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**FINANCIAL REGULATION**  
Investment services, asset management  
and market infrastructure

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January & February 2019

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## INTRODUCTION

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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 the 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 Royal Decree Law on Spain's Brexit contingency measures.

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

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## INVESTMENT SERVICES

### Spain

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#### LEGISLATION

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 **Royal Decree Law 5/2019 of 1 March on contingency measures for a no-deal Brexit**

The Spanish government has approved Royal Decree-Law 5/2019 (the “Law”) on Spain’s Brexit contingency measures. All the measures are conditioned upon equivalent treatment by the UK.


In particular, regarding financial services matters, the Law provides (i) that existing contracts will not be affected by the UK’s withdrawal, although after the withdrawal, existing contracts will require a new authorisation – pursuant to the third-countries regime – in the following cases: renewal, amendments entailing the provision of new services in Spain, amendments affecting the key obligations of the parties, or when activities linked to the management of the existing contracts require an authorisation; and (ii) for a temporary-permission regime: valid for a period of nine months following the UK’s withdrawal. During that period financial entities will have two options: continue to service existing contracts, in order to wind down their Spanish business in an orderly fashion, or apply for the relevant authorisation.

A newsletter about this Law is available in this [link](#).

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#### CNMV

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 **Communication regarding the obligation of entities to take measures aimed at ensuring the reliability of the information obtained from clients in order to assess their appropriateness and suitability**

The CNMV has identified that investment services providers overestimate the training, financial knowledge and investment experience of their retail clients when assessing their appropriateness and suitability.

The CNMV has been working, including by imposing sanctions, to correct this situation and it plans to carry out a specific review of this area in 2019 that will impact a wide range of entities.

The CNMV suggests (i) analysing whether there are situations that are *a priori* atypical, and which could be expected not to arise, or which only arise on a purely occasional or isolated basis; and (ii) that for the adequate detection and correction of situations such as those mentioned above, entities must have adequate procedures in place during the provision of the service in order to review information and rectify incidents.

## Europe

### ESMA

#### Decision to restrict the marketing, distribution or sale of CFDs to retail clients

ESMA has agreed to renew the prohibition against marketing, distribution or sale of CFDs to retail clients.

This decision applies from 1 February 2019 for a period of three months.

#### Decision to restrict the marketing, distribution or sale of binary options to retail clients

ESMA has agreed to renew the prohibition against marketing, distribution or sale of binary options to retail clients for a further three months from 2 April 2019.

#### Update of the Q&A on MiFID II and MiFIR commodity derivatives topics

ESMA has updated its Q&As on MiFID II and MiFIR commodity derivatives topics. A new Q&A has been included on how the field “Price Multiplier” (field 25 of Table 3 of the Annex of RTS 23) should be populated for electricity derivative contracts.

#### Update of the commodity derivatives transitional transparency calculations for MiFID II / MiFIR

The update relates to the transitional transparency calculations for commodity derivatives (TTC ) and only affects electricity derivatives.

#### Opinion on limits regarding commodity derivatives under MiFID II


ESMA agrees proposed position limits regarding: (i) Low Sulphur gasoil, (ii) Panamax Freight, (iii) Dutch TTF ICE Endex, (iv) Dutch TTF Powernext, (v) Dutch Power Base, and (vi) Dutch Power Peak.

#### New bond liquidity data available

ESMA made new data available for bonds subject to the pre- and post-trade requirements of MiFIR through its data register.

#### Data for the systematic internaliser calculations for equity, equity-like instruments and bonds

ESMA has published data for the systematic internaliser calculations for equity, equity-like instruments and bonds under MiFID II and MiFIR.

 **Reports on accepted market practices under MAR**

ESMA has published its annual report on the application of accepted market practices (AMPs) in accordance with the Market Abuse Regulation (MAR).

ESMA's report provides an overview of the establishment and application of AMPs in the EU, with particular reference to the AMPs established on the basis of the MAR and which were still in force when the MAR became applicable, and the AMPs established under MAR. The report includes ESMA's views on the application of AMPs and recommendations to National Competent Authorities (NCAs).

 **MiFID II supervisory briefing on the supervision of EU firms' non-EU branches which provide investment services and activities**

ESMA has published a MiFID II supervisory briefing on the supervision of EU firms' non-EU branches which provide investment services and activities. The supervisory briefing has been designed to assist NCAs in their supervision of EU firms' establishment of branches in non-EU countries.

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## EUROPEAN COMMISSION

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 **Publication of the draft rules for ensuring that investment firms and insurance distributors consider sustainability topics when advising clients**

The draft rules set out how investment firms and insurance distributors should take sustainability issues into account when providing advice to their clients.

The new draft rules will help integrate Environmental, Social and Governance (ESG) considerations and preferences into investment advice and portfolio management, and into the distribution of insurance-based investment products.

## ASSET MANAGEMENT

### Europe

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#### EUROPEAN COMMISSION

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##### **Capital Markets Union Agreement reached on measures to improve the EU's investment fund market**

The Commission has welcomed the political agreement reached by the European Parliament and EU Member States on new rules to make it easier, quicker and cheaper for EU asset managers to sell funds to a wider range of investors.

The main changes introduced by the new rules will (i) make it easier for EU alternative investment fund managers to test the appetite of potential professional investors in new markets (so-called pre-marketing); (ii) clarify customer service obligations for asset managers in their host Member State; (iii) align procedures and conditions for managers of collective investment funds to exit national markets when they decide to terminate the offering or placement of their funds (so-called de-notification procedure); and (iv) introduce increased transparency and create a single online access point for information on national rules related to marketing requirements and applicable fees.

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#### ESAS

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##### **Recommendations on changes to the PRIIPs Key Information Document**

Based on the feedback provided to the competent authorities, the European Supervisory Authorities (ESAs) have decided that it is not appropriate to propose substantive amendments to the PRIIPs Delegated Regulation at this time. Instead, the ESAs are making efforts to provide input on the review of PRIIPs Delegated Regulation during 2019. This report sets out how the ESAs plan to conduct this work. The feedback received from this public consultation will also be used in the upcoming work on the review of the PRIIPs Delegated Regulation.

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## ESMA

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### **Update of its Q&As on the European Benchmark Regulation**

The new Q&A clarifies the provisions of the Benchmark Regulation (BMR) regarding the scope of application of the Commission Delegated Regulations adopted under the BMR depending on the type of benchmark and, in particular, the requirements (i) for regulated-data benchmarks, (ii) for interest-rate benchmarks, (iii) for commodity benchmarks; and (iv) that an administrator may choose not to apply for significant benchmarks and non-significant benchmarks.

### **Public consultation on its draft guidance regarding liquidity stress tests in UCITS and AIF**

ESMA's draft guidelines for fund managers aim to promote convergence in the way national competent authorities supervise funds liquidity stress testing across the EU.

The consultation sets out 14 principle-based criteria for managers' liquidity stress tests to follow when executing liquidity stress tests on their funds.

The consultation is open for feedback until 1 April 2019. ESMA will analyse the feedback provided in early Q2 2019 and expects to publish a final report by the summer of 2019.

### **Annual Statistical Report on the cost and performance of retail investment products**

The ESMA has published its first Annual Statistical Report (Report) on the cost and performance of retail investment products. The Report covers Undertakings for Collective Investment in Transferable Securities (UCITS), Alternative Investment Funds sold to retail investors (retail AIFs) and Structured Retail Products (SRPs).

The Report documents the significant impact of costs on the final returns that retail investors make on their investments: (i) the charges for UCITS funds, taken all together, reduce their gross returns by one quarter on average; (ii) the cost impact varies widely, especially depending on the choice of product, asset class, fund type; and (iii) management fees and other on-going costs constitute over 80% of investors' costs, whilst entry and exit fees have a less significant impact.

## MARKET INFRASTRUCTURES

### Europe

#### ESMA

##### Update of its Q&As regarding the implementation of the CSDR

The updated Q&As include two new Q&As on the scope and calculation of cash penalties.

##### Update of its Q&As on EMIR data reporting

The updated Q&As include amendments to the responses related to (i) contracts with no maturity date, (ii) trades terminated before the reporting deadline, and (iii) reporting of confirmation means.

##### Update of its Q&As on MiFIR data reporting

Two new Q&As further clarify the requirements for submission of reference data under MiFIR relating to the following issues: (i) reporting the LEI of the issuers to Financial Instruments Reference Data Systems in cases where the issuer of the instrument has a branch(es) that have a LEI; and (ii) reporting maturity, expiry and termination dates to Financial Instruments Reference Data Systems.

##### Update of its Q&As on MiFID II and MiFIR market structure and transparency topics

The new Q&As clarify the following topics: (i) APA reports to competent authorities and ESMA; and (ii) identification of high-frequency trading techniques.

##### Statement on EMIR Refit implementation

The public statement addresses issues around the clearing and trading obligations for small financial counterparties and the backloading requirement for reporting entities, ahead of upcoming deadlines, which would represent challenges for the abovementioned entities in the context of the ongoing EMIR Refit negotiations.



## International

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### OICV - IOSCO

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 **Report on Commodity Storage and Delivery Infrastructures: Good or Sound Practices**

This report provides guidance for relevant storage infrastructures (RSI) and their relevant oversight bodies (ROB) in the form of Good or Sound Practices to assist those entities in identifying and addressing issues that could affect commodity derivatives' pricing and in turn affect market integrity and efficiency.

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### FSB

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 **Publication of the responses to consultation on financial resources to support CCP resolution and the treatment of CCP equity in resolution**

On 15 November 2018, the FSB published a consultation document on proposed financial resources to support CCP resolution and the treatment of CCP equity in resolution. Interested parties were invited to provide written comments by 1 February 2019. The public comments received are now available.

The FSB expects to publish further guidance for public consultation in 2020.

## OTHERS

### Spain

#### CNMV

##### **CNMV biannual strategic lines of action and activity plan for 2019**

Three strategic lines of action will guide the CNMV's activity: (i) giving priority to supervision, (ii) boosting the competitiveness of the Spanish market, and (iii) focusing on technological developments in the financial sector.

The CNMV has also published an activity plan, which includes 44 specific objectives or actions that the CNMV will carry out in 2019.

##### **Communication addressed to issuers of listed securities regarding the new legal framework on market abuse**

Royal Decree Law 19/2018 of 23 November has recently amended Royal Legislative Decree 4/2015 of 23 October approving the consolidated text of the Securities Market Law, with the purpose of, among other matters, fully implementing the European market abuse regime.


In particular (i) the Spanish legislature has opted for some solutions out of those permitted by the European regulatory framework in specific cases, (ii) a number of changes have been made to the sanctioning regime for market abuse, and (iii) Royal Decree 1333/2005 of 11 November, which develops the Securities Market Law in relation to market abuse, has been repealed.

### Europe


#### ESAS

##### **Multilateral agreement on the practical modalities for exchange of information between the ECB and AML/CFT competent authorities**

This is part of the EU legislature's wider efforts to enhance cooperation and information exchange between prudential and AML/CFT supervisors through a clear legal mandate. To fulfil this mandate, the ESAs, together with the ECB and CAs, have developed this Multilateral Agreement, which contains provisions on (i) the type of information to be exchanged and underlying process for exchanging it, (ii) confidentiality and data protection, (iii) situations where the request for information can be refused, (iv) means of communication and language used in information exchange, (v) the signing process, and (vi) the settlement of disputes procedures.

 **Joint report on regulatory sandboxes and innovation hubs**

A comparative analysis of the national innovation facilitators is set out in the report and, based on this analysis, a set of best practices has been prepared. The best practices are intended to (i) promote consistency across the single market in the design and operation of innovation facilitators; (ii) promote transparency of regulatory and supervisory policy outcomes arising from interactions in the context of innovation facilitators; and (iii) facilitate cooperation between national authorities, including consumer and data protection authorities.


 **Standards on supervisory cooperation under the Securitisation Regulation**

ESMA's regulatory technical standards clarify how competent authorities and the ESAs should cooperate with each other in the field of securitisation transactions.

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ESMA

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 **Opinion and Q&A on disclosure technical standards under the Securitisation Regulation**

ESMA has published an opinion containing a revised set of draft regulatory and implementing technical standards (disclosure RTS/ITS) under the Securitisation Regulation, which concern the details of a securitisation to be published by the originator, sponsor and Securitisation Special Purpose Entity (SSPE), as well as the relevant format and templates.

 **Advice to the European Institutions on ICOs and crypto-assets**


ESMA has been working with NCAs to analyse the different business models of crypto-assets, the risks and potential benefits that they may introduce, and how they fit within the existing regulatory framework.

ESMA has identified a number of concerns regarding crypto-assets in the context of the current financial regulatory framework.


 **Clarification of the reporting and handling of derivatives data in the event of a no-deal Brexit**

The statement clarifies the following aspects for different reporting scenarios, namely where both counterparties are from the EU27, where both are from the UK, and where one is from the EU27 and the other from the UK.

The statement clarifies (i) reporting by CCPs and counterparties, (ii) reconciliation and recordkeeping by trade repositories, (iii) access by EU27 authorities, and (iv) portability and aggregation by trade repositories.

 **MoUs agreed with the FCA in the event of a no-deal Brexit**

The MoUs form part of authorities' preparations should the UK leave the EU without a withdrawal agreement (i.e. the no-deal Brexit scenario). The MoUs will therefore only take effect in the event of a no-deal Brexit scenario. The MoUs are similar to those already signed regarding the exchange of information with the supervisory authorities of many third-party countries.

 **Standards on supervisory cooperation under the Securitisation Regulation**

ESMA's regulatory technical standards clarify how competent authorities and the ESAs should cooperate with each other in the field of securitisation transactions.

## International

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### OICV-IOSCO

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 **Report on IOSCO Standards Implementation Monitoring on Secondary and Other Market Principles**

The main objective of the report is to present a global overview of the status of implementation of each of the five principles by the participating member jurisdictions, based on their own self-assessment.

The review also aims to identify gaps in implementation, as well as examples of good practices in implementing these principles.

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### FSB

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 **Report on FinTech developments and potential financial-stability implications**

The report is part of the FSB's ongoing work in monitoring FinTech market developments and their potential implications for financial stability. Some key considerations from the FSB's analysis of the link between technological innovation and market structure are the following: (i) to date, the relationship between incumbent financial institutions and FinTech firms appears to be largely complementary and cooperative in nature; (ii) the competitive impact of BigTech may be greater than that of FinTech firms; and (iii) reliance by financial institutions on third-party data service providers for core operations is estimated to be low at present.

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