

**THE MIFID II DELEGATED REGULATIONS ON NOTIFICATION OF QUALIFYING HOLDINGS AND ON AUTHORISATION AND THEIR RELATIONSHIP TO INSURANCE AND REINSURANCE UNDERTAKINGS**

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**1. BACKGROUND AND LEGAL FRAMEWORK**

In the mid-80s, through the adoption of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, the European Union ("**EU**") made its first move with regards to the harmonization of the internal financial market, as it considered that the European Members' legislations differed significantly between each other on matters of collective investment undertakings, particularly, in relation with the obligations and controls which were imposed on said companies. This need to create a harmonized legal framework emerged as a result of the disturbances of the conditions of competition between those entities and the lack of a uniform protection for investors, within the Member States.

For this reason, in 1993, Council Directive 93/22/EEC of 10 May 1993, on investment services in the securities field (hereinafter, "**Directive 93/22/EEC**"), was adopted. Through this Directive 93/22/EEC, the European Union continued legislating in favour of the harmonization of the financial market, in order to guarantee investors' protection and the stability of the financial system. Conditions were established in which investment services companies and banks had to provide their services within the framework of the European Union on the basis of authorization and supervision in the home country, mainly through harmonization of initial authorization requirements, as well as rules of conduct; thus enabling both (i) the granting of a single authorization to be considered valid throughout the Community, and (ii) the application of the principle of supervision by the home Member State.

Nonetheless, the increase of the number of investors, as well as the greater complexity of the financial products and of the markets, made it necessary to expand the referred regulation, which was unable to regulate the latest developments. Investors were becoming unprotected, and, in practice, it had become impossible for investment service companies to operate with a harmonized legal framework within the whole of the European Union. Directive 2004/39/EC ("**MIFID I**") emerged to address the apparent deficiencies of Directive 93/22/EEC.

Likewise, in the following years, and mainly due to the financial crisis of the 21<sup>st</sup> Century, certain weak points in the functioning and in the transparency of financial markets were discovered. Consequently the European Union decided again that there was a need to strengthen the regulating framework of the financial instruments' markets, in order to, amongst other reasons, increase transparency, ameliorate investors' protection and reinforce trust in markets. Directive MIFID I was partially recast, becoming Directive 2014/65/EU ("**MIFID II**"), and partially substituted by Regulation (EU) N° 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

MIFID II came into force on January 3<sup>rd</sup>, 2018<sup>1</sup> and sets out the provisions that govern the authorisation of the business, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the operating conditions for investment firms to ensure investor protection, the powers of supervisory authorities of home and host Member States and the regime of imposing sanctions.

Delegated Regulation (EU) 2017/1946 of 11 July 2017 ("**Regulation 2017/1946**") and Delegated Regulation (EU) 2017/1943 of 14 July 2016 ("**Regulation 2017/1943**"), were adopted by the Commission with the objective to complete both MIFID I and MIFID II, as described below.

## 2. **REGULATION 2017/1946 AND REGULATION 2017/1943, AND THEIR RELATIONSHIP WITH INSURANCE AND REINSURANCE UNDERTAKINGS**

### 2.1 Regulation 2017/1946

Regulation 2017/1946's main objective is to establish an exhaustive list of the information that the acquirers of a qualifying share in an investment company shall include in the notification of the proposal of such acquisition. Recital (5) sets out (*emphasis added*):

**"Information on whether an assessment of reputation as an acquirer, or as a person who directs the business of a credit institution, assurance, insurance or re-insurance undertaking, investment firm or any other entity has already been conducted by another competent authority or other authority and, if so, the outcome of such assessment, should be provided by the proposed acquirer in order to ensure that the outcome of investigations run by other authorities are duly considered by the competent authority of the target entity when assessing the proposed acquirer."**

Likewise, Article 5 ("Additional information relating to the proposed acquirer that is a legal person"), item (h), establishes that if the proposed acquirer is a legal person, it shall provide the competent authority of the target entity with:

*"identification of any credit institution; assurance, insurance or re-insurance undertaking; collective investment undertakings and their managers or investment firm within the group, and the names of the relevant supervisory authorities."*

Despite the fact MIFID II, in Article 2.1.a) expressly excludes from its scope of application the insurance undertakings or undertakings carrying out the reinsurance and retrocession activities referred to in Directive 2009/138/CE ("**Solvency II**"); we may observe how this new European regulation collaterally affects not only investment undertakings, but also insurance and reinsurance undertakings. This is due to the fact that the tendency of harmonization within the legal framework of the different regulated markets is moving forward in the same direction as market unity.

Indeed, **this propensity to create a harmonized system within the EU is reflected specifically in this Delegated Regulation that establishes in detail an exhaustive list in which the information that the proposed acquirers have to provide at the time of the initial communication**, to enable investment firms that are authorized in a Member State to also operate in the other Member States. The previous, since both the authorization processes and the supervisory authorities operate in a harmonized manner and under a

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<sup>1</sup> Although it has not yet been transposed into Spanish Law. The Congress agreed on February 6<sup>th</sup>, 2018, on the validation of the Decree Law that will partially transpose MIFID II to our legal system.

regulatory framework that, despite the fact that it comes from Directives that must be transposed by each of the Member States, each of these allow less room for manoeuvre to national legislators; thus favouring communication between the authorities of the Member States and, therefore, enabling investment firms and the rest of entities that operate in regulated sectors (such as insurance and reinsurance undertakings) to operate more easily throughout the different Member States.

## 2.2 Regulation 2017/1943

Regulation 2017/1943 sets out the regulatory technical standards on information and requirements for the authorisation of investment firms.

The Commission adopted Regulation 2017/1943 to enable the competent authorities to carry out a thorough assessment when granting or refusing requests for authorisation to investment firms. Article 9 ("Requirements applicable to shareholders and members with qualifying holdings") of this Delegated Regulation provides the following:

*"The competent authority shall verify that the request of an applicant for authorisation as an investment firm, in accordance to Title II of Directive 2014/65/EU, offers sufficient guarantees for a sound and prudent management of the entity by assessing the suitability of proposed shareholders and members with qualifying holdings, having regard to the likely influence on the investment firm of each proposed shareholder or member with qualifying holdings, against all of the following criteria: (...)*

*d) whether the investment firm will be able to comply and continue to comply with the prudential requirements set out in Article 15 of Directive 2014/65/EU and, where applicable, Directives 2002/87/EC and 2013/36/EU of the European Parliament and of the Council and in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;"*

For the purposes of this article, **the relevant part of this item d) is the express mention made** of the requirements mandated by Directive 2002/87/EC of the European Parliament and of the Council, **concerning additional supervision of credit entities, insurance undertakings and investment firms (Financial Conglomerates)**. For this reason, we may observe, once again, that the adoption of this Delegated Regulation is a clear sign of the harmonization within the Member States of the regulations regarding the authorization of regulated activities such as investment services or insurance or reinsurance activities.

## 3. CONCLUSIONS

Through the adoption by the EU Commission of these two Delegated Regulations that round off the MIFID II regulations, it is clear that there is a tendency to set out a harmonized legal framework amongst the Member States in relation to regulated markets. There is no doubt that efforts are being made to make it easier for entities operating in these types of markets to operate internally without the need to meet special requirements in each of the Member States; as well as to make authorization processes simpler through the coordination of national legislations that govern regulated markets, and the creation of agile communication systems between the supervising authorities of said activities in each Member State.

Therefore, there can be no doubt that this harmonized legal framework will favour both (i) entities that provide this type of services, which are increasingly required to meet fewer special requirements in each of the Member States in which they intend to operate, once they have already overcome the corresponding authorisation or supervision processes in their home country, and (ii) investors, who are guaranteed a common level of protection within the EU's internal market.