



TECHNICAL GUIDE 2/2019 ON THE PROVISION OF ANCILLARY ACTIVITIES BY INVESTMENT FIRMS

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Introduction

Article 138 of the Recast Text of the Spanish Securities Market Act (SMA) defines Spanish investment firms (IFs) as firms that are primarily engaged in the provision of professional investment services to third parties. Article 142(2) thereof further stipulates that under the provisions laid down by law, IFs may, as an non-core activities to their main business, provide investment or ancillary services in instruments other than the financial instruments referred to in Article 2 SMA, and carry on other ancillary services entailing an extension of their business, insofar as they do not adversely affect their sole corporate purpose, and providing potential risks and conflicts of interest are resolved.

IFs opting to engage in these ancillary activities, which may not include activities reserved exclusively by law to other types of firms, must include in their programmes of activities specific information in this regard, and must have the appropriate means to carry on such activities.

Considering that SMA does not define the terms “ancillary activity” or “extension of the business” or what should be understood by “adversely affect the sole corporate purpose of the investment firm” and that, at least for the time being, no regulations have been developed in this regard, it is considered appropriate, by using this Technical Guide, to identify the key aspects which, in the opinion of the CNMV, IFs should take into account if they decide to carry on ancillary activities, as well as to transmit to the sector how these terms are interpreted by the CNMV, in particular the criteria that it intends to apply in its supervisory activities with regard to the scope for carrying on such activities. The aim is to provide certainty to IFs in this regard, but also to clarify that the CNMV's approach is not restrictive, insofar as the main activity of the firms continues being the provision of investment services and giving a more favourable treatment to ancillary services related to areas subject to supervision or that may be considered as low risk.

If the firms exceed the limits laid down in the Technical Guide, they must adopt measures to regularise the situation. The guide proposes, among other measures, the potential segregation of activities of a group subsidiary. In this regard, it is important to clarify that the guidelines of the Technical Guide are applicable at individual IF level and not at consolidated or group level. However, if the segregation of activities were necessary, the most appropriate course of action would be more to segregate in a subsidiary that is not directly controlled by the IF itself.

In any event, the CNMV would apply the criteria contained in this Technical Guide in its supervisory activities, bearing in mind the specific circumstances prevailing in each firm, and the principle of proportionality.

This guide has been prepared taking into account the applicable national legislation, as well as the experience accumulated by the CNMV in the performance of its supervisory tasks.

In accordance with Article 21(3) of the Recast Text of the Spanish Securities Market Act, approved by Spanish Royal Legislative Decree 4/2015, of 23 October, the CNMV's Board approved on 27 June 2019, following a report from its Advisory Committee, this Technical Guide.

One. Scope

1. This Technical Guide shall be applicable to IFs that provide investment or ancillary services for assets other than the financial instruments referred to in Article 2 SMA or that carry on other ancillary activities entailing an extension of their business.

Two. Applicable legislation

2. The European legislation on IFs (contained in Directive 2014/65/EU, known as MiFID II, and the implementing regulations thereof)¹ do not expressly refer to the possibility of IFs engaging in ancillary activities other than the provision of investment or ancillary services. Nor, however, does it contain any principle or rule solely aimed at or excluding such activities (which, in any event, would not be subject to any type of “passport” for the provision of cross-border services, via a branch or under the freedom to provide services regime).

3. In contrast, Spanish legislation does make reference to the ancillary activities of IFs.

Article 138 SMA defines IFs as *“those companies whose main activity consists of providing investment services, on a professional basis, to third parties with respect to the financial instruments set out in Article 2”*. This definition makes reference to an Annex of SMA itself, containing a list of assets, which excludes instruments related to the insurance and banking sectors, among others. Article 142(2) SMA stipulates that *“investment firms may, under the terms laid down by legislation, and provided that any risks and conflicts of interest between them and their clients, or between different types of clients, are suitably resolved, perform the activities envisaged in the preceding articles*

(investment services referred to in Article 140 and ancillary services under Article 141), in connection with instruments not envisaged in Article 2, and other ancillary activities that entail an extension of their business, where this does not adversely affect the sole corporate purpose of the investment firm. Investment firms may not operate solely as management companies of collective investment schemes, pension funds or securitisation funds”.

4. However, SMA does not contain any definition for the terms “main activity”, “ancillary activity” or “extension of the business”, nor does it state what should be understood by “adversely affect the sole corporate purpose of the IF”. The implementing regulations of SMA do not contain any additional clarifications with regard to these terms. In fact, after the amendment, dated 28 December 2018, to Spanish Royal Decree 217/2008, of 15 July, on the legal regime for investment firms and other firms that provide investment

¹ Directive 2014/65/EU, of the European Parliament and of the Council, of 15 May, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

services, Article 10 thereof makes no reference to “ancillary activities”, despite that fact that its former wording did not contain anything further to that laid down in SMA.

Three. Inclusion of ancillary activities in the programme of operations of IFs

5. The performance of ancillary activities by investment firms has to simply be communicated to the CNMV 15 business days prior to the effective date of carrying on the activities, for their inclusion in the register (Rule 6(2) of CNMV Circular 1/2013). These activities must be included in the IF's list of activities together with the other investment services and activities and ancillary services that it provides to its clients.

In this regard, a brief note must be submitted by the firms detailing the ancillary services that they intend to provide, the revenue expected from the provision thereof, and a statement confirming that controls are in place for risks generated, as well as procedures to duly settle potential conflicts of interest.

6. To include the provision of an ancillary activity in the programme of operations, such provision must comply with the following two conditions:
 - a) Entail the provision of an investment or ancillary service related to instruments which are not referred to in Article 2 SMA (financial instruments), but are related to the banking or the insurance sector or have some type of financial component.
 - b) Entail the extension of the business of an IF. To this end, it must have a sufficient degree of connection with the financial field or the financial sector, or be performed with the aim of optimising or using the resources already available to the firm, or that the latter has carried on in connection with sector-related activities. For example, activities such as the provision of technology services or training may be considered as an extension of the business of IFs, provided that they are focused on the development or maintenance of applications related to the financial sphere, or to training in matters related to the financial sector, respectively, or activities which simply entail optimising or using resources as mentioned above (which could justify, for example, the provision of certain services that are similar to investments in real-state assets).

Four. Management of risks and conflicts of interest deriving from ancillary activities

7. Firms must be able to ensure that they adequately manage, at all times, potential risks and conflicts of interest deriving from the carrying on of ancillary activities. In this regard, they shall:
 - Identify and manage, where appropriate, any conflicts of interest by applying procedures that are similar to those in place for the main activity.
 - Adopt the appropriate measures to control, manage and mitigate, where appropriate, any specific risks related to the ancillary activities.

Five. Criteria on the acceptable scope of ancillary activities

8. Firms must ensure that the ancillary activities do not acquire a degree of importance in the overall activity that adversely affects the corporate purpose of IFs (which, without prejudice to the possibility of ancillary activities, it must be remembered is legally defined as *sole*).
9. To identify when ancillary activities do not adversely affect their scope or the revenue expected to be generated from the sole corporate purpose of investment firms, taking into account the investor protection and prudential objectives of the securities markets legislation, it is deemed appropriate to distinguish between activities that are subject to supervision by other supervisory bodies and those that are not. Thus, it is considered reasonable to treat with greater caution the performance of activities or services that are not subject to specific supervision by other supervisory bodies, and to apply a more flexible approach in the case of activities supervised by supervisory bodies such as the Bank of Spain or the Directorate-General for Insurance and Pension Funds, or which entail investments, such as the provision of technology development services or training.
10. Accordingly, the CNMV considers acceptable the performance of ancillary activities by IFs insofar as their revenue is below certain thresholds:
 - If the firm's gross revenue from all its ancillary activities represents less than 45% of its total revenue for the financial year.
 - If, in addition to respecting the aforementioned limit, gross revenue from ancillary activities that may entail risks for the firm or its clients (or similar services or services equivalent to investment or ancillary services), and which are not subject to supervision by the Bank of Spain or the Directorate-General for Insurance and Pension Funds, does not exceed 25% of the IF's total revenue. (In this regard, it is understood that activities such as the provision of technology development services or training do not entail risks for firms or their clients, whereas the provision of certain services that are similar to investments in real-state assets property investment services may entail risks).
11. For the purpose of calculating the percentages, the total revenue earned must be considered on a gross basis. As an exception, however, revenue from activity carried on on own account shall be considered on a net basis, deducting from this figure the

amounts declared by the firm as losses on own account (although, if the firm incurs net losses deriving from the activity on own account, such losses shall not be taken into account).

Six. Monitoring by the firms

12. Firms shall adopt effective control and monitoring measures that limit the risk of exceeding the established limits at the end of each financial year.
13. In the event of exceeding the aforementioned limits in any financial year, the IF shall report such excess to the CNMV as soon as possible, and in any case, within the first six months of the following financial year, and shall adopt the necessary measures to ensure that the situation does not entail a new excess of the limits at the end of the following financial year. The measures may, where appropriate, include the segregation of the relevant activities.