



FINANCIAL REGULATION
Investment services, asset management
and market infrastructure

November & December 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.

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 **at international, european and national level** 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 newsletter is the publication of **Royal Decree 1464/2018** whereby the **implementation of MiFID II in Spain has been completed**.

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 1464/2018 of 21 December, completing the incorporation of MiFID II into Spanish law

Royal Decree 1464/2018 completes the transposition of the Markets in Financial Instruments Directive (MIFID II) into Spanish law. For that purpose, this Royal Decree completes the regulatory development of the revised text of the Securities Market Law and makes amendments to Royal Decree 217/2008.

Royal Decree 1464/2018 will become effective on 17 January 2019, except for the amendments to Royal Decree 217/2008 that will apply as from 17 April 2019.

We highlight the regulation of the following matters as the main novelties of the Royal Decree:

- Position limits for commodity derivatives
- Conditions for APA, CTP or ARM
- Significant investment firms
- The combined buffer requirement for investment firms
- Provision of investment services by third-party states
- Internal organisational measures in relation to asset management and title transfer financial collateral arrangements
- Recording of telephone conversations or electronic communications
- Algorithmic trading and direct electronic access
- Inducements
- Product governance: manufacturers and distributors

CNMV


Public hearing regarding the intervention measures on binary options and CFDs

The purpose of the proposal is to implement indefinitely in Spain the ban on the marketing, distribution and sale of binary options to retail investors and a restriction on the marketing, distribution or sale of CFDs to retail investors adopted by ESMA, with the support of the CNMV.

The measures, which are essentially the same as those approved by ESMA, would apply to the provision of services in Spain (including under the freedom to provide services without establishment) and once the ESMA measures cease to be in force.

 **The CNMV will cease to publish aggregate short positions on listed shares from 1 January 2019**

From 1 January 2019, the CNMV will no longer publish the aggregated information on short positions as it has been doing to date on a fortnightly basis. The main reason for this decision is to be consistent with what is done in other European countries. None of them currently publish aggregated short positions. This is a particular feature of the Spanish market.

 **Communication of the CNMV in relation to the ESMA Guidelines on Exemption for Market-Making Activities and for Primary Operators Authorised under Regulation (EU) No 236/2012 on short selling**

The CNMV has agreed to cease to apply these Guidelines exclusively to aspects that require market-making activity to be limited to instruments admitted to a trading venue.

Consequently, entities that wish to make use of the market-maker exemption under Article 17 of Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps may apply for the exemption without restriction if they notify the CNMV, even in relation to financial instruments not admitted to trading in a trading venue.


 **CNMV adopts ESMA guidelines on MiFID II suitability requirements**

The CNMV notified ESMA on 21 December 2018 of its intention to comply with the Guidelines on certain aspects of the MiFID II suitability requirements and, therefore, the CNMV will take into account how they are being applied by entities providing investment advice (whether independent or not) or portfolio management when exercising its supervisory functions. These Guidelines will apply from 7 March 2019.


The Guidelines update the existing Suitability Guidelines (published by ESMA in 2012) to adapt them to the modifications introduced by MiFID II and provide further information. Specific criteria on the provision of an automated service are also provided.

Europe


ESMA

 **Renewal of the binary-options prohibition for a further three months from 2 January 2019**

ESMA has agreed to extend the prohibition of the marketing, distribution or sale of binary options to retail clients, in force since 2 July 2018, for a further three months.

 **Update of the Q&As on ESMA's temporary product-intervention measures**


ESMA has updated its Q&As on ESMA's temporary product-intervention measures regarding the marketing, distribution or sale of CFDs and binary options to retail clients based on Article 40 of Regulation (EU) No 600/2014 (MiFIR). ESMA has modified the concept of "payment" to enter into a CFD and has included a new Q&A on how a firm should ensure the prominence of the appropriate risk warning specified in Annex II of ESMA Decision 2018/796.

 **Publication of the MiFID II Supervisory Briefing on Suitability**

ESMA has published an updated version of its supervisory briefing on MiFID II suitability requirements. This publication is an updated version of ESMA's 2012 supervisory briefing and takes into account the content of ESMA's guidelines on certain aspects of the MIFID II suitability requirements published on 28 May 2018.

 **Update of the Q&As on Regulation (EU) No 236/2012 on short selling**

ESMA has updated its Q&As on the Short-Selling Regulation (SSR), including a new Q&A to identify the Relevant Competent Authority (RCA) for the financial instruments mentioned in point v) of Article 2(1)(j) of the SSR (and in particular, for shares) following the date on which MiFID II/MiFIR begins to apply.

 **Update of the public register with the latest set of double volume cap (DVC) data**

ESMA has updated its public register with the latest set of double volume cap (DVC) data under MiFID II. The updates include DVC data and calculations for the period from 1 November 2017 to 31 October 2018, as well as updates to already published DVC periods.

 **Guidelines on the application of C6 and C7 of Annex 1 of MiFID II**

These guidelines amend the ESMA C6/C7 guidelines (ESMA/2015/1341) that were issued in October 2015 to clarify points (6) and (7) of Section C, Annex I of MiFID to adapt them to the new MiFID II regulatory framework without changing the substance of those provisions. These guidelines start to apply two months after the date of their publication on the ESMA website in all official languages of the EU.

ASSET MANAGEMENT

Spain

LEGISLATION

Royal Decree-Law 22/2018 of 14 December on the implementation of macro prudential tools

The amendment of article 71 *septies* of Law 35/2003 on collective investment schemes and article 87 of Law 22/2014, which regulates venture capital entities and other closed-end collective investment undertakings, grants the CNMV temporary powers to, if necessary and proportional, adopt measures aimed at reinforcing the liquidity of collective investment undertakings and entities and, in particular, increasing investment in liquid assets.

Royal Decree 1464/2018 of 21 December, completing the incorporation of MiFID II into Spanish law

In addition to incorporating MiFID II into Spanish law, this Royal Decree also amends paragraph 13 of article 5 of Law 35/2003 to regulate the research fees that collective investment schemes can be charged. The new regulation requires, among other aspects, the unbundling of research and brokerage fees and that charges for research services not be influenced by or conditional upon levels of payment for brokerage services.

CNMV

Circular 5/2018 of 26 November

Circular 5/2018 of 26 November amends CNMV Circulars 4/2008, 7/2008, 11/2008 and 1/2010 on accounting standards, annual accounts and statements of restricted information of investment companies, companies managing CISs and venture capital management companies.

The most significant changes introduced by Circular 5/2018 are set out below.

- 1) Financial Investment Funds
 - Funds' annual reports must include information on the remuneration policies established in article 46 bis of Law 35/2003.
 - The CIS' half-yearly and/or yearly report, as the case may be, must contain information on securities financing transactions, the reuse of guarantees and total return swaps, as established in Regulation (EU) 2015/2365.
- 2) Venture Capital and Closed-End Entities Management Companies (SGEIC)
 - The management report, audit and annual accounts must be submitted to the CNMV by 30 June of the following financial year.
 - The reserved statements must be filed half-yearly and must be sent by the SGEIC to the CNMV on the 30th day of the following month.

- The content of the reserved statements R02, R05 and G02 is modified.
- 3) EU Branches of management companies of CIS
 - Two new statements are introduced that must be submitted to the CNMV on an annual basis within the following two months of each calendar year:
 - SGE1. Company details and contact persons.
 - SGE2. Activities performed, number and type of customers, and revenue received by service and by business segment.

Update of the Q&As on UCITS, Venture Capital and other closed-end investment schemes

The CNMV has updated its Q&As on UCITS, Venture Capital and other closed-ended investment schemes by including a new Q&A on the following matters:

- The eligibility to invest in the local and international bodies of any Member State.
- The suitability of ETFs over gold for Quasi-UCITS.
- CISs can invest, within the freely-available coefficient of 10%, in closed-end foreign entities.
- Whether buy/sell back transactions for longer than a day are acceptable when the day or days following contracting are a national holiday.
- The requirements and main aspects to be taken into account when preparing and implementing the control procedures on the management of the liquidity of the CIS.
- The method of valuing the assets of an MMF.
- Modification of the accounting of the CIS “retroactively” in order to correct errors in the calculation of the net asset value.
- Possibility of outgoing managers consolidating the performance management fee accrued until they are replaced.
- Possibility of allocating to the fund the expenses derived from the procedures necessary to obtain the return of withholdings made in relation to foreign securities that have formed part of the portfolio.
- Possibility of charging the CISs commissions for managing the collection of interest and amortisation of securities, transfer of securities, collection of dividends and coupons or other financial transactions.
- Possibility of applying the swing pricing mechanism, in order to preserve equity among the investors of the CISs.
- Information to be included on the remuneration policy of the managers in their annual report on the CIS.
- Monitoring by the depositary of a real estate company of its mortgage loans.
- Application of the 25% limit in Article 104 on the industry and commerce tax (IRIC) levied against each CIS individually.

Q&As on the benchmark regulation

The CNMV has issued a Q&A on the benchmark regulation regarding its scope of application, definitions, the use of benchmarks by supervised institutions, the transitional regime and other general issues.

Europe

ESAS

Consultation on proposed changes to the KID for PRIIPs

The ESAs have issued a consultation paper on targeted amendments to the Delegated Regulation covering the rules for the Key Information Document (KID) for Packaged Retail and Insurance-based Investment Products (PRIIPs). The proposals are made in the context of the ongoing discussions between the European co-legislators on the application of the KID by certain investment funds as well as the timing of a wider and more comprehensive review of PRIIPs.

International

IOSCO

Feedback on proposed framework for assessing leverage in investment funds

The proposed framework comprises a two-step process aimed at achieving a meaningful and consistent assessment of global leverage, as part of an effort to address risks that may arise from certain asset management activities.

Comments may be submitted to IOSCO on or before 1 February 2019.

MARKET INFRASTRUCTURES

Europe

LEGISLATION

📄 **Publication of Commission Implementing Regulation (EU) 2018/1889 of 4 December on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in Regulations No 575/2013 and No 648/2012 of the European Parliament and of the Council.**

This Regulation extends the 15-month transitional period applicable to own funds requirements for exposures to central counterparties by an additional six months until 15 June 2019

ESMA

📄 **Update of the Q&As on CSDR**

ESMA has updated its Q&As regarding the implementation of the Central Securities Depository Regulation (CSDR), including the following new Q&A on: (a) services or activities of a CSD that fall within the scope of Article 30 of CSDR (outsourcing); (b) the provision of services by a CSD in other Member States; (c) cash penalties.

📄 **Update of the Q&As on MiFID II and MiFIR market structure and transparency topics**

ESMA has updated its Q&As regarding [market structures](#) and [transparency issues](#) under MiFID II and MiFIR, including a new Q&A on the restriction of the ability of market makers to voluntarily post additional liquidity on either side of the order book as a result of the requirement imposed on market makers to post simultaneous two-way quotes of comparable size.

📄 **Update of the Q&As on the Benchmark Regulation**

ESMA has updated its [Q&As](#) on the Benchmarks Regulation (BMR), including a new Q&A on: (a) the use of a benchmark in a bilateral agreement on the interest to be paid on exchanged collateral; (b) the possibility that the methodology of a benchmark include factors that are not input data; (c) the possibility that the methodology of a regulated-data benchmark include factors that are not covered by Article 3(1)(24) BMR.

Final report on the guidelines regarding non-significant Benchmarks

ESMA has published its final report on guidelines on non-significant benchmarks under the BMR regarding the following areas: (a) procedures and characteristics of the oversight function; (b) input data; (c) transparency of methodology; (d) governance and monitoring requirements for supervised contributors.

International

IOSCO

IOSCO members found mostly compliant with Principles for Commodity Derivatives Markets

The report shows that IOSCO members have made substantial progress towards achieving full compliance and, in many cases, have strengthened their implementation of the Principles. The report provides a summary of the updated survey results and sets out the specific areas in which IOSCO members have achieved compliance through the implementation of regulatory reforms.

FSB

Publication of the 2018 Resolution Report and publicly consults on financial resources to support CCP resolution

The report provides updates on progress in implementing the framework and policy measures to enhance the resolvability of systemically-important financial institutions and sets out the priorities for the FSB's resolution work going forward. The report finds that jurisdictions have undertaken substantial reforms to mitigate the "too-big-to-fail" (TBTF) problem.

Publication of the report on incentives to centrally clear over-the-counter (OTC) derivatives

The Derivatives Assessment Team conducted an analysis that led to the following findings:

- The changes observed in OTC derivatives markets are consistent with the G20 Leaders' objective of promoting central clearing as part of mitigating systemic risk and making derivatives markets safer.
- The relevant post-crisis reforms, in particular the capital, margin and clearing reforms, taken together, appear to create an overall incentive, at least for dealers and larger and more active clients, to centrally clear OTC derivatives.
- Non-regulatory factors are also important and can interact with regulatory factors to affect incentives for central clearing.
- Certain categories of clients have less strong incentives to use central clearing, and may have a lower degree of access to central clearing.
- The provision of client-clearing services is concentrated in a relatively small number of bank-affiliated clearing firms.

- Some aspects of regulatory reform may not incentivise provision of client-clearing services.

 **Publication of reports on implementation of OTC derivatives reforms and removal of legal barriers**

The FSB published the following two reports: (i) setting out progress on reforms to OTC derivatives markets, and (ii) reporting on FSB member jurisdictions' actions to remove legal barriers relating to OTC derivatives trade reporting.

OTHERS

Spain

LEGISLATION

Royal Decree-Law 19/2018, of 23 November, on payment services and other urgent financial measures

This Royal Decree-Law partially transposes into Spanish law Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

The main objectives of the Royal Decree-Law are to facilitate and improve security in the use of payment systems over the internet, further protect users against fraud and potential abuse – with respect to what is established in Law 16/2009 of 13 November – and promote innovation in payment services through mobile phones and the internet.

Europe

ESAS

The ESAs consult on guidelines on cooperation and information exchange for AML/CFT supervision purposes


The ESAs launched a public consultation on draft Guidelines on cooperation and information exchange between competent authorities supervising credit and financial institutions for the purposes of Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) supervision.

Publication of a statement clarifying securitisation disclosure requirements and consolidated application of securitisation rules for credit institutions

The ESAs have published a statement in response to industry concerns relating to severe operational challenges both in meeting the transitional provisions of the Securitisation Regulation disclosure requirements, as well as in complying with the EU requirements on risk retention, transparency, re-securitisation and criteria for credit-granting obligations on a consolidated basis by EU credit institutions engaged in local securitisation activities in third countries.


Publication of the joint EMIR STS standards

The ESAs have published two joint draft Regulatory Technical Standards (RTS) to amend [the RTS on the clearing obligation and risk-mitigation techniques for non-cleared OTC derivatives](#). These standards provide a specific treatment for simple, transparent and standardised (STS) securitisation to ensure a level playing field with covered bonds.

 **Proposal in order to amend bilateral margin requirements to assist Brexit preparations for OTC derivative contracts**

The ESAs have published a [final report](#) with draft regulatory technical standards (RTS) proposing to amend the Commission Delegated Regulation on the risk-mitigation techniques for OTC derivatives not cleared by a CCP (bilateral margin requirements) under EMIR in order to introduce a limited exemption in order to facilitate the novation of certain OTC derivative contracts for EU counterparties during a specific timeframe.


ESMA

 **Publication of the standards and guidance for securitisation repositories under the Securitisation Regulation**

ESMA has issued a set of documents to implement the new European regulatory framework for securitisations and help promote STS securitisations.

 **Reminder to institutions of their obligations to inform clients under MiFID in the context of the United Kingdom's exit from the European Union**

ESMA has published a notice to remind investment firms and credit institutions providing investment services of their obligation to provide clients with accurate information on the impact on the provision of services and investor rights that may result from the exit of the United Kingdom from the EU.

 **Update of the Q&As on MAR**

ESMA has updated its Q&As on the implementation of the Market Abuse Regulation (MAR) and included a new Q&A specifying the elements which issuers that are credit/financial institutions intending to delay disclosure of inside information under Article 17(5) of MAR should consider when assessing the conditions contained therein.

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