of Spanish legislation to the MiFID II Directive, they are required to be admitted to trading on a regulated market, on an equivalent market of a third country or on a multilateral trading facility (MTF), and in addition to bonds that incorporate embedded derivatives, those that incorporate a structure that makes it difficult for clients to understand the risks incurred are also excluded from the category of non-complex products.[45]

In a complaint referring to simple bonds, the entity the exemption from the appropriateness assessment, but did not issue the corresponding warning clearly or in full. Therefore, in the pre-contract information document signed by both holders on the date the product was acquired, the entity stated that the transaction had been carried out at the request of the clients, on their own initiative, and informed them that the entity did not have the obligation to collect information about their financial knowledge and experience or assess the appropriateness or suitability of the transaction. However, it also failed to warn them that for this reason they did not enjoy the protection established in the rules of conduct of securities market law (R/102/2019).

45 Article 217.1.c) of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

A.2 Investment advice and client portfolio management

➢ Concept of investment advice and client portfolio management

Investment advice is a service that consists of making personalised recommendations to a client – whether at the request of the client or at the initiative of the investment firm – with regard to one or more transactions relating to financial instruments.

The recommendation must be presented as suitable for the client, based on the client's personal circumstances, and may consist of:

– Buying, selling, subscribing, exchanging, maintaining, insuring or redeeming a specific financial instrument.

– Exercising or not exercising any right conferred by a given financial instrument to buy, sell, subscribe, exchange or redeem a financial instrument.[46]

The assessment may be one-off when the commercial relationship with the client does not include advice services. However, on occasion, the entity may make an investment recommendation to the client (usually in the generic commercial segment), or recurrent recommendations when the client has an ongoing relationship with the advisor, who usually puts forward investment recommendations (usually in the private banking segment).

For this purpose, recommendations of a generic and non-personalised nature put forward as part of the marketing of financial instruments do not constitute advice. Similarly, recommendations that are disclosed exclusively to the public are not considered personalised recommendations.[47]

Consequently, for each case and each complaint it is important to determine whether or not advice was given, since depending on the conclusion reached, different obligations in the area of investor protection will be triggered.

In the case of discretionary and individualised portfolio management an investment advice service is deemed to exist when an entity receives a mandate from the client to implement the investment decisions it considers most appropriate to the client.

➢ Handwritten declaration reflecting the non-provision of an advice service when contracting complex products

When the entity provides a service relating to a complex instrument other than investment advice or portfolio management for retail clients, or for professional cli-

46 Article 5.1. g) of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 9 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

47 Article 140 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

ents who have obtained this category by waiving their right to be treated as retail clients (see section "Request from a retail client to be treated as a professional client") and the entity wishes to include in the documentation to be signed by the investor a statement saying that it has not provided any investment advice, it must obtain, in addition to the client's signature, a handwritten declaration stating:[48] "I have not been advised on this transaction".

The non-provision of advice services on contracting complex products was properly reflected in complaints resolved in 2019. Entities obtained the handwritten declaration required by law, complying with the provisions established in the standard and signed by the client (R/604/2018, R/621/2018 and R/75/2019).

In relation to non-complex products, some entities included in the contract order or in an annex thereto the following statements about the non-provision of an investment advice service:

– The entity informed the client that it had not provided investment advice during the contracting process. In some cases, the entity added that it therefore had not issued any personalised recommendations based on the client's overall financial situation or presented any product as being appropriate to the client's profile.

– The entity issued a warning stating that the information provided to the holders about the general features and inherent risks of the product should in no case be understood as a personalised recommendation.

– The entity stated that it was a transaction undertaken by the client without any advice, which the entity had arranged at his request and for which he was responsible, having carried out his own research and made the investment decision, and that the entity had given no advice about the transaction, although it had informed the client sufficiently in advance of the features and risks of the product.

With regard to non-complex products for which a handwritten declaration was not required, in the absence of other documents that could contradict this statement, the Complaints Service considered that investment advice had not been provided in the transactions forming the subject of the complaints (R/533/2018, R/554/2018, R/586/2018, R/42/2019, R/146/2019, R/174/2019, R/193/2019, R/211/2019, R/297/2019, R/308/2019, R/312/2019, R/316/2019, R/380/2019, R/404/2019 and R/459/2019).

In contrast to these complaints, other entities were deemed to have acted incorrectly for the following reasons:

– Having indicated the non-provision of advice in contracts for complex products without obtaining a handwritten declaration from the client.

  In some financial contracts, clauses to clarify that there was no personalised advice relationship were included, but the entity did not obtain, along with the

48 Rule Four, Section 5, of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

client's signature, a handwritten declaration that the client had not received advice on the transaction (R/665/2018 and R/300/2019).

Another financial contract included the following statement: "The client must write in his or her own handwriting the following declaration in the box below: 'I have not been advised on this transaction'". However, no handwritten declaration appeared in the box (R/144/2019).

– The non-provision of advice was indicated in the orders to contract non-complex products when the entity had actually provided advice.

The entity made personalised recommendations for transfers to harmonised investment funds, and these recommendations met the requirements to be considered a one-off advice service. However, in the transfer orders signed by the client, the entity issued a warning stating that the offers did not constitute advice (R/43/2019).

The entity provided documents signed by the clients in which the entity stated that it had provided an advice service, recommending that they participate in a capital increase and stating that the recommendation was in line with their profiles and investment goals, and with their knowledge, experience and financial situation as reflected in the suitability test. However, in the signed order for participation in the capital increase, a warning was issued stating that the transaction had been performed at the client's own initiative, not on that of entity (R/86/2019, R/217/2019, R/348/2019 and R/494/2019).

➢ Difficulties in providing evidence of an advice service

Entities that provide investment advice are required to enter into agreements with professional and retail clients only when a periodic assessment of the suitability of the financial instruments or recommended services is carried out. In these cases, a basic written agreement must be drawn up, on paper or any other durable medium, establishing the main rights and obligations of the firm and the client.[49]

This requirement, introduced following the implementation of MiFID II, differs from previous Spanish legislation, which only required contracts entered into with retail clients to be recorded in writing and if investment advice was provided, the written or reliable proof of the personalised recommendation was sufficient.

The provision of an advice service was demonstrated in some complaints resolved in 2019 through the formalisation of an investment advice contract, which was attached to the proceedings (R/9/2019, R/44/2019, R/86/2019, R/87/2019, R/164/2019, R/249/2019, R/348/2019, R/358/2019 and R/475/2019). In some cases, the entity providing this services stated that an advice services contract had been arranged with the client, although failing to provide a signed copy of this contract was considered incorrect behaviour (R/215/2019 and R/217/2019).

49 Article 58 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

Entities that provide investment advice must, before the transaction is made, provide the client with a statement on suitability in a durable medium specifying the advice given and how that advice meets the preferences, objectives and other characteristics of the retail client.[50] Prior to this statement or report on suitability introduced by MiFID II, a description of how the recommendation was suited to the client's characteristics and goals was required, as set down in the securities market regulations (see section "Recommendations in the area of advice").

In the following cases, the provision of advice services was demonstrated through proposals in which the entity took into account the client's characteristics and objectives:

- The entity drew up a business proposal for the investment or transfer of a specified amount in an investment fund. The entity stated that it considered this proposal to be suitable for the client based on the information provided in the suitability test in terms of their financial situation, knowledge and experience and investment goals (R/38/2019, R/175/2019 and R/198/2019).

- The entity provided several product offers that were presented as appropriate for the customer's knowledge and experience, specific investment needs and objectives. The offers took account of the client's personal circumstances (one condition that demonstrates the provision of advice) and proposed transfers to one of the investment funds of the entity's group, which they identified by name, taking into account the minimum investment required, the level of risk and the recommended time horizon (R/43/2019).

- The entity provided an addendum to a financial contract stating that in its opinion the product was suitable for the holders as it matched their investment objectives and financial situation, and they had the knowledge and experience necessary to understand its nature and risks (R/60/2019).

- The entity provided the suitability test signed by the client, in which, based on the profile obtained, the entity recommended six investment funds including the fund to which the client finally subscribed. Furthermore, the subscription order stated that the fund had been recommended to the client (R/192/2019).

- The entity drew up an investment proposal addressed to the complainant recommending the acquisition of a certain amount of an investment fund. The proposal indicated that the risk level of the fund was consistent with the client's risk profile, calculated by the entity based on his stated investment objectives (R/583/2018).

In other cases, to establish that the entity had given the client investment advice, the CNMV Complaints Service looked at whether certain conditions were met simultaneously, which, when consistent with the facts and explanations received, make it possible to reach such a conclusion. Therefore, when addressing the complaints, the following situations arose that had to be assessed to conclude whether or not an advice service had been provided:

50 Article 213.5 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

– In the annex to a subscription form for an investment fund or a financial contract, it was stated that the order had been processed within the framework of the investment advice service provided (R/641/2018, R/677/2018, R/198/2019, R/319/2019 and R/347/2019). In addition to this mention in the order, the entity provided an "advice service by product" document, in which it was stated that the entity had recommended that clients invest in a specific investment fund (R/400/2019).

– The entity offered the client the possibility of investing in a financial contract in order to recoup the loss he had incurred in a previous financial contract. The Complaints Service considered that this contract had been carried out within the framework of one-off legal advice on investment matters, since the offer clearly indicated that the entity had made a personalised investment proposal to the client aimed at offsetting a loss on a previous investment (R/31/2019).

➢ Irregularities in completion of the suitability test

As indicated in the section "Irregularities in completion of the appropriateness test", in terms of marketing, investors who are provided with advice and carry out a suitability test sometimes allege that there are falsehoods in the content of the responses or that responses were completed with the aim of overvaluing the parameters for contracting the product forming the subject of the complaint.

The CNMV Complaints Service indicated to the complainants that, based on the information available in the complaint proceedings, it was not possible to establish the truthfulness or authenticity of the answers collected in this type of test due to the lack of sufficient elements with which to make a judgement on said facts, and that therefore these matters must be resolved through the courts (R/86/2019, R/87/2019 and R/347/2019).

Further, entities are entitled to trust the information provided by their clients except when they know, or should know, either that it is clearly out of date or that it is inaccurate or incomplete.[51] The MiFID II Directive adds that investment firms must take reasonable steps to ensure that the information collected on their clients or potential clients is reliable. Among other actions, they must adopt the appropriate measures to ensure the consistency of client information, for example, by assessing whether there are any obvious inaccuracies in the information provided.[52]

On 21 December 2018, the CNMV published a statement adopting the ESMA guidelines regarding the suitability requirements of MiFID II. General guideline 4 includes the following: "Firms should take reasonable steps and have appropriate tools to ensure that the information collected about their clients is reliable and

51 Article 74.3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force until 17 April 2019. Article 55.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

52 Article 54.7 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

consistent, without unduly relying on clients' self-assessment". This guideline is developed through other supporting guidelines, such as that establishing that: "In order to ensure the consistency of client information, firms should view the information collected as a whole. Firms should be alert to any relevant contradictions between different pieces of information collected, and contact the client in order to resolve any material potential inconsistencies or inaccuracies".

Subsequently, on 5 February 2019, the CNMV issued a statement on the obligation of entities to take measures to ensure the reliability of the information obtained from clients in order to assess the appropriateness and suitability of their investors. This refers to certain situations that seem atypical and establishes the obligation to have procedures to detect these during the contracting process and through periodic reviews of the information, as well as correction procedures. In regard to incident correction procedures, it states that: "If inconsistencies, discrepancies or a large volume of atypical situations (situations that may arise for a variety of reasons, for instance, that the client information has not been collected correctly) are detected, the proper steps must be taken to compare and validate the data using means other than simply checking that the information agrees with that shown in the completed questionnaires".

In case R/386/2019, the complainant considered that the responses given in two questionnaires performed with a time difference of two years were inconsistent. However, all the answers were the same or could be considered similar, except for one relating to previous investment experience (no product was marked in the first test and one was marked in the test carried out two years later). The Complaints Service ruled that the responses submitted in the two tests could be classified as consistent.

In contrast, in case R/41/2019, the Complaints Service considered it incorrect that when certain inconsistencies arose in relation to a suitability test, the entity did not check that the information obtained in the test was consistent with other information it held on the client.

The 91-year-old client stated that she had not carried out any transactions in investment funds, open-ended collective investment companies, structured funds, derivatives traded on organised markets, warrants, OTC derivatives or alternative investments of over €3,000 in the last three years and that she had not completed compulsory education or worked in any position that required knowledge of financial markets and instruments.

However, the client stated in the same questionnaire that she had a very good knowledge of the different markets, financial instruments, terminology and risks inherent to the products, including alternative management funds, hedge funds and complex structures. She also affirmed that she understood certain features of CAPs and exchange insurance.

The Complaints Service resolved that at first glance this might not be consistent with the client's age and abilities, as age is considered to be a relevant factor in the suitability assessment. Further, the stated investment experience and level of education were not consistent with subsequent statements, according to which she professed to have a high knowledge of complex products.

Similar inconsistencies were detected in cases R/112/2019 and R/213/2019, where on one hand the clients said they had little investment experience and a limited

level of education while at the same time claiming to have advanced financial knowledge of markets, financial instruments, terminology and implicit product risks.

➢ Suitability assessment

Both the investment decisions adopted by the entity within the framework of a portfolio management contract and the recommendations offered within the scope of investment advice must be aligned with the investor's profile resulting from the suitability assessment carried out prior to the start of the provision of these services.

When providing investment or portfolio management advice services, the entity must obtain the necessary information on the knowledge and experience of the client or potential client in the investment field corresponding to the specific type of product or service and the client's financial situation and investment objectives, so that it can recommend the most suitable investment services and financial instruments. Following the adaptation to MiFID II, the law now specifies that the client's financial situation must include the capacity to tolerate losses and that the investment objectives include risk tolerance, in order to recommend the financial services and instruments that best fit the client's level of risk tolerance and capacity to withstand losses.[53]

In short, the recommendations that entities give to their clients within the area of advice or the investment decisions taken in the case of portfolio management must meet the following criteria:[54]

✓ *Investment objectives*

These are the client's investment objectives, including risk tolerance. Information on the desired time horizon of the investment, the client's risk preferences, risk profile and the purpose of the investment must be taken into consideration, where applicable.

✓ *Financial position*

This must be such as to allow the client, from a financial point of view, to assume any investment risk consistent with his investment objectives. The information to be obtained must include details of the client's income, assets (including liquid assets), investments and properties, in addition to their financial commitments.

53 Article 213 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

54 Article 72 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 54 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

✓ *Knowledge and experience*

The client must have the experience and knowledge necessary to understand the risks involved in the transactions or portfolio management (see section "Assessment of customer knowledge and experience" under "Marketing/simple execution").

Knowledge and investment experience may differ depending on whether the service provided is investment advice or portfolio management. In advice services, the final investment decision is always taken by the client and, therefore, the entity may only recommend transactions whose risks and nature the client can understand. However, in portfolio management, given that the manager monitors that the portfolio is in line with the client's investment objectives and financial position, it is sufficient for the client to be familiar with the instruments that make up his or her portfolio, in other words to have general financial knowledge. However, clients must understand the nature of the instruments that make up the bulk of their portfolio.[55]

To assess the above parameters, investment recommendations or decisions must generally be adapted to the level of risk that the investor has set in his or her investment objectives and entities may not exceed that level even where allowed by the investor's knowledge or experience, unless the investment in question forms part of a portfolio under advice or management and that portfolio as a whole meets the investment objectives set by the client. However, it is recommended that the client be informed of this.[56]

However, even if the client is willing to take on a very high level of risk, if this may compromise the client's financial position or if the entity believes that the client does not have sufficient knowledge or experience to understand the nature and features of the investment, strictly respecting the investment objectives set by the client would not make this a suitable investment. In these cases it may be appropriate to recommend or take investment decisions that the client is financially equipped to take on or that have a more simple nature and features.[57]

The European Securities and Markets Authority (ESMA) published guidelines on certain aspects of suitability requirements under the MiFID II Directive, which were adopted by the CNMV in a statement dated 21 December 2018. Among other issues, it establishes the scope of the information collected from customers (General Guideline 3) and the measures necessary to ensure the suitability of an investment (General Guideline 8), as well as various supporting guidelines.

In accordance with General Guideline 3: "The extent of 'necessary' information may vary and has to take into account the features of the investment advice or portfolio management services to be provided, the type and characteristics of the investment products to be considered and the characteristics of the clients".

---

55 Question 24 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

56 Questions 19 and 22 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

57 Question 19 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

In accordance with General Guideline 8:

> *In order to match clients with suitable investments, firms should establish policies and procedures to ensure that they consistently take into account:*
>
> – *all available information about the client necessary to assess whether an investment is suitable, including the client's current portfolio of investments (and asset allocation within that portfolio);*
>
> – *all material characteristics of the investments considered in the suitability assessment, including all relevant risks and any direct or indirect costs to the client.*

Therefore, the entity must obtain and assess information to determine the suitability of the product or service, so that:

i) When the entity does not obtain the necessary information, it cannot recommend investment services or financial instruments to the client or potential client or manage their portfolio.[58]

ii) If, after assessing the information obtained, the entity considers that the transaction is not suitable, it will not make recommendations or take investment decisions in the provision of investment advice services or portfolio management if none of the services or instruments are suitable for the client.[59]

iii) If the assessment of information obtained leads the entity to consider the transaction to be suitable, it may recommend the product or service, or make the corresponding investment decision.[60]

Some entities established the complainant's investor profile based on the sufficiency of the information provided in the suitability assessment, and used this investor profile as the basis for the recommendations made or conditions agreed in the portfolio management contract (R/522/2018, R/677/2018, R/9/2019, R/11/2019, R/44/2019, R/60/2019, R/77/2019, R/103/2019, R/126/2019, R/164/2019, R/175/2019, R/192/2019, R/266/2019, R/308/2019, R/331/2019, R/351/2019, R/356/2019, R/358/2019, R/386/2019, R/438/2019 and R/475/2019).

However, some entities acted incorrectly when recommending products to clients with an investor profile that was not in accordance with the investment proposal made (R/641/2018 and R/319/2019), having only collected information about their

---

58 Article 213 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October. Article 72 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 54.8 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

59 Article 54.10 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

60 Article 213 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

knowledge and experience but not about their financial situation and investment objectives (R/31/2019, R/43/2019 and R/400/2019), as the information provided in the questionnaire was insufficient to confirm the assigned investment profile (R/86/2019, R/87/2019, R/229/2019, R/249/2019, R/347/2019 and R/348/2019), the questionnaire justifying the profile attributed to the investor was not provided (R/583/2018, R/637/2018, R/641/2018, R/215/2019 and R/217/2019) or certain inconsistencies emerged in the test and no statement was provided that the entity had verified the accuracy of the information (R/41/2019, R/112/2019 and R/213/2019).

In the sections "Recommendations in the area of advice" and "Investment decisions in the area of discretionary portfolio management" for each of these services, the cases in which the entities acted correctly and incorrectly in their suitability assessments and other related issues are discussed.

➢ Evidence of the suitability assessment

Entities must maintain a suitability assessment record, which will place on record the information or documentation considered for the purposes of determining whether the specific product or service is suitable for the client or potential client on the basis of their investment knowledge and experience, financial position and objectives.[61]

In this regard, in the provision of advice services and portfolio management, the entity must in all cases be in a position to show that it performed the suitability test, which can be evidenced by conducting the assessment in writing and keeping a copy duly signed by the client stating the result of the assessment and the date it was submitted. It can also be performed through the record of notification to the client by electronic means or any other channel which can provide proof that the assessment was carried out.[62]

In the resolution of complaints related to the provision of evidence that the suitability of the product or service has been assessed, entities provided a duly signed copy of the suitability test, which contained the information collected by them in relation to the client's investment profile, the result of the assessment and delivery date (R/522/2018, R/677/2018, R/9/2019, R/11/2019, R/38/2019, R/44/2019, R/60/2019, R/77/2019, R/86/2019, R/87/2019, R/103/2019, R/164/2019, R/175/2019, R/192/2019, R/198/2019, R/266/2019, R/308/2019, R/319/2019, R/331/2019, R/347/2019, R/348/2019, R/351/2019, R/358/2019, R/386/2019, R/438/2019, R/475/2019 and R/494/2019).

All the foregoing is without prejudice to the Complaints Service's having considered the content of the questionnaire or its assessment by the entity as adequate or inadequate, as discussed in sections "Recommendations in the area of advice" and "Investment decisions in the area of discretionary portfolio management".

---

61 CNMV Resolution of 7 October 2009, on the minimum records to be kept by investment firms. Article 72 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

62 Rule Three of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

In contrast, it was considered incorrect in the provision of an investment advice or portfolio management service that:

– The entity informed the client of the investor profile assigned but did not submit the suitability test which according to its statements it had carried out, and which underpinned this result (R/583/2018, R/637/2018, R/641/2018, R/215/2019 and R/217/2019).

– The entity only provided an appropriateness test that assessed the client's knowledge and investment experience. Given that it had provided an investment advice service, it should have assessed the suitability of the investment also considering the clients' financial situation and investment objectives (R/31/2019, R/43/2019 and R/400/2019).

– The entity obtained some relevant data on the clients' investment profiles, but did not provide evidence that it had informed them of the assessments made (R/41/2019 and R/213/2019).

– The entity informed the client that a transaction was not suitable, but did not provide the suitability assessment or the information on the basis of which it rated the transaction as such (R/190/2019).

➢ Validity period of prior suitability assessments

With regard to the period of validity of prior suitability assessments, even where there are certain circumstances that are not likely to change over time, such as knowledge and experience, there are others, such as the financial position or investment objectives, that can vary. Therefore it is necessary to review suitability on a regular basis.

For one-off advice services, the suitability assessment is most likely to be limited to one specific transaction and it is not therefore generally reasonable to extrapolate the results obtained from one transaction to subsequent transactions.

As indicated above, in the provision of longer-term services, recurrent advice or portfolio management, as the investment objectives may vary, the entity must periodically review these objectives to check whether they have been modified.[63]

The regulations also address this issue from the perspective of contract regulation and the policies and procedures established by entities.

The provision of portfolio management services requires a standard contract.[64] This contract must contain its essential features and establish in a clear and concrete manner, that can be understood easily by retail investors, among other aspects, the procedure for updating information on the client's knowledge, financial position

63 Question 27 of the *Operational guide for the analysis of suitability and appropriateness*. IF and Credit & Savings Institutions Supervision Department. 17 June 2010.

64 Article 5.2 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

and investment objectives, to enable the entity to provide the best possible service, as appropriate.[65]

MiFID II establishes that investment firms that have a continuous relationship with their clients – for example, those that provide ongoing advice or portfolio management services – must have appropriate policies and procedures to keep proper and updated information on clients and must be able to demonstrate that they have such policies and procedures in place. ESMA guidelines regarding MiFID II suitability requirements, adopted by the CNMV through a statement dated 21 December 2018, specify, in General Guideline 5, that these procedures must define:

i) What part of the client information collected should be subject to updating and at which frequency.

ii) How the updating should be done and what action should be undertaken by the firm when additional or updated information is received or when the client fails to provide the information requested.

The supporting guidelines add, among other things, that the frequency of update might vary depending on, for example, clients' risk profiles and the type of financial instrument recommended or certain events, and that firms should inform the client when the additional information provided results in a change of their profile.

In case R/38/2019, the entity provided a specific advice service and formulated an investment proposal based on a suitability test carried out more than two years previously. While certain circumstances (financial situation or investment objectives) had changed since the date of the assessment, the proposal contained a warning for the client that any variation in the starting positions and the premises on which the proposal had been based could alter the suitability of the recommendations contained in the document, which would no longer be valid. The client expressed no opposition or wish to rectify this information. However, given the time elapsed until the one-off advice was provided, the Complaints Service considered that it would have been appropriate for the entity to update the content of the suitability test.

➢ Recommendations in the area of advice

As discussed in the section "Suitability assessment", entities that provide advice services to retail clients must obtain the necessary information on the knowledge and experience of these clients, their financial position and investment objectives. They must then assess this information to recommend the most suitable financial instruments. They must also provide evidence that they have carried out this test and keep a record of the suitability assessment with the related information as described in the section "Evidence of the suitability assessment".

When providing investment advice, the investment firm must, before the transaction is made, provide the client with a statement on suitability in a durable medium specifying the advice given and how that advice meets the preferences, objectives

65 Rule Seven, Section 1, letter h), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

and other characteristics of the retail client.[66] It must refer to the investment period required, the knowledge and experience of the client, the client's attitude to risk and tolerance for losses.[67]

Entities must keep records of the investment advice they provide to retail clients, which contains: i) a statement that investment advice has been provided and the date and time it was provided, ii) the recommended financial instrument, and iii) the suitability report submitted to the client.[68]

Prior to this statement or report on suitability introduced by MiFID II, a description of how the recommendation was suited to the client's characteristics and goals was required, as set down in the securities market regulations and considered in the resolution of complaints in which the events occurred when it was applicable.

The actions undertaken by the respondent entities in the suitability assessments and their consistency with the recommendation made were deemed to be correct in the following cases:

– The entity recommended that the client sign a financial contract and provided the duly signed suitability test. With regard to his investment objectives, the client stated that his investment time horizon was greater than three years, that the purpose of the investment was to obtain a potential increase in capital at maturity and that he would be willing to invest in products in which the capital was not fully guaranteed. In terms of his professional experience, the client stated that he held or had held a professional position in the financial sector or area that allowed him to understand the risks of the product or service.

  Therefore, the Complaints Service considered that due to the professional experience and the investment objectives declared by the client, the financial contract that was the subject of the complaint was suitable in case R/677/2018.

  The entity also acted corrected in case R/60/2019 when it recommended that a financial contract be signed based on the knowledge, experience, investment objectives and the financial situation of the clients. The entity provided a duly signed copy of the suitability assessment completed by its clients.

– The entity recommended subscribing around 35% of the client's portfolio in an investment fund for a period of 30 months with a maximum loss of approximately 3%. The entity had assigned a moderate investor profile to the client, who had given the following responses in the suitability test: i) he had investment experience in subscribing to investment funds in recent years; ii) he was aware of the market, credit and liquidity risk of investing in investment funds and structured deposits; iii) the purpose of his investment was to make

66 Article 213.5 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

67 Article 54.12 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

68 Article 72 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

long-term savings, he was prepared to take on a small risk but was not willing to lose more than 5% of his investment; and iv) he would have liquidity to cover unforeseen situations when the investment had been made.

In view of the answers contributed in the suitability test, mainly relating to the client's investment objectives, the Complaints Service considered that the risk profile assigned by the entity could be considered correct. Therefore, the recommendation to invest in the fund should be understood to be appropriate (R/9/2019).

– Both the client and the entity provided a duly signed copy of the suitability questionnaire. In the test, in addition to his financial situation, investment objectives and investment experience, the client declared that he had an average knowledge of mixed funds, meaning that he understood how the product worked and its main risks. Based on the answers provided, the entity considered that investing in an international mixed fixed income fund was appropriate for the client and reflected this consideration in a commercial proposal signed by the client, stating the circumstances that it had taken into account to reach its conclusion (R/175/2019).

– The entities provided the suitability questionnaires signed by their clients, through which they had collected information on their knowledge, investment experience, financial situation and investment objectives and assigned them an investor profile.

In case R/44/2019, the entity informed the client that it had assigned her a moderate profile, in accordance with the answers she had provided. Subsequently, the entity recommended that she divest an amount from the portfolio it managed for her, to invest in two investment funds. The proposal was duly signed by the client and included a description of how it was suitable for her characteristics and objectives.

In case R/164/2019, the entity informed the client that his investment objectives were consistent with a moderate risk profile, although based on his financial situation, it considered it appropriate to lower this to a conservative risk profile. The entity provided an investment proposal, signed by the client, in which it presented the client's savings/investment portfolio position prior to the advice and the position that the entity considered would be most suitable for his needs. It recommended that the client withdraw a certain amount from his portfolio to invest in an investment fund. The investment proposal contained a description of how it was aligned with the characteristics and objectives of the investor and established a conservative risk profile.

In case R/192/2019, based on the conservative profile obtained, the entity recommended six low risk investment funds to the client, including the fund that was the subject of the complaint and explained the reasons why it recommended them.

In case R/358/2019, the entity assigned a conservative profile to a client, drew up a proposal to invest certain amounts in three investment funds and included a description of how this proposal was in accordance with the characteristics and objectives of the investor. In view of the responses given by the client in the suitability test and the features of the funds, the Complaints Service

concluded that the CIS portfolio a whole was suitable for the client's knowledge, experience, objectives, financial situation and conservative investment profile.

In contrast, incorrect actions were identified in the following cases:

– The entity made an investment proposal for a fund that was not aligned with the investment profile assigned to the complainant. The Complaints Service stated that if, as indicated in the investment proposal, the profile of the complainant was very conservative, an investment fund classified as risk level 3 out of 7 could not be considered appropriate (R/641/2018), and nor could an investment fund classified as "conservative" (R/319/2019). If this were the case, the recommended investment funds would have higher risk than that corresponding to the client's profile.

– The entity made a personalised recommendation when proposing a financial contract to recoup the losses incurred by the client on a previous contract. Prior to providing this one-off advice service, the entity should have asked the client to complete the corresponding suitability test, collecting data on his knowledge and experience as an investor, as well as his financial situation and investment objectives. However, the entity only provided an appropriateness assessment document that did not meet the criteria for determining the suitability of the financial contract, as it contained only five questions which collected very little information on the client's knowledge and investment experience and none on his investment objectives and financial situation (R/31/2019).

– The entity provided one-off advice on two occasions, recommending the subscription or transfer to certain investment funds. In the first investment proposal, the entity took into account a suitability test carried out three months previously, the result of which was a balanced investment profile, indicating that the time elapsed from the completion of the test to the acquisition of the fund was not excessive. The second investment proposal was based on the same suitability test, although the Complaints Service considered that the client's profile should have been reviewed, given that the previous one-off advice had been provided more than two years previously (R/38/2019).

– The entity prepared a document with a product offer that constituted a personalised recommendation to make transfers to specific investment funds and that met the requirements to be considered one-off advice. This investment proposal was expressly signed by the client and took into account an appropriateness test that the entity had carried out a year previously. As it was an appropriateness text, it only assessed the client's knowledge and investment experience. Therefore, given that advice had been provided, the Complaints Service resolved that the questionnaire carried out should have been the suitability test as this also considered the client's investment objectives and financial situation. However, the entity did not demonstrate the prior assessment of the client's suitability or other regulatory requirements (R/43/2019).

– The entity gave a recommendation to the clients to invest a certain amount in an investment fund. This recommendation formed part of a document that compared the client's preferences with the characteristics of the product in terms of their needs, time horizon, maximum capital risk, maximum percentage of assets to invest, need to recover the investment at any time and level of

risk from 1 to 5. However, the entity was only able to prove that it had carried out an appropriateness assessment through a document in which it requested information from the complainants on their knowledge and investment experience, but it did not submit the suitability test through which, in addition to the clients' knowledge and previous investment experience, it requested information about their financial situation and investment objectives (R/400/2019).

– The entity made personalised recommendations to clients in which it assigned them an investment profile, established the maximum percentage of investment in equities that this profile allowed, specified the percentage invested in equities on the date of the recommendation and proposed to hold certain positions, sell or invest in other assets. However, the investment recommendations or proposals had not been signed by the clients (R/86/2019, R/87/2019, R/215/2019, R/217/2019, R/249/2019 and R/494/2019). Other bad practices were identified, such as providing a suitability test that lacked sufficient information to determine the client's investment profile (R/86/2019, R/87/2019, R/249/2019 and R/348/2019) or not providing the test used to justify the investment profile assigned to the client (R/215/2019 and R/217/2019).

– The client subscribed to an investment fund on two occasions. In the first subscription, the entity did not provide advice and asked the client to complete an appropriateness test, the result of which indicated that the product was appropriate. However, in the second subscription, the entity provided advice and submitted the suitability questionnaire, on the basis of which it formulated the proposal to invest in the fund. However, the Complaints Service noted some differences between the answers provided in the appropriateness test and in the suitability test carried out the following year. To the question asking whether the client had held a professional position in the past that related to financial market transactions, the answer was yes in the appropriateness test but no in the subsequent suitability test (R/198/2019).

– The entity provided a suitability test, duly signed by the client, together with a personalised investment proposal in which, based on the answers given in the test, it recommended that the client subscribe a certain amount in an investment fund. The investment proposal mentioned the conservative profile assigned to the client and the features of the investment (amount, product, time horizon, conservative profile of the investment, average annual return obtained from an investment of these characteristics, etc.).

  However, the suitability test completed by the client did not include questions about his financial situation and investment objectives, which are essential to be able to recommend the most suitable investment services and financial instruments within the scope of financial advice. Therefore, the Complaints Service resolved that the entity had not demonstrated that it had collected all the information it needed to determine the client's investor profile and consequently it should not have recommended subscribing to the fund referred to in the complaint (R/347/2019).

– The complainant, together with another joint holder, made a combined investment in investment fund units and a deposit. In relation to this investment, the entity provided an investment proposal addressed only to the complainant, recommending the acquisition of the fund. In the proposal, the entity indicated that according to its calculations the risk level of the fund would fall within

the conservative category and, according to the profile expressed by the client, the overall risk of his investments should fall within the conservative category.

Therefore, the Complaints Service indicated three relevant aspects about the recommendation made to the client and his final investment:

The respondent entity did not provide the previous suitability test signed by the complainant, so it could not be established whether the recommendation matched his profile and the information declared.

The recommendation did not include any information on the term deposit, which accounted for half of the investment made. Therefore, although the term deposit was considered a savings product with a guaranteed principal, the final return was clearly linked to the fund in question, and the proposal itself should have accounted for the risk of loss of the final premium paid on the amount deposited as an additional risk. This would have clearly influenced the suitability of the proposal to the complainant's profile.

The risk profile and the investment profile were 3 on a scale of 1 to 7. The Complaints Service considered that this indicator would be more typical for investors with a moderate investment risk profile rather than a conservative profile.

Additionally, the Complaints Service clarified that although the investment proposal had been signed by the other holder of the joint investment (not by the complainant) and the entity had provided a suitability test completed by him, which established a conservative investment profile, the document contained a series of responses referring to his experience and knowledge of the product and future objectives that could also call into question the recommendation of the investment fund.

As a result, the Complaints Service concluded that the entity did not correctly advise the complainant about his joint investment in the deposit and the investment fund (R/583/2018).

– The entity stated in the subscription order for an investment fund that it had provided advice to the client and submitted the suitability test signed by the client. However, it did not provide a copy of the investment proposal, so the Complaints Service had no evidence to determine whether or not the acquired fund was suitable for the client (R/319/2019).

– The entity provided a suitability test signed and dated by the complainant, which produced a very conservative result. As part of the advice service provided, the entity drew up an investment proposal that included a description of how it was appropriate for the features and objectives of the complainant. However, this investment proposal had not been signed. Therefore, the Complaints Service stated that as the complainant's signature had not been included in the investment proposal, an error of form occurred which made it impossible to prove that it had been delivered to her (R/475/2019).

➢ Investment decisions in the area of portfolio management

The management of client portfolios also requires entities to obtain information on the knowledge and experience, financial position and investment objectives of their clients. This information is assessed and enables the entities to make the most suitable investment decisions for the client's investor profile, as explained in the section "Suitability assessment". They must also provide evidence that they have carried out this test and keep a record of the suitability assessment with the related information as described in the section "Evidence of the suitability assessment".

The legal framework according to which portfolio management decisions must be adapted to the client's investment profile resulting from the suitability assessment is supplemented by other contractual limits that determine the framework in which the portfolio management service will be implemented. In this regard, the obligations and rights of the parties for the provision of portfolio management services must be reflected in a standard contract signed by the client and the entity.[69]

The standard contract has a minimum content and must include, among other aspects:[70]

– A detailed description of the general investment criteria agreed between the client and the entity.

– Specified management objectives, as well as any specific limitations to the discretionary management powers affecting the client.

– A specific and detailed list of the different types of transactions and categories of the securities or financial instruments to be managed and the types of transactions that may be performed, defining as a bare minimum those which involve equities, fixed income securities, other spot financial instruments, derivative instruments, structured and financed products.

  The geographical scope of financial instruments and transactions must be specified and any applicable limits included. If hybrid or low liquidity assets are included, a warning must be added. Further, if derivatives are included, there must be an indication as to whether they will be used for hedges or investments.

  The client's authorisation must be clearly recorded for each individual security, instrument or transaction type.

Entities act correctly when they make management decisions on their client's portfolio in accordance with the client's investment profile and in compliance with regulatory limitations and the portfolio management contract, as occurred in the following cases:

---

69 Article 5 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

70 Article 7 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services in regard to fees and standard contracts, and Rules Seven and Nine of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

– The entities demonstrated that they had collected information on the client's investment profile, and the level of risk assumed through portfolio management was consistent with the result of the assessment carried out.

  To this end the entity provided the duly signed suitability test and the standard discretionary and individualised management contracts for investment portfolios.

  The profiles assigned in each case were:

  i) Investment, which corresponded to investments in CIS, ranging from 0% to 100% in equity and 0% to 100% in fixed income (R/11/2019 and R/356/2019).

  ii) Balanced, which corresponded to investments in CIS, ranging from 0% to 30% in equity and from 70% to 100% in fixed income (R/77/2019).

  iii) Asset growth, which corresponded to investments in CIS, ranging from 0% to 30% in equity and from 0% to 100% in fixed income (R/126/2019 and R/141/2019).

– The entity signed a contract with the client for the management of CIS portfolios. On the subscription date, the entity asked the client to carry out a suitability test, which resulted in a "conservative" risk profile. This meant that the client was willing to assume a small capital risk, making the decision to partially unwind her investment in the event of unfavourable performance or if market expectations changed.

  The management contract referred to the portfolio as "balanced" and it had a conservative associated profile, a 12-month Euribor benchmark and a time horizon of between 1 and 3 years. The investment objective was: "To obtain a return by combining investment in fixed income and equity funds in such a way that the latter represents a percentage of less than 25% of the total investment. The portfolio management objective is that clients with conservative profiles seek to achieve better returns than they would from risk-free investments, accepting possible decreases in the value of their investment".

  Subsequently, during a review of the client profile, she completed a new suitability test. Based on her responses, the entity concluded that her risk profile had changed compared to the previous test and was now classified as "moderate". In other words, according to this suitability test the client could accept a higher level of risk compared to the previous test, which had resulted in a conservative profile.

  After the second suitability test, the client's management contract was updated to reflect her new profile. The portfolio was renamed as a "performance portfolio" and had a "moderate" risk profile, a time horizon of between 1 and 3 years and the 12-month Euribor as a benchmark. The investment objective was: "To obtain higher returns by combining investment in equity and fixed income funds whereby clients with moderate risk profiles choose to seek higher returns while accepting possible decreases in the value of their investment". The fund portfolio recommended an investment percentage of around 25% in money market funds, 20% in fixed income funds, 30% in equity funds and 25% in "other" funds.

The Complaints Service considered that the entity acted correctly, since with the documentation provided it proved that it had recommended a change in the fund portfolio management in accordance with the client's moderate profile, which was accepted by the client on signing the updated contract (R/44/2019).

– The entity provided the suitability questionnaires completed and signed by the corresponding holder. These questionnaires resulted in an investment profile that matched the profile established in the portfolio management contract. The profile assigned was conservative in cases R/103/2019, R/164/2019 and R/266/2019, medium in case R/308/2019, moderate in case R/331/2019 and dynamic in case R/351/2019.

However, complaints were resolved unfavourably for an entity that had entered into discretionary portfolio management contracts with several clients and engaged in the following bad practices:

– The entity had invested the portfolio primarily in a type of securities that were not appropriate to the investment profile assigned to the clients.

  Specifically, the Complaints Service resolved that the concentration of investments in companies listed on the alternative stock market (MAB) did not appear to be the most appropriate option for investors with a moderate risk profile, taking into account that these securities are characterised as being high risk and low liquidity, since they are issued by expanding companies with low capitalisation levels (R/86/2019, R/87/2019, R/215/2019, R/249/2019 and R/494/2019).

– The questions asked in the suitability test did not provide information that was sufficiently clear to be able to determine the client's investment profile.

  In response to the question about their investment objective, clients had marked with an X the answers "I attach as much importance to the security of the investment as I do to the return. I would be willing to invest a reasonable part of my capital in risk assets" (R/87/2019, R/229/2019 and R/348/2019) and "I prioritise the growth of my assets in the medium and long term. I would be willing to invest a substantial part of my portfolio in risk assets. I am aware of the risks associated with these financial products and I accept that my portfolio is subject to certain fluctuations" (R/86/2019 and R/249/2019).

  In view of these responses, the Complaints Service considered that an objective variable had not been established to determine the level of risk that the investors were willing to accept as their investment objective and that references to a "reasonable part", a "substantial part" or "certain fluctuations" were indeterminate concepts, which were generic and difficult to understand.

  Therefore, the Complaints Service resolved that from the answers offered to the entity through the suitability test on the question of investment objectives, there was not sufficient information to be able to establish a risk profile.

– The portfolio management contract, and the investments made by the entity under this contract, had been assigned a risk profile that was not aligned with the result of the client's test.

Specifically, the profile assigned for the portfolio management contract was high risk, as were the investments made by the entity in the exercise of the powers entrusted to it under this contract. However, this profile did not correspond to the responses given in the suitability test by the client, which resulted in a moderate risk profile (R/87/2019).

– Changes in the investor profile of a client did not translate into changes in the real risk of the managed portfolio and some of them were not preceded by the corresponding suitability test.

  In case R/86/2019, the entity provided copies signed by the client of a first suitability test, which resulted in a moderate risk profile, and of a test carried out four years later, which led to a high-risk profile being assigned, in addition to a request to change the risk profile from high risk to moderate, that the client had signed a few months after the second test and which was attached to the portfolio management contract.

  Despite the changes in the client's investment profile, the risk of the managed portfolio was very similar. Therefore, the existence of a similar real risk between portfolios with different risk profiles suggested that no appreciable distinction was being made in the service provided.

  Furthermore, at the time the client requested to change her risk profile from high risk to moderate, the entity should have carried out a new suitability test, in accordance with the provisions of the agreed contractual clauses.

– The entity reported risk profiles assigned to some clients, but did not provide a copy of the suitability questionnaires carried out (R/215/2019, R/217/2019 and R/637/2018).

  Therefore, the Complaints Service could not assess whether from the responses offered by the client in the suitability questionnaires about his knowledge, experience, financial situation and investment objectives, it could be considered that the entity had sufficient information to assign his risk profile.

– The entity did not provide a copy of the portfolio management contract duly signed by the parties (R/217/2019).

A.3 Prior information

A.3.1 Securities

➢ Information documents prior to contracting the product

Clients, including potential clients, must be provided with information on financial instruments and investment strategies. This information must contain the appropriate guidance and warnings about the risks associated with these instruments or strategies.[71]

71 Articles 209 and 210 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

Entities that provide investment services must provide their clients (including potential clients), on a durable medium, with a general description of the nature and risks of the financial instruments bearing in mind, in particular, the classification of the client as a retail or professional client[72] or, under MiFID II, an eligible counterparty.[73]

The description must include an explanation of the features of the type of financial instrument in question and its inherent risks, which must be sufficiently detailed to allow the client to make informed investment decisions.[74] The MiFID II Directive adds other obligations for prior information on financial instruments, such as indicating the type of retail or professional client for which the financial instrument is intended, taking into account its target market,[75] and explaining how the financial instrument works and its results in different market conditions, both positive and negative.[76]

The explanation of the risks must include the following, where appropriate:[77]

– The risks related to this type of financial instrument, including an explanation of leverage and its effects, and the risk of total loss of the investment, and under the MiFID II Directive, the risks associated with the insolvency of the issuer or related events, such as bail-ins.

– Volatility in the price of the instrument and any limitations on the market on which it can be traded.

– The possibility that an investor may take on, in addition to the acquisition cost of the instrument, financial commitments and other obligations, including contingent liabilities, as a result of transactions carried out with the instrument.

– Any compulsory margin or similar obligation applicable to that type of instrument.

– The MiFID II Directive further requires information to be included on the obstacles or restrictions on divestment, as may be the case, for instance, for an

72 Article 64.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019.

73 Article 48.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

74 Article 64.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019.

75 Article 77.1b) of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force from 17 April 2019.

76 Article 48.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

77 Article 64.2 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 48.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

illiquid financial instrument or one with a fixed investment term, indicating the possible exit methods and their consequences, the possible limitations and the estimated term to be able to sell this type of financial instrument to recoup the initial cost of the transaction.

For the purpose of providing information, a durable medium is understood as any instrument that allows the client to store the information personally addressed to them so that it may be easily recovered during a period of time that is appropriate for its purpose and which allows its reproduction without changes.[78]

Entities can comply with this obligation by submitting various documents to the client: a summary of the securities note of the issue, the full securities note of the offer or a document prepared by the entity for this purpose. When the client is given the full securities note, it is considered reasonable for the client to also be given an issuance summary,[79] as it is often easier for investors to understand due to its summarised and concise nature.

If the product is contracted on the secondary market, even when the entity has no obligation to provide the securities note or the prospectus, it must provide a general description of the nature and risks of the financial instrument to be contracted, which is usually delivered in the form of an informative document containing this description.

Lastly, if any specific regulations are applicable at the time the product is contracted, the entity should certify that it has previously provided the information required by these regulations to the client. For example, the order relating to information and classification of financial products, European regulations on packaged retail investment products and packaged retail and insurance-based investment products (PRIIP); the CNMV circular on particularly complex products and eligible liabilities for bail-in purposes, the CNMV resolution on financial contracts for differences, the transposition of the MiFID II Directive, etc.

➢ Method for demonstrating submission of the information

The information document on the features and risks of financial instruments must be given to the client prior to contracting the product and the entity must be in a position to provide evidence of this submission.

The evidence must always be provided in the same way, irrespective of the financial instrument in question. Accordingly, as in the case of CIS, submission is demonstrated by means of a copy of the information document signed by the client.

The criterion of the Complaints Service is not to accept clauses incorporated into purchase orders through which the client acknowledges that the entity has provided

78 Article 2 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 3.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

79 Article 37 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

sufficient information or certain documentation prior to contracting the product. As indicated for the case of CIS, the Complaints Service considers that this does not reliably guarantee that the client has received the necessary documentation.

Lastly, it is important to highlight that oral information on the product given to the investor by an employee of the entity is not sufficient to fulfil the obligation to provide information prior to formalisation of the transaction. In addition, conversations are often acrimonious and there are often conflicting versions in the complaint proceedings when these conversations are not recorded.

Taking into consideration the regulatory requirements applicable at the time the events occurred, the submission of prior information was provided in several complaints resolved in 2019, through the client's signature on the summarised securities note of a bond or share issuance,[80] the documentation for the contracting of structured products containing information on their features and risks[81] or the information document provided by the entity on shares or medium- or long-term bonds.[82]

However, it was considered bad practice that: i) unsigned, incomplete or inaccurate documentation was provided;[83] ii) the respondent entity did not provide any supporting documentation of having informed the complainant of the characteristics and risks of the securities;[84] and iii) the entity only provided a subscription order containing a clause in which the client acknowledged having been informed of the conditions of the product or transaction.[85]

The sections "Complex products" and "Non-complex products" of this section describe (by type of security) cases in which entities acted correctly and incorrectly in providing the client with the mandatory information that must be submitted to the client before the product can be contracted.

➢ Risk indicator and liquidity and complexity warnings

On 5 February 2016, a new regulation came into force that establishes a standardised information and classification system that warns clients about the risk levels of financial products and allows them to choose those that best meet their requirements and savings and investment preferences.[86] Therefore, entities must provide their clients or potential clients with a risk indicator and, where appropriate, liquidity and complexity warnings.

---

80 R/479/2018, R/543/2018, R/559/2018, R/156/2019, R/170/2019, R/289/2019, R/291/2019, R/295/2019, R/343/2019 and R/425/2019.

81 R/621/2018, R/665/2018, R/677/2018, R/60/2019, R/75/2019, R/123/2019, R/144/2019, R/201/2019, R/300/2019 and R/417/2019.

82 R/604/2018, R/86/2019, R/87/2019, R/102/2019, R/156/2019, R/170/2019, R/217/2019, R/249/2019, R/289/2019, R/291/2019, R/295/2019, R/348/2019 and R/391/2019.

83 R/537/2018.

84 R/537/2018, R/215/2019 and R/282/2019.

85 R/479/2018.

86 Order ECC/2316/2015, of 4 November, on the duty of information and classification of financial products.

In relation to the stock markets, this rule is applicable to certain financial instruments,[87] although it does not include financial products subject to Regulation (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs),[88] CIS units and shares subject to Regulation (EU) No. 583/2010 on key investor information,[89] or Circular 2/2013 on the key investor information document and the prospectus of collective investment schemes.[90]

For securities subject to this regulation, the general description of the nature and risks of the securities that entities must submit to investors also need to include a risk indicator and, where appropriate, liquidity and complexity warnings that will be prepared and presented in graphic format, pursuant to the aforementioned regulations.[91] The risk indicator must be established on an ascending scale from 1 to 6 (where 1 is the lowest risk and 6 is the highest). The liquidity warning will factor in all possible limitations on this aspect and the risks of an early sale of the financial product and a complexity warning will only be included in the information provided when the financial product is complex.

Some of the complaints resolved in 2019 that related to prior information on securities referred to situations where the product was contracted after the entry into force of the aforementioned regulation. In particular, complaints were resolved in which the respondent entities acted correctly and proved that they had provided clients with information on:

– Bonds with an early redemption option, in which a risk indicator of 6/6 was recorded, as well as the corresponding warnings on liquidity and complexity (R/604/2018).

– Simple bonds that contained a 6/6 risk indicator and the consequent liquidity warnings (R/102/2019).

– Shares listed on a regulated market or a multilateral trading facility, which included a risk indicator of 6/6 (R/86/2019, R/87/2019, R/156/2019, R/170/2019, R/217/2019, R/249/2019, R/289/2019, R/291/2019, R/295/2019 and R/425/2019).

➢ Complex products

The complaints resolved in 2019 relating to prior information provided to the client for complex products referred to the following:

---

87 Article 2.1 of the Recast Text of the Spanish Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

88 Regulation (EU) No. 1286/2014 of the European Parliament and of the Council, of 26 November 2014, on key information documents for packaged retail and insurance-based investment products (PRIIPs).

89 Commission Regulation (EU) No. 583/2010, of 1 July 2010, implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website.

90 CNMV Circular 2/2013, of 9 May, on the key investor information document and the prospectus on collective investment schemes.

91 Articles 10.b) and 11 of Order ECC/2316/2015, of 4 November, on the duty of information and classification of financial products.

✓ *Convertible/exchangeable medium- or long-term bonds*

The submission of prior information on convertible/exchangeable medium- or long-term bonds gave rise to disputes not only when the securities were acquired directly but also when they were acquired in an exchange of preferred shares or subordinated bonds.

Entities usually certify compliance with prior information obligations by providing the information documents duly signed by the client (R/479/2018, R/543/2018 and R/559/2018).

✓ *Debt that can be redeemed in advance by the issuer*

As in the previous section, entities usually prove that they have fulfilled their obligation to submit prior information by providing the summary (duly signed by the client) of the issuance of medium- or long-term bonds that can be redeemed in advance by the issuer before the maturity date (R/343/2019).

On other occasions, entities provided a document duly signed by the client that included a description of the characteristics and key risks of subordinated bonds with an early redemption option and a summary of the risks that, having been contracted after the entry into Order ECC/2316/2015 on the duty of information and classification of financial products, contained a risk indicator of 6/6 and warnings about liquidity and complexity (R/604/2018).

Unlike the previous complaints, entities acted incorrectly when they did not provide any supporting documentation showing they had informed the complainants of the features and risks of the securities (R/282/2019).

✓ *Structured instruments on which the return and repayment of capital invested are linked to the performance of an index or of one or more shares*

The contract order or the contract for a structured product itself (structured bonds or notes or financial contracts) usually set down the characteristics and general terms and conditions of the instrument, describe the risks inherent to them and contain a warning of the maximum loss that can be incurred in the investment. Therefore, attaching these documents to the complaint proceedings, duly signed by the client, demonstrated compliance with the entity's obligation to provide the client with prior information (R/621/2018, R/665/2018, R/677/2018, R/60/2019, R/75/2019, R/123/2019, R/144/2019, R/201/2019, R/300/2019 and R/417/2019).

However, there were complaints in which entities engaged in bad practice. One entity provided a document with information on a structured note linked to the performance of an index, but did not prove that it had been delivered to the client (R/537/2018).

➢ **Non-complex products**

The complaints resolved in 2019 relating to prior information provided to the client for non-complex products referred to the following:

✓ *Common shares of companies admitted to trading*

In general, entities demonstrated that they had delivered prior information to their clients in the contracting of listed shares by means of a copy, duly signed by them, of the summarised securities note of the share issuance, of a document containing pre-contractual information or an informative note about the nature and risks inherent to the shares, or both documents (R/86/2019, R/87/2019, R/156/2019, R/170/2019, R/217/2019, R/249/2019, R/289/2019, R/291/2019, R/295/2019 and R/425/2019).

However, bad practices were identified in the following cases:

– Entities did not provide any proof of having informed the complainant of the features and risks of the shares acquired (R/537/2018 and R/215/2019).

– The entity only provided a statement contained in the subscription order for some shares by which the client declared he had been informed of the conditions of the capital increase, in accordance with the provisions of the prospectus filed with the CNMV's official registry, or that it was available at any of the entity's offices and on the CNMV website. The Complaints Service considered that this type of clause does not reliably guarantee the delivery of the complete documentation (R/479/2018).

✓ *Bonds that do not incorporate an embedded derivative*

In the contracting of some simple bonds in dollars, the entity demonstrated that it had met the requirement of providing relevant and sufficient information about the characteristics and inherent risks of the bonds through the information provided the purchase order and in the pre-contract information document. This highlighted that the risk indicator was "6/6" (the maximum) and that the risks that could affect the investment included "changes in exchange rates in issues denominated in foreign currency" (R/102/2019).

➢ Compliance with commitments

Entities sometimes propose to their clients offers that are subject to compliance with certain conditions. In these cases, the entities must duly inform the client of the conditions they must comply with and clearly reflect them in the contractual documentation of the offer for it be accepted by the client. These conditions will be binding for both parties if the offer is accepted.

One complainant joined a loyalty programme in which, in order to receive a bonus, he had to maintain a minimum level of funds (savings or investment products where the client is the holder of the portion corresponding to their share of the contracts). The problem arose when the client did not receive a bonus in two of the half-yearly settlements.

The contract through which the client had joined the programme mentioned the conditions and the amount of funds that he had to maintain, and therefore the terms of the commitment were clear and easily understood. The documents submitted in the proceedings demonstrated that the client had held cash accounts and financial contracts on the reference dates for establishing the balance of funds

required by the entity, in which the balance of funds was lower than the amount established in the commitment accepted by the parties. Consequently, the Complaints Service considered that the entity had acted correctly by not paying the bonuses in question, as the client had not fulfilled his commitment to maintain a minimum amount invested in stable funds at the entity (R/419/2019).

A.3.2 Collective Investment Schemes (CIS)

➢ Spanish CIS. Submission of information documents before contracting the products

In 2011, with the aim of increasing investor protection with regard to their information rights, a new "Key Investor Information Document" (KIID) was introduced to replace the previous simplified prospectus. This document incorporated two substantial changes which helped investors reach informed investment decisions.

– Full harmonisation of the document, which made harmonised funds and companies from any Member State perfectly comparable.

– Presentation of the information in a short format that is easily understandable for the investor and only contains the key information.

The KIID is deemed to be pre-contractual information.

At European level, this document was included in Directive 2009/65/EC[92] and its form and content were described in detail in Regulation (EU) No. 583/2010.[93] Spanish rules were adapted to the European regulation by amending the CIS Act in 2011 and with the approval of a new regulation for CIS in 2012 and CNMV Circular 2/2013.[94]

With regard to the information to be submitted to investors, subscribers must be provided with the latest half-yearly report and the KIID free of charge and, on request, the prospectus and the latest published annual and quarterly reports.[95] Following the entry into force of the regulatory changes deriving from the adaptation to MiFID II, any costs and expenses of the product and service that have not been included in the KIID must also be provided. In this regard, the CNMV has stated that:

> *[...] it should be made clear that the UCITS KID is not sufficient to comply with the cost information obligations established in Article 50 of the Delegated*

92 Directive 2009/65/EC of the European Parliament and of the Council, of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

93 Commission Regulation (EU) No. 583/2010, of 1 July 2010, implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website.

94 CNMV Circular 2/2013, of 9 May, on the key investor information document and the prospectus of collective investment schemes.

95 Article 18.1 of Law 35/2003, of 4 November, on Collective Investment Schemes.

Regulation, since Article 51 expressly states that additional information must be provided on all the costs and expenses associated with the product and the service that has not been included in the UCITS KID.[96]

Intermediaries selling to or advising clients are subject to compliance with the obligation to provide the above-mentioned prior information on CIS.[97]

It is important to note that the entity may not replace these documents with information that may appear in the advertising of the CIS or provide it to the client orally or by means of a summary.

The entity must demonstrate compliance with the obligation by keeping, in a durable medium, a copy of the information signed by the unitholder(s)/shareholder(s), for as long as they hold this status.[98] For these purposes, a durable medium is understood as any instrument that allows the investor to store the information personally addressed to him or her so that it may be easily accessed during a period that is appropriate for its purposes and that allows it to be reproduced without changes.[99]

In order to provide evidence that the entity has delivered the prior information to the investor, it is not sufficient for the framework agreement for CIS transactions to provide that the corresponding documentation will be delivered prior to the purchase or for the CIS subscription order or a client statement to mention that said documentation was delivered beforehand. The entity must provide evidence that it has been delivered.

The regulations contain specific provisions in the event that the KIID or the prospectus are in the process of being updated when the client asks to subscribe to the fund. Thus, during the period between the adoption of the agreement and the registration of the updated KIID or prospectus, the investor must be informed, prior to subscribing the units or shares, of the key changes that are pending registration.[100]

The delivery of this information was correctly demonstrated in some complaints resolved in 2019, in which entities provided either the KIID and the latest half-yearly report, both bearing the client's signature,[101] or paginated documentation that included the KIID and the latest half-yearly report, which bore the client's signature.[102] This

96 See Question 9.6 of the CNMV document *Q&A on the application of the MiFID II Directive*.

97 Article 18.1 *bis* of Law 35/2003, of 4 November, on Collective Investment Schemes.

98 Rule Five of CNMV Circular 4/2008, of 11 September, on the content of the quarterly, half-yearly and annual reports of collective investment schemes and their statements of position.

99 Article 18.1 of Law 35/2003, of 4 November, on Collective Investment Schemes.

100 Rule Ten of CNMV Circular 2/2013, of 9 May, on the key investor information document and the prospectus of collective investment schemes.

101 R/533/2018, R/554/2018, R/564/2018, R/572/2018, R/586/2018, R/597/2018, R/602/2018, R/641/2018, R/9/2019, R/12/2019, R/27/2019, R/42/2019, R/44/2019, R/57/2019, R/79/2019, R/119/2019, R/128/2019, R/140/2019, R/143/2019, R/157/2019, R/162/2019, R/164/2019, R/172/2019, R/174/2019, R/175/2019, R/180/2019, R/183/2019, R/188/2019, R/192/2019, R/193/2019, R/203/2019, R/206/2019, R/207/2019, R/211/2019, R/220/2019, R/241/2019, R/303/2019, R/308/2019, R/316/2019, R/319/2019, R/346/2019, R/358/2019, R/380/2019, R/394/2019, R/400/2019, R/404/2019, R/438/2019, R/459/2019, R/483/2019, R/487/2019, R/508/2019 and R/569/2019.

102 R/629/2018, R/633/2018 and R/107/2019.

documentation included an annex showing all costs and expenses relating to contracts arranged after the entry into force of the MiFID II Directive (R/475/2019).

Some complainants, who had received the KIID and latest half-yearly report prior to subscribing, complained that they had not also been provided with the full fund prospectus. The Complaints Service clarified that the full prospectus is delivered at the request of the unitholder and the proceedings showed that it had not been requested at that time (R/175/2019).

In contrast, it was considered that the correct documents had not been delivered to the complainant in the following complaints:

– The entity delivered a half-yearly report that was not the latest one published but an earlier one (R/38/2019). In some complaints, this bad practice was compounded by others, such as failing to deliver the KIID (R/676/2018).

– Entities provided a signed copy of only some of the documents that should have been delivered (R/8/2019, R/55/2019, R/122/2019, R/139/2019, R/147/2019, R/153/2019, R/312/2019, R/378/2019 and R/480/2019) or they did not provide a signed copy of any of them (R/208/2019, R/347/2019 and R/470/2019).

– In some cases, although the entity provided the KIID and the latest half-yearly report signed by the client, it provided other information that was inconsistent with the content of these documents. In particular, it informed the client that from a certain date the risk would be zero and he would obtain his capital plus a return. However, this was a fund categorised as risk level 3 on a scale of 1 to 6 (where category 1 did not mean that the investment was risk free) and did not guarantee any return (R/625/2018).

– The entity proved that it had delivered the latest half-yearly report and the KIID to the client, but did not certify that it had informed him of the changes that were going to be made in this latter document and in the prospectus. The investment fund was in the process of changing its investment policy, increasing its management fee, changing its calculation base and establishing agreements to return fees charged by the manager to certain unitholders. However, the entity did not demonstrate that it had informed the client of these changes, which were to enter into force a few days after his first subscription to fund units (R/396/2019).

Lastly, the relationship between CIS information requirements and other prior information obligations is established as follows:

– CIS units and shares subject to Regulation (EU) No. 583/2010 or CNMV Circular 2/2013 are excluded from the scope of the standardised information and classification system for financial products.[103]

103 Article 2.2.d) of Order ECC/2316/2015, of 4 November, on the duty of information and classification of financial products.

– With regard to the European Regulation on packaged retail investment products and insurance-based investment products (PRIIP), the following considerations should be made:[104]

  • Spanish harmonised CIS or UCITS (authorised pursuant to Directive 2009/65/EC) will be exempt from the obligations established in the regulation on PRIIPs until 31 December 2021.[105, 106]

  • Spanish non-harmonised or non-UCITS CIS (not authorised pursuant to Directive 2009/65/EC) will be exempt from the obligations of the regulation governing PRIIPs until 31 December 2021, provided that the CIS publishes the KIID, as regulated by Circular 2/2013.[107]

➢ Spanish CIS. Exceptions to the delivery of information documents before contracting the product

Even where the aforementioned documents must be submitted before contracting the CIS, it should be noted that there are cases in which it is not mandatory or even possible to submit all or some of these documents:

✓ *Additional subscriptions in the same CIS*

The aim of providing prior information is to ensure that the unitholder is aware of the product's features and risks. Therefore, it would not be necessary to provide it again in the case of additional subscriptions in the same CIS,[108] since the client will already have received such documents in the first purchase. Furthermore, any updates or changes will be reported in subsequent documents.

In case R/198/2019, each of the complaints made an additional subscription to an investment fund in which they were already holders. The additional subscription orders signed by the complainants indicated that the holder had received the fund's KIID and the latest published half-yearly report sufficiently in advance of signing.

In addition, the entity provided the signed documentation of one of the complainants, consisting of the KIID and the latest half-yearly report, which he had been given at the time of his first subscription thereby proving that it had informed the client of the characteristics and the risks of the fund. For the other complainant,

---

104 Document query 2.5 *Questions and answers on the implementation of Regulation 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)*.

105 Amendment of Article 32.1 of Regulation (EU) No. 1286/2014 by Article 17 of Regulation (EU) 2019/1156 of the European Parliament and of the Council, of 20 June, on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) 345/2013, (EU) 346/2013 and (EU) 1286/2014.

106 Article 32.1 of Regulation (EU) No. 1286/2014 of the European Parliament and of the Council, of 26 November 2014, on key information documents for packaged retail and insurance-based investment products.

107 Article 32.2 of Regulation (EU) No. 1286/2014 of the European Parliament and of the Council, of 26 November 2014, on key information documents for packaged retail and insurance-based investment products.

108 Rule Five of CNMV Circular 4/2008, of 11 September, on the content of the quarterly, half-yearly and annual reports of collective investment schemes and their statements of position.

the entity did not provide the documentation signed at the time of the first subscription to the fund, which the Complaints Service considered an incorrect action on the part of the entity.

✓ *CIS contracted before the preparation of the first half-yearly report*

Failure to deliver the latest half-yearly report would be justified if the client had contracted a CIS that had recently been registered with the CNMV and prior to the obligation to prepare its first half-yearly report. However, even if the half-yearly report cannot be delivered for this reason, the entity's obligation to provide evidence that the KIID has been delivered remains intact, as demonstrated in cases R/58/2019, R/71/2019, R/90/2019, R/155/2019, R/265/2019 and R/554/2019.

✓ *Funds with a specific target return at maturity (guaranteed or not)*

On 30 December 2018[109] the amendment to the law on CIS came into force, which included exemption from prior delivery of the latest half-yearly report in the event of renewals of funds with a specific return on investment at maturity, guaranteed or otherwise. Before this amendment, the Complaints Service had already established an identical criterion. However, as mentioned above, the delivery of the KIID must be proven by means of a copy signed by the complainant.

In case R/261/2019, the complainant subscribed to an investment fund which, on expiry of its previous strategy, had established a new specific non-guaranteed target return. The entity only provided a signed copy of the KIID, since at the time of subscription, the first half-yearly report containing the new strategy had not yet been drawn up. To provide proof of this, the advertising information provided to the complainant indicated that for new unitholders it was not necessary to submit the latest published half-yearly report given that it was a new strategy.

➢ **Spanish CIS. Strengthening the transparency of CIS with a specific target return**

The CNMV has looked into the marketing of funds with a non-guaranteed target return and established a series of measures to reinforce the transparency of these products so that unitholders are fully aware that the investment policy does not have the guarantee of a third party outside the investment fund.

For this purpose, the CNMV has approved and published the following documents on its website:

– Communication of 11 July 2013 to strengthen transparency in the marketing of funds with a target return.

109 Amendment of Article 18.1 of Law 35/2003, of 4 November, on Collective Investment Schemes, through Law 11/2018, of 28 December, amending the Commercial Code, the recast text of the Corporate Enterprises Act approved by Royal Legislative Decree 1/2010, of 2 July, and Law 22/2015, of 20 July, on accounts auditing, regarding non-financial information and diversity.

This communication establishes a series of measures, including a requirement that funds with a specific target return:

i) Must include in the section of the prospectus and the KIID "CNMV warnings" a warning in capital letters describing the non-guaranteed status of the fund, using the following text:

THIS FUND IS NOT GUARANTEED BY A THIRD PARTY. THEREFORE, NEITHER THE INVESTED CAPITAL NOR THE RETURN ARE GUARANTEED.

For harmonised CIS, this same text must be highlighted in capital letters in a prominent part of the KIID.

ii) Both the prospectus and the KIID must state that the target return is not guaranteed, and where appropriate this must be included in the communication sent to unitholders. When an APR is indicated, the warning to the effect that it is not guaranteed must be highlighted in capital letters.

– Technical Guide 1/2017, of 18 January, on strengthening the transparency of investment funds with a specific long-term target return.

This guide contains several warnings that must be included in the KIID, as well as in the marketing documentation, by CIS management companies that apply to register funds with a specific target return and a maturity of over 3 years with the CNMV.

Thus the KIID of funds with a specific target return with a maturity of over 3 years must include a warning to investors about the term risk involved, with the following wording:

LONG-TERM INVESTMENTS MADE BY THE FUND ARE EXPOSED TO HIGH MARKET RISK, THEREFORE REDEMPTIONS MADE BEFORE THE MATURITY DATE MAY RESULT IN SIGNIFICANT LOSSES FOR THE INVESTOR.

In addition, the KIID of these funds must include:

– A warning to investors regarding the liquidity of the fund when there are not at least four liquidity windows per year (providing the possibility of redeeming without a redemption fee), with the following wording:

PLEASE NOTE THAT THE TARGET RETURN OF THE FUND IS DUE ON ... AND THAT ANY REDEMPTION MADE PRIOR TO THAT DATE WILL INCUR A REDEMPTION FEE OF ...%, UNLESS IT IS REQUESTED ON ONE OF THE ... DATES SPECIFICALLY PROVIDED.

– A warning to investors regarding the marketing period risk when the marketing period of these funds is longer than one month, with the following wording:

DURING THE INITIAL MARKETING PERIOD THE FUND IS ALLOWED NOT TO VALUE PART OF ITS TRANSACTIONS. AS A RESULT THE NET ASSET VALUE OF THE UNITS IN THE FUND MAY CHANGE SIGNIFICANTLY ON THE FIRST VALUATION DAY (XX-XX-XX).

The above warnings must be included in all marketing documentation describing the fund which may be delivered to clients by the management companies or the marketers for distribution purposes, such as tri-fold leaflets, marketing fact sheets, and similar.

Several complainants who acquired funds with a specific non-guaranteed target return expressed their disagreement with the losses they incurred when the marketing literature argued that the capital contributed by the unitholder would not be adversely affected. However, the entity provided the corresponding KIID and, in some cases the prospectus, which had been signed by the client, indicating that there was no guaranteed target return and which contained warnings in capital letters stating that the fund was not guaranteed by a third party – so neither the invested capital nor the return were guaranteed – and also that the APR was not guaranteed. Consequently, the entity acted correctly as the documentation signed by the client contained the information required under the communication of 11 July 2013, which was applicable on the date on which the events occurred (R/609/2018, R/147/2019, R/261/2019 and R/439/2019).

➢ Foreign CIS. Submission of information documents before contracting the products

In general, foreign CIS are not supervised by the CNMV, but by the competent body in their respective home countries. However, the CNMV is responsible for supervising certain matters such as the actions of providers of investment services in Spain in relation to the foreign CIS authorised by the CNMV to be marketed in Spain. Among foreign CIS, "harmonised" CIS are those that are subject to the directive[110] on these undertakings that EU Member States have had to transpose into their legal systems. In contrast, "non-harmonised" foreign CIS would fall outside the scope of the directive.

In this regard, and as established under current legislation,[111] the distributors in Spain of harmonised foreign CIS registered in the corresponding CNMV register are required to submit to each unitholder or shareholder, prior to subscription of the units or shares, a copy of the simplified prospectus or the document replacing it in the home state of the CIS and a copy of the latest published financial report. In addition, a copy of the memorandum on the intended types of marketing to be conducted in Spain must be submitted using the form published on the CNMV website. The reference in this legislation made to the simplified prospectus must be understood as referring to the KIID, which, as indicated on the CNMV website,[112] must be translated into Spanish.

This delivery is mandatory and cannot be waived by the unitholder or shareholder. In addition, an updated copy of the other official documentation of the undertaking must be provided upon request. In any event, at least one of the Spanish distributors of the

110 Directive 2009/65/EC of the European Parliament and of the Council, of 13 July 2009, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

111 Rule Two, Section 2, of CNMV Circular 2/2011, of 9 June, on information of foreign collective investment schemes registered in the CNMV's registries.

112 *Spanish provisions on UCITS' notification procedures.*

foreign undertaking must make all these documents available by electronic means, as well as the net asset values corresponding to the shares or units marketed in Spain.

Complaints were received in 2019 in which the Complaints Service analysed whether entities marketing harmonised foreign CIS in Spain had delivered the required prior information before the products were contracted. In case R/386/2019, the entity acted correctly by providing a paginated document signed by the client that included the latest half-yearly report, fact sheet, marketing memorandum and KIID. However, in case R/576/2018, the entity acted incorrectly since it provided a signed copy of the subscription order and the KIID, but did not provide a copy of the marketing memorandum.

The distributors of non-harmonised foreign CIS must comply with the aforementioned obligations to provide information prior to subscription (delivery of the information document and the latest published financial report) with the exception of the marketing memorandum, which is replaced by the specific conditions applied by the distributor.[113] In particular, if they are marketed to non-professional investors, the authorised intermediary must deliver, free of charge, to the shareholders or unitholders of the foreign CIS that are resident in Spain the prospectus, KIID or a similar document together with the annual and half-yearly reports, as well as the fund management regulations or, as the case may be, the Articles of Association of the company. These documents must be provided translated into Spanish or another language accepted by the CNMV.[114]

In case R/537/2018, the entity acted incorrectly since it did not evidence delivery of any information documents relating to the non-harmonised foreign CIS acquired by the client.

➢ Consistency of the KIID and the prospectus with other information provided to the investor

Any advertising that contains an invitation to purchase units or shares in a CIS must indicate the existence of the prospectus and the KIID described in this section, as well as where and how the public can obtain or access them.

This advertising must not contradict or detract from the information contained in the prospectus and the KIID.[115]

In case R/261/2019, the entity classified an investment fund as a product with a high credit rating/solvency in the subscription request. However, the fund's KIID considered that it had significant credit risk and counterparty risk and included a warning in capital letters that the fund was investing in a low credit quality bond portfolio and therefore had a high level of credit risk. Consequently, the Complaints Service considered that the entity had acted incorrectly, since the information provided in the subscription order for the fund could have confused the investor.

---

113 Rule Three, Section 4, of CNMV Circular 2/2011, of 9 June, on information on foreign collective investment schemes registered in the CNMV's registries.

114 Article 15 *quinquies*, Section 6, of Law 35/2003, of 4 November, on Collective Investment Schemes.

115 Article 18.3 of Law 35/2003, of 4 November, on Collective Investment Schemes.

➢ Marketing commitments

Subscribing to CIS may entail certain advantages or promotions that make the acquisition more attractive. In these cases, in addition to the mandatory information on the product's features and risk, the entity must provide full and clear information on the terms and conditions of the commercial offer.

Some investors disagree with the loss of commercial promotions or the application of penalties after deciding to transfer the units of their investment funds to others. It is therefore necessary to analyse in each case the commercial proposal agreed between the parties and the events that caused the benefits of the promotion to be revoked.

In relation to commercial promotions, the Complaints Service considered that entities had acted correctly in the following cases:

– In one case, the entity adequately disclosed the conditions of a combined investment in an investment fund and a deposit. According to the conditions offered, the deposit would accrue a certain premium at maturity if an amount equivalent to the amount deposited was simultaneously invested in an investment fund and if the shares were held until a specified date. In the event that the deposit were to be cancelled early or the investment in the fund decrease, the premium would not be received on maturity. The entity provided a signed copy of the KIID and the most recent half-yearly report of the fund, as well as an informative document describing the features of the deposit, which included the link between its return on maturity and the respective investment in the fund (R/583/2018).

– The entity correctly made the payments that corresponded according to the marketing offer signed with the client. The client thus signed up for a campaign whereby he would be entitled to receive a bonus if, during the offer period, he subscribed a minimum amount to the classes of investment funds specified in an annex and held the units for a certain term. The terms of the signed document also specified that any subscriptions that had not been made in compliance with the conditions of the promotion would not be rewarded.

  The complainant made contributions to certain classes of investment funds during the offer period. One of the classes was included in the promotion and the entity demonstrated that it had delivered the corresponding reward under the heading "fund campaign bonus". However, the other class of fund subscribed was not included in the promotion and therefore although the subscription had been made within the offer period, no bonus was applicable (R/127/2019).

However, in the context of promotions offered to clients, the Complaints Service considered that some entities had not acted correctly, in the following cases:

– The client expressed her disagreement with the losses deriving from the redemption of an investment fund that she had contracted in combination with a bank deposit. The client stated that she had agreed to subscribe to the investment fund in order to receive a bonus for contracting a deposit with a 1-year maturity. After a period of one year, when the deposit matured, she submitted an order to redeem the units in the investment fund, which generated losses, for which she requested to be reimbursed.

In relation to the prior information provided on the investment fund, the KIID indicated that the fund might not be suitable for investors planning to withdraw their money within a period of less than 24 months. The complainant provided a copy of the KIID and of the latest half-yearly report signed and stamped by the entity, demonstrating that these documents had been duly delivered. However, the entity did not prove that it had kept a copy of these documents signed by the client, thereby not complying with this regulatory obligation to provide evidence of delivery.

Furthermore, taking into account the features of the investment fund included in the KIID, the redemption ordered by the complainant stood out as it coincided exactly with the maturity of the bank deposit despite the recommendation in the KIID to hold the investment for more than 24 months, which is why a loss was incurred. This inadvisable redemption was not mandatory either, since the investment fund did not have a maturity date, unlike the bank deposit.

The Complaints Service considered that the entity should have alerted the client to the desirability, or at least the possibility, of continuing to hold her investment in the fund after the deposit had matured, but the documents submitted in the case did not demonstrate that any such alert had been given. There was only a letter sent by the entity informing her of the maturity of the contracted deposit, which was dated one month before said maturity (R/146/2019).

– The client maintained that she met the requirements established in an agreement reached through a loyalty programme aimed at investment fund holders.

The entity demonstrated that the client did not comply with the requirements in the first six months of the programme, but did comply in the second six months. The entity claimed that the bonus due for the second six-month period had not been paid due to an administrative error.

The Complaints Service considered that the entity had acted incorrectly by mistakenly not crediting the client's account with the corresponding amount, even though she met the requirements agreed in the loyalty programme agreement. However, the entity recognised this error and corrected it by subsequently crediting the client's account (R/318/2019).

A.3.3 Discretionary portfolio management

Entities that provide investment services must provide their clients with prior information about the investment firm and its services.

➢ Simulated historical results

In particular, when the company provides an investment portfolio management service, it must establish a suitable valuation and comparison method, such as a meaningful benchmark based on the client's investment targets and the types of financial instruments in his or her portfolio to allow the client to assess the results obtained by the company. Furthermore, when an entity offers an investment portfolio management service to a client or potential client, it must provide, among other information, details of the method used and the periodicity of the valuation of

financial instruments in the client's portfolio and specify any benchmarks to be used to compare the results obtained for the client's portfolio.[116]

One entity provided the client, prior to contracting the investment fund portfolio management service, with information on the benchmark index and on the performance of the portfolio, including a simulation of historical returns. This simulation covered the period from 2011 to 2017 and included an investment fund set up in November 2016, which led the complainant to complain that the entity had provided him with a document with data on portfolio returns corresponding to years in which this fund did not exist.

The Complaints Service resolved that in this case it was reasonable that the performance of the investment fund for that period had been included in the simulation, given its expected weight in the client's portfolio (more than one third of the investment).

In order to be impartial, clear and not misleading, the information may only include simulated historical results of financial instruments or financial indices provided that certain requirements are met. One of these requirements is that the simulated historical results must be based on the actual historical results of one or more financial instruments or financial indices that are identical (or, after the entry into force of MiFID II, substantially identical), or underlyings of the financial instrument concerned.[117] Therefore, provided that these requirements had been met, the Complaints Service considered that the simulation carried out would not only be correct, but suitable in order to provide a more realistic idea of the results that could be obtained, in the first place by the fund, and consequently in terms of the portfolio management, always bearing in mind the caveat that past results do not guarantee future returns (R/40/2019).

➢ Terms for the provision of the portfolio management service

In addition to information on the method and periodicity of the valuation of financial instruments and the benchmark for comparing portfolio results, entities offering discretionary portfolio management services must provide other information, such as types of financial instruments that can be included in the client's portfolio, as well as the types of transactions that can be carried out with them – including any limits – or management targets, the level of risk that must be reflected in the discretionary management and any specific limitations to this discretionary power.[118]

---

116 Articles 62, 63.2 and 63.3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force until 17 April 2019. Articles 46, 47.2 and 47.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, implementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

117 Article 60.4 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force until 17 April 2019. Article 44.5 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, implementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

118 Articles 62 and 63.3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Articles 46 and 47.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, implementing Directive 2014/65/EU

The contract for the provision of the portfolio management service must include the matters referred to in the foregoing paragraph, as well as other detailed information on the conditions under which the service is provided (e.g. a detailed description of the general investment criteria, the types and geographical scope of the transactions and financial instruments, with the client's separate authorisation for each of the securities or transactions, the loss threshold or the limits on the commitments of the managed portfolio).[119]

In some cases, the complainants stated that they were unaware of the terms of the provision of portfolio management services. However, the contractual documents signed on contracting this service were submitted to the proceedings. The Complaints Service held that these binding documents between the parties were sufficiently descriptive about the features and operations of the portfolio management service (R/103/2019, R/126/2019, R/308/2019, R/331/2019 and R/356/2019).

➢ Temporary funds in CIS portfolio management

The discretionary management of CIS portfolios may require the use of a class of a temporary investment fund to channel contributions to or redemptions in the managed portfolio.

In case R/351/2019, the complainant herself provided the portfolio management contract, the specific pre-contractual information document, the contract for the provision of investment services, the KIID of the temporary fund and the corresponding half-yearly report. In view of the aforementioned documentation, the Complaints Service declared that it had identified no irregularities with respect to the entity's compliance with its obligations to supply the required prior information.

In general, portfolio management consists in authorising the entity, by signing a contract, to invest the assets under management in financial instruments, within the investment parameters established by the client and in line with the client's investment profile, as described in the section "Investment decisions in the area of portfolio management".

➢ Information on the financial instruments contracted

Regarding prior information on the financial instruments referred to above, it should be noted that the purpose of this information is to allow investors to make informed decisions about investments and divestments, although in the case of discretionary portfolio management these decisions are made by the manager.

Therefore, signing the portfolio management contract authorises the entity to make the investments it deems most suitable within the limits agreed with the client for the

---

of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

119 Article 7 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts, and Rule Nine of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

management of the portfolio, without having to obtain instructions from the client or send any prior communication. Accordingly, the Complaints Service explained to the complainant that the entity was not required to inform the client of the risks of each of the investments made by the manager (R/41/2019 and R/213/2019).

A.4 Subsequent information

A.4.1 Securities

The information requirements of entities that provide investment services do not lapse once the product has been purchased or marketed.

Accordingly, following the processing and execution of a securities purchase order, investors will receive confirmation of the execution with information on the conditions under which it was carried out (amount, date, time and settlement conditions, among other data).

In addition, entities must provide clients with sufficient periodic information for them to be able to monitor the performance of their investments.

Furthermore, for as long as the contractual relationship between both parties exists, firms providing investment services are required to inform their clients of any events that may affect their investments, in their role as depositories or managers of these investments.

All the information that entities must provide to their clients, whether deriving from legislative provisions or contractual obligations or resulting from specific requests from clients, must be clear, comprehensive and appropriate.

➢ Mandatory periodic information on the status of clients' financial instruments or funds

✓ *Frequency and method of delivery of periodic information*

At least every quarter, investment firms that hold clients' financial instruments or funds must send each client for whom it holds financial instruments or funds a statement of these financial instruments or funds in a durable medium, unless this information has already been provided in another periodic statement.[120] Before the entry into force of the MiFID II Directive, Spanish regulations established a minimum annual statement.

Therefore, entities must send their clients information on their financial instruments with the minimum established frequency. However, it may be agreed by the parties that information will be sent more regularly. In this case, the contract for the provision of the custody and administration service for financial instruments

120 Article 63 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

must establish the frequency with which the entity must make available and send information to its clients.[121]

A durable medium is understood as any format that allows the client to store the information personally addressed to him or her so that it may easily be recovered during a period that is appropriate for the purposes of such information and that allows it to be reproduced without changes.

Entities may provide the information on a medium other than paper providing the format is appropriate to the context in which the activity is performed and the person to whom the information must be provided specifically chooses to receive it on a medium other than paper when given the option to choose between paper and this other medium.[122]

Under the MiFID II Directive this periodic statement of the client's assets does not have to be provided if the investment firm offers its clients access to an online system that meets the conditions to allow it to be considered a durable medium, provided that it can give easy access to the updated statements of the client's financial instruments or funds and that the company has proof that the client has accessed this statement at least once during the corresponding quarter.[123]

In case R/267/2019, the complainant stated that he had not received the quarterly statements for some securities the issuer of which was in liquidation. The Complaints Service stated that Spanish regulations do not require these statements to be delivered by certified post or with acknowledgement of receipt. Given that the entity was able to provide the communications sent to the complainant's name and correct address, the Complaints Service considered that they had been sent correctly.

✓ *Content of periodic information*

The content of the periodic information sent to clients must include the following information:[124]

i) Information on all financial instruments or funds held by the investment firm on behalf of the client at the end of the period covered by the statement.

---

121 Article 5 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts, and Rule Seven, Section 1, of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

122 Article 3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, and Article 3.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

123 Article 63.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

124 Article 63.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

ii) The extent to which the client's financial instruments or funds have been used in securities financing transactions.

iii) The amount of any gains accrued in favour of the client from participation in any securities financing transaction, as well as the corresponding accrual basis.

iv) A clear indication of which assets or funds are subject to the rules, and execution measures, of the MiFID II Directive,[125] and which are not, and those that are subject to title transfer financial collateral arrangements.

v) A clear indication of which assets are affected by particularities relating to their ownership, for example due to guarantee rights.

vi) The market value or estimated value (when the market value is not available) of the financial instruments included in the statement, clearly indicating that when there is no market price this may be indicative of a lack of liquidity. The firm must assess the estimated value with the utmost diligence.

Before the entry into force of the MiFID II Directive, Spanish regulations[126] did not expressly cover the last three points (subjection to MiFID II and to financial collateral arrangements, particularities of ownership and market or estimated value). However, in terms of valuation, the Complaints Service considered it to be good practice for the periodic statements of securities accounts that the product be properly identified and its effective or market value stated, or failing that, an estimate of the fair value of the instrument at the reference date for the information be included, so that the client could observe the performance of the product during each period. When providing an estimated value, the entity should indicate that the estimate is for indicative purposes only.

In case R/433/2019, in relation to the information on some shares issued in the United States that had been delisted, the client expressed his disagreement with the disparity between the valuations in the statements sent (zero value) and in an investment application offered on the entity's website (nominal value).

The Complaints Service considered that the zero valuation in the statements was correct according to applicable valuation rules.

Regarding the information in the web application, in which all the client's shares were detailed at market price, except for those that had been delisted, which were valued at their nominal value, the Complaints Service considered that the entity had not adequately informed the client and indicated that the shares should have been valued at fair value or, failing that, there should have been an express warning to the effect that shares that had been delisted were valued at nominal value. In addition, it considered that, as pointed out by the complainant, the sum of the value of all the shares – both those valued at market price and those valued at their nominal value – could cause confusion for users of the web application, since the nominal

125 Directive 2014/65 EU of the European Parliament and of the Council, of 15 May 2014, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

126 Article 70.2 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019.

value did not correspond to the real value of the security. In this specific case, the real value of the shares was zero, while the nominal value was €75,114.

➢ Particularities of binary options and CFDs

On 1 June 2018, the European Securities and Markets Authority (ESMA) published in the *Official Journal of the European Union* product intervention measures on the marketing to retail investors of contracts for differences (CFDs), through Decision (EU) 2018/796,[127] and binary options, through Decision (EU) 2018/795.[128]

The measures, which took into account the cross-border nature of the marketing of binary options and CFDs and the desirability of establishing a harmonised approach at the European level, were applicable to anyone who marketed, distributed or sold these products to retail investors in the European Union and included the following:

– The marketing, distribution or sale of binary options to retail investors was prohibited.

– The following restrictions were established, all of which had to be complied with when trading, distributing or selling CFDs to retail investors:

  i) Retail clients were required to pay the initial margin protection defined in Article 1.d) of Decision (EU) 2018/796. This protection consisted of different percentages of the notional value of the CFD, depending on the type of underlying, and it was intended to limit leverage.

  ii) Retail clients had to be provided with margin close-out protection as defined in Article 1.e) of Decision (EU) 2018/796. If the total margin on an account fell below 50% of the initial margin requirement with respect to the client's open CFDs, the provider had to close out one or more of the CFDs.

  iii) Retail clients had to be provided with negative balance protection as defined in Article 1.f) of Decision (EU) 2018/796. This was the limit of a retail client's aggregate liability for all CFDs connected to a CFD trading account with a CFD provider to the funds in that CFD trading account.

  iv) There was also a ban on incentives to trade.

  v) Finally, the obligation to include a standardised risk warning was also introduced.

The measures were applied from 2 July 2018 for binary options and from 1 August 2018 for CFDs. No additional provisions were required in Spain to ensure their

127 European Securities and Markets Authority Decision (EU) 2018/796, of 22 May 2018, to temporarily restrict contracts for differences in the Union in accordance with Article 40 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council.

128 European Securities and Markets Authority Decision (EU) 2018/795, of 22 May 2018, to temporarily prohibit the marketing, distribution or sale of binary options to retail clients in the Union in accordance with Article 40 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council.

effectiveness, and they were valid for three months, although this period was renewable by ESMA.

ESMA renewed and where appropriate amended the temporary prohibition on binary options on three occasions, through decisions applicable for periods of three months at a time from 2 October 2018,[129] 2 January 2019[130] and 2 April 2019.[131]

ESMA also renewed and amended the temporary restriction on CFDs through three decisions, each of which was applicable for a period of three months, from 1 November 2018,[132] 1 February 2019[133] and 1 May 2019.[134]

In order to provide stability to the decisions made by ESMA, the CNMV considered it appropriate to adopt a resolution that would implement these rules indefinitely in Spain, subject to review if market circumstances were to change. Therefore, the CNMV approved its Resolution of 27 June 2019 on product intervention measures related to binary options and contracts for differences. The resolution came into force the day after the expiry of the last intervention measures established in the ESMA Decisions on binary options and financial contracts for differences. The Spanish measures on binary options entered into force on 2 July 2019 and the measures on financial contracts for differences entered into force on 1 August 2019.

In 2019, the Complaints Service resolved the following complaints regarding the information provided by the entity in relation to ESMA's measures on CFDs:

– Application of ESMA measures to CFD positions of retail clients acquired prior to the entry into force of Decision (EU) 2018/796.

  In regard to this issue, ESMA published a document in which it responded to a question on whether entities should apply the restrictions imposed in the decision to the existing CFD contracts of their retail clients.[135]

  ESMA indicated that in relation to CFDs firms were required to apply the margin close-out protection and the negative balance protection under Articles 1.e) and 1.f) of Decision 2018/796 to new CFD positions when the measures came

---

129 European Securities and Markets Authority Decision (EU) 2018/1466, of 21 September 2018, renewing and amending the temporary prohibition in Decision (EU) 2018/795 on the marketing, distribution or sale of binary options to retail clients.

130 European Securities and Markets Authority Decision (EU) 2018/2064, of 14 December 2018, renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients.

131 European Securities and Markets Authority Decision (EU) 2019/509, of 22 March 2019, renewing the temporary prohibition on the marketing, distribution or sale of binary options to retail clients.

132 European Securities and Markets Authority Decision (EU) 2018/1636, of 23 October 2018, renewing and amending the temporary restriction in Decision (EU) 2018/796 on the marketing, distribution or sale of contracts for differences to retail clients.

133 European Securities and Markets Authority Decision (EU) 2019/155, of 23 January 2019, renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients.

134 European Securities and Markets Authority Decision (EU) 2019/679, of 17 April 2019, renewing the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients.

135 Question 5.1 of the document *Questions and Answers on ESMA's temporary product intervention measures on the marketing, distribution or sale of CFDs and binary options to retail clients* (ESMA35-36-1262).

into effect. Firms could choose to create separate sub-accounts for CFD positions opened prior to the implementation date. Alternatively, firms could choose to extend the margin close-out protection and the negative balance protection to existing CFD positions. Firms were required to inform clients of the changes in the terms and conditions of their account in a durable medium in good time before the changes applied.

Firms exercising their discretion to close retail clients' open CFD and binary option positions, other than in accordance with existing terms and conditions, prior to the measures coming into effect without the express consent of their retail clients would not be considered as acting in the best interests of the client as required under Article 24 of MiFID II.

Retail clients were not required to post additional margin for existing CFD positions to meet the initial margin protection requirement under Article 1.d) and Annex I of Decision 2018/796. Retail clients were only required to provide margin required under Article 1.d) and Annex I for CFD positions entered into after the date of application.

In other words, extending the restrictions applicable to the marketing of CFDs to retail clients to existing contracts opened prior to the entry into force of the new regulations was a decision that firms had to make at their own discretion. However, they had to report the alternative they had chosen and in any case retail clients were not required to post additional margin for existing CFD positions to meet the initial margin protection requirement under Article 1.d) and Annex I of Decision 2018/796.

Based on the above, in one case the entity clearly informed its client that the new ESMA regulations would be applicable, as demonstrated in a document sent to him and in the telephone conversations held with him up until 1 August 2018.

However, the entity did not act correctly, since despite having initially informed the client that the new ESMA regulations would apply to him, in the end it did not apply the protection required under Decision 2018/796 to him. Thus from 1 August 2018, the entity not only denied that the new regulations were applicable to the client – as demonstrated in the recordings of the telephone calls – but also requested additional margin, up to 100% of the nominal value, and blocked the shares that he held in other securities accounts for use as collateral for some foreseeable losses deriving from his CFD positions.

The Complaints Service concluded that the client's CFD positions were subject to the restrictions contained in the ESMA decision, including the negative balance protection that prevented the other positions held by the client in other securities accounts from being blocked and used as collateral (R/623/2018).

– Application of the margin close-out protection established in ESMA measures.

One entity sent a communication to its clients regarding the implementation of the ESMA measures contained in Decision (EU) 2018/796, in which, among other matters, it informed them that the margin close-out protection measure would apply to each position not to each account. Following the entry into force of the ESMA measures, the entity closed out some of its clients' positions because they had consumed more than 50% of the initial margin requirement.

The clients considered that in implementing this measure the entity should have taken into account their global positions in CFDs, not the individual positions, as well as the available balance in the account, before automatically closing out the position.

Although recital 116 of Decision (EU) 2018/796 establishes that "[...] a standardised margin close-out rule per account basis at 50% of the total initial margin protection, as an individual measure to take in addition to the other measures described in this Decision, is more proportionate as a minimum protection to be applied", the Complaints Service considered that this rule did not prevent the entity from applying it to each individual CFD position.

In fact, the following recital (117) establishes that: "The margin close-out protection proposed by ESMA does not prevent a provider from applying a per position close-out rule at 50% of the initial margin requirement of the specific position instead of a per account close-out rule; indeed this could reduce the complexity for retail clients. Furthermore, by applying a per position close-out rule at 50%, the provider inherently fulfils the close-out requirement on a per account basis as all the single positions will be closed in accordance with the 50% close-out rule".

Therefore, the Complaints Service concluded that the entity had acted correctly in the case complained about (R/663/2018 and R/315/2019).

– Non-application of ESMA measures to professional clients.

One complainant expressed his disagreement with the fact that, as he was classified as a professional client, he had not been given the protection established in the ESMA measures for some CFD transactions made in 2018. In this case, the client had waived his right to be treated as a retail client and after his request had been accepted he had been classified as a professional client since the end of 2017.

The entity claimed that it had informed the complainant that he could reapply to change his classification back to that of retail client at any time. Thus, the e-mail confirming that the client's request to be classified as a professional client had been approved also reminded him to inform the entity if anything should happen that might affect his eligibility to be classified as a professional client and also that he should contact the entity if he wished to be reclassified as a retail client.

Furthermore, in two e-mails sent to the client about the contractual changes that would be brought about by the entry into force of the ESMA measures, the entity stated that these applied only to retail clients, and the client had accepted these new contractual conditions.

Therefore, the Complaints Service considered that the client had been correctly informed, that he knew about the terms of the changes to be introduced and that he could have asked to be reclassified as a retail client at any time (R/47/2019).

➢ Information on events that affect securities

Investment firms must act honestly, impartially and professionally, in the best interest of their clients, and observe, in particular, the principles established in the rules of conduct applicable to those who provide investment services.[136]

One of the obligations of these entities is to keep their clients properly informed at all times, ensuring that all information provided is impartial, clear and not misleading.[137] In this regard, among other requirements, any information addressed to retail or professional clients – or potential retail or professional clients – or disseminated in such a way that it is likely to be received by them, including advertising, must be accurate, sufficient and understandable to any average member of the target group and not conceal, cover up or minimise any important point, statement or warning.[138]

Furthermore, the basic obligations of financial instrument administrators or depositories include doing whatever may be necessary to ensure that the instruments maintain their value, as well as exercising all the rights corresponding to them as prescribed by law.

Therefore, entities that provide securities administration or depository services must establish in a contract the details of the main actions involved in the administration of the financial instruments in their custody and how instructions are to be received from their clients where necessary. In particular, the entity's procedure for dealing with a lack of instructions from the clients in connection with any subscription rights that might be generated by the securities in custody must be specified, and this procedure must in all cases be in the best interests of the client.[139]

In this regard, entities must provide their clients, with due diligence and promptness, information on the procedure to be followed in corporate transactions undertaken by companies issuing the shares that they hold and which require specific instructions from shareholders, such as the distribution of shareholder remuneration by the issuer, with the prior option of receiving shares or cash. They must also inform clients of the consequences of the instructions not being received in due time and form by the entity providing the investment service. In any case, entities must act as agreed with the client and always in the client's best interest.

However, in the opinion of the Complaints Service not only corporate transactions requiring precise instructions from the investor should be the subject of prior communication from the depository to the client, but any corporate transaction, insofar as it may affect the rights and interests of the investors, must be properly communicated. Thus the Complaints Service considers that there are other transactions

136 Article 208 of Royal Decree Law 4/2015, of 23 October, approving the Recast Text of the Securities Market Act.

137 Articles 209, 1 and 2 of Royal Legislative Decree 4/2015, of 23 October, approving the Recast Text of the Securities Market Act.

138 Article 44 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

139 Rule Eight of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

that, while not requiring precise instructions from the client, would require a communication from the depository prior to their execution, such as splits or reverse splits for example. The CNMV Complaints Service therefore considers it necessary for the depository to inform its client not only of corporate transactions in which the client's instructions are necessary, but of all corporate transactions agreed by the securities issuers, regardless of whether or not they give rise to a right to choose on the part of the investor.

To comply effectively with all these obligations of information, depositories must adopt measures and procedures to ensure that their clients receive information promptly, especially in cases where instructions on transactions have to be requested. This information must be provided in sufficient time so that investors may, if they so wish, choose the option that best suits their interests. To this end, it is considered good practice for entities to establish a fast communication procedure with their clients, for instance, through online communications or SMS messages.

Corporate transactions in which the provision of information by the entity was the subject of a complaint include:

✓ *Scrip dividends or flexible dividends*

A scrip dividend consists of a company's deciding to remunerate its shareholders by giving them the option of receiving the dividend either in cash or in the form of new shares instead of the traditional payment of a cash dividend. To this end, the issuer's governing body approves a capital increase to be charged to voluntary reserves ("bonus issue") for a maximum nominal amount equivalent to the payment of the ordinary dividend in cash.

A scrip dividend is an example of a transaction that requires precise instructions from the client by a specific deadline, as the depository must inform its clients of the terms and conditions and the options available to them in the context of this transaction. However, Spanish legislation does not require information on this type of transaction to be sent by certified post or with an acknowledgement of receipt and therefore communications by ordinary post or by alternative means agreed between the parties will be sufficient to comply with the legal requirements.

For this reason, bearing in mind the short deadlines granted by issuers to place instructions (particularly for the sale of rights to the issuer) and the importance of investors' having as long as possible to give their instructions, entities must send the communications seeking instructions as soon as they become aware that the issuer has approved the shareholder remuneration programme.

Specifically, it would be appropriate for these communications to be sent in time for shareholders to receive them before the first trading day of the subscription rights. In the case of communications sent electronically, this would be, in any event, prior to the opening of the session on the first trading day of the preemptive rights.

For this purpose, the Complaints Service considers that the reasonable course of action is for entities to have procedures in place which, as far as possible, automate the immediate dispatch of these communications to all clients affected by the transaction in question and which, furthermore, allow them to choose to receive them by fast communication channels, such as e-mail.

Regarding the content of the communication, once the issuer of the shares has implemented the transaction, the depositories must inform shareholders of the type of transaction (bonus issue), the rights that correspond to it, the options and terms for exercising them, the measures that the entity will adopt if they do not issue instructions and the fees and expenses applicable depending on the option chosen.

Options available to shareholders may include:

i) Accepting the capital increase and hence subscribing to the new shares.

ii) Selling their subscription rights[140] on the secondary market.

iii) Selling their subscription rights to the company at a fixed price.[141]

iv) Combining the above options.

Clients must issue instructions to proceed with their chosen option, sending these instructions to their intermediary in due time and form, for the order to be executed.

However, if the instructions include a sell limit order for the rights on the secondary market, shareholders must be aware that they run the risk of the sell order's not being executed if the listed price of the rights does not reach the limit price for the sale, unless other operational guidelines are established by the entity and communicated to the client in due time and form. On other occasions it may not be possible to sell the rights due to market reasons.

Further, it is possible that the rights may expire and be left with no value following the trading period.

It is therefore advisable for entities to include warnings or provisos in communications sent to shareholders regarding the sale of rights, emphasising the risks involved in the transaction. These warnings may take the form of phrases such as "providing market circumstances so permit".

It is also important to note that clients commonly have more rights than necessary to subscribe a whole number of shares. These rights are called "surplus rights", and they can either be sold on the market or more rights can be acquired until a sufficient number has been obtained to subscribe one or more shares.

When shareholders issue instructions to purchase more rights, they must issue specific instructions to the intermediary as to what is to be done with them (subscribe to more shares, sell them before the trading period ends, etc.), otherwise there is a risk of the entity's doing nothing and the investment's being lost due to the rights expiring. However, rights acquired in this manner may in no circumstances be sold to the issuer.

---

140 The subscription rights that arise in a bonus issue are called "free allotment rights". Article 30.6.2 of Royal Legislative Decree 1/2010, of 2 July, approving the Recast Text of the Corporate Enterprises Act.

141 The commitment to purchase rights will apply only to rights received by persons who are shareholders on the reference date and are recorded as shareholders in Iberclear's registers, not to those acquired on the market.

The same applies to investors who were not previously shareholders who acquire the capital increase rights on the market.

In any event, it is advisable for investors to pay attention to the clear and specific information that must be provided by their intermediary about the possible consequences depending on their instructions.

Lastly, it should be noted that the communications sent by the intermediary must inform clients of the consequences of its not receiving instructions from them by the deadline established for the purpose. In general, in these types of capital increases, the instructions are to subscribe to the shares allotted and sell any surplus rights on the market.

It is considered good practice for entities to warn their clients that their surplus rights will not be sold in the market in cases where the amount obtained from the sale is less than the cost of the transaction, unless otherwise instructed.

In case R/628/2018, the complainant stated that she was unaware of the electronic communication relating to a flexible dividend programme because the counter on the electronic communications mailbox on the entity's website had been at 0 for an indefinite period of time, instead of showing the real number of unread communications.

The complainant provided a copy of a screenshot of the correspondence section of the website, showing "Online correspondence (0)" and of the "Summary of your online documentation", which showed "0 communications since your last visit". The Complaints Service considered that the entity had acted correctly, since the communications section of its website clearly and explicitly indicated that the number of pending communications corresponded to new communications that had been received since the client last connected to the site. Therefore, contrary to the complainant's argument, the notice did not refer to correspondence that had not been read, regardless of the date of receipt.

In case R/81/2019, the flexible dividend calendar showed that the trading period for subscription rights would begin on 22 December 2018 and end on 9 January 2019. The end date of the period for requesting to sell rights to the company was 31 December 2018.

The complainant claimed to have received the communication concerning the flexible dividend by post when the period for selling rights to the company had already expired. Since he could not sell the rights to the company, as he would have wished, the complainant opted to sell them in the market, as a result of which he obtained a lower amount.

However, the entity acted correctly and provided the communication generated prior to the start of the trading period and sent to the postal address that appeared in its databases, which had been provided by the complainant as a correspondence address.

In case R/197/2019, the Complaints Service considered that the entity acted correctly by sending a statement concerning the flexible dividend along with the request for instructions prior to the start date for trading the subscription rights. In contrast, the entity acted incorrectly in other previous flexible dividend communications where the send date contained therein was later than the first trading day of the subscription rights.

✓ *Capital increase at par or above par (with share premium or called-up capital)*

This is another kind of corporate transaction requiring entities to ask their clients for instructions on how to proceed, after which they have a specific deadline by which they must carry out their instructions. In capital increases referred to as "at par" or "above par", shareholders have to pay the nominal amount of the shares (at par) or the nominal amount plus a premium (above par) to subscribe to the new shares issued.

The client's instructions are aimed at informing the entity about how it should proceed with regard to any rights that may correspond to them. For this purpose, entities must previously request precise instructions from their clients about what to do with the rights. As indicated above, Spanish legislation does not require this communication to be sent by certified post or with an acknowledgement of receipt and therefore communications sent by ordinary post or by alternative means agreed between the parties will be sufficient to comply with the legal requirements.

The CNMV Complaints Service considers it good practice in capital increases for the entity to provide information to its clients prior to the start of business on the first trading day of the preemptive rights and in any case sufficiently in advance for shareholders to be able to issue orders on their rights, if they so wish, from the start of business on that day.

Specifically, it is appropriate for these communications (both written and sent using remote means) to be delivered sufficiently in advance so that shareholders receive the information before the first trading day of the subscription rights and, in the case of communications sent using remote means, before the start of business on the first trading day of the preemptive rights.

For this purpose, the Complaints Service considers that the reasonable course of action is for entities to have procedures in place which, as far as possible, automate the immediate dispatch of these communications to all clients affected by the transaction in question and which, furthermore, allow them to choose to receive these kinds of communications through fast communication channels, such as e-mail.

As for the content of the communication, it must inform the client about the following:

– The different options available to the shareholder for giving instructions in this regard.

– The deadline for participating in the capital increase and the time until which, as the case may be, they may give instructions to the entity – the deadline for giving instructions is usually one or two days earlier than the deadline for the capital increase.

– How the entity will act in the absence of instructions from the shareholder by the established deadline.

– Other relevant issues, such as the existence of an allocation period for surplus shares or an over-subscription period, the conditions in which said period would become effective and the circumstances in which the shareholders would be able to participate.

As previously mentioned, if shareholders' instructions include a sell limit order for their rights on the secondary market, they must be aware that they run the risk of the sell order's not being executed if the listed price of the rights does not reach the limit price, unless other operational guidelines are established by the entity and communicated to the client in due time and form. On other occasions the rights may not be sold for market reasons.

Further, it is possible that the rights may expire and be left with no value following the trading period.

It is therefore advisable for entities to include warnings or provisos in the communications sent to the shareholders, essentially with regard to the sale of rights, emphasising the risks involved in the transaction. Such warnings or provisos may take the form of phrases such as "providing market circumstances so permit".

It is also important to note that clients commonly have more rights than necessary to subscribe a whole number of shares. These rights are called "surplus rights", and they can either be sold or more rights can be acquired in the market until a sufficient number has been obtained to subscribe one or more shares.

When shareholders issue instructions to purchase more rights, they must issue specific instructions to the intermediary as to what is to be done with them (subscribe to more shares, sell them before the trading period ends, etc.), otherwise there is a risk that the rights might expire and the investment could be lost.

The same applies to investors who were not previously shareholders who acquire the capital increase rights on the market. In these cases, the entity must provide evidence that, at the time the investor acquired the rights on the market, it had informed the client about how the entity would proceed if it did not receive express instructions on what to do with them. This warning can be included in the purchase order for the rights.

In general, in the case of capital increases with called-up capital, if a shareholder receives preemptive rights for shares deposited with the entity and, once informed of the conditions of their exercise, does not give instructions before the deadline, the entity must act as agreed in the securities deposit and administration contract and always in the client's best interests.

In this regard, and unless otherwise agreed in the contract, it is considered good practice that, in the absence of instructions from the client, the entity should unilaterally order the sale of the preemptive rights before the end of the trading period, since once this period has ended, the value of the rights from a financial, legal and corporate point of view disappears completely and it is therefore considered that this action would be in the shareholder's best interests.

Similarly, it is considered good practice for the entity to warn its clients that their surplus rights will not be sold on the market – unless an order to the contrary is received – in the event that the amount that may be obtained from the sale of the rights on the market is lower than the cost of the transaction.

In case R/406/2019, the complainant said that he had not received the information about a capital increase with preemptive rights with a monetary contribution. Specifically, he complained that he had intended to participate in the capital increase, but because he had not been informed in time, the entity had sold his rights.

The entity provided a copy of the notice of capital increase – addressed to the complainant – and the postal address to which it was sent, which was the same as the correspondence address appearing in the letter of complaint. In the notice, the client was provided detailed information about the capital increase and warned that if he failed to return the duly completed and signed notice containing his instructions to the branch before a certain date, it would be understood that he wanted to sell the rights.

Consequently, the Complaints Service considered that the entity had acted correctly by sending the notice of capital increase to the client's address and on not receiving any instructions selling the rights by the deadline established.

✓ *Calls for shareholders' meetings*

Securities administration or depository service contracts must establish the details of the main actions involved in the administration of the financial instruments in entities' custody and how any instructions that might be necessary are to be received from their clients.

In relation to the obligation to issue notice of shareholders' meetings, one complainant, who was the holder of some shares deposited with the entity, complained that he had not been sent a card for the delegation of voting powers for a general shareholders' meeting. In this case, the entity had contractually undertaken to send out communications of "financial events", most notably attendance bonuses and calls for general meetings. Therefore, the client should have received detailed information prior to the meeting.

In view of the documentation submitted, the Complaints Service considered that the entity had not fulfilled its duties as depository of the client's shares, since it could not prove that it had supplied information on the calling of the shareholders' meeting before it was held. However, the Complaints Service also pointed out that once the client had made a complaint the entity's staff offered him information on how to proceed to delegate his voting powers on the issuer's website and that the CS had taken the necessary timely measures to provide him with information about upcoming corporate events (R/367/2019).

In regard to how to delegate voting powers, one complainant stated that his branch had failed to deal with his request to delegate his vote and, in addition, had provided him with incorrect information, since it first indicated that these procedures could be performed using the entity's app but later told him that the only way to delegate a vote was to physically hand in the signed card delegating voting powers at the branch.

The communication sent out by the entity informed the client of the expected dates for the call of the general meeting. Specifically, it established that if he wished to attend he would have to exchange the enclosed delegation of voting powers form for an attendance card sufficiently in advance of the meeting at the branch where his shares were deposited, and if he was unable to attend in person and wished to be represented by someone else, he should fill out and sign the enclosed form for the delegation of voting powers.

The client contacted the branch that had issued the communication by e-mail, which he submitted to the proceedings. In these e-mails he stated that his local

branch had refused to process his delegation of attendance at the general meeting and requested information on how to delegate his vote through the application. The branch office provided him with a link to download the application, but did not indicate the section where he could delegate his attendance at the general meeting or inform him that this was not the appropriate channel for delegating his voting powers. The client then contacted the entity by telephone, and the entity informed him that he had to deliver the signed delegation form to the branch in person and that it could not be done through electronic banking. After this telephone conversation, the client informed the branch that there was no section on the website or the application where the requested procedure could be carried out.

The Complaints Service concluded that the client had not been adequately informed of the reason why he could not deliver his request to delegate voting powers at the general shareholders' meeting when he went to his local branch or of whether his vote could be delegated through channels other than the branch when consulted by e-mail (R/411/2019).

✓ *Takeover bids*

The basic obligations of financial instrument administrators or depositories include doing whatever may be necessary to ensure that the instruments maintain their value and the rights corresponding to them as prescribed by law. Securities depositories must inform their clients of all corporate transactions that require their instructions in order to act.

In takeover bids, as in capital increases, entities must provide their clients, with due diligence and speed, information on the procedures they must follow to issue instructions.

In case R/272/2019, the depository sent clients a communication regarding a takeover bid that mistakenly stated a different price to that contained in the prospectus – an error which it acknowledged. Therefore, even though the prospectus was submitted, the Complaints Service considered that the entity had acted incorrectly in regard to the information provided to the complainant about the transaction in question.

In case R/456/2019, the clients complained that they had not received any communications about a takeover bid, although the entity submitted copies of the successive information notices addressed to their attention and to their postal addresses, in which they were informed of the main points and conditions:

- One notice when the takeover was announced, telling them about the options available (consideration, exchange or a combination of the two), the terms and conditions, acceptance period, etc.

- Another later notice informing them that a competing bid had been presented, as well as the various options available and the term for exercising them.

- A subsequent notice informing them of changes in the characteristics of the takeover bid, since the rival bidder had withdrawn and the original bidder had eliminated the share exchange option, granting a new acceptance period.

– The final notice stated that, following the successful takeover bid, the shares had been de-listed after the bidder had formulated a sustained buy order for the shares up until a specified date.

Consequently, the Complaints Service considered that the respondent entity had demonstrated that it had sent the clients the appropriate communications relating to the takeover bid for the purpose of obtaining their instructions, although it was not established that any instructions had been formulated.

✓ *Securities buyback offers*

In some cases, an odder is made to buy back certain securities from holders on condition that they use the proceeds to acquire other securities (for example, shares or convertible bonds).

Case R/66/2019 concerned an offer to exchange preferred shares for shares that would be delivered at different times and which was subject to compliance with certain requirements. The complainant maintained that the last instalment had not been made and that the terms agreed in the offer had been breached.

The entity provided the communication sent to the complainant, informing him of the possibility of a voluntary cash buy back of his preferred shares for an amount equivalent to 102% of their nominal value, using the cash obtained for the simultaneous purchase or subscription of other shares. The communication indicated the acceptance period for the offer and the payment periods corresponding to the buyback price:

– A first cash payment for the buyback of all the preferred shares for an amount equivalent to 90% of their nominal value, which would foreseeably be made on 4 January 2012 and be used to simultaneously acquire shares in the entity.

– The remaining 12% of the repurchase price would be paid in cash in the second half of December 2012 and would also be used immediately to acquire shares. In this case, one of the requirements was the client's uninterrupted ownership of all the shares acquired with the cash portion of the initial payment.

The complainant accepted the buyback offer during the period established for that purpose, as stated in the signed copy of the acceptance document and the offer summary provided by the entity. The complainant also met the requirement for uninterrupted ownership of all the shares acquired with the cash portion of the initial payment.

The entity was deemed to have acted correctly since it proved that, in line with the contractual conditions, both the initial payment (90% of the nominal value) and the deferred conditional payment (12% of the remaining repurchase price) were paid in cash on the scheduled dates and these amounts were immediately used to acquire shares.

Case R/253/2019 dealt with an offer to exchange subordinated bonds for shares and bonds convertible into shares. Even though the complainant indicated that she had not received any information on the subject, the entity was considered to have acted correctly, since it proved that it had informed the complainant and provided a copy of a communication addressed to her and dated the same day as the price-sensitive

information was published. The communication stated that the CNMV had approved a prospectus for a public offering aimed at holders of subordinated debt and explained the possibilities available to them, the acceptance period for the offer and where they could consult the prospectus.

In case R/191/2019, a company that had been delisted suggested the possibility of selling its shares to clients through a sale/purchase agreement. The depository of the shares informed the client of this possibility and explained that if he was interested he should go to the branch to ask for a sale/purchase agreement and find out how to proceed with the transaction.

The entity acknowledged that the complainant had come to its branch and stated that once the required details had been completed, he had been informed of the steps that needed to be followed to sell the shares, which included the complainant's sending the completed document to the e-mail address provided for this purpose. However, the complainant stated that he considered that his sell order had already been submitted and that he was unaware that he, as a shareholder, had to send the request directly to the delisted company.

The Complaints Service resolved that this obligation did not appear in the documentation provided and that the entity had not demonstrated that it had informed the complainant that he should send the document with the instructions completed at the branch to the postal address or e-mail address of the delisted company (the e-mail address was not provided either, or at least there was no record of it). Therefore, this lack of information was considered to constitute bad practice by the entity.

Hearing no news, the client subsequently returned to complete another order at the branch, although the entity did not inform him that the deadline for requesting the buy-back of the shares had already passed. The Complaints Service also considered this omission of information to be bad practice by the entity.

✓ *Changes in characteristics of the issue*

The characteristics of an issue can be modified according to the procedure established for this purpose. Complaints were received in relation to the information provided by the entity regarding such changes.

In case R/3/2019, the complainant accepted a repurchase offer in which some subordinated bonds were exchanged for shares and for subordinated bonds mandatorily convertible into shares. He also signed a commitment to a loyalty programme offered in relation to the new products subscribed following the exchange. This programme gave several advantages to clients if they kept their allotted shares until a certain date and the subordinated bonds mandatorily convertible into shares until the corresponding final conversion date.

The complainant held the convertible subordinated bonds until maturity and was dissatisfied with the conversion price applied. He argued that a minimum limit of €0.68 had been applied, when the issue summary delivered alongside the subscription and repurchase order established a minimum limit of €0.50.

The document delivered mentioned that the issue prospectus was a summary and the client stated that he had been informed that the securities note and the issuer

registration document were available to him, and had been filed in the CNMV register. The anti-dilution clause in the securities note established when the minimum and maximum conversion prices should be modified and the rules for making the corresponding adjustments. In addition, the loyalty document signed by the complainant provided information on possible price changes and adjustments.

The issuer of the securities also published a price-sensitive information notice on the CNMV website stating that due to the capital increase carried out by the company it had been necessary to make adjustments to the mandatorily convertible subordinated bonds, which affected, among other aspects, the stipulated minimum price, bringing it to €0.68 per share.

The respondent entity, which was issuer and depository of the securities, provided numerous communications that had supposedly been sent to the client. However, it did not prove that it had informed the client in a personalised manner through a significant event notice of the change in the limit prices, even though the CNMV Complaints Service had requested this. Therefore, it was concluded that the entity had not followed good practice.

✓ *Redemption of securities*

Some debt issues include in their prospectus the possibility that they will be redeemed early by the issuer from a certain date and with prior authorisation from the corresponding supervisory bodies where necessary. Therefore, according to the provisions of the issue prospectus, the issuer of the securities may sometimes exercise their right of early redemption. The market must be informed of this in the form of a price-sensitive information disclosure. The securities depository should notify its holders of all redemptions of issues of which it is aware, and entities are obliged to suitably inform their clients.[142] This obligation is often included in the securities custody contract. Some entities provided evidence that they had issued such a communication through letters addressed to the complainants, which provided information on the conditions and dates of the early redemptions (R/604/2018).

Shares can also be redeemed as a result of the agreed liquidation and dissolution of the issuing company. In one case, the complainant had transferred shares from one entity to another and complained that the second entity had not informed him about the call of the general shareholders' meeting in which the liquidation and dissolution of the company had been agreed. The Complaints Service considered that since the recipient entity was not the depository of the securities on the date the call for the general shareholders' meeting was announced, the entity was not obliged to provide the client with this information. In any case it was indicated that the issuer had complied with the requirements established in the Corporate Enterprises Act regarding the publication of the corresponding announcement in the *Official Gazette of the Companies Registry* and in a national newspaper (R/171/2019).

In relation to some securities issued in the United States which were amortised following the liquidation of the issuer, the complainant stated that the periodic statements did not reflect a merger and an acquisition that had occurred eight and six

142 Article 209 of Royal Decree Law 4/2015, of 23 October, approving the Recast Text of the Securities Market Act.

years earlier respectively, and that the last liquidation event had not been filed with the US Securities and Exchange Commission (SEC) and did not appear in any company communications. The respondent entity said that the shares had been transferred from another entity and that there had been no corporate events involving them until they were amortised.

The Complaints Service considered that the respondent entity had acted correctly. In relation to the information in the statements, the Complaints Service considered that it was the source entity that had the responsibility of informing the client of the corporate events involving the security prior to the transfer date, not the recipient entity. In relation to the liquidation of the company, the Complaints Service indicated that it would be good practice for the depository to inform shareholders of these types of transactions before they are executed, so that they are aware of the details of the transaction to be carried out. However, since they were not listed on Spanish stock markets, the Complaints Service had no knowledge of whether the issuer had published any price-sensitive information relating to the event in question between the date on which the respondent entity received the transfer of the securities and the date of the mandatory event (R/304/2019).

✓ *Resolutions of the FROB (the Spanish Executive Resolution Authority) that affect securities*

The shares of Banco Popular Español, S.A. were cancelled in full as a result of FROB Resolution of 7 June 2017[143] executing a decision adopted by the Single Resolution Board (SRB).[144] The price-sensitive information disclosures released on 7 June 2017 announced the precautionary suspension from trading of the shares of Banco Popular Español, S.A. and group companies[145] and the acquisition by Banco Santander, S.A. of 100% of the share capital of Banco Popular Español, S.A.[146]

In case R/130/2019, regarding the information on these events provided to the securities holders, the entity acted correctly, since supporting documentation was provided to show that it had sent the information to the clients on time.

In case R/273/2019, the complainant acquired shares of Banco Popular Español, S.A. on 5 June 2017 via the telephone channel of one of the entities involved in the aforementioned transaction. The complainant stated that the department of the entity that attended telephone orders should have been aware of the real situation of Banco

143 Resolution of 7 June 2017 of the Governing Committee of the FROB (Fund for Orderly Bank Restructuring, the Spanish Executive Resolution Authority), adopting the measures required to implement the decision of the Single Resolution Board in its Extended Executive Session of 7 June 2017 adopting the resolution scheme for Banco Popular Español, S.A. in accordance with the provisions of Article 29 of Regulation (EU) No. 806/2014 of the European Parliament and of the Council, of 15 July 2014, establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010.

144 The SRB is the European Union resolution authority. It is a key element of the banking union and its single resolution mechanism. Its mission is to ensure the orderly resolution of banks in crisis with the least possible impact on the real economy and public finances of EU member countries and third parties.

145 Price-sensitive information disclosure No. 252989.

146 Price-sensitive information disclosure No. 252992.

Popular and of the acquisition being prepared by Banco Santander, and that it was not correct for this information to be hidden or withheld from the ordering parties.

The Complaints Service explained that the information provided by the FROB to potential buyers about the resolved entity was of extreme significance to the securities markets and strictly confidential and therefore had to be treated as inside information. In accordance security market regulations that established how this type of information was to be managed, the departments that were not directly involved in preparing the binding offer presented for the acquisition of Banco Popular Español, S.A. could not have had access to any information related to the subject, particularly the market research. Consequently, the Complaints Service considered that the lack of knowledge of such information by the department attending the telephone lines at the time the order was placed was merely a reflection of the fact that the "Chinese walls" had worked properly.

✓ *Restructuring processes*

In their role as custodian and administrator of the securities, entities must report any relevant circumstances that could affect their clients' investments, including the options available to them to protect their rights vis-à-vis the issuer in question.

In an offer for the exchange of bonds for shares agreed after the organisational and debt restructuring of the Codere group, the complainant lost all of his investment, as his request to take part in the offer contained an error of form. The request submitted by the complainant to the entity, which the latter sent on to the coordinating agent, did not contain the signature of a witness or the identifier information of this witness. In this case, the depository of the securities acted incorrectly, as follows:

– Delay in sending the communication with information about the corporate event. The entity sent the communication just a few days before the deadline for qualifying for the exchange expired, whereas the period offered to bondholders for the exercise of their rights had started 11 months previously. Therefore, the complainant did not have sufficient time to correct any errors of form in his request or remedy any other incident that may have occurred.

– Failure to demonstrate verification, or otherwise communication, of the formal requirements that the exchange request had to meet. Here, the entity did not prove that it had verified, once the request had been received and before it was sent to the coordinating agent, that it did not comply with the formal requirements or, failing that, that it had informed the client, at the time the documentation was submitted for his signature, that the witness information needed to be completed.

– Failure to inform about the total loss of the investment. Immediately on becoming aware of the incident that had occurred in the bond exchange, the entity should have contacted the complainant to provide detailed, impartial and clear information about what had happened with his investment. However, the entity not only failed to contact the complainant to inform him of the consequences of not having completed the request correctly, namely the total loss of his investment, but also continued to include the bond in his statement of positions valued at its nominal price, as if nothing had happened (R/612/2018).

✓ *Information on the unilateral closing of positions or accounts by the entity*

The unilateral closure of positions or accounts by the entity has given rise to disputes in the field of financial contracts for differences and securities accounts opened with the entity, as described below.

– Financial contracts for differences.

To contract CFDs margins must be provided. If these margins were to prove insufficient, the client would have to make additional contributions or close positions and failure to do so could allow the entity to directly close the positions on behalf of the client.

The CNMV Complaints Service considers that clients must be made aware of the reasons that would allow the entity to legally act in this way before they undertake the investment.

In addition, without prejudice to the entities' right to unilaterally close a client position when this is reflected in the terms and conditions agreed by the parties, the Complaints Service considers that the entity must be able to demonstrate that it has clearly informed the client, prior to the closure of the position, to give them the opportunity to contribute more funds or to adopt measures that would prevent the unilateral closure of their positions.

Insofar as the terms and conditions laid down in the contract signed with the client can be executed at the entity's discretion (which is usually the case), if a decision is taken to close a position, the client must be informed in advance. This is because the contractual document signed by the parties would make the client aware that the entity could close out the positions if the client failed to provide the required margin, but the client would not know whether or not the entity intended to exercise this power or if so when the position would be closed out.

As noted in previous sections on financial contracts for differences, the product intervention measures approved by the CNMV in its Resolution of 27 June 2019 should also be considered. In accordance with Articles 3 e) and 4 b), of this resolution, the marketing, distribution or sale of CFDs to retail clients must meet certain requirements. Specifically, the CFD provider must provide the retail client with margin close-out protection, which implies the closure of one or more of the client's open CFD positions in the most advantageous conditions for the client, when the sum of the funds in the CFD trading account and the unrealised net gains on all open CFD positions associated with that account fall below 50% of the initial margin provided for all open CFD positions.

The resolution also indicates that the CNMV considers it good practice for entities to establish a proper policy for calculating additional margins, so that investors can be warned before the threshold of 50% of the initial margin is reached, establishing the obligation to close the position and can, therefore, provide additional margins or where appropriate close the position before this threshold is reached.

Based on the above, the entity acted correctly in case R/567/2018. In this case, the entity confirmed that it had informed the client by e-mail of the margin call before the close-out of his CFD positions. The contract submitted to the

proceedings mentioned e-mail as one of the channels that the entity could use to inform its clients of such a requirement.

However, the entity acted incorrectly in case R/450/2019. In this case, the complainant was in disagreement with the blocking of his open short position in CFDs on an issuer that had been the subject of a takeover bid. The complainant stated that he had opened a short position and that, once it had been executed, he had placed a buy limit order in order to close his position. However, the next day his order disappeared and his position was blocked, which forced him to take part in the bid at the price set using part of his position.

The Complaints Service considered that according to the provisions of the contract, in the event of a takeover bid, the entity reserved the right to cancel orders and close positions at any time, subject to prior notice. In view of the documentation provided, the entity acted in accordance with the conditions of the contract and having given notice, closed the complainant's position in line with the outcome of the takeover bid.

However, the entity was at fault in that it did not alert the complainant to the fact that a trading deadline had been set by the primary broker for CFD positions as a result of the bid. As soon as the primary broker informed the entity of the CFD trading deadline, the entity should have alerted its clients to the fact that once that deadline had passed it was highly likely that their short positions would be blocked as a result of the takeover bid.

Moreover, in general terms, the Complaints Service considered that, once a takeover bid has been accepted, warnings should be issued that trading in CFDs on the instrument in question may be affected, in order to prevent situations such as those described in this complaint.

– Securities deposit and administration contracts.

The entity also has the obligation to provide prior information when it decides to exercise its power to definitively terminate the standard contract linking it with the client, although the following points would also be taken into consideration.

The specific clauses relating to the amendment and termination of the contract by the parties must be established in a clear, concise manner that is easily understood by retail investors in the standard contract formalised between the investor and the entity before the service for the custody and administration of financial instruments or portfolio management is provided.[147] In particular, the prior notice that entities are required to give their clients in the event that they decide to exercise this power must not be less than one month, unless the termination is due to the non-payment of fees, client credit risk, failure to comply with the regulations governing money laundering or market abuse, in which cases it may be carried out with immediate effect.[148]

147 Article 5.2 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

148 Rule Seven, Section 1, letter f), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

In relation to cancellation of contracts, the entity's actions were correct in the following cases:

– One entity informed a client that it would cancel his standard securities administration and custody contracts, which had been inactive for four years, with no securities and no balance, if within one month of the date of notification he did not contact the branch to sign a new contract in line with the legal requirements following the reform of the stock market and under the MiFID II Directive.

  Although the complainants sent letters to the branch asking for their contractual relationships to be maintained, there was no record of their having gone there to sign the new standard contracts adapted to the MiFID II Directive, which was a necessary condition for the contractual relationships' being maintained. Consequently, the entity cancelled the contracts two months and ten days after the notification date (R/601/2018).

– The entity requested from the complainant company documentation required under the regulations for the prevention of money laundering and financing of terrorism. One month after the request, the entity informed the complainant company of its decision to resolve their relationship early, indicating that it should issue the necessary instructions to transfer the cash and securities deposited with it.

  Three weeks later, the entity was informed of an attachment order from the Social Security authority for the securities account of the complainant company. One month after that, the entity received the order to execute or sell the attached assets, and accordingly issued an order to sell the securities, subsequently ordering the transfer of the sale proceeds to the current account indicated by the General Social Security Fund.

  The Complaints Service considered that the entity had acted correctly. In regard to providing notification of the termination of the securities deposit and administration contract, although the client claimed to have given instructions to the entity to transfer its assets, no supporting documents were provided to uphold these claims. In regard to handling the attachment and execution order, it stated that entities that provide investment services must carry out attachment orders within a stipulated time frame and, in addition, in this case the proceedings indicated that recovery orders for the debt had been issued and had proven fruitless (R/482/2019).

➢ Response to requests for documentation

It is common practice for complainants to request from the entity and subsequently from its CS documentation related to orders, contracts, appropriateness and suitability tests, etc.

Investment firms must keep a record of all the services, activities and operations that they carry out. This record must be sufficient to allow the CNMV to perform its supervisory functions, apply the appropriate executive measures and, in particular, be able to determine whether the investment firm has fulfilled all its obligations, including those relating to its clients or potential clients and the integrity of the

market. This record must include recordings of telephone conversations or electronic communications related to the investment firm's activities.[149]

– Contract register.

  The contract or contracts setting out the agreements between the company and the client, which must specify the rights and obligations of the parties and other conditions regulating the provision of the investment services by the entity to the client must be kept. The record must be retained for the duration of the contractual relationship between the parties and a further five years after it ends.

– Order register.

  Orders received from clients must be kept for a minimum of five years. The record must have the minimum content established in the corresponding regulations.[150]

– Confirmation log.

  This record must include information on the content of confirmations of transactions made by the entity on behalf of the client that are not related to portfolio management. This information must be kept for a period of five years from the date the confirmation is sent to the client.

– Client register.

  The entity must keep the following information about its clients:

  - Identification data for each client, with the client's classification and, if applicable, any revisions or reclassifications. Any client classifications of interest to the entity may be included.

  - Documents supporting the classification, revision or reclassification of the client.

  - Requests from clients to be classified in a different category from their original classification and any other necessary information.

  The obligation to keep the information starts on the date the relationship with the client begins, or on the reclassification or renewal date as the case may be, and ends five years after the end of the relationship.

  In addition, the client record must contain an up-to-date record of all clients assessed and non-appropriate products, reflecting for each client the products that have previously been assessed as non-appropriate, identifying the date

149 Article 194 of Royal Decree Law 4/2015, of 23 October, approving the Recast Text of the Securities Market Act.

150 Article 74 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

from which the entity considered each type of product non-appropriate for each specific customer. If applicable, the date on which the product ceased to be considered non-appropriate will also be recorded.[151]

– Appropriateness and suitability assessment register.

  In relation to the investment profile of each client, entities must keep a record of the information or documents used for the purpose of assessing the appropriateness or suitability of a specific product or service for the client, as well as any warnings made within the scope of the appropriateness analysis. This documentation must be retained for five years after the assessment.

  Under the MiFID II Directive, records must be kept not only of the assessments made and warnings issued on non-appropriateness or a lack of information, but also of: i) whether the client asked to proceed with a transaction despite the warning and if so ii) whether the entity accepted the client's request to proceed with the transaction.[152] In principle, it is considered that if the client issues an order and the entity processes this order, these two procedures have been duly recorded.[153]

– Register of periodic statements.

  Information on the content of statements sent to clients must be kept for five years after the send date.

It is important to highlight that requests for information should be addressed mainly to the office or branch of the entity that provided the investment service from which the obligation to keep the documentation derives, since this is where the requested information should be kept. However, if the office or branch does not properly respond to these requests, the client should file a complaint with the entity's CS stating that his or her request for information has not been attended to.

✓ *Requests where the entity had to keep the documentation*

Client requests for documentation submitted to financial institutions must be duly attended to. Therefore, entities must provide the client with any requested documents for which the corresponding retention period has not elapsed.

Additionally, entities must not destroy the supporting documents for any transactions in respect of which the client has expressed disagreement before the end of the minimum retention period (or, if the disagreement was raised after the end of the minimum period, the documentation of which has not yet been destroyed), until the disagreement has been resolved.

---

151 Rule Five of CNMV Circular 3/2013, of 12 June, on the implementation of certain information obligations relating to the financial instrument appropriateness and suitability test for clients of investment services.

152 Article 56.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

153 Question 16.2 of the CNMV document *Q&A on the application of the MiFID II Directive.*

Some entities acted correctly and provided the documentation that they were obliged to keep when so requested by the client (R/581/2018, R/78/2019 and R/197/2019). However, in other cases, although the entity was obliged to retain the documentation requested by the complainant, the following incidents occurred in the provision of this information:

– Entities took too long to respond to requests, e.g. almost one year after receiving the client's request (R/516/2018) or almost four months afterwards (R/588/2018).

– Entities did not provide the information and documents requested by the complainant either when the request was addressed to the entity directly or during the complaint proceedings filed with the Complaints Service. In these cases, it was considered that the entity had acted incorrectly and had failed to comply with its obligation to inform the client or retain the documentation (R/601/2018, R/270/2019, R/328/2019 and R/359/2019).

– The information was not delivered when the complainant first complained to the entity's CS, although it was provided once the complaint proceedings had been initiated with the Complaints Service. These complaints are discussed in the section "Complaints Service criteria", "Operation of entities' CS".

– The entity did not provide the part of the documentation requested by the client that it was obliged to keep, even though the request also referred to other documentation for which the retention period had elapsed.

  This was the case in some complaints in which clients requested documentation related to the acquisition of securities. The entities did not have the obligation to provide part of the requested information because more than five years had elapsed since the product had been contracted, but other parts of the information did have to be provided, such as the securities custody and administration contract, since the contractual relationship between the parties was still in place or had ended in the five years prior to the request for documentation. Consequently, the entities acted incorrectly in not providing their clients with this last-named documentation that they were indeed obliged to keep (R/570/2018, R/662/2018, R/163/2019 and R/390/2019).

  In case R/434/2018, the client requested documentation corresponding to the acquisition, performance, amortisation and settlement of some securities that had been amortised in the previous year. The entity's CS completely dismissed the request, arguing that the documentation retention period had elapsed. Although the CS responded correctly with respect to the documents referred to at the time the securities were subscribed, for which the mandatory retention period had expired, its response was incomplete as it ignored the request for more recent documents. Consequently, the entity was at fault in not responding correctly to the request for information relating to the last five years on the performance, amortisation and settlement of the securities. Furthermore, the entity did not provide the periodic information sent to the complainant in the last five years and the specific communications on price-sensitive information relating to the amortisation of the securities which the Complaints Service requested during the processing of the complaint.

  In case R/227/2019, the entity did not have the obligation to keep part of the documentation, as these were documents it was not required to retain. However,

it acted incorrectly in not responding to the request for information for tax purposes and the securities account statement as these documents and details should have been retained for the last five years.

✓ *Requests where the entity did not have to keep the documentation*

There are limits to the right to be informed and to obtain documentation. One of these is the time limit, which means that the entity is not required to provide information beyond the retention period laid down by the law. Therefore, when the documentation is requested after this period has elapsed, the entity does not legally have to provide it (R/571/2018, R/581/2018, R/590/2018, R/603/2018, R/166/2019, R/202/2019, R/332/2019, R/350/2019 and R/434/2019).

However, if the documentation has not been kept because the corresponding mandatory period for keeping the record has elapsed, the entity must clearly indicate to the client that this is the reason why it cannot provide the documentation. If the complainant is not given due explanations in this regard, the Complaints Service will consider that the entity has not attended diligently to its client (R/570/2018, R/593/2018 and R/85/2019).

Lastly, the Complaints Service commends the entities that sought out and provided a history of movements in a securities account, even though they were not obliged to retain the requested documentation, since more than ten years had elapsed since the end of the contractual relationship with the client (R/611/2018 and R/345/2019) or more than 30 years (R/80/2019, R/335/2019 and R/469/2019) or 20 years (R/195/2019) since the transaction for which information was requested was carried out. The Complaints Service also considered that the entity had acted in accordance with best practices when it delivered to the complainant buy, sell or exchange orders that it was not obliged to keep due to the time elapsed (R/156/2019, R/163/2019, R/189/2019 and R/227/2019).

➢ **Response to requests for information**

As previously mentioned, entities have the obligation to keep their clients adequately informed at all times.

Clients sometimes complain that they have requested certain information, generally relating to investments or transactions with said investments, but that the investment firm has not submitted that information to them.

In this case, as with document requests, there are also limits. One of these limits regarding the right to information establishes that the entity does not have to respond to a request for information made by a client when it lacks specificity or is manifestly disproportionate and unjustified. In other cases there are special circumstances that make it inadvisable to provide the requested information. In all these cases, however, the entity must provide arguments to support its decision.

Complaints about the handling of requests for customer information involved the following aspects:

✓ *Client order processing*

Entities must provide the client, on request, with information on the status of their orders.[154] Some complainants asked to see the processing status of the orders they had issued. In this area, complaints were resolved on the following aspects:

– The complainant requested information on how some currency derivatives transactions had been executed. Since no documentation or statement whatsoever had been provided by the entity in regard to the request, either in its response to the client's previous complaint or in the pleas submitted to the proceedings, the Complaints Service considered that the request for information had not been duly addressed (R/630/2018).

– The complainant was a company that was filing for insolvency. The receivership lawyer informed the entity's contact person by e-mail that all the company's assets were being liquidated and requested instructions on the steps to follow to liquidate the securities deposited in its securities account. Subsequently, six more e-mails were sent requesting a response to the first e-mail.

  Finally, almost three months after the first e-mail had been sent, the entity's staff replied, saying that the shares could now be sold, although the associated account was overdrawn. The Complaints Service considered that the entity took too long to respond to the request for information regarding the procedure for ordering the sale of the securities.

  On the basis of the information provided by the branch on the account overdraft, the complainant sent a new e-mail to request that the matter be resolved. On receiving no reply, more than 20 days later, she sent an e-mail to the entity proposing to change the account associated with the securities account in order to be able to sell the shares and following the sale, transfer the full amount to the associated account. Another proposal was also put forward in the event that the account could not be disassociated. The complainant requested a response to her proposals on two occasions during the following two months.

  However, two months after the proposals were made the entity informed her that the shares were being sold, and that because of a regulatory change, it needed a document that had to be provided by the company. Despite the complainant's having proposed alternatives to rectify the account overdraft and having requested a response, there was no evidence that the entity had submitted any information in this respect, which the Complaints Service considered to be bad practice (R/70/2019).

– The complainant received an e-mail from the entity informing him of an offer to convert shares issued abroad from book entries to direct registration. The conversion to registered shares, which were not negotiable or transferable, allowed dividends to be received as long as the shares had been registered for two years.

---

154 Article 68 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force until 17 April 2019. Article 59.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, implementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

As a result of the communication, the complainant sent an e-mail informing the entity that he had requested the conversion of his shares into registered securities one year previously and asked for confirmation that this request had been received, so as not to repeat the application process. Even though the entity acknowledged in the complaint proceedings that the shares were registered, there was no record of its having responded to the e-mail sent by the client. The Complaints Service concluded that the entity acted incorrectly by not explicitly confirming to the client that his shares had been converted into registered securities following his requests for information (R/72/2019).

– The complainant made an order to transfer some shares issued in another country, for which, following the indications given by the source entity, he had provided a statement from the securities account showing the ISIN code of the shares. The recipient entity stated that the transfer could not be carried out because the ISIN code was not listed and provided another ISIN code which it had registered for that issuer.

  The complainant went to the source entity to request information about the incident which had prevented the transfer from being carried out. The entity's staff responded that they would request the information from the securities department. After two days, it informed him that according to this department the ISIN code identified in the statements was not an ordinary code, since the shares in question were not common shares, but rather "loyalty" shares, which were identified with a specific code. The codes were correct, but only the code for common shares was transferable. In order to make the transfer, the securities department stated that it would ask for the securities to be converted to the code for common shares that the recipient entity held. Once they had confirmed the code change, they would issue an updated statement, which the recipient entity would need to initiate the transfer.

  Three weeks later, the source entity confirmed that the loyalty shares had been converted to common shares and sent him a document showing a breakdown of the securities portfolio so that the recipient entity could start the transfer process.

  The Complaints Service considered that the source entity informed the client of the transfer process in a timely and adequate manner, as well as the incident with the security's ISIN code, and acted quickly and agilely to resolve the problem. Consequently, the three week period that elapsed, given the type of operation that had to be performed in order to transfer the shares, was not deemed to be excessive (R/182/2019).

✓ *Procedure for waiving maintenance of registration of shares delisted due to inactivity*

The holders of shares in delisted companies remain shareholders and continue to have all the rights inherent to this status recognised in the Corporate Enterprises Act (economic rights, voting rights, rights to information, etc.) and in the company's Articles of Association.

However, delisting means that the shareholders may not use the secondary market to trade their shares although they may sell them outside the market by means of

alternative procedures such as searching for a buyer on their own account or through an intermediary, setting a price and formalising the transaction.

Another option involves offering the securities to the issuer by contacting the company's registered office, although the latter is not obliged to acquire the shares.

There is always the option of transferring the shares to another entity or a third party through other legally admissible channels (e.g. donations), and the depository would be entitled, in principle, to continue charging the relevant custody and administration fees. However, the Complaints Service has repeatedly stated that if the securities, in addition to being delisted, are inactive, entities should not charge their clients the above fee.

In these cases (delisted and inactive securities), the Spanish central securities depository (Iberclear)[155] has established a procedure that allows the registered holder (the investor) to request the voluntary waiver of maintenance of registration in the second-tier register for participants.

Iberclear Circular 08/2017, of 4 September, approves a new procedures manual for the ARCO settlement system. Specifically, in the event that Iberclear has received no previous request to waive the security in question from another entity (i.e., a procedure for the waiver of the securities has not already been initiated) the requesting entity must submit a proposal asking that the relevant actions be carried out to start the voluntary procedure for waiving maintenance of registration. For this purpose, the entity must provide a copy of the request for voluntary waiver made by the registered holder to the participant, in addition to an original certification issued by the Trade & Companies Register showing the registered office of the security issuer and showing that no entry has been made on the sheet opened in the name of the issuer in the four years prior to the calendar year in which the proposal is made.

Iberclear, through the publication of a notice, will then announce the start of the procedures, which it will perform once for each security (notarised request, and where appropriate, an announcement published in the listing bulletin). Once these actions have been completed, Iberclear will apply the procedure for recording the request for voluntary waiver of maintenance of registration, in accordance with the requests of the registered holders of the security, provided that no type of charge or encumbrance exists on the securities owned by the holders requesting the procedure.

Likewise, once the request deadlines have been reached, Iberclear will duly notify the CNMV of the procedures performed, and it will report, through the publication of a warning, that the procedure for recording a request for the voluntary waiver of maintenance of registration can be applied to the security in question.

155 Iberclear is the Spanish central securities depository. It is a public limited company that was created pursuant to the provisions of Article 44 *bis* of the Securities Market Act, Law 24/1988, of 28 July, introduced by Law 44/2002, of 22 November, on measures to reform the financial system. It is subject to Regulation (EU) No. 909/2014 of the European Parliament and of the Council, of 23 July 2014, on improving securities settlement in the European Union and on central securities depositories, and regulated in Articles 97 *et seq*. of the recast text of the Securities Market Act, approved by Royal Legislative Decree 4/2015, of 23 October.

With respect to subsequent requests made by registered holders regarding the same security, Iberclear will apply this procedure provided that all applicable requirements are met.

In any case, it is recommended that the investor be informed in advance of the fees and expenses established by the entity in its current fee prospectus for processing requests for the recording of voluntary waiver of maintenance of registration in securities accounts.

The Complaints Service considers that it is advisable for entities to inform their depositors of the existence of this voluntary waiver procedure, either facilitating the procedure or otherwise informing them that it is not possible to initiate the procedure as the requirements for applying the waiver have not been met.

In case R/361/2019, the complainant wanted to waive the maintenance of registration of some shares that had been delisted, although they did not meet the requirement that they should be inactive. The depository contacted the entity in charge of the issuer's book-entry process, which stated that as these were not physical securities, the maintenance procedure could not be waived, also indicating that there was no procedure for the repurchase of shares by the issuer. The Complaints Service considered that the entity had acted diligently by contacting the entity in charge of the securities register and informing its client of the different options for disposing of his shares, given that maintenance of registration could not be waived.

In case R/379/2019, the complainant was the holder of some delisted shares of a company in liquidation, although given that the last movement registered with the Trade & Companies Registry was dated 28 February 2018, the procedure for voluntarily waiving maintenance of registration could not be initiated. In response to the complainant's request to dispose of the shares, the entity informed him that as they were not physical securities, they could not be withdrawn and maintenance of registration could not be waived.

The Complaints Service observed that the client had been correctly informed that since they were not physical securities they could not be withdrawn. However, when the entity asserted register entry maintenance of these securities could not be voluntarily waived, the client could have interpreted this as meaning that this was not a possible option for the securities in question, when in reality it was an option, albeit subject to certain requirements being complied with, such as no entry having been made in the last four years prior to the calendar year in which the proposal was made; a requirement that in this case had not been met. Therefore, the Complaints Service considered that the information provided to the client about the waiver procedure could be confusing.

In case R/420/2019, the entity informed the client that it could not carry out the procedure for waiving the maintenance of registration of delisted shares because the established requirements had not been met, although the option of transferring the securities to another entity or a third party through other legal means (such as donation, although this would have to be formalised through a notary) did exist. The Complaints Service considered that the entity acted correctly in the provision of information.

In case R/449/2019, the client wished to renounce some non-voting public shares (*cuotas participativas*) in CAM (Caja de Ahorros del Mediterráneo) given that they

had no value (zero euros since 2012), they were not listed on the stock market and he had already been financially compensated for them. The entity stated that although the shares had been legally amortised, the formal deed of amortisation had not been filed with the corresponding Trade & Companies Register, so the non-voting shares were still owned by the client. Therefore, although an agreement for financial compensation had been reached, this did not imply the removal of the non-voting units from the client's securities portfolio, so his request could not be complied with since it was not yet possible to renounce them.

The Complaints Service considered that the entity had acted correctly in this case, and stated that the non-voting units had been written down to zero as required by law, and therefore had a book value of zero. However, the amortisation agreement had not been filed with the Trade & Companies Register, so the amortisation was not yet formally effective.

✓ *Securities position contracted through the entity*

On occasion, complainants request information on the securities deposited in the entity's accounts and are dissatisfied because the entity does not provide the information or when it does provide it, they consider the form of presentation to be inappropriate.

In the following cases, requests for information on securities positions were processed correctly:

– One complainant considered the information on his positions shown through a tool on the entity's website to be inadequate. The return on his investment had been calculated from 31 December 2016, whereas the complainant considered that it should have been calculated from the acquisition date.

  The entity's website stated: "The information on gains made on equity and fixed income instruments reflects the gains made on the instruments in the contract from 31 December 2016 onwards. If the acquisition date was prior to this date, the gain shown will not be the same as the gain obtained from the acquisition date". This was clarified by the entity to the client both in the response to the complaint submitted to the CS and in the pleas submitted to the complaint proceedings.

  Therefore, the Complaints Service considered that the entity had offered correct information on its website based on the parameters used (R/596/2018).

– Another client wanted proof of the capital loss of the non-voting shares of which he was the holder. As indicated in the heading "Procedure for waiving maintenance of registration of shares delisted due to inactivity", the non-voting shares had been written down to zero by law and had a book value of zero. However, since the amortisation agreement had not been filed with the Trade & Companies Register, it had not fully come into effect. The entity informed the complainant, in the written reply to his complaint, that there would be no capital loss until the securities had actually been amortised, at which point the corresponding asset variation would take place. The Complaints Service considered that the entity had acted correctly, as it properly addressed the request for information from its client (R/200/2019).

– The complainant requested movements in an account and the final use of the amount. The entity clarified that the account was not actually a current account but an interest rate hedge. The entity also provided copies of the documentation that had been retained since the contract was signed, specifically: the contract itself, the subsequent change in its numbering system, the appropriateness test, the warning of non-appropriateness of the product and the agreement for receiving, executing and transmitting derivatives orders.

  The Complaints Service stated that as this was a very different instrument to a current account, the entity could not provide the client with the documentation that he requested. However, with the clarifications and documentation provided, the entity met its obligation to give the client adequate and sufficient information about the product that was the subject of dispute (R/648/2018).

– The complainant said that the information provided by the entity did not demonstrate ownership of some shares in Banco Popular Español, S.A., which he had acquired between 1999 and 2012.

  The entity had provided him with: i) a signed copy of the order for one of the transactions made in 2012, even though on the date of the complaint, the entity was not required to keep this order or any previous ones; ii) an extract showing the movements requested that contained a securities account number; iii) a document that indicated that the securities account had changed to a different numbering system due to its merger with another entity in 2013; and iv) the tax information sent to the complainant before 2013, which included the account with the initial numbering system and, from 2013, the new numbering system.

  Based on the testimonies and the documentation provided, the Complaints Service considered that the entity had proved that it had adequately informed the client about the issue in the complaint and valued the effort made to try to fulfil the request, as far as this was possible. Furthermore, the Complaints Service considered that ownership in the extract could be deduced from the documentation provided (R/279/2019).

– The complainant presented an unmanageable number of questions, queries and requests. As an example, one written document contained 54 requests, including a request for a full audit of his business relationship with the entity over a period of approximately two and a half years. On assessing all the requests submitted by the complainant, the Complaints Service considered that they could be described as disproportionate.

  However, many of the queries and requests could have been resolved using the periodic information provided by the entity, which it re-sent to the complainant. Further, even though it was impossible to determine which information or documentation had been provided to the complainant after his consultation, it was demonstrated that he had several documents in his possession prior to one of the CS responses and that as part of its response, the ombudsman had re-sent many of the documents to the complainant. The entity submitted its response along with all the aforementioned information (281 pages of attached documentation related to the complainant's requests). In the pleas to the CNMV, the entity presented even more information that it had provided the client (R/308/2019).

However, entities acted incorrectly in the following complaints:

– One entity acted incorrectly by not providing the client with movements in his securities account for the previous year (R/48/2019) or the last five years (R/227/2019).

– The complainant requested clarification about the operation, monitoring and exposure of his investment in CFDs in several e-mails sent to the entity. Although it was proved that the client received responses to these e-mails, the Complaints Service did not consider that he had been properly informed, based on the content of the responses and the subsequent e-mails sent by the client, in which he asked further questions or requested clarifications (R/142/2019).

✓ *Tax information*

In the analysis of complaints, at times complainants question the tax information received from entities. In these cases, the role of the CNMV Complaints Service is exclusively limited to assessing the entity's compliance with the information obligations laid down in securities market legislation, the tax authority being responsible for assessing whether or not the tax treatment applied to the transaction is correct.

Entities adequately dealt with requests for tax information in some cases, in which:

– A Spanish resident asked the entity to process a form for him in order to avoid double taxation of payment of dividends from securities traded on a foreign market. The respondent entity informed him that it did not offer this service and that the complainant himself had to request the reimbursement of the withholding tax by completing and submitting the form.

  The Complaints Service considered that the entity had adequately informed the client, since the information provided was in accordance with the service agreement signed with him. The Complaints Service also reminded the entity that it is obliged to provide the client with the documentation required by the tax authorities of the source country to obtain the reimbursement of the withholdings made and that it must deliver that documentation with diligence and speed or, if not feasible, inform the client clearly and concisely on how to obtain it. For these purposes, entities must have adequate means and procedures to diligently attend to such requests, as well as informing their clients of how they can benefit from these double taxation agreements in an agile, simple and fast manner (R/16/2019).

– In another case, the complainant requested a certificate of the withholdings applied to the dividends on some foreign shares and addressed this request to the entity in which he had deposited these securities. The purpose of the request was to claim reimbursement of the excess withholding from the tax authority of the source country under the agreement to avoid double taxation.

  To claim reimbursement of the excess withheld by the foreign tax authority, he needed some certificates issued by the central depository of the shares. The respondent entity, where the client had deposited the securities, had to issue a request to that company on behalf of the client. The respondent entity alleged that it had contacted the central depository on four occasions and that the

request for the withholding certificate had even been processed prior to the complainant's request.

In response to a request for additional information made by the Complaints Service, the entity provided the e-mails exchanged with the central depository concerning the withholding certificates requested on behalf of the client. These communications demonstrated that the entity had managed the client's documentary request actively and in advance. The entity also provided copies of the withholding certificates issued by the central depository a few days after the Complaints Service had formulated the aforementioned request and proved that the complainant had subsequently received the original certificates.

As a result of the above, the Complaints Service considered that the respondent entity, which was the custodian of the shares, had acted diligently when processing and attending the client's request (R/210/2019).

– One complainant had opened a securities account with the respondent entity and by virtue of the terms of the securities custody and administration agreement the entity had subcontracted some of the services included in the contract. In the account, the complainant deposited shares of a listed company for which he received his portion of an issue premium, charged to reserves. On examining the draft of his personal income tax return, the complainant understood that the subcontracted entity had misreported the distribution of the issue premium as a sale of shares.

  The Complaints Service considered that the respondent entity had correctly informed the complainant of the breakdown provided to the State Tax Administration Agency (AEAT) and that no incident had occurred in this regard for the following reasons:

  The credit item was correctly reflected as an issue premium in the computer system of the respondent entity and in the tax information document provided to the complainant.

  The respondent entity confirmed that it had contacted the subcontracted entity to resolve the incident and informed the complainant in writing that the subcontracted company had confirmed that the movement had been correctly recognised as a payment for the distribution of the issue premium.

  As proof that the event had been correctly processed, the respondent entity provided in its pleas the response – via e-mail – from the subcontracted entity and the query submitted by it to the tax authority in relation to the subject of the complaint. This proved that the declaration of the issue premium made by the subcontracted entity had been made in accordance with AEAT rules using the corresponding form and code (R/327/2019).

– The complainant requested clarification of tax information relating to dividends received on shares of a foreign issuer. The entity acted correctly as it provided detailed information on the reasons why the tax information reflected a tax withholding in Spain and at source on the income received in this transaction (R/544/2019).

The CNMV Complaints Service also identified bad practice in other cases:

– One entity did not inform the complainant in a timely manner that the documentation he had submitted was not sufficient to prove non-residence for tax purposes in Spain.

  In 2013 and 2018, the complainant presented residence certificates issued by the Spanish consulate in his country of origin so that, by virtue of the corresponding agreement to avoid double taxation, personal income tax withholdings would not be applied to dividend payments on some shares deposited in his securities account. However, withholdings were made at the time the dividends were paid and therefore he filed a complaint with the entity's CS.

  The entity responded to this complaint and informed him that the documentation was not valid for the purpose of proving his tax residency with respect to his securities account, so it was necessary for him to submit a certificate issued by the competent tax authority of his country of tax residence, which would be valid for one year from the date of issue.

  The Complaints Service considered that the entity was at fault, since it should have realised before the complaint was lodged that the documentation presented was not sufficient to consider the client a non-resident in Spain for income tax purposes and consequently it should have asked for the documents that it subsequently requested. However, the entity did rectify the situation, proving that it had paid into the client's current account an amount that would comply with his request to retroactively regularise the tax withholdings that had been unduly applied (R/555/2018).

– Another entity did not demonstrate that it had submitted tax information in recent years as requested by the complainants (R/116/2019 and R/227/2019).

A.4.2 Collective Investment Schemes (CIS)

➢ Quarterly, half-yearly and annual reports

✓ *Submission*

The annual and half-yearly reports of the CIS must be sent to all unitholders and shareholders, unless they expressly waive the right to receive them. If they request it, they must also be sent the quarterly CIS report.[156]

Following a regulatory amendment that entered into force on 30 December 2018,[157] reports must be sent through electronic channels, unless the client does not provide the necessary information for this to be done or expresses in writing a preference to receive them in physical format, in which case a hard copy must be sent. Prior to

156 Article 18 of Law 35/2003, of 4 November, on Collective Investment Schemes.

157 Amendment of Article 18 of Law 35/2003, of 4 November, on Collective Investment Schemes, through Law 11/2018, of 28 December, amending the Commercial Code, the recast text of the Corporate Enterprises Act approved by Royal Legislative Decree 1/2010, of 2 July, and Law 22/2015, of 20 July, on accounts auditing, regarding non-financial information and diversity.

this amendment, regulations allowed the reports to be sent via electronic means if so requested by the unitholder or shareholder.

Similarly, all these documents will be made available to the public in the places indicated in the prospectus of the CIS and the KIID, which, following the aforementioned amendment, must include the address of the website.

At all times, the CIS must be in a position to prove that it has complied with these information obligations.[158] For this reason, the Complaints Service considered it incorrect practice that the entity did not prove that it had sent some complainants the quarterly report, which they had expressly requested, or the half-yearly and annual reports of the investment funds they held, for which there was no evidence of their having expressed a wish not to receive them (R/290/2019).

➢ Statement of position

✓ *Submission*

The CISMC, or the distributor of the units if they are not registered in the management company in the name of the unitholders, must send each unitholder of the investment fund statements of position. These statements must be sent out at least monthly. If during that period there are no subscriptions or redemptions, the delivery of the statement of position may be postponed until the following period. However, in all cases, the unitholder's statement of position must be sent out at the end of the year.[159]

This obligation is also applicable to open-ended collective investment companies that offer liquidity under the terms provided for financial investment funds. For companies with shares that are admitted to trading on a stock exchange or on regulated markets or trading systems, the entity in charge of the registration and custody of their shares is responsible for submitting the statement of position with the aforementioned frequency.[160]

The documents must be sent to the address designated by each unitholder or shareholder within one month of the reference date. When the unitholder so requests, the documents may be delivered using data transmission provided that the investor's agreement to this method of transmission has been recorded in a durable medium.[161]

In case R/607/2018, the entity sent several statements of position in investment funds to the complainant, who was divorced, to her address, but in the name of her

158 Article 21 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

159 Article 4.3 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

160 Articles 6.7 and 78 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

161 Rule Seven, Section 1, of CNMV Circular 4/2008, of 11 September, on the content of the quarterly, half-yearly and annual reports of collective investment schemes and their statements of position.

ex-husband. The Complaints Service resolved that regardless of whether the postal service had delivered the letters to the indicated address or not, they were not addressed to the complainant but to her ex-husband. Consequently, it did not consider that the communications had been made correctly, as they were not properly addressed, leaving aside the additional problem that the complainant might have in relation to confidentiality of mail.

✓ *Content*

The statement of position must contain for each CIS, sub-fund and class or series, as appropriate, at least the following information:[162]

– Identity of the institution and, where appropriate, the sub-fund, class or series of the unit or share held by the unitholder or shareholder; identity of the management company, the depository and the unitholder or shareholder.

– Date of statement of position; subscription date of units/shares; whether the investment derives from a transfer or has given rise to one, the number of units/shares and the amount subscribed for each position that is still held; net asset value on the reference date of the statement of position, estimated realisation value of each position and of the final position on the reference date of the statement of position, total number of units held and percentage represented by the final position of the unitholder or shareholder of the total assets of the CIS; monetary revaluation (capital gain), average return on the total position held on the date of the statement of position and the average period, in years, that the final position has been held.

– When all or part of the management fee is calculated based on performance in the form of an individual charge, the following message will be included: "The net asset value of the fund and, therefore, its return, does not reflect the effect of the individual charge made to the unitholder for the performance fee". In these cases, information must also be included on any payments on account made by the investor.

– It should be noted that subscription or redemption fees are not included in the calculation of the average return.

In case R/636/2018, the complainant had two unitholder accounts in the same investment fund and was the sole holder of one of them and a joint holder in the other. The complainant queried the fact that the percentage capital loss obtained was different for one unitholder account compared to the other. The entity acted appropriately, since the information contained in the statement of position was correct and it explained in detail the reason for the difference, which was that the subscription dates of the two holdings were different and the returns obtained over two different time periods were therefore also different.

162 Rule Seven, Section 2, of CNMV Circular 4/2008, of 11 September, on the content of the quarterly, half-yearly and annual reports of collective investment schemes and their statements of position.

➢ Position summary after each transaction

The CIS management company of an investment fund, without prejudice to unitholders' right to obtain the statements of position referred to in the foregoing section, may use, as a management document, position tickets to inform unitholders of their fund positions after each transaction.[163] This option is also available for open-ended collective investment companies (SICAVs).[164]

In case R/290/2019, the complainant stated that she had not received detailed information about the investment funds in which she was a unitholder. The entity informed her that: i) whenever the client carried out transactions in the funds, she received confirmation of the transactions made; ii) at the end of each month, she was sent an extract containing a statement of position which reflected the transactions she had made during the month; iii) she was also sent a statement of position each quarter with data for each outstanding item and from the first subscription made.

The transaction confirmations included the name of the investment fund, the type of transaction, the date and time the order was received, the execution date and net asset value, the number of units, the net asset value and the transaction amount, as well as the withholding made, the capital gain and the resulting net amount. The data matched the information included in the statements of position that were also submitted in the case.

In regard to all this information, the confirmations of the transactions carried out, the statements of position after each of the transactions and the unitholder's global position in the fund after the transactions were also included. To demonstrate that all the documentation had been sent, the entity attached a list of e-mails sent to the client's e-mail address, identifying the send date and the type of document from October 2012.

The Complaints Service concluded that the entity had provided the unitholder with sufficient information about her investment in the fund through the transaction confirmations, the summarised statements of position for the specific transactions and the global statements of position.

In case R/349/2019, the complainant made a transfer from a fund denominated in euros to an investment fund denominated in dollars. The entity sent her a statement of the settlement of the subscription to the recipient fund, which contained the amount subscribed in dollars in the recipient fund and the equivalent amount in euros at an exchange rate that was different from the rate applied for the transaction. The complainant was misled by this information, as the equivalent amount in euros reflected in the statement did not coincide with the amount in euros obtained in the redemption of the source fund.

The Complaints Service stated that the extract, due to its nature – the settlement of transactions – should only reflect the information corresponding to the transfer

163 Article 4.3 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

164 Article 6.7 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

subscription transaction on the date it occurred and, therefore, the parameters indicated should fully match the real value of the settled transaction. Therefore, it considered that the entity had acted incorrectly and did not accept its argument that the total amount expressed in euros reflected the amount subscribed, applying the exchange rate at the statement date, which was therefore different from the rate applied in the transaction.

➢ Annual information on costs and related expenses

Entities that provide investment services must comply with the information obligations on costs and related expenses established in the MiFID II Directive.[165]

In accordance with the aforementioned directive,[166] investment firms must provide annual *ex post* information on all costs and expenses related to financial instruments and investment and ancillary services when they have recommended or sold the financial instruments, or when they have provided the client with the KIID in relation to the financial instruments, and have or have had a continuous relationship with the client during the year. This information must be personalised and based on real costs.

Investment firms may choose to provide aggregated information on the costs and expenses of investment services and financial instruments together with the periodic information that they send to clients.

For the purposes of disclosing cost and expense information to clients, investment firms must aggregate:

i) All costs and related expenses charged by the investment firm or third parties, when the client has been referred to the third parties, for the investment or ancillary services provided (see Table 1). In this case, third-party payments received by investment firms in relation to the investment service provided to a client will be broken down separately, and the total aggregate costs and expenses will be expressed both as a cash amount and a percentage.

165 Article 65 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force from 17 April 2019.

166 Article 50 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

All costs and related expenses charged for investment or ancillary services provided to the client that must be included in the reported amount

TABLE A.1

Cost items that must be reported		Examples
Non-recurring expenses related to the provision of an investment service	All costs and expenses paid to the investment firm at the beginning or end of the provision of the investment service or services	Deposit fees, contract termination fees and account transfer costs[1]
Recurring expenses related to the provision of an investment service	All costs and recurring expenses paid to investment firms for services provided to clients	Management, advice or custody fees
All costs related to transactions started during the provision of an investment service	All costs and expenses related to transactions carried out by the investment firm or other interested parties	Brokerage fees[2], entry and exit fees paid to the fund manager, platform fees, increases (included in the transaction price), tax on documented legal acts, transaction tax and currency exchange expenses
Any expenses related to ancillary services	All costs and expenses related to ancillary services that are not included in the aforementioned costs	Research costs, custody costs
Incidental expenses		Performance fee

1 Account transfer are to be understood to be those borne by investors for moving from one investment firm to another.
2 Brokerage fees are to be understood as the costs charged by investment firms for the execution of orders.

ii) All costs and related expenses for the production and management of financial instruments (see Table 2).

All costs and expenses related to the financial instrument that must be included in the reported amount

TABLE A.2

Cost items that must be reported		Examples
Non-recurring expenses	All costs and expenses (included in the price of the financial instrument, or additional) paid to the product provider at the beginning or end of the investment in the financial instrument	Initial management fee, structuring fee[1], distribution fee
Recurring expenses	All recurring costs and expenses related to the management of financial products that are deducted from the value of the financial instrument on investment	Management fees, service costs, financial swap fees, costs and taxes for loans of securities, financing costs
All costs related to transactions	All costs and expenses incurred as a result of the acquisition and disposal of investments	Brokerage fees, entry and exit fees, fee increases included in the transaction price, tax on documented legal acts, transaction tax and currency exchange expenses
Incidental expenses		Performance fee

1 Structuring fees are to be understood as the fees charged by producers of structured investment products for structuring the products. They can cover a wider range of services provided by the producer.

In relation to the two tables above, the directive clarifies that although certain cost items appear in both tables it should be noted that they are not redundant, since they refer to product costs and service costs, respectively. Examples include management fees (in Table A.1 these refer to fees charged by an investment firm that provides a portfolio management service to clients, while in Table A.2 they refer to fees charged by the manager of an investment fund to its investors) and brokerage fees (in Table A.1 these refer to fees that the investment firm must pay when trading

on behalf of its clients, while in Table A.2 they refer to fees paid by investment funds when trading on behalf of the fund).

In case R/421/2019, at the time of the adaptation to the MiFID II Directive, the entity sent its client an extract containing aggregate information on costs and expenses related to some investment funds that had arisen in 2018, and the complainant disagreed with the amount. The Complaints Service clarified that although the entity had sent the complainant the extract by virtue of the new regulation, the information shown did not imply an increase in the fees and expenses included in the KIID or in the current fund prospectus but simply provided quantified information on them. However, it considered that it would have been good practice for the entity to have included a mention in the extract that the new fee breakdown did not imply an increase and, furthermore, that the calculation basis of the reported percentages was shown for the express purpose of providing a better understanding of the data.

➢ Response to requests for documentation

On occasion, clients request documentation related to their CIS investments. The registration obligations applicable to investment firms have already been mentioned in the section on the response to requests for documentation related to securities. In this section, referring to CISs, we must add the obligation of CIS management companies to keep records of the transactions and subscription and redemptions orders for a period of at least five years.[167]

The entity acted correctly in the following cases:

– Complainants requested the contractual documents for some investment funds in which they were holders. The entity complied with the request for documentation and provided them with copies of the subscription, redemption and transfer orders (R/560/2018).

– A complainant requested the documentation related to his units in an investment fund, and the entity explained that it was not obliged to keep them as the requisite time period had elapsed (the units had been redeemed more than 12 years previously). However, the entity informed him of the date on which the units had been redeemed and the net amount paid, according to a settlement extract that it submitted to the proceedings (R/620/2018).

In case R/531/2019, the entity acted incorrectly as it did not provide the subscription and redemption orders for the units of an investment fund that the client requested before five years had elapsed.

➢ Response to requests for information

As mentioned above, investment firms must act with honesty, impartiality and professionalism, in the best interest of their clients, and observe, in particular, the principles established in the rules of conduct applicable to providers of investment

167 Article 115.1.m) of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

services.[168] In this regard, entities must keep their clients properly informed at all times.[169]

However, in relation to requests for information made by clients, the Complaints Service has clarified that if they are manifestly disproportionate and unjustified or lack specificity or if there are special circumstances that advise it, the entity may refuse to deliver the information (R/614/2018).

CIS management companies can perform the CIS administration function, which includes the task of responding to client enquiries relating to the CIS under management.[170]

Client requests for information in complaints relating to CIS resolved in 2019 concerned the following topics.

✓ *Investment fund fees and expenses*

Investment fund fees and expenses are established in the information documents that the entity must deliver to the unitholder before the fund is subscribed, as described in the section on investment fund fees. Unitholders may subsequently request information on fees and expenses from the entity through which they subscribed to the units (usually, the distributor of the CIS).

Entities acted appropriately in responding to the following requests for information:

– The complainant requested information on the fees charged for his investment fund transactions. The entity's CS informed him that no fee payments had been identified for these transactions (R/560/2018).

– The complainant requested information on the currency exchange rate applied in the transfer of some investment funds and enquired whether contracting forward exchange had an added cost. The entity explained in detail how to calculate the applicable exchange rate and that forward exchange did not entail any additional cost (R/30/2019).

However, another entity acted incorrectly in a request for information about a transfer of investment funds. The complainant asked the source entity to indicate the exact date and time on which the redemption of the source fund had taken place, because he considered that it was not appropriate to charge redemption fees since the redemption had taken place during a liquidity window. The source entity informed him that it was unable to attend to his request and that he should approach the target entity.

---

168 Article 208 of the Recast Text of the Securities Market Act as approved by Royal Decree Law 4/2015, of 23 October.

169 Article 209.1 of the Recast Text of the Securities Market Act as approved by Royal Decree Law 4/2015, of 23 October.

170 Article 94.2 a) of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

The Complaints Service considered that although the target entity of the transfer could provide the client with the requested information, the source entity could also do so. Consequently, it did not consider that the source entity had acted in the interest of its client or kept him properly informed (R/334/2019).

✓ *Positions in investment funds contracted through the entity*

Complainants may also request information on positions in investment funds that they have held over a period of time or at a certain moment.

For example, some complainants requested information on movements in investment funds in which they had been holders. The entity acted correctly and provided them with copies of the various one-off and periodic communications (monthly information, statements of position and tax information), which demonstrated the movements in these products (R/560/2018).

✓ *Investment fund gains and losses*

In relation to some investment funds in which he had invested, one complainant requested an explanatory table broken down by item, percentages and periods to show the gains and losses from the beginning to the end of his investment, on a month by month basis. The entity informed him that the fund manager provided its clients with all the information on the monthly performance of their funds through information sheets, quarterly and half-yearly reports and annual reports, and gave him the address of the manager's website where the information could be found. The Complaints Service considered that the entity had acted correctly and that the request for a monthly table of the investment fund's gains and losses, broken down according to different parameters, was disproportionate (R/560/2018).

In another case, the complainant requested information on the net asset value of the units he held in an investment fund to find out whether he would obtain a gain or a loss on redeeming them. The entity provided him with an Excel file with information on the dates of his investments and the net asset value, and demonstrated that it had sent the complainant a simulated redemption including the tax effects of the transaction. However, the Complaints Service concluded that the entity had acted incorrectly due to the delay in responding to the complainant's request for information, given that, as acknowledged by the entity itself, it had not responded diligently, since one month elapsed from the client's first request until a reply was provided (R/460/2019).

✓ *Tax information*

In some cases, issues related to the taxation of investment funds are queried. In these cases, the CNMV Complaints Service cannot issue any type of statement as to whether the tax treatment of investments carried out by the entities is correct or not, as this falls to the State Tax Administration Agency (AEAT) as the competent body.

However, the Complaints Service does assess compliance with the information obligations of the entities as providers of investment services. Therefore, except in cases of disproportionate or unjustified requests or other exceptional circumstances,

entities must properly respond to clients' requests for information concerning their investment funds.

Entities acted correctly in the provision of tax information in the following cases:

– The complainant requested clarification on the tax gains/losses and the withholdings applied following the redemption of some investment funds in which he was a unitholder. The entity provided the client with a breakdown of the tax items corresponding to the calculation made for the application of the reported withholding in relation to the funds redeemed (R/214/2019, R/444/2019 and R/445/2019).

– The complainant had requested an extract showing a history of his positions in an investment fund and although he was satisfied with the data related to the direct subscriptions, he considered that the information on subscriptions associated with transfers did not coincide with the contracts signed with the entity. The entity clarified that due to the tax deferral regime for reinvestment in CIS, the figures in the statement were historical information that represented subscriptions associated with transfers received and reported the subscription value of the units acquired from the start (R/369/2019).

However, some entities acted incorrectly for the following reasons:

– One entity provided confused information about the loss on redemption of an investment fund. Although there was no withholding, since the redemption gave rise to a capital loss rather than a capital gain, the breakdown of the redemption sent to the complainant was misleading as it provided information on a supposed negative withholding which was not applicable (R/397/2019).

– The entity provided the client with an erroneous tax simulation for the redemption of an investment fund denominated in dollars. In this case, it did not demonstrate that it had informed the client about the errors in the simulation before he made the redemption to which the complaint referred. In addition, the entity did not prove that it had subsequently explained to the client about the taxation of the redeemed funds, since it did not provide the e-mail in which it claimed to have clarified this issue, or the response of the ombudsman to the complaint made by the client (R/388/2019).

– The entity did not properly inform the client about corrections in the withholding made following the redemption of an investment fund. The entity acknowledged that it had made a mistake given that, as it was a redemption corresponding to an investment fund that had been acquired before 31 December 1994, it had not applied the coefficient of abatement, which the client had requested be applied. Since the abatement or reduction coefficient was not applied directly to the capital gain, the amount of this capital gain was not reduced, which led to a higher withholding being exacted. Once the error was detected, the entity corrected it before the client submitted her complaint to the Complaints Service, and the excess withheld and the statutory interest due were credited to her account.

In regard to a subsequent request for information made by the client, the entity acted incorrectly since it did not provide the requested documentation reflecting the reduced capital gain and the actual withholding, so that the client could comply with her tax obligations (R/566/2019).

✓ *Applicable net asset value (NAV)*

The net asset value is the price of each investment fund unit at a given time. Subscriptions and redemptions are carried out on the basis of the net asset value on the same day that they are requested or on the following business day depending on the relevant provisions in the prospectus.

The prospectus must also indicate the procedure for the subscription and redemption of units in order to ensure that the CIS management company accepts subscription and redemption orders only when they have been requested at a time when the NAV is not known to the investor and cannot be accurately estimated.

In order to achieve this objective, a cut-off time may be established in the prospectus from which the orders received will be deemed to have been made on the following business day for the purposes of applicable NAV. For this purpose, days on which there is no market for assets representing more than 5% of the fund's assets will not be considered business days.[171]

One complainant expressed his dissatisfaction with the fact that in a telephone conversation held on 5 December 2018 the entity erroneously indicated that the net asset value of that same day would be applied if he issued the redemption order before 2:00 p.m. However, 5 December was not a business day, as there was no market for assets representing more than 5% of the fund's assets, and neither was 6 December, since it was a bank holiday in Spain. Therefore, the orders issued on 5 December, regardless of the cut-off time, would have to be executed with the NAV calculated for the next business day, which was 7 December.

5 December 2018 was considered a non-business day as more than 5% of the fund assets were invested in securities that were traded on US stock exchanges and the main US markets were closed that day as it was an official day of mourning. In this respect the following events occurred: i) former President George W. H. Bush died on 30 November 2018; ii) on 1 December 2018 it was announced that 5 December 2018 would be a national day of mourning and the NYSE[172] and NASDAQ[173] announced that they would take part in this commemoration; and iii) on 3 December 2018 at 3:04 p.m. (local time), the NYSE published on its website a statement saying that on 5 December, the following markets would be closed due to the day of mourning: The New York Stock Exchange, NYSE American, NYSE National, NYSE Arca and Chicago Stock Exchange.

Therefore, although it was an unforeseen event, the closure of the main US markets on 5 December 2018 was not news to the financial world and the fund managers should have been aware of the fact.

Based on the above, and given the fluid communication between the parties throughout the day of 5 December, both by telephone and e-mail, the Complaints Service considered that the entity did not provide the client with full information about this

171 Article 78.2 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

172 New York Stock Exchange.

173 National Association of Securities Dealers Automated Quotation.

significant event, which would affect the redemption of the fund and that it should have warned her – even after her order had been placed, if it had not done so before – as to which day's NAV would be applied (R/6/2019).

✓ *Investment fund settlement calendar*

Entities must comply with the information commitments they have assumed with their clients. In relation to a fund that mainly invested in hedge funds, and which was affected by the Madoff fraud, the management company informed the complainant in a statement that it had asked the CNMV's permission to initiate an orderly process of redemption of all the fund units in order to ensure equal treatment of unitholders. The statement also indicated that the CISMC thought it prudent to draw up a settlement calendar for the fund's investments that would end in 2013 and added that the parties would be informed of any changes to this tentative schedule of partial liquidation.

The complainant asserted that the liquidation process had lasted until 2018 and that he had not received any information about changes to the schedule. In this case, the Complaints Service considered that the entity had acted incorrectly, since it could not prove that it had sent out information about the changes to the calendar as it had undertaken to do in the statement even though liquidation of the units had been delayed for more than five years (R/151/2019).

➢ **Changes in key features of investment funds**

On a regular basis, within the scope of the power conferred under current regulations,[174] CIS management companies can make significant changes to the key features and nature of investment funds, such as the management regulation or, where applicable, the prospectus or KIID, that may involve a substantial change in the investment or profit distribution policy, the replacement of the management company or depository, the transfer of the management of the institution's portfolio to another entity, a change of control of the management company or depository, the transformation, merger or spin-off of the fund or sub-fund, the application of or increase in fees, the application, increase or elimination of discounts in favour of the fund in subscriptions and redemptions, changes in the frequency of the NAV calculation or transformation of a CIS into sub-funds or sub-funds of other CIS.

Unitholders must be informed of any such changes clearly, in writing and with sufficient notice. Specifically, by law, they must be informed at least 30 calendar days before the change enters into force. However, regulations do not require that the information be sent by registered post or by any other means that allows proof of delivery.

As a prerequisite for filing these changes in the CNMV registers, the CIS management company must provide proof that it has fulfilled its obligation to inform the unitholders of the change in question.[175]

---

174 Article 14.2 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

175 Rule Nine of CNMV Circular 2/2013, of 9 May, on the key investor information document and the prospectus of collective investment schemes.

Similarly, regulations stipulate that, provided that a redemption fee or associated expenses or discounts are established for the fund, when they are notified of this type of change unitholders have a period of 30 calendar days from the notification date to choose the total or partial redemption or transfer of their units at the corresponding net asset value on the date of the last day of the 30 calendar days granted for this purpose, with no redemption fees or expenses.[176]

To do this, the unitholder must issue the corresponding redemption or transfer order, since the purpose of this right of separation is not, in itself, to provide liquidity for unitholders, but to enable those who are not satisfied with investment fund terms and conditions that differ significantly from those existing at the time the units were acquired to opt to pull out of the fund at no cost.

In the case of CIS mergers, regulations establish the specific information to be provided to unitholders and shareholders, as well as the specific right of separation[177] that must be granted.

Some unitholders complained that they had neither been informed of nor accepted substantial changes in the investment policy of their investment funds, fee increases or mergers with other investment funds. In these cases, entities provided evidence of having informed them by submitting the communications sent to the complainants. In addition, the Complaints Service explained that, in general, failure to exercise the right of separation within the specified period automatically implies that the unitholder wishes to maintain his or her investment (R/565/2018, R/566/2018, R/606/2018, R/656/2018, R/108/2019, R/155/2019, R/180/2019, R/209/2019, R/360/2019, R/410/2019 and R/426/2019).

However, in other cases, entities did not prove that they had informed their clients of such changes, in that they either did not provide the communication sent (R/39/2019 and R/108/2019) or provided a communication that was not personalised and therefore did not prove that it had been sent to the complainant's notification address (R/639/2018, R/676/2018, R/90/2019, R/108/2019, R/139/2019 and R/276/2019).

➢ Mergers of foreign CIS sub-funds

Some mergers of foreign CIS sub-funds gave rise to dispute, as investors stated that they were unaware of the mergers, or their terms and conditions, and above all, their tax effects.

Foreign CIS are not supervised by the CNMV, but by the competent body in their respective home country. However, the CNMV is responsible for certain matters such as supervising the actions of providers of investment services in Spain in relation to the foreign CIS authorised by the CNMV to be marketed in Spain.

In relation to informing investors of the merger of sub-funds, the distributors of harmonised foreign CIS in Spain must send (free of charge) to unitholders or

176 Article 14.2 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

177 Articles 42, 43 and 44 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

shareholders who have acquired units or shares in Spain all the information required under the legislation of the State in which they have their headquarters, adhering to the same terms and deadlines set down in the legislation of their home country.[178]

The Complaints Service concluded that the entity's actions were in accordance with applicable CIS regulations in this regard in case R/137/2019. The entity provided a communication that the Complaints Service considered informed the complainant of the relevant aspects of the merger process that affected his investment although it was not able to validate its content for the aforementioned reasons. However, entities acted incorrectly in case R/184/2019 and R/458/2019, since although they provided communications informing clients of the relevant aspects of the merger process, they did not prove that they had sent all this information to the clients prior to the merger, or in case R/557/2019, since they did not prove that they had sent the client any information at all about the merger.

Regarding the tax effect deriving from the merger of foreign CIS sub-funds, although unitholders and shareholders are responsible for informing themselves about the tax treatment of transactions related to their investments, the Complaints Service also considers that the information obligations of entities include a duty to provide information on all aspects of particular relevance for the investor. In relation to the very significant tax effects of this type of transaction, the entity must inform clients before the merger of how the merger will be classified for tax purposes and, where applicable, whether or not the corresponding tax withholding will be effected. Entities did not prove that they had provided tax information in the terms indicated in cases R/137/2019, R/184/2019, R/458/2019 and R/557/2019.

Lastly, full and detailed information about the merger, as well as its tax effects, must be sent to clients in time for them to be able to make well-founded investment decisions and avoid the tax consequences of such a merger.

In case R/443/2019, the entity sent a newsletter to unitholders by e-mail informing them of a merger, the date on which it would take place and its tax effects, and gave them the opportunity to transfer their shares to avoid these tax effects. However, the clients were given only one day in which to make their decision.

Consequently, even though the information that the entity sent to the unitholders was sufficient to inform them of the consequences of the merger, the Complaints Service concluded that the entity's actions were not in accordance with the CIS' own regulations, as they were not given reasonable time in which to make an analysis and take a decision.

➢ Return/capital gains obtained by the CIS

The scope of the Complaints Service's authority does not include determining the quality of the management or issuing judgements on the level of return obtained by the managers as a result of their activity and it cannot therefore assess the cumulative return of a CIS over a certain period or the capital losses suffered as a result of its investments. However, it considers that the information that must be passed on to the client must be as complete and clear as possible.

178 Rule Two, Section 2, of CNMV Circular 2/2011, of 9 June, on information of foreign collective investment schemes registered in the CNMV's registries.

One complainant questioned the final return obtained on his investment in a fund, since he considered that it did not correspond to the annual returns that appeared on the entity's website. The entity correctly explained the situation, stating that the annual returns published on its website were calculated based on the NAV of the investment fund on 1 January and 31 December each year whereas the return obtained by the complainant had been established based on the NAV applicable on his particular subscription and redemption dates (R/494/2018).

A.4.3 Discretionary portfolio management

➢ Statement of management activity

When investment firms offer portfolio management services, they must provide each client with a periodic statement of the portfolio management activities carried out on their behalf, in a durable medium.[179]

The periodic statement must provide a fair and balanced analysis of the activities carried out and the portfolio performance during the reporting period and include, where appropriate, the following information:[180]

– The name of the investment company.

– The name or other form of address of the client account.

– Information on the content and valuation of the portfolio, with data on each financial instrument, its market value – or the fair value if the market value is not available – and the cash balance at the beginning and end of the reporting period, as well as the performance of the portfolio during that period.

– The total fees and expenses arising during the period to which the information refers, containing at least a breakdown of the total management fees and total expenses associated with execution and including, where appropriate, a declaration indicating that a more detailed breakdown will be provided on request.

– A comparison of the performance during the period covered by the statement, with the investment performance benchmark (if any) agreed between the investment firm and the client.

– The total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio.

---

179 Article 69.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 60.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

180 Article 69.2 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019. Article 60.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

– Information on other corporate transactions that grant rights in relation to the portfolio's financial instruments.

– Specific information on each transaction executed during the period, except when the client prefers to receive separate information about each transaction carried out.

If the client chooses to receive separate information, the key information relating to the transaction must be provided immediately after execution in a durable medium. The investment firm must send the client a notification confirming the transaction no later than the first business day after execution or, if the investment firm receives confirmation from a third party, the first business day after receiving this confirmation.

The statements must be provided quarterly, except in the following cases:[181]

– When the investment firm offers its clients access to an online system that meets the conditions to be considered a durable medium, which provides easy access to the updated valuations of the client's portfolio and certain other information,[182] and provided that the company has proof that the client has accessed a portfolio valuation at least once during the quarter in question.

– When the client has chosen to receive separate information, the periodic statement must be provided at least annually, except in certain cases.

– When the agreement between an investment firm and a client of a portfolio management service authorises a leveraged portfolio, a periodic statement must be provided at least on a monthly basis.

The MiFID II Directive establishes that the statement must be sent quarterly, whereas the previous regulations required it to be sent only half-yearly unless the client asked for it to be sent every quarter.[183] A new feature of MiFID II is that aforementioned statement does not need to be delivered if an online access system can be provided that contains specific information and it can be proved that the client has accessed the platform at least once during the quarter.

In relation to the periodic statements of CIS portfolio management contracts, one complainant asserted that he had not been provided with the full amount of the fees and expenses accrued during the period, with a breakdown of the management fees and total expenses associated with execution.

In these statements, he was informed of the weighted average annual fee based on the portfolio assets, in addition to the headings (management and deposit) and beneficiaries of the fee. Although it had to be taken into account that this was a portfolio

181 Article 60.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

182 In this regard, the information to which the client may have access is included under "Content of periodic information" in the section "Mandatory periodic information on the status of clients' financial instruments or funds".

183 Article 69.3 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019.

of investment funds and therefore the item "total expenses associated with execution" did not appear in the information for each fund, the Complaints Service considered that to provide the best possible information on the total expenses, current expenses should also be reported (as in the KIID or periodic public information for each fund), also weighted for the portfolio's assets (R/205/2019).

In other cases, the complainants stated that they had not received the information on portfolio management activities carried out by the entity. However, the entity provided the statements sent to its clients and was therefore considered to have acted correctly (R/229/2019 and R/429/2019).

➢ Surpassing the loss threshold

Investment firms that provide portfolio management services must inform their clients when the overall value of the portfolio, as valued at the beginning of each reporting period, depreciates by 10% and subsequently in multiples of 10%, no later than the end of the business day on which the threshold is exceeded or if on a non-business day at the close of the following business day.[184]

This MiFID II requirement prevails over the previous Spanish regulation, which established a loss threshold of 25%.[185] Specifically, in accordance with the previous Spanish regulation, standard portfolio management contracts had to establish, among other items, the loss threshold agreed between the parties, which could not be higher than 25% of the assets under management, and the entity had to inform the client immediately if this threshold was breached.[186]

In case R/205/2019, the complainant expressed his discontent because he considered that the entity had not respected the agreed loss threshold as it had not informed him that it had been exceeded. The complainant referred to the suitability test, in which he had stated, in the question relating to investment objectives, that he would not accept an annual loss of more than 3% in normal market conditions, with a confidence level of 95%.

The Complaints Service explained to the complainant that although the question was asked to find out the investor's investment objectives in relation to his risk in order to establish a risk profile, the parties actually set down the agreements, clauses and conditions, and also target returns and risks in the investment portfolio management contract.

In this regard, the contract established that if the value of the client's portfolio had lost more than 5% of its value on the reference date of the latest information sent to the client, or an additional loss threshold agreed with him, the entity would immediately notify him of this situation. It was also agreed that the additional maximum loss threshold was 15% of the value of the contracted portfolio and that if the agreed threshold was exceeded the entity would inform him immediately.

---

184 Article 62.1 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

185 Question 13.3 of the CNMV document *Questions and Answers on the application of the MiFID II Directive.*

186 Rule Nine, Section 4, of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

The entity provided copies of the reports sent to the client showing that the portfolio loss was below the reduction threshold of 5% and also below the other maximum loss threshold agreed. Therefore, the entity had acted correctly as it was not obliged to inform the client immediately.

➢ Information on cancellation of the management contract

Irrespective of such other causes as may, by law or by agreement, give rise to the termination of a portfolio management contract, clients have the power to resolve these contracts unilaterally at any time. Once resolved, the portfolio managers have a maximum period of 15 days in which to render and if necessary explain the management accounts.[187]

The standard contract must also establish in a manner that is clear, concrete and easily understandable for retail investors the information that the entity must make available and send to clients, its periodicity and the form of transmission.[188]

In case R/234/2019, the standard CIS portfolio management contract established that once the contract had been terminated, the bank would make the CIS shares and units and the cash that was the object of the contract available to the client and provide him with full information on his positions, as well as the maximum term. However, the entity acted incorrectly since it did not prove that it had provided this information due to the cancellation of the contract by the client. In addition, the Complaints Service stated that this information would have served to inform him of the performance of his portfolio in the period from when he received the last periodic information up until the effective cancellation, a performance which explained the decrease in the number of units, which was the subject of the client's complaint.

In case R/363/2019 the respondent entity acted incorrectly as it did not prove that it had provided the complainant with complete information on the liquidation of his managed portfolio.

➢ Requests for information

As indicated in previous sections, entities must respond to requests for information from their clients pursuant to their obligation to keep them properly informed at all times. However, on some occasions the entity is not obliged to respond to these requests, such as when they lack specificity or are manifestly disproportionate and unjustified, provided that it can justify its reasons for such a decision.

187 Article 7 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and of the other entities that provide investment services, in regard to fees and standard contracts.

188 Rule Seven, Section 1, letter c), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

✓ *Specific reports or certificates*

One client who had signed a discretionary portfolio management contract requested that the entity carry out an audit on the movements carried out after the date on which he announced his intention to terminate the contractual relationship, as he considered that movements may have occurred that he had not authorised and that were against his best interests, and also that an official document of the charges for fees and expenses, broken down and signed by a controller or the corresponding officer, be issued.

In regard to the claim of possible improper management, the entity's CS replied that it did not have the power to assess the situation. The Complaints Service considered that the entity had acted correctly, since the request to audit the client's accounts and movements was disproportionate, and therefore it was not legally obliged to do so.

In regard to the official document of charges for fees and expenses, broken down and signed by a controller or the corresponding officer, the entity's CS indicated that the information on fees charged had already been sent to the client and that the issue of duplicate copies could entail additional expenses. It therefore advised the client to go to his branch to ask for information about the cost of the requested service and, if he accepted the charge, obtain the requested documentation.

Although it appears that the CS may not have understood the request correctly, the Complaints Service did not consider the answer given to be wrong, since the client's request referred to the issue of a document with non-standard content, probably in the form of a certificate, which would require more personalised attention and an additional cost, so it was reasonable for the branch to attend to the request (R/212/2019).

✓ *Tax information*

One complainant contracted a discretionary portfolio management service which he cancelled two years later, redeeming the investment funds held in the portfolio. The client stated that the capital gains obtained and reported by the entity did not match the figures in his tax information and the draft of his personal income tax return.

Both the client and the entity provided a copy of the CS's response letter to the complaint, which contained a summary of the capital gains and losses and details of the fees accrued by the portfolio management service. The response also clarified for the client that the amount that he had taken as a gain had been reduced in the accounting process by the fees charged over the duration of the portfolio and that he had received the net amount. Further, the entity provided copies of statements informing the client of the fees for the portfolio management service for the different periods.

The Complaints Service stated that it could not issue an opinion on the tax treatment applied to the investment fund redemptions or the fees accrued or received for the portfolio management service, as this was a matter concerning the tax authorities. However, based on the above and the documentation provided, the Complaints Service considered that the entity had proved that it had fulfilled the duty to inform its client, as corresponds to investment firms (R/532/2018).

Similar conclusions were reached in case R/263/2019, in which the client's disagreed with the information provided by the entity on the calculation of the capital gain generated after the cancellation of an investment fund portfolio management contract.

A.5 Orders

In general, an order is the mandate or instruction that the investor passes on to the investment firm of which he or she is a client (which acts as an intermediary in the transaction) to buy or sell different financial instruments.

The former include subscription orders (when newly issued securities are acquired) or purchase orders (when securities that are already traded on secondary markets are acquired). As described below, there are various types of orders, which can be processed through different channels.

In 2019, complaints of various kinds were raised, ranging from querying the investment made (i.e. the entity acquired a financial instrument on the client's behalf that the client did not want), through the execution's not conforming in some way to the mandate or instruction issued by the client (this topic accounted for the largest number of complaints), to the entity's selling the instrument without the client's having ordered the sale, or due to various incidents occurring in the execution process.

A.5.1 Securities

➢ Orders without client authorisation

The legislation applicable to entities as regards order execution establishes that entities must execute them according to the criteria of best execution. However, when the client gives specific execution instructions, the company must execute the order according to these instructions.[189]

In the cases below, the investment firms executed transactions on behalf of their clients with no order on which to base the execution or did not execute the transaction despite the fact that the client had issued specific instructions.

In case R/653/2018, the client complained that when a telephone call was interrupted the entity had not obtained his confirmation for the details of an order – as required in the steps for orders placed online. He therefore thought it would be incomplete and invalid. However, minutes later he received information on the execution of his buy order.

The evidence submitted showed no interruption whatsoever prior to the confirmation of the order dispatch nor that the client had placed an order to cancel the transaction in question. Therefore, the entity was not considered to have acted incorrectly in executing the order.

189 Article 223 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

In case R/253/2019, although the complainant stated that she had not given her consent for a purchase of securities, as the transaction was a mandatory exchange of subordinated bonds arranged by the FROB (Fund for Orderly Bank Restructuring), the entity did not need the consent of the client to carry out the transaction, so no wrongdoing was observed. A similar situation occurred in case R/595/2018.

➢ Errors in form in completion of orders

Securities orders that contain the client's instructions must be completed so that both the ordering party and the entity responsible for receiving and processing the order accurately and clearly know the scope and effects.

The order must have the following content:[190]

- Identification of the investor.
- Identification of the type of security.
- Purpose of the order: purchase or sale.
- Strike price and volume, if limits or conditions are to be applied (if the client does not specify a price, the order is deemed to be a market order and to remain in force until the close of the session).
- Period of validity.
- Securities debit or credit accounts.
- Associated cash account.
- Any other necessary information depending on the channel used or market regulations.

In 2019, several investors complained that some of this information was missing or incorrect in their orders:

For example, case R/4/2019 referred to the execution price of a purchase order, in which the complainant believed that it had been executed at a limit price while it had actually been executed at a higher price. However, from the documentation provided, it was proved that the order signed by the complainant was a "market" order and that it had been executed correctly.

➢ Market, limit and at-best orders

As previously mentioned, there are different types of orders and they can be transmitted through different channels. The final return of the investment may be contingent on the correct execution of a securities order.

190 For further information on orders, see the CNMV Guide on securities orders available at the following link: https://www.cnmv.es/DocPortal/Publicaciones/Guias/guia_ordenesvalores_engen.pdf

In the trading of shares on the secondary market, there are three types of orders: limit orders, market orders and at-best orders.[191] This is a fundamental distinction as it affects the price at which the order is executed. Only in the first case (limit orders) is a client guaranteed an execution price (price that acts as the maximum price for the buy order and minimum for the sell order).

Therefore, the only order that truly eliminates risk or uncertainty about the execution price is the limit order as it is the client who sets the price, without prejudice to the risk of non-execution of the order as a consequence of the chosen price differing from the market price. This issue is particularly important at times of high market volatility, when the execution price of an order may differ substantially from the latest market price available prior to the time the order was made.

The nature and features of each type of order gave rise to various complaints in 2019:

In case R/604/2018, evidence was provided that the order was a limit order. However, the complainant claimed that at the time the order was issued, the entity informed her that the total amount would be lower. In this regard, and since it was stated in the order that the amount referred to the previous closing price and that it was an "approximate transaction amount", it was considered that the final amount of the transaction could differ from approximate amount and therefore the order had been correctly executed at the limit price.

In case R/402/2019, the complainant said that his purchase order had been executed at a higher price than he wished, as the share in question had traded below the purchase price that day. In this case, it was proved that the client had given a limit order to buy at €3.08 per share and that it had been executed at a price of €3.07 per share, in line with the market price in the time range in which the order had been issued. Therefore, the entity did not act incorrectly.

As described above, the complainant was informed that the price shown in limit orders acts as a maximum price for the purchase and a minimum price for the sale.

It should also be noted that the market does not allow limit purchase orders to be placed at a price that is higher than the maximum price in the static range or limit sales orders where the price is lower than the minimum in the range.[192]

In this regard Bolsas y Mercados Españoles establishes the static and dynamic ranges, which are calculated using the most recent historical volatility of each security, so that each one usually has its own range. The static range is the maximum variation permitted with regard to the static price established at any time (this limit is also applicable to shares traded on the Latibex).[193] The ranges are in the public domain and are updated periodically.

---

191 Rule 6.2.2 of Sociedad de Bolsas Circular 1/2001 on the Operating Rules of the Spanish Stock Market Interconnection System (SIBE).

192 Rule Five, Section 2, of Sociedad de Bolsas Circular 1/2001, as amended by Circular 1/2004 on the amendment of the Operating Rules of the Spanish Stock Market Interconnection System, in relation to the definition of the static range.

193 Trading segment for Latin American securities listed in euros.

However, in the event that an order issued by the client is rejected by the system for being outside the range, the CNMV Complaints Service considers that the entity must inform the client immediately. Otherwise, it would be considered to have acted incorrectly.

With market orders, no price limit is specified, so they are traded at the best price offered by the counterparty at the time the order is entered. These orders can be entered in both auctions and open market periods.

The risk in this type of order is that the investor cannot control the execution price. If the order cannot be fully executed against the counterparty order, the remaining tranche will still be executed at the next purchase or sale prices offered, as many times as necessary until the order has been fully completed. Typically, especially for highly liquid securities, market orders are executed immediately, even if in several tranches. These types of order are useful when the investor is more interested in performing the transaction than in trying to obtain a better price.

In case R/149/2019, the complainant alleged that a buy order had been executed at a higher price than agreed. In the copy of the order submitted in the complaint proceedings, it was observed that the type of order issued was a market order and, while a price had been included, the order did not have the same features as a limit order and it was clear that the price was the last available price, in other words it was an indicative price.

Given that the client had not issued a limit order, the Complaints Service did not consider it bad practice on behalf of the entity that the sell order was executed at a price higher than the indicative price (and which, according to available data, was within the security's price margin between the order date and the execution date).

➢ Electronic orders

At present, with the rise of new technologies and the increasing access that clients have to the electronic channels offered by entities, clients often place securities orders through the entity's website, or through a mobile application or by using investment platforms.

Although the regulations applicable to these transactions are essentially the same as for those performed in person, when the entity intends to provide the service electronically it must have adequate resources to guarantee the security, confidentiality, reliability and capacity of the service rendered.[194]

Different incidents may arise, such as the existence of communication problems that might interrupt the processing of the order, with the consequent disruption for the investor.

In 2019, several complaints relating to this issue were processed. Examples included:

194 Article 14.1.f) of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, partially amending the regulations of Law 35/2003, of 4 November, on Collective Investment Schemes, approved by Royal Decree 1309/2005, of 4 November.

R/615/2018: Due to a computer problem affecting the entity's systems, a client was unable to sell certain financial instruments, for which he requested financial compensation. In this case, although the entity acknowledged the existence of the technical problem, which meant it was deemed to have engaged in bad practice, it decided not to compensate the complainant financially on the grounds that the client did not suffer any financial damage.

R/635/2018: The complaint in this case related to an error on the entity's website which, according to the complainant, had led him to repeat a purchase of some shares.

Although the entity claimed that no operational incident had been detected in the execution of the orders, when the complainant provided a screenshot showing the following content: "Your request could not be completed... We are sorry for the inconvenience" at the time of the failed execution, the Complaints Service considered that the screenshot provided had come from the entity's website and that regardless of the cause this specific warning had interrupted the purchase transaction at the very end, after the order had been signed digitally, so it could clearly create confusion as to whether or not it had been successfully processed. Therefore, it was considered the entity had acted incorrectly as a result of the error in its online channel.

➢ Contingent orders

Some entities that provide investment services offer their clients more sophisticated securities orders than those available on the market for all investors, as referred to above.

These are contingent orders that are entered in the market only if a specific condition is met, for example the financial asset reaching a certain price.

The best-known are stop-loss orders, which are widely used by investors in order to protect themselves against any possible falls in the price of the financial asset in which they have invested. They are activated when the quoted price falls to a level at which the investor no longer wishes to take risks and therefore wishes to unwind the position.

In case R/409/2019 the complainant alleged that the entity had not correctly executed a contingent sell order, since the condition was a price of €8.15 (at-best) per share, but the trade was executed at €8.12, when that same day the share had traded at €8.19, and therefore the client considered that the minimum condition had not been met.

In this regard, it should be noted that a contingent order is an order to buy or sell shares which is delivered to the market only if the established price condition is met. These orders do not enter the market immediately. The quoted price of the security must reach the condition established in order for the order to be activated and enter the market, and this activation condition of any mandate of these characteristics is met only when transactions have actually been carried out in the secondary market at the price pre-established by the client giving the order.

In this case, based on the trading data for the session, it was observed that from a certain point in time there were transactions to buy and sell the shares at a quoted

price of €8.15 (when the order was activated). Therefore, once the condition for this order was met, the entity was obliged to launch a sell order at-best, as it did.

It should also be noted that at-best orders are orders with no price that are limited to the best price available on the opposite side of the order book.

Once the order was activated, the quoted price of the share in question fell to €8.12, at which time the complainant's order was executed, so no incorrect action by the entity was observed.

➢ Long squeezes

In case R/632/2018, the complainant stated that a sell order for some Urbas shares that he had issued on several occasions had not been executed.

The respondent entity alleged that "the URBAS GRUPO FINANCIERO issue (ES0182280018) had been in a long squeeze situation since 26 March 2018, meaning that there were no buy orders to cater to the sell orders issued" and that as a result it was not possible to carry out the sale.

A copy of a sole sell order with a specific date (prior to 26 October 2018) expiring on the same date was provided.

In clear relation to the foregoing, Sociedad de Bolsas Circular 1/2018, amending the Operating Rules of the Stock Market Interconnection System in relation to minimum price variation was intended to do away with the reference to the minimum trading price per security established until then at €0.01 including additionally for securities with a lower quoted price than this, a trade by lot requirement for securities whereby the lot established for each security would apply when the orders were entered.

The purpose of this rule was to resolve the problem that occurred when securities were subject to long squeezes, as there was more supply than demand and consequently no transactions were carried out at the minimum established price of €0.01. The rule stated that the date of the entry into force of these amendments was the date of the corresponding operating instruction.

Sociedad de Bolsas Operating Instruction No. 75/2018 established 26 October 2018 as the date of entry into force of these amendments and also contained a list of the securities to which the minimum lot requirement applied due to their quoted price. These securities included Urbas Grupo Financiero, for which a minimum lot of 100 securities was established.

The Circular also provided that all orders that were outstanding at the end of the session on 25 October 2018 would be automatically cancelled and, where appropriate, should be entered again from Friday, 26 October, in accordance with the minimum lot requirements.

As the complainant held 45,454 securities, he met the multiples of 100 requirement, and was informed that if he issued another sell order there would be more chance of its being executed on the market.

A similar situation occurred in case R/670/2018, although it involved shares of Duro Felguera, S.A., which were also included in the list of securities in Operating Instruction No. 75/2018.

➢ Client instructions in corporate transactions

The obligations of entities that provide securities administration services include providing their clients, with due diligence and speed, with information on all corporate transactions carried out by the issuing entities. This obligation is especially relevant for transactions that require precise instructions from clients. In these cases, entities must inform their clients of the procedure that they must follow to issue instructions in corporate transactions carried out by companies in which they hold shares, particularly in view of the fact that these transactions have deadlines.

When the client issues instructions in due time, the entity is required to comply with them, in due time and form, even in the event that the client issues instructions on the last day of the period for acceptance. Failure to do so is considered to be an incorrect action by the entity.

✓ *Capital increases*

When a client places a sell order relating to subscription rights and the order is not executed because no counterparty is found on the market, the CNMV Complaints Service considers that the entity cannot be criticised for the loss of value of these rights. This occurred in case R/557/2018.

✓ *Voluntary exchanges of financial assets*

In the framework of a voluntary exchange of one financial asset for another, it is necessary for the entity to receive instruction from the client. Therefore, it must inform the client in a timely manner of the transaction and its terms and conditions.

In case R/612/2018, although it was proven that the entity had informed the client of the transaction in a timely manner and had obtained the complainant's instructions, the exchange could not be carried out because the documentation contained an error of form. Given that depositories must do all in their power to ensure that instruments maintain their value, it was considered that once the documentation had been received and before it was sent to the coordinating agent, the entity should have detected the error of form that prevented the transaction from being carried out.

✓ *Other securities offerings*

In case R/673/2018, the complainant asserted that he had been unable to subscribe to some bonds that the entity in question had offered to clients that met certain requirements, in accordance with the securities note (prospectus) of the bond issuer published with the CNMV, even though he had given instructions in this respect.

Having regard to the documentation provided in the case, it was proved that the complainant had started the bond subscription procedure with sufficient time and

that the delays suffered in the process – which resulted in the complainant not signing the final document – were attributable to the entity and not to the complainant. Therefore, it was concluded that the respondent entity had acted incorrectly.

➢ Errors in the execution of orders on behalf of clients

When executing client orders, entities that provide investment services must adopt reasonable measures to obtain the best possible result for their clients' transactions, bearing in mind the price, cost, speed and probability of execution and settlement, volume, nature of the transaction and any other significant element for their execution.

Entities must also act with care and diligence in their transactions and execute them in accordance with their best execution policy. However, in cases where the client provides the entity with instructions, it must comply with the specific instructions given.[195]

In this matter of securities orders, as with other matters raised in the complaints, the CNMV Complaints Service considers that entities should make as few errors as possible and they must therefore control and organise their resources responsibly, adopting the pertinent measures and making use of the appropriate resources to perform their activity efficiently; dedicating all the time required to each client, responding to their complaints and enquiries and rapidly and efficiently correcting any errors that may occur.

The Complaints Service therefore welcomes those cases in which the respondent entity itself acknowledges the error made and offers the client a solution that financially compensates the damage resulting from unfortunate conduct by the entity.

In case R/654/2018, the respondent entity acknowledged that an error had occurred when transmitting the complainant's instructions, whereby an order was placed for the sale of 100 subscription rights when the client wished to sell 4,100 rights. The entity offered to pay the client for the difference.

However, it should be indicated that the rectification of the errors committed by entities does not necessarily entail the absence of bad practice. The rectification of the consequences by the entities is the result of a prior error, but that does not ensure that the error will not be repeated.

For this reason, in general, when an error is detected, the CNMV Complaints Service considers that there has been bad practice and requests that the entities provide evidence that measures have been adopted in order to prevent a repeat of such practice, without prejudice to the Service's welcoming the entity's offering a solution to the client affected by the error.

195 Articles 221 and 223 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

➢ Failure to execute an order according to the client's instructions

As previously mentioned, the regulations on order execution establish that entities must execute orders according to the specific instructions issued by each client.[196]

Despite the provisions set out in the legislation, it might be the case that the entity does not take into account its clients' instructions for performing certain transactions which, for various reasons, cannot be carried out.

The Complaints Service considers that diligent action by the entity involves providing clients with all the information necessary so that they may understand the problem that prevented their order from being executed.

For example, in case R/573/2018, the complaint related to a trade that could not be executed in a securities account because the client had not submitted any identification documents, in accordance with the MiFID II Directive. Specifically, Annex II of Commission Delegated Regulation (EU) 217/590 requires for Italy (the complainant was an Italian national) a tax identification code (*codice fiscale*) in order to operate. Therefore, it was considered that the entity had not overreached itself in requesting that this identification document be provided by the client in order to accept and execute his orders.

In this case, the entity provided a communication dated 6 November 2017 about the requirement to provide certain information, in accordance with the provisions of Annex II of the aforementioned regulation. The entity was therefore not considered to have acted incorrectly.

In case R/262/2019, the entity argued that the complainant could not operate because his standard securities administration and custody contract did not have an associated cash account.

In this case, it was concluded that the entity had acted incorrectly, since it did not prove that prior to date the complaint was filed it had taken any action in relation to this issue or had informed the complainant that since his standard securities administration and custody contract did not have an associated cash account, he would not be able to operate.

➢ Unilateral execution of positions by the entity

On certain occasions, complainants query the execution of orders on their behalf, even though the transactions had been authorised in the framework of the corresponding investment service contract.

In this regard, investment firms can unilaterally close positions opened by their clients in certain financial instruments, a possibility that is usually included in the operating rules established in the contractual documentation signed between the parties regulating the investment.

196 Article 223 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

Although this may be justified in some cases, the CNMV Complaints Service considers that prior to the investment, the entity must inform its clients of the cases in which it will act in this manner. It should be noted that the legislation applicable to investment firms establishes, in the field of conduct of business rules, that they must keep their clients informed at all times.[197]

The most common case of unilateral closure of client positions by entities is related to trading with certain financial derivatives products, which, due to their leveraged nature, lead to the actual exposure to a certain asset (referred to as "the underlying asset") exceeding the investment or the money that the client has deposited in the entity. It is therefore necessary to continuously monitor the position and, in some cases, if the underlying asset performs unfavourably and the client does not provide any new funds, the entity would be justified in cancelling the investment.

For example, in contracts for differences (CFDs), the obligations assumed by the parties are generally laid down in the contract itself. This usually includes the client's obligation to set up and maintain a series of margins that depend on the price of the underlying asset on the secondary market.

In the event that these margins are exceeded, the positions will be closed if the investor does not provide the requested funds.

Therefore, entities must provide documentary evidence that the client was informed about these issues prior to the start of the transactions. Otherwise, the entity would have been deemed to have acted incorrectly (as occurred in case R/82/2019).

Also, without prejudice to the entity's right to unilaterally close a client's positions when this circumstance has been fully reflected in the initial contract, the Complaints Services considers that the entity must be able to demonstrate that it clearly informed its client, prior to the closure, that it was going to proceed in this manner in order to enable the client to take such actions as he or she might deem appropriate with respect to the open positions.

In case R/315/2019, the client complained that the entity had unilaterally closed some of his positions.

The report concluded that the entity had been forced to close the positions as a protection measure by entering an order on the market in the opposite direction to his position.

In this regard, it should be noted that the European Securities and Markets Authority (ESMA) published in the *Official Journal of the European Union* a series of product intervention measures related to the marketing of CFDs and binary options to retail investors.

These measures were approved by the ESMA Board of Supervisors on 22 May 2018 and made public through European Securities and Markets Authority Decision (EU) 2018/796.

197 Article 209.1 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

The marketing, distribution and sale of CFDs to retail investors is restricted to cases in which the following protections are guaranteed:

– A leverage limit on opening a position that varies according to the underlying asset and its volatility. For stock market indices, this is set at 20% of the notional value.

– Margin close-out protection. Specifically, if the total margin in an account falls below 50% of the initial required margin with respect to the client's open CFD positions, the provider must close out one or more of the CFDs.

– Negative balance protection. A general limit is established to guarantee the losses of retail clients.

– The prohibition of incentives to promote transactions.

– A standardised risk warning.

In this regard, it was proved that the entity had sent a statement to its retail clients informing them of the measures imposed by ESMA on investment firms that marketed CFDs, in this specific case, to the e-mail address provided for this purpose in the framework agreement for the client's products and services.

A.5.2 Collective Investment Schemes (CIS)

➢ Orders without client authorisation or where no such authorisation exists

The rules of conduct applicable to investment firms establish, in matters of order execution, that when the client gives specific instructions for the execution of an order, the company must execute the order following those instructions.

With regard to investment funds, the subscription/redemption of units must be reflected in an order that certifies the unitholder's wish to subscribe/redeem units of a certain fund.

Therefore, to establish the existence of the client's instruction, the order or document indicating his or her wish to order the transaction must be provided.

In case R/206/2019, the complainant asserted that she had given an order to redeem some units of an investment fund but the entity had not processed it.

No documents or evidence were provided that proved that the complainant had ordered the operation or had at least intended to redeem the units on the date indicated and, as the Complaints Service could not make a judgement based on her verbal statements, it had to consider only the documentary evidence provided, which did not indicate the existence of a redemption request.

➢ Disputes over the net asset value applied to the transaction

Given the intrinsic liquidity features of CISs, many complaints refer to the net asset value (NAV) applied in the subscription or redemption of CIS units.

First of all, in should be pointed out that in general the NAV applied in subscriptions and redemptions of unlisted investment fund units may be that of the same day as the request (which will be made public on the following day) or the day after the request (which will be published two days later), depending on the provisions of the fund prospectus. Business days do not include, among others, days on which there is no market for the assets accounting for more than 5% of the total fund assets.

Consequently, the net asset value (NAV) applicable to subscriptions and redemptions of units of financial investment funds is unknown to investors when they place their orders. The prospectus must also indicate the procedure for subscription and redemption of units in order to ensure that the management company or distributor accepts subscription and redemption orders only when they have been requested at a time when it is impossible to accurately estimate the NAV.

It is also common practice for the investment fund prospectus to set out what are referred to as "cut-off times", so that requests received after this time are deemed to have been made on the following business day for the purposes of calculating the applicable net asset value.

For both subscriptions and redemptions, certain practical aspects such as fees, minimum investment requirements or advance notice should be taken into account. All this information is contained in the KIID and in the prospectus.

In the case of harmonised foreign CIS registered in the corresponding CNMV registry, distributors in Spain must deliver to each unitholder or shareholder, prior to subscription of the units or shares, a copy of the memorandum on the methods of distribution envisaged for Spain in accordance with the standard form published on the CNMV's website.[198] This delivery is mandatory and cannot be waived by the unitholder or shareholder. The standard form establishes the following:

> *SUBSCRIPTION AND REDEMPTION PROCEDURE*
>
> *Orders for subscription, redemption or exchange of shares/units must be received by the distributor on a business day and before [...]. Orders performed after the time limit or received on a non-business day will be processed together with the orders received on the following business day. The distributor will also confirm the transactions to each investor informing about the date on which they were performed, the number of shares/units subject to the transaction and the price and, where appropriate, the fees and expenses charged, and the exchange rates applied in any foreign exchange transactions performed.*

The following complaints questioned the NAV applied to the transactions.

In case R/576/2018, the complainant said that there had been a delay in the redemption of his units, arguing that he had issued an order dated earlier that the date on which it was actually executed.

However, based on the only order that was submitted as evidence, it was concluded that the redemption date and hence the NAV applied were correct.

198 Rule Two, Section 2, of CNMV Circular 2/2011, of 9 June, on information of foreign collective investment schemes registered in the CNMV's registries.

The same situation occurred in case R/600/2018, where the entity applied the correct NAV, but in this case the client was given incorrect information through its website that gave rise to an erroneous expectation about the date of the NAV applicable in the redemption of the units in question, and the entity was considered to have acted incorrectly.

In case R/6/2019, the client complained about the NAV applied, as the NAV of the day following the day corresponding to the order had incorrectly been applied. The entity argued that the NAV applied was correct as the day on which the order had been issued was a holiday for the market in question.

Given that more than 5% of the fund assets were invested in securities that were listed on a stock market for which it had been a non-business day, it was concluded, as indicated in the fund prospectus, that orders given on the day that the order in this complaint was given would be executed with the NAV established for the first following business day, as had been done in this particular case.

➢ Incidents in the subscription and redemption process

The request or order must state the identification of the CIS in which the investor wishes to subscribe or redeem shares or units, the amount or number of units or shares that the investor wishes to subscribe or redeem, as well as other information of interest. In the case of transfers, the source and target fund must also be identified.

In 2019, complaints were resolved in which entities executed transactions on behalf of their clients with no order to support the execution (or if there was an order it had some type of deficiency) or, conversely, transactions were not executed even though they had received specific instructions from the client.

In case R/668/2018, the complainant asserted that she had not been able to transfer units of an investment fund which she owned. However, it was discovered that the units had been pledged so it was concluded that the respondent entity had acted correctly by not executing the transfer, given the special status of the units, which prevented their transfer. However, as it was an internal transfer and a copy of the signed order had been provided, it was concluded that the entity had acted incorrectly by signing an order with the complainant that was impossible to execute.

A similar situation occurred in case R/25/2019, where it was proved that the guarantee on a mortgage loan in the name of the complainants extended to units in the investment funds subject to the complaint that had been pledged and blocked, and consequently, it was not possible to redeem or transfer the units as they had been blocked in favour of the bank.

As mentioned previously, the Complaints Service considers that entities should commit as few errors as possible, for which they must control and organise their resources in a responsible manner, adopting the appropriate measures and using the appropriate means to carry out their activity efficiently; dedicating all the time required to each client, responding to their complaints and enquiries and rapidly and efficiently correcting any errors that may occur.

The Complaints Service therefore welcomes those cases in which the respondent entity itself acknowledges the error made and offers the client a solution that

financially or otherwise compensates the damage caused by the entity's unfortunate conduct.

In this regard, in some complaints, such as case R/377/2019, the entity offered its client financial compensation for the error made.

➢ Transfers between investment funds and other CIS

CIS transfers are governed by the provisions laid down in Article 28 of Law 35/2003, of 4 November, on Collective Investment Schemes and, for matters not provided therein, by general legislation regulating the subscription and redemption of investment fund units and the acquisition and disposal of shares in investment companies.

Withdrawing from a fund, even when reinvesting the resulting amount in another fund (which is treated differently for tax purposes), involves a redemption of the units of the source fund and a subscription of the units of the target fund. This transaction is therefore subject to all general legislation on CIS subscriptions and redemptions.

The aforementioned regulation indicates that in order to initiate the transfer, the unitholder/shareholder must contact the target management company or distributor, with the latter required to send to the management company or distributor of the source fund, in a maximum period of one business day from the time it receives the notification, the duly completed transfer request.

The source company has a maximum of two business days following receipt of the request in which to perform the verifications that it deems necessary. Both the transfer of cash and transmission by the source company to the target company of all the financial and tax information necessary for the transfer must be performed from the third business day following receipt of the request.

Similarly, both the deadlines established for setting the NAV (D or D+1) applicable to transfer operations and the period provided for settlement of the transactions are governed by the provisions in the prospectus of each fund for subscriptions and redemptions.

In general, CIS transfers are performed through the National Electronic Clearing System (SNCE). The manner in which the fields are completed is determined by the operating instructions of the SNCE. It should be clarified that the identifying data of the order issued by the target management company must match the data held by the source management company in accordance with the aforementioned operating instructions.

In this regard, in accordance with Inverco's protocol for CIS transfers,[199] if as a result of the checks made it is found that the transfer cannot be carried out, the source entity must notify the target management company or distributor, within a maximum additional period of one business day, of the reasons why the transfer cannot be made.

199 http://www.inverco.es/archivosdb/cuaderno-334-def-2015-11.pdf

In this respect, it should be noted that most of the complaints that are received questioning the applicable NAV in the redemption of units of a CIS arise in the context of a transfer between CISs, which also mostly involve more than one entity.

In these cases, the Complaints Service requests arguments from the entities involved in the transfer, either as the respondent entity or the participant (i.e. source or target entity).

In case R/235/2019, the source entity rejected several transfer orders made in the target entity. Based on the documentation provided, it was demonstrated that the first two orders had correctly been rejected due to an error in the identification of the source fund. However, in the third order, the source entity acted incorrectly as failures in the transfer due to a technical incident at its end led to an excessive delay in processing the transfer.

In case R/551/2018, the client complained about the NAV applied in the redemption of units in the source fund. The entity alleged that since the manager of the source fund had two business days to carry out the checks, the NAV for the final day available to carry out these procedures had correctly been applied.

However, in this case, the source and target funds were both marketed by the same entity.

In this regard, it is important to note that in transfers between CIS – source and target – marketed by the same entity, the deadlines provided in the regulations for transmitting the target data to the source and performing the necessary checks do not apply. Therefore, for the execution of the redemption in the source fund indicated in the transfer, the date of the transfer order must be taken as the redemption date. This is because, in this case, no additional period is needed to check the transfer request as the entity carrying out the checks would be the same as the entity receiving the transfer, beyond of course those that must be carried out as part of the procedure for redeeming and subscribing units in the CIS referred to in the order, within the regulatory deadlines for performing such transactions.

When the entity receiving the transfer order is the distributor of the source and target CIS, it must be processed as an ordinary redemption order and distributor must send the redemption order of the source fund in the transfer to the source management company, which will act in accordance with the fund prospectus.

Therefore, it was concluded that the entity had acted incorrectly.

➢ Change of distributor

A change of distributor is a separate transaction from a transfer, in which the investment remains unchanged; the investor keeps the CIS it has already acquired, but the entity that acts as distributor or custodian for the CIS is changed.

In case R/492/2018 the complainant, as the owner's representative, ordered the change of the distributor of some foreign CIS with corporate form (the deposit of the shares in the securities account opened with another intermediary), which had to be carried out within a reasonable period of time, in compliance with the entities' duty to behave diligently and transparently in the interest of their clients.

The entity took 24 days to make the changes but argued that the delay had been due to its obligations to comply with anti-fraud regulations and securities market law, and above all, to protect the assets, funds and interests of a client.

Considering that the entity had the obligation to verify that the ordering party had the power to act on behalf of the CIS holder, that the mere change of distributor of the CIS could not be taken as fraud and that the entity was also aware of the powers of representation, it was concluded that the entity had been at fault in not executing the orders in a timely manner.

➢ Purchase of assets with insufficient balance in the client's account

In general, regulations[200] establish that members of the official secondary market are required to execute, on behalf of their clients, any orders they receive for the trading of securities in the corresponding market. However, with regard to spot transactions, the entity may make compliance with this obligation conditional upon the ordering party's delivering the funds used to pay for the amount of the transaction.

The conditionality referred to in the legislation may be incorporated into the relevant contracts.

In any event, it seems necessary for entities to have implemented appropriate procedures and control measures so as to avoid overdraft situations, given the negative consequences that this causes for both parties.

In regard to this issue, it is important to take account of whether this type of incident happens on a one-off basis, in which case the responsibility may fall on the complainant, or whether it occurs systematically, which is a situation that the entity should avoid.

In fact, entities may make the processing and execution of their clients' securities orders conditional upon the client's providing the necessary funds; not only of the amount of the investment, but the total amount, including the transaction fees.

For example, in case R/138/2019, the Complaints Service considered the non-execution of an order to change the distributor of a CIS to be justified because the complainant did not have a sufficient balance in his associated account to cover the transaction fees.

➢ Unilateral execution of positions by the entity

Complaints were also received in 2019 in which complainants alleged that entities had performed transactions without their consent.

In case R/135/2019, the complainant asserted that the bank had unilaterally executed the sale of his shares in an exchange-traded investment fund (ETF). The entity claimed that the ETF had actually been liquidated.

200 Article 71 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

According to the documentation provided, the security referred to in the complaint had been liquidated and the complainant had been subsequently informed of this.

The Complaints Service considers that it is good practice for the depository to inform securities holders of this type of transaction before it is performed, so that the client is aware of the details of the transaction, the date on which it will be carried out and the consequences deriving from it; information that may be useful for making the best investment decisions. Therefore, it was concluded that the entity should have previously informed the complainant about the transaction and, more specifically, about its features and consequences.

A.6 Fees

A.6.1 Securities

Investment firms must keep their clients properly informed at all times. Among other matters, clients and potential clients must be provided with adequate prior information on all associated costs and expenses.[201]

➢ Prior information on costs and expenses following the introduction of MiFID II

The MiFID II Directive establishes information requirements for costs and associated expenses that must be met by investment firms.[202] To ensure that clients are informed of all costs and expenses they must bear, as well as assessment of this information and its comparison with different financial instruments and investment services, investment firms must provide clients with clear and understandable information on all costs and expenses before these services are provided.[203] For the purposes of disclosing *ex ante* or *ex post* cost and expense information to clients, investment firms must aggregate:

i) All costs and related expenses charged by the investment firm or third parties, when the client has been referred to the third parties, for the investment or ancillary services provided.

ii) All costs and related expenses for the production and management of financial instruments.[204]

---

201 Articles 209.1 and 209.3 of the Recast Text of the Securities Market Act as approved by Royal Legislative Decree 4/2015, of 23 October.

202 Article 65 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, in force from 17 April 2019.

203 Recital 78 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

204 Article 50.2 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

The CNMV clarified the way in which this information must be provided in accordance with the MiFID II Directive[205] and established the following.

According to MiFID II[206] and its delegated regulation,[207] all information on costs and charges related to the service and financial instrument must be disclosed *ex ante* in such a way that it is understandable to the clients for whom it is intended. Furthermore, payments received from third parties in relation to the provision of the service to the client (inducements) must be detailed.

In general, the *ex-ante* information on costs must refer to the real fees applicable to each client for each transaction. In this regard, we refer to the following questions addressed by the European Securities and Markets Authority (ESMA):

– This information must be provided to clients separately and refer to specific transactions, instruments and services.[208]

– It is possible to provide this information by means of predefined or standardised investment amounts (even using grids or tables), for instruments that do not incorporate product costs (such as equity instruments or derivatives traded on organised markets), providing sufficiently detailed information is provided and providing that by means of these tables the client is fully informed with the same degree of accuracy as if he or she had been informed prior to each transaction.[209]

– Estimated investment amounts can be used where the costs vary depending on the amount (i.e., when these are not applied linearly). However, in this case, such estimated investment amount should be close to the amount that the client wishes to invest, and the entity should reflect the range of costs applicable to the transaction.[210]

– The *ex-ante* information on costs and charges cannot be submitted with reference to tranches, ranges or thresholds, but must be completely individualised.[211]

Taking all this into consideration, to the question of whether it is possible to meet the *ex-ante* cost disclosure requirements by referring to a list of standardised transactions on the website, the CNMV's response is as follows:

---

205 Question 11.7 of the CNMV document *Q&A on the application of the MiFID II Directive.*

206 Articles 24.4c) and 24.5 of Directive 2014/65 EU of the European Parliament and of the Council, of 15 May 2014, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

207 Article 50 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

208 Questions 22 and 23 in the section "Information on costs and charges" of *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics* (ESMA35-43-349).

209 Question 23 in the section "Information on costs and charges" of *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics* (ESMA35-43-349).

210 Question 29 in the section "Information on costs and charges" of *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics* (ESMA35-43-349).

211 Question 30 in the section "Information on costs and charges" of *Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics* (ESMA35-43-349).

In instruments such as equity instruments or derivatives traded on organised markets, when the real costs payable by clients do not vary according to the amount (e.g. in situations where the same percentage fee is always applied), the use of this type of ex-ante *information, based on tables and standardised investment amounts, is appropriate providing that such information includes an example with amounts and refers to the real costs applicable to each client. However, in these cases, it must be ensured that the* ex-ante *standardised information appropriately reflects all the real costs applicable to the client (*inter alia*, exit costs, recurring costs, etc.).*

In the case of CIS, standardised investment amounts can also be used.

However, where the charges may vary significantly depending on the amount of each transaction (minimum amounts, variable charges and brokerage fees linked to the amount ordered, etc.), this approximation would not be acceptable since the exclusive use of standardised amounts or tables would not ensure the presentation to the client of the real costs to be borne. In these cases, if the client is provided with standardised ex-ante *information or information based on predefined investment amounts (which as mentioned above, must refer to the real costs payable by each client, be complete and appropriately reflect all costs, including also examples with amounts), such information must be supplemented with the specific costs payable by the client for the transaction.*

However, when regular equity transactions or derivative trades are closed on organised markets by the client on a regular basis, it is not necessary that such information be submitted for each transaction. This information would be necessary, however, at least for the first trade closed each calendar year for a specific type of asset, insofar as, in addition, at that point in time, a more general description is provided (without a reference to a specific amount being required), of the fees that would be applicable to any other transactions closed later on in the year.

Finally, in the case of instruments such as fixed income where implicit costs vary and are determined for each transaction, standardised ex-ante *information reflecting the real costs payable by the client cannot be submitted. In this case, the information must refer to the real fees applicable to each client for each specific transaction.*

➢ Prior information on costs and expenses before the introduction of MiFID II

Before the adaptation of Spanish regulations to MiFID II, entities had to submit a fee prospectus to the CNMV, in which they included the maximum fees that could be charged to their clients, and which they publicised in all their branches and offices, as well as on their website, in an easily accessible location.[212] The CNMV published these fee prospectuses on its public website in addition to any

212 Article 71 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019, and Articles 3 and 9.2 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

amendments submitted by entities, once it had verified that they complied with the required conditions.[213]

Even though the maximum fee prospectus had to be published, entities had to expressly inform their clients of the fees individually, and sufficiently in advance. In relation to this, the standard contract required for the provision of custody and administration services for financial instruments[214] had to establish in a manner that was clear, precise and easily understandable for retail investors the headings, periodicity and amount of the fees to be charged when these were lower than those established in the fee prospectus. Otherwise, the prospectus was delivered and the acknowledgement of receipt of the client kept.[215]

Due to the adaptation of Spanish regulations to MiFID II, with effect from 17 April 2019, investment firms were no longer obliged to prepare a fee prospectus. Therefore, the fee prospectuses on the CNMV's website are the last ones submitted by each entity in compliance with the previous regulations.

The entity had to be able to prove that it had provided the client with prior information about the applicable fees for the various services offered, by providing evidence of submission of the fee prospectus (or the lower fees occasionally agreed between the parties) at the time the contract was entered into.

Entities acted correctly by submitting documentation proving that they had provided the client with information on the fees initially agreed upon through the custody and administration contract for financial instruments signed between the entity and the client. This contract contained specific conditions, an annex or a signature sheet showing the fees (R/540/2018, R/632/2018, R/667/2018, R/113/2019, R/134/2019, R/150/2019, R/182/2019, R/248/2019, R/311/2019 and R/362/2019), a mention of having delivered the fee prospectus (R/65/2019) or the client's confirmation of having received it (R/111/2019, R/246/2019 and R/440/2019).

The entities also acted correctly in the following complaints:

– In case R/575/2018, the entity confirmed that it had informed the client of its fees through the custody and administration contract for financial instruments, an annex detailing the applicable fees and acknowledgement of receipt of the fee prospectus, whereby all three documents were signed by the complainant. The entity also reiterated in the purchase order the fees forming the object of the complaint.

– In case R/630/2018, the entity provided the contractual documentation signed by the client on opening a securities account and an associated current account to operate on the stock market on credit, in which the client declared that he

213 Article 9.1 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

214 Article 5.2 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

215 Rule Seven, Section 1, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

had read and accepted the fee prospectus. In addition, the entity provided computer records of the client's access and a video about how the system worked, whereby, prior to physically signing the contract, the client had to accept on the website the general terms stipulated for continuing to contract the product (in other words, he had to mark the boxes for the documents which he once again accepted when signing the paper document). The entity also proved that on arranging a currency trading account by remote means, the client had to accept the general terms and conditions for this type of account before the contracting process was completed.

– In cases R/54/2019 and R/56/2019, the entity provided the securities custody and administration contract signed by the parties, which contained the fees set down in the maximum fee prospectus. The following year, it granted the complainant a discount for six months and later sent her a letter to her postal address reminding her of the expiry date of the particular conditions agreed upon and of the fact that from that time on the fees set down in the maximum fee prospectus would apply, which were the same as those stated in the contract. The Complaints Service understood that the fees had not changed as the entity had offered a discount on said fees to the complainant. Therefore, the complainant was already aware of the fees and by signing the contract, she agreed to them. A similar situation occurred in case R/237/2019.

– In case R/246/2019, the entity provided a copy of the securities transfer order, duly signed by the client, informing him of the fee that would be charged (percentage, calculation basis and total amount in euros).

– In case R/407/2019, following the transfer of a business between entities, the client sent several e-mails in relation to the collection of fees for the custody of fixed income securities that he alleged had not been applied by the transferor. The respondent entity argued that the reasons that the transferor gave a free custody service for the securities were not based on the contract, but on a commercial action. Therefore, the CS responded to the e-mails explaining the reason for the charge, although in the last e-mail sent to the client in March it indicated that, as a commercial gesture, the entity would reimburse all the custody fees charged up to that date and that from May it would charge to his account the custody fees corresponding to the fixed income securities. Taking this communication into account, the Complaints Service considered that the entity was entitled to charge the custody fees from May.

In contrast, the following actions were considered to be incorrect:

– One complainant complained about the lack of information about the expenses deriving from the execution of a purchase order and a sale order for shares listed on the Hong Kong stock exchange. The information about the signing of a securities custody and administration contract did not contain the applicable fees and merely mentioned the existence of a maximum fee prospectus, without providing any record that the complainant had received it. In regard to information requested by the complainant when he placed a telephone order, the operator had said that she could not provide the brokerage costs and the entity claimed that it was not possible to know these in advance. However, the entity did provide information on brokerage costs for the Hong Kong market on its website, so the Complaints Service considered that it had been at fault in not providing the client with this information when requested (R/502/2019).

– The entity did not provide a copy of the securities contract in force on the date that some custody fees were collected to prove that the client had been duly informed of the fees applicable for this service (R/526/2018).

– The entity did not prove that it had informed the client about the fees applicable before a transaction was performed, since it did not provide the acknowledgement of receipt of the delivery of the fee prospectus and although it did provide the securities contract signed by the client, the disputed fee did not appear in that document (R/624/2018 and R/490/2019).

– The entity signed a custody and administration contract for financial instruments with the client, in which she confirmed that she had received a copy of the current fees and an additional annex which stated that provided she met certain requirements she could be exempt from payment of the custody and administration fees of certain equity securities until a specific maturity date. This exemption from payment of the custody and administration fee and the maturity date were also included in an advertising leaflet delivered to the client.

  Once the period of exemption from the securities custody and administration fees described in the contract signed with the client and in the advertising leaflet had ended, the entity made a commercial decision to credit these fees by first charging and then reversing them, which reasonably led the complainant to expect a reimbursement of the fees; however at a certain point and with no prior notice, the entity chose to pass on the fee to the client without reversing it subsequently. The Complaints Service resolved that the entity should have notified the client that the exemption had expired before it did and that it was not appropriate to pass on the fees to the client until this notice had been issued (R/133/2019).

– A contract signed between the client and the entity contained an annex detailing the applicable securities custody and administration fees, which, although they had been included in the contract, the entity had been reversing for commercial reasons. Without prior notice, the entity started to collect the custody fee in the last quarter of the year. On receiving the client's complaint about the fee, the CS informed him in January of the following year that he would be reimbursed for that amount but that from the next quarterly settlement date the corresponding fee would be applied at the current rate.

  The entity acted incorrectly by failing to warn the complainant that the exemption would cease to apply from the last quarter of the year, which meant that the custody fees would no longer be reversed. However, the Complaints Service considered that the CS had informed the client of this circumstance, when it informed him that the entity would reimburse the custody fees already charged and would apply the corresponding fee in the next quarterly settlement. In any case, the entity was bound by the commitment undertaken by the CS and it also acted incorrectly by failing to prove that it had complied with the obligation to reimburse the custody fees for the fourth quarter of the year (R/136/2019).

– An annex to the standard contract for the custody and administration of financial instruments signed by the parties contained, among other items, a fee for the custody and administration of traded securities on Spanish securities markets. The entity had been reimbursing a part of the custody fee by crediting the

complainant's account, until it failed to do this for two consecutive six-month periods, which prompted the client to file a complaint. Although there was no agreement setting down special conditions between the entity and the complainant – as no document was provided to prove that these circumstances existed – the entity reimbursed part of the custody fee charged to the complainant, which responded only to an objective framed in the entity's commercial policy and for which no documentary proof was required. The Complaints Service considered that the entity acted incorrectly in not proving that it had informed the complainant about the changes to said commercial policy before they were made (R/148/2019).

➢ Notification to the client of any changes in the fees initially agreed

✓ *Method of sending the notification of fee changes*

Entities must inform clients of any change to the rates of fees and expenses applicable to the established contractual relationship. In particular, specific rules apply to changes in fees for services which require the use of a standard contract, within the general scope of said contracts, as set out below.

In the event that fees are adjusted upwards, the entity must inform its clients and grant them a minimum period of one month in which to modify or cancel their contractual relationship. The new fees will not be applied during this period. In relation to the latter, it should be clarified that the former rates will continue to be charged, unless the entity indicates otherwise. In the event of a downward change, the client will also be informed without prejudice to its immediate application.[216]

The information on the fee changes, both upwards and downwards, may be included in any periodic communication that the entity must submit to its clients or sent by any means of communication agreed by the parties in the contract.[217]

However, regulations do not require that this modification should be sent by registered mail or with an acknowledgement of receipt. Therefore, it is sufficient that the communication be delivered by ordinary mail or by any alternative means agreed by the parties. Consequently, entities must be able to prove that they have sent the information to the client, while its receipt is subject to circumstances, in principle, beyond their control.

Based on the above, although entities are not obliged to send their clients the corresponding information by certified post with acknowledgement of receipt – in other words, they are not obliged to provide proof of delivery –, they do have an obligation to prove that the information has been dispatched, through a copy of the personal and separate communication sent to the client at a valid notification address.

Therefore, if there has been any change in fees since the start of the contractual relationship, the entity must be able to prove that it has sent its clients the information about this change in the required terms.

---

216 Rule Seven, Section 1, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

217 Rule Seven, Section 1, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

Regarding the method of delivery, entities usually send letters by post, which they then submit to the case file when required (R/632/2018, R/667/2018, R/129/2019, R/136/2019, R/247/2019 and R/566/2019). In case R/231/2019, in addition to ordinary postal delivery, the information was sent to the client through the mailbox on his personal profile on the entity's website, a form of notification that the client had contractually accepted. In case R/432/2019, the entity sent its client a communication about fees through the web portal and attached the proof that it had been sent. In this case, communications had been sent to the client's private area on the entity's website for a year and a half and the client had been informed that this would be the form of notification in a letter sent by post almost two years previously and in a reminder.

In regard to sending communications of changes in a personal and separate manner, the Complaints Service considers that the entity acts correctly, for example, when the letter is addressed to the client and sent to the address indicated in the custody and administration contract for notification purposes (R/247/2019).

However, in the following cases of changes to the agreed fees, entities did not properly inform their clients:

– The entity did not prove that it had provided its client with information on the new fees applicable, when the six-monthly account movements showed that they had been changed.

  While neither the securities contract nor the conditions agreed therein regarding fees were submitted, the extracts showing the fee charges indicated how the securities custody and administration fee had been calculated, and it was clear from this that it had increased. However, the entity was not able to prove that it had informed the client, in the terms provided by law, of the increase in the custody and administration fees (R/526/2018).

– The entity charged a transfer fee that did not correspond to the amount agreed in the contract signed between the parties, but rather to a new fee implemented by the entity following a change in the fee prospectus. However, there was no record in the case file of the client having been duly informed of this increase (R/100/2019).

– The entity only provided a standard fee modification letter that specified neither the identity of the recipient nor his postal address. Therefore, the non-personalised standard letter was insufficient, at least as proof of having sent the information to the complainant (R/254/2019 and R/262/2019).

– The client had several securities accounts and the entity sent a communication with a new version of the securities contract that did not identify the accounts to which the fee changes referred to in the communication applied (R/296/2019).

✓ *Date of application of fee changes*

As mentioned above, clients must be informed of any increase in fees and given a minimum period of one month from the receipt of the information (or such other minimum notice period as the parties may have agreed or the entity has committed to) in which to change or cancel the contractual relationship, during which time the new fees will not be applied. Any reduction must also be communicated, without

prejudice to its immediate application. These provisions are included in the specific regulations of the standard contracts.[218]

Typically, in the communication of a fee adjustment, a date of entry into force for the new fees is established. In the case of an increase, entities would have to send the communication well in advance in order to enable the client to exercise the aforementioned right to change or cancel the contractual relationship.

Some entities sent the advices of fee increases sufficiently in advance of their entry into force (R/632/2018, R/667/2018, R/65/2019, R/129/2019, R/136/2019, R/231/2019, R/405/2019 and R/566/2019).

However, in other cases the notice given of the fee changes gave clients insufficient time to exercise their legal right to cancel or modify their contractual relationship. Entities were considered to have acted incorrectly in the following cases:

- The complainant had agreed an exemption from the administration and custody fee in the contract and the entity sent him a letter on 1 December informing him of a new fee for this service, which would come into effect on 1 January of the following year (R/657/2018 and R/658/2018).

- The entity informed the complainant of the fee increase only two weeks before the change entered into force (R/148/2019).

- The entity applied the fee increase before the client had been informed of its coming into effect. In this regard, the entity had sent the client a statement about the upcoming rate changes in December, although this indicated that it would maintain the fee discounts on purchases, sales and custody services contracted until 30 June of the following year. However, the entity passed on the new custody fees and a fee for the collection of dividends during the six months following this communication. In accordance with its commitment to maintain the fee discounts in that period, the previous (lower) custody fee should have been applied, and it should not have applied a fee for the collection of dividends (R/182/2019 and R/373/2019).

- The entity sent a communication about the fee changes ten days after the new fees had entered into force (R/274/2019).

✓ *Content of the notification of fee changes*

With reference to the content of the communication that entities are required to send their clients informing them of changes in fees, for the purpose of adequately informing the client, the communication should indicate the transactions that have undergone changes (at least the most usual ones) and, preferably, their amounts (those in force until a specific date and the new ones).

In the event that the fees are to be increased, in accordance with current regulations it is mandatory to inform clients of their right of separation in the event of disagreement

218 Rule Seven, Section 1, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

with the proposed changes, the deadline for exercising this right (which must be at least one month after the communication is received), and the fact that the new fees are not applicable during this period. However, the entity may apply the fees previously in force unless otherwise stated.

Entities acted correctly in some cases when communicating future increases in their fees to clients and indicated a period of at least one month from receipt of the letter to modify or cancel the contract, whereby the new rates would not be applicable until completion of this period (R/667/2018, R/129/2019, R/136/2019, R/405/2019 and R/566/2019) or with no cost (R/231/2019).

However, errors of form were detected in communications addressed to clients relating to increases in fees that did not provide information on clients' right to modify or cancel the contractual relationship if they disagreed with the proposed changes (R/65/2019 and R/148/2019). In case R/274/2019, the error of form was that although the statement sent indicated that the client could terminate the contract or service that he had contracted with the entity at any time before the fee change was applied, it did not contain any reference to the minimum period of one month from receipt of this information in which his contractual relationship with the entity could be modified or cancelled without the new fees being applicable, although the previous fees would still be charged.

➢ Fee amounts and items

As part of its clarifications in regard to the MiFID II Directive, the CNMV has indicated that, in general, the *ex-ante* information on costs must refer to the real fees applicable to each client for each transaction.[219]

However, as indicated above, prior to the adaptation of Spanish regulations to MiFID II, entities had to prepare a maximum fee prospectus, and could not charge clients fees or expenses that were higher than those established in this document, apply more burdensome conditions or pass on unforeseen expenses or costs for items not mentioned therein.[220]

The fees did not exceed the maximum amounts indicated in the fee prospectus in the following complaints relating to fees for intermediation in the markets (reception, transmission, execution and settlement),[221] fees for the transfer of securities[222] and fees for the administration and custody of securities.[223]

In cases R/246/2019 and R/311/2019, the client wished the entity to apply the best fees shown on its website for trading through a platform. However, according to the information on the entity's website, to be eligible for these fees, a new securities account was required and the complainant had not opened one, but had traded from

219 Question 11.7 of the CNMV document *Q&A on the application of the MiFID II Directive*.

220 Article 3.2 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, in regard to fees and standard contracts.

221 R/150/2019, R/182/2019 and R/247/2019.

222 R/624/2018, R/659/2018, R/182/2019, R/274/2019, R/362/2019, R/432/2019 and R/440/2019.

223 R/526/2018, R/529/2018, R/575/2018, R/129/2019, R/134/2019 and R/148/2019.

an account he already held. Consequently, the Complaints Service considered the entity's action to be justified, as it applied the fees agreed in the securities custody and administration contract.

However, in some cases the entity acted incorrectly:

– In one case, the entity charged its client an intermediation fee that was higher than the agreed fee (R/115/2019).

– In another, the entity passed on to the client a custody fee during the fee exemption period, although it was later reversed. Both the contract signed between the parties and an advertising leaflet clearly referred to the exemption from the custody and administration fee for financial instruments, so this was not optional for the entity and therefore the charge and the subsequent reversal of the fees did not appear to be the best way to implement the exemption (R/133/2019).

– The entity charged a fee agreed in the contract, which resulted in a higher fee being charged than that provided in the maximum fee prospectus. The entity had agreed in the contract a percentage transfer fee, whereas the maximum fee prospectus in force on the date the contract was signed referred to a fixed transfer fee for each security class.

  The Complaints Service resolved that depending on the calculation basis (the cash value of the securities to be transferred) the fee agreed in the contract could be lower than the fixed fee and consequently comply with the regulations, since the fee agreed in the contract would have to be lower than that established in the fee prospectus. However, if the result of applying the percentage set contractually between the parties results in a fee that was higher than the fixed fee established in its prospectus, the Complaints Service considered that the fixed fee in the prospectus should be applied and should be understood as the maximum fee applicable for the provision of this type of service (R/204/2019).

➢ Foreign currency transactions

When a portion of the total costs and expenses is to be paid in a foreign currency or represents a foreign currency amount, investment firms must provide, sufficiently in advance, an indication of the currency in question, as well as the exchange rate and costs applicable. Investment firms must also provide information about payment conditions or other forms of execution.[224]

In relation to the aggregate cost figure provided for in the MiFID II Directive, the CNMV has clarified that it includes, among others, the costs implicit in currency exchange.[225]

---

224 Article 50.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

225 Question 11.15 of the CNMV document *Q&A on the application of the MiFID II Directive.*

The Complaints Services considers that entities must therefore inform their clients in advance about the exchange rate and the applicable costs or, failing that, about the manner in which they would be determined and, in the event that the exchange rate used is not the market rate, about the spread that is to be applied.

Each section of the fee prospectus that entities had to draw up prior to adaptation to MiFID II had to contain the explanatory notes that were necessary to inform clients of the need to apply the exchange rate in force at any given time and the costs applicable to foreign currency transactions.[226] The standard fee prospectus included provisions for intermediation transactions in markets and the custody and administration of securities issued in currencies other than the euro.

In cases R/247/2019 and R/359/2019, the respondent entity was at fault in some share purchase and sale transactions carried out on the US stock market, as there was no evidence that it had previously provided the client with information on the exchange rate and costs. In case R/125/2019, in addition to the bad practice due to the lack of prior information, it was proved that the exchange rate given to the client on the screen (transaction receipts printed by the client from the online banking platform) did not match the rate actually used (indicated in the entity's arguments).

➢ Sell-out/squeeze-out after a takeover bid

The regulations governing takeover bids cover certain cases in which, after this type of transaction, a sell-out or squeeze-out may be required. Thus, when as a result of a takeover bid for all the securities, the bidder owns securities representing at least 90% of the capital conferring voting rights and the offer has been accepted by holders of securities that represent at least 90% of the voting rights, other than those already held by the bidder:

i) The bidder may require the remaining securities holders to sell their securities to it at a fair price.

ii) The securities holders of the affected company may also require the bidder to purchase their securities at a fair price.[227]

In regard to the expenses corresponding to these transactions, it has been established that all the expenses deriving from the sale or exchange and settlement of the securities will correspond to the bidder in the event of a squeeze-out, and to the seller in the event of a sell-out.[228]

In case R/15/2019, the entity acted incorrectly by charging the client fees in a squeeze-out transaction. In line with the aforementioned regulatory provisions, the take-over prospectus and, subsequently, the price-sensitive information disclosure that contained the announcement of the characteristics of the squeeze-out stated

226 Rule Three, Section 3, letter f), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and content of standard contracts.

227 Article 60 *quater* of the Recast Text of the Securities Market Act as approved by Royal Decree Law 4/2015, of 23 October.

228 Article 48.8 of Royal Decree 1066/2007, of 27 July, on the legal regime of investment firms.

that all expenses deriving from sale and settlement under the squeeze-out process would be borne by the bidder. The maximum fee prospectus in force at the time of the transaction established that the fees in public offerings or subscriptions were not applicable when this was stated in the prospectus of the corresponding issue, public offer or institution and the entity was contractually obliged not to pass on the fees in accordance with the prospectus. Given that the complainant did not participate in the bid during the voluntary acceptance period, but his shares were acquired during the squeeze-out, the Complaints Service considered that no fees should have been charged.

➢ Transfer of securities

Transferring securities is necessary for cancelling the contract/commercial relationship with the depository. Therefore, without prejudice to the freedom that entities have to set their rates, if the fee established for providing that service is excessively high, this might make it difficult, possibly even prohibitively so, for clients to terminate the contractual relationship with the investment firm and in short to exercise their freedom of contract. In this regard, a transfer fee could be considered an abusive clause, although the CNMV is unable to rule on the hypothetically abusive nature of this or any other fee, which can be determined only by an ordinary court of justice.

Therefore, the transfer fee must never serve as a penalty or deterrent and it may only be used to remunerate, in a proportionate manner, the service provided by the investment firm.

The regulations governing the fee prospectus that entities had to prepare prior to the adaptation of Spanish regulations to MiFID II were amended at the end of 2016 to try to achieve proportionality in the fees for transfers of securities.[229] In this regard, the previous regulation established a maximum fee for each class of transferred security expressed in monetary terms, while the new regulation changed the calculation basis for these fees such that they would be a percentage of the value (cash or nominal) of the transferred securities, including, where appropriate, a maximum fee and with no possibility of establishing a minimum amount. In the transfer of equity securities, the calculation basis was the cash value on the date on which the transfer was made, while in the transfer of fixed income securities the calculation basis was the nominal value.[230]

In cases R/667/2018 and R/148/2019, the Complaints Service highlighted the above considerations and reminded the complainant that it did not have the power to classify transfer fees as abusive or discriminatory, since its remit is limited to assessing whether there has been any violation of the rules of conduct applicable to the entity. In these cases, the transfer fee was set down in the fee prospectus registered with the CNMV and the entity had informed the client of the fee.

229 CNMV Circular 3/2016, of 20 April, amending Circular 7/2011, of 12 December, on the fee prospectus and content of standard contracts.

230 Rule Four, Section 2, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

➢ Custody and administration fees for securities that are delisted and inactive

Sometimes complaints arise as a result of entities charging custody and administration fees for securities after they have been delisted.

In these cases, even if the securities are delisted, they must remain deposited in an account opened with an authorised financial institution under a securities deposit and administration contract (unless the securities are transformed into physical certificates). However, the CNMV Complaints Service considers that it is good practice in these cases for the depository of the delisted securities to choose not to charge administration fees for the securities when such securities are not only delisted (with no liquidity), but also inactive, particularly those cases in which no procedure is applicable for clients to de-register the shares from their securities account (see "Delisted shares: procedure for waiving register-entry maintenance of delisted shares that are inactive" under the heading "Subsequent information").

In the case of illiquid and inactive securities, most respondent entities that are still charging this fee decide to reimburse the client once the complaint proceedings start (R/23/2019, R/267/2019 and R/379/2019).

In case R/582/2018, the client complained that he had been charged fees for the custody and deposit of non-voting shares (*cuotas participativas*) of CAM (Caja de Ahorros del Mediterráneo). The units had been legally amortised, although the amortisation had not been officially filed in the corresponding Trade & Companies Register, so the legal amortisation had not come fully into effect (see section "Procedure for waiving register-entry maintenance of delisted shares that are inactive" in the "Subsequent information" section).

The Complaints Service considered that the entity had acted incorrectly by charging the client a fee for the custody of the non-voting shares of CAM, as it went against its stated criterion that this type of fee should not be charged when the securities in question have an economic value of zero or close to zero, or there is a specific situation that prevents them from being removed from the client's securities accounts. Following the Complaints Service report, the entity stated that it had paid into the client's account an amount equivalent to the fees for custody and deposit of the securities collected in four six-month periods to rectify its actions.

In case R/631/2018, the Complaints Service considered that the entity had been at fault in charging custody fees for a deposit of shares that were illiquid – because they had been delisted – and inactive – as the issuing entity was not active –, especially considering that it was still not possible to request the voluntary waiver of register-entry maintenance because the requirement for no register entries to have been made in the sheet opened for the company in the Trade & Companies Register in the four years prior to the calendar year in which the request was made had not been met. In the communication issued by the entity after receiving this report, it stated that it had regularised the custody fees charged since the company was delisted and submitted proof of the custody fee settlements and reimbursements paid into the account.

In case R/22/2019, the entity had adhered to the criterion of not charging a fee for the administration of some shares of companies that had been delisted and were inactive, and provided an extract showing that the fees charged to the current account associated with the securities had been reversed. However, at one point, the

branch refused to reverse the fee prompting the client to file a complaint with the CS and the CNMV Complaints Service in order to reinstate the good practice of not charging fees in these cases.

The Complaints Service considered that the entity had been at fault in requiring its client to apply a criterion set by the service and accepted by the entity. Although it was proved that the entity had not charged fees for the custody of securities of delisted and inactive companies, it should not fall to the investor to ask for the criterion be applied each time these charges are made. Therefore, the entity should establish a procedure to allow the automatic reimbursement of custody fees each time they are charged in regard to deposited shares that meet these conditions.

➢ Operational cash account linked to the securities account

The MiFID II Directive[231] mentions, as an example of cross-selling, the need to open a current account to provide an investment service to a retail client and establishes, in Recital 81:

> *Cross-selling practices are a common strategy for retail financial service providers throughout the Union. They can provide benefits to retail clients but can also represent practices where the interest of the client is not adequately considered. For instance, certain forms of cross-selling practices, namely tying practices where two or more financial services are sold together in a package and at least one of those services is not available separately, can distort competition and negatively affect client mobility and their ability to make informed choices. An example of tying practices can be the necessary opening of current accounts when an investment service is provided to a retail client. While practices of bundling, where two or more financial services are sold together in a package, but each of the services can also be purchased separately, may also distort competition and negatively affect customer mobility and the ability of clients to make informed choices, they at least leave choice to the client and may therefore pose less risk to the compliance of investment firms with their obligations under this Directive. The use of such practices should be carefully assessed in order to promote competition and consumer choice.*

Spanish legislation, adapted to MiFID II establishes that when an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm must inform the client whether it is possible to buy the different components separately and provide separate evidence of the costs and charges of each component.[232] In addition, ESMA published *Guidelines on Cross-selling Practices,* which address, among other issues, the full disclosure, prominent presentation and timely communication of price and cost information for cross-selling. The CNMV notified ESMA of its intention to comply with these guidelines and disseminated that decision through a statement.[233]

---

231 Directive 2014/65 EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

232 Article 219.2 of the Recast Text of the Securities Market Act as approved by Royal Decree Law 4/2015, of 23 October

233 Statement of 13 September 2016, "CNMV to adopt ESMA Guidelines on Cross-selling Practices".

In regard to the regulation of the maximum fee prospectus required prior the adaptation of MiFID II to Spanish legislation, the fee established in the prospectus for the custody and administration of financial instruments contained in the fee prospectuses had to include the maintenance of the securities account, together with the maintenance of the operational cash account in the event that this was exclusively linked to the securities account,[234] with no charges or payments for other items.

In complaints resolved to which the regulation on the maximum fee prospectus applied, the Complaints Service considered that when cash accounts (current accounts, savings accounts, etc.) were opened or maintained with the sole aim of supporting the movements in the securities accounts, provided that in practice these were only movements related to securities, i.e. merely operational accounts that were ancillary to a main product (the investment product), investors did not have to bear any additional cost for opening and maintaining these cash accounts as the costs would be included in the fees charged for the provision of the custody and administration service for financial instruments.

However, if not all the movements of the cash account were related to the securities account and the account was used for purposes other than supporting the investments in securities, the aforementioned exception would not apply and therefore the entity would be able to charge maintenance fees for the cash account in question. In this case, the amount charged would be purely a banking fee, so the Bank of Spain's Institutions' Conduct Department would be the competent body in this area, which should decide whether the fee applied is correct or not.

The Complaints Service considered that the entity had acted correctly in the following cases:

– In case R/50/2019, the entity had returned the maintenance fee of the associated trading account, given that it was used only for movements related to securities or investment funds in the last quarter of the year. The exemption from the maintenance fee did not apply in second and third quarters of the year as the movements made did not correspond solely to cash transactions.

– In case R/65/2019, the entity reduced the maintenance fee for a current account that was used exclusively to support a securities account. However, the Complaints Service stated that it would be good practice for these fees not to be charged and then reimbursed, but only to be charged if the cash account were used for activities other than supporting the securities account.

– In case R/500/2019, the entity had sent a letter to a client informing her that her positions in cash account and card contracts were going to be transferred to the entity's technological platform and indicated that, if she did not agree to this transfer, she could terminate these contracts immediately and with no cancellation cost.

  On receiving this information, the client decided to terminate all the contracts and, as she also held a securities account in addition to the cash accounts and cards she requested that this also be cancelled. She was told by the branch that

234 Rule Four, Section 2, letter b), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

she had to either sell or transfer the securities, since it was not possible to have a securities account without a cash account. The client considered she should not have had to pay a fee for the transfer of the securities. She argued that if the entity had offered to close her cash accounts free of charge and this resolution implied the cancellation of another product – the securities portfolio – which, in turn, required the transfer of the shares to another entity, it could not charge her for a transfer which she had been obliged to make in order to comply with the entity's own rules.

The Complaints Service stated that contrary to the client's argument, in these cases the main product is the securities contract, while the cash account associated with the securities contract is an ancillary or instrumental product, given that its sole purpose is to process the charges and payments corresponding to the securities deposited in the securities account. Therefore, in the case of cash accounts associated with a securities account, the prior cancellation of the securities account is an essential requirement for cancelling the cash account, which implies the transfer or sale of the shares deposited in it.

Therefore, the Complaints Service considered that in this case the entity, following the client's instructions, did no more than comply with and execute her transfer order, which was necessary to proceed with the cancellation of the securities account – the main product –, which, in turn, was a prerequisite for the cancellation of the associated cash account. Consequently, having effectively provided an investment service, the entity was entitled to charge a fee for that service of which the client had been informed sufficiently in advance. In this regard, the entity had sent her a letter six months earlier informing her, among other issues, of the fee for the transfer of the securities and informing her of her right to cancel or modify her securities account within one month of receipt of the letter if she were not satisfied with the new fees applicable; a right which there was no evidence of the client having exercised.

However, the entity acted incorrectly in case R/385/2019 by charging a maintenance fee for a bank account for six months, when the only movement in the account was a cash withdrawal.

➢ Expenses from the intervention of other entities

The MiFID II Directive establishes that when more than one investment firm provides investment services or ancillary services to a client, each of them must provide information on the costs of the investment or ancillary services provided. An investment firm that recommends or sells the services provided by another firm to its clients must add the costs and expenses of its own services to those of the services provided by the other firm. The investment firm must take into account the costs and expenses associated with the provision of other investment or ancillary services by other firms when it has referred the client to them.[235]

235 Article 50.7 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

In relation to the aggregate cost figure provided for in the MiFID II Directive, the CNMV has clarified that it includes, among others, third-party fees and brokerages.[236]

The regulations governing the fee prospectus that entities had to prepare prior to the adaptation of Spanish regulations to MiFID II established that entities that provided the service of execution or receipt and transmission of orders on equity securities in national markets had to establish a fee in their prospectus that included the full amount that had to be paid to the intermediary, while those deriving from the intervention of other entities could not be included as chargeable expenses, with the exception of market fees and fees for clearing and settlement services.

For equity securities traded abroad, the entity could choose between establishing a fee that reflected the full cost to the client or reflected the cost due solely to its intervention, in which case it had to include a reference to the cost relating to the participation of third parties in the execution and settlement.

As an alternative, entities could establish a fixed rate for Spanish and foreign markets expressed in monetary terms per monthly period for clients with whom this option had been agreed. In the case of foreign markets, if an entity opted to indicate its own fee, a reference to the cost passed on from other entities had to added.[237]

In case R/618/2018, the entity was at fault in passing on to the client an amount from sale of shares in the Spanish markets as a brokerage cost. This additional brokerage cost had been charged in addition to the stock market fee and agreed brokerage fee. In this regard, the Complaints Service stated that:

– Unlike the expense generated by the market fee – which would be included in the additional section on fees in the maximum fee prospectus –, the brokerage cost would have been generated by the intermediation of a broker, in other words, by an entity that supposedly traded on the market and not by the market itself.

  However, as indicated above, the fee established in the prospectus for transactions in Spanish markets included the full amount that had to be paid to the intermediary, and did not indicate as chargeable expenses the costs deriving from the intervention of other entities, with the exception of market and clearing and settlement fees.

– The brokerage cost applied was not covered in any point, clause or item in any of the previously signed contractual documents.

– As they were transactions for the purchase and sale of equity securities in the Spanish Stock Market Interconnection System (SIBE) and given that the entity was a member of the four Spanish stock markets, in compliance with the principle of acting in the interest of its client and the policy of executing his order in the best way, the entity should have avoided any unnecessary intermediation that would increase the cost of the transactions to the detriment of the ordering party.

---

236 Question 11.15 of the CNMV document *Q&A on the application of the MiFID II Directive.*

237 Rule Four, Section 1, of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

In case R/115/2019, the entity acted incorrectly by charging a brokerage fee in a sale of securities on the Spanish markets. In this regard, the charging of this fee to a defunct third entity was inexplicable, since it had been absorbed by its sole shareholder which had been simultaneously absorbed by the respondent entity itself.

➢ Fees outstanding and accrued on cancellation of the financial instrument custody and administration contract

Standard contracts for the custody and administration of financial instruments must establish, among other aspects, the form and terms in which the entity will make the deposited or registered financial instruments available to its clients, as well as, where appropriate, their funds and the procedure for their transfer when the contract is terminated, expressly indicating the requirements for this, such as the fees charged for carrying out the transactions pending settlement at the time the contract is resolved and the proportional part of the fees accrued that corresponds to the period started at the time of the termination.[238]

In case R/148/2019, the complainant disagreed with the fee charged for the cancellation of an account in May, and the entity indicated only that the fees applied had been agreed on in the contract submitted with its arguments. The Complaints Service resolved that if the fee charged to the complainant was a cancellation fee it would have been incorrectly charged, as it had not been included in the contract. However, if the fee charged was an intermediation fee contracted by the complainant, it would have been correctly charged, although proportional to the first six months of the year, during which the account for which the cancellation request applied had remained open. In any case, the Complaints Service highlighted that part of this fee had already been reimbursed to the client.

In case R/479/2019, the dispute revolved around determining the date on which a contract had effectively been cancelled, to establish whether or not the collection of the accrued proportional part of the custody fee was appropriate. The client saw that date as being that of an e-mail sent in April, while the entity claimed it was the date of a letter of authorisation to transfer all positions to the target entity received in May.

Based on the documentation provided, the Complaints Service resolved that the date on which the instructions to make the transfer between the target and source entity had been issued was in May. While from the e-mail sent in April it could be understood that the client had expressed his intention to end his commercial relationship with the entity, it also indicated that someone would contact the entity "shortly" to conclude the relationship and this did not occur until May.

A.6.2 Investment funds

The fees charged by investment funds are one of the features that investors need to take into account when choosing a fund in which to invest as they may have a significant influence on the fund's returns.

238 Rule Eight, Section 2, of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

Investment fund management companies and depositories may receive management and deposit fees, respectively, from the fund. In addition, the management companies may charge unitholders subscription and redemption fees. Likewise, they may establish subscription and redemption discounts in favour of the funds themselves.

The regulations governing investment funds establish the maximum percentages for these fees. According to these general maximum percentages, the prospectus and the KIID must contain, for each specific investment fund, the method of calculation and the maximum limit of the fees, the fees effectively charged and the beneficiary of the fees.[239]

All other expenses borne by the investment funds must be expressly stated in the fee prospectus. These expenses must relate to services effectively provided to the fund that are essential for its normal activities. They must not involve an additional cost for services inherent to the work of the CIS management company or depository, which are already remunerated through their respective fees.[240]

With regard to other types of fees and expenses, provided that a series of additional regulatory requirements are met, the fund prospectus may stipulate that:

i) Investment funds bear the expenses corresponding to the financial research service provided for investments.[241]

ii) Investment fund distributors charge unitholders who have subscribed units through them fees for the custody and administration of the units.[242]

Fund fee prospectuses may also stipulate that the CIS management company may establish agreements to reimburse unitholders for fees charged, in addition to the criteria that must be followed for such reimbursements.[243]

Any information on fees and expenses that is reflected in other documents must be consistent with the terms and features set out in the fund's prospectus.

➢ Information on fees and expenses of investment funds

Most complaints relating to information on investment fund fees refer to the unitholder's not being aware of the subscription and redemption fees that the fund manager charges for investing or disinvesting in the fund. These fees are usually calculated as a percentage of the capital invested or disinvested, reducing the

239 Article 8 of Law 35/2003, of 4 November, on Collective Investment Schemes.

240 Article 5.11 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

241 Article 5.13 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

242 Article 5.14 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

243 Article 5.1 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

amount that is invested in the fund in the case of subscription or the disinvested capital on redemption.

Unlike management and deposit fees, which are implicit (they are charged directly and periodically to the investment fund itself) and are stipulated in the prospectus, subscription or redemption fees are explicit (they are charged to the unitholders when they invest or disinvest in the fund) and are also included in the prospectus, which sometimes specifies exemptions due to the seniority of the units or due to being ordered on certain dates or in certain periods (liquidity windows).

In addition to the aforementioned fees, the funds have operating expenses that some complainants have stated that they were not aware of.

The various ways in which entities can prove that they have informed their clients of the fees and expenses relating to investment funds are set out hereunder.

✓ *Documentation submitted before subscribing to the fund*

As indicated under "Prior information" in the "Collective Investment Schemes (CIS)" section, before subscription to the units and shares of a CIS, the most recent half-yearly report and KIID must be delivered free of charge to the subscribers, and on request, the prospectus and the latest annual and quarterly published reports.

The aforementioned documentation contains information on the fees and expenses of CIS. However, following the entry into force of the regulatory changes deriving from the adaptation to MiFID II, the costs and expenses associated with the products and services that have not been included in the KIID must also be reported. In this regard, the CNMV has indicated that:

> *[...] it should be made clear that the UCITS KIID is not sufficient to comply with the cost information obligations established in Article 50 of the Delegated Regulation, since Article 51 expressly states that additional information must be provided on all costs and expenses associated with the product and the service that have not been included in the UCITS KIID.* [244]

Thus MiFID II establishes that investment firms that distribute UCITS units must also inform their clients of any other related costs and expenses of the product that may not have been included in the UCITS KIID, as well as the costs and expenses corresponding to the provision of investment services in relation to the financial instrument.

Some complaints in this period referred to a lack of information provided by entities on the applicable subscription and redemption fees and the corresponding exemptions. The KIID contains information on subscription and redemption fees. However, the maximum fee that can be applied could also be mentioned in this document and the full prospectus delivered to provide detailed information on cases where the fee may be lower or may not apply (e.g. the minimum time the investment has to be kept or the specific days of the liquidity window). Therefore, the information contained in the KIID and, in some cases, the information included in the

244 See Question 9.6 of the CNMV document *Q&A on the application of the MiFID II Directive*.

full prospectus would, in principle, fully define the fees applicable and the corresponding exemptions.

In some complaints, entities provided evidence that they had informed their clients of the redemption fees applicable in investment funds through the information documentation that they demonstrated having delivered to the unitholder before the investment fund was subscribed (R/550/2018, R/564/2018, R/644/2018, R/664/2018, R/76/2019, R/221/2019 and R/455/2019).

✓ *Content of subscription and redemption orders*

On some occasions, the entity had informed the complainants of the fee subject to dispute in the orders issued by the client.

In case R/674/2018, the signed redemption order showed the fee applied in the transaction. However, emails were submitted demonstrating that, in response to the client's request for reversal of the fee, the branch had made him a firm and formal offer to reimburse it, a commitment that furthermore was assumed before the investment fund was redeemed.

The Complaints Service stated that the reimbursement of fees by entities of which the client has been duly informed and which have been correctly applied is a purely commercial decision, undertaken at the discretion of the entity. However, it was considered bad practice for the branch approached by the client to have given him false expectations, as the fees applied on the redemption of the fund were not reimbursed.

In case R/221/2019, in addition to the KIID and the half-yearly report signed by the client, the entity provided the partial transfer order through which the fund had been subscribed and which included the particular conditions for the client (redemption fee and liquidity windows, etc.). Therefore, the Complaints Service considered that the entity had proved the client's prior knowledge of the features of the source fund and the applicable fees.

➢ **Notification of changes in fees**

The fees set down in the KIID and the prospectus can be changed after the investment fund has been contracted, so the fee applicable to a particular transaction may be different from the fee initially stated.

There are certain changes, such as those establishing or increasing fees or establishing, increasing or eliminating discounts in favour of the fund upon subscription and redemption, of which unitholders must be informed individually and at least 30 calendar days in advance of their entry into force. The notification must mention the unitholder's right to opt, for a period of 30 calendar days, for the total or partial redemption or transfer of their units, with no deduction of redemption fees or any expenses, at the net asset value of the last day of the 30-day period.[245]

245 Article 14.2 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes, and Rule Nine, Sections 1 and 2, of CNMV

Although these changes must be clearly communicated to the unitholders in writing, with the minimum advance notice required, regulations do not require that the information be sent by registered post or by any other means that allows proof of delivery.

Further, during the period between the decision to make the change(s) and the registration of the updated KIID or prospectus, investors must be informed, prior to the subscription of units or shares, about any essential changes to the KIID or the prospectus that are pending registration.[246]

In case R/396/2019, the complainant was going to make his first subscription to an investment fund for which an updated prospectus and KIID were pending registration, which involved, among other issues, an increase in the management fee and a change in the calculation basis. The entity provided the client with the KIID of the fund that was valid on the date of that first subscription and the last half-yearly report. However, given that there were changes that would come into effect in the days following the subscription of the fund, the entity should have notified the client of these changes together with the KIID that was delivered at the time of the subscription.

Therefore, the Complaints Service considered that the entity had acted incorrectly in not proving that it had duly notified the client of the changes that entered into force a few days after his first subscription of the fund units.

➢ Redemption fees: collection in funds with liquidity windows

The dates laid down in the fund's prospectus in which unitholders may redeem their units without paying a redemption fee are referred to as "liquidity windows". In other words, on the basis of the content of the fund prospectus, exemptions to the redemption fee may be established when the redemption takes place on specific established dates (liquidity windows).

The redemption of an investment fund in a liquidity window may arise from a direct redemption order or be the result of a transfer order.

✓ *Redemption orders in funds with liquidity windows*

The application of a redemption fee requires consideration of the exemption terms provided for in the fund prospectus, as well as the date on which the client issued the order. Based on these factors, the entity correctly charged a redemption fee in the following cases:

– A redemption fee was applicable, according to the fund prospectus, only for the redemption of units less than seven days old. However, the client ordered

Circular 2/2013, of 9 May, on the key investor information document and the prospectus of collective investment schemes.

246 Rule Ten, Section Two, of CNMV Circular 2/2013, of 9 May, on the key investor information document and the prospectus of collective investment schemes.

the redemption of the fund after only six days had elapsed, so the entity applied the corresponding fee (R/664/2018).

– The fund prospectus stated that a redemption fee would be charged if the transaction was carried out within 30 days of the subscription date of the units. The purchase of the investment fund took place on 10 October and the subsequent sale was made on 9 November, as evidenced in the orders submitted in the case, in other words, a period of less than 30 days. Therefore, a fee could be charged (R/76/2019).

✓ *Orders to transfer source funds with liquidity windows*

It should be noted that for the application of redemption fees on transfers of funds with liquidity windows, the CNMV's Institutions Authorisation and Registration Department[247] has published guidelines stating that:

> *In transfer orders in which the "liquidity window" coincides with the day the order is received, or within the verification period, by the source management company, the redemption fee cannot be charged, in accordance with the duty to execute orders under the best terms for the client.*
>
> *In cases in which the above does not occur, and yet the unitholder has informed the target fund manager of his/her intention to make use of the liquidity window prior to that date, the target fund manager must take the necessary steps to inform the source fund manager of this intention, using a communication channel that ensures it can be subsequently accredited, so that the order is executed with no redemption fee applied. [...]*
>
> *For orders received by the source fund manager after the day of the liquidity window, a redemption fee will be charged, as established in the corresponding prospectus.*
>
> *In the case of funds with an established cut-off time in the prospectus, if the source fund manager receives the order on the day of the liquidity window, but after this cut-off time, the redemption fee will apply, since the order will be considered to have been made on the following business day.*

It should be noted that the source entity has a maximum of two business days following receipt of the request in which to perform such checks as it may deem necessary.[248]

For the transfer of units of funds for the prospectus of which provides for days that are exempt from fees, to assess whether the source fund manager has acted correctly account must be taken, among other aspects, of whether at the time it received the transfer request the redemption fee was applicable and whether the redemption fee charged corresponds to the fee stated in the fund documentation. Additionally, if the complainant not only disputes the fee charged but also claims to have been

247 CNMV communication on the application of redemption fees in transfers of guaranteed equity funds with liquidity windows, dated 16 October 2007.

248 Article 28 of Law 35/2003, of 4 November, on Collective Investment Schemes.

unaware of its existence, the Complaints Service must assess whether the source entity complied with its obligations to inform the unitholder prior to contracting the CIS. This issue was analysed in greater detail in the section "Information on fees and expenses of investment funds".

The source entity correctly charged redemption fees in the following cases which were the subject of complaints referring to transfers of funds:

– The liquidity window was 1 June and the source entity received the request on 28 May, so it had two business days in which to carry out the appropriate checks, i.e., 29 and 30 May. Accordingly, a redemption fee was charged (R/550/2018).

– The complainant ordered the transfer of two investment funds: where the prospectus of one fund did not include a redemption fee and that of the other established a fee only for the redemption of units that had been held for less than one month. The entity acted correctly by not charging the redemption fee, since it was not appropriate to charge a fee in either of the two transfers (R/564/2018).

– The fund prospectus established a redemption fee, although it included a series of quarterly liquidity windows. The redemption order was issued on 2 October and the closest liquidity window was 31 October, therefore the entity charged a redemption fee (R/644/2018).

– The source fund had established in its prospectus a redemption fee with a liquidity window on 16 November each year, or the following business day. The source fund manager received the request on 1 November and, in compliance with the established deadlines, carried out the redemption before the liquidity window and collected the corresponding fee (R/221/2019).

– The source fund prospectus included a redemption fee and generally redemptions could be made without this fee being charged on the 10th day of each month or, if this was a non-business day, on the following business day. The source entity received the request on 6 March and had two business days in which to carry out the corresponding checks, i.e., 7 and 8 March, on which dates the redemption implicit in the transfer was executed. As the conditions for redemption without a fee had not been met, the entity charged the fee (R/334/2019).

– Based on the source fund prospectus, the redemption fee established was not applicable on the 19th (or following business day) of March, June, September and December.

  In case R/313/2019, the source entity received the request on Friday, 7 December and had a verification period of two business days, i.e., 10 and 11 December. In case R/314/2019, it received the request on Monday, 10 December, and the two day verification period was 11 and 12 December.

  As the liquidity window was on 19 December, the redemptions were not eligible, so the source entity charged the redemption fee in both cases.

– As it was a guaranteed equity fund, the prospectus established a redemption fee up until the day prior to the guarantee expiry and included annual liquidity windows. The complainant wished to wait until the guarantee expiry date to

redeem his units free of charge. However, he issued the redemption order four months before the expiry and therefore the entity charged him the corresponding redemption fee (R/455/2019).

In contrast to these complaints, irregularities were detected in the entity's actions for the following reasons:

– The source entity incorrectly charged a redemption fee in cases where the liquidity window coincided with the day it received the transfer order or with the days available for verification.

  In case R/5/2019, the liquidity window was the 15th of each month (or the following business day), according to the source fund prospectus, and the source entity received and executed the client's transfer request on the same day of the liquidity window. In case R/226/2019, the source fund had established a liquidity window on a certain day every three months. The management company of the source fund received the transfer order on the day established to be eligible for the window.

➢ Custody and administration for investment in CIS

Distributors of Spanish investment funds may charge the unitholders that have subscribed units through them fees for their custody and administration providing this is indicated in the CIS prospectus and the following requirements are met:[249]

– The units are represented by means of certificates and appear in the register of unitholders of the management company or the distributor through which they have been acquired on behalf of the unitholders and, consequently, the distributor provides evidence to the investor of ownership of the units.

– The general requirements for fees and contracts for the provision of investment and ancillary services are met.

– The distributor does not belong to the same group as the management company.

However, in the case of foreign CISs, it is not the CNMV that supervises the CIS prospectus, but the home authority. For this reason, in the case of foreign CISs, it is understood that custody services are provided and therefore the corresponding fee can be charged when the distributor keeps an individualised register of the CIS units, i.e., one that details the holders of the units which, on an aggregate basis, appear in the corresponding management company in the name of the distributor. This occurs when the distribution of the investment fund is made through omnibus accounts, which is usually the case.

However, in order for a charge to be made, the client must have been informed about the fee prior to its application, as indicated for prior information on costs and expenses and changes to fees initially agreed in the section on securities fees. In

249 Article 5.14 of Royal Decree 1082/2012, of 13 July, approving the implementing regulations for Law 35/2003, of 4 November, on Collective Investment Schemes.

addition, when the entity has the obligation to draw up a maximum fee prospectus, it must appear in the prospectus of the respondent entity.

In regard to some Spanish investment funds, one entity acted incorrectly by charging administration and custody fees without these fees being mentioned in the CIS prospectus. Apart from this, the entity sent some electronic communications about establishing and increasing these administration and custody fees that contained an error of form, in that there was no mention of the client's right to change or cancel the contractual relationship within one month of receipt of the notification, during which time the new conditions would not be applied (R/68/2019).

In relation to foreign CIS, complaints were resolved in which:

– The units of some foreign CIS were exempt from the custody fee and the entity sent the client a personalised letter in mid-October informing him that it was going to charge a custody fee from 1 January of the following year. The entity passed on a custody fee that corresponded to the fee notified in a letter for the three years that started from the send date. However, the Complaints Service detected an error of form in the letter sent about the new fee as it did not inform the client of his right of separation, that is, the right to change or cancel his contractual relationship within a minimum of one month, during which time the new fees would not be applied (R/24/2019).

  A similar situation occurred in another case, in which the entity notified the client about a change in the custody fee for some foreign investment funds but the communication contained the same error of form (R/93/2019).

– Another entity informed its clients about a new custody and administration fee for the registration of shares or units of third-party foreign CIS. The communication was sent one month in advance of its application, although according to the securities deposit and administration contract signed by the clients, they had two months in which to accept the new conditions or terminate the contract, during which time the new fees would not be applied. Consequently, the Complaints Service considered that the fee should not have been applied until at least two months had elapsed, instead of one month as indicated in the notification (R/288/2019).

– Another entity sent a communication to the client about the custody fee for third party foreign CIS, which would be established two months after the send date. In addition, it provided the securities deposit and administration contract signed by the client, which mentioned the right of separation corresponding to the client in the event of a fee increase. The Complaints Service considered that the entity acted correctly by charging the custody fee for foreign CIS, about which it had previously informed the client through the corresponding communication. However, it considered that it would be good practice to include information on the client's right to change or cancel the contractual relationship in the event that he or she did not agree with the new conditions, even if information about this right was already included in the contract signed between the parties (R/339/2019).

– The entity proved that it had properly informed the client about the fee that it would apply for the custody of a foreign CIS in the annex to the securities deposit and administration contract signed with him (R/380/2019).

➢ Exchange rate in CIS transactions denominated in foreign currencies

As indicated for securities fees, for CIS transactions carried out in a currency[250] other than the euro, when part of the total costs and expenses must be paid in foreign currency or represents an amount in foreign currency, investment firms must indicate the currency in question and the applicable exchange rate and costs with sufficient notice. Investment firms must also inform clients about the payment conditions or other forms of execution.[251]

The entity receiving the order must inform its clients sufficiently in advance about the exchange rate and the applicable costs or, failing that, about the manner in which they would be determined and, in the event that the exchange rate used is not the market rate, about the spread applied.

In case R/293/2019, in the trading screens of an investment fund denominated in dollars, the applicable spread on the base exchange rate was reported when the cursor was placed on a question mark that appeared in the "currency equivalent" field. However, neither the printed documentation submitted nor the consultation of the respondent entity's website showed information related to the spread to be used when contracting an investment fund denominated in a foreign currency. Therefore, the Complaints Service resolved that it had not been proved that the information on the exchange rate spread to be applied when contracting an investment fund denominated in another currency had been given to the client in a durable medium at the time the orders were placed.

In case R/436/2019, the complainant disagreed with the exchange rate applied in the redemption of some units of an investment fund denominated in dollars and asserted that it should have been the same as the rate on a website that did not belong to the entity, of which he submitted a copy.

The entity's website showed the updated exchange rates offered for the currencies in which it operated and this information was available to the general public, not only clients. In the disputed transaction, for commercial reasons, the entity gave the client a more favourable exchange rate than that shown on its own website.

The Complaints Service checked the rates published on the entity's website on the corresponding date and concluded that the entity had acted correctly in applying a more beneficial exchange rate for the client.

A.6.3 Portfolio management

Clients sometimes contract CIS portfolio management services in which they make contributions and grant powers to an entity for it to carry out, in the name and on behalf of the client, transactions with different securities, or in case where a portfolio of CISs is managed, specifically with this type of product.

250 It is usual to find classes of units or shares denominated in currencies other than the euro in foreign CISs.

251 Article 50.3 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

➢ Evidence that information on fees has been provided prior to the start of the contractual relationship

Clients and potential clients must be provided sufficiently in advance with suitable information about all associated costs and expenses.[252] In this regard, investment firms must comply with the disclosure obligations for associated costs and expenses listed in MiFID II.[253] The particularities of this information in regard to discretionary portfolio management have been clarified in the Q&A documents on MiFID II issued by ESMA[254] and by the CNMV.[255]

As indicated in the section on securities fees, prior to the adaptation of Spanish regulations to MiFID II, entities had to prepare a fee prospectus in which they included the maximum fees that they could charge their clients.[256] If at the start of the contractual relationship between the client and the entity, remuneration that was lower than that established in the fee prospectus was agreed, this had to be set out in the standard contract. In the event that no such agreement existed, the entity had to provide the client with the aforementioned prospectus and keep the client's acknowledgement of receipt.[257]

Entities proved that they had informed the complainant of the fees to be charged for the provision of a discretionary portfolio management service by providing a copy of the contracts signed by the client for that purpose, in which both the type of fees and their calculation basis were established, in addition to the settlement period, and where applicable, the corresponding discounts (R/520/2018, R/525/2018, R/637/2018, R/77/2019, R/99/2019 and R/308/2019).

➢ Notification to the client of any changes in the fees initially agreed

The standard contract for portfolio management must establish the obligation to inform the client, prior to their application, of any increase in the fees and expenses applicable to the service provided, and that had been previously agreed with the client. In this case, the client must be given a minimum period of one month from the receipt of this information in which to change or cancel the contractual relationship, during which time the new fees will not be applied. If the fees are decreased, the entity must also notify the client, without prejudice to the immediate application

---

252 Article 209.3 of Royal Decree Law 4/2015, of 23 October, approving the Recast Text of the Securities Market Act.

253 Article 50 of Commission Delegated Regulation (EU) 2017/565, of 25 April 2016, supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

254 Questions 24 and 31 of the information block on costs and charges of ESMA's Q&As *on MiFID II and MiFIR on issues related to investor protection and intermediaries* (ESMA35-43-349).

255 Question 11.5 of the CNMV document *Q&A on the application of the MiFID II Directive.*

256 Article 71 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in force until 17 April 2019, and Articles 3 and 9.2 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, in regard to fees and standard contracts.

257 Rule Seven, Section 1, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

of the new fees. This information can be included in any periodic communication that the entity must submit to its clients or sent by any means of communication agreed by the parties in the contract.[258]

Entities acted incorrectly in changing initial fees in the following cases:

– One entity submitted a personalised letter in which the client was informed of the entry into force and change of the fee for cash deriving from the portfolio management service. The complainant stated that he had never received this communication, while the entity claimed to have deposited it on a specified date in his online mailbox through the electronic banking service contracted by the complainant.

  The Complaints Service resolved that the information letter did not contain the exact date on which it had been sent as its first page only showed the month and the year, and the entity also failed to demonstrate the exact date of the electronic deposit of the letter, or even that the client had contracted an online banking service. Therefore, the entity had been at fault in not having proved that the information about the change to the fee for the cash held in the managed portfolio (R/520/2018).

– The entity sent a communication about a fee increase, as it intended to introduce a fixed management fee for its portfolio management service. However, the communication did not inform clients about their right of separation, which was considered incorrect.

  This information item was essential for the holders. In this regard, the portfolio management contract stated that clients had a period of one month from the receipt of the aforementioned information in which to request the amendment or termination of the contract without the new rates being applied until the end of this period, and also imposed a penalty for cancellation at the request of the client before six months had elapsed – as in this case.

  The Complaints Service considered that the entity should have informed the client that he had the right to terminate the portfolio management contract within one month of receiving the communication without the new fees being applied. In addition, since the decision to increase the fees was a unilateral decision taken by the entity, the communication should also have expressly indicated that the exercise of this right did not imply the application of the penalty mentioned in the contract (R/159/2019 and R/568/2018).

– The respondent entity increased its portfolio management fee and to prove that the increase had been notified, provided a letter addressed to the client. In addition to informing him of the entry into force of MiFID II and MiFIR, the letter included the contractual clauses that would be changing as a result of the entry into force of the new regulations. The entity attached to the letter the discretionary and individual portfolio management contract with the clauses that had been changed, one of which related to the applicable fees.

258 Rule Seven, Section 1, letter e), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

The Complaints Service concluded that the communication contained a procedural irregularity, in that it did not grant the client a minimum period of one month from receipt of the information in which to change or cancel the contractual relationship, during which time the new terms would not be applicable. In addition, the Complaints Service considered it incorrect, in terms of transparency and the provision of the correct information to clients, that the respondent entity had used the entry into force of MiFID II to justify the increase in its fees, when in fact these changes had nothing to do with the new regulations (R/619/2018).

The same considerations were made in case R/205/2019. In this case, the contract mentioned the client's right to request the termination of the contract within a period of two months from the receipt of the information, and that the new fees would not be applicable until this period had expired. According to the settlement document, the new annual management fee was applied for the period from 1 January. Taking into account the two-month period and the fact that the date of the communication was 14 November of the previous year, the Complaints Service considered that the fee should not have been applied until this period had elapsed.

As in the previous case, in cases R/258/2019 and R/429/2019, the Complaints Service also resolved that the entity had not acted correctly as it did not respect the two-month period which had to elapse before the new fees could be charged as stipulated in the portfolio management contract signed by the parties and in force on the date the fee changes were disclosed.

– In another case, the entity improperly applied an increase in fees for portfolio management services. Thus, the regulations applicable at the time the dispute occurred required the CNMV to be notified of all fee changes and the resulting maximum fee prospectus had to be registered. However, there was no evidence that the entity had notified the CNMV of the change or that it had registered the new maximum fee prospectus.

  Other incidents were also noted, since the communication about the fee increase submitted in the case file did not inform the client about his right of separation or its term. Nor was it proved that the client had been informed of the communication's having been made available to him.

  In relation to the delivery of the communication, the entity stated that it had been sent through its e-banking service and that when any communication was made available to the client on this medium, a notice was sent from the entity's email address to the email address indicated by the client on contracting the service. The entity submitted a list of notices it had sent to the email address indicated by the client, but could not prove that this specific communication had been sent as it only kept records for a period of one year (R/238/2019).

In relation to the complaints in which incorrect actions were detected, some entities offered or paid their clients a reimbursement of the fees, which they reported during the case process (R/159/2019) or after the Complaints Service report had been issued (R/568/2018, R/205/2019 and R/429/2019).

➢ Accrual of the fee

Discretionary portfolio management contracts usually establish provisions for the collection of fees in the event that the service is not provided throughout the full settlement period (for example, if the service has been contracted or cancelled during that period).

The rules governing the fee prospectus that entities had to draw up before MiFID II came into force established that the fees accrued through discretionary portfolio management should be structured in such a way that invoice periods that were shorter than the agreed ordinary settlement period would be billed in proportion to the number of calendar days during which the service was provided.[259]

In case R/525/2018, the respondent entity had acted correctly by charging the management fee on the effective value of the managed portfolio in proportion to the number of days that had elapsed since the initial contribution to the portfolio.

However, in case R/568/2018, the entity acted incorrectly by not reducing the annual fee on portfolio gains on a pro rata basis for the days of service actually provided, given that the client's relationship with the entity began in mid-September. In accordance with the regulations applicable at that time, the aforementioned fee should not have contradicted the terms or exceeded the limits established in the maximum fee prospectus published by the entity. Thus, the prospectus established the annual fee as a percentage of the portfolio gains and clarified that for periods of less than one year, the proportion corresponding to the general fee for the number of days elapsed in the period would be accrued.

In case R/308/2019, the portfolio management contract stipulated a fixed fee on the effective value of the portfolio with a minimum (annual fee payable at the end of every six-month period) and a fee on the portfolio gains (applicable once a year, comparing the value of the portfolio on 31 December with the value on 1 January of the same year). If the contract was cancelled, the proportional amount of the fixed fee would be calculated on the effective value for the days on which the service had been provided and the corresponding fee would accrue on the portfolio gain (if there were gains between the termination date and 1 January of the same year).

The portfolio management contract had been signed in November and cancelled in January of the following year. The entity acted correctly in charging the management fee, which in the first year was from the start of the contract to 31 December and for the second year from 1 January to the day the managed portfolio was cancelled.

A similar situation occurred in case R/340/2019. Thus, the entity acted correctly in charging the management fee for a portfolio that was subscribed in March and cancelled in January of the following year, in proportion to the period in which it was active.

259 Rule Four, Section 3, letter b), of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

A.7 Wills

➢ Starting the inheritance process: reporting the death and blocking securities accounts

Before starting the inheritance process, in order to adjudicate the securities deposited in the accounts, the heirs or other interested parties must report the death to the entity where the securities or investment fund units are deposited. To do this, they must provide a copy of the death certificate.

The death certificate must be presented at the financial institution because from the moment that the death has been reported the institution must block all the securities accounts in which the deceased is named as a holder.

This means that if there are other co-holders, they cannot access the financial instruments deposited, regardless of the provisions established (joint and several regime) when the account was opened. Similarly, if there are holders of powers of attorney for the accounts, they may not access the deposited securities either, because powers of attorney are revoked by the holder's death. The account must remain blocked until the will of the deceased holder has been executed.

In these cases, the Complaints Service considers that firms providing investment services are acting correctly when they prevent the redemption of investment fund units or the sale of securities – or any other manner of disposing of such instruments – by other co-holders (jointly and severally) or holders of powers of attorney.

Otherwise, while the institution is unaware of the death of the co-holder, the remaining co-holders or authorised parties for the accounts may dispose of the financial instruments deposited in the securities accounts. For this reason, and in order to prevent unwanted access to the financial instruments owned by a deceased person, it is important that the entity providing investment services be promptly informed of the event.

Various complaints were resolved in relation to this issue:

R/530/2018: The complainants considered that the entity acted incorrectly by allowing the sale of some shares that had been blocked after the death of the holder. However, the entity clarified that the sale had been carried out following the execution of a court ruling that had declared null and void the sale of some preferred shares from which the shares derived.

R/196/2019: The entity was at fault in not blocking the unitholder's account. In this case, it was proved that the entity allowed the redemption of some investment fund units after having learned of the death of the holder of the units and having issued the statement of position.

R/520/2019: In this case, no documentation was provided proving that the respondent entity had knowledge of the death of the co-holder of the investment fund participation account.

R/330/2019: This resolution stands out due to its exceptional nature. In this case, the complainant considered that the entity had acted negligently because, having knowledge of the death of his father, it authorised and permitted the sale of all the

shares deposited in the securities accounts owned individually and jointly – with the surviving spouse – by the deceased, while there was no agreement among the heirs for their distribution.

In this specific case, the death was not reported to the entity until 24 September 2014, through a letter signed by the widow of the deceased and co-holder of the securities accounts.

This letter was not the habitual document in which the surviving spouse informs the entity of the death of her husband and requests the blocking of the securities accounts. On the contrary, the main purpose of the letter was to ask for permission from the entity to place orders to sell 50% of the shares she held jointly with her deceased spouse, due to an urgent need to pay off a debt with the social security department.

Given the exceptional nature of this request, the Complaints Service considered that the branch staff should have contacted the entity's legal affairs service to obtain instructions on how to proceed.

However, without waiting for notification of the entity's decision on the request made by the surviving spouse, the day after the request had been submitted, sell orders were issued for all the shares deposited in the securities accounts through the entity's online banking platform.

In view of these events, the Complaints Service considered that the entity had acted in good faith by not proceeding to immediately block the accounts until a solution had been obtained from legal affairs for the question raised by the surviving spouse, a circumstance that she took advantage of to place orders for the sale of the individually and jointly-owned shares that the deceased had deposited with the entity.

Consequently, the respondent entity was not held responsible for the sale that occurred because the account had not been blocked, as alleged by the complainant, because the entity did not have sufficient time to analyse the viability of the exceptional proposal made by the surviving spouse.

It is also necessary to report the death of any of the co-holders of an account so that the clauses that are sometimes included in the securities deposit and administration or portfolio management contracts signed by clients with their investment service providers, which establish the procedures to follow in the event of a death, may take effect.

R/549/2018: The respondent entity prevented the redemption of some investment fund units because two of the co-holders had died. To substantiate its actions, the entity argued that although the fund had been established under a joint ownership regime with reciprocal power of attorney, following the death of one of the co-holders, it understood that the reciprocal power of attorney clause to which the fund owners were subject would cease to be effective, pursuant to article 1732 of the Civil Code.

The Complaints Service considered that having been notified of the death, the entity acted correctly by blocking the investment fund units and therefore preventing disposals being made.

R/352/2019: The complainant provided two purchase orders, issued and duly signed by the co-holder of the account.

The entity alleged that as the securities contracts were jointly owned, until the matrimonial property regime had been dissolved and the deceased's estate distributed, joint ownership continued to exist and the individual ownership could not be assessed.

However, clause 10 of the securities contract, "Death of the holders", established that once the death of any of the holders of the contract had been reported to the entity, the securities would automatically be held jointly by the surviving holders and the duly evidenced heirs.

Consequently, it was concluded that the entity had been at fault in allowing the co-holder of the account to issue the purchase orders.

In relation to portfolio management, the Complaints Service considers that the management decisions adopted by an entity that provides investment services, which is unaware of the death of a client, are valid and fully effective vis-à-vis third parties with which it has transacted in good faith.

Consequently, the contract holder's heirs or interested parties must inform the financial institution of his or her death in order to activate the contract clauses.

R/401/2019: In this case, the contract established that in the event of the death of the holder or any of the co-holders, the contract mandate would remain in force until the bank had been reliably informed of this fact. Therefore, the bank was exonerated vis-à-vis third parties of all responsibility regarding the transactions carried out after the death.

Once the death had been reported, the bank had a maximum of 15 business days in which to process and execute the orders issued, provided that all the transactions could be settled within this period.

In this case, the entity was considered to have been at fault because it was proved that after issuing the certificate of positions, it continued to perform subscriptions and redemptions for the period between 28 September 2017 (the date of death) and 27 April 2018.

R/518/2018: In this case, it was proved that the movements in the investment fund units related to transactions carried out after the date of the death of the contract holder, 27 March 2017, until the entity became aware of the fact, 8 May 2017.

Specifically, the entity continued to manage the portfolio of funds entrusted to it until it learned of the death of the holder.

R/333/2019: The complainant, in his capacity as heir, complained that he had not received periodic payments from a guaranteed fund owned by his deceased parents.

The entity informed him that blocking the contract due to death of a holder implied the cancellation of the periodic quarterly payments that occurred automatically through the redemption of a number of units.

In view of the documentation submitted, it was proved that the units that existed on the date of death of the holder were the same as those that were redeemed after the will was processed, so the Complaints Service considered that the entity had blocked the fund as soon as it learned of the death.

Consequently, the Complaints Service considered that the entity acted correctly by suspending the mandatory sale of units to meet the periodic payments following the death of the complainant's parents.

➢ Information on the deceased person's estate: steps to follow

✓ *Status of heir*

Before starting the procedures for the distribution of the estate, the heirs must prove their status as such by submitting the certificate of the General Registry of Last Wills and Testaments and an authorised copy of the last will and testament or the declaration of heirship in intestate proceedings.

✓ *Certificate of the deceased person's positions*

In the certificate of the deceased person's positions the financial institution must disclose all the securities and cash accounts, as well as a list of the financial instruments that the deceased held in the financial institution on the date of death, both owned and co-owned.

For heirs or interested parties to obtain this information they must first prove their status as such. Otherwise, the financial institution may refuse to provide the information, which would not be considered an incorrect action by the Complaints Service.

In case R/269/2019, the complainant considered that the content of the certificate of the deceased person's positions issued by the respondent entity was incorrect, because a financial contract should have been valued at its real value on the date of the death, in the same way as for the shares and investment funds.

As the financial contract had been valued for the amount invested when it was concluded (€30,000) instead of an estimated real value of 60% of the invested capital, the complainant was adversely affected in the payment of inheritance tax.

However, from the entity's point of view, the certificate was correct and reflected the position of the deceased on the date of his death, since:

> *[...] the certified product on the date of death was a financial contract, not shares or an investment fund.*
>
> *That what is certified is the balance of the structured deposit at that date, not the result of a possible cancellation request issued by the holder at that date, as this is not the case at hand.*
>
> *That the financial contract has a principal recognised by the holder of €30,000, on which amount the coupon of 10% is paid at maturity.*

In relation to this issue, it was stated that the rules[260] establish that the financial contract is a non-negotiable bilateral contract and that, consequently, it has no market value unlike other types of securities – shares or investment funds – for which there is a quoted price or daily net asset value.

In relation to the value that must be established for the product for the purposes of inheritance and donations tax, Article 9 of Law 29/1987 of 18 December, which regulates this tax, establishes that as a general rule the taxable income will be the "real value" of the assets and rights transferred less all deductible charges and debts.

However, the law includes no definition or criterion that allows this "real value" to be objectively understood, indicating only that: "On the other hand, in the valuation of the assets and rights transferred, for the purpose of establishing taxable income, the traditional criterion of real value is used, which is estimated, in principle, by the interested parties and verified by the tax administration", which makes it an indeterminate legal concept that must be estimated in this case by the depository of the product, without prejudice to its review by the competent tax administration.

In this regard, it was indicated that the financial contract could be considered a cash term deposit, in which case, for tax purposes, its real value would be the initial value deposited to acquire the product. In fact, the invested amount of the deposit would actually remain unchanged until maturity and, on the maturity date, the investment would either be recovered – if the particular conditions were met – or a predetermined number of shares would be distributed resulting from dividing the capital by the initial price of the securities as previously established in the contract.

In this case, if the real value were estimated as indicated, the value recorded in the certificate of positions would be correct, since the entity certified on the date of death the balance of the account in which the financial contract was deposited, that is, €30,000.

However, as the complainant asserted, it could also be argued that the real value could be construed as the "market value", understood as the price that would be obtained in a hypothetical redemption or settlement of the financial contract on the date of death.

In any case, the real value declared must be capable of being proved and defended vis-à-vis the corresponding tax authority, which, as indicated above, has the power to review this value.

For this reason, given that the tax administration must be the body to ultimately validate the disputed real value, the complainant was advised to contact the Tax Agency, if he so wished, to receive more information about the case and to establish the real value of the financial contract on the date of death for tax purposes, given that these are matters that fall within its scope of competence.

260 Final Provision of Order EHA/2515/2013, of 26 December, implementing Article 86.2 of the Securities Market Act 24/1988, of 28 July. This type of contract is defined by incorporating the definition of the atypical financial contracts provided by Circular 2/1999.

✓ *Certificates of entitlement*

The securities deposited in deposit and administration accounts in the name of the deceased or the units in investment funds will be included in the deceased's estate, but only that part of the financial instruments of which the deceased has full ownership.

In the case of securities accounts with shared ownership, although it is presumed that co-ownership of the deposited securities exists, this may not be the case. In fact, the shared ownership of a securities account only means that any of the holders has the right, vis-à-vis the depository, to access the account in which the securities are deposited, in accordance with the securities deposit and administration contract, but does not determine co-ownership of the securities deposited therein. The ownership of the securities is established according to the origin of the funds used to acquire the securities, and the internal relationships between the account holders.

Certificates of entitlement list all the securities owned by the deceased that are deposited with the corresponding entity, either individually or under co-ownership.

Once any existing queries about ownership have been resolved, the assets to be included in the deceased's estate must be established.

The issue of certificates of entitlement with regard to book-entry securities necessarily involves freezing the securities and no sales orders affecting said securities may be carried out except in the case of transfers resulting from enforcement of judicial or administrative rulings.

In other words, the custody and administration account in which the securities are deposited will be blocked.

With regard to units in investment funds, although it is true that there are listed and non-listed funds – the former would be subject to the legislation provided for other listed securities – it is also true that in accordance with applicable sector regulations,[261] units of non-listed funds must be registered either in the register of unitholders of the management company in the name of the unitholder or unitholders, or in the identifying register of unitholders held by the distributor.[262]

In addition, the obligations of CIS management companies, or distributors when these are responsible for identifying holders, include the issuance of certificates of investment fund units.

However, sector legislation does not provide for how the issue of the aforementioned certificates will affect the transferability of the investment fund units. Nevertheless, it seems reasonable to conclude that, as with listed securities, these should also be blocked from the time the corresponding certificate is issued until any queries that may exist about the new owners of the units are resolved.

---

261 Royal Decree 878/2015, of 2 October, on the clearing, settlement and registration of negotiable securities represented by book-entries, on the legal regime of central securities depositories and central counterparties and on transparency requirements of issuers of securities admitted to trading in an official secondary market.

262 Law 35/2003, of 4 November, on Collective Investment Schemes.

This block must be maintained until the heirs provide the entity with all the necessary documentation for changing the ownership of the financial instruments, for which the entity is required to check, *inter alia,* that the corresponding tax has been paid. During this period, the heirs may only perform acts of conservation, monitoring and administration of financial instruments that form part of the estate.

✓ *Dissolution of joint ownership of assets*

The death of one of the spouses triggers the dissolution of the joint ownership regime to which the marriage was subject, and the assets that formed it become part of the means and estate (post joint ownership) that exists until liquidation takes place.

The dissolution of joint ownership requires a series of transactions aimed at determining whether or not there are jointly owned assets and, where appropriate, which ones correspond to the deceased's estate.

For the purposes of inheritance and donation tax, Article 27 of Law 29/1987 establishes: "In successions caused by death, whatever the distribution made by the interested parties, for tax purposes these will be considered to have been carried out with strict equality and in accordance with the rules governing succession".

However, the criterion of the Directorate General for Taxation (General Tax Consultation of 17 July 2001) is that the dissolution of joint ownership and subsequent distribution of assets must adhere to the provisions of the Civil Code, and that Article 27 of the Law on inheritance and donations tax would not apply. In other words, it is not necessary that 50% of each of the assets making up the joint assets be passed on to the surviving spouse and the other 50% to the heirs of the deceased, it is possible to award both the spouse and the heirs the assets they deem appropriate in the percentages they wish, so long as the sum of the assets awarded to each of them does not exceed 50% of the joint assets.

Therefore, after the tax obligations have been settled there is nothing to prevent the heirs and the spouse agreeing to distribute specific assets in a different manner to that set down in the inheritance tax, provided that the total value of the assets distributed – half, whole or in the percentage established – does not exceed 50% of the amount of the assets (R/501/2019).

As for the form of the dissolution of the joint ownership of assets *mortis causa,* it may be formalised in a private document, which does not need to be notarised providing that it complies with the sole requirement that it be executed by mutual agreement between the surviving spouse and the other heirs. The dissolution establishes, among other assets, the financial instruments that will be become the exclusive property of the surviving spouse and those that will become part of the deceased's estate, which must be distributed among the heirs.

It thereby follows that after the dissolution of joint ownership of assets, it is necessary to distribute the assets between the surviving spouse and the heirs, and once distributed, their ownership must be changed.

R/181/2019: In this case, the entity was considered to have acted correctly by blocking the securities account, since no documentation had been provided proving the

dissolution of joint ownership of assets *mortis causa* and establishing that the complainant would become the sole owner of 50% of the shares in the contract.

However, bad practice was observed in this complaint in that the entity did not offer the complainant sufficient information on how to dispose of the 50% of the shares of which she was co-holder.

R/18/2019: The complainant considered that her client had been charged a fee for changing the ownership of some securities where no real change had occurred, since she had previously been the co-holder of the securities with the deceased, and what had really occurred was a dissolution of joint ownership.

However, it was clarified that after the dissolution of joint ownership of assets, it is necessary to distribute the assets between the surviving spouse and the heirs, and once distributed, the ownership had to be changed.

In conclusion, the shares deposited in the securities account co-owned by the deceased and the surviving spouse at the time of death had to be distributed between the surviving spouse and the deceased's heirs and, once the documentation for processing the will had been presented, it was necessary to change the ownership of the shares and deposit them in the new securities accounts opened by the beneficiaries. Consequently, the entity had to change the ownership of the shares that corresponded to the complainant's mother and deposit them in a new account opened in her name, whether they belonged to her due to the dissolution of joint ownership or through inheritance.

R/520/2019: In this case, following the death of one of the spouses, her heirs did not inform the entity of this circumstance or execute the will, so the investment fund units remained under joint ownership with her surviving husband.

As the joint ownership was not liquidated, it remained suspended in time.

After the death of the surviving spouse, his heirs – now the complainants – wanted 50% of the fund units to pass to them.

However, the Complaints Service resolved that before processing the inheritance, the joint ownership regime had to be dissolved in order to establish how many units from the investment fund would become part of the estate of each spouse, since the money with which they had been acquired could have belonged exclusively to either of the owners. Therefore, the heirs of the two spouses should agree to establish the percentage of the investment fund units that would be distributed to their respective estates.

It also warned that if the process was not performed in that way, in the future the heirs of the predeceased spouse or their descendants could claim that their rights had not been respected.

However, if they were in agreement, a solution would be to establish the assets corresponding to the estate of each of the spouses through the courts.

➢ Inheritor's right to information

Once the heirs or interested parties have proved their status as such to the entity, they can exercise their right to request information on the accounts and financial instruments of the deceased.

However, problems arise in determining whether an heir has the right to obtain information or documentation on a securities account if the co-holder objects.

As indicated above, the heirs have the right to obtain information on the balances held by the deceased in the financial institutions on the date of death, since this is essential information to establish the estate, pay the corresponding taxes and proceed with the distribution of the assets.

As regards the documentation and information on movements in the deceased's account prior to the date of death, it must be stressed that the relevant case law and literature are unanimous in considering that the acquisition by the heirs of the rights and obligations that correspond to the deceased does not occur on the date of death, but is postponed to the date on which the inheritance is accepted, at which point the heirs are subrogated to the rights of the deceased, now indeed from the date of death.

Consequently, the Complaints Service considers that until the inheritance has been accepted, the surviving co-holder of the securities account may object to documents showing the movements in the account prior to the death of the other co-holder being passed over to the heir, since there is always the possibility that the inheritance will not be accepted and, consequently, the person designated as heir will not replace the deceased as co-holder of the account.

However, at the moment when the prospective heir accepts the inheritance, he or she is placed in the same legal position previously held by the deceased in respect of all assets and debts, with effect from the date of death. Therefore, from that moment, the surviving co-holder of the securities account cannot oppose the delivery of the documentation, since the heir assumes the same position as the deceased by replacing him as co-holder of the securities account.

Consequently, upon acceptance, the heir has the right to receive documentation on the transactions carried out prior to the death.

It should be noted that the right to obtain this documentation is limited, in principle, to the time period that entities are legally required to keep it.[263] However, if the requests for information are manifestly disproportionate, unjustified or generic, or there are special circumstances that so advise, the entity could refuse to provide such information.

In other words, the objective of informing the heirs must not be confused with the heirs' attempt to present, *ex post*, a kind of amendment to the entire relationship

263 Rule Two, Section 8, of CNMV Circular 3/1993, of 29 December, on records of transactions and files containing supporting documentation (in force at the time of the first acquisition of securities). With effect from 15 February 2008, Royal Decree 217/2008, of 15 February, on the legal regime of investment firms. This Royal Decree reduces the retention period to five years.

between the financial institution and the deceased over an extended period of time that would require the entity to offer explanations about all the transactions carried out by the deceased.

It should be noted that entities have the obligation to keep a record of all supporting documents on securities orders for a minimum of five or six years, depending on the trade date. This retention period is equally applicable to appropriateness and suitability assessments. Lastly, in the case of contracts, the duty of retention extends for the duration of the contractual relationship and up to five years after it ends.

Lastly, once the financial instruments have been distributed after the execution of the will, the heir now occupies the same legal position as the deceased by assuming his position from the date of death, and from that moment on has the same rights and obligations as would have corresponded to the deceased.

In the event that there are other co-holders, data protection regulations cannot be used to oppose the delivery of documentation, since the new position occupied by the heir – who assumes the position of the deceased – grants him the same rights and obligations as the rest of the heirs (R/305/2019).

In case R/515/2018, it was concluded that the entity acted correctly by not providing the information requested by the complainant, because there was no proof that he accepted the inheritance and because his request for information and documentation extended to accounts that had been cancelled by the deceased and which consequently had not become part of the estate.

However, the Complaints Service considered that the explanations given by the entity to the complainant were not sufficient, since it stated that the documents had not been delivered because there were two other deceased holders of the securities account.

In case R/558/2018, the complainant submitted a copy of a document called "Positions report", supposedly issued by the respondent entity on the date of death, showing a position in an investment fund for an amount of €301,870.50.

However, the respondent entity informed the complainant that the deceased was not listed as a unitholder in the investment fund and stated that the document had not been issued by the entity and therefore had no value. In fact, the entity had a well-founded suspicion that the document was false, since the fund's depository had no record of its issue either.

The Complaints Service requested information from the depository of the fund, which confirmed that the deceased had never been a client of the entity, so it could not provide any type of documentation.

It was considered that the entity had acted correctly in relation to the requests for information on the financial instruments that the deceased may have deposited in his securities accounts.

However, regarding its statements alleging that the "Position report" was false, it stated that establishing whether or not the document was false was outside the scope of the administrative powers legally attributed to the Complaints Service, and therefore, if the complainant did not consider the entity's actions reasonable, he should take the matter to an ordinary court of justice.

In contrast, in case R/675/2018, the entity was at fault in informing the heir, in an email, that the equity portion of a financial contract was guaranteed to maturity.

In accordance with the terms and scenarios envisaged in the contract, the reimbursement of the equity portion (10% of the nominal amount) depended on the performance of some shares (Nokia, Telefónica and Banco Santander) on certain reference dates.

In case R/21/2019, an incorrect action was detected where the entity did not provide all the information required by the complainant with due diligence, or otherwise inform him of the reasons why it was not possible to receive this information within the legally established retention period.

In case R/109/2019, the entity also acted incorrectly because it was not proved that the complainant had been provided with information on the movements of a securities accounts during the year prior to the date of death.

In cases R/176/2019, R/177/2019 and R/322/2019, the complainants, in their capacity as heirs, requested an opinion of the Complaints Service on the entity's performance in relation to its failure to attend to their request for information and documentation.

The entity submitted most of the requested information to the case file, leading the Service to consider that its failure to provide the information had been rectified, at least partially.

However, bad practice was considered to have existed since it did not deliver a copy of the securities account contract, taking into account that entities are obliged to retain and store the contracts signed with their clients for as long as the contractual relationship remains in force and up to five years from the end of that relationship.[264]

In case R/418/2019, the entity was obliged to retain the securities depository and administration contracts concluded with its clients for as long as that relationship remained in force and up to five years from its end. As it did not submit copies of the contracts to the case file, it was considered to have been at fault.

In case R/325/2019, the complainant requested information about a redemption entry dated 24 January 1996 in the participation account of the deceased. In view of the documentation submitted, it was proved that the entry referred to the change of ownership of the shares carried out in April 1997, with a value date on the day of the death. Consequently, it was considered the complainant had been suitably informed about the issue in question.

In case R/395/2019, it was concluded that bad practice had existed as the entity did not provide the complainant with the contractual documentation related to the investment funds subscribed by the deceased, nor did it deliver the statement of the investment funds movements.

---

264 Article 32.1 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms, and CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies that provide investment services.

In contrast, in case R/393/2019, it was considered that the entity had acted correctly by confirming to the heirs, following their request, that the deceased did not hold positions in the respondent entity.

➢ Unsettled estate

The first stage of the inheritance process is known as "unsettled estate". The Civil Code does not directly regulate this process but does refer to it in Article 1934: "The legal effects of the prescription in favour and against the estate shall take place prior to the acceptance thereof and during the time allowed to make the inventory and deliberate".

The ruling of the 1st Civil Chamber of the Supreme Court, 12 March 1987, defined the unsettled estate, indicating that "the succession of a person shall start precisely at the moment of his or her death, when the assets become the unsettled estate, which is nothing but those assets while no owner has been established, and therefore has no legal personality, although for certain purposes it may be temporarily considered and treated as a unit, as it will be acquired by the voluntary or legal heirs".

In other words, this is an indeterminate legal situation which affects the estate of the deceased from the moment of his or her death until the heirs have accepted the inheritance. It is therefore a temporary situation and during this period the estate has no legal personality. In other words, there is no owner of the deceased's estate and once the heirs or legatees accept the inheritance, they acquire ownership from the date of death. From that moment, the heirs or legatees assume the position of the deceased and acquire ownership of the assets from the date of death (Article 989 of the Civil Code).

Therefore, it can be concluded that the unsettled estate is the situation of the deceased's estate, without a holder, which lasts until the heirs accept the inheritance.

In cases R/199/2029 and R/430/2019, the heirs wished to allocate the assets to the unsettled estate and gain access to them from there.

However, the Complaints Service considered that once the heirs have accepted the inheritance, the unsettled estate ceases to exist. In other words, the temporary situation in which the estate has no owner no longer exists, and from the moment the inheritance is accepted, the heirs or legatees assume the position of the deceased and become the owners of the assets that make up the deceased's estate, either individually (if the inheritance is distributed) or collectively (if the assets are not distributed).

Therefore, from the time when the heirs themselves, or through their representatives, accepted the inheritance, it was not possible to dispose of the assets through the unsettled estate since this no longer existed.

However, in case R/199/2019, bad practice was considered to have occurred as the entity did not properly inform the complainant about the consequences of accepting the inheritance with respect to the unsettled estate and requested additional documentation that, in the opinion of the Complaints Service, was unnecessary, not only because at the time it was requested it was not possible to settle the securities

against the unsettled estate but also because it was not required in order to make such an allocation – to the unsettled estate – if it could have been carried out.

In short, there were disagreements between the parties that the entity did not adequately resolve, which could have caused an unjustified delay in the final distribution of the estate.

➢ Acceptance of the inheritance: establishment of joint ownership

Once the estate has been established, the heirs may accept or reject it.

On acceptance, the heirs express their willingness to succeed the deceased. Joint ownership is said to exist when all persons entitled to the inheritance accept it, whether expressly or tacitly, and will last until the distribution and allocation of the specific inherited assets to each of the heirs.

Under the joint ownership regime, all heirs hold an abstract share of the assets and no specific portion is allocated to any of them. Therefore, during this stage the heirs may not dispose of the assets as the estate remains undivided. They do, however, have the right to sell their share of the entire inheritance, which would give their co-heirs a pre-emptive right to it (Article 1067 of the Civil Code).

In this regard, although an heir may not sell any of the specific assets making up their inheritance until they are expressly and formally allocated such assets, it is possible that the joint ownership regime that is established following the acceptance of the inheritance may sell all or part of the financial instruments making up the estate. In that case, all the heirs of the deceased and, where appropriate, the forced heirs, must consent and sign the sales orders. The assets to which these orders refer must be excluded from the inheritance distribution instrument which may have been submitted to the financial institution, without prejudice to the tax consequences that this may entail.

➢ Partition of the estate and allocation of assets

The partition is an agreement that puts an end to the joint ownership in order to distribute the deceased's assets and rights among the heirs in proportion to the share corresponding to each of them according to the type of inheritance (will or notarial declaration of heirs in intestate proceedings).

The agreement for partition of the inheritance and allocation of the assets can be drawn up in a public deed or in private partition document signed by all the heirs.

The criterion followed by the Complaints Service is that financial institutions must allocate the deceased's assets in accordance with the provisions made by the heirs in the public deed or private allocation document.

In cases where the financial instruments cannot be allocated as determined in the allocation document provided, entities must request new distribution instructions from all the heirs prior to the change of the ownership of the securities.

However, it frequently happens, as happened in case R/675/2018, that an undivided partition is made of the value of a series of financial assets deposited in different financial institutions at a certain date. In these cases, specific assets are not allocated but rather a share of these assets resulting from applying the corresponding percentage to the total value of the series of assets at a given date.

In other words, in this allocation the joint ownership is unwound and ordinary ownership by share is established, as indicated in Article 392 of the Civil Code: "There is joint ownership where ownership of a thing or a right belongs pro indiviso to several persons. In the absence of a contract or special regulations, joint ownership will be governed by the requirements of this title".

However, the unanimous agreement of the heirs (now joint owners) is sufficient to end the situation of ordinary joint ownership and allocate the assets in specific shares.

In this case, to avoid an undivided partition, the entity asked the legatees to draw up a private document with a breakdown of the assets to be allocated to each one.

A separate distribution document was also submitted on 29 September 2017, when the entity distributed the shares and cash in the accounts.

In case R/518/2018, the complainant expressed his disagreement with the entity's failure to comply with the instructions agreed in the inheritance deed, since there were discrepancies in 25 of the 40 funds allocated.

In accordance with the portfolio management contract the deceased had signed with the entity, from the date of death until the entity became aware of the fact, the entity continued to manage the portfolio of funds that had been entrusted to it.

As a consequence of these portfolio management activities, the number of units in some of the funds changed, and therefore the distribution performed by the entity did not match the number of units allocated to each heir in the deed of partition.

Based on the principle of subrogation, the Complaints Service considered that one asset had been legally substituted by another in the inheritance and the entity proceeded to partition the assets by applying the same distribution percentage to each heir as was established in the allocation deed.

The entity provided a document showing the differences between the portfolio on the date of death and on the date of transfer and demonstrating that the number of units allocated to each heir had been obtained by applying the same percentage for each of the seven heirs.

Notwithstanding the foregoing, the Complaints Service found that there were other funds in which the number of units had remained unchanged between the date of death and distribution of the inheritance, but there were, however, differences between the amounts allocated to each heir in the deed and the amounts actually distributed by the entity.

Therefore, it was concluded that the entity had engaged in bad practice by allowing the distribution of some investment funds to vary with respect to the provisions of the allocation document submitted to the entity, to which the heirs had not given their consent.

In case R/382/2019, it was considered that the entity had not acted correctly by allowing changes to be made in the allocation and distribution of the inheritance through a private document that amended an earlier public document.

The reasons given by the Complaints Service were that, on the one hand, the distribution and allocation orders in the two documents were clearly contradictory and, further, that the type of document that should be used to amend the distribution and the allocation initially made should have the same characteristics as the one that is to be changed. In other words, the entity should have required that the new distribution be made through a public deed, in accordance with the Civil Code.

In case R/226/2019, it was considered that the entity had engaged in bad practice by proceeding in a different manner from that requested in the distribution document signed by the heirs and the surviving spouse.

Although the will gave the surviving spouse universal usufruct of all the assets, according to the distribution document the heirs had agreed to commute[265] the usufruct to the surviving spouse.

However, the entity alleged that the private document was not consistent with the tax paid by the heirs, since it stated that the surviving spouse had acquired usufruct of the deceased's assets.

On this matter, the Complaints Service indicated that it could only assess the entity's performance in terms of compliance with the obligations that, in the form of rules of conduct, are required of it in its capacity as a provider of investment services, and could not issue any type of opinion on the settlement of inheritance tax or any other tax matter, since this is a subject that concerns the State Tax Administration Agency (AEAT), which is the competent body in this area.

However, it was concluded that the only power held by the entity, in the event that it considers that a distribution document is inconsistent with the taxes paid by the heirs, is to inform them of this inconsistency in order to resolve the issue. The entity may in no circumstances allocate and distribute the inheritance assets according to its opinion.

In case R/401/2019, although the complainant had provided all the documentation for the distribution of some fund units in accordance with the deed of acceptance and allocation of inheritance, it could not be carried out because of differences in the units or CIS included. Therefore, the entity informed the complainant that in order to distribute the funds, the heirs would have to submit a new allocation document signed by all of them, expressly specifying how they wished to dispose of each one of the existing funds.

➢ Executor/estate partitioner-distributor

The fundamental difference between the executor and the estate partitioner-distributor is that the former has the mission of executing the last will and testament of the deceased in accordance with its provisions, or failing that, with the provisions of

265 Articles 839 and 840 of the Civil Code.

Article 902 of the Civil Code, while the estate partitioner-distributor's mission is to divide the inheritance.

However, the same person may be granted both powers, in which case he or she will be the executor/estate partitioner-distributor.

In case R/504/2018, the entity acknowledged that it had been presented with a partition record prepared by the executor/estate partitioner-distributor, but that it had been rendered invalid upon his resignation.

Consequently, the entity considered that due to the resignation of the executor, the heirs must provide a new document of acceptance and allocation of inheritance, signed by all of them, in which the funds would be inventoried and allocated.

However, the Complaints Service resolved that the partition made by the executor/estate partitioner-distributor, is not in principle subject to form, unless access is required to the Property Registry, in which case it must be drawn up in a public deed, in accordance with Article 80.1 of the Mortgage Regulations.

In regard to inheritance partitions drawn up by an estate partitioner-distributor, the General Directorate of Registries and Notaries, interpreting Article 1057 of the Civil Code, considers that partitions made by the partitioner-distributor must be taken as if they had been made by the deceased himself or herself (Resolutions of 16 September 2008, 14 September 2009, etc.).

Further, following the Resolution of 24 March 2001 (which has been repeated in many others) the General Directorate considers that "the lack of consent of the legitimate heirs ceases to apply when the partition has been granted by the partitioner-distributor designated by the testator; and this partition is valid as long as it is not legally challenged; so that only the Courts of Justice are competent, where appropriate, to rule that the partitioner-distributor has acted against the wishes of the testator, and the partition made by this official must be respected".

Therefore, when the entity received the partition record, it should have acted accordingly. The resignation of the executor should not have been relevant and the consent of the heirs was not required.

Consequently, it was considered that after the resignation of the executor/estate partitioner-distributor, the partition record remained valid for all purposes, so that any heirs who did not comply with the provisions set out in that record would have no other way to oppose the partition except through the courts.

It was concluded that the entity had not acted with due diligence, since it should have followed the provisions of the partition record drawn up by the executor/estate partitioner-distributor.

➢ Inheritance tax

In accordance with Article 8 of Law 29/1987, of 18 December, on Inheritance Tax, and Article 19 of its implementing regulations, financial institutions are legally liable on a subsidiary basis to pay the tax in *mortis causa* transfers. Hence, in order to complete the execution of the will, the heirs must provide evidence to the financial

institution that they are up to date with tax payments, or prove their exemption from such taxes or their expiry.

If they are not up to date with the payment of the inheritance and donations tax, the entity in which the deceased's securities are deposited may refuse to continue processing the will, as in the event that the tax is not paid by the heirs, the entity will be liable on a subsidiary basis for its payment.

Therefore, for the entity to complete the processing of the will, and where applicable lift the block on the securities deposited in the name of the deceased, the heirs must be up to date with the payment of the tax or otherwise the block will remain in place and the deposited securities may not be accessed.

However, Article 8.1.a) of Law 29/1987 establishes that "the issue of bank cheques charged against deposits, guarantees or the proceeds from the sale of securities shall not be considered as the delivery of cash or deposited securities, or the return of guarantees if its sole purpose is the payment of the inheritance and donations tax applied on the *mortis causa* transfer, provided that the cheque is issued in the name of the tax administration to which the tax is due".

In other words, the law authorises financial institutions to allow disposals of securities to settle the inheritance tax.

In case R/55/2019, although the inheritance tax was paid at a branch of the respondent entity on 26 June 2018, forms 650 and 660, which would prove the payment of the required inheritance tax, were not presented until 29 August 2018 and, consequently, the investment fund units remained blocked, and could not be accessed.

In case R/504/2018, the entity claimed that the documentation provided had been reviewed but that it was not able to distribute the units of the deceased's investment funds, as provided in the partition record, because not all the heirs had presented their inheritance tax settlement forms.

However, in the review document provided by the complainant, Point 5 – relating to inheritance tax stated: "Tax obligations fulfilled".

Therefore, the entity had engaged in bad practice due to the discrepancy between the provisions of the documents provided by the entity and its own written arguments.

In cases R/158/2019 and R/160/2019, the complainants, who were brothers, maintained that there had been an arbitrary block of some Telefónica shares that they owned through inheritance.

According to the arguments submitted by the entity, the shares had been blocked because it had not been established that the heirs had demonstrated payment of the inheritance tax.

However, in this case, the tax settlement corresponded to the Regional Government of Madrid, although it had not been paid because an appeal had been filed against the settlement before the Central Administrative Court (TEAC), and, in addition, the payment of the total amount was guaranteed by a credit institution.

Bad practice was considered to have occurred as the guarantee secured the tax payment and therefore it was not necessary to block the shares. A dual guarantee was effectively being required of them.

In case R/307/2019, the complainant considered that the entity had not acted with due diligence when on 30 November 2015 it had provided all the documentation required to execute an order to sell some securities deriving from an inheritance to obtain cash to pay the inheritance and donations tax. However, the order was not executed until 14 December 2015.

The entity acknowledged that the complainant had provided the deed of acceptance and allocation of the inheritance. However, it pointed out that the entity's staff subsequently requested a document signed by all the heirs indicating the assets that should be sold to raise the amount needed to pay the tax and a copy of the tax payment letters.

It was proved that on 30 November 2015, the complainant presented a document signed by all the heirs in which they requested the settlement of some products in order to pay the tax. However, the sell order could not be executed because they had requested the sale of all the products allocated in the inheritance that were deposited with the entity.

Consequently, in order to correct this error, the entity's staff requested another letter signed by all the heirs indicating which assets deposited with the entity should be sold in order to pay the tax.

The sell orders were delivered on 14 December 2015, and executed and credited to the account between 14 and 16 December.

Therefore, in view of the documentation provided, it was considered that the entity had acted properly and in accordance with the rules of conduct of the securities market.

➢ Commutation of usufruct

In regard to the life usufruct of all the assets of the inheritance, Article 839 of the Civil Code establishes that:

> *The heirs may pay the spouse his part of usufruct by allocating to him a life annuity, the proceeds of certain assets or a sum of capital in cash, by mutual agreement and, in the absence thereof, pursuant to a court order.*
>
> *Until this is performed, all assets in the estate will be earmarked to pay the part of usufruct corresponding to the spouse.*

Therefore, the widow's usufruct may be changed or commuted through different forms of payment: the allocation of a life annuity, the allocation of the proceeds of certain assets or a sum of capital in cash.

In case R/501/2019, the entity refused to distribute the units of an investment fund in accordance with a private document provided by the heirs, because that document was not consistent with the settlement of the inheritance tax.

According to the will, the surviving spouse would be able to acquire the third of the estate apportionable at will to all the legitimate heirs and the surviving spouse's usufructuary share, or total usufruct for life of the entire estate.

From the documentation provided, it was clear that the surviving spouse had chosen the second option – total usufruct for life of the entire estate.

In this case, there were two options available: i) to value the cash amount to which the commutation of the usufruct would give rise, or ii) to keep all the assets acquired by the heirs as their inheritance encumbered by the usufruct that corresponded to the surviving spouse, but it was not possible to do both, as established in the private distribution document.

Therefore, the error could derive from how the usufruct for life of the surviving spouse should have been valued for the purposes of the inheritance tax. In accordance with the tax regulations and given the age of the surviving spouse, she should have paid 10% of the estate.

Once the tax had been paid, the heirs could do one of two things: quantify the value of the usufruct that corresponded to their mother by paying it against the inheritance assets, which would mean the extinction of the usufruct and the full ownership of the assets by the heirs with no charge, or maintain the assets acquired by the heirs encumbered by the usufruct in favour of the surviving spouse.

In this case, the surviving spouse was being allocated higher amounts than those that would have corresponded to her, which is why the entity indicated that in reality a donation was being made to the surviving spouse.

Ultimately, it was proved that the distribution set down in the private document would have had tax effects, as the surviving spouse had received an excess allocation and in accordance with Article 27 the amounts of such excesses must be settled.

➢ Legacies

The legatee, unlike the heir, acquires a real asset or right in a private capacity, i.e., he or she acquires the specific asset without the liabilities of the inheritance, and always according to the will of the deceased set down in the testament.

Article 882 of the Civil Code establishes the following:

> *When the legacy consists of a specific and determined thing, owned by the testator, the legatee shall acquire ownership thereof upon the testator's death, and shall be entitled to pending benefits or income, but not income accrued and unpaid prior to such death. The thing bequeathed shall from such time be at the legatee's risk and peril, and the legatee shall therefore bear its loss or impairment, and shall benefit from any accretion or improvement thereof.*

However, Article 885 of the Civil Code stipulates:

> *The legatee may not take possession of the thing bequeathed by his or her own authority, but must request delivery and possession thereof to the heir or the executor, where the latter is authorised to do so.*

For its part, Article 1025 of the Civil Code indicates that:

> *During the formation of the inventory and the term to deliberate, the legatees may not demand the payment of their legacies.*

When the legacy is a specific and determined thing owned by the testator, the legatee acquires ownership from the moment of death, although the legatee must request the delivery and possession of the legacy from the heirs, once the inventory has been drawn up.

R/196/2019: The complainant, the partner of the deceased, was dissatisfied with the fact that the entity made available to the children of the deceased all the inheritance assets that had been deposited at the respondent entity, including those of the corresponding third of the estate, thereby contravening the last will and testament of the deceased and violating her recognised right as a legatee.

In regard to whether the investment funds forming the deceased's estate had been distributed correctly, the entity alluded in its pleas to the aforementioned Article 885 of the Civil Code.

The Complaints Service considered that the public deed submitted to the case complied with all the legal obligations corresponding to the heirs; as they first accepted the inheritance, then they made the corresponding legacy available to the legatee (one third of the inheritance) and lastly the remaining assets (two thirds of the inheritance) were distributed among them, in equal parts, as their father had arranged in his will.

Consequently, the instructions given by the heirs were clear, precise and in accordance with current legislation. They also specified which investment fund units should be allocated to the legatee, once the legacy had been accepted and the inheritance and donations tax had been paid.

However, the entity allocated fifty per cent of the inheritance funds to each of the heirs, instead of the two thirds that corresponded to them, contradicting the instructions of the public document, without providing any explanation of its actions.

➢ Study of documentation and change of ownership

Once the heirs have submitted the necessary documentation to gain access to the securities deposited in the deceased's securities accounts, investment firms must spend some time verifying that the documentation provided is valid and sufficient.

If the documentation submitted is correct, the entities must execute the last remaining procedure to allow the heirs to exercise all the rights related to ownership of the securities acquired in accordance with the provisions of the partition record, i.e., the change of ownership.

This procedure to change ownership of the shares or units in the funds must be carried out without delay.

Otherwise, the entity must ask the heirs to correct the documentation presented as rapidly as possible, indicating the reasons why it considers that the documentation is not sufficient or does not comply with the law.

The entity must be able to prove that it has informed the heirs clearly and without delay about the documents or issues that have to be completed or rectified (if possible, listing them in detail) to be able to conclude the execution of the will and carry out the change of ownership of the securities or units in the investment funds.

However, it must be taken into account that in order to carry out the change of ownership of securities acquired through inheritance, the beneficiaries must open a securities account, as well as an associated cash account, in the same financial institution in which the securities held by the deceased are deposited, or in a different one. The only requirement for this account is that the holder must be the same as the awardee of the securities. In other words, the ownership of the account must be shared, where the inheritance remains *pro indiviso*, and individual (one in the name of each heir) when the financial instruments are distributed.

In this regard, the Complaints Service considers that once all the heirs have notified the entity of their agreement with the distribution of the inheritance, the award procedure does not require all the heirs to open accounts for the deposit the securities awarded or associated accounts at the same time, but these may be opened at different times. The Complaints Service also considers that while changes in ownership of the securities must be subject to the prior opening of the corresponding account, this too can be done on an individual basis, not necessarily collectively, such that the entity would complete the allocation of the inheritance assets when the last heir opened an account and requested the change of ownership of the securities allocated to him.

However, a clarification must be made. The Complaints Service is not aware of the precise operating procedures of any particular banking institution, so the opinion expressed above is sustainable as long as it can be feasibly carried out and is not inconsistent with the entity's banking operations.

Also, as mentioned previously, there is nothing to prevent the allocated shares from being deposited in a securities account opened in a different financial institution from that making the allocation. To do this, the heir can issue an order to transfer the securities awarded to the entity in which a securities account has been opened in his or her name, so that change of ownership and transfer of the securities are performed simultaneously. However, if the holder of the target account is not the same as the awardee of the securities, the entity would be acting correctly by refusing to transfer the securities.

However, if the assets acquired *mortis causa* are units of investment funds, the heirs are not obliged to open a securities account with the entity, since these types of financial instruments are not usually deposited at the banking institution. Nor is it mandatory to open a current account associated with the fund.

However, a securities account (and an associated cash account) would be necessary if the acquired assets are shares of an investment company (another type of CIS) and not investment fund units.

Although it is not obligatory (as indicated above) to open a securities account in order to access units of an investment fund, in their banking operations most entities use membership contracts or investment fund contracts to manage this type of asset, as well as cash accounts associated with these contracts through which to credit or debit any cash movements linked to the investment fund; a practice that is

considered correct. In these cases, it is the entity's responsibility to provide the heir with clear and precise information about the procedures to be followed to achieve the intended purpose, in this case, changing the ownership of shares in an acquisition *mortis causa*.

If, as mentioned above, entities ask the heirs to open a current account, securities account or any other account associated with the investment fund, provided that they are linked exclusively to the operations of said fund, the CNMV's criterion is that the entity should not charge any maintenance fees.

Lastly, it should be noted that in these cases it is usual for the investment fund unit acquired *mortis causa* to be held in the same entity as the deceased, since unlike other types of securities, these units can only be transferred to another entity that also distributes them, which is not always the case. This is known as changing distributor.

R/251/2019: The entity, after processing the will, made an error that was recognised at all times. Specifically, two of the heirs received fewer shares than they were entitled to under the inheritance deed.

R/216/2019: The entity clarified that the award of the shares could not be carried out until January given that the securities contracts had not been signed by the heirs, an essential requirement for the transfer of securities.

In this case, the Complaints Service considered that the entity had taken the steps available to it to resolve the will, therefore, once the securities accounts had been opened and the contractual documentation signed by the heirs (early January 2019), the transfer of securities was carried out on 14 January 2019.

R/671/2018 and R/94/2019: The respondent entity acted incorrectly by agreeing to the change of ownership of some shares and their simultaneous transfer to another entity, as requested by the complainant, without requiring a securities account to be opened with the entity itself.

R/661/2018: In this case, the complainant asserted that in order to open an account in his name and in the name of the other heirs, the entity had obliged them to go in person to its El Escorial branch, and he could not understand why the power of attorney granted before the Spanish consul in Montpellier, a copy of which was included in the case file, was not sufficient to perform this requirement.

The entity did not mention this issue in its arguments. However, the power of attorney granted by the consulate was not sufficient to open an account in the name of the heirs. Therefore, it was considered that in order to open the accounts in the names of the heirs, a special power of attorney should have been granted.

Notwithstanding the foregoing, it was concluded that the entity should have informed the heirs about the different options available to them to effectively distribute the inheritance, especially taking the fact that they resided outside Spain into account.

R/640/2018: The heirs requested the redemption of some fund units from the deceased's account and the subsequent deposit of the resulting amount in the cash

account jointly owned by one of the heirs, in order for the heirs to distribute the resulting redemption between them, in accordance with the inheritance deed.

In this regard, the Complaints Service ruled that it was not possible to process the request because once the inheritance had been awarded, the units of the deceased's investment fund could not be disposed of until the change of ownership had been made in the name of each of the heirs in the proportion established in the partition deed. Once this change had been made, the units could be redeemed or transferred to another fund.

R/671/2018: In this case, it was considered that the award of the securities had not been made in accordance with the instructions issued by the heirs in the public or private inheritance distribution document.

➢ Deadlines

The regulations governing the rules of conduct of the securities markets do not stipulate any deadlines for the execution by investment firms of change of ownership in acquisitions *mortis causa*.

On this issue, the criterion reiterated by the CNMV Complaints Service is that entities must promptly change the ownership of securities subject to an inheritance process. It has been stated on multiple occasions that a speedy execution of inheritance procedures is the result of diligent collaboration between the parties involved, namely the heir or heirs and other interested parties (usufructuaries, legatees, etc.) and the entity. In this way, the former must provide all relevant documentation to carry out these procedures and the entity must promptly carry out all the necessary steps to complete the process, once the required documentation is in its possession.

Once the documentation has been presented, financial institutions must start a series of checks and reviews to verify whether it is correct and sufficient. If this is not the case, they must inform the heirs in a clear, precise and concrete manner about all the deficiencies detected, so that these can be corrected and to speed up the probate process, as far as possible.

Once the documentation has been verified, the financial institution must change the ownership of the financial instruments as rapidly as possible.

Further, the Complaints Service considers that entities should commit as few errors as possible, for which they must control and organise their resources in a responsible manner, adopting the appropriate measures and using the appropriate means to carry out their activity efficiently; dedicating all the time required to each client, responding to their complaints and enquiries and rapidly correcting any errors that may occur.

R/605/2018: The Complaints Service considered that it was not possible to distribute the units of a fund given that the deed of partition submitted in the case file did not refer to the units of the investment fund in dispute.

R/145/2019: The heirs and the surviving spouse agreed on the distribution of the securities, bank balances, shares and investment funds in five equal parts.

No specific assets were actually awarded, but rather shares of the assets. In other words, in this award the ordinary joint ownership was unwound and ordinary ownership by share was established.

To dissolve the joint ownership of, among other securities, some shares that were indivisible, it was necessary to provide a distribution document.

In this case a private document containing distribution instructions was submitted. However, each heir was awarded a number of shares which contained decimals, which was not permitted as the shares were intrinsically indivisible.

Faced with this error, the entity contacted the heirs to inform them about the incidents detected.

In relation to the rectification requested, the entity submitted a private document of distribution instructions that replaced the previous one, duly signed on 21 December 2018.

Therefore, with the documentation provided, it was considered that there had been no delay in processing the will, given that the request for distribution was presented on 21 December 2018 and the will was executed on 11 February 2019.

R/283/2019: The entity was considered to have acted correctly when the complainant (proxy appointed by the other heirs), instead of opening accounts in the name of each of the heirs, asked the entity to transfer all the shares in the deceased's securities account to his own.

In 2019, complaints were resolved in which it was considered that the entity had acted incorrectly, describing the time it had spent on changing the ownership of investment fund units in an inheritance to be excessive.

R/622/2018: In this case, the respondent company did not provide any public or private document regarding the acceptance and partition of the inheritance, although this was expressly required by the Complaints Service.

R/640/2018: In this complaint, there was a delay in processing the inheritance due to the entity's failure to act with diligence, since if – as indicated by the complainant – the distribution deed had been provided along with the rest of the documentation necessary to conclude the execution process, it should have been performed promptly and diligently, requesting any additional clarification that may have been required. If, on the contrary, it had not been provided, the entity should have requested it.

R/89/2019: The entity was considered to have acted incorrectly due to the excessive time spent in processing the will, because the entity had been given the receipt of the inheritance tax payment by the complainant on 22 September 2017, but the will was not executed. The entity did not inform the complainant about the need to open a securities account with it or with a different entity to proceed with the change of ownership of the securities until March 2019.

R/104/2019: The entity was considered to have acted incorrectly due to the lack of clarity of the information provided to the complainant – the representative of the heirs – in relation to the procedures to follow to take possession of the shares that

corresponded to the 17 heirs she represented, which caused an excessive delay in the award of the estate.

R/161/2019: In this case, the entity itself acknowledged the delay in processing the will. However, the Complaints Service rated positively that the entity had recognised the error made.

R/431/2019: The entity alleged that on 22 May 2018, securities and cash accounts were opened in the name of the three children of the complainant, but that there was a discrepancy between the management entity (individual distribution) and the opening of the accounts under the joint ownership regime. This meant that the manager could not carry out the distribution.

Once the incident had been resolved, on 28 June 2019, the change of ownership took place and the investment fund units were awarded.

However, on reading the pleas, it emerged that the entity had not taken into account the time elapsed between March 2016 (when the first email on the matter was sent by the complainant's lawyer to the entity) and May 2018 (when the accounts were opened), and it was concluded that the entity had acted incorrectly by not justifying its actions during those two years.

R/371/2019: It was not proved that the respondent entity had processed the change of ownership of the shares with due diligence in the case of the will in question.

R/446/2019: The entity did not act with the due diligence since it did not clearly inform the complainant of the documentation necessary to process the will, which led to an unjustified delay.

➢ Conservation, monitoring and administration of financial instruments

During the period for processing the execution of the will, financial transactions or corporate events often take place with the issuers of the financial instruments making up the estate, or agreements of different types, such as the merger between CISs in which the investment funds subject to the inheritance are involved.

Some of the detected situations that may occur:

R/167/2019: In this case, from the dates of death (2001 and 2006) until the heirs signed the inheritance partition deed (12 May 2017), the investment funds underwent a series of mergers or transformations due to the expiry of the associated guarantee.

Further, during the period one of the merged funds incorporated an "income plan", which meant that the unitholders signed up to a regular redemption programme.

These transactions caused the number of funds and units to vary significantly between the time the death certificate was issued and the time when the units of the investment funds were awarded.

In regard to the automatic unit redemptions that occurred between the death of the deceased and the change of ownership of the securities, a problem arose in that the

redemptions continued to occur, as the units were still in the name of the deceased and consequently the redemptions were credited to the cash account associated with the funds.

It was resolved that this did not mean that the payments did not correspond to the heirs, but given that they were deposited in the indicated current account, the owner or owners of this account would be responsible for paying them to the complainant.

Therefore, it was concluded that the entity acted correctly by paying the periodic redemptions into the cash account designated for that purpose.

R/471/2019: In this case, the investment funds were mobilised because they were part of several merger processes between CISs brought about by the management companies of the funds. In these cases, there is no disposal of the fund units but an exchange of the units of the absorbed fund for units of the absorbing fund.

Therefore, the Complaints Service clarified that the block imposed by the entity affected the disposal of the securities by the surviving joint owners and the heirs of the deceased, but not the financial transactions or corporate events carried out by the issuers of the financial instruments included in the estate.

➢ Fees

As indicated above, investment firms are free to set the fees or expenses charged for any service effectively provided.

It should be noted that financial institutions may have two types of fee in relation to this process of executing wills: a fee for processing the execution of the will and a fee for changing ownership.

It is the responsibility of the Bank of Spain to be aware of all issues relating to will execution fees, as it is a purely banking fee.

However, the CNMV must be aware of the fees for changing the ownership of financial instruments, regardless of whether this is *inter vivos* or *mortis causa*.

The Complaints Service understands that if the entity passes on to its client a will execution fee this must include the fee for the change of ownership, since this is one of the phases of that process (the last one). Therefore, it is not possible to collect both fees at the same time. As indicated above, investment firms are free to set the fees or expenses charged for any service effectively provided. Clients must be informed of these fees prior to the provision of the service in question.

Clients must also be notified of the fees as a prerequisite for the application of fees.

In case R/518/2018, the entity acknowledged that given that it could not prove that it had informed the complainant in advance of the fees that would be charged for processing the securities in his inheritance, *mortis causa*, it resolved to reimburse him for the fees charged.

➢ Right of the heirs to claim for marketing of the product

On occasion, the heirs, when informed of the investment products that make up their inheritance, consider them inappropriate for the investor profile of the deceased for various reasons, which leads them to claim for bad practices in marketing. One of these reasons may be the advanced age at which the deceased, without the proper knowledge or experience, in the opinion of the heirs, acquired a product classified as complex according to the regulations for this purpose.[266]

Article 661 of the Civil Code stipulates: "Heirs succeed the deceased by the sole fact of his death in all his rights and obligations", although only when they have accepted the inheritance. Therefore, once their status as heirs and acceptance of the inheritance have been proved, they can file complaints with the financial institutions of which the deceased was a client to object to the entity's performance in marketing of the product at the time it was subscribed or acquired by the deceased.

However, in these cases it must be taken into account that no more than five years may have elapsed from the time the events occurred and when the complaint is filed. If longer than this period, the events would be considered to have expired.

If the events to which the complaint refers have not expired, the Complaints Service must analyse the performance of the entity at the time the financial instrument (now inherited) was marketed to the deceased, examining the legal relationship between the deceased and the entity (advice or execution only), the type of product contracted (complex or non-complex) and, where appropriate, whether the suitability or appropriateness of the product was assessed, as well as whether the deceased received information about its features and risks prior to the acquisition.

In contrast, before the inherited financial instruments are awarded to the heirs, financial institutions are not obliged to obtain information about the suitability or appropriateness of the inherited product for the profile of the acquiring heir or to offer information about its features and risks, since this transaction only involves a change of ownership, not a remarketing of the awarded securities.

R/543/2018: The complainant, in his capacity as heir, expressed disagreement with the marketing of some subordinated bonds mandatorily convertible into shares and their subsequent exchange. In this case, it was concluded that the entity had engaged in bad practice by not having provided a copy of the appropriateness test – carried out prior to the exchange in May 2012 – or, otherwise, the documentation analysed to demonstrate proper assessment of the appropriateness of the product.

R/33/2019: The complainant asserted that the deceased had not signed any contracts or received any type of pre-contractual information after inheriting an investment fund.

However, it was established that prior to the subscription of units in the fund, the company had provided the deceased with a document called "Marketing of investment products" that contained a copy of his appropriateness assessment and a copy of the document signed by the deceased.

---

266 Article 217 of Royal Legislative Decree 4/2018, of 23 October, approving the Recast Text of the Securities Market Act.

R/55/2019: The entity was considered to have been at fault because it did not provide the KIID or the last six-monthly reports of a series of investment funds marketed to the deceased.

R/152/2019: The complainant considered that the "currency options" product should not have been offered to the deceased since it did not fit his profile, according to the suitability test performed.

He pointed out that in the suitability test the deceased indicated that he was not willing to lose more than 5-10% of the investment, so he understood that the entity should not have offered a product which could incur a loss of up to 100%.

However, the entity clarified in its pleas that the loss of 5-10% referred to the total portfolio position, not to a specific product.

Further, the entity provided a copy of a document signed by the deceased which proved that the transaction had not been carried out through an advice service.

The documentation contained the following warning: "Transaction decided upon by the client, not advised. We hereby inform you that this transaction has been arranged at your request and under your responsibility, based on your own analysis and investment decision. Banco Santander has not given you any advice regarding this transaction, although you have been informed sufficiently in advance of the features and risks of the product". The document provided contained the client's signature along with the handwritten statement: "I have not been advised on this transaction".

It was also considered that the entity had not been obliged to provide prior information about the features and risks of the financial instrument to be inherited.

However, in this case, bad practice was observed in that it had not been proved that the entity had reported the result of the investment on the product expiry date.

A.8 Ownership

➢ Proof of ownership of financial instruments

In order to trade with securities, it is necessary to open a securities account and sign a securities custody and administration contract with a financial institution authorised to provide this type of service.

Through the securities account, the financial institution is responsible for the custody and management of the investor's portfolio and is obliged to keep the client's positions up to date, facilitate the exercise of the rights derived from holding the portfolio and provide notice of any corporate transactions, especially those that require instructions from the client. The securities account has an associated cash account to which any money will be credited or debited (deriving from purchases/sales, payment of dividends, fees, etc.).

The ownership of a financial instrument is assumed to be held by the holder of the securities account in which it is deposited, with the ownership of the security established in the account contract. Therefore, the shares will be registered in the

accounting registers in the name of the same holders that appear in the securities account held with the entity.

When ownership of the shares appears in the name of several people in the corresponding accounting registers, there is an assumption of co-ownership for tax purposes, although this assumption may be rebutted by evidence to the contrary.

Co-holder accounts (with two or more holders) are the main source of the complaints received, with the main cause being one of the holders making use of the financial instruments without the knowledge or consent of the other owner(s).

To determine whether or not the entity has acted correctly in response to an order to access the securities issued by one of the co-holders, the access regime of the securities account established in the administration and deposit contract will be decisive.

R/418/2019: In this case, the complainant wished to change the ownership of a securities account held by the deceased jointly with other holders, without obtaining the prior consent of the rest of the joint owners.

However, this was not permitted because the acquisition date of the securities deposited in the account for the heir and for the rest of the holders was not the same. In this regard, the acquisition date resulting from an inheritance was the same as the date of death, while for the rest of the joint owners, the acquisition date remained the original date on which the shares were acquired under shared ownership.

Therefore, the heir had to open a new individual securities account, to which her securities would be transferred, at which time the effective change of ownership would take place, as well as the book entry of the securities at the acquisition date, which would coincide with the date of death.

Secondly, the remaining holders were required to open new securities accounts or modify the ones they had already opened.

➢ Rule of operation: joint and several, and joint

In general, on opening a securities deposit and administration account the rule of operation is established. In joint and several accounts, on signing the account opening contract, the co-holders give mutual authorisation to access the funds. Any of the holders is therefore authorised by the others to perform transactions. In the case of joint accounts, the signature of two or more holders, as established, is required to perform transactions.

➢ Changing the rules of operation

Any of the securities account holders may change the rules of operation from an account opened on a joint and several basis to a joint basis. Once the change has been requested, the procedure established in the contract for this purpose must be followed, or if no procedure has been included, the entity must inform the other holders before carrying out the request.

It must be remembered that decisions taken by one of the co-holders of a securities account will have consequences for all the co-holders. If there is a breach of trust between the holders, any one could request to change of the rule of operation from joint and several to joint, and for this reason the entity must, if solely as a precaution, inform the rest of co-holders.

If the initial rule of operation for the account is joint, it can only be modified with the joint consent of all the co-holders.

The Complaints Service considers that entities must be able to justify any changes in the rule of operation that may arise during the contractual relationship.

However, in general, it is considered bad practice for the entity to change the rule of operation of a securities account (from joint and several to joint) based on the subjective perception of its staff without having any documents that justify such a change, which would in fact lead to the account being blocked.

This happened in case R/416/2019. Given that the parents of the minors (their legal representatives) were legally divorced and given that they had issued contradictory orders, it was considered that the entity acted correctly by changing the rule of operation of the securities accounts of the minors.

R/286/2019: The complainant requested an opinion from the Complaints Service in relation to her disagreement with the redemption of a fund that she had subscribed on behalf of her nephews of which she was the sole administrator, in accordance with her mother's will.

The complainant stated that on 5 March 2018, when the fund had been subscribed, she reiterated that she would be the only person who could administer and operate the fund, since she had been appointed the sole administrator in a notarial document. However, a few months later, on 7 September 2018, she visited the entity's branch to ask for information on the performance of the investment and was told that the fund had been redeemed with no prior authorisation having been requested.

The entity informed her that the sight account from which the money had been transferred to subscribe the fund had two representatives – her brother and herself – and that although the account had been opened under a joint and several regime, given the discrepancies in the orders received from the complainant – as administrator of the legacy – and her brother -as parent of the legatees –, following the criteria of the Bank of Spain for accounts held by minors, the entity, as a precautionary measure to protect the assets of the minors, changed the account operation rule to joint, thus preventing cash being withdrawn without the consent of both representatives.

The entity acknowledged that it had made a mistake because at the time the fund was subscribed, it allowed the balance of the sight account to be used to subscribe the fund units without the express consent of both representatives.

However, once the error had been detected, the entity returned the funds to the sight account held by the minors, and the subscription and subsequent redemption of the investment fund did not result in a capital loss for the legatees.

Nonetheless, the complainant considered that the entity had violated Article 164 of the Civil Code, which establishes:

Parents shall administer their children's property with the same diligence as they do their own, in compliance with the general obligations applicable to any administrator and with the specific obligations set forth in the Mortgage Law.

The following property shall be excepted from parental administration:

1. Property acquired as a gift, where the grantor has ordered it expressly. The will of the transferor on the administration of this property and the destination of its fruits shall be strictly complied with.

In its pleas, the entity indicated that it was the complainant who had freely chosen to appoint the father of the legatees as a representative in the account with a joint and several rule of operation.

However, in her response to the entity's allegations, the complainant stated that the entity's staff had indicated that the father's signature was necessary to open the minors' account, since he held parental responsibility, but that only she could administer it, as this was the will of the deceased, the complainant's mother. She also claimed that her brothers were witnesses to this. Further, she considered that even assuming that she had wanted to include her brother, the entity was aware that this would not possible in view of the will.

In view of the account contract, it was established that the complainant had agreed to her brother being included as the representative of her nephews and that the rule of operation would be joint and several.

Therefore, even though, according to the will and the deed of the inheritance, the complainant had been appointed the sole administrator of the assets awarded under the legacy until the legatees reached legal age excluding their parents, she had consented, at the time the sight account was opened, to her brother being included as the representative of his nephews under the joint and several regime. Therefore, it had set up the account to allow him to access the funds.

However, it was indicated that if the complainant had other evidence that could lead to a different conclusion being reached, she could present before the ordinary courts of justice at her convenience.

R/39/2019: In this case, it was demonstrated that as a consequence of the IT integration of the respondent entity, the participation account of the fund in which the complainant appeared as the sole owner had been cancelled, and it had been merged with another participation account of another fund, in which the complainant was a joint holder.

The complainant disagreed with the fact that the merger of the accounts had been carried out unilaterally, without his consent.

In this case, it was concluded that the entity had engaged in bad practice because it was not proved that it had provided information about the transfer/integration of fund units or that, as the fund accounts had different rules of operation, it had requested authorisation to do it.

➢ Cash account associated with a securities account with a different holder

It is an essential requirement that on opening a securities account, it is associated with a current account to support the cash movements related to trades made on the securities deposited in the first account.

The holders of the securities and the cash accounts do not necessarily have to be the same. However, being the holder of the cash account associated with a securities account does not lead to a presumption of ownership of the securities deposited therein and said ownership is only assumed with regard to the holders of the securities account.

If any of the co-holders of the securities account disagree with the fact that the holder of the cash account is only one of them or is even a third party, he or she may request the depository to change the cash account associated with the securities account, although in this case all co-holders must approve the change. This is the case for the following complaint:

R/301/2018: In this case, the complainant and her siblings were the joint owners of a securities account in which some shares had been deposited of which their father, who had died on 25 August 2018, had right of usufruct.

After his death, they realised that the cash account into which the dividends corresponding to their father, as the usufructuary, should have been paid, had been cancelled in 2017.

Accordingly, they requested clarification from the respondent entity. The entity confirmed that according to its computer records, on 14 March 2017, their father, the usufructuary of the shares, had issued instructions to cancel the account into which the dividends from the securities deposit were paid. Therefore, from that date, given that he had not provided a new standing order, the dividends had been paid into an accounting book awaiting the corresponding instructions from the usufructuary, or in the event of his death, the holders of the contract.

Since the entity was not aware of the death of the usufructuary until the complaint had been filed, the CS contacted the corresponding internal unit to expedite the change of domain due to the death of the usufructuary. For this purpose, a fax was sent on 4 July 2019, addressed to the bare owners, informing them of the need to submit a duly signed written document with their instructions for awarding the dividends. Consequently, it was concluded that the entity acted correctly.

R/330/2019: In this case, the sale proceeds of some shares that the deceased had held jointly with his wife were paid into a cash account owned exclusively by the latter.

In this case, all the securities accounts owned by the deceased, both individually and jointly, were associated with the same cash account and, as demonstrated in the account statement, all the sales orders were settled by crediting this account.

It was clarified that although it is an essential requirement that a cash account be associated with the securities account when it is opened, this does not mean that it must have the same ownership structure as the account with which it is associated.

Consequently, it was concluded that the entity acted correctly by paying the proceeds from the sale of the shares into the cash account associated with each of the securities accounts.

➢ Cancellation of the securities account and associated cash account

In order to buy securities, it is necessary to open a securities account and sign a securities custody and administration contract with a financial institution. Through this securities account, the financial institution manages the investor's portfolio (purchase and sale of securities, collection of dividends, etc.). This account must be associated with a cash account, in which the cash inflows and outflows corresponding to the securities transactions carried out by the client are recorded.

In order to cancel a securities account, it is necessary to first transfer or sell all the securities deposited in it. Once the securities account is empty, it can be cancelled.

In case R/666/2018, although the account holders placed an order to sell all shares and cancel the accounts, "due to the inefficiency of the staff or bad faith" they were not warned that at that time Repsol was involved in a capital increase, so they were not permitted to decide how to proceed in this transaction.

The Complaints Service considered that while it was true that the securities account could not be closed without selling or transferring the securities deposited therein, it was also true that at the time the complainant and the rest of the holders contacted the entity's branch to cancel the securities account, the pre-emptive rights had started trading, so, on that date, these rights should already have been deposited in the account.

Consequently, the Complaints Service considered that the entity's staff would have acted diligently by checking whether they had received the order to sell all the securities deposited in the account before proceeding with the requested cancellation. If they had done so, they would have verified that the subscription rights for Repsol had been deposited and could have obtained instructions then on how to proceed with these rights.

Therefore, the respondent entity was considered to have engaged in bad practice by not having acted with the required due diligence.

➢ Usufruct of shares: dividends, sale of rights and remuneration programmes

In the usufruct of shares, the bare owner maintains the status of shareholder, while the usufructuary has the right to receive dividends.

In the event that the issuer of shares distributes interim dividends, the amount of the corresponding dividend must be paid to the usufructuary.

However, in shareholder remuneration programmes, the transaction is structured through an increase in paid-in capital that is supplemented by a permanent commitment to purchase rights by the issuer at a guaranteed fixed price.

In this context, Article 129 of the Corporate Enterprises Act states that, if company capital is increased against profits or reserves generated during the usufruct, the

new units or shares shall correspond to the bare owner, but shall be subject to the usufruct.

Thus, the power to decide how to use the free allotment rights must correspond to the bare owner, as set forth in Article 127 of the Corporate Enterprises Act, which attributes to the bare owner all shareholder rights other than the collection of dividends. Furthermore, the same interpretation would be obtained by analogy taking into account that in the matter of pre-emptive rights in capital increases, the decision on the subscription of new shares or the sale of the right is initially allotted to the bare owner. Alternatively, in the absence of an express decision, this power would fall to the usufructuary, as, otherwise, a situation could arise that would be detrimental to said usufructuary. However, in the case of a bonus issue, in the absence of an express decision, the bare owner automatically receives the new shares, and the economic basis of the usufruct remains intact. Therefore, no provision is necessary for the inaction of the bare owner, because it would not harm the usufructuary.

Regarding the destination of the sale proceeds, it must be taken into account that the regulation provides that when the subscription rights are sold, either by the bare owner or usufructuary, the usufruct must be extended to the amount obtained by the sale.

In a bonus issue, the usufruct extends to all new shares received by the bare owner. But if the rights are sold on the market, it is considered that in both cases the objective is to preserve the economic basis of the usufruct in a capital increase, and therefore, in this case, the proceeds of the sale belong to the bare owner, to whom the right of usufruct will be extended.

In case R/523/2018, the complainant, the bare owner of a securities account after the death of his mother (his father was the usufructuary) was taxed for the sale of subscription rights for some shares that he did not receive because they were credited to the account of the usufructuary.

Here, the proceeds from the sale of the rights on the market belonged to the bare owner. However, as the cash account associated with the administration and custody contract was owned by the usufructuary, the cash payment went to the latter and not to the bare owner.

Consequently, it was considered that the entity acted correctly given that there is no legal obligation for the holders of the securities account and the associated current account to be the same, and the designation of a cash account with different ownership is a decision to be taken through private agreement by the parties.

In case R/605/2018, the payment of dividends generated by some shares included in a right of usufruct should have been received by the complainant (the usufructuary) although they had they had been paid into a current account in which he was not a holder. Although the case could also have been filed with the corresponding tax authority, the best solution would have been that the dividends of the shares of which he had right of usufruct were paid into an account owned by the complainant.

➢ Owner representation

Sometimes, the owner of the securities may perform transactions through a representative appointed through a power of attorney or in a court ruling. In order for the representative to carry out acts of disposition, he or she must provide a copy of the power of attorney or ruling, and the entity must check and confirm that the transaction is in accordance with the powers granted by the power of attorney or ruling. If the entity considers that the power of attorney is not sufficient, it may refuse to carry out the act of disposition ordered by the representative.

In case R/492/2018, the owner of an open-ended collective investment scheme had granted a general power of attorney before a notary to his sister to act on his behalf. By virtue of this power of attorney, the complainant requested the target entity to change the distributor of her brother's open-ended collective investment schemes. The source entity took almost one month from the receipt of the order to completing this change. It argued that in compliance with its anti-fraud and securities market obligations, and to protect the assets, funds and interests of its client, it was not appropriate to process the order to change the distributor until the holder's consent had been obtained.

However, the Complaints Service considered that the arguments put forward by the respondent entity to justify the delay in changing the distributor could not be accepted as a valid cause for the following reasons:

– Although the representative had given the orders, there was no change in the ownership of the CIS. In other words, the orders to change distributor could not be considered an act of disposition by the ordering party.

– The orders were issued through the target distributor, who was obliged to verify the powers of the ordering party to act on behalf of the holder of the CIS before processing them.

– There could not be any incidence of fraud as it was merely a change of CIS distributor. As observed in the subscription orders required by the Complaints Service and provided by the entity, the CIS had been acquired through the respondent entity. Therefore, it would have previously verified the source of the cash funds used to acquire the CISs.

– In the subscription orders of the CISs themselves, the complainant appeared either as the authorised party or ordering party.

– The entity did not deny it was aware of the power of attorney (in a statement expressly requested by the Complaints Service).

Consequently, the Complaints Service concluded that the entity had unjustifiably delayed responding to the order to change the CIS distributor given by the complainant on behalf of her brother.

In case R/562/2018, the complainant requested information about a securities account in which she was listed as administrator, not owner, under the joint and several regime.

In its pleas, the entity reported that since 2011 the complainant had acted as the account holder's proxy. However, in 2015, the account holder revoked the power of attorney.

In this case, the entity did not provide documentation supporting the appointment of the complainant as administrator of the securities account from 2011 to 2015, or the revocation of that appointment, stating that the agreements had not been made in writing.

The Complaints Service did not consider that the entity could orally revoke the power of attorney in accordance with the administration and custody contract, since, for this to be extended, a notarised power of attorney reviewed by the entity would have to be provided.

Consequently, it was concluded that the entity acted incorrectly, as it could not prove the revocation of the power of attorney.

➢ Loyalty programmes

Loyalty programmes can also give rise to incidents involving the allocation of shares to investors due to technical and operational errors caused by the entity. When this occurs, and once the entity detects the error, it must inform the client and rectify the situation, restoring the original situation and correcting any tax effects, where appropriate.

R/668/2018: The complainant signed, following the advice of an employee of the entity, a transfer between investment funds to enjoy a discount offered by the target fund.

However, the transfer could not be executed because the source fund units had been pledged as collateral for a loan granted by the entity itself.

Pursuant to the pledge contract, it was expressly provided that as long as the pledge remained in place, the pledgors could not dispose of, assign, sell, transfer or in any other way encumber the pledged securities, or cancel the account associated with the custody and administration contract of the securities owned by them, without the express consent of the entity.

Consequently, it was considered that the entity had acted incorrectly as it had signed a contract with the complainant that was impossible to execute due to the conditions agreed in the pledge contract.

R/646/2018: The complainant was assigned a share through a loyalty programme that she claimed to have refused. After the sale, she was negatively affected because she had to pay the amount of €720.67 in her tax return.

However, it was proved that the refusal letter was issued after the share had been delivered as a result of her acceptance of the loyalty programme.

In relation to the complaint about the tax issues arising from the sale of the share, the Complaints Service indicated that it could not issue any type of opinion about the obligation to file an income tax return on receiving the securities, as this was an area that concerned the State Tax Administration Agency (AEAT).

➢ Distribution of dividends: investment funds

In the securities market, dividend payments are made on specified dates. Consequently, all shareholders who hold shares on the *ex-dividend* or record date have the right to collect the dividend on the payment date.

In case R/392/2019, the complainant maintained that the dividend should not calculated on the basis of the number of units on a given date but taking into account the entire period from when the first units were subscribed.

In this case, it was proved that the dividend payment was calculated in accordance with the information set forth in the KIID and the notification issued by the investment fund management company establishing the ex-dividend date at 23 August 2019.

Consequently, it was concluded that the entity acted correctly by paying a dividend of 3% of the initial price of the issue on the number of units held in the fund on 22 August 2019; in this case, one thousand shares.

In case R/186/2019, as a result of the steps taken to correct an error in the award of shares after the execution of a will, the dividends agreed by Telefónica, S.A. could not be paid, as the securities had not been entered in the securities account at that time.

➢ Fees

In general, it is considered that entities are entitled to charge a fee for changes of ownership, provided that the client has been duly informed in advance, since this is a service that is requested and effectively rendered. However, it is also considered that in cases where the number of securities for which ownership is changed is high and their value is low, which causes the entity to almost systematically apply the established minimum fee – which in many cases is more or only slightly less than the value of the inherited securities –, the application of the minimum fee would not adhere to the principle of proportionality that should exist between the amount charged to each heir and the service actually rendered, but would have a multiplier effect on the fee that would not be justified by the service provided by the entity (the actual and effective expense generated by the service is the same, regardless of the effective value of the securities subject to the change of ownership).

Therefore, the Complaints Service considers it good practice that in cases in which the actual and effective expense generated by providing the service to each heir is the same regardless of the effective value of the securities affected by the change of ownership, they should try to avoid the aforementioned multiplier effect (R/608/2018 and R/437/2019).

In cases R/577/2018 and R/18/2019, it was concluded that the fee charged for the change of ownership of the shares was correct, since it corresponded to the fee indicated in the document issued by the entity certifying the deceased's positions, and the parties were informed of the cost of the change of ownership.

A.9 Operation of entities' Customer Service Department

Complaints were received in 2019 that revealed deficiencies in the operation of the Customer Service Department of financial institutions in the matters indicated below.

The following complaints revealed a breach of procedural requirements:

➢ Calculation of the termination period

In accordance with Article 12 of Order ECO/734/2004, of 11 March, "the calculation of the maximum termination period will start from the date the complaint or claim is submitted to the customer service department, or where applicable, the Ombudsman. In any case, a written acknowledgement of receipt must be provided, in addition to the date of submission, for the purpose of calculating the period".

In addition, Article 12.1 of Order ECO/734/2004, of 11 March, establishes: "Once the complaint or claim has been received by the entity, if it is not resolved in favour of the client by the branch or service that is the object of the complaint or claim, it must be sent to the customer service department or service, which, when appropriate in accordance with operating regulations, must send it to the ombudsman. If the complaint or claim submitted to the ombudsman does not refer to a matter within its scope of competence, it must be forwarded to the customer service department. The complainant must be informed about the competent authority that will address the complaint or claim".

R/612/2018, R/163/2019 and R/430/2019: The entity acknowledged that a complaint filed at the branch had not been redirected to the CS for processing.

The criterion followed by the CNMV Complaints Service is that where the entity's CS issues an acknowledgement of receipt, the starting date for the two-month calculation period for resolving the complaint is the date of said acknowledgement. Otherwise, i.e., if the CS has not issued an acknowledgement of receipt, the calculation period starts on the date shown in the document presented by the complainant in any place authorised for that purpose.

➢ Resolution period

Article 15 of Order ECO/734/2004, of 11 March, establishes the following regarding the resolution period: "The proceedings shall conclude in a maximum period of two months from the date on which the complaint or claim was filed with the Customer Service Department or the ombudsman as the case may be".

Article 15 also provides that: "The decision shall at all times be reasoned, and contain conclusions as to the request raised in each grievance or complaint, based on the contractual clauses, the applicable standards of transparency and client protection, and good practice and financial norms".

These obligations are included in the operating regulations of investment firms' CSs.

R/181/2019, R/249/2019 and R/356/2019: It was concluded that the entity had breached Order ECO/734/2014, of 11 March, and its own customer protection regulations by responding to the complaint after the deadline.

R/471/2019: It was considered that the lack of response to the complaints presented was due to an error in the email address, which resulted in them not being received correctly by the CS of the respondent entity.

R/30/2019: In this case, the complainant provided a letter addressed to the chairman of the entity that had not been answered.

The Complaints Service considered that this letter could not be considered a complaint or claim for the purposes of Article 2 of Order ECO/734/2014.

The complainant also provided a copy of a document proving that the entity had read the email sent to the ombudsman on 25 September 2018.

However, this document was not considered to be an acknowledgement of receipt of the complaint. In this case, all indications were that the entity had admitted the complaint document for processing on 28 September 2018, so that the resolution had occurred within the established two-month period.

R/45/2019: In contrast, in this case it was considered that the entity acted properly as it provided a copy of the email sent and thereby resolved the complaint filed with its CS in a timely manner.

However, the reasons why the complainant did not receive the reply were considered to be unknown, but were not necessarily attributable to the respondent entity.

R/32/2019: The entity proved that it had adequately answered all the complaints filed.

R/380/2019: In this case, the entity's CS rejected the complaint in accordance with its own customer protection regulations and transferred it to the ombudsman for assessment and resolution due to its amount. Consequently, it was deemed to have acted correctly.

➢ Complaints Service criteria

In addition to the provisions of Order ECO/734/2004, of 11 March, and the operating regulations of the different Customer Service Departments, it is important to refer to Order ECC/2502/2012, of 16 November, regulating the procedure for filing complaints with the complaints services of the Bank of Spain, the CNMV and the Directorate-General for Insurance and Pension Funds. The criteria followed by the Complaints Service in the resolution of complaints is described below:

– The Complaints Service considers it bad practice for entities to fail to respond to requests for comments, clarifications or cooperation that this Service may make during the processing of a complaint. This failure to cooperate makes it impossible to issue a suitable resolution on the issues raised by the complainant.

– It also considers it bad practice for entities to respond to requests for comments, clarifications or cooperation after the cut-off date, as this means that

the Complaints Service will not be able to meet its deadlines for resolving complaints.

– It also classifies the operation of the entity's Customer Service Department as inappropriate when it does not respond to clients' requests for information or documentation. It is relatively frequent for entities not to submit to their clients the requested documentation in the first instance, but rather to postpone it until the time they make pleadings before the CNMV's Complaints Service after the complaint proceedings have been initiated by the dissatisfied client. (R/142/2019, R/20/2019 y R/662/2019).

– However, it should also be noted that investors should request information from their bank office or branch and only if they are not properly attended in that instance should they approach the entity's CS to complain that their request has not been properly addressed. At that time, the entity's CS must, if possible, provide the documentation requested by the client, without waiting for the client to file a complaint with the Complaints Service.

  In these cases, the reports resolving the complaints indicate that it is not considered appropriate that in order to obtain a copy of the documentation generated in their commercial transactions with the entity, clients are forced to file a complaint with the CNMV. This is based on two reasons: firstly, as a result of the delay that this causes in addressing the investor's requests and secondly, because it makes it necessary to start the administrative process for inappropriate purposes (R/48/2019, R/116/2019, R/140/2019, R/366/2019 and R/368/2019).

– The decisions taken by the entity's ombudsman (as appropriate) are binding on the entity and therefore it must also be understood that the commitments made by the entity to its Ombudsman to resolve its client's complaint must also be deemed binding, and it is bad practice for the entity to breach these commitments.

  A bad practice occurred when a payment was made on 21 February 2019, three months after the issue of the resolution of the ombudsman and once the complainant had filed a complaint with the Complaints Service (R/36/2019).

– For this same reason, the resolutions adopted by the Customer Service Department in favour of the complainant must also be deemed binding on the entity, its being considered bad practice for the entity not to consider them as such.