



FINANCIAL REGULATION

Latest updates

September & October 2018

INTRODUCTION

Thank you for your interest in Uría Menéndez's *Newsletter on Financial Regulation*.

The financial regulatory framework has changed significantly in recent times, both qualitatively and quantitatively, and will continue to do so in the coming years. It now encompasses most, if not all, aspects of businesses and the functioning of financial institutions. Furthermore, the framework is notable for its complexity, given that it comprises a wide array of binding legal instruments, both national and international, together with guidance and opinions from various financial regulatory authorities worldwide.

As a result of this evolving regulatory landscape, it is very important for institutions to identify, assimilate and implement changes in a timely and proper manner. The purpose of this newsletter is to assist financial institutions in this monitoring exercise. It will periodically compile the regulatory developments applicable to certain fields of financial activity, that is, **investment services, asset management and market infrastructures**. It will also include a section which will cover **other matters of general interest**.

The highlight of this first issue is the **amendment of the consolidated text of the Securities Market Law** in order to continue the implementation of MiFID II in Spain.

We hope you find this newsletter interesting and it helps you to stay current on the financial regulatory framework applicable to the areas mentioned above.

INVESTMENT SERVICES

Spain

LEGISLATION

 **Royal Decree-Law 14/2018 of 28 September, which amends the consolidated text of the Securities Market Law, passed by Royal Legislative Decree 4/2015 of 23 October**

Royal Decree-Law 14/2018 amends the consolidated text of the Securities Market Law, which was passed by Royal Legislative Decree 4/2015 of 23 October, to implement some provisions of Directive 2014/65/EU (MiFID II).

Royal Decree-Law 11/2018 became effective on 29 September 2018, except for specific provisions which will become effective when the Royal Decree which implements such provisions is approved.

A newsletter on the topic is available (in English) on this [link](#).

CNMV

 **CNMV approves amendments to Circulars 1/2010 and 7/2008 on the confidential statements of credit institutions and investment firms**

This new Circular updates the templates of confidential information established in Circular 1/2010, submitted by credit institutions and investment firms on their activity of marketing financial products and providing investment services.

In addition, it modifies the confidential accounting statements of investment firms established under Circular 7/2008 in order to obtain, among other things, information regarding ancillary activities.

The new information to be provided relates only to activities carried out as from 1 January 2019.

 **Notice on the amendments to some exemptions related to pre-transparency obligations during the trading of some listed shares**

In accordance with the volume cap mechanism regulated in MiFIR, the CNMV has agreed to suspend, amend and terminate the application of some exemptions to the transparency obligations for trading orders at prices referenced to another market.

 **CNMV adopts the directives of the EBA on the interpretation of the various circumstances in which an entity is considered to be failing or likely to fail**

The CNMV implements the directives of the EBA on the interpretation of the various circumstances in which an entity is considered to be failing or likely to fail in accordance with Article 32(6) of Directive 2014/59/EU covering credit institutions and investment firms.

Article 32(4)(a), (b) and (c) of the Directive defines the circumstances under which an entity is considered to be failing or likely to fail. Article 32 of the Directive has been transposed into Spanish law by article 20 of Law 11/2015 of 18 June on the recovery and resolution of credit institutions and investment firms.

Europe

ESAS

 **Report on the results of the monitoring exercise on “automation in financial advice”**

The results of this report focus on (i) the evolution of the market of automated financial advice tools, (ii) the evolution of the national legislative framework and/or supervisory approach, (iii) the risks and benefits of automation in financial advice, and (iv) automated portfolio management, including the evolution of the market of automation in this service and the national legislative framework and/or supervisory approach to automation in this service.

ESMA

 **Extension of the prohibition of binary options to retail clients for a further three months**

ESMA has agreed to extend the prohibition of the marketing, distribution or sale of binary options to retail clients, which has been in effect since 2 July 2018. The prohibition is extended on 2 October 2018 for a further three months.

 **Extension of the restriction on CFDs for a further three months**

ESMA has agreed to extend the restriction on the marketing, distribution or sale of contracts for differences (CFDs) to retail clients, which has been in effect since 1 August. The restriction is extended on 1 November 2018 for a further three months.

 **Q&A update on MiFID II and MIFIR investor protection and intermediaries**

The Q&A update provides additional answers on (i) best execution and reporting for firms using a venue’s RFQ system to agree a trade; and (ii) investment advice on an independent basis – use of a “look-through” approach.

 **Q&A update on temporary product intervention measures**

The Q&A update provides clarification on the application of the temporary product intervention measures in relation to rolling spot forex.

 **Q&A update on data reporting under MiFIR**

The Q&A update includes the following information:

- FX Swaps reporting: reference data and transaction reporting scenarios where an FX swap is reported as a single stand-alone financial instrument.
- Interest Rate Swaps reporting: reference data and transaction reporting scenarios involving Interest Rate Swaps.

 **Q&A update on MiFID II and MiFIR commodity derivatives topics**

New or revised answers are provided on the following topics: (i) ancillary activity, Q&A numbers 3 and 10 were updated, and Q&A number 13 was deleted, and (ii) position limits and reporting, a new Q&A clarifies the treatment of legacy positions and specifies the types of firms that have to submit weekly position reports.

 **New data for the systematic internaliser calculations for equity, equity-like instruments and bonds available**

ESMA has published the total number of trades and total volume over the period April-September 2018 for the purpose of the systematic internaliser (SI) calculations for 17,999 equity and equity-like instruments and for 387,212 bonds. The results are published only for instruments for which trading venues submitted data for at least 95% of all trading days over the six-month observation period.

 **Withdrawal of MiFID guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities**

ESMA has decided to withdraw guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities implemented in December 2011 following the entry into force of MiFID II.

 **ESMA letter to European Commission on MiFID II/MiFIR third-country regimes**

ESMA has written to the European Commission in relation to additional issues in the context of the United Kingdom's withdrawal from the European Union, in particular: (i) concerns regarding the MiFIR regime for third country firms providing investment services and activities to eligible counterparties and per se professional clients; (ii) concerns regarding the MiFID II regime for third country firms providing investment services and activities to retail and professional clients on request; (iii) third country firms providing investment services and activities at the exclusive initiative of EU clients (reverse solicitation); and (iv) investment firms outsourcing critical or important functions other than those related to portfolio management to third country providers.

IOSCO

 **Guidance addressing conflicts of interest and conduct risks in equity capital raising**

This guidance addresses the conflicts of interest at various stages of the equity capital raising process: (i) when analysts form their views on an issuer during the pre-offering phase of a capital raising, (ii) during the allocation of securities, (iii) in the pricing of equity securities offerings, and (iv) those which stem from personal transactions by staff employed within firms managing a securities offering.

For IOSCO, the implementation of the guidelines should enhance (i) the range and quality of timely information that is made available to investors during the process, (ii) the transparency of allocations, and (iii) the efficiency and integrity of the overall process, boosting investor confidence and making capital markets a more effective route for issuers to raise funding.

 **Policy measures to protect investors in OTC leveraged products**

The policy includes a range of toolkits for the following purposes: (i) to enhance conduct standards, (ii) to educate investors with guidance on retail OTC leveraged products and firms offering them, and (iii) on how to approach and mitigate the risks posed by unlicensed firms offering OTC leveraged products to retail investors.

ASSET MANAGEMENT

Spain

CNMV

Statement to enhance transparency on the type of management carried out by Collective Investment Schemes

The CNMV proposes that investors (retailers and professionals), as well as entities that market or recommend investment in CIS, take into account the following information on management style in taking their decisions. They should also take into account the content of this statement in their supervisory and registration activities.

The CNMV believes that entities should apply the following criteria in order to improve the information provided to investors in this area:

- Key Investor Information Documents: In the section called "Investment Objectives and Policy", when information on a financial benchmark is included, it must specify whether that benchmark is used in merely informative or comparative terms (that is, without affecting the manager's freedom) or whether, on the contrary, to a greater or lesser extent management is linked to the financial benchmark. In the latter case, additional information must be provided on the degree of management freedom with respect to the financial benchmark, such as limits on tracking errors, correlation, levels of exposure to benchmark constituents, or even the range of overweightings and underweightings with respect to benchmark constituents (for example, between 0% and 5%). This information contained in the CIS KIID must be included in the document's next update.
- Periodic Public Reporting: Information must be provided on the degree of discretion used in the management carried out during the period, and if it is linked to a benchmark to a greater or lesser extent, details must be provided as to the performance of the fund in comparison with that of the benchmark. Other information that the manager considers appropriate must also be provided, such as that relating to tracking errors, total exposure of the assets held in components of the benchmark, "active share", degree of coincidence in the order of the positions with respect to that benchmark, etc.

Europe

ESMA

Q&A update regarding the Benchmark Regulation

The BMR Q&A update clarifies the following:

- When written plans are considered to be robust;
- When financial instruments traded via systematic internaliser are within the scope of BMR;
- When banks are issuing “users of benchmarks” certificates;
- Whether NAV of investment funds qualify as benchmarks;
- Whether a single application for endorsement can include a family of benchmarks;
- The language in which benchmark statements should be published.

Q&A update on the application of the AIFMD

ESMA has added a new Q&A clarifying the application of the AIFMD notification requirements with regard to AIFMs managing umbrella AIFs on a cross-border basis.

ESAS

The ESAs highlight the relevance of legislative changes for the Key Information Document for PRIIPs

The ESAs sent a letter to the European Commission expressing their concerns regarding the possibility of duplicating information requirements for investment funds from 1 January 2020 and the importance of legislative changes to avoid such a situation.

In addition, the ESAs intends to propose targeted amendments to the PRIIPs Delegated Regulation in the first quarter of 2019. As part of this process, the ESAs intends to launch a short public consultation during the fourth quarter of this year.

MARKET INFRASTRUCTURES

Europe

ESMA

CSDR Q&A update

The latest batch of Central Securities Depository Regulation (CSDR) Q&As covers the following topics:

- Book-entry form requirements, the scope and timing of application of the requirement in Article 3(2) of CSDR to dematerialise certain transferable securities when they are transferred as collateral;
- The scope of the services and activities of a CSD covered by the requirements set out in Article 30 of CSDR on outsourcing;
- First set of Q&As relating to settlement discipline issues following the publication of Commission Delegated Regulation (EU) 2018/1229 on settlement discipline.

Q&A update on the implementation of EMIR

The Q&A update provides an explanation on models that typically aim to facilitate buy-side or small participant access to CCPs and allow better capital treatment for clearing members.

A new Q&A has also been added to the trade repositories section of the document explaining how a forex swap derivative should be reported under Article 9 of EMIR.

Q&A update on MiFID II and MiFIR market structure and transparency topics

The Q&A update clarifies the following matters: (i) the classification of derivatives on derivatives for transparency purposes; (ii) the default liquidity status of bonds; (iii) the scope of the pre-trade transparency waiver provided under Article 9(1)(c) of MiFIR; (iv) the market Making activities and incentives to be provided during stressed market conditions; (v) the treatment of bulk quotes for the calculation of the Order to Trade Ratio; (vi) the scope of Article 17(6) of MiFID II and Chapter IV (Articles 24-27) of Delegated Regulation (EU) 2017/589 (RTS 6); (vii) the arrangement of transactions that are ultimately formalised on another trading venue; (viii) the registration of a segment of an MTF as an SME growth market; and (ix) the Maker Taker schemes.

Final report amending RTS on the clearing obligation under EMIR for third country intragroup transactions

The report presents the proposal to amend the relevant articles of regulations 2015/2205, 2016/592 and 2016/1178 in order to extend for two years, that is, until 21 December 2020, the exemption of intragroup OTC derivatives (IRS and CDS) where a counterparty is established in a third country and there is no equivalence decision.

 **Opinion on the European Commission's proposed amendments to Commission Delegated Regulation (EU) 2017/587**

In general, ESMA agrees with the amendment of article 10 to limit the application of "tick sizes" to quotes of systematic internalisers to shares and depositary receipts.

 **Statement on the challenges to start CCP clearing**

The statement sets out the challenges that some groups, as well as some NFC+, would face on 21 December 2018 to start CCP clearing some of their OTC derivative contracts and trading them on trading venues.

Given the absence of equivalence decisions, ESMA has reviewed the RTS on the clearing obligation and developed draft amendments to extend the derogation expiration to 21 December 2020 to intragroup transactions concluded with a third country group entity without an equivalent decision.

OTHERS

Spain

LEGISLATION

 **Royal Decree-Law 11/2018 of 31 August on the implementation of, amongst others, the directive on money laundering**

Royal Decree-Law 11/2018 amends Law 10/2010 of 28 April on the prevention of money laundering and the financing of terrorism by completely implementing Directive (EU) 2015/849.

Royal Decree-Law 11/2018 came into force on 4 September 2018.

A newsletter on the topic is available (in Spanish) on this [link](#).

CNMV

 **Note on the criteria regarding initial coin offerings**

The note provides the criteria followed by the CNMV when tokens are considered securities and they refer to: (i) the role of authorised companies to provide investment services in this context, (ii) the representation of the tokens and consequences of their trading on trading platforms, and (iii) the need for a prospectus.

 **2017 annual report on the claims and investor queries**

The report refers to the activities of the CNMV in relation to the claims, complaints and queries by investors handled by the Customer Care Service in 2017. It also includes the performance and data regarding the unauthorised providers of investment services that received a warning from the CNMV.

Europe

ESMA

 **2019 Work Programme**

In 2019 the key areas of focus under ESMA's activities of supervisory convergence, assessing risks, single rulebook and direct supervision will be: (i) supporting the consistent application of MiFID II and MiFIR along with the Prospectus Regulation and Securitisation Regulation by market participants and National Competent Authorities (NCAs); (ii) utilising the data gathered under MiFID II/MiFIR to support its work on stable and orderly markets; (iii) contributing to the implementation of the Capital Markets Union Action Plan and of the Fintech Action Plan; and (iv) enhancing

the effectiveness of its supervisory activities for credit rating agencies (CRA) and trade repositories (TR), while preparing for the registration and supervision of new entities under the Securitisation Regulation and SFTR.

Q&A update on the Market Abuse Regulation

ESMA has updated its Q&A adding a question on delayed disclosure of inside information.

International

FSB sets out potential financial stability implications from crypto-assets

The FSB published *Crypto-asset markets: Potential channels for future financial stability implications* that includes an assessment of the primary risks present in crypto-assets and their markets, such as low liquidity, the use of leverage, market risks from volatility, and operational risks. Based on these features, crypto-assets lack the key attributes of sovereign currencies and do not serve as a common means of payment, a stable store of value, or a mainstream unit of account.

The FSB concluded that crypto-assets do not pose a material risk to global financial stability at this time. However, it also stated that vigilant monitoring is required in light of how quickly markets develop. Should the use of crypto-assets continue to evolve, financial stability could be affected in the future.

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