CNMV
COMISIÓN NACIONAL DEL MERCADO DE VALORES

Criteria applied in the resolution of complaints

INVESTOR DEPARTMENT

1. Marketing / simple execution

- Appropriateness assessment

The law establishes that when providing order execution, receipt and transmission services for clients, the investment firm must request that the clients (including, as the case may be, potential clients) provide information on their knowledge and experience in the area of investment relating to the specific type of product or service offered or requested so that the entity may assess whether said product or service is appropriate for the clients. This is referred to as the "appropriateness test".

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

The scope[1] of the analyses to be carried out by the entities, to the extent that they are appropriate to the characteristics of the client, to the nature and scope of the service to be provided or to the intended type of product or transaction, including the complexity and the inherent risks, covers the following items:

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

b) The nature, volume and frequency of the client's transactions in financial instruments and the period over which they have been performed (prior investment experience).

c) The level of studies, current profession and, as the case may be, previous professions of the client which may be relevant (education and professional experience).

Entities may carry out the analysis of appropriateness either through an appropriateness test or evaluation, which must include a series of questions with the aforementioned scope, or based on the information that the entity has relating to the client. In this regard, entities have the right to trust the information provided by the client unless they know or should know that the information is out-of-date or is incomplete or inaccurate[2].

[1] 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.
[2] 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 any event, when the entity believes that the product is not appropriate for its client based on the information obtained, it must inform the client[3]. Similarly, if the client does not provide the requested information or the information provided is insufficient, the entity shall inform him/her that it is impossible to conclude whether or not the product is appropriate[4].

CRITERION. Where services are provided for the execution or receipt and transfer of client orders, entities must assess whether the product or service is suitable for the client. To this end, they must consider information regarding the client's knowledge and experience, obtained on the basis of an *ad hoc* questionnaire (appropriateness test), or the prior information held by the entity

- **The entity shall provide evidence that it analysed appropriateness**

The entity must in all cases be in a position to accredit the appropriateness test performed. To this end, 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 appropriate for the client or potential client on the basis of their knowledge and experience and the warnings given in the event that it is not appropriate, or the client does not provide information, or this is insufficient[5].

It is deemed appropriate to conduct appropriateness tests in writing in a document separate from the purchase order containing the replies given by the client and the results of the assessment. In addition, if the assessment refers to a specific operation, the relevant procedures must be established for the assessment to be unequivocally referenced to the operation in question.

Furthermore, the appropriateness test or questionnaire must be duly completed, without containing any defects in form; be signed by the owner or by the joint owner with most knowledge, or by the ordering party or authorised party; record the date of the assessment[6]; and be in force at the time the transaction is performed. The absence of any of these elements might, in principle, invalidate the assessment performed.

In order to provide evidence that the appropriateness test or questionnaire was performed, entities generally provide a duly signed copy of the assessment together with the result. This result is usually contained in the questionnaire itself, although in some cases it is included in a separate attached document or in the product purchase or subscription order, which usually includes, where appropriate, the warning on the inappropriateness of the product.

The entity will 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 operation appropriate, the entity will furthermore assess the financial knowledge, training and professional experience of the client.

[3] Article 214.3 of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act.
[4] Article 214.4 of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act.
[5] CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies providing investment services.
[6] Question 6 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010

However, entities may sometimes act incorrectly. On some occasions, financial entities do not accredit that they gathered information as to the knowledge and investment experience of the complainant, and do not provide a copy of the appropriateness questionnaire or test. On other occasions, entities provide an appropriateness test that does not record the name of the individual assessed, the date of the assessment or the signature, or indicate an assessment date later than the date when the product was contracted. Lastly, in certain cases, entities gather information as to the knowledge and investment experience of the complainant and reach the conclusion that the product is not appropriate for him/her, despite failing to notify the client of this circumstance.

CRITERION. The entity must be able to accredit the appropriateness test performed, and retain the corresponding information in its records.

If assessment is performed by means of an appropriateness questionnaire or test, it should contain the answers given by the client and the result of the assessment (appropriate or warning), be properly completed, be free of any formal defects, be duly signed, and specify the date when it was conducted, which must be prior to the date when the product was contracted, and be in force at the time when the operation is performed.

The entity would assess the prior experience of the client with products of the same family as those that are to be acquired, and if said experience is insufficient to deem the operation appropriate, the entity would furthermore assess the financial knowledge, training and professional experience of the client.

- **The entity shall submit a copy of the assessment**

Nevertheless, the entity's obligation is not only to assess the investment knowledge and experience of their client through the test performed for this purpose or the prior information that it holds on the client, but it must also submit to the client a copy of the document recording the evaluation undertaken[7].

In this regard, entities must accredit that they have fulfilled this obligation, which they may do by retaining a copy signed by the client of the assessment document handed over, which will need to record the date of handover, by means of the record of electronic communication with the client, or some other means providing reliable accreditation that the obligation was fulfilled[8].

The entity would therefore be deemed to have acted incorrectly if it did not provide the full assessment (for example, if the result of the assessment conducted was not included on the appropriateness questionnaire signed by the client and performed for these purposes). It would likewise be deemed incorrect for the entity not to be able to accredit presentation to the client of the document recording the assessment performed.

[7] Article 214.2 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.

[8] Rule Four of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services as regards assessment of the suitability and appropriateness of financial instruments.

CRITERION. Entities must present the client with a copy of the document recording the assessment performed, which they may accredit by means of a signed text, electronic record or some other reliable means. The accreditation document must contain not only the relevant information, but also the results of the assessment and the handover date.

- **Obligations where a retail client asks to be treated as a professional**

Entities providing investment services must classify[9] their clients into two types:

- Professional clients: those who can claim to have the experience, knowledge and qualifications required in order to reach their own investment decisions and properly assess the risks

- Retail clients: those who are not professionals.

Retail clients may request to be treated as professionals, although they must do so prior to the investment service being provided, and expressly waive their right to be treated as retail clients[10]. To this end, a series of formalities[11] are established comprising the following:

a) 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.

b) The entity must inform them clearly in writing of the protections and potential rights of which they would be deprived.

c) The client will be required to declare in writing, in a document other than the contract, that they are aware of the consequences derived from their waiver of classification as a retail client.

Likewise, acceptance of the application and waiver is not automatic, but will instead be dependent on the company providing the investment service conducting an appropriateness assessment of the experience and knowledge of the client in connection with the operations and services requested, furthermore ensuring that the client is able to reach his/her own investment decisions, and understands the risks.

When said assessment is performed[12], the company will be required to check that at least two of the following requirements are met:

a) that the client has performed operations of a significant volume on the securities market, with an average frequency of more than ten per quarter, for the previous four quarters,

[9] Articles 203, 204 and 205 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.
[10] Article 206.1 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.
[11] Article 61.3 of Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment firms and other entities providing investment services.
[12] Article 206 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.

b) that the value of the cash and securities deposited is greater than 500,000 euros, or

c) that the client holds, or held for at least a year, a professional position in the financial sector that would require knowledge of the operations or services provided.

With regard to the assessment of the appropriateness of professional clients, the entity may assume that they have the necessary knowledge and experience to understand the risks inherent to these investment services and specific products, or the types of services and operations for which they are classified as a professional client[13].

Some investment product issues are intended solely for professional investors. However, in order to place this type of investment with retail clients that have requested treatment as professionals, the entity must accredit:

- That the required formalities have been fulfilled, providing the texts recording the investor's request, the entity's warnings, and the declaration of awareness of the consequences of the waiver, and

- That the relevant checks have been performed, providing documentation demonstrating fulfilment of at least two of the requirements regarding the volume and frequency of operations, assets deposited, and professional position.

As a consequence, in cases of investment intended for professionals contracted by retail clients who have requested treatment as professionals, malpractice would be deemed to exist in those cases where, on the one hand, there is no record of all the texts required by the regulations, and on the other where the relevant checks have not been performed, or the checks were performed regarding aspects that would not serve to reach a conclusion as to the fulfilment of the requirements set out in the regulations.

In this regard, entities must maintain a client register, which will record: 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 is based; review or reclassification of the client; and iv) client requests to be classified other than as they were originally classified, and any other necessary information[14].

CRITERION. Entities must accredit that all the established formalities have been fulfilled and that they have performed the relevant checks in order to accept a request from a retail client to be treated as a professional. This constitutes a prerequisite in order to be able to sell them financial products intended for professionals.

- **Obligations of entities where the product is not appropriate**

[13] Article 73 of Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment firms and other entities providing investment services.
[14] CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies providing investment services.

CNMV Circular 3/2013, of 12 June, on the implementation of certain obligations regarding information provided to clients of investment services was published in the BOE (Official State Gazette) on 19 June 2013.

This Circular implements the new aspects included in the Securities Market Act relating to the appropriateness and suitability assessment of products and services offered to, or acquired by, investors.

In this regard, the third final provision of Law 9/2012, of 14 November, on the re-structuring and resolution of credit institutions, introduced certain amendments to the Securities Market Act, establishing as mandatory some of the recommendations that the CNMV had already communicated as good practice to entities providing investment services. Among changes, Article 79 bis(3) of this Law was amended, empowering the CNMV to require that the information submitted to investors prior to acquisition of a securities market instrument and any marketing material should include as many warnings relating to the financial instrument as they consider necessary and, in particular, warnings highlighting the fact that the product is not appropriate for non-professional investors due to its complexity.

The amendments also affected Article 79 bis(6) and (7) relating, respectively, to the suitability and the appropriateness assessment.

In this regard, the following was included in Article 79 bis(7) of the Securities Market Act (current Article 214(5) of the recast text) in relation to the appropriateness assessment:

> *In the event that the investment service is provided in relation to a complex instrument, as established in the following section, the contractual document must include, together with the client's signature, a handwritten statement, in the terms set by the CNMV, whereby the investor declares that he/she has been warned that the product is not appropriate for him/her or that it has not been possible to assess the client in the terms of this article.*

This question was defined in Rule Four of the aforementioned Circular, which established the following (emphasis added):

> *If, after performing the assessment, the entity considers that the product or service is not appropriate for the client, it must warn him/her. The warning shall have the following content:*
>
> *"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 subject to the transaction".*

When the transaction is performed on a complex instrument, the entity shall ensure the client signs the above text and includes a handwritten statement indicating:

"This product is complex and is considered inappropriate for me".

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

In addition to the obligations regarding the registration of the appropriateness assessment[15], entities must maintain an updated register of the clients assessed and of the inappropriate products, which will for each client indicate those products the appropriateness of which has previously been assessed with a negative result[16].

In this regard, it should be clarified that the "*handwritten statement, in the terms set out by the CNMV*", referred to in the aforementioned Article 79 bis(7) was not specified, as indicated above, until Circular 3/2012, of 12 June, and that, in accordance with its transitional provision, entities are not required to collect from their clients the handwritten statement set out in Rule Four until entry into force of the Circular on 19 August 2013, i.e., two months after its publication in the BOE (Official State Gazette).

Furthermore, the literal text of the warnings specified in the Circular is not mandatory for entities until three months following its entry into force, i.e., as from 19 November 2013.

The Complaints Service has announced the calendar for application of these obligations to certain complainants who requested that their applicability be demanded of the entity subject to the claim prior to their entry into force, established, as stated, in the transitional provision of the Circular.

CRITERION. Circular 3/2013 includes the text of the warning to be included in those cases in which, once the entity has performed the assessment, it deems that the operation is not appropriate for its client. In the case of complex products, in addition to signing this warning, the client must include a handwritten statement. The enforceability of these obligations on entities is determined in accordance with the transitional regime established in the Circular itself.

- **Obligations for entities when the client does not provide information or the information is insufficient**

When the client does not provide the entity with the information necessary for the appropriateness assessment or the information is insufficient, the entity will be required to warn the client that his/her decision prevents it from determining whether

[15] CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies providing investment services.

[16] Rule Five of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services, as regards assessment of the suitability and appropriateness of financial instruments.

the investment product or service is appropriate for him/her[17]. The entity must likewise keep the documentation or information expressing the warnings given or issued in this regard, as this is one of the minimum mandatory records that must be kept by companies providing investment services[18].

Entities typically submit a specific document, duly signed by the investor, and containing the corresponding warning.

However, Rule Four of CNMV Circular 3/2013, of 12 June, referred to in the above point, also introduced amendments in this regard, specifically as follows (emphasis added):

> *When the assessment cannot be performed because the client does not provide sufficient information, the entity must warn the client that the lack of information prevents it from determining whether the investment service or product is appropriate for him/her. The warning shall have the following content:*
>
> *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 said assessment, the entity cannot form an opinion with regard to whether or not the transaction is appropriate for you".*
>
> *When the transaction is performed on a **complex instrument**, the entity shall ensure the client signs the above text and includes a handwritten declaration stating:*
>
> *"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".*

In this case, the warning and the handwritten statement will also form part of the contractual documentation of the transaction, even when formalised in a separate document from the purchase order.

The date beyond which these new obligations are enforceable is the same as that indicated in the previous subsection, namely that established for the warning as to the inappropriateness of the product or service.

CRITERION. Circular 3/2013 contains the text of the warning to be included in those cases where appropriateness cannot be assessed because the client does not provide sufficient information as to his/her knowledge and experience. In the case of complex products, in addition to signing the warning, the client must include a

[17] Article 214 of Royal Legislative Decree 4/4, of 2015 October 23, approving the recast text of the Securities Market Act.

[18] CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies providing investment services.

handwritten statement. The enforceability of these obligations is determined in accordance with the transitional regime set out in the Circular itself.

- **Prior investment experience**

Prior experience may be sufficient by itself in order to consider the product or service provided as appropriate, providing the following conditions[19] are met:

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

- Two or more prior transactions have been performed.

- No more than five years have elapsed since the financial instruments in question were in the portfolio for non-complex products and no more than three years for complex products.

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

Entities may determine their client's prior investment experience based on the information provided in the appropriateness assessment by the client him/herself or through the transactions that the client has performed and that the entity was aware of prior to marketing the new product or providing the investment service.

In both cases, the entity must provide evidence of said prior experience by providing, firstly, a copy of the questionnaire including the date it was carried out and the client's signature and, secondly, a statement of the transactions that the client performed demonstrating his/her experience.

CRITERION. Prior investment experience may be the only element evaluated by the entity in justifying the appropriateness of a particular product provided that this refers to products that are the same or similar in terms of their nature and risks, that the client has performed operations involving them on two or more occasions, and kept them in a portfolio during the previous three years, in the case of a complex product, or the previous five years, if the product is not complex.

If the investment experience prior to the operation analysed does not fulfil any of these requirements, then the training, professional experience and financial knowledge of the client would need to be evaluated to determine whether or not the product to be acquired is appropriate.

- **Truthfulness of the answers of the appropriateness test**

A large number of investors express their disagreement with the responses included in the appropriateness tests performed by entities, claiming irregularities in

[19] Question 4 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010

completion of the test (submission of the test already completed by the entities), in the truthfulness of some responses.

In these cases, the CNMV's Complaints Service considers that determining the truthfulness or authenticity of the responses contained in the tests provided in the complaint proceedings by the entities or by the investors themselves is an issue which, bearing in mind the information in the complaint proceeding, it is not possible to decide on as a result of the lack of sufficient elements with which to make a judgement on said facts. Where appropriate, these cases should therefore be decided by the courts.

CRITERION. The Complaints Service does not have any subjective elements available to determine whether the answers to the appropriateness test are accurate, or are pre-established in the document presented to the client for signature. These are issues that will, where applicable, need to be resolved by the courts.

- **Co-ownership or representation**

There are frequent complaints indicating that the entity did not perform the appropriateness assessment on all the co-owners acquiring the same product.

In this regard, when the jointly held accounts or contracts are established under a system of joint access, the appropriateness assessment must be made on the holder or authorised party with most knowledge and experience. However, in those cases in which access is joint and several or indistinct, the assessment must be made with regard to the holder that is the ordering or authorised party.

In the cases in which the account holder (natural or legal person) designates a proxy or legal representative to act on their behalf, the assessment must be performed with regard to the proxy, authorised party or representative, when this is the party that acts.[20]

CRITERION. In the case of co-holders, or where authorised parties are designated to draw on the securities account, consideration must be given to the account drawdown regime to determine who should undergo the appropriateness test.

- **Obtaining information from clients when the service is provided electronically or by telephone**

When the investment service is provided electronically or by telephone, the information that entities must collect from their clients may be obtained through these channels providing effective measures are established to prevent manipulation of the information.

As already indicated, in the case of operations with a complex product, the client must write certain literal expressions in two cases: where the entity cannot assess appropriateness because its client does not provide the necessary information for this, and where the entity, following the corresponding appropriateness test, considers the product is not appropriate for him/her.

[20] Question 15 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010.

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 verbally, in the terms provided by law. The recording will be made available to the client when requested.

If the services are provided electronically, the entity must establish appropriate mechanisms to ensure that the client has appropriately completed the test. Where necessary, entities must ensure that the client can type the corresponding written statement. All of the above must be performed prior to processing the order and the entity must be able to provide evidence that this has effectively been done.

CRITERION. Telephone and remote electronic operations must guarantee compliance with the obligations to obtain information from clients, to issue warnings, and to receive any statements that might be needed from clients.

In telephone contracts, the entity must retain the recording that contains the client's answers to the appropriateness test and, where necessary, the corresponding verbal statement. In electronic contracts, the entity must accredit that, before the order is given, the client has appropriately completed the test and, where applicable, has been able to type in the appropriate written expression.

1.1. Complex financial instruments

Many of the cases analysed by the CNMV Complaints Service refer to the distribution of complex products. This case would apply, among others, to subordinated bonds that are necessarily convertible/exchangeable - both at the moment of subscription and that of exchange; option sale and purchase agreements, also known as atypical financial contracts; bonds and structured notes; subordinated debt with accelerated amortisation rights (implicit derivative), preference shares and swaps.

In a large number of these cases, it is necessary to analyse whether the financial institutions have assessed whether the product was appropriate to the client's investment knowledge and experience and, as the case may be, whether said assessment has been performed in accordance with good financial customs and practices.

Financial institutions generally opt to perform a test in order to assess appropriateness.

In addition, the result of the assessment must be consistent with all the information that the client has provided and that the entity possesses and has used in the assessment. In other words, the responses contained in the test must reveal that the client has sufficient knowledge and/or experience in order to understand the nature and risks of the product or service offered, in which case, it will be considered appropriate or the opposite should be deduced when the result is not appropriate.

In this regard, the CNMV's Complaints Service understands that the information that the entity obtains from its clients with regard to the general level of education or

other training, or with regard to their profession, may only provide a generic idea of their financial knowledge and it would therefore be necessary to assess such knowledge with the other given answers.

Similarly, the actions of the financial institution must be consistent with the warning made, i.e., contradictory actions must not occur. As a result, it would constitute incorrect action to issue contradictory warnings to the client, such as simultaneously informing the investor that appropriateness cannot be assessed, and that after the appropriateness test, it is deemed that the client has experience with non-complex financial products.

With regard to the prior assessments of the client recorded by the entity, it is reasonable, as indicated above, to consider them valid in order to determine the appropriateness of the product to be acquired or the service to be provided providing said analysis was not conducted a long time prior. The level of complexity and risk inherent to the financial instrument in question are key aspects when setting a period of time immediately prior to the new transaction during which the prior appropriateness tests may be taken into consideration (three years for complex products).

At any event, it should be indicated that the positive assumptions of appropriateness based on the client's general level of education and professional experience may be maintained indefinitely unless the entity has information that makes a re- view advisable.

With regard to prior investment experience, the entity must analyse the nature, volume and frequency of the client's transactions in financial instruments and the time when they were performed.

In these cases, as indicated above, it will be recommendable for no more than three years to have elapsed for complex products.

CRITERION. When complex products are contracted, the Complaints Service analyses whether the entity assesses appropriateness, whether the analysis conducted is coherent and consistent with good practice and financial norms, and whether the warnings are issued and the corresponding handwritten statements received.

The validity period for appropriateness assessments that clients have previously undergone regarding complex products of a similar nature and risk will be three years. A distinction must be drawn in this regard between prior investment experience, which must refer to the previous three years, and professional experience and training, which in principle would remain unaltered in time, unless the information available at the entity would make a review advisable.

- **Pre-emptive subscription rights**

In principle, pre-emptive subscription rights, when assigned to the shareholder of a company as a result of being a shareholder, or when the shareholder acquires them in the secondary market with the sole objective of rounding up the number of rights that he/she has in order to obtain a last new share issued by the listed company, must be considered as a component of the share and it would not therefore be necessary to assess appropriateness prior to acquisition.

When the rights are purchased with the aim of acquiring financial instruments other than the shares that gave rise to them, the rights will be complex or non-complex depending on the classification of the instrument to be acquired by them.

Finally, when an investor acquires rights in the secondary market during the trading period, these are considered complex products and the financial institution must assess the appropriateness of this product prior to processing the client's order

In this latter case, the entity must accredit that it has assessed the appropriateness of said rights, and has sufficient information on the client to evaluate this. In this regard, it should be clarified that prior experience of having invested in shares would not be sufficient to invest in pre-emptive subscription rights, as these are products with a different nature and risk.

CRITERION. In general, the appropriateness assessment in the case of pre-emptive subscription rights acquired on a secondary market during the negotiation period is necessary, without experience of having invested in shares being deemed sufficient to invest in this type of instrument.

Nonetheless, in other cases, the mandatory requirement of this assessment depends on whether the pre-emptive subscription rights are deemed complex (for example, if they give the right to acquire a complex financial instrument other than the shares on which they are based) or non-complex (for example, if they give the right to acquire a similarly non-complex financial instrument, or if they are acquired by a shareholder to supplement those already held, and so ultimately obtain a new share).

- **Non-EU harmonised collective investment schemes**

Unlike for harmonised collective investment schemes (CIS), which are classified as non-complex financial products, for non-harmonised CIS entities have to perform a prior assessment of the schemes in order to determine whether they meet the requirements established in the current Article 217(2) of the recast text of the Securities Market Act (in which case the product would be classified as non-complex) or, on the contrary, said requirements are not met (in which case the product should be considered as complex).

Depending on the result of that assessment, the entity may apply the exemption from the appropriateness assessment provided for non-complex products (see the heading on harmonised CIS) or it must follow the steps set out for the appropriateness assessment, i.e., it must ask clients (including, where appropriate, potential clients) to provide information on their knowledge and experience in order for the entity to assess whether that investment product is appropriate for the client or not.

CRITERION. A non-harmonised CIS may be complex in nature or not, depending on the assessment conducted by the entity as to its characteristics, in accordance with the provisions of Article 217 of the recast text of the Securities Market Act, approved by Royal Legislative Decree 4/2015, of 23 October 2015.

1.2. Non-complex financial instruments

Entities will not have to follow the appropriateness assessment procedure set out for complex products 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 him/her 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 for complex products.

Consequently, for the entity to claim the exemption from the appropriateness analysis, each and every one of the requirements set out in the legislation[21] must be met, which would include issuance of the aforementioned warning.

This Complaints Service deems that if the entity provides the appropriateness test it is because none of the conditions indicated to apply the exemption have been met. In such cases, the entity must perform the appropriateness assessment in accordance with the guidelines set out in the above subsections.

CRITERION. The contracting of a non-complex product may be excepted from the appropriateness assessment, provided that a series of conditions are met, including the requirement that the service be provided on the initiative of the client, and that the entity accredits that it has clearly warned the client that it is not obliged to assess the appropriateness of the instrument or of the service, and that as a result the client does not enjoy the protection established in the regulations.

- **Ordinary shares**

Shares are deemed to be non-complex where they do not incorporate an implicit derivative, and are listed for trading on a regulated market. Such ordinary shares may have been acquired in an initial public offering process, or in purchases made on the stock market.

Where the order is processed in the secondary market, the CNMV's Complaints Service assumes that the transaction is made at the client's initiative, particularly when ordered through electronic means. However, in these cases, as indicated above, the entity must comply with the requirement to clearly inform the client that, as shares are a non-complex product, the entity is not required to assess the product's appropriateness in relation to the client's knowledge and experience and, therefore, the client does not enjoy the protection that said assessment would provide. If the entity does not make this warning to the client, it would not comply with one of the requirements established in securities market regulation for applying the ex- emption from the appropriateness analysis and, consequently, this exemption would not be applicable and the assessment should be conducted.

Entities may indicate in the purchase order those cases where the order was processed on the initiative of the client. This circumstance, together with accreditation that the warning established in the regulations was given, would allow a conclusion that the entity acted correctly. Meanwhile, this conclusion could not be reached in those cases where, although it is a "non-complex" product, accreditation is not given that the service is provided on the initiative of the client, and that the investor was warned that there was no appropriateness assessment.

On other occasions, entities accredit that they evaluated the appropriateness of the product by presenting a copy of the test performed, and of the acquisition orders. Where shares are acquired in a public offering and are distributed by the issuer itself or by an entity that has some interest in the effective subscription thereof, unless demonstrated otherwise this Complaints Service will deem that the operation is not performed on the initiative of the investor, and the entity will therefore be required to proceed to analyse appropriateness.

CRITERION. The client's initiative to acquire ordinary shares may be indicated in the purchase order, or be presumed if the operation is performed on the market, in particular if the order is issued via electronic means. In this case, the entity need not assess appropriateness, provided that the client is given the corresponding warning.

If the shares are acquired in a public offering and are distributed by the issuer itself or by an entity that has some interest in conducting the subscription of the shares, unless demonstrated otherwise this Complaints Service will deem that the operation is not performed on the initiative of the investor, and the entity will therefore be required to analyse appropriateness.

Lastly, if the purchase of ordinary shares is proposed by the entity to its client, then the client must undergo the appropriateness assessment and be informed of the result of the test.

- **EU harmonised collective investment schemes**

EU harmonised CIS are legally classified as non-complex products in accordance with legislation on the applicable conduct of business rules; as a result, they would be products to which the appropriateness assessment exemption could be applied.

In the case of listed funds, or Exchange Traded Funds (ETF), some entities inform their clients that, when they order the purchase of units through online banking, in general they are not obliged to assess the appropriateness of the operation "*as this is not a complex product, and the operation is performed on the initiative of the originator of the order*". For this purpose, they activate a standard warning message when any client on their own initiative orders the purchase of this type of fund.

However, it is not sufficient to apply the appropriateness exemption that a declaration simply be given by the entity that the product is classified as "non-complex", and that as a result they are not obliged to assess appropriateness. To apply this exemption, as has already been stated, the requirement is that the entity accredit that the order was issued on the initiative of the client and that they warned the client that the entity is not obliged to assess appropriateness, and that as a result the client does not enjoy the associated protection.

There are also financial institutions that have decided not to make use of the exemptions set out in the regulations, but have established an internal protocol whereby it is considered that the appropriateness assessment should be conducted on a general basis for all their clients subscribing the harmonised funds that they market.

In other cases, without further comments in this regard, entities provide the appropriateness test performed by the participant for claim files, which shows that these

entities considered that, at the time of subscription of the fund, not all of the necessary requirements for applying the exemption were met.

CRITERION. Harmonised CIS are considered to be non-complex products, and entities may therefore take advantage of the exemption from the appropriateness assessment, if the initiative of the operation comes from the client, who is warned that assessment is not conducted in accordance with the regulatory terms.

Operations are deemed to be performed on the initiative of the client if they are contracted over the Internet (typically in the acquisition of ETFs), and consequently some entities activate an online warning when purchases are ordered via this channel.

2. ADVICE / PORTFOLIO MANAGEMENT

- **Suitability assessment**

The legislation applicable to firms that provide investment services establishes that, when advisory services are provided to retail clients relating to investment or portfolio management, the entity shall obtain the necessary information on the client's knowledge and experience, their financial position and their investment objectives so as to be able to recommend to the client the financial instruments that are most appropriate or to adopt investment decisions relating to such instruments. When the entity does not obtain this information, it will not recommend investment services or financial instruments to the client or potential client[22].

CRITERION. The provision of advisory services in the field of investment for portfolio management for a retail client requires that information be obtained from the client as to certain parameters, so as to assess whether the recommendations or investment decisions regarding financial instruments issued by the investment firm are suitable. If this information is not obtained, the entity cannot provide the stated services to the client.

- **Scope of suitability**

In short, the recommendations that entities give to their clients within the scope of advice or the investment decisions adopted in the case of portfolio management must meet the following requirements[23]:

- Be in line with the investment objectives set by the client (investment objectives).

- The client must be able, from a financial point of view, to assume the risks of the products (financial situation).

- The client must possess sufficient knowledge and experience to understand the risks of the product (knowledge and experience).

CRITERION. The suitability assessment requires a consideration of: i) the knowledge and experience of the client, which must be sufficient to understand the risks; ii) their financial situation, which must allow the risks to be withstood; and iii) their investment objectives, with which the operation must be aligned.

. Article 72 of Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment firms and other entities providing investment services.

[23] Article 72 of Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment firms and other entities providing investment services.

- **Recommendations: risk level and investment objectives**

Investment recommendations or decisions must generally be adapted to the level of risk that the investor has set in his/her investment objectives and entities may not exceed that level even where allowed by knowledge or experience unless the investment in question forms part of a portfolio under advice or management and this portfolio as a whole meets the investment objectives set by the client. Nevertheless, the client should be informed of this situation[24].

However, even if the client is willing to take on a very high risk level, if this may compromise their financial situation 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, this would make this investment unsuitable. In these cases, it may be appropriate to recommend or adopt investment decisions that may be assumed by the client from a financial perspective or which are of a similar nature or with similar features[25].

In this regard, it is important to point out the differences with regard to this last aspect (knowledge and experience) between the service of advice and that of portfolio management. While in advisory services the final investment decision is always adopted by the client and, therefore, the entity should only recommend transactions whose risk and nature the client may understand, in portfolio management, given that the manager monitors that the portfolio is in line with the client's investment objectives and financial situation, it is only necessary for the client to be familiar with the instruments that make up his/her portfolio, i.e., that he/she has general financial knowledge. The client must however understand the nature of the instruments that make up the bulk of his/her portfolio[26].

In any event, the entity must be in a position to provide the recommendations made to their client. In this regard, it will be required to maintain an investment advice register, containing written or reliable records of the customised recommendations given to retail clients, indicating information that provides evidence (i) of the retail client who was given the advice; (ii) the recommendation; and (iii) the financial instrument or portfolio recommended, placing on record, among other aspects, the date of the recommendation[27].

CRITERION. The level of risk set by the client in his/her investment objectives must be respected when recommendations are issued to advise the client, or decisions are taken as to the management of his/her portfolio. However, this could individually be exceeded if the investment forms part of a portfolio that, as a whole, would fulfil the investment objectives. Otherwise, even if the client were prepared to accept a very high level of risk, if this could compromise his/her financial situation, or the client does not have sufficient experience and knowledge, respecting the investment objectives set by the client would not make the investment suitable.

[24] Questions 19 and 22 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010.
[25] Question 19 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010.
[26] Question 24 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010.
[27] CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies providing investment services.

Knowledge and experience require that, in the advice process, the client is able to understand each operation recommended, enjoys the final decision as to the investment, and in portfolio management, that the client is familiar with and understands the bulk of the instruments in the portfolio, as the manager is responsible for assessing whether this is aligned with the client's profile.

- **Evidence of assessment performed**

With regard to the suitability analysis, the entity must be able to provide evidence that it performed said assessment. It may do this by performing the analysis in writing and keeping a copy duly signed by the client recording the result of the assessment and the date it was handed over. It may also be done through the client communication register by electronic means or through any other medium that allows a certifiable record that said analysis was performed[28].

In this regard, entities must maintain a suitability assessment register, placing on record the information or documentation used to assess "suitability" as regards knowledge and experience within the sphere of investment corresponding to the specific product or service type, the financial situation and the investment objectives of the clients or potential clients[29].

In the case of advice, the entity will provide the client in writing, or by means of some other durable storage medium, with a description of how the recommendation issued corresponds to the investor's characteristics and objectives[30]. The recommendation will need to be consistent with all aspects assessed regarding the client, and the description must refer at least to the terms on which the investment product or service was classified, from the perspective of market, credit and liquidity risks and its complexity, along with a suitability assessment applied to the client in all three assets[31]. If carried out by telephone, the description of how the recommendation made matches the investment characteristics must be made orally, with a recording kept. In addition, the document containing the recommendation must be sent to the investor by other means, such as postal mail or email[32].

In the resolution of complaints regarding suitability, entities will be deemed to have acted correctly if they provide the suitability test, duly signed, containing the information obtained by the entity as regards the client's investment profile, the results of the assessment performed, and the handover date. In the case of discretionary and individualised portfolio management, the service provision agreement typically indicates that, before it is formalised, information has been obtained as to the investment experience, investment objectives, financial capacity and risk preference of the investor, normally recording the result in an annex to the agreement.

[28] Rule Three of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services, as regards assessment of the suitability and appropriateness of financial instruments.
[29] CNMV Resolution of 7 October 2009, on the minimum records to be kept by companies providing investment services.
[30] Article 213.4 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.
[31] Rule Three of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services, as regards assessment of the suitability and appropriateness of financial instruments.
[32] Question 2 of the Questions and answers document relating to CNMV Circular 3/2013, of 12 June. Investment Firm and Credit and Savings Institution Supervision Department, 3 April 2014.

Meanwhile, it is considered to be malpractice not to provide documentation accrediting that due information has been obtained from the client.

Even if the entity accredits that it conducted the client suitability test, the CNMV Complaints Service would declare the action to be incorrect in those cases in which the product acquired, the profile assigned to the investor or the investment proposal do not correspond to the information provided thereby, or where there is no record that a description of how the recommendation issued corresponded to the client's investment objectives and characteristics was provided in writing or on some other durable storage medium.

CRITERION: The entity must provide accreditation that the assessment was handed over to the client by means of a text written by the investor, an electronic record, or some other reliable means. The accreditation document must not only contain the relevant information, but also the results of the assessment and the handover date. Meanwhile, in the case of advice, the entity must accredit that it handed over to its client a description of how the recommendation given corresponds to the client's investment objectives and characteristics.

Both the results of the assessment and, in the case of advice, the recommendation given, must be consistent with the information obtained from the client.

- **Validity of the assessment performed**

With regard to the period of validity of the prior analyses, even where there are certain circumstances that are not likely to change over time, such as knowledge and experience, others such as the financial situation and investment objectives may change and it is therefore necessary to review suitability on a regular basis.

In the event of a one-off advisory service, it is only reasonable that the suitability analysis be limited to one specific transaction and it is not therefore generally reasonable to extrapolate the results obtained for one transaction to subsequent transactions.

With regard to longer-term services, recurrent advice or portfolio management, given the fact that investment objectives may change, the entity must periodically review whether said objectives have been modified[33].

In accordance with the legislation in force[34], entities have the right to trust the information provided by the client except when they know, or should know, either that it is clearly out-of-date or it is inaccurate or incomplete. In this regard, the Complaints Service would conclude that the entity had not acted appropriately if, for example, it did not detect that it previously completed questionnaires with its client that were clearly contradictory with subsequent tests as regards, among other aspects, the client's knowledge (education, profession, etc.).

CRITERION. The client suitability analyses conducted need to be periodically reviewed.

[33] Question 27 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010.

Depending on the type of information, knowledge and experience, it is possible that they might not change over time, while the investment objectives and asset situation could change. Depending on the service provided, where occasional advice is given, it would not seem reasonable to extrapolate the suitability results obtained for one specific transaction to subsequent transactions. In recurrent advice or portfolio management, the entity should periodically review whether the investment objectives have changed.

- **Features of advice compared with portfolio management**

As indicated above, the suitability analysis must be performed when the entity provides two types of services, advice or portfolio management, although the features of each differ slightly:

- ✓ Discretionary and individualised investment portfolio management: When an entity provides this service, it receives a mandate from its client for it to take the investment decisions that it deems most appropriate for the client. These investment decisions must match the profile resulting from the suitability test that must be performed prior to the provision of this service.

- ✓ Investment advisory services: These consists of making personalised recommendations to the 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. Generic, non-personalised recommendations which may be made in the context of marketing financial instruments shall not be considered as advice for these purposes[35].

When the advisory or portfolio management service is provided, it will be assumed, in the absence of evidence to the contrary, that all transactions performed by the client are covered by said services.

However, it may be the case that, even when providing said services, one particular transaction or several specific transactions are performed outside the scope of the services. In these cases, entities must clearly warn of this situation.

CRITERION. If advice and portfolio management services are provided, the client's operations would be presumed to be performed within the context of said services. An exception would apply to those cases where there is accreditation that the operation was performed outside the scope of said services, with entities being required clearly to notify their clients of this circumstance.

Below we will only focus on the advisory service.

- **Advisory service**

The advisory service may be given on a one-off basis when the commercial relationship with the client is not carried out under the scope of an advisory service. However, the entity may, on some occasions, offer the client investment recommendations (this is usually the case in the generic commercial segment) or

recurring advisory services where the client has an ongoing relationship with his/her adviser, who regularly offers the client investment recommendations (this is usually the case in the private banking segment)[36].

Every time that it makes a recommendation, the entity shall provide, in writing or another durable medium, a description of how this investment matches the investor's characteristics and objectives[37].

The recommendation must be consistent with all the aspects that the entity has assessed with regard to the client and the description must at least refer to the terms in which the investment product or service has been classified from a market, credit and liquidity risk point of view and from the point of view of its complexity, as well as the suitability assessment performed on the client with regard to its three components. The description may be abbreviated when repeatedly making recommendations on the same type or family of products[38].

For its part, the entity must provide evidence of compliance with the obligation to submit the recommendation to its client. To this end, it may keep a signed copy of the document provided, which will contain the date on which the document was submitted, or it may do so through a register of communications with the client by electronic or any other certifiable means[39].

The law establishes that, when the entity provides a service relating to complex instruments other than investment advisory services and it wishes to declare that this transaction has been performed outside of the scope of the advisory service, then, a handwritten statement should appear on the corresponding documentation, together with the client's signature, stating: "*I have not been advised in this transaction*"[40].

However, in order for there to be an advisory relationship, it is not essential for there to be an advisory service agreement, unlike the case of the portfolio management service, which must always be set out in a corresponding agreement.

The criteria of the CNMV's Complaints Service is therefore that, irrespective of whether or not the investment advisory service between the client and the entity is formalised contractually, it may be considered that this type of relationship is established when certain conditions are met, which, when consistent with the facts and explanations received, make it possible to reach such a conclusion.

CRITERION. Advice may be occasional or recurrent. Entities must provide their clients with a description of how the recommendation is aligned with their profile. Unlike portfolio management, there is no need to formalise a contract to provide the advisory service.

[36] Subsection 2 of the operational guide for the analysis of suitability and appropriateness. ESI – ECA. Supervisory Department, 17 June 2010.
[37] Article 213.4 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.
[38] Rule 3.1 of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services, as regards assessment of the suitability and appropriateness of financial instruments.
[39] Rule 3.2 of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services, as regards assessment of the suitability and appropriateness of financial instruments.
[40] Rule 4.5 of CNMV Circular 3/2013, of 12 June 2013, on the development of certain obligations to inform clients provided with investment services, as regards assessment of the suitability and appropriateness of financial instruments.

In those cases where entities might wish to place on record that they are not providing their clients with an advisory service, they will be required to include a handwritten statement by the client in this regard in the corresponding documentation.

- **Circumstances taken into account to assess whether there is an advisory service relationship**

(i) The client belongs to the private banking segment of the respondent entity and has been assigned a personal manager/adviser.

It is typical in the private banking sector that clients are provided with value-added services, compared with commercial or retail banking, which involve, among other aspects, being dealt with by a qualified professional who typically draws up an investment proposal tailored to the needs, specific objectives, assets and taxation situation of the client.

In this regard, there is an exchange of emails between the investor and his/her personal private banking adviser on some occasions that accredits the existence of sporadic advice.

(ii) The client had not expressly requested from the entity the acquisition of a specific product, but had asked for suggestions about the best options for in- vesting based on his/her return targets, personal financial situation and expectations.

(iii) The product purchase documents include clauses in which the client recognises that he/she has received advice on the level of risk and on whether the in- vestment matches his/her investment profile.

In certain cases in complaints procedures, entities or investors present a copy of the investment proposal or of a purchase order serving notice that the operation is performed within the context of the investment advisory service provided by the entity.

(iv) There are emails, telephone recordings and other elements on durable media that make it possible to verify that the entities performed more or less explicit investment recommendations with regard to one or several products.

(v) Whenever it is demonstrated that the respondent entity has offered its client an investment in a new product with the aim of recovering losses suffered in another previously acquired product with similar characteristics.

For example, products in which the clauses indicate that they are intended for clients holding certain financial products, for the purpose of offering these clients an alternative that, where certain characteristics of the originally acquired product change, would allow them to recover the amount invested in the failed product. These clauses are normally accompanied by accreditation that the suitability test was performed, this being required, as stated, in order to provide the advisory service.

CRITERION. The circumstances indicating that an advisory service may have been provided are: i) The client belongs to the private banking segment, and is assigned a personal adviser/consultant; ii) Request by the client for investment suggestions aligned with his/her profile (without referring to a specific product); iii) Clauses in which the client acknowledges having received advice; iv) Emails, telephone recordings or other elements on a durable storage medium in accreditation of customised recommendations; and v) Contracting of a new product for the purpose of recovering the losses from another with similar characteristics that was previously acquired.

3. PRIOR INFORMATION

3.1. Securities

- Information to be provided on the product

With regard to the information to be provided to the client relating to the product's features and risks, 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.

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

Where justified by the type of financial instrument in question and the client's knowledge and profile, information must be added, *inter alia*, on the risks linked to the type of financial instrument, including an explanation on leverage and its effects, as well as the risk of full loss of the investment.

Where it is probable that the risks associated with a financial instrument comprising two or more financial instruments or services would be greater than the risk associated with each of those instruments for services viewed individually, an appropriate description will need to be given of each of the instruments or services comprising the financial instrument in question, and an explanation of the way in which the interaction between the different components of the financial instrument increases the risks[41]. This situation would, for example, arise in the event that financing were granted to acquire an investment product.

From 5 February 2016 onwards, the general description of the nature and risks of securities must in addition include a risk indicator and, where applicable, alerts as to liquidity and complexity, which will be generated and represented in graphical terms in accordance with the provisions of the regulations[42]. The risk indicator is established on a rising scale from 1 to 6, the alert regarding liquidity will consider possible limitations on liquidity and the risks of the accelerated sale of the financial product, and the alert regarding complexity will be included in the information on complex financial products, reading as follows:

! Financial product that is not simple and could be difficult to understand

[41] Articles 62 to 64 of Royal Decree 217/2008, of 15 February 15, on the legal regime of investment firms and entities providing investment services.
[42] Article 10.b) of Order ECC/2316/2015, of 4 November 2015, on information and classification obligations for financial products

Durable storage mediums are understood to be as any instrument that allows the client to store the information personally addressed to him/her so that it may be easily recovered during a period of time that is appropriate for the purposes of such information and which allows its reproduction without changes[43].

Entities can comply with this obligation by submitting to the client a summary of the securities note of the issue, the securities note of the offer, the prospectus or a document prepared by the entity for this purpose. Furthermore, as from 5 February 2016, a risk indicator and, as the case may be, liquidity and complexity alerts must be communicated.

Similarly, the CNMV Complaints Service believes it is reasonable that, when the client is given the securities note, an additional summary of the issue should also be made. As it is shorter and more concise, this summary will normally be easier for investors to understand than the securities note, which is normally longer and often written in more complex language.

CRITERION. Entities must provide a description of the nature, characteristics and risks of financial liabilities, with sufficient detail to permit reasonable investment decisions. From 5 February 2016 onwards, this information must include a risk indicator and, where applicable, liquidity and complexity alerts.

Information will be provided on a durable storage medium, or otherwise by means of a website fulfilling certain requirements.

- **Form of accreditation of the submission of prior information about the product**

Entities must be able to provide evidence that they have submitted the aforementioned documentation on the product before it is contracted.

One way of demonstrating the submission of said prior information is a copy of the document submitted signed by the client and dated prior to acquisition of the product.

Entities sometimes provide purchase orders that include clauses where the client recognises that certain information has been made available or submitted. However, the criterion of the CNMV's Complaints Service is that this type of clause does not guarantee, in any way whatsoever, the submission of the corresponding documentation.

In addition, any oral information that the entity may have provided to the investor with regard to the product will not be deemed to be the ideal formula to comply with the obligation to provide information prior to formalisation of the transaction, in the opinion of the Complaints Service.

CRITERION. Compliance with the obligation to provide prior information about the product may be accredited by providing a signed copy of the documentation, dated prior to the acquisition.

[43] Article 2 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment service.

- **Electronic and telephone transactions**

In cases in which the product is contracted electronically, entities must establish mechanisms that make it possible to provide evidence that the mandatory documentation was submitted to their client prior to contracting the product in question. In this regard, entities usually set up an electronic system that requires the opening of prior information before contracting the product so that if the client does not open the document containing said information, the IT system does not allow him/ her to contract the product.

In these cases, opening said documentation by the investor leaves a digital fingerprint of individual confirmation of submission of the information prior to contracting the product, which the entity has to keep and which may be used as evidence that it has complied with its obligation.

In the case of telephone transactions, prior to processing the order, the entity must send its client an email with the pertinent documentation (or, as the case may be, by other means, such as ordinary mail), and the investor must confirm that he/she has received said information. Once the entity has received confirmation of receipt of said information by the client, it will process the order made by telephone. Every telephone conversation must be recorded.

If the storage medium used to provide information about the financial product does not allow the figures of the risk indicator and the alerts to be reproduced, the client or potential client will be informed thereof by means of a description of the number of classes that make up the risk scale, the number and colour assigned to the financial product, and the corresponding liquidity and complexity alerts[44].

In some complaints, a document automatically generated moments after the product is purchased is sent via electronic channels within the personal area of the client on the entity's web platform. Even if the client has expressly agreed that notifications and communications to be sent by the entity may be via electronic channels, it would be incorrect for the information to be generated after the product is purchased, and therefore sent after the moment when it is acquired.

CRITERION. In remote electronic operations, mechanisms are established to accredit the provision of the mandatory documentation to the client prior to the formalisation of the operation in question. For these purposes, the digital trace generated by the client opening the information about the product would be valid, provided that the opening thereof is an unavoidable precondition for arrangement of the contract.

In telephone operations, other means are used to send the relevant information to the client, such as email or conventional mail. Once the entity has obtained confirmation that the information has been read by the investor, it will process the telephone order. The telephone conversation must be recorded.

- **Complying with marketing commitments**

[44] Article 11.5 of Order ECC/2316/2015, of 4 November 2015, on information and classification obligations for financial products

All information addressed to clients, including marketing material, must be fair, clear and not misleading. Marketing communications must be clearly identified as such[45].

Similarly, the information contained in marketing communications must be consistent with the information the firm provides to clients in the course of carrying on investment and ancillary services[46].

CRITERION. Advertising must be impartial, clear, not deceitful, and consistent with the information provided by the entity in performing its services.

3.2. Collective Investment Schemes

- Information about CIS to be provided before they are contracted and the method of accreditation

Current legislation regulating collective investment schemes (CIS) establishes that all specific features and conditions must be included in the prospectus. In this regard, prior to the subscription of units or shares, the entity must submit to the unit-holder free of charge the key investor information document (KIID) and the latest published half-yearly report and, following a request, the prospectus and latest published annual and quarterly reports[47], and therefore these documents may not be replaced by the information that may appear in the marketing material of the CIS or by information provided to the client orally or on a summarised basis by the entity.

CIS management companies or investment companies or, as the case may be, CIS distributors, must provide evidence of compliance with information obligations. In the case of the first acquisition, said evidence will involve keeping a copy on a durable medium of the KIID and the latest published half-yearly report signed by the unit-holder/shareholder while the latter continues in said capacity. In the case of additional subscriptions in the same CIS, it will not be necessary to submit the same information, since this was already provided at the time of the first acquisition[48].

However, legislation provides an exemption for compliance with some of the prior information obligations relating to certain products acquired on the secondary market, such as units in exchange-traded funds. Thus, the acquisition of units in exchange-traded funds on the stock market is exempt from the obligation to provide a free KIID and the latest half-yearly report. In any event, if requested, both the prospectus and the latest published annual and quarterly reports must be provided to the unit-holder[49].

CRITERION. The key investor information document and the most recent half-yearly report published must be submitted prior to contracting the CIS, except in cases such as acquisition on the stock-market of units in listed investment funds and listed index SICAVs. Accreditation of said submission is provided by retaining a

45 Article 209(2) of the recast text of the Securities Market Act, approved by Royal Legislative Decree 4/2015, of 23 October, and, previously, Article 79 bis(2) of the Securities Market Act 24/1988, of 28 July.

46 Article 62(5) of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services.

47 Article 18 of Law 35/2003, of 4 November, on Collective Investment Schemes.

48 Rule 5 a) "Accreditation of provision to unit-holders7shareholders of information established in Article 18 of the CIS Act" of CNMV Circular 4/2008, of 11 September, on the content of quarterly reports, half-yearly reports and annual reports of collective investment schemes and of the position statement.

49 Article 79(6) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

copy of both documents signed by the investor for as long as the client retains investor status.

Upon request, CIS investors must be provided with both the prospectus and the most recent annual and quarterly reports published.

- **Electronic and telephone transactions**

The fund's prospectus and KIID may be provided on a durable medium or through the website of the investment company or management company. Following a request, a hard copy of said documents will be provided to investors at no charge.

An updated version of the documents will be published on the website of the investment company or management company.

When the product is acquired electronically, the client will receive the documentation when he/she opens the document that the entity provides with the prior information. This action must be performed prior to subscription of the CIS in question. Opening of the document leaves a digital fingerprint of individual confirmation of delivery, which the marketing entity of the CIS must keep and submit when required. As in the case of securities, opening of the document with the prior information is a mandatory procedure for subscription, and it should not therefore be possible to continue with the subscription process without having completed this procedure.

In order for an investor to be able to subscribe a fund over the telephone, he/she must first have had access to at least the KIID and to the most recent half-yearly report, and if so requested by the investor, all other documentation indicated in Article 18.1 of the CIS Act. The manager or distributor is obliged to inform the client of this right.

In order to fulfil this obligation, the manager or distributor will need to establish measures that facilitate said prior access (for example, by providing an email address for the consultation of documentation, sending documentation by post, sending a courier, etc.). Once this access can be accredited, subscription may, where relevant, proceed.

During the telephone conversation, the unit-holder will specifically need to choose the channel by means of which he/she wishes to be provided with documentation prior to the initial subscription. Telephone conversations will need to be recorded and retained by the manager or distributor to provide accreditation of the provision of the mandatory documentation prior to initial subscription.

In the event that the unit-holder has asked to be provided with an email address to consult documentation, once the distributor has provided this, the subscription order will need to be confirmed by means of a further telephone call.

In the event that the unit-holder does not have access to the Internet or to an email address, he/she may ask to be sent documentation by some other means, such as by post or courier. In such cases, to accredit access to the documentation prior to initial subscription, the distributing entity must also retain a copy of the first page of each document, signed by the unit-holder, and the unit-holder will therefore need to return

these documents signed to the distributor. Once this condition is fulfilled, the subscription order will need to be confirmed by means of a further telephone call.

CRITERION. In remote electronic operations, mechanisms are established to accredit the handover of mandatory information to the client prior to formalisation of the operation in question. For these purposes, the digital trace generated by the client opening the information about the CIS would be valid, provided that the opening thereof is an unavoidable pre-condition for arrangement of the contract.

In telephone operations, other means are used to send the relevant information to the client, such as email, courier or conventional mail. Once the entity has obtained confirmation of access to the information by the investor, the order will be confirmed by means of a further telephone call. The telephone conversations must be recorded.

- **Marketing commitments**

Some investors disagree with the loss of commercial promotions or the application of penalties after deciding to transfer the holdings from their investment funds to others. In these cases, a specific analysis has to be conducted in accordance with the commercial proposal agreed between the parties and the related facts that led to the promotion being revoked.

On some occasions, to access the conditions offered by the entity, the position in an investment fund must be maintained for a certain time period.

However, if a modification of a fund of such nature took place which required the entity to give the right of separation to its unit-holders, the latter must freely exercise said right – redeeming, transferring to another fund from the same entity or a fund from another entity – without this generally involving the loss of the conditions offered.

However, if said essential modification does not occur, and in the contractual documentation signed by the client the minimum period for which the investment fund position must be maintained is clearly and understandably agreed, the unit-holder could forfeit the conditions offered if he/she breaches the lock-in commitment.

CRITERION. The forfeiture of promotions by CIS investors requires individual consideration of the conditions agreed and the applicable circumstances.

In the case of promotions with a minimum lock-in period tying the unit-holder to an investment fund, the specific reasons that prompted the unit-holder to transfer the funds will need to be analysed, along with whether the unit-holder was clearly and understandably informed of the lock-in obligation in the agreed contractual documentation.

4. SUBSEQUENT INFORMATION

4.1. Securities

4.1.1. Mandatory information: periodic

- Information on the statements of the clients' financial instruments or funds

Current legislation establishes that securities depositories must submit to their clients, on a durable medium and on an annual basis, a securities statement except when such information has already been provided to them in another periodic statement[50].

As a result, the clients of investment firms that keep financial instruments deposited at said entities must receive information about them at least on a yearly basis. In this regard, it may be agreed that information be sent more regularly (for example monthly, quarterly, etc.), and so the standard contract that must be used in the provision of the custody and administration service for financial instruments must establish the frequency with which the entity must provide and send information to its clients[51].

In this regard, the Complaints Service considers that it is good practice for the periodic statements of securities accounts to appropriately identify the product and report its effective or market value or, failing that, an estimate of the fair value of the instrument on the information date, so that the client may verify the performance of the product in each period.

CRITERION. Clients must receive information about the securities deposited at an entity enabled for this purpose on a durable storage medium at least on a yearly basis, and more frequently if so agreed.

- Lack of communication

Investors sometimes state that they have not received the periodic statements and even that they suddenly appear as holders of securities for which they had not given a purchase order or received any periodic information.

In these situations, they are informed that all the documentation that the securities depository must send them should have been sent to the correspondence delivery address, to the email address or through the means of contact provided for in the

[50] Article 70 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services.
[51] Article 5 of Order EHA/1665/2010, of 11 June 2010, developing Articles 71 and 76 of Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment firms and other entities providing investment services, with regard to fees and standard contracts, and Rule 7.1 of CNMV Circular 7/2011, of 12 December 2011, on the information prospectus on fees and the content of standard contracts

securities account opening agreement and which is commonly used between the parties.

In this regard, for provision of the financial instrument custody and administration services, a standard contract must be used[52] which must indicate both the means, form and procedure for the parties to exchange communications, and the information that the entity must provide and send to clients, the frequency and form of issuance thereof[53].

In the case of postal delivery, Spanish legislation does not require this information to be sent by means of certified post or with an acknowledgement of receipt and therefore communications by ordinary post or, as the case may be, by alternative means agreed between the parties will be sufficient to comply with the legal requirements. Said communication may also be carried out through the electronic means that the entity generally uses in its relationship with the client.

CRITERION. Spanish regulations do not specifically define the manner in which information is to be sent to clients, but instead refer to the securities custody and administration contract, in which the means to be used for communications and the sending of information will be agreed.

- **Content of the statements: valuation**

Financial instruments must be valued in the position statements and it is considered good practice for entities to inform about the effective, market or, failing this, estimated value of the financial instruments in the periodic information statements and to identify them correctly such that no doubts arise on the nature or risks thereof.

The annual statements would correctly identify the product, for example, with an appropriate commercial name and the ISIN code. With regard to market value, the regulations in this regard do not require entities to provide said information, despite which the CNMV Complaints Service has expressed its criterion that it views the provision of information by entities in the regular statements that they send to their clients about the effective, market or estimated value of the product as good practice.

In this regard, the information included in the periodic statements sent to the investor would not, for example, be correct if a structured product is catalogued in the securities account statements as "*money markets*" with the concept "*deposits*", and in the tax statements as "*term deposit*". Such cataloguing would give rise to doubts as to the true nature and risks of the product, since in this case it would in truth be a structured product the essential element of which would be a structure of derivatives, through which the entire principal invested could be lost.

CRITERION. It would be good practice for the information statements to properly identify the financial instruments, avoiding terms that could give rise to error as to the true nature thereof, and providing information as to the effective or market value,

[52] Article 5 of Order EHA/1665/2010, of 11 June 2010, developing Articles 71 and 76 of Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment firms and other entities providing investment services, with regard to fees and standard contracts.
[53] Rule 7.1 of CNMV Circular 7/2011, of 12 December 2011, on the information prospectus on fees and the content of standard contracts.

or otherwise an estimate of the fair value of the financial instrument on the reference date of the periodic information.

4.1.2. Information resulting from the status of depository

Entities that provide investment services must act with diligence and transparency in the interest of their clients, protecting said interests as if they were their own and, in particular, observing the rules laid down in Chapter I of Title VII of the recast text of the Securities Market Act and its implementing regulations[54].

These obligations of investment firms include maintaining their clients appropriately informed at all times and ensuring that all the information that they submit to their retail clients, whether directly or indirectly (but highly likely to be received by them), is fair, clear and not misleading. To this end, the information must meet requirements, including being accurate, sufficient and understandable to any member of the target group and it must not hide, conceal or minimise any important aspect, statement or warning[55].

In addition, the basic obligations of financial instrument administrators or depositories include performing as many actions as may be necessary to ensure that the instruments maintain their value, as well as exercising all the rights corresponding to them in accordance with legal provisions.

As a result, entities providing securities administration and/or deposit services must establish in a contract the details of the main actions involved in administration of the financial instruments in their custody, and how instructions are to be received, where necessary. In particular, the entity's procedure for dealing with a lack of instructions in connection with any subscription rights that might be generated by the securities in custody will be specified, and this procedure must in all cases be in the best interests of the client[56].

In this regard entities must, with due diligence and promptness, provide their clients with information as to the procedure to be followed to issue instructions in the context of corporate operations undertaken by the companies issuing the shares that they hold and requiring specific instructions from the shareholder, for example the distribution of remuneration among shareholders with a prior choice to receive a scrip or cash dividend, and where instructions are not given, the consequences resulting from this. In all cases, entities must act as agreed with the investor, and always in the client's interest.

Similarly, depositories must adopt measures and procedures that allow them to guarantee that their clients will receive the requests for instructions about these operations promptly and, in any event, sufficiently in advance that they may choose

[54] Article 208 of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act.

[55] Article 209 of Royal Legislative Decree 4/2015 of 23 October, approving the recast text of the Securities Market Act and Article 60 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services.

[56] Rule Eight of CNMV Circular 7/2011, of 12 December 2011, on the information prospectus on fees and the content of standard contracts.

the option that best matches their interests. To this end, it is considered good practice for entities to establish a fast-track communication procedure with their clients in general, but particularly in these cases, such as via the Internet or SMS messages.

CRITERION. The depository entities must adopt measures and procedures serving to guarantee that their clients promptly receive requests for instructions on corporate operations, particular those subject to a pressing deadline, and in all cases sufficiently in advance to allow them to choose the option offered that best fulfils their interests from among all those available.

This would be the case, for example, in operations resulting from the generation of pre-emptive subscription rights or shareholder remuneration programmes with a prior choice of receiving a scrip or cash dividend.

- **Splits and reverse splits**

Until recently it was the criterion of the CNMV's Complaints Service that the obligations of depositories of financial instruments only include informing about those operations which, having been decided by the product's issuer, confer upon the holder the right between several possible options. However, this Service has recently considered it necessary to extend this criterion to all corporate operations decided on by the issuer, whether or not these entail the right of the holder to make a choice.

This new criterion has a two-fold objective. On the one hand, investors will be better informed about all the events that affect the securities deposited with the financial institutions. On the other hand, entities guarantee better service to their clients and reduce possible conflicts with them.

This new context would include splits and reverse splits. It is considered good practice for entities to inform shareholders about this type of operation before they are effectively performed so that the shareholder may have detailed knowledge about the operations and, consequently, may adopt the measures that best match their interests should they deem it appropriate (for example, buying or selling shares when the number that they hold is not divisible among the number of shares resulting from the operation). That is without prejudice to the fact that, if no instructions are received by the shareholder to this effect, the depository must comply with the obligatory mandate incorporated in the corporate operation in question.

Furthermore, depositories, in their capacity as providers of the securities administration service, must report these operations to the clients once they have been executed, informing them of the number of shares they hold following the operation, as well as their nominal value.

However, it should indicate that both splits – increasing the number of shares by dividing the nominal value of the former shares by an equivalent amount – and reverse splits – reducing, by a specific proportion, the number of shares in the market by multiplying by that same proportion the price of these shares and their nominal value – are operations that fall under the authority of the issuer's General Shareholders' Meeting, which must approve them before they can be implemented.

Another different question relates to operations of this type which are imposed by the authorities and not by the affected entity. In this regard, the grouping and

modification of the nominal security, or reverse split, may have been imposed by the authorities and be mandatory both for the affected entity and for the holders of the related securities. In other words, these would not be decisions taken unilaterally by the aforementioned entity, but imposed within a certain context. In these cases, the Complaints Service will inform complainants of this particular situation.

CRITERION. The Complaints Service deems it to be good practice that the securities depository entity should provide information on all corporate operations agreed by the issuer, even if they do not give the shareholder the right of choice.

This context would include the sending of information about a split or counter-split operation before it is performed, in order for shareholders to be able to reach whatever decision they should deem to be the most appropriate and beneficial for their interests. Nonetheless, in the absence of instructions by the shareholder, the depository must fulfil the required mandate corresponding to the corporate operation in question.

One exception to this criterion would be operations of this type imposed by the authorities, and not by the entity in question, in which case fulfilment is mandatory.

Nonetheless, in both cases the depository entities, as the providers of the securities administration service, must inform their clients of the outcome of these operations once they are executed, informing them of the number of shares that they hold after the operation, and the par value thereof.

- **Scrip dividend or flexible dividend**

Over recent years scrip dividends, or flexible dividends, have become consolidated in Spain as a form of shareholder remuneration that offers the possibility of receiving the amount equivalent to the traditional dividend either in new shares or in cash.

Scrip dividends are implemented such that the governing bodies of the entity agree a share increase charged to voluntary reserves (which is known as a "bonus issue") for a maximum nominal amount equivalent to the amount for paying the ordinary dividend in cash.

Once the issuer of the shares structures the operation, the entities will be required to send an announcement to the shareholders, informing them of the type of operation in question (bonus issue), the rights they enjoy, the options and time periods available, the action that will be taken if they do not issue instructions, and any fees and/or expenses that they will be charged under each of these options.

As indicated in the previous section ("Lack of communication"), Spanish legislation does not require the information on this type of operation to be notified by certified post or with an acknowledgement of receipt, and therefore communication by ordinary post or by alternative means agreed between the parties will be sufficient to comply with the mandatory regulations.

For this reason, the Complaints Service considers with regard to this type of shareholder remuneration programme that, bearing in mind that the deadlines granted

by issuers to give instructions are generally very short (particularly for the sale of rights to the issuer) and given the importance that investors should have as long as possible to give their instructions, entities must send the communications for this purpose immediately after they become aware that the issuer has approved the programme.

Specifically, it would be appropriate for these communications to be sent, both in the case of written and electronic communications, with sufficient margin so that shareholders may receive the information prior to the first day of trading of the subscription rights and, in the case of communications sent electronically, prior to the first day of trading and, in any event, prior to the opening of the session on the first day of trading of the preferential subscription rights.

For this purpose, the Complaints Service considers that it would be reasonable for entities to have in place procedures which, as far as possible, automate the immediate dispatch of these communications to all the clients affected by the operation in question and which, furthermore, allow them to choose to receive them by fast communication channels, such as email.

As regards the content of the announcement, in addition to inclusion of the terms set out in paragraph three of this subsection, it will inform the shareholders of the options they have in the event of this type of programme to receive their instructions, namely:

1. Participate in the capital increase and, therefore, subscribe the new shares.

2. Sell the subscription rights[57] on the secondary market.

3. Sell the subscription rights to the company at a fixed price[58].

Meanwhile, the client will be required to issue instructions as to their chosen option, by sending this instruction to their intermediary in due time and form, for the order to be executed accordingly.

Nonetheless, if said instructions include a limit order for the sale of rights on a secondary market, the shareholders must bear in mind that they bear the risk that their sale instruction might not be executed if the listed price of the rights does not reach the limit price for the sale as indicated in the order. On other occasions, for market reasons, the rights may not be sold. These circumstances could mean that once the trading period has ended, the rights expire and are left with no value. This would occur in general, unless other operational guidelines are established by the entity of which the client must have been informed in due time and form.

It is therefore advisable for entities to include warnings or provisos in the communication sent to the shareholders in question, essentially with regard to the sale of rights, emphasising to their clients the risks involved in this operation, such as "*provided that market circumstances would so permit*".

[57] The subscription rights which arise from a bonus issue are referred to as "free allocation rights". Article 306(2) of Royal Legislative Decree 1/2010, of 2 July, approving the recast text of the Capital Companies Act.

[58] The commitment to purchase rights will only apply with regard to rights received by those who are shareholders on the reference date and are registered as shareholders in the Iberclear records, but not with regard to those acquired on the market.

Furthermore, it is important to stress that it is typical for the number of rights required to subscribe a whole number of shares to be less than the number of rights held by the client. These rights are known as surplus rights, and instructions may either be given for their sale, or otherwise more rights could be acquired on the market to make up the number needed to subscribe one or more shares.

When the shareholder issues instructions to purchase more rights, he/she must issue specific instructions to the intermediary as to what is to be done with them (subscribe more shares, sell them before the trading period ends, etc.), since the risk otherwise would be that the rights could expire and the investment in them be lost. Nonetheless, it should be indicated that rights acquired in this way may under no circumstances be sold to the issuer.

This applies to investors, not prior shareholders acquiring rights in the market issue.

In any event, it is advisable for investors to consider the clear and specific information that must be given to them by their intermediary as to the consequences that could result from each of the instructions that the client may issue.

It should lastly be pointed out that in communications sent by the intermediary to its clients, it will inform them that if it does not receive instructions from the client by the deadline established for this, it will in general proceed to subscribe the shares to which they are entitled, and sell the surplus rights on the market.

It will likewise be deemed good practice for the entity to warn its clients that their surplus rights cannot be sold on the market unless an order is received to the contrary, in those cases where the amount to be obtained through the sale of the rights on the market is less than any expenses that said operation involves.

CRITERION. Entities must send out announcements to request instructions from their clients immediately after learning that the issuer has approved the scrip dividend or flexible dividend programme.

It would specifically be appropriate for such announcements to be sent in the case of both written and remote electronic announcements, with sufficient margin to allow the shareholders to receive the information prior to the first day when the subscription rights are listed.

As regards the content of the announcement, it must contain clear and specific information as to the different options available to the shareholder, and any consequences that might result depending on the option chosen.

In all cases, this announcement must indicate the consequence that would result if the shareholder failed to issue instructions.

It is likewise considered good practice that entities should inform their client that they will not sell the rights in those cases where the costs involved in the sale are greater than the amount to be obtained by the client, unless the entity receives an order to the contrary.

- **Bonus issue**

A bonus issue is charged to the company's reserves and therefore shareholders obtain new shares without having to contribute any money.

In bonus issues, ¡ shareholders have two options: either to subscribe new shares in the issue, or sell their rights on the market, and so monetise a part of their investment. The main difference between a bonus issue and a scrip dividend is thus that while the latter is structured by means of a bonus issue, the scrip nonetheless also includes the option to sell the rights to the issuing company at a fixed price.

In short, in this case entities will be required to fulfil the same information obligations regarding their clients as set out in the above subsection (scrip dividends), albeit with the necessary adaptations in accordance with the difference in circumstances as indicated.

- **Capital increase at par or above par: with share premium or called-up capital**

In capital increases referred to as at par or above par, shareholders will have to pay the nominal amount of the shares (at par) or a premium over the nominal amount (above par) to subscribe the new shares issued.

With regard to the obligation to provide information to clients, in the case of cap- ital increases for cash it is critically important for the entity to inform the client so as to collect instructions on what to do with those rights which may correspond to the client before the start of the session on the first day of trading.

Nonetheless, as indicated, Spanish regulations do not require information as to this type of operation to be sent by registered mail or with confirmation of receipt, and notification by conventional mail, or by any other alternative means that the parties might agree, would be sufficient in order to fulfil the regulatory principles.

However, this Complaints Service considers it to be good practice, both in the case of an announcement sent by mail and via remote electronic channels, for it to be sent out sufficiently in advance so as to be received by the shareholder prior to the first day of listing of the rights. In any event, where the announcement is via remote electronic means, it must always be received before the start time on the first day of trading of the pre-emptive subscription rights.

It may therefore be concluded that the entity is guilty of malpractice if it does not place on record that it has sent information about the issue sufficiently in advance to its client.

In this regard, it is deemed to be good practice that entities should establish fast channels of communication with their clients, such as email, SMS, or any other system that would serve to conduct communications swiftly and effectively.

As regards the content of said announcement, it must provide information as to: i) the different options available to the shareholder, requesting instructions in this regard; ii) the final deadline to subscribe the issue, and before said date, the time by which any instructions to the entity must be issued, it being typical for these purposes that the deadline for instructions be one or two days prior to the deadline for the issue; iii) how the entity will act in the absence of instructions from the shareholder in this

regard by the deadline; and iv) any other relevant issues, such as the existence of a period for the assignment of surplus shares or oversubscription period, the conditions on which said period would apply, and the circumstances under which shareholders could take advantage of it.

If the shareholders' instructions include a limit order to sell their rights on a secondary market, it must be borne in mind that they bear the risk that their sale mandate might not be executed if the listed price of the rights is less than the limit price for the sale. On other occasions, the rights may not be sold for market reasons. These circumstances could mean that once the trading period has ended, the rights could expire and be left valueless. This would occur in general, unless other operational guidelines are established by the entity, of which the client must have been informed in due time and form.

It is therefore advisable for entities to include warnings or provisos in the communication sent to the shareholders in question, essentially with regard to the sale of rights, emphasising to their clients the risks involved in this operation, such as "*provided that market circumstances so permit*".

Furthermore, it is important to stress that it is typical for the number of rights required to subscribe a whole number of shares to be less than the number of rights held by the client. These rights are known as surplus rights, and instructions may either be given for their sale, or otherwise more rights could be acquired on the market to make up the number needed to subscribe one or more shares.

When the shareholder issues instructions to purchase more rights, he/she must issue specific instructions to the intermediary as to what is to be done with them (subscribe more shares, sell them before the trading period ends, etc.), since the risk otherwise would be that the rights could expire and the investment in them be lost.

This applies to investors, not prior shareholders acquiring rights in the market issue.

In these cases, the entity must accredit that, at the time when the investor acquired the rights on the market, it informed him/her of the consequences that would result from a failure to receive express instructions as to what to do with them. This warning as to the entity's procedure if it does not receive instructions as to how to act with the rights acquired could be included in the order to purchase said pre-emptive subscription rights.

In general, in the case of capital increases with a disbursement, if the shareholder receives pre-emptive subscription rights because of shares previously deposited at the entity, and if, having been informed of the strike conditions, no instructions are given in this regard prior to expiry of the deadline, the entity should act in accordance with the terms set out in the securities deposit and administration contract, which must be in the best interests of the client.

It is in this regard deemed to be good practice that, in the absence of instructions from the client, the entity should unilaterally order the sale of the pre-emptive subscription rights prior to expiry of the trading period, because once this period has ended, the value of the rights is entirely forfeited, from an economic, legal and corporate perspective.

It will likewise be deemed good practice for the entity to warn its clients that their surplus rights cannot be sold on the market unless an order is received to the contrary, in those cases where the amount to be obtained through the sale of the rights on the market is less than any expenses that said operation involves.

CRITERION. In the case of capital increases with a disbursement, if the shareholder receives pre-emptive subscription rights because of shares previously deposited at the entity, and if, having been informed of the strike conditions, no instructions are given in this regard prior to expiry of the deadline, the entity should act in accordance with the terms set out in the securities deposit and administration contract, which must be in the best interests of the client.

In this regard, it is considered good practice that, in the absence of specific instructions from the shareholder, the entity should unilaterally order the sale of the rights generated as a result of the shares held prior to expiry of the corresponding trading period, because once this period has ended, the value of the rights is entirely forfeited from an economic, legal and corporate perspective.

Furthermore, the announcement of the strike conditions for any rights assigned as a consequence of shares previously held should be issued:

- Sufficiently in advance. If the announcement is sent by mail, it will be sent sufficiently in advance to be received by the shareholder the day before commencement of the first market session. If it is sent by remote electronic channels, the time of sending must be recorded, and this must in all cases be prior to the start time of the first trading session for the pre-emptive subscription rights.

- In full. As regards the content of said announcement, it must provide information as to: i) the different options available to the shareholder, requesting instructions in this regard; ii) the final deadline to subscribe the issue, and before said date, the time by which any instructions to the entity must be issued, it being typical for these purposes that the deadline for instructions be one or two days prior to the deadline for the issue; iii) how the entity will act in the absence of instructions from the shareholder in this regard by the deadline; and iv) any other relevant issues, such as the existence of a period for the assignment of surplus shares or oversubscription period, the conditions on which said period would apply, and the circumstances under which the shareholders could take advantage of it.

Nonetheless, if the pre-emptive subscription rights are acquired by a prior shareholder on the market, in the event that the shareholder acquiring the rights does not issue instructions to the entity as to how to act, it would not be obliged to take any type of action in this regard, and the rights could even expire, with the corresponding loss for the purchasers thereof. This would apply in general, unless other operational guidelines are established by the entity, of which the client would need to be informed in due time and form.

In the case of acquisitions of rights on the market by investors that are not prior shareholders, the entity will be required to accredit that, at the time when the investor acquired said rights, it informed him/her of the consequences resulting from a failure to receive express instructions as to what to do with them.

- **Information due to closing of positions as a result of a lack of guarantees**

Entities that provide investment services are sometimes forced to unilaterally close positions opened by their clients in certain financial instruments. Although, as we shall see below, this might be justified in some cases, the CNMV's Complaints Service understands that the reasons that justify the entity acting in this manner must be made available to its clients prior to making the investment. It should be noted that the legislation applicable to firms that provide investment services establishes, in the field of conduct-of-business rules, that they must keep their clients informed at all times[59].

The most common case of unilateral closure of client positions by entities is related to trading with certain financial derivatives 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 with 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.

Without prejudice to the legitimacy of entities unilaterally closing a client's position when this has been clearly reflected in the initial contract, the CNMV's Complaints Service understands that the entity must be able to demonstrate that it clearly informed, prior to cancellation, that it was going to do so in order to allow the client, as the case may be, to provide more funds and therefore avoid said unilateral closure. Finally, in contracts for differences (CFDs), the obligations assumed by the parties are generally laid down in the contract itself. This usually includes, inter alia, the client's obligation to set up and maintain a series of margin calls that will depend on the price of the underlying asset on the secondary market. In the event that these margin calls are exceeded, the positions will be closed if the investor does not provide the requested margins. Therefore, entities must provide documentary evidence that the client was informed about these issues.

CRITERION. The reasons giving the entity legitimate grounds to unilaterally close positions in certain financial instruments must be announced to the clients not only before they invest in them, but also during the course of the investment immediately prior to said closure being performed.

4.1.3. Request for documentation

Properly dealing with the requests for documentation that clients make to financial institutions requires them to provide the client with the requested documents that are available and, if they are not available (as they are not kept or for any other reason), to clearly inform the client.

However, it should be pointed out that the right to obtain this documentation is limited to the time period during which legislation requires entities to keep said documentation.

However, entities must not destroy the supporting documents for the orders with

[59] Article 209.1 of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act.

regard to which the client has expressed his/her disagreement prior to conclusion of the minimum conservation period (or when, if raised after the end of said period, they have not yet been destroyed), until said disagreement has been resolved.

It is common for complainants to request from the entity and subsequently from the Customer Service Department, a copy of the supporting documents of the orders, contracts, appropriateness and suitability tests, etc.

It is also relatively frequent for entities not to submit to their clients the requested documentation in the first instance, but rather to postpone said submission until the time they make pleadings before the CNMV's Complaints Service after the complaint proceedings have been initiated by dissatisfied clients. In these cases, the re- ports resolving the complaints indicate that it is not considered appropriate that in order to obtain a copy of the documentation generated in their commercial operations 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 achieving the investor's claims and secondly, because it makes it necessary to start up the administrative machinery for inappropriate purposes. In short, it would demonstrate improper functioning of the entity's Customer Service Department (CSD).

Even if the client is provided with the requested contractual documentation, it may be that this is not performed diligently, if it is not provided in a reasonable time period.

It should lastly be indicated that, in general, clients must present their request for information at their office, and should contact the Client Response Service of the entity only to bring a claim because of a failure to respond to said request in those cases where it has not been handled by the office, or has been handled inadequately.

CRITERION. The entity must provide the documentation requested by the client throughout the period for which it is obliged to keep it.

Nonetheless, entities must not destroy documentation regarding operations concerning which their clients have raised any disagreement prior to the end date for keeping them.

Likewise, if the retention period has expired but the entity still keeps the documentation, it must not destroy this even if the client raised the complaint after said retention period ended.

The provision of documentation should occur at first instance (without needing recourse to the CNMV Complaints Service to obtain it), and within a reasonable time period.

If the entity does not have the documentation available, it should clearly inform its client of the reasons for this.

- **Request for information on contracts**

Applicable legislation provides, in the matter of contract registration, that entities that provide investment services must keep a register that includes the contract or contracts setting out the agreement between the company and the client, which must specify the rights and obligations of the parties and other conditions regulating

provision of the service to the client. In addition, it lays down the obligation that contracts entered into with retail clients must be recorded in writing[60]. These contracts must be maintained for the duration of the contractual relationship between the parties and up to five years after the end of the contract[61].

CRITERION. Contracts must be kept, and therefore provided to those clients so requesting, for as long as the contractual relationship between the parties exists, and up to 5 years after it ends.

- **Request for information on orders**

With respect to the order register, which must also be kept by entities that provide order receipt and transfer services, it should be noted that the respondent entity has the obligation to maintain all the supporting documents of the securities orders in said registers for a minimum period of five years[62].

CRITERION. Receipts of orders regarding securities must be kept, and therefore provided to those clients so requesting, for a minimum period of five years from when they were issued.

- **Request for information on purchase value**

As indicated above, entities are required to submit to their clients information on the transactions performed, indicating the purchase price.

In this regard, the confirmations of orders will record the volume, the unit price, and the total consideration. As regards the volume, if the order is executed in tranches, information may be provided as to the price of each tranche, and the average price. If information is provided as to the average price, the price of each tranche must be stated if the client expressly so requests[63].

The minimum period for the keeping periodic statements and confirmations would be five years from the date of dispatch for sending[64].

On some occasions, complainants query the acquisition value of some securities, although they make the complaint with the entity where the securities were deposited after having acquired them with another entity. In these cases, the Complaints Service considers that the respondent entity had acted correctly as it was not the obligation of the entity receiving the securities to inform about transactions performed prior to the transfer date, but rather said obligation falls on the entity that carried out the transaction – the previous depository.

Furthermore, the complainant was informed that, at the time of a securities purchase or sale, entities are required to immediately send to the client on a durable medium

[60] Article 218 of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act (Article 79 ter of the previous text of the Act).
[61] Article 32 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms.
[62] Article 33 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms.

[64] CNMV Resolution of 7 October 2009, on the minimum records to be retained by companies providing investment services.

essential information on execution of the purchase/sale and its subsequent confirmation details[65].

CRITERION. The purchase value of financial instruments will be recorded in the confirmation of the operation and the periodic statements to be kept by the entities, and therefore provided to those clients so requesting, for a minimum period of five years from the sending thereof. The maintenance obligation will apply to the entity that processed the order, but not to any other entities not involved in the purchase, but that subsequently received the titles as a result of a transfer.

- **Request for information on fees**

Entities are obliged to provide their clients with information on the fees applicable to the different services that they will provide. In this regard, clients may ask to be informed about which fees have been applied to one or several services provided or transactions performed.

The regulations provide in this regard that entities must provide their clients or potential clients with full information about the fees in force if so required by them. In the case of clients that maintain a contractual relationship with the entity, they will likewise be required to handle requests regarding the fees in force throughout their contractual relationship[66].

CRITERION. Entities must address requests for information from clients regarding the fees in force at the time of the request and any fees that might have been in force throughout the contractual relationship.

- **Information on incidents that have occurred**

In the case of an event such as the insolvency of the company issuing the securities, the entity, in its capacity as securities custodian and administrator, must promptly inform its clients of this situation, as well as any relevant circumstances that might affect their investment, including the options available to the clients to defend their rights with regard to the issuer. Entities may accredit the sending of this information by means of letters and announcements sent to their client.

CRITERION. Entities must provide information as to circumstances arising that would affect the securities they have on deposit for their clients, such as, for example, the insolvency of the issuer, informing them of the options available to them to defend their rights before the issuer.

- **Information on incidents that occurred on placing an order**

The information obligations of entities that provide investment services include keeping their clients appropriately informed at all times[67] and informing them about any significant difficulties that may arise for executing their orders[68]. Similarly, as

[65] Article 68 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms.
[66] Rule 2.4 of CNMV Circular 7/2011, of 12 December 2011, on the information prospectus on fees and the content of standard contracts.
67 Article 209(1) of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act.
68 Article 80(1)(c) of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services.

mentioned previously, entities must immediately provide their clients with essential information on the execution[69] on a durable medium.

CRITERION. Entities must provide information as to any difficulties arising in the execution of clients' orders.

- **Information on omnibus accounts**

Omnibus accounts are frequently used in trading with foreign financial instruments. In this type of account, there is no record of the identity of the final holders of the securities as it is the entity that appears as holder of the total balance of its clients. Nevertheless, when this type of account is going to be used, the entity must inform its clients in advance and notify them of the risks that they assume, in particular in the case of insolvency of the entity that is the account holder as in these cases the insolvency proceedings of said entity will be governed by the law of the corresponding country.

In this regard, in some securities administration contracts, the entities warn that in the event of the acquisition of foreign securities, these might be deposited in an omnibus account. It is common practice in international markets for the purchase or sale of securities and financial instruments on behalf of clients to be registered in omnibus accounts for clients of one single entity, with the entity itself recorded as holder of the account rather than the final investor. However, in this case the entity must inform its client in accordance with the terms indicated in the above paragraph.

However, even when the securities contract informs the complainant of the risks of the aforementioned omnibus accounts (basically in relation to the possibility of insolvency of the sub-custodian), the contract does not tend to state that use of this type of account exempts the Spanish entity from providing its client with information relating to any corporate operations to which the securities might be subject. In the absence of this exemption, the entity would not act correctly if it did not accredit having provided its client with information on corporate operations that affect foreign shares.

CRITERION. In the event that entities are to use omnibus accounts, they must inform their clients of this in advance, and also inform them of the risks (in particular, the risk of insolvency of the holder of the securities). In such cases, unless otherwise provided, the entity would maintain its duties to provide the information as to corporate operations affecting foreign securities.

- **Delisted shares: Possibility of a waiver**

In the case of shares of listed companies excluded from trading, their holders continue to be shareholders and continue to have all the rights inherent to this status recognised in the Capital Companies Act (economic rights, voting rights, rights to information, etc.) and in the company's articles of association. However, exclusion

69 See Article 68 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services

from trading means that the shareholders may not use the secondary market to trade their shares although their sale is possible 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 for the transaction and organising the transaction.

Another sales 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.

Finally, in the case of securities excluded from trading in the domestic market, which, furthermore, are unproductive and are in a situation of inactivity, Iberclear[70] has established a procedure that allows the registered owners to request a voluntary waiver of maintenance of their registration as holder of the securities in the detailed registry controlled by the participating entity.

To this end, the registered holder shall communicate the request to the participating entity on whose detailed registry the securities are entered and said entity will make a request to the Spanish central securities depository (Iberclear) for the entry of a voluntary waiver to maintenance of the registration, providing it is verified that a minimum period of four years has elapsed without any registry entry in the issuer's page opened in the Companies Registry.

CRITERION. For delisted securities, that can therefore not be sold on the secondary market, there are alternative transfer procedures, such as searching for a purchaser, by means of which, once the price has been set, the sale would be formalised, or the securities could be offered to the issuer, which may, where applicable, wish to acquire them.

A waiver would also be possible in the case of securities delisted from the domestic market that are unproductive and have inactive status, provided that a series of requirements are fulfilled.

4.2. Collective investment schemes

In accordance with applicable sector legislation[71], and with regard to knowledge about the performance of the investment, current regulations establish that the yearly and half-yearly reports of collective investment schemes (CIS) should be sent periodically, and at no charge, to unit-holders and shareholders unless they specifically instruct otherwise. In addition, CIS will send, on a regular basis and at no charge, a quarterly report to the unit-holders and shareholders that request one. When requested by the unit-holder or shareholder, said reports will be sent by electronic means.

Similarly, all these documents will be made available to the public in the places indicated in the prospectus of the CIS and the key investor information document[72].

[70] IBERCLEAR is the Spanish central securities depository. It is a public limited company that was created under the provisions of Article 44 bis of the Securities Market Act 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 23 July 2014, on improving securities settlement in the European Union and on central securities depositories, and regulated in Article 97 et seq. of the recast text of the Securities Market Act, approved by Royal Legislative Decree 4/2015, of 23 October.

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[71] Artículo 18.2 de la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva.

[72] Artículo 18.2 de la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva.

In addition, management companies of collective investment schemes, or the distributor of the units of investment funds if the management company's register does not contain the name of the unit-holders, must send each unit-holder a statement of their position in the fund at the end of the year. When expressly requested by the unit-holder, said document may be sent by electronic means.

The position statement must at least contain information relating to the transaction date and the identity of the scheme, as well as its management company and its depository, and on the unit-holder or shareholder, and any additional information established by the CNMV[73].

Meanwhile, as indicated in the subsection regarding subsequent information on securities, the depository entities for shares in investment companies must send their clients a statement of the securities, on a durable storage medium and at least yearly, unless this information has already been provided in another periodic statement.

In this regard, implementing legislation provides that management companies of collective investment schemes, investment companies and, as the case may be, distributors, must send unit-holders or shareholders, free of charge, until they no longer hold such status, and within one month of the end of the reference period and to the address that they have indicated, the successive simplified half-yearly reports and the first part of the annual report and, if requested, the simplified quarterly reports. The second part of the annual report will be sent to unit-holders or shareholders within the first five months of each year. The shareholder or unit-holder may waive the sending of the yearly and half-yearly report in a separate written document, duly signed, following receipt of the first periodic information. This waiver will be revocable in nature[74].

In the case of foreign CIS, the management company or the distributors in Spain will send the unit-holders or shareholders, free of charge and to the address they provide, any successive financial reports and annual reports prepared subsequent to registration with CNMV, in a period of one month from their publication in the home country, unless said unit-holders or shareholders have waived their right to receive said information. Nevertheless, the distributor must send said documents to unit-holders or shareholders if so requested even if they have previously waived their right to such information being sent. However, the waiver will be revocable.

Similarly, they must send, free of charge, to the unit holders or shareholders that have acquired their units or shares in Spain all the information provided in the legislation of the State in which the CIS have their head office in the same terms and with the same deadlines as provided for in the legislation of the home country[75].

Therefore, from the subscription or acquisition date of the shares of the CIS units, unit-holders or shareholders must receive the periodic reports and corresponding position statements through which they will be able to monitor the performance of the CIS and check their general features at all times.

[73] Artículo 4.3.a del Real Decreto 1082/2012, de 13 de julio, por el que se aprueba el Reglamento de desarrollo de la Ley 35/2003, de 4 de noviembre, de instituciones de inversión colectiva.
[74] Rule Four of CNMV Circular 4/2008, of 11 September 2008, as to the content of the quarterly, half-yearly and yearly reports on collective investment schemes and the position statement.
[75] CNMV Circular 2/2011, of 9 June, on information on foreign collective investment schemes registered in the CNMV Registries.

In those cases in which the investor's complaint refers to the composition of the CIS reported in the periodic documentation received was called into question, or to the extent to which it was in line with the quantitative and qualitative limits of the investment policy, the Complaints Services considers that this was an issue directly regulated in the internal control and solvency rules of the CIS and which consequently does not fall under the scope of transparency and client protection rules or of good financial customs and practices. Therefore, correct asset valuation and compliance with the investment policy, as well as monitoring of the liquidity of the CIS by the management company, are activities that are subject to ongoing prudential supervision by the CNMV and fall outside the scope of its Complaints Service.

In addition, CIS management companies and distributors are required to comply with certain obligations once an investor becomes a unit-holder of the CIS and while the investor maintains that status.

CRITERION. From the moment when a CIS is contracted, investors must receive periodic reports (unless they have waived their right to be sent them) and statements as to their position, or the corresponding securities.

In the case of domestic CIS, they will, within a period of a month of the close of the reference period, receive the successive simplified half-yearly reports and the first part of the yearly report, and if so requested, the simplified quarterly reports. The second part of the yearly report will be sent to the unit-holder or shareholder within the first five months of each financial year. They will likewise receive the yearly statement on their investment in the CIS.

In the case of foreign CIS, they will receive successive reports containing economic information and yearly reports drawn up after registration in the CNMV, within a period of one month from publication in the country of origin. Furthermore, having acquired units and shares in Spain, they will receive all information established in the legislation of the State where they are based, under the same terms and by the same deadlines as under the legislation of the country of origin.

- **Modifications to essential elements of investment funds**

On a regular basis and under the scope of the authority granted by the corresponding legislation[76], investment fund management companies may introduce significant changes in the essential features and nature of said funds, such as: amendments to the management regulation or, as the case may be, the prospectus or key investor information document which involve a substantial change in the investment or profit distribution policy; replacement of the management company or the depository; delegation of management of the scheme's portfolio to another entity; change in control of the management company or the depository; transformation, merger or split of the fund or of the compartment; establishment or raising of fees; establishment, raising or elimination of discounts in favour of the fund to be made on subscriptions and redemptions; amendments to the frequency for calculating the net

[76] Article 14(2) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

asset value; or transformation into a CIS divided into compartments or in compartments of another CIS.

The unit-holders must be informed of these changes in writing and with sufficient advance, notice and clarity. However, the legislation does not require the communication to be made by certified post, as a result of which, any possible incidents raised by the unit-holders as to a failure to receive this communication would not necessarily be attributable to the entity.

In contrast, the legislation establishes, as a prior requirement for registration of these amendments in the CNMV's registries, that evidence should be provided of compliance with the obligation on communication to unit-holders by means of a certificate issued by the CIS management company[77].

Similarly, legislation establishes that wherever there is a redemption fee or expenses or discounts associated with it, unit-holders may opt during a period of 30 calendar days counting from the submission of the communications on the changes introduced by the entity for redemption or transfer of their units, whether fully or partially, without deduction of the redemption fee or any expense, at the net asset value on the date of the last day of the 30 calendar-day notice period[78].

To this end, the unit-holder must make the corresponding redemption or transfer order. The purpose of this right of separation is not in itself to act as a provider of liquidity for unit-holders, but to allow those unit-holders who disagree with the new conditions of the investment fund which are objectively different to those that existed when they acquired the units to opt to leave the fund at no cost.

In general, a failure to exercise the right of separation by the established deadline implies that the unit-holder wishes to maintain its investment.

CRITERION. Modifications to the key elements of investment funds must be announced to the unit-holders, and for 30 calendar days from the issuance of settlement, they may opt for redemption or transfer of their units, in whole or in part, for the liquidation value corresponding to the last day of the period of 30 calendar days granted for this purpose, without having any redemption fee or expense applied.

Accreditation of compliance with the obligation to inform unit-holders is provided by presenting the CNMV with certification from the management body, enclosing a copy of the letter sent to the unit-holders, all of which documentation is required prior to registration of the modification in the corresponding official registers.

The right of separation may only be exercised if the unit-holder issues a redemption or transfer order by the deadline, and in the absence of said order, it would be assumed that the unit-holder has opted to maintain the investment.

- **Information request**

[77] Rule Nine of CNMV Circular 2/2013, of 9 May, on the key investor information document and the prospectus of collective investment schemes.
[78] The same Article 14(2) of Royal Decree 1082/2012, of 13 July, approving the implementing regulations of Law 35/2003, of 4 November, on collective investment schemes.

As mentioned above, legislation applicable to companies that provide investment services generally establishes, in the field of conduct-of-business rules, that companies should behave with diligence and transparency in the interests of their clients, protecting such interests as if they were their own. In this regard, entities must maintain their clients adequately informed at all times.

This section might therefore include requests for a copy of documentation relating to the investment, as well as the requests for information that unit-holders make to distributors. In these cases, it is assessed whether the entity responded to the information requests and also whether it provided appropriate information.

There is a wide range of information that might be requested. As an example we can cite: information about the procedure of a transfer between investment funds; the history of subscriptions and redemptions of a particular CIS; changes in net asset value over a particular period (R/173/2016, in which no incorrect conduct was noted); information on a certificate of the investment fund position containing pledged units; information about ownership of the investment funds; and the net asset value date to be applied to an implicit redemption in a CIS transfer, etc.

It is also necessary to highlight two issues within this section which arise on a regular basis: requests for information on taxation provided by the entities and return calculations.

CRITERION. Requests for information issued by unit-holders and shareholders of CIS must be duly handled by entities, in accordance with the general duty to keep their clients properly informed.

To this end, consideration will be given to whether the entity responds to the request information, and whether it provides adequate information as to the aspects queried.

- **Tax information**

With regard to this issue, it should be highlighted that in the analysis of the complaints questioning the tax information that the different entities provided to CIS unit-holders, the role of the CNMV's Complaints Service is exclusively limited to assessing compliance by the entity with the information obligations laid down in securities market legislation, with the tax authority being responsible for assessing the correction or not of said information.

In short, the CNMV Complaints Service does not have competency in taxation matters, and cannot therefore, in any way, evaluate whether or not the tax treatment applied by entities to different operations performed with regard to a CIS is correct, this being a matter that would require analysis by the Tax Agency.

CRITERION. The CNMV Complaints Service does not have competency to evaluate whether or not the tax treatment applied by entities to different operations performed by investors with regard to a CIS is correct, which would require analysis by the Tax Agency As a result, this Service simply confirms whether or not the entity responds to its client's queries with regard to the duty to keep clients properly informed.

- **Return calculation**

The scope of the CNMV's authority does not include determining the quality of the management or issuing judgements on the degree of return obtained by the managers as a result of their activity and the Complaints Service cannot therefore assess the cumulative return of the fund over a certain period or the losses obtained as a result of its investments.

However, it is considered that the information that must be passed on to the client must be as complete and clear as possible.

In this regard, this Complaints Service takes a positive view of entities including information in the statements that they send to investors that would, in the light thereof, allow a conclusion to be drawn at the end of the financial year that information was given as to the result of the calculations performed and the method on the basis of which the return was calculated, along with any variables that might be taken into account in obtaining said result. It would in this regard be understood that the entity does not provide satisfactory information if, for example, it should have provided more precise information as to the method on the basis of which the return is calculated.

CRITERION. The CNMV Complaints Service does not have competency to judge the returns obtained by a CIS. As a result, it simply considers whether the information conveyed to the client is sufficiently precise.

- **Change of an investment fund manager**

Until 2015, the resignation or change of a fund manager was not established in CIS legislation[79] as a significant event and therefore the subject of a mandatory notification. Neither did it appear among the situations which grant the right of separation to unit-holders of investment funds without any redemption fee or expense being charged.

However, legislation regulating CIS was amended in 2015 to include certain aspects, including the treatment of this type of situation[80]. In this regard, it was established that, when a CIS is managed by a significant manager such that this fact is one of the distinctive elements of the CIS and is included in the prospectus and in the key investor information document, the change of the significant manager will be considered a substantial change in the investment policy and therefore must be published as a significant event and will grant, in the case of investment funds, the right of separation. If the replacement of the significant manager has immediate effects, it may also be communicated to the unit-holders of the investment fund subsequent to its entry into force, in a period of ten working days[81]. At any event, said provisions

[79] Article 30 of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes and Rule Two of CNMV Circular 5/2007, of 27 December, on significant events of collective investment schemes.

[80] Sole article of Royal Decree 83/2015, of 13 February, amending Royal Decree 1082/2012, of 13 July, approv- ing the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

[81] **Article 14(3) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.**

would only be applied to changes in the significant manager taking place subsequent to the entry into force of the amendment to the legislation, i.e. as from 15 February 2015.

CRITERION. A change in CIS manager occurring after 15 February 2015 requires the publication of a price-sensitive information announcement, and in the case of investment funds, could give rise to the right of separation, wherever the manager is a distinctive element of the CIS and is indicated in the prospectus and in the key investor information document.

5. ORDERS

5.1. On securities

5.1.1. Generic

When executing client orders, entities that provide investment services should generally adopt reasonable measures to obtain the best possible result for its clients' transactions, bearing in mind the price, cost, speed and probability of execution and settlement, volume, nature of the transaction and any other significant elements for its execution. To this end, entities must act with care and diligence in their transactions, have in place a policy for the execution of orders, inform their clients of this execution policy, obtain their consent prior to the application thereof, and be in a position to demonstrate that they have executed their orders in accordance with their best execution policy.

Nonetheless, if specific instructions are given by the client, the entity will be required to fulfil said instructions.

CRITERION. The execution of orders by entities that provide investment services requires that they adopt measures to obtain the best possible results. To this end, they will have in place a policy for the execution of orders, which clients must be familiar with and agree to prior to the application thereof, and which the entity will be required to demonstrate that it has followed. Nonetheless, the entity will be required to fulfil any specific instructions that might have been given by its clients.

5.1.2. Specific

- Classification of buy/sell orders in the secondary market

In the case of direct purchases of shares in the secondary market, there are three types of orders: limited orders, market orders and at-best orders[82]. This is a key distinction because it affects the price of the order: only in the first case (limited

[82] Section 6.2.2 of Sociedad de Bolsas Circular 1/2001, on rules of operation of the Spanish Stock Market Interconnection System (Spanish acronym: SIBE).

orders) is a client guaranteed a strike 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 strike price is the limited 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 major market volatility, when the strike price of an order may differ substantially from the latest market price available immediately prior to the moment when the order is made.

On some occasions, investors complain that they have not been given a fair market price in the executions of the orders, with the complainant understanding a fair price as that provided by the entity at the time the order was made, which might be either the market price at that time or the closing price of the previous day if the order was made when the market was closed. In such cases, if the client had not made a limited order, the Complaints Service explained to the complainant that orders without a price limit are executed at the best counterparty prices existing in the market at the time they are entered. These prices do not necessarily match the market price immediately prior to the time at which the order was made or the closing price.

As previously discussed, although the limited order eliminates the uncertainty associated with the strike price, the investor runs the risk that the order will not be executed quickly and, in the event of sharp movements in the market, the limited price may be very far from the market price, thus making it impossible to execute the order, for which the entity bears no responsibility.

Although the price of limited orders functions as a maximum price for the purchase and minimum price for the sale, the market does not allow entry of limited buy orders at a price above the upper limit of the static range of the security in question or limited sell orders below the lower limit of that range[83], The static range is the maximum variation permitted in a value with regard to the static price established at any time (this limit is also applicable to shares traded on Latibex[84]) The static range is calculated based on the historic volatility of each security and is therefore usually specific to each security. However, in the event that an order issued by the customer is rejected by the system for this reason, the CNMV's Complaints Service understands that the entity must inform the client if it requests information as to the status of its order.

Furthermore, investors also complain of orders relating to fixed-income assets, such as bonds and debentures. In Spain, these assets are usually traded on the AIAF fixed-income market and, more specifically through the Electronic Debt Trading System (Spanish acronym: SEND) As in the SIBE, limited orders are allowed in SEND, the advantage of which is that they eliminate the risk of execution at a price lower than that set by the client in the case of a sell order (or higher in the case of a buy order), but, as indicated above, this system has the disadvantage that the order may take time to be executed or may even not be executed at all in the event that the market price differs from the price set by the client.

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[83] Rule Five, Section 2 of the aforementioned Sociedad de Bolsas Circular 1/2001 (amended by Circular 1/2004, amending the rules of operation of the Spanish Stock Market Interconnection System with regard to the definition of the static range)

[84] Trading segment for Latin American securities listed in euros.

CRITERION. There are three types of direct orders for the purchase of shares on the secondary market: limit orders, market orders, and at-best orders. In limit orders, the client has a guaranteed fill price (which acts as the maximum purchase price and minimum sale price).

Non-limit orders are executed at the best counterpart prices on the market at the time when they are entered, which may differ from the market price immediately prior to their entry or the closing price the previous day.

In the case of limit orders, the limit price may diverge considerably from the market price, making the order impossible to execute, although non-execution of the orders is not in such cases attributable to the entities. Nonetheless, in the event of a request by its client, the entity must inform it of the reason why the order could not be executed.

- **Execution of orders relating to capital increases or other corporate operations**

As indicated in the section on subsequent information in relation to securities, the obligations of entities that provide securities administration services include providing, with due diligence and speed, information to their clients about the procedure to be followed to give instructions with regard to corporate operations carried out by listed companies in which they are shareholders.

In this regard, in capital increases in which the client makes a limited sell order of its pre-emptive subscription rights and said order is not executed as the price does not at any time match the market price, it would have no complaint to raise with the entity for the loss in value of those rights.

However, as discussed in the point on "*capital increases at par or above par: with share premium or called up capital" within the section entitled "information resulting from the status of depository*" in the chapter "*Subsequent Information*", those investors that during the pre-emptive subscription rights negotiation process order the purchase on the secondary rights market, whether they are prior shareholders of the issuing company or not, must give specific instructions to the intermediary on what to do with them, irrespective of the time at which that purchase was ordered. In the event that the corresponding sell order or exercise of rights is not made by the legally established deadline, the depository would not be required to carry out any type of action in this regard, and may even terminate the rights, with the subsequent loss for the investors. This is the case on a general basis and unless different guidelines for action by the entity have been set and these have been communicated to the client in due time and form. However, in the specific case that the aforementioned acquisition of the rights takes place on the last day of trading, it would be impossible for the investor to receive information from the entity as to the last date for the right to be exercised, if said party wishes to subscribe the increase (or the last day for negotiation, if the intention is to sell the rights on the market). It would therefore be good practice when completing the buy order for the rights online or by any other means, to warn about the limit date to participate in the capital increase.

In takeover bids, as in capital increases, entities must provide their clients, with due

diligence and speed, with information on the procedure to be followed to place instructions. Clearly, when the client places instructions in due time, the entity will be required to comply with them, in due time and form, even in the event that the client gives instructions on the last day of the period for acceptance. A separate issue would be when the client does not place instructions in the established period and submits the instructions to the branch after the deadline established for placing instructions

It should in this regard be indicated that when limit sale orders are issued, it is possible that they might not be executed, a circumstance that is not necessarily attributable to the entity. This circumstance is of particular importance with pre-emptive subscription rights, since the failure to execute a sale order leads to a loss in their value.

CRITERION. In general, entities must provide clients with information as to the procedure to be followed to issue instructions in corporate operations such as capital increases, public offers for the acquisition of stock, or scrip dividend or flexible dividend programmes.

Orders in this context must be accredited.

- **Errors committed by entities when executing orders on behalf of their clients**

As indicated at the start of this chapter, entities that provide investment services must act with care and diligence in their transactions, performing them according to the strict instructions of their clients and adopting reasonable measures to ensure the best possible result for said clients.

The CNMV's 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. They must also allocate the necessary time to each client and pay attention to their complaints and claims and quickly and effectively correct any error that may have taken place.

Consequently, the Complaints Service welcomes those cases in which the respondent entity itself recognises the error made and offers the client a solution that would serve to resolve the consequences of the error and/or provide economic compensation for the damage suffered as a result of the entity's inappropriate action.

However, it should be indicated that recognition of the error by the entity does not necessarily entail the absence of bad practice. In every case, the rectification of the consequences by the entities is the result of an error committed, but that does not ensure that the error will not be repeated. Consequently, when an error is detected, the CNMV's Complaints Service generally 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 welcoming, as indicated, the solution adopted by the entity with regard to the consequences resulting from such an error.

CRITERION. In order to minimise errors, entities must control and organise their resources in a responsible manner, adopt the necessary measures and employ appropriate resources in order to efficiently perform their activity, dedicate all the time necessary to each client, consider their complaints and claims, and swiftly and effectively rectify any error that might have occurred.

Recognition of the error by the entity and offering a solution and/or economic compensation to offset the consequences resulting from this are viewed very positively by the Complaints Service.

Notwithstanding the above, the Complaints Service believes that the adoption of such solutions does not mean that the cause that gave rise to the event resolved has been corrected, and it will therefore conclude that when an error occurs there is malpractice, and it will call on the entity to provide accreditation that it has adopted measures to avoid a repeat.

- **Failure to provide evidence of an order supporting the transaction or failure to execute with instructions from the client**

On some occasions, entities that provide investment services execute transactions on behalf of the client without having an order supporting said operation or, on the contrary, transactions are not executed even though the client placed specific instructions in this regard.

With regard to orders, applicable legislation on mandatory registers establishes that client order registers must contain the original copy of the order signed by the client or by the authorised person, when made in writing; the recording, when the order is made by telephone; and the corresponding magnetic register, in the case of electronic transmission. The respondent entity has the obligation to keep the orders in its register for a minimum period of five years[85].

The Complaints Service would deem an inability by the entity to accredit the existence of an order to be malpractice.

On the other hand, it is the Complaints Service's criterion not to conclude that there has been incorrect conduct when the entity refuses to process an order while the client does not have sufficient funds in its associated cash account to pay the fee established in said prospectus of maximum fees for remunerating the service rendered, for example in the case of a transfer of securities.

CRITERION. The original of the written orders signed by the client or by an authorised person, the tape recording of telephone orders, and the digital storage medium for electronic orders must be kept for a period of five years.

Execution of an order may be dependent on the client having sufficient funds available to cover the fee indicated in the prospectus setting out the maximum charges to be levied for the service provided.

[85] Article 33 of Royal Decree 217/2008, of 15 February, on the legal regime on investment firms and other entities that provide investment services.

- **Incidents on processing orders electronically**

At present, with the arrival 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 legislation applicable to these transactions is essentially the same, 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[86]. In addition, special situations may arise, for example, the existence of communication problems that might interrupt the processing of the order, with the consequent disruption for the investor. However, these situations will not always be the responsibility of the company that provides the investment service, but they may also be attributable to the telecommunications service provider used by the client.

When the respondent entity recognises a technical incident attributable to the entity itself, whether on its website or through a mobile application, as indicated above, a very positive view will be taken of those cases in which the entity offers the client, where applicable, a solution and/or economic compensation, without prejudice to the fact that the entity's action must be classified as incorrect in that it prevented the client from operating with its securities deposited at the entity, a report being requested from the entity in such cases as to the measures taken to avoid a repeat of the incident.

Nevertheless, it may be the case that although it has not been possible to operate electronically, the entity is diligent and informs its clients about the situation with sufficient notice and as soon as the problem arises so that they may use other channels of communication with the entity, such as placing the order in person or by telephone. If it can be demonstrated that the respondent entity informed the client with sufficient notice that it was not possible to place orders electronically or as soon as the problem arose, offering reasonable alternatives in this regard, in this case it cannot be concluded that the entity has acted incorrectly, without prejudice to the obligation that entities would have to act with the due diligence when re-establishing the electronic service as soon as possible.

All operations ordered by electronic means must leave a digital trace which must be used by the entities to accredit the existence of a client's order.

CRITERION. Any incidents preventing remote electronic operations are classified as incorrect actions if it is accredited that they are attributable to the entity, without prejudice to the positive view taken of any solutions that it might offer to its clients affected by the incident.

Nonetheless, incorrect action would not exist in those cases in which, in response to an incident preventing the processing of orders via remote electronic channels, the entity informed the client sufficiently in advance, or as soon as said incident arose, of the alternative channels to be used.

- **Execution of orders with stop loss condition**

[86] Article 33 of Royal Decree 217/2008, of 15 February, on the legal legal regime of investment firms and other entities that provide investment services

Some entities that provide investment services offer their clients more sophisticated securities orders than those available on the market for all investors. 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. These are referred to as stop loss orders, which are extensively used by investors in order to protect them- selves against any possible falls in the price of the financial asset in which they have invested.

With regard to this type of contingent order, it may be the case that the client complains to the entity about poor execution. However, as these are orders that are executed through the SIBE, the CNMV's Complaints Service can verify whether the order, once entered into the market, was executed appropriately.

A similar case arises when the client places orders and the order is executed differently from how the client expected. In this case, if the client does not set the price for the order to be entered into the market, the transaction is executed at the best available price, which may be different from the price set in advance as the activation price. We insist, however, on the importance that the client be properly informed, and, in this case, the client must be informed previously about the functioning of this type of stop loss order and its risks, either through the initial contractual documentation or through information available on the entity's website or when placing the order.

On the other hand, it would not be correct for the entities to allow their clients to be able to place this type of order through its website in those cases in which its financial intermediary market member does not allow them since, once the order has been entered into the system, it is then rejected.

CRITERION. Any disputes regarding stop loss orders typically require the Complaints Service to check whether they were properly executed by the SIBE, and whether the entities properly complied with their duty of information as regards the functioning and risks of this type of order.

The entity may allow such orders to be issued via its website, although this would not be correct in those cases in which the market member through which the orders are executed does not permit them and rejects them after they are entered.

5.2. On collective investment schemes

5.2.1. Generic

As discussed in the section on securities orders, entities that provide investment services must generally adopt, when executing client orders, reasonable measures in order to obtain the best possible result in the transactions of said clients.

Nonetheless, the legislation applicable to entities that provide investment services establishes, with regard to conduct-of-business rules, that when the client gives

specific instructions about the execution of his/her order, the firm must execute the order by following said specific instruction[87].

CRITERION: Entities must adopt reasonable measures to obtain the best results possible in client operations. Nonetheless, if the client issues specific instructions as to the execution of its orders, the entity will act in accordance with said instructions.

5.2.2. Specific

In the case of CIS, the subscription/redemption process must be set out in a securities order that records the unit-holder or shareholder's desire to subscribe/redeem or transfer units/ shares of a particular CIS.

With regard to their execution, although, in CIS, given their characteristics in relation to liquidity, there are fewer incidents compared with securities orders, this does not mean that there are no particular aspects that should be taken into account.

In this regard, there are incidents relating to delays in processing the orders, failures to execute, defects in formalisation of the orders and errors when executing the same incidents referred to in the following points.

CRITERION. Orders regarding CIS reflect the desire to subscribe/redeem and/or transfer units/shares in a particular CIS.

- **Defects in formalisation of orders**

As indicated above, entities that provide investment services must act with care and diligence in their transactions, execute them in accordance with their best execution policy and abide by the specific instructions that, as the case may be, their clients have given them.

Securities orders that cover those instructions must be fulfilled such that both the ordering party and the entity responsible for receiving and processing the order accurately and clearly know its scope and effects.

The information contained in the subscription order of a CIS is considered incorrect as it does not match the conditions established in its information documentation of the CIS and this could lead to confusion in investors with regard to the applicable conditions.

CRITERION. CIS orders must be completed in a clear and precise manner, and it is therefore incorrect to include information that does not correspond to the CIS information documentation.

- **Incidents relating to the net asset value applicable to investment fund subscriptions or redemptions**

[87] Article 223 of Royal Legislative Decree 4/2015, of 23 October, approving the recast text of the Securities Market Act.

According to applicable sector legislation[88] the net asset value (NAV) employed in the subscriptions and redemptions of units in financial investment funds will be that taken on the same day as the request or the following business day depending on the rule set for this purpose in the fund's prospectus.

The prospectus must also indicate the procedure for subscription and redemption of units in order to ensure that the subscription and redemption orders are accepted by the CIS management company only when they have been requested at a time when the applicable NAV is unknown to the investor and is impossible to accurately estimate.

In order to meet this objective, the prospectus may contain a cut-off time as from which the orders received will be deemed to be made on the following business day for the purposes of the applicable NAV, where appropriate. In this regard, days on which there is no market for the assets accounting for more than 5% of the fund's total assets will not be considered working days. The prospectus may set different cut-off times depending on the distributor, which, in any event, will be prior to that established by the CIS management company on a general basis.

The depository shall make the payment of the redemption in a maximum period of three working days from the date of the NAV applicable to the request. On an exceptional basis, that deadline may be extended to five working days when required by the specialities of investments exceeding 5% of the fund's assets.

Therefore, and bearing in mind applicable legislation, it will be necessary to consider the provisions of the prospectus of each fund in order to determine the NAV applicable to the subscriptions and redemptions.

In the case of foreign CIS, the distributors in Spain registered in the corresponding CNMV registry must submit a copy of the report on the categories of marketing established in Spanish territory, in accordance with the standard form published on the CNMV's website[89] to each unit-holder or shareholder prior to subscription of the units or shares, in addition to the informative documentation of the CIS.

Said standard form establishes the 'PROCEDURE FOR SUBSCRIPTIONS AND REDEMPTIONS', which states:

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

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[88] Article 78(2) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

[89] Rule Two, paragraph 2, of CNMV Circular 2/2011, of 9 June, on information on foreign collective investment schemes registered in the CNMV's registries.

transaction and the price and, where appropriate, the fees and expenses charged, and the exchange rates applied in any foreign exchange transactions performed.

The provisions of both the informative documentation and the marketing report will therefore be followed.

It should be stressed in these cases that it is important for the unit-holder to previously obtain information from the distributor about the working days for the purposes of subscriptions and redemptions, both for the distributor and for the corresponding CIS. This is especially important on dates on which public holidays may delay the applicable NAV and, therefore, effective redemption of the investment.

CRITERION. The national financial investment fund prospectus establishes the NAV applicable to subscriptions and redemptions, which will normally be the date of the request or the next working day. It may furthermore establish a cut-off time beyond which the orders received are deemed to have been issued the next working day, with said orders therefore being subject to the NAV corresponding to said date. For these purposes, working days are deemed not to include, among others, those days when there is no market for assets comprising more than 5% of the fund equity.

In foreign CIS, the commercial report and the information documentation must both be taken into account to determine the applicable NAV.

Disputes regarding the NAV applied require consideration of all the above elements (type of CIS, type of assignment of liquidation value, cut-off time and working days).

The applicable NAV must be unknown to the investor and impossible to estimate with certainty at the moment when the order is issued.

- **Specific case of CIS transfer orders**

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 for therein, by general legislation regulating the subscription and redemption of investment fund units.

Withdrawing from a fund, even when reinvesting the resulting amount in another fund (which is treated differently for tax purposes), involves redemption of the units of the source fund and a subscription of the units of the target fund. This operation is therefore subject to all the general legislation on subscriptions and redemptions of collective investment schemes.

The aforementioned legislation indicates that in order to initiate the transfer, the unit-holder/shareholder must contact the target management company or distributor, with the latter required to send 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 will have a maximum period of two working days following receipt of the request in order to perform the verifications that it deems necessary. Both the transfer of cash and transfer by the source company to the target company

of all the financial and tax information necessary for the transfer must be performed as from the third business day following receipt of the request.

Similarly, both the deadlines established for setting the NAV applicable to transfer operations and the period set out for settlement of the operations will be governed by the provisions in the prospectus of each fund for subscriptions and redemptions.

CIS transfers are performed through the National Electronic Clearing System (Spanish acronym: 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 aspect, we must highlight that most of the complaints that are received questioning the NAV applied refer to the time of a transfer between CIS, which involve more than one entity. This may cause the transfer to be delayed.

Similarly, it is interesting to highlight that, the Complaints Service typically requests pleadings from both entities that have participated in the transfer either as respondent entity or as the entity involved in the transfer (whether source or target entity).

It may also be the case that, during the processing of the proceedings and after requesting information from the two entities participating in the transfer, it is noted that the entity responsible for the bad practice may not be the respondent entity, but rather the other entity involved. If this is the case, the Complaints Service sends a reasoned notification to the latter in accordance with Rule Twelve of Circular 7/2013[90], informing it that objective data has come to light that lead to conclude, at least initially, that the entity may have incurred in bad practice with regard to the transfer subject to the complaint and that, consequently, a reasoned notice is served that said entity will be considered the respondent entity in the final report issued on the complaint in question.

If the target entity completes the transfer order incorrectly, and because of those faults in completion, the source entity rejects the order, this would in general be considered malpractice by the target entity. Furthermore, in such cases the target entity should promptly re-send the corrected order.

Likewise, entities must appropriately and without delay provide information as to incidents in the processing of transfer orders that would prevent them from being executed.

CRITERION. The transfer between investment funds is subject to the procedure and periods set out in the regulations. The target entity receives the duly completed transfer request, and has one working day to send it to the source entity. The target

[90] CNMV Circular 7/2013, of 25 September, regulating the resolution procedure for claims and complaints against companies which provide investment services and for addressing enquiries in the field of the securities market.

entity performs the checks required within a period of two working days of receipt, and transfers the cash and the financial and tax information required from the third working day onwards.

The NAV applicable to the transfer and the liquidation period is established in the regulatory terms and conditions and in the section of the prospectus for each fund regarding subscriptions and redemptions.

The Complaints Service in general requests arguments from both entities involved in the transfer. If this reveals that the perpetrator of the malpractice was not the entity claimed, but could have been the other entity involved, a reasoned notice will be served on the latter that in the final report it will be deemed subject to the claim.

Unjustified delays by entities in processing the transfer, absence of or delay in communication to the investor of the incidents, or incorrect completion of the transfer request by the target entity would, among others, be taken into consideration in general.

- **Change of distributor**

With regard to this issue, it is important to distinguish between the transfer of units or shares between CIS and a change in distributor. In the latter case, it should be noted that most foreign CIS marketed in Spain take the form of a company and therefore investing involves acquiring shares that must be deposited in a securities account. Selling the shares through another intermediary requires transferring shares to this other distributor, without altering the investment.

It is also important to highlight that, although Spanish legislation does not establish any specific deadline before which the operation relating to foreign CIS must be performed, there are conduct of business rules for entities that provide investment services, which must act with diligence and transparency in the interests of their clients, protecting their interests as if they were their own, which would require the transfer to be performed in a reasonable period.

CRITERION. The change of a distributor of a foreign CIS with corporate form (in other words, the shares are deposited in the securities account opened at another intermediary) would need to be performed within a reasonable period, in accordance with the duty of the entities to behave in a diligent and transparent manner in the interest of the clients.

- **Errors committed by entities when executing orders on behalf of their clients**

As indicated above, 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. They must also allocate the necessary time to each client and pay attention to their complaints and claims and quickly and effectively correct any error that may have taken place.

CRITERION. Entities must control and organise their resources in a responsible manner so as to avoid errors and adopt the necessary measures and employ

appropriate resources in order to efficiently perform their activity, dedicate the required time to each client, pay attention to their complaints and grievances, and swiftly and effectively rectify any error that might have occurred.

- **Incidents on processing orders electronically**

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[91]. In addition, there may be special situations, such as the existence of problems with the entity's systems that prevent the correct processing of an order.

Incidents in the systems of the entity may affect operations regarding one or more CIS, Internet access to which might not be available for a period of time.

In the event of such an incident in the systems of the entity that would prevent the proper processing of remote electronic orders, incorrect action could be deemed to have occurred if the entity did not provide the client with alternative means to process orders, or did not accredit that it resolved the incident of which it was aware sufficiently in advance.

CRITERION. The provision of investment services by remote electronic means requires access to appropriate resources to guarantee the security, confidentiality, reliability and capacity of the service provided.

In the event of incidents in the systems of the entity that would prevent the proper processing of a remote electronic order, it could be concluded that the entity acted incorrectly if it did not provide the client with alternative means to process the orders or did not accredit sufficiently swift resolution of the incident.

- **Failure to provide evidence of an order supporting the transaction or failure to execute with instructions from the client**

As indicated in the section on securities orders, on some occasions, entities that provide investment services execute transactions on behalf of the clients without having an order supporting said execution or, on the contrary, transactions are not executed even though the client placed specific instructions in this regard.

A failure to execute operations requires consideration of whether it was accredited that the order was given. If formalisation of the order was not accredited, it could not be concluded that the entity acted improperly in not performing the operation. If it is accredited that the order was formalised and not executed, consideration would be given in general to any incidents that might have occurred in its execution, and the speed with which the entity informed the investor of said incidents.

On some occasions, investors give specific instructions as to the execution of their order. Although in general entities must follow said instructions, there are reasons preventing them from being performed on some occasions. This would apply, for

[91] 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.

example, in the case of non-execution of an order to redeem a number of units in an investment fund that pledged to guarantee a loan, even if the purpose were to subscribe new units in another fund to replace the previous guarantee.

In this regard, to have access to the pledged securities, this would require prior lifting of the pledge in accordance with the provisions of the clauses of the loan and prior extinction of the cause of the pledge, i.e., cancellation of the guarantee that gave rise to it. Furthermore, some loan agreements establish that the validity of the pledge lasts until the guaranteed obligations expire, and the right to redemption of the units is therefore pledged in favour of the entity, in the event that the fund is dissolved.

As a result, the drawdown order, even if it contained specific instructions to subscribe other units to replace the previous guarantee, could not be accepted unless the guaranteed obligations had expired, and this was possible in accordance with the clauses of the guaranteed loan agreement.

Lastly, the execution of operations on behalf of clients, without having a prior order formalised by a person entitled for this purpose, would constitute malpractice by the entity.

CRITERION. Failure to execute the operations requires consideration of whether it has been accredited that the order was given, and if it was accredited but not executed, the speed with which the entity informed the investor of the incident in the execution thereof.

In the event of a failure to follow specific instructions by clients, it must be considered that there are reasons why the instructions cannot be implemented (for example, pledging of the securities).

The execution of operations by the entity on behalf of its clients without having a prior order formalised by the person entitled for this purpose would constitute malpractice.

6. FEES

6.1. Securities

- Prior information on fees

Entities that provide investment services are legally authorised to freely set maximum rates for fees or expenses charged to their clients for the services that, having been accepted or definitively requested by the client, are effectively provided. A prerequisite for application of the fees is that the prospectus of maximum fees applicable to services and transactions [92] must be sent to the CNMV and published.

Entities must provide retail clients with the information provided for by law sufficiently in advance of providing the service in question. Among other aspects, this information contains the full price the client must pay, including all fees, commissions, costs and associated expenses[93].

Similarly, the provision of services of custody and administration of financial instruments requires the use of a standard contract[94].

The standard contract must establish in a manner that is clear, specific and easily understandable for retail investors the items, frequency and amounts of the remuneration when they are lower than those established in the fee prospectus. Other- wise, said prospectus will be delivered and the acknowledgement of receipt of the client will be kept[95].

In addition, entities must inform clients of any modification to the rates of fees and expenses applicable to the established contractual relationship regulated within the general content of the standard contracts.

In the event that the rates are modified upwards, the client must be previously informed and given a minimum period of one month or, as the case may be, any longer notice period agreed by the parties or which the entity has undertaken to respect, to amend or cancel the contractual relationship. During this period, the old rates will be applicable rather than the new rates.

[92] Article 71 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, and Article 3 of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on fees and standard contracts.
[93] Articles 62 and 66 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services.
[94] 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 companies and other entities that provide investment services, on fees and standard contracts.
[95] Rule Seven, paragraph 1(e) of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

In the event of a downward change, the client will also be informed without prejudice to its immediate application.

The information on the rate 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[96].

In this regard, the legislation does not require that this modification should be notified 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.

The entity must prove that it provided the client with information about the applicable rates, by providing evidence of submission of the fee prospectus (or the lower rates occasionally agreed between the parties) at the time the contract was entered into or, in the event of any modification subsequent to the start of the contractual relationship, by providing evidence that the information on said change was sub- mitted to the client. In this regard, the public availability of the current fee prospectuses and notifications to the CNMV at all the entities' offices and representations and on its website[97] is not sufficient to consider the entity's obligation to inform the client as fulfilled. Nor may this be considered a valid method or alternative to the legal obligations that entities have to inform their clients of fees individually, expressly and in advance, as required by current legislation.

In this regard, the conduct of the entities is considered incorrect in the cases in which:

- The entity does not submit evidence that it had provided the client with information about the fees applicable in the aforementioned terms.

- The entity submits documentation that is not sufficient to provide evidence that the client was informed of the increase in the rates; for example, a prospectus of the new rates applicable with no evidence that it has been sent to the client.

- The entity provides a copy of computer images showing communications with the client's name, through various channels, over a period of time, although it is not possible to know the content of the communications or if they were sent to the client at the correct time.

[96] Article 62 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services, and Rule Seven, paragraph 1(e) of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts. Prior to entry into force of this Circular, legislation indicated that clients should be informed of an amendment to the rates of applicable fees and expenses and that clients would have two months to request an amendment or termination of contract without the new rates being applied during said period and that the rate that was clearly beneficial for the client should be immediately applied.

[97] Article 9 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, on fees and standard contracts.

In contrast, the conduct of the entities is considered correct in the following cases:

- When the entity provides evidence that it had provided information to the client on modifications to rates applicable to certain transactions by means of a letter sent to the complainant or through a highlighted and explicit mention in a position statement.

- In the absence of a subsequent modification, the entity provides evidence that it had provided the client with information on the applicable rates through the signed securities custody or administration contract or any other document.

With reference to the content of the communication, for the purpose of adequately informing the client, the communication should indicate the transactions that have undergone modification – at least the most usual ones – and, preferably, their amounts (those current to date and the new rate). It is mandatory according to current legislation to inform the client about his/her right of separation in the event of disagreement with the proposed modifications and any costs that may result should said separation be exercised, which would correspond with the rates still in force.

Bad practice is noted when the content of the communication does not contain information on the client's right of separation in the event of disagreement with the proposed modifications or about any costs that might arise on exercising said right.

Furthermore, if the communication of an increase in rates sent to the client establishes a date for entry into force and the prospectus with said rate increase is registered with the CNMV after the communicated date, the entity would have to wait until the registration date of the prospectus in order to apply the new rates. In this regard, one of the prerequisites for the application of the new rates is, precisely, their submission to the CNMV[98].

When a part of the full price must be paid in a currency other than the euro, entities are free to set the exchange rate to be applied to foreign exchange operations, i.e., exchange rates are freely decided and may change at any time. Credit institutions and foreign exchange bureaux may apply exchange rates that they agree with their clients in their transactions, without prejudice to the obligation of each entity to publish the minimum purchase rate and maximum sale rate or, as the case may be, the single rates that must be applied for transactions lower than 3,000 euros. However, the entity receiving the order must inform its client prior to executing its instructions about the currency in question and the exchange value and applicable costs[99].

Entities must therefore inform 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.

[98] Article 3 of Order EHA/1665/2010, of 11 July, 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.
[99] Articles 62 and 66 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities that provide investment services.

CRITERION. Fulfilment of the obligation to inform the client of the applicable fees prior to performing an operation may be accredited by entities by means of the client's confirmation of receipt of the fee prospectus or of any lower fees that might on some occasions be agreed, of by the information sent to the client as to the fee modification if this occurred.

Notifications of upward modifications must, among other matters, inform the client of the right of separation in the event of disagreement, and the costs of exercising this right. If the date stated was prior to the date of registration of the new fee prospectus with the CNMV, the entity will have to wait until the latter date before it begins to apply the new fees.

Likewise, entities must inform their clients prior to performing an operation that would involve a foreign currency exchange as to the rate of exchange and the applicable costs, or otherwise the manner in which this would be determined, and if the exchange rate applied is not the market rate, the margin that would be applied to said rate.

- **Maximum amount and fee items**

Entities may not charge clients fees or expenses that are higher than those set in their rates, apply more stringent conditions or charge expenses that were not provided for, or for items not mentioned in their rates[100].

The rates or fees established in the prospectus are, at any event, maximum rates and the actual fees may therefore be lower. Consequently, if the entity informs of the application of a lower amount to the client, it must adjust the amount charged to the information that has been provided.

CRITERION. Fees and expenses charged must be set out in the fee prospectus, and may not exceed the amounts established in said prospectus. If the entity announces the application of a lower amount for a specific service, this will also need to be respected.

- **Payment of outstanding expenses and fees before executing an order**

As already indicated, entities may condition the execution of a client order on the client providing the funds necessary to meet any fees and expenses arising from said order.

In this regard, by way of example, the failure to execute a securities transfer order would be considered justified on the part of the entity if the complainant did not have sufficient balance in the associated account to meet the outstanding sums for fees and expenses.

CRITERION. Execution of an order may be made dependent on the client providing the funds required to cover the fees and expenses involved in processing it.

[100] Article 3(2) of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on fees and standard contracts.

- **Incorrect or insufficient information in the statements on fee charges**

Entities that provide investment services must maintain their clients appropriately informed at all times[101]. In this regard, clients must be properly informed as to the fees charged by the entity for each of the services provided.

CRITERION. Excerpts regarding fees and expenses must be clear in terms of the concepts charged, and must correspond to the amounts actually charged.

- **Types of fees**

  ✓ **Securities custody and administration fees. Accrual of the fee**

The custody and administration fee applies to all securities deposited at the entity, including sovereign debt, with the entity being entitled to waive collection of this fee from its clients with regard to said financial instruments.

Entities that provide the service of custody and administration of financial instruments must set out the applicable rates in their prospectuses with a series of requirements, such that for billing periods shorter than the agreed ordinary settlement period, a part proportional to the number of calendar days during which the service is provided will be applied. This is without prejudice to what the parties may agree with regard to their accrual and settlement in the corresponding contract[102].

Consequently, it is considered incorrect conduct for the entity to charge the custody fee for transferred securities for the entire period without adjusting the fee to the period in which said custody service was provided and for the entity to charge a full quarter when the product held in custody is redeemed prior to the end of the quarter.

CRITERION. In the event of circumstances that would mean that the service will not be provided for the full ordinary period (for example, because of a transfer of securities or amortisation), the proportional part applicable to the number of calendar days during which the service was performed will be applied. The above is established without prejudice to agreements between parties as regards accrual and settlement in the contract.

  ✓ **Securities custody and administration fees. Charges in the case of securities that are delisted and in liquidation**

There are frequent complaints as a result of the delisting of securities deposited in the respondent entity.

In these cases, the CNMV's Complaints Service understands that, in general, 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.

[101] Article 209(1) of the recast text of the Securities Market Act approved by Royal Legislative Decree 4/2015, of 23 October, and previously Article 79 bis(1) of Securities Market Act 24/1988, of 28 July.
[102] Rule Four, paragraph 2(a) of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

In this regard, provision of the custody service by the entity would not cease, in principle, as a consequence of the deposited securities no longer paying a particular remuneration to the holders or the fact that they are no longer listed on any market.

However, the CNMV's Complaints Service considers that it is good practice for the depository not to charge administration fees for the securities when the corresponding issuer is delisted – without liquidity – and, furthermore, its securities are unproductive, particularly in those cases in which no procedure is applicable through which the client may de-register the shares from his/her securities account. See the section on "*Delisted shares: waiver*" under the heading of "*Subsequent information*".

CRITERION. The Complaints Service considers it to be good practice that the entity does not pass on custody commissions in the event that the securities deposited are delisted and unproductive.

✓ Fees for the provision of advisory services

Entities that provide investment advisory services will establish rates depending on the amount of the assets under advice, the increase in their value or both items. An express indication will need to be given as to whether the two fees are complementary or exclusive. If this is not indicated, it will be understood that they are exclusive, with whichever is more beneficial for the client being taken as the maximum[103].

On some occasions, complainants indicate their disagreement with the fact that fees are charged for the provision of the advisory service when the portfolio under advice has changed very little, without producing any gains. In such cases, recourse is needed to the investment advisory service contract to check whether it explicitly and clearly states the charging of fees for the advisory service applied to the average effective value of the portfolio under advice and not on any possible positive gains.

CRITERION. The fees charged for providing an investment advisory service are established by entities in accordance with the amount of assets under advice or the appreciation of their value, or both, and it must be clearly stated whether said fees are complementary or exclusive.

✓ Fees for the provision of portfolio management services. Statements

Entities that provide portfolio management services must provide each client, on a durable medium, with a periodic statement of the portfolio management activities carried out on behalf of the client, except when said statement is provided by another person. In the case of retail clients, the statement must include the total amount of the fees and expenses accrued over the period to which the information refers, breaking down at least the total of the management fees and the total expenses associated with execution of the service, including, where necessary, a statement indicating that a more detailed breakdown may be provided at the client's request[104].

[103] Rule Four, paragraph 3(a) of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.
[104] Article 69 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities providing investment service.

Similarly, provision of portfolio management services requires the use of a standard contract[105], which must specify the medium and the frequency of said statement[106].

It is considered that the client has been informed of the fees for portfolio management, if this circumstance is recorded in the information statement.

CRITERION. Information as to the fees charged to retail clients will be included in the periodic information statements on portfolio management, and will at least detail all the management fees and total expenses associated with execution.

✓ Securities transfer fees. Abusive nature.

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, there could be a breach of the rights recognised in favour of consumers by the regulations governing Consumers and Users.

A transfer fee that is too high might be an obstacle to the investor's right to terminate a service agreement and it might even be identified as an abusive clause, although its hypothetical abusive nature can only be decreed by an ordinary court of justice and not by the CNMV.

Therefore, the transfer fee may 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.

Similarly, the CNMV's annual report on investor complaints highlighted the need for proportionality of the fees for security transfers. In this regard, based on the information obtained from the complaints, as well as the conclusions drawn from an analysis of the fee rates contained in the fixed part of the prospectuses indicating the entities' fees, the CNMV modified, in late 2016, the regulations governing the rate applicable to securities transfers[107].

In this regard, the previous regulation established a maximum rate for each class of transferred security expressed in monetary terms, while the new regulation establishes that the rate would be based on a percentage of the amount of the transferred securities, together with a maximum amount in euros and without the possibility of establishing a minimum amount. If the transferred securities are equity, the basis for calculation will be the effective value thereof on the date on which the transfer is performed and, if they are fixed-income securities, the nominal value[108].

This modification is thus aimed at achieving a reasonable application of the principle of proportionality in the interest of investor protection and proper functioning of the market, but without undermining the freedom to set rates.

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[105] Article 5, paragraph 2(a) of Order EHA/1665/2010, of 11 June, implementing Articles 71 and 76 of Royal Decree 217/2008, of 15 February, on fees and standard contracts.
[106] Rule Nine, paragraph 3 of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.
[107] CNMV Circular 3/2016, of 20 April, amending Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.
[108] Rule Four, paragraph 2(e) of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

CRITERION. The transfer fee must never have a penalty and/or deterrent function, as its purpose must only be to provide proportional remuneration for the service provided by the investment firm.

It should in this regard be stressed that the regulatory standard governing the fee applicable to the transfer of securities was modified. Rather than a maximum fee for each class of security transferred, stated in monetary terms, the basis for calculation was changed to a percentage of the amount of the securities transferred, accompanied by a maximum amount in euros, without the option of establishing a minimum amount. In the case of transfers of variable income securities, the basis for the calculation would be the effective value of the securities on the date when the transfer is performed, and in the case of fixed income, the par value.

- **Associated account**

In accordance with applicable legislation in this regard, the item of custody and administration of financial instruments contained in the fee prospectuses will include the maintenance of the securities account, together with the maintenance of the operational cash account in the event that this is exclusively linked to the securities account[109].

Consequently, when money accounts (current accounts, savings accounts, etc.) are opened or maintained with the sole aim of supporting the movements in the securities accounts – providing that in practice these are only movements relating to securities, i.e., that these are merely operational accounts that are ancillary to a main product which is an investment product – investors must not bear any additional cost for opening and maintaining these money accounts as said costs would be included in the fees charged for provision of the financial instruments custody and administration service.

However, if not all the movements of the cash account are related to the securities account and the cash account is used for purposes other than supporting the investments in securities, the aforementioned exception would not apply. Consequently, deciding on whether the fees applied to the cash account are correct or not corresponds to the Bank of Spain as the competent authority for this issue. As a result, entities would be guilty of malpractice if they charged their clients fees for maintaining a current account associated with the securities account, if the sole purpose of the current account is to support investments in securities.

CRITERION. The fees to be charged for the securities custody and administration service include maintenance of the instrumental cash account, provided that this is solely tied to the securities account, and hence does not include any movements unconnected with securities operations.

- **Fees for intermediation operations on equity markets**

The first aspect that must be taken into consideration in this type of fee is that it is standard practice that for such operations the entity should include in its the prospectus two types of fee: firstly a percentage applied to the cash value of the operation, and secondly a fixed fee stated in euros, to be applied to all those

[109] Rule Four, paragraph 2(b) of CNMV Circular 7/2011, of 12 December, on the fee prospectus and the content of standard contracts.

operations where the percentage of the effective value involved in the operation is no greater than said fixed or minimum fee.
As a result, if as a consequence of the type of order given by the client the order is executed in several tranches, it is fairly common for the entity providing investment services to charge fees for each tranche.
This is not particularly significant in those cases where the percentage fee calculated on the basis of the effective value of each of the charges would result in an amount greater than the fixed or minimum fee established by the entity in its prospectus.
However, it would be relevant where, as a consequence of the execution of the overall order in several tranches, the percentage calculated on the basis of the effective value of each of the tranches is lower than the minimum fee established by the entity, since in such cases the fee that would ultimately be payable by the client for the execution of their order (the amount of the fixed fee, charged once for each tranche into which the order is divided) could ultimately be significantly higher than the amount that would have been paid if the order had been executed in one single tranche (a percentage of the total effective value or, where applicable, one single fixed fee).
This Complaints Service therefore views as good practice on the part of entities that, in those cases where the order given by the client is executed in several tranches, the fee ultimately applied in this regard is no greater than that which would have applied if the order had been executed in one single tranche.

CRITERION. It is considered good practice that the fee charged by entities to their clients for intermediation operations on equity markets should be the same, irrespective of whether the order is executed in one or several tranches.

6.2. Investment funds

According to current legislation, management companies and depositories may receive management and deposit fees, respectively, from the Funds. Furthermore, management companies may receive subscription and redemption fees from unit-holders. Similarly, subscription and redemption discounts may be established in favour of the Funds themselves. Said fees, which will be set as a percentage of the Fund's assets or yield, or a combination of both variables or, where appropriate, a percentage of the net asset value of the unit, may not exceed the limits that have been set in the regulations as a guarantee of the interests of the unit-holders and according to the nature of the Fund.

Furthermore, different fees may be applied to the different classes of units issued by one single Fund. Nonetheless, the same management and depository fees will be applied to all the units of the same class.

The prospectus and the key investor information document must contain the method of calculation and the maximum limit of the fees, the fees effectively charged and the beneficiary of the fees[110].

[110] Article 8 as worded by Number Four of the Sole Article of Law 31/2011, of 4 October, amending Law 35/2003, of 4 November, on Collective Investment Schemes (BOE – Official Gazette of the State – of 5 October). Entry into force: 6 October 2011.

Consequently, any information that is included in any other document must match the conditions and characteristics established in the fund's prospectus.

CRITERION. Information as to the fees resulting from investment funds is set out in the prospectus and the key investor information document, and the information contained in any other additional documentation must correspond to this.

- **Types of fees and maximum percentages**

✓ **Subscription and redemption fees**

These are the fees charged by the fund's management company to each unit-holder for investing or disinvesting in the fund. They are calculated as a percentage of the invested or disinvested capital, reducing the amount invested in the case of subscription or the disinvested capital at the time of redemption. The redemption fee sometimes varies depending on the period in which the units have been held in the fund. Both fees are optional and, therefore, the terms established by the fund in its prospectus must be followed[111].

In financial funds, neither the subscription and redemption fees nor the discounts in favour of the fund that are applied in subscriptions and redemptions, nor the sum of both may be greater than 5% of the net asset value of the units.

Meanwhile, in real estate funds the subscription and redemption fees may be no greater than 5% of the liquidation value of the unit, respectively.

CRITERION. Fees charged for subscription and/or redemption by the company managing the investment fund units may be established in the information prospectus, and if so established, there are limits on the maximum percentage that they may represent of the liquidation value of the units.

✓ **Management fees**

The management fee in investment funds will be established based on the assets, the yield or both variables[112]. In general, management fees that exceed the following limits in annual terms may not be charged:

- When the fee is calculated solely on the basis of the fund's assets, in annual terms it may not exceed 2.25% of the assets in financial funds; in real estate funds, this limit stands at 4%. This fee is generally deducted daily from the fund's net asset value.

- When the fee is only calculated on the basis of the results, it may not be greater, in annual terms, than 18% of the results in financial funds. In real estate funds, the fee may not be greater than 10% of the results.

[111] Article 5 of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

[112] Article 5(3) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

- When both variables are used, the limits will be 1.35% of assets and 9% of results in financial funds, while in real estate funds, the limits will be 1.5% of assets and 5% of results.

CRITERION. The management fees to be received by the management company are established in accordance with the fund's assets, yields, or both variables, and in each of these cases, there are limits on the maximum percentage that this fee may amount to yearly.

✓ **Deposit fees**

This is a fee charged by the fund's depositories for custody and administration of the securities that form part of its portfolio. It is accrued on a daily basis and is implicit, i.e., it is deducted from the net asset value. This commission may not exceed 0.2% per year of the fund assets.

CRITERION. The deposit fee remunerates the depository for custody and administration of the securities that belong to the fund portfolio, with limits applied to the maximum percentage that this fee may amount to yearly.

✓ **Other expenses**

Other expenses that must be borne by investment funds must be expressly set out in the prospectus. In any event, such expenses must match services effectively provided to the fund and which are essential for normal performance of its activity. No may they lead to additional costs for services inherent to the work of its CIS management company or its depository, as these are already remunerated by their respective fees.

CRITERION. Expenses other than those specifically mentioned in this subsection must, if they are to be applied, be set out in the information prospectus, correspond to essential services that are actually provided, and not be inherent to tasks for which the CIS Management Company and the Depository have already received remuneration.

- **Redemption fees: lack of information**

As indicated in the section on prior information, the subscribers of investment funds must receive, when making their first subscription of the fund, a key investor information document (KIID), which must include the method of calculation and the maximum limit of the fund's fees.

In this regard, there are frequent complaints in which unit-holders assert that they are not informed of the fund's fees and claim a reimbursement of the redemption fee charged.

On other occasions, complainants indicated that they were informed that the investment funds subscribed by them were exempt from certain fees.

In order to provide proof that unit-holders were duly informed of the applicable redemption fee and the exemptions, they typically submit the key investor information document in force on the date when the fund was subscribed, duly

signed. This document contains information about the redemption fee that could be established in this document as a maximum fee, and refer to the full prospectus to obtain detailed information as to those cases in which said fee would be reduced or would not be applied (for example, because of the age of the units).

As a result, the information set out in the key investor information document and in the full prospectus would, in principle, determine the applicable redemption fee and the exemptions from this. However, consideration must also be given as to whether modifications have been made to the redemption fee after subscription by the unit-holders and prior to the moment of redemption, such that a fee other than that initially agreed would be applicable.

Bearing in mind the information set out in the above paragraphs, the fee applicable at the moment of redemption will be determined, and this must coincide with that ultimately charged to the unit-holder by the entity.

CRITERION. Presentation by the entity to the unit-holder of the key investor information document, duly signed, prior to subscription, is in principle sufficient accreditation that the unit-holder was aware of the fees and expenses to be charged in connection with the investment fund acquired. The key investor information document could refer to the full fund prospectus to expand on the information.

The redemption fee will be determined by not only taking into account the information referred to in the above paragraph, but also any modifications that might have been applied to the fee.

- **Redemption fees on switching funds**

Complaints arise on making a transfer between investment funds in which complainants express their disagreement with the redemption fee charged by the source entity after making an order with the target entity to transfer their investment to another fund of the latter.

In this regard, it must be remembered that a transfer of an investment fund, even when it has special tax treatment, involves a final redemption in the source fund and subscription in the target fund. Both redemption and subscription fees may therefore be applied.

In this regard, it should be recalled that the fund's prospectus must include all the applicable fees, including redemption fees. Consequently, in response to complaints of this nature, the first thing to be done is to verify whether the source entity, at the time of subscription of the fund by the unit-holder, complied with the information obligations established in the legislation, i.e., whether it submitted the KIID and the latest published half-yearly report, documentation which allows the investor to know about the redemption fees that would be applied in the event of a sale or transfer of his/her fund.

However, based on the contents fund prospectus in force at the time of subscription, exemptions to the redemption fee could be established if the redemption took place on specific dates established in the prospectus (liquidity windows)[113].

[113] The dates laid down in the fund's prospectus in which unit-holders may redeem their investments without paying a redemption fee are referred to as liquidity windows.

In those cases where, even though the entity provides a copy of the KIID, said document is not signed by the complainant, there is therefore no evidence that the entity had submitted this documentation to its client and it would not have acted correctly.

Meanwhile, if it is accredited that the unit-holder ordered, through the target entity, the transfer of the investment fund on a date other than those established as the liquidity window in the fund prospectus, that the prospectus established a fee for redemption outside said window, that said fee would correspond to that actually charged by the source entity, and that the source entity provided information as to said fee on the terms indicated above, the conclusion drawn would be that it had acted correctly.

As regards the target entity, it would be obliged to inform the unit-holder of newly arising matters, in other words those arising as a result of the transfer itself (for example, the foreign currency exchange, if the source fund is denominated in a foreign currency).

CRITERION. Disagreement with the redemption fee applied by the source entity in the transfer between investment funds, if said fee was not modified after subscription of the fund, requires consideration of whether there is accreditation that, prior to subscription, the source entity fulfilled the information requirements established in the regulations.

As regards the target entity, it would be obliged to inform the unit-holder of newly arising matters, in other words those arising as a result of the transfer itself.

- **Fee following essential modification of the prospectus: right of separation**

As already mentioned, when there are essential modifications to an investment fund its management regulations or, where applicable, the prospectus or the key investor information document, current legislation establishes the requirement for the management company to set a period within which the unit-holders may redeem the units without any fee for this item in exercise of the right of voluntary separation[114]. This is due to the fact that the purpose of this right of separation is not in itself to act as a provider of liquidity for unit-holders, but to allow those unit-holders who disagree with certain conditions that are objectively different to those that existed when they acquired the units to opt to leave the fund at no cost.

Essential modifications may be the result of a substantial change in the investment policy or the results distribution policy, the replacement of the management company or of the depository, the delegation of management of the scheme's portfolio to another entity, a change in control of the management company or of the depository, the transformation, merger or demerger of the fund or compartment, the establishment or raising of fees, the establishment, raising or elimination of discounts in favour of the fund to be applied in subscriptions and redemptions, modifications to the frequency of calculation of the liquidation value; or transformation into a Collective Investment Scheme (CIS) by compartments, or into compartments of another CIS.

[114] Article 14(2) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

In this regard, unit-holders must be informed of essential modifications, giving them the right of separation, without deduction of the redemption fee or any charge, within 30 calendar days of notification. Accreditation of fulfilment of the obligation to inform unit-holders is provided by submitting the certification from the management body to the CNMV, enclosing a copy of the letter sent out to the unit-holders, whereby all such documentation is required prior to registration of the modification in the corresponding official registers.

The entry into force of said modifications will occur at the moment of registration of the modification to the management regulation or, where applicable, the updating of the explanatory prospectus and/or the key investor information document.

On some occasions, the unit-holder asserts that the entity has not informed them of the modifications or the right of separation that they would enjoy. However, over the course of the claims investigation it may be accredited that, in the event of a modification to fees, the fund management entity informed the unit-holder of these changes, stating the right of separation that was enjoyed (but not exercised), in addition to the new redemption fee. Upon expiry of the deadline for the right of separation, if this has not been exercised by the unit-holder, it is deemed that the modification has been accepted thereby.

CRITERION. Where there are essential modifications to the management regulation or, where applicable, the brochure or the key investor information document of an investment fund, the unit-holders will enjoy the right of separation, allowing them to reimburse their units without any fee whatsoever being charged in this regard. They may exercise this right within 30 calendar days of the notification which must be served on unit-holders in this regard.

Accreditation of fulfilment of the obligation to inform unit-holders is provided by presenting the CNMV with certification from the management body, enclosing a copy of the letter sent to the unit-holders, all of which documentation is required prior to registration of the modification in the corresponding official registers.

Exercising the right of association without the redemption fee requires that the unit-holder issue a redemption or transfer order by the deadline, and in the absence of said order, it would be deemed that the unit-holder accepts the modifications and maintains the investment.

- **Transfer in liquidity window: redemption fee**

As indicated above, a liquidity window is defined as the dates set out in the fund's prospectus during which unit-holders may redeem their investment without paying any redemption fee.

With regard to the application of redemption fees on transfers of funds with liquidity windows, the CNMV's Entity[115] Authorisation and Registration Department published guidelines which stated that, "In transfer orders in which the 'liquidity window' coincides with the day the order is received, or within the verification

[115] CNMV Communication about application of redemption fees in transfers of guaranteed funds with "liquidity windows" dated 16 October 2007.

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".

CRITERION. In transfer orders of funds for which the *"liquidity window"* coincides with the date when the order is received, or lies within the period for confirmation by the source manager, the redemption fee may not be collected, in accordance with the duty to execute orders on the best terms for the client.

- **Funds with different unit classes**

There are investment funds that have several classes of unit. The difference between them mainly lies in the minimum amount to be invested by the unit-holder and the amount of the fees that are applied (lower fees in the class that requires greater investment).

In these cases in which, as a result of the amount of the subscription order, the unit-holder may access the more advantageous class of the investment fund – as indicated, the higher the minimum investment the lower the fees – the management company shall, in the case of natural persons, acquire units of the more advantageous class.

In those cases in which, as a result of various circumstances, such as: new investments of the unit-holder in the fund, transformation of a single-tranche fund into another fund with two unit classes, merger of funds, etc., it is considered good practice for the entity to make an automatic transfer of the units of its client to the most beneficial class, with the obligation to inform the investor.

In this regard, on 15 March 2012, the CNMV's Directorate-General of Entities published a communication on the possibility of establishing procedures for automated reclassification of investment fund unit-holders between classes of units or other equivalent situations. Entities may therefore voluntarily establish systems for the automated reclassification of unit classes. It is in fact considered good practice for management companies to establish control procedures in order to periodically identify investors that meet the requirements to access unit classes that are more beneficial in terms of fees than those that they have subscribed and, as the case may be, reclassify the units.

However, the unit-holder must know a priori how the management company will act in response to a reclassification of his/her investment.

If a transfer of units to a target with several classes is performed, and although the minimum investment requirements are fulfilled for access to the more favourable class among those existing in the target fund, the target entity subscribes the less favourable, and having detected this situation on its own initiative, reclassifies the unit-holders to the more beneficial class, there could be a lack of information if the entity does not inform the clients of the said reclassification in advance.

A similar case occurs where the manager decides to create several classes of units in a fund, which have different minimum amounts required for the investment and as regards the amount of the fees, and although when the classes are created a unit-holder has an investment greater than the minimum required to access the more favourable class, the entity maintains said unit-holder in the less favourable one.

This type of modification - creating different classes of unit of the investment fund, in accordance with current legislation – Article 14 of the CIS Regulation and Rule Nine of CNMV Circular 2/2013 – does not need to be reported to the unit-holders on an individual basis. It is sufficient for the entity to publish a significant event at the time the modification takes place and to notify the unit-holders in the periodic information. Consequently, the unit-holder may not, on some occasions, detect a change in the fund until he/she receives the aforementioned periodic information.

Even though, in accordance with the aforementioned CNMV Communication dated 15 March 2012, it would be considered good practice for the respondent entity to have implemented some kind of procedure to identify the unit-holders which, as a result of their invested amount, would have been eligible to access this new and more advantageous class and to have automatically reclassified his/her units from the former class to the new class (after having informed them of this change), implementation of this good practice is optional as current legislation does not establish any provisions in this regard.

Consequently, in those situations in which the entity has not implemented the good practices recommended by the CNMV, the only way in which unit-holders would be able to access the more beneficial class would be to request the transfer from one class to the other, with the value date being the date on which the aforementioned transfer is executed.

Therefore, even though the entity did not follow the good practice as recommended by the CNMV, the Complaints Service would conclude by indicating that, in response to the request by the unit-holder to change the class of the complainant's units in the fund, the entity would act appropriately by ordering a transfer of his/her units from the former class to the new, more beneficial class (transfer of funds) as this would be the only manner to perform this type of operation if the entity had not implemented an automatic mechanism for reclassifying the units.

Nonetheless, once the final report is issued, the entities announce on some occasions that they accept the opinion and provide information and accreditation that the fees have been returned to the unit-holder.

In this regard, in those cases where the entity has not implemented the automated reclassification mechanism for fees, and requires a transfer order to the more beneficial class expressly issued by those unit-holders that fulfil the requirements for access to said class, the CNMV Complaints Service deems it to be a good practice that the entity should return the surplus fees involved in maintaining the more unfavourable class up until the moment when the order for transfer to the more favourable class is executed.

CRITERION. Investment funds may have several classes of unit, and to access the class with the lower fees, a greater investment is normally required.

If the unit-holder attains the minimum investment on the initial subscription, the entity should acquire units of the more beneficial class.

If the unit-holder subsequently attains the minimum investment, it would be appropriate for the entity to establish an automatic system to transfer the units to the more beneficial class, and it should inform the unit-holder of this circumstance. If the

entity has not implemented such a system, unit-holders would only have access to the more beneficial class by requesting a transfer from one class to another, with the operation having as its value date the day when the stated transfer is executed, it being considered good practice to return the fees charged up to that date.

- **Custody and administration fees for investment in funds**

Distributors of Spanish investment funds may charge the unit-holders that have subscribed units through them fees for their custody providing this is indicated in the CIS prospectus and the following requirements are met[116]:

a) The units are represented by means of certificates and appear in the register of unit-holders of the management company or the distributor through which they have been acquired on behalf of the unit-holders and, consequently, the distributor provides evidence of ownership of the units with regard to the investor.

b) The general requirements on fees and contracts for the provision of investment and ancillary services are met.

c) The distributor does not belong to the same group as the management company.

However, the above is not valid for foreign investment funds. In these cases, the distributor of foreign CIS may only charge the custody fee if it effectively provides this service. In the field of foreign CIS, it is understood that custody exists when the distributor keeps an individualised register of the CIS units, i.e., one which details the holders of the units which, on an aggregate basis, appear in the corresponding management company in the name of the distributor. This will occur when the distribution of the investment fund is carried out through omnibus accounts.

Said fee must be indicated in the fee prospectus of the respondent entity.

If the complainants expressed their disagreement with the custody fees charged by the marketing entity of foreign CIS, it would be ascertained whether the fees claimed were in line with the fee prospectus and that the complainants had been previously informed about their application through the contractual documentation, which sets out the applicable fees.

CRITERION. Custody and administration of investment fund units may determine the collection of fees by the distributor, provided that global accounts are used and the corresponding requirements are fulfilled.

- **Exchange rate applicable to CIS operations denominated in a currency other than the euro.**

As indicated in the fees for securities, in operations with CIS denominated in a currency[117] other than the euro, entities are likewise free to establish the exchange rate to be applied to foreign currency sale and purchase operations, in other words the exchange rates are freely determined and may be modified any time, with credit

[116] Article 5(14) of Royal Decree 1082/2012, of 13 July, approving the Implementing Regulation of Law 35/2003, of 4 November, on Collective Investment Schemes.

[117] It is usual, above all in foreign CIS, to find classes of holding and shares in a currency other than the euro.

entities and currency exchange establishments being entitled to apply in their operations any exchange rate they might agree with their clients, without prejudice to the obligation of the entity to publish the minimum buy and maximum sell rates or, where applicable, the only rates to be applied to operations involving less than €3,000.

As a result, for this type of operation entities may apply exchange rates other than those officially published.

Nonetheless, in accordance with standards of conduct[118], the entity receiving the order must inform its client, sufficiently in advance of the execution of the investment service provision contract, or provision of the service itself, if the latter is prior to the former, of the foreign currency in question, the corresponding value and the applicable costs.

Entities must therefore inform their clients in advance of the exchange rate and the applicable costs, or in default thereof, of the way in which this would be determined. This Complaints Service has likewise established the criterion that if the exchange rate applied is not the market rate, then the margin that would be applied to the market rate must be stated.

The exchange rate applied by entities is not, strictly-speaking, a fee, although it may constitute a surcharge applied to the market exchange rate for the operation to be performed.

CRITERION. Custody and administration of units in investment funds may determine the collection of fees by the distributor, provided that global accounts are used and the corresponding requirements are fulfilled.

[118] Articles 62 and 66 of Royal Decree 217/2008, of 15 February, on the legal regime of investment firms and other entities providing investment services. .

7. EXECUTION OF WILLS

7.1. Generic

Generally, following the death of a person probate proceedings are initiated consisting of a series of stages whereby the deceased's assets pass to his/her heirs.

Securities deposited in deposit and administration accounts in the name of the deceased or the units in investment funds make up part of the deceased's estate, but only that part of the financial instruments for which the deceased has full ownership.

Accordingly, the entity, both in the case that the securities custody and administration account or units of investment funds are exclusively owned by the deceased or are in the name of several owners, must, at the request of the deceased's heirs or of those parties that demonstrate a legitimate interest, issue the corresponding certificate of ownership, which, *inter alia*, shall record the identity of the owner or owners of the financial instruments.

Even when shared ownership of securities that appear in the accounts with more than one holder is assumed, the fact that financial instruments are in the name of several holders does not necessarily mean that their full ownership corresponds to each of them equally. It only means that the right to access the account in which these securities are deposited, with all the ancillary powers, corresponds to all of them up to the time of death, although on a joint or joint and several basis, as agreed in the contract opening the account.

In this regard, full ownership of said securities will be determined by the internal relationships between the different co-holders and, more specifically, the original ownership of the funds with which the financial instruments were acquired, although this issue must be proven in accordance with the law.

In short, even where there is an assumption, in the case of co-holders of the account, with regard to the shared ownership in equal parts between the different holders from one account of what is deposited there, said assumption admits evidence to the contrary.

Precisely for this reason, the aforementioned ownership certificates include all the securities owned by the deceased deposited in the corresponding entity whether on an individual basis or under shared ownership. The aim is that, once any doubts as to ownership of said instruments have been resolved, the assets to be included in the deceased's estate are determined, the heirs pay the corresponding inheritance tax and execution of the will begins. This process will culminate with the change of ownership of the securities in favour of the heirs, from which time they will obtain

ownership and the securities will be made available to them, either by awarding the securities as established in a public or private document of partition of the inheritance or maintaining them *pro indiviso* under co-ownership.

Having reached this point, it is necessary to indicate the following: only the legislation regulating the representation of securities by means of book entries[119] (listed securities) provides for the consequences that would result from the issuance of the aforementioned certificates. In this regard, it is worth mentioning that ownership certificates for securities entered in the account necessarily involves freezing the securities and no sale orders affecting said securities may be placed except in the case of transfers resulting from enforcement of judicial or administrative rulings.

In short, as the deposited financial instruments are frozen, there is a *de facto* blocking of the custody and administration account in which they are deposited. This is the case regardless of whether the account has one or several holders and, in the latter case, regardless of the manner of access agreed between the different holders when the account was opened.

With regard to the units in investment funds, although it is true that there are listed and non-listed funds – the former would be subject to the legislation indicated in the above paragraph for other listed securities – it is also true that in accordance with the sector legislation[120] applicable to them, the units of non-listed funds must be registered in the register of unit-holders of the management company in the name of the unit-holder or unit-holders, or in the unit-holder identifying register[121] held by the marketing entity.

CRITERION. Issuance by the entity of the legalisation certificates recording the securities held by the deceased, individually or jointly with other co-holders, gives rise to the freezing thereof, and consequently the blocking of the custody and administration account in which they were deposited.

This freezing will prevent any securities drawdown orders that might be issued by the heirs or co-holders from being processed, unless they are transfers that are the result of court or administrative execution orders. During the freezing, the heirs may only perform acts of maintenance, safekeeping and administration of any financial instruments that might form part of the inheritance.

The freezing order is lifted when the heirs provide all the documentation required to change ownership of the financial instruments, with said entity being required to verify, among other aspects, that the corresponding tax has been paid.

7.2. Specific

- Status of heir

[119] Royal Decree 878/2015, 2 October, on clearing, settlement and registry of negotiable securities represented in book-entry form, on the legal regime of central securities depositories and central counterparties and on transparency requirements of issuers of securities admitted to trading on an official secondary market.
[120] Law 35/2003, of 4 November, on Collective Investment Schemes.
[121] Law 16/2013, of 29 October, establishing certain environmental tax measures and adopting other tax and financial measures as from 1 January 2014.

Prior to initiating the procedure for awarding the inheritance, the heirs or legitimate interested parties must report the death of the deceased to the entity in which the securities or investment fund units are deposited, providing for this purpose the death certificate. The entity will then freeze the securities.

Immediately afterwards, evidence must be provided of the status of heir or legitimate interested party, submitting for this purpose 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 heirs in intestate proceedings.

CRITERION. Once the entity has been informed of the death, through presentation of the death certificate to freeze the securities, the heirs must accredit their status by means of the Certificate issued by the General Register of Last Wills and Testaments, and the notarised copy of the last will or declaration of intestate inheritance.

- **Effects of reporting the death.**

It is therefore important for the heirs or legitimate interested parties to report the death of the deceased to the entity as soon as possible. This notification will mean that the securities account or the investment fund units will be blocked, preventing holders of the account that have joint and several access from making use of the securities.

Consequently, there is no incorrect conduct from entities providing the securities to any other joint and several co-holders that might exist in the securities accounts of the deceased while they are unaware of the deceased's death. In contrast, once the death has been reported, investment firms will be required to prevent any sale of securities - or any other form of disposal – from that moment until the time the heirs submit the full documentation for processing the execution of the will and the change of ownership is carried out.

CRITERION. Notice served on the entity of the death of the holder of a securities account gives rise to the blocking of the securities deposited therein. Once notice of the death has been given, investment service companies must prevent any sale of securities - or any other form of disposal - from that moment up until presentation by the heirs of complete documentation to process the inheritance, with the change in ownership thereof then being conducted.

- **Right to request information**

Once the status of the heirs has been demonstrated, said heirs have the right to make specific requests for information, within certain deadlines, about the deceased's investments, and for these to be responded to by the entities. Therefore, a refusal to provide said information would constitute incorrect conduct.

However, if the requests for information are clearly disproportionate or unjustified, or if there are special circumstances that make it recommendable, the CNMV's Complaints Service accepts that the entity may object to providing said information.

As a general rule, the time limit to which this request should refer will be five years, a period coinciding with the legal obligation on entities to keep documentation on the operations performed.

CRITERION. Requests for information about the investments of the deceased will be addressed provided that they are submitted by the duly accredited heirs. Nonetheless, it may be justifiable not to respond to such requests if they go beyond the time limits, are presented in a clearly disproportionate and unjustified manner, or if special circumstances apply.

- **Dissolution of joint ownership of property**

Following the death of one of the spouses, the joint ownership of property governing the marriage is dissolved and will therefore have to be liquidated (Article 1,396 of the Civil Code). The *mortis causa* liquidation of the joint ownership of property can be recorded in a private document or public notarised instrument and will be executed by the surviving spouse and the other heirs. In this liquidation, a decision will be made on the financial instruments that become the private property of the surviving spouse and those that will pass on to the deceased's estate.

Thus, if no public or private document exists recording the liquidation of the joint ownership of property and acceptance, partition and awarding of inheritance, the conduct of the entity cannot be considered incorrect on refusing delivery of the requested securities until their ownership was clarified.

CRITERION. Death will give rise to the dissolution of the jointly held marital assets, which must then be liquidated by means of a public or private instrument executed by the surviving spouse and the remaining heirs.

- **Evidence of payment of inheritance tax**

Once the deceased's estate has been determined, the heirs must pay the corresponding inheritance tax. We must address at this point that financial intermediaries have subsidiary liability in *mortis causa* transfers of the payment of this tax[122]. It is therefore an essential requirement to provide evidence of having paid the corresponding tax to conclude the processing of the execution of the will.

Consequently, if no evidence is presented of settlement of the tax, the entity may refuse to continue with the processing of the inheritance.

CRITERION. The entity may require accreditation of the payment of inheritance tax to avoid the subsidiary liability that could attach to it. In the absence of said accreditation, the entity may refuse to process the inheritance.

- **Prior provisions: exceptions and requirements**

In the event that any of the heirs do not accept or disclaim the inheritance to avoid an unsettled estate, Article 1,005 of the Civil Code establishes that: *"Any interested parties that provide evidence of their interest in the heir accepting or disclaiming the*

[122] Article 8 of Act 29/1987, of 18 December, on Inheritance and Donation Tax, and Article 19 of Royal Decree 1629/1991, of 8 November, approving the Inheritance and Donation Tax Regulation.

inheritance may request a Notary Public to communicate to the heir that they have a period of 30 calendar days to unconditionally accept, on the condition of not paying creditors more than the value of the inheritance, or to disclaim the inheritance. The Notary Public shall indicate to said party that if they do not declare their choice by said deadline, the inheritance will be accepted unconditionally".

This act would therefore put an end to the unsettled inheritance and a community of heirs will be established.

Consequently, following acceptance of the inheritance, temporary joint ownership between all the heirs of the deceased is generated, which will be dissolved with the awarding, to each of them, of the specific assets. The heirs will therefore be joint owners of all of the deceased's assets without any specific partition corresponding to any of them. The community of heirs ceases with the partition and the abstract right that the heirs have over the community is transformed into a specific right over the corresponding assets that have been awarded to each of them.

In this regard, although an heir may not sell any of the assets making up the inheritance until they are expressly and formally awarded such assets, it is possible that the joint ownership system that is established following acceptance of the inheritance may sell all or part of the financial instruments making up the estate. In this case, the sale order must be signed by all the heirs of the deceased. In addition, the assets to which this order refers must be excluded from the inheritance partition instrument which, as the case may be, has been submitted to the financial institution. All of the above is without prejudice to the tax consequences that this may entail.

Another possibility of having access to part of the deceased's estate prior to the individualised award of the corresponding assets to the heirs would take place in the event that it was necessary to obtain cash in order to meet the burial or funeral expenses of the deceased or to pay inheritance tax. In this case, we would be dealing with the exceptions established by law.

In this regard, in some complaints, the following is indicated: "*For the payment of inheritance and donation tax, the taxpayer*[123]*may use the mechanism of the request for access to the assets of the inheritance, which consists of requesting from the financial intermediaries, insurance companies or brokers in the transfer of securities access to the deposits, guarantees, current accounts, insurance or securities recorded in the deceased's name in order to pay the inheritance tax. The tax is therefore paid with money from the inheritance and not paid using money of the successors themselves.*

In particular, this procedure is established in tax legislation – Article 80.3 of Royal Decree 1629/1991, of 8 November, approving the Inheritance and Donation Tax Regulation – such that the tax office that has performed the tax levies may authorise, at the request of the interested parties, within eight days following the day of the notification, the financial institutions to dispose of securities deposited in such

123 In the case of natural persons and mortis causa transfers, these are the successors, Article 5 of Law 29/1987, of 18 December, on Inheritance and Donations Tax.

institutions in the deceased's name, charged to the amount of said securities, or to the balance in favour of the deceased in accounts of any type, releasing the corresponding receipts in the name of the Public Treasury for the exact amount of the aforementioned tax levies".

Finally, there may be significant occurrences or events that affect the financial instruments subject to the inheritance that make it necessary for the heirs to adapt a decision within a deadline, whereby the consequence of not adopting such a decision could lead to an undesired investment. In these cases, the entity must comply with the order placed by the heirs, in what might be considered a simple act of provisional conservation and administration of the inheritance. The only requisite to be able to order such transactions is that the documents evidencing the ordering party's status of legitimate heir or heirs of the deceased have been submitted to the entity. In the event that the deceased's account is under co-ownership, the joint consent of the heir or heirs and of the surviving co-owner would also be required.

CRITERION. The community of assets established after acceptance of the inheritance may order the sale of securities belonging to the inheritance, provided that said order is signed by all the heirs, and that the financial instruments sold are excluded from any deed of division of inheritance that, where applicable, might have been handed to the financial entity, all the above without prejudice to the tax consequences of said operation.

The successors may draw on the financial instruments comprising the inheritance in order to cover the costs of the burial or funeral, or to pay the inheritance tax. In this regard, they may present a request to the entities to draw on the securities registered in the name of the deceased in order to pay the inheritance tax, which would then be paid with money from the inheritance, to avoid the need to settle the tax with the successors' own money.

If the financial instruments comprising the inheritance are affected by significant events or occurrences that require decisions to be taken within an urgent time period so as to avoid maintaining an undesired investment, the corresponding orders could be given by those who have accredited their status as heirs. In the event that the securities account of the deceased is subject to co-ownership, operations will require the joint consent of the heirs and the surviving co-holder.

- **Documentation necessary for the processing of the execution of the will**

In short, for each one of the heirs to be able to make use of the securities deposited in the deceased's accounts, after providing evidence of said status, the financial institution must be provided with a notarised instrument of partition of inheritance or a private partition document signed by all the heirs (for the purpose of changing the corresponding ownerships), together with the documents demonstrating that all the successors are up-to-date with payment of inheritance tax. Therefore, the entity may refuse to process the execution of the will with regard to the financial instruments owned by the deceased and deposited in the financial institution and, consequently, place sale or redemption orders until said documentation is presented and the corresponding ownership changed. Up to that time, the securities accounts or investment fund units will remain blocked, even if the request for access to the securities comes from a co-holder of a joint and several account or of an investment fund.

In addition, financial entities may not award the assets that are deposited if they do not receive the public or private distribution document accepted by all the heirs. If, despite not having said document or with said document not accepted by all the deceased's heirs, they distribute the assets, the entity would be considered to have acted incorrectly. This same criterion would apply in those cases where there are bequests

None of the heirs may be compelled to remain in a situation of undivided inheritance, and therefore if any of them objects to its distribution or they do not agree on how to carry it out, they may make use of the provisions of paragraph 2 of Article 1,057 of the Civil Code:

"There being no will, or no designated auditor/partitioner therein or with the position vacant, the Court Clerk or the Notary Public, at the request of the heirs and legatees that represent at least 50% of the estate, and summoning the other interested parties if their addresses are known, may appoint an auditor/partitioner, in accordance with the rules that the Law on Civil Procedure and on Notaries establishes for the designation of experts. The partition performed in this manner will require the approval of the Court Clerk or of the Notary Public unless there is express confirmation from all of the heirs and legatees".

CRITERION. The documentation required to perform the change of ownership includes the public deed of the division of inheritance or private documents of division, signed by all the heirs and legatees, in addition to proof that none of the successors has any outstanding inheritance tax payment. The distribution document must also be accepted by all the heirs.

- **Incidents that may arise in its processing**

It may sometimes be the case that, as a result of financial operations performed by the issuers of securities or by investment funds coinciding with the period for the execution of the will, certain errors arise in the procedure, such as:

- Greater number of shares to be distributed than those included on the certificates. If the company issuing the securities uses what is known as the scrip dividend system to remunerate its shareholders, the deceased could, while the inheritance is being processed, be assigned shares that were not included on the legalisation certificates issued by the depository entity, and which are therefore left outside the distribution among the successors.

- Mergers of funds. - If the inheritance distribution document records an investment fund that has been taken over by another, and as a result at the time of distribution there are no units corresponding to said fund, it would be ascertained that the acquiring fund was properly distributed among the heirs in the inheritance process.

- **Documentation analysis and change in ownership**

Following submission of the documentation, entities generally spend a period of time studying the documents with the aim of executing the will in order to verify whether it is complete or to request further documentation if it is incomplete or not in line with the law.

Once the financial institution has verified the documentation, it must change the ownership of the shares or units.

Prior to performing the change of ownership of financial instruments acquired *mortis causa*, the beneficiaries must have securities accounts open in their name with all holders awarded the assets covered by the inheritance - with shared ownership if the inheritance is maintained jointly, or individual ownership if it is distributed - in order for the securities awarded to be deposited in the accounts, which will either be at the same entity, or at another. In other words, there is nothing to prevent the shares awarded from being deposited in a securities account held at an entity other than that which performs the awarding, and the heir may issue an order for the transfer of the securities to the former entity where said party holds a securities account in his/her name, with the award then being performed and the securities transferred as one single act. Nonetheless, in the event that ownership of the target account does not coincide with that of the party awarded the securities, it would be correct for the entity to refuse to transfer the securities.

However, in the event that the securities acquired *mortis causa* are investment fund units, it should be pointed out, as a general rule, that the acquisition of units of this type of fund does not involve the obligation of having a securities account (holding a securities account would be necessary, however, in the event that the acquired securities are shares of an investment company, which is another collective investment structure) or a current account associated with the fund in the depository or distributor.

Nevertheless, even where it is not necessary to open a securities account in order to make use of the investment fund units, it is the case that most entities, as a result of banking operations, use standard form contracts or investment fund contracts, a practice which should be considered to be correct. However, in these cases, the entity must provide the client with clear and precise information on the procedures to be followed in order to achieve the intended purpose, in this case, the change of ownership of the shares by acquisition *mortis causa*.

In addition, if for operational reasons the entities request the opening of a current account associated with the investment fund, to the extent that these accounts were exclusively related to the operations of said fund or funds, the entity must not charge any maintenance fee for the account.

Finally, entities that provide investment services must ensure that the change of ownership takes place not only in the contracts or in the securities accounts, but also in the actual account linked to said contract or securities account. Only in cases where the entity has warned the heir of the need to open a linked cash account and the latter has refused to do so, would the entity be exempt from liability for not having modified said payment account.

CRITERION. Following analysis of the complete inheritance documentation by the entity, the change of ownership would be performed by depositing the financial instruments in the securities accounts opened by the awardees at the entity itself or at another, with shared ownership if the inheritance is awarded jointly, or individual ownership otherwise.

In addition to ordering the change of ownership to a securities account at the same entity, the awardee could issue an order for a transfer to a securities account at

another entity, the holder of which would need to be the awardee him/herself, and as a result execution of the order would entail a change of ownership and a transfer as one single act.

- **Time limit for processing**

Current legislation does not stipulate any specific deadline for performing the aforementioned process for executing a will, which will conclude with the change of ownership of the securities by the entities that provide investment services.

The criterion of the CNMV's Complaints Service is that all these processes must be performed swiftly. In this regard, speed in the execution of the processes for executing the wills is the result of diligent cooperation between the parties involved – namely, the heir or heirs and other legitimate interested parties (usufructuaries, legatees, etc.) and the entity. The former must provide all the pertinent documentation to carry out the procedures and the entity must properly perform all the procedures necessary to conclude the process, once it possesses the aforementioned documentation.

CRITERION. The regulations do not establish a specific time period for an inheritance to be processed by entities, although it must be performed promptly. A swift process will result from collaboration between the interested parties, by submitting the necessary documentation, and the entity, by promptly performing administrative procedures.

- **Change of ownership with regard to marketing**

In accordance with Article 661 of the Civil Code: "*The heirs succeed the deceased by the mere fact of his/her death in all his/her rights and obligations*". Therefore, once their status as heirs has been proven, they may file complaints with the financial entities of which the deceased was a client, objecting to the actions of the entity, for example, with regard to the marketing of the product at the time it was subscribed or acquired by the deceased, although with a time limit as the heir cannot expect the complaints process to scrutinise the relationship existing between the deceased and the entity. This time limit should be five years, the period for which entities are obliged to keep documentation on the operations performed.

In these cases, the conduct of the entity is analysed with regard to the original acquisition leading to the execution of the will by means of: the legal relationship that the deceased held with the entity (advisory service or simple execution), the type of product contracted (complex or non-complex) and, as the case may be, whether the product's suitability or appropriateness was analysed, in addition to whether, prior to the acquisition, the deceased received information on the product's features and risks.

On other occasions, complaints are lodged by the surviving co-holder of the accounts.

In contrast, in "*mortis causa*" acquisitions, financial entities are not required to obtain information on the appropriateness or suitability of the product inherited to the

characteristics of the acquiring heir or to offer information on its features and risks, given that in these cases this would represent a change of ownership and not a marketing of securities.

CRITERION. Compliance with the information obligations on entities prior to the acquisition of financial instruments by the deceased could be subject to a complaint by the heirs, provided that they can accredit their status as such. To this end, consideration would be given to the type of service provided and the type of product contracted, in order to determine whether suitability was assessed as appropriate, and whether adequate prior information was given as to the characteristics and risks of the product with regard to the deceased, although likewise subject to a time limit of five years.

However, the processing of the inheritance does not require the entity to assess the suitability of the product for the investment profile of the awardee, nor to provide prior information as to the product awarded, since this would involve a change of ownership, rather than the selling of securities.

- **Fees**

Finally, we must indicate that as noted in the section on fees, entities that provide investment services are free to set the fees or expenses charged for any service effectively provided.

As a prerequisite for application of the fees, entities must notify the CNMV and publish a prospectus of maximum fees applicable to all the usual transactions, which must be available to clients at all times so that if they make a request to consult it in the branch or online, they may do so immediately.

It should be made clear 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*".

The authority to analyse the correct or incorrect application of the first of these fees would be the Market Conduct and Complaints Department of the Bank of Spain (this would be a purely banking fee), while the second, provided the change in ownership relates to financial instruments, would be analysed by the CNMV's Complaints Service. In this regard, it should be indicated that we would be in a situation of a generic fee applicable to any change of ownership whether *mortis causa* or *inter vivos*.

However, the Complaints Service understands that if the entity charges its client a fee for processing the execution of the will, said fee would be generic in nature and, consequently, will include the last procedure of said process, i.e., the change in ownership, and it would therefore not be appropriate for the entity to charge both fees.

CRITERION. The change of ownership of the securities awarded may have an associated fee, of which the client would be informed by means of specific documents drawn up for the purpose of the inheritance, or by means of the securities custody and/or administration contract, and would correspond to the fees established in the registered prospectus of maximum fees.

Nonetheless, this Complaints Service holds that the fee for a change of ownership would not be compatible with a banking fee collected for processing the inheritance, since the latter fee would include the final step in the process, namely the change of ownership.

8. OWNERSHIP

8.1. Securities

The shares must necessarily be deposited in a securities account opened with an entity that provides the depository investment service. This securities account will have an associated current account in which such movements of funds as take place will be charged or deposited (purchases, sales, payment of dividends, fees, etc.).

In general, ownership of a financial instrument is assumed to be held by the holder of the securities account, with the ownership of the security established in the account contract. In this regard, 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.

In this context, the register of ownership of the shares in the name of several people in the corresponding accounting registers forms the basis for an assumption of co-ownership for tax purposes which, however, may be removed through evidence to the contrary[124].

Typically, complaints about ownership refer to shared co-holder accounts (with two or more holders), with the main cause being one of the holders making use of the shares without the knowledge or consent of the other owner(s).

The rules of operation of the security account will be used to determine whether an entity has acted correctly in response to an order made by a holder to make use of the securities.

CRITERION. Disagreements as to orders issued by co-holders of securities accounts require consideration of the drawdown regime established in the contract to open the account in question.

- Rules of operation of the securities account

The rules of operation are generally established when opening the securities administration account. In indistinct or joint and several accounts, with the signature

[124] Article 108(3) of Law 58/2003, of 17 December, on General Taxation (BOE – Official State Gazette – of 18 December).

of all the intervening parties in the contract opening the account, said parties give their mutual authorisation so that any of them, individually, may perform operations with the securities. In the case of joint accounts, the signature of all the holders will be necessary to perform operations with the securities.

CRITERION. A joint and several drawdown regime for a securities account will be established in the contract to open the account. This regime means that all the owners mutually empower one another to perform individual operations with the securities.

The joint regime will furthermore require each operation ordered to be signed by all the owners of the securities account.

- **Modification of the rules for operation**

It may be the case that one of the holders of an account opened on a joint and several basis requests a modification of the rules of operation of the account so as to change from a joint and several basis to operating on a joint basis.

In practice, even though this is a problem that arises frequently, deposit and administration contracts do not normally contain provisions on this aspect (if this situation is provided for in the contract, the clauses therein will be followed). Therefore, doubt is generated about who must agree to these changes to the rules of operation, i.e., whether it is sufficient that one of the holders notifies, in due form, the entity of his/her objection to the account continuing with indistinct access for the holders for it to be automatically modified to a system of joint access or whether the change must be requested by both holders.

There may be circumstances that involve a loss of the mutual trust granted to each other by the joint-holders of a securities account when they decided on joint and several access to the account, which would justify a change in the rules of operation of the account. In these situations, it will be sufficient for one of the holders of the securities account to request modification for the entity to carry out the modification, although it will be necessary for the entity to previously inform the other holder or holders of said change. It should not be forgotten that the decisions adopted by one of the joint-holders in a securities account has tax and other consequences for all the joint-holders. For this reason, after the trust between them has been lost, it is clear that any of them may request the change in the rules of operation, with the only condition being that the other co-holders be notified in advance.

Finally, it should be indicated that if the initial rules of operation of the account establish joint access, this may only be modified with the joint consent of all of the joint-holders of the account.

CRITERION. The change in drawdown regime would be governed by the terms of the securities deposit and administration contract. In the absence of contractual terms, the change from joint and several to joint could be instigated unilaterally by one of the co-holders, provided that the entity informs the other co-holder or co-holders of the change in advance.

The change of the drawdown regime from joint to joint and several requires the joint consent of all the co-holders of the account.

- **Regulatory agreement**

Entities must keep clients properly informed[125]. In accordance with this obligation, the entity should inform the client of the documentation required in order to process orders for the distribution of securities after a divorce, and accordingly if the client only presents the Divorce Agreement, he/she should be informed of the need to provide accreditation of court approval of the Agreement in order to be able to process the order.

CRITERION. The entity should inform the client of the documentation required in order to process orders for the distribution of securities after a divorce, and as a result if the client only presents the Divorce Agreement, he/she should be informed of the need to provide accreditation of court approval of the Agreement in order to be able to process the order.

- **Evidence of the rules of operation**

In order to provide evidence of the rules of operation of the account, the respondent entity must provide the securities custody and administration contract, duly signed by all the parties, in order to verify whether the sales order of the shares is in line with the rules of operation set out in the contract.

CRITERION. The drawdown method for the securities account is accredited by the entity by presentation of the securities deposit and administration accounts signed by the clients.

- **Current account associated with a securities account with different holder**

Meanwhile, incidents arise in connection with the deposit of the amount obtained following the disposal of securities in a current account held solely by one of the co-holders of the securities account or of a third party.

Although other options may be agreed in the securities deposit and administration account, in principle it would be an essential requirement that at the time when the securities account is opened, it should be linked to a cash account.

Nonetheless, this does not mean that the ownership group of both accounts need coincide exactly, and there may, for example, be several co-holders in the securities account, and only one in the associated account.

In the event that the co-holder of the securities account disagrees with this fact, he/she must request that the entity modify the payment account, although this request must be ratified by all the co-holders of the account.

When the co-holder or co-holders of the securities account considers/consider that the holder of the cash account has made improper use of the proceeds of the sale of the securities, they must use the courts to resolve that. However, being the holder of

[125] Article 209 of Royal Legislative Decree 4/2015, of 23 October 2015, approving the recast text of the Securities Market Act.

the cash account associated with a securities account does not involve ownership of the securities deposited therein and said ownership is only assumed with regard to the holders of the securities account.

CRITERION. The cash account linked to the securities account may have a different holder.

- **Usufruct: Scrip dividend**

Scrip dividends are a shareholder remuneration system in which the shareholder must choose between receiving the dividend in cash or receiving ordinary shares allocated at no cost (see the point entitled "Scrip dividend" in the section entitled "Information resulting from the status of depository" under the heading of "Subsequent information").

Given that these situations constitute a capital increase charged to reserves as provided for in Article 303(1) of the Capital Companies Act and the status of shareholder lies with the bare owner, even when the usufructuary has the right to the dividends decided on by the issuer of the securities during the usufruct (Article 127 of the Capital Companies Act), if during the validity of the usufruct, the issuer distributes dividends in accordance with this system, the bare owner will be authorised to adopt the decision on how the remuneration should be paid and, in the event that he/she opts for the delivery of shares, ownership of those shares will correspond to him/her, even though the usufruct shall continue over the shares[126]

CRITERION. Remuneration by means of the scrip dividend system would, in the event that the shares are subject to usufruct, mean that the bare owner would decide the method of remuneration, and if the chosen option were the handover of shares, then they would be owned by said party, even if the usufruct would necessarily extend to them.

8.2. Collective investment schemes

The rules of operation of either joint and several or joint access with regard to investment funds is established when they are subscribed, whether through the standard form contract, the subscription order or any other document for this purpose.

CRITERION. The contracting of units in investment funds by several co-holders could mean that, at the time of subscription, a "*joint and several*" or "*joint*" drawdown regime could be agreed, by means of the adhesion contract, the subscription order or some other document for this purpose.

- **Modification of the rules of operation**

[126] Articles 127(1) and 129(4) of the Capital Companies Act, Royal Legislative Decree 1/2010, of 2 July, approving the recast text of the Capital Companies Act.

However, in the same manner as explained above for securities, the mutual trust granted between co-holders may decline under certain circumstances that might break that friendly bond, for example a marital separation. The request to change to a system of joint access may be made at any time and by any of the holders, although it would be necessary for the entity to inform the other holder or holders of said change in advance.

In this regard, it would be deemed malpractice for the entity subject to the complaint to fail to process an order issued by one of the joint and several co-holders if none of them requested the change in the drawdown regime, and the entity did not have any document justifying the blocking of the account, with said block being applied only because of the subjective perception of the staff of the entity.

CRITERION. The change in the investment fund unit drawdown regime from joint and several to joint could be the result of the occurrence of exceptional circumstances that lead to a loss of mutual trust among the co-holders. In this regard, if the entity had reliable information as to the circumstances through objective data (rather than merely subjective perceptions), it would request the consent of all the co-holders in order to accept the orders.

The request for a change of drawdown regime from joint and several to joint could be performed at any time and by any of the holders, although in the event that just one of the co-holders requested the change, the entity would first inform the other co-holder.

- **Rights in rem**

The pledging of securities as collateral in a loan or commercial guarantee is extremely common. According to current legislation, the owner of any transferable securities, such as investment fund units, may provide these as guarantee for payment, which automatically implies restrictions on their free transferability.

The pledge necessarily involves blocking the securities to the benefit of the creditor whether they are deposited with a third party or with the creditor itself. They would therefore be frozen and the depositories may not process any transfers while the pledge remains unless the transfers result from compulsory enforcement of judicial or administrative rulings.

Consequently, any use made of the pledged securities, such as their redemption in the case of funds, would require 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 debt that gave rise to it. However, Spanish law[127] assumes, in the absence of evidence to the contrary, cancellation of the obligation when the pledged item, after having been delivered to the creditor, is in the power of the debtor.

In the clauses of a loan agreement with mortgage guarantee, it may be established that the validity of the pledge would last up until the expiry of the guaranteed obligations, and in principle no redemption of the fund could be performed.

[127] Article 1(191) of the Civil Code, Royal Decree of 24 July 1889.

However, the entity could lift the blockage of the units, as a matter lying within its commercial and risk acceptance policy. This would therefore be a situation in which the guarantee is released if the amount of redemption of the fund is deposited in the account of which the client is listed as the holder.

CRITERION. The pledging or establishment of a pledge over securities as guarantee for a loan or bond constitutes the blockage and freezing thereof. In such cases, it would not be possible to draw on the units in the investment fund unless the pledge were lifted in accordance with the terms set out in the clauses of the loan, or as a commercial decision by the creditor, the reason for the pledge expired, or enforced execution were ordered by the courts or official bodies.

9. OPERATION OF THE COSTUMER SERVICE DEPARTMENT (CSD)

Some complaints show deficiencies in the operation of the entities' Customer Service Departments (CSDs).

Article 11, *in fine*, of Order ECO/734/2004, of 11 March, on the customer service departments and customer ombudsman of financial institutions, establishes the following:

"Grievances and complaints may be presented to the customer service department, the client ombudsman, where applicable, or at any office of the entity open to the public, and via the email address that all entities will establish for this purpose".

Meanwhile, Article 12 of said legal text establishes that

"Once the complaint or claim has been received by the entity, in the event that it has not been resolved in favour of the client by the office or service subject to the complaint or claim, it will be forwarded to the customer service department, which, where appropriate in accordance with the operating regulations, will in turn forward it to the customer ombudsman. If the complaint or claim submitted to the client ombudsman addresses an issue outside its area of competence, the client ombudsman will forward it to the customer service department. The complainant must be informed about the competent authority to hear his/her complaint or claim".

The terms established in the above paragraph should be understood to apply without prejudice to the calculation of the maximum period for termination beginning from the date of presentation of grievance or complaint at the client response service or department or, where applicable, the client ombudsman. In all cases, written confirmation of receipt must be given, and the data presentation must be recorded for the purposes of calculating said period".

Lastly, Article 15, with regard to the conclusion of the complaint investigation, indicates that

"The decision will at all times be reasoned, and will 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 likewise set out in the Customer Service Department Regulations of entities providing investment service.

As a result, the entity is obliged to address complaints raised both with the Customer Service Department of the entity and, where applicable, the Client Ombudsman, and

also those presented at any office of the entity open to the public, in addition to those submitted via the email address established for this purpose.

This Complaints Service likewise applies the criterion that if the client presents their complaint at a department of the entity other than the Customer Service Department, or via an email address other than that established for this purpose, the recipient of the complaint should either forward it to the Customer Service Department for processing, or otherwise clearly inform the complainant how he/she is to proceed in order for the complaint to be properly received.

Furthermore, in accordance with the aforementioned regulations, where the complaint is presented at an office of the entity, it must attempt to resolve it in favour of the client, and only if this cannot be done should it be forwarded to the entity's Customer Service Department, informing the client of the appropriate channel for consideration of the complaint.

Once the complaint has been received by the entity's Customer Service Department or, where applicable, the Client Ombudsman, written confirmation of receipt must be issued, recording the date when the complaint was presented, in order to allow the complainant to calculate the period for resolution.

For these purposes, the criterion of this Complaints Service is that, in the event that the entity has sent the aforementioned confirmation of receipt, the start date for calculation of the period for resolution will be as indicated in said confirmation. Nonetheless, if receipt has not been confirmed, calculation of the period will begin on the date recorded on the document presented by the complainant at any of the locations established for this purpose.

Likewise, as indicated in the aforementioned regulations, the content of the resolution of the complaint issued by the Customer Service Department of the entity must contain a ruling as to the matters raised by the complainant in a clear manner, and must always be reasoned, may not under any circumstances contradict the contractual clauses binding the parties, nor standards of transparency, client protection, good practice and financial norms.

Furthermore, this Complaints Service deems it to be malpractice that entities should fail to respond to requests for comments, requests for clarifications or requests for collaboration that could be raised by the Service in question in processing a complaint, since a failure to provide the required information is deemed to correspond to precise, necessary information in order to be able to issue an appropriate resolution of the matter or matters raised by the complainant, and a failure to provide this would hamper the achievement of said aim.

Lastly, as mentioned in the regulations in this regard, the decisions reached by the entity's Client Ombudsman, should this figure exist, are binding on the entity, and it should likewise be understood that commitments given by the entity before its Ombudsman to resolve its client's complaint must likewise be deemed binding, it being considered malpractice for the entity to breach said commitments. Similarly, resolutions in favour of the client reached by the Customer Service Department must be implemented, it being deemed malpractice to fail to do so.

CRITERION. The Customer Service Department of entities must:

- Handle complaints raised with the department, with the Client Ombudsman, or where applicable, at any office open to the public, or via the email address established for this purpose.

- Where they are presented at an office of the entity, it must attempt to adopt a favourable solution in the interests of the client, and if this is not possible, must refer the case to the Customer Service Department of the entity. In this case, the complainant must be informed of the relevant channel in order to consider the complaint.

- The Customer Service Department of the entity must confirm receipt of the complaint, with the period of resolution being calculated from the date recorded in said confirmation.

- The resolution of the complaint issued by the Customer Service Department must be reasonable, and contain clear rulings as to the matters raised by the complainant.

- Entities must fulfil the commitments they have given to their Client Ombudsman, should this figure exist, or those given with regard to Customer Service Department resolutions before their clients.