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

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March & April 2019

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## INTRODUCTION

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

As a result of an 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.

For the March-April period, we highlight the many updated Q&As, guidelines and other criteria issued by ESMA and by the CNMV in connection with MiFID II and MiFIR related topics.

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

#### CNMV

 **The CNMV submits a technical guide on the provision of ancillary services by investment firms for public consultation**

The CNMV has submitted a proposed Technical Guide on the provision of ancillary services by investment firms (IFs) for public consultation.

The objectives of the Guide are to (i) identify the key aspects to be considered by IFs if they decide to provide ancillary services and communicate to the sector the CNMV's interpretation on this matter; and (ii) determine the maximum economic scope of such services over the total revenues of each IF so that the firm's corporate purpose is not adversely affected.

### Europe

#### LEGISLATION

 **Commission Delegated Regulation (EU) 2019/348 of 25 October 2018 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions**

Pursuant to Directive 2014/59/EU the impact that the failure of an institution can have should be assessed first on the basis of quantitative criteria and subsequently on the basis of qualitative criteria. This regulation set outs norms on quantitative and qualitative assessment for credit institutions, investment firms and institutions belonging to groups. In addition, the regulation refers to the assessment of promotional banks and credit institutions subject to an orderly winding-up process.

It also establishes that competent and resolution authorities from the same Member State may reach different conclusions with regard to the application of the above, in which case they shall regularly assess whether those different conclusions remain justified.

## ESMA

### **ESMA sets out its opinion on several MiFID II/MiFIR and BMR provisions under a no-deal Brexit**

ESMA has published a statement setting out its opinion on the application of certain key MiFID II/MiFIR and Benchmark (BMR) provisions should the UK leave the EU under a no-deal Brexit.

In particular, the statement addresses the following issues: (i) the MiFID II C(6) exemption; (ii) trading obligations for derivatives; (iii) ESMA opinions on post-trade transparency and position limits of transactions traded on trading venues; (iv) post-trade transparency for OTC derivatives transactions between EU IFs and UK counterparties; and (v) the ESMA benchmark register of administrators.

### **MiFID II: ESMA issues latest double volume cap data**

ESMA has updated its public register with the latest set of double volume cap (DVC) data under MiFID II. This update includes DVC data and calculations for the period from 1 February 2018 to 31 January 2019, as well as updates to DVC periods that have already been published.

### **ESMA agrees position limits under MiFID II**

ESMA has published seven opinions on position limits regarding commodity derivatives under MiFID II/MiFIR. ESMA's opinions agree with the position limits proposed by the respective national authorities for (i) ICE Endex PSV natural gas; (ii) Powernext PSV natural gas; (iii) Powernext CEGH-VTP natural gas; (iv) Powernext GPL natural gas; (v) Powernext NCG natural gas; (vi) Powernext PEG natural gas; and (vii) EEX PXE Hungarian Power Baseload.

### **ESMA to renew restrictions on CFDs for a further three months from 1 May 2019**

ESMA has agreed to renew the restrictions on the marketing, distribution or sale of CFDs to retail clients, in effect since 1 August. They will be renewed from 1 May 2019 for a further three-month period.

### **ESMA updates its Q&As on MiFID II and MiFIR commodity derivatives topics**

ESMA has updated its Q&As on MiFID II and MiFIR commodity derivatives topics. In particular, it clarified the following topics: (i) third-country firms that trade with commodity derivatives on a EU trading venue, emission allowances or derivatives do not need to notify the competent authorities regarding the use of the ancillary activity exemption; and (ii) the deadline for the notification to make use of the ancillary activity exemption set out in Article 2(1)(j) of MiFID II.

### **MiFID II supervisory briefing on appropriateness and execution-only**

This supervisory briefing takes into account the new version of ESMA's guidelines on suitability published on 28 May 2018 and covers the following topics: (i) determining situations where the appropriateness assessment is required; (ii) obtaining information from clients; (iii) assessing appropriateness; (iv) warnings to clients; (v) qualification of IFs' staff; and (v) record-keeping.

 **Renewal of ESMA's product-intervention decision in relation to binary options**

On 22 March 2019, ESMA adopted a Decision under Article 40 of Regulation (EU) No 600/2014 to renew the prohibition on the marketing, distribution or sale of binary options to retail clients.

 **ESMA updates its Q&As on MiFID II and MiFIR investor protection and intermediaries**

The Q&As provide new answers on (i) provision of investment services and activities by third-country firms and reverse solicitation; (ii) product governance – target market of CoCo-bond funds; (iii) suitability report – use of generic statements; (iv) information on costs and expenses; (v) durable medium; and (vi) RTS 27 reporting requirements for market makers and other liquidity providers.

 **ESMA updates its Q&A on MiFIR data reporting**

The Q&A provides clarifications in relation to the requirements for submission of reference data under MiFIR. In particular, the Q&A relates to reporting obligations for trading venues operating on the basis of a specified list of instruments.

## ASSET MANAGEMENT

### Europe

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#### CNMV

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 **Circular of 28 March amending Circular 1/2009 of 4 February on the categories of collective investment schemes according to their investment objectives**

The aim of this Circular is to include new categories of money market funds following Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds.

The former category “Euro fixed income” is now divided into two different categories according to the portfolio duration: (i) short-term Euro fixed income, and (ii) Euro fixed income. The category “passive management collective investment schemes (CIS)” is now divided into (i) CIS that tracks an index, and (ii) CIS with a non-guaranteed profitability objective.

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#### ESAs

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 **The ESAs propose an amendment to PRIIPS KID to clarify application to investment funds**

The amendment clarifies the application of the Key Information Document (KID) to investment funds where these are offered as underlying investment options to a PRIIP (so-called “multi-option products” or “MOPs”).

The aim of the ESAs’ proposal is to provide, in good time, legal certainty to market participants before the expiry of the current provision in the PRIIPs Delegated Regulation at the end of 2019. The proposal must be approved by the European Commission.

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#### ESMA

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 **ESMA Q&A clarifies benchmark disclosure obligations for UCITS**

Regarding the Undertakings for Collective Investments in Transferable Securities (UCITS) Key Investor Information Document (KIID) benchmark disclosure the updated Q&A clarifies that (i) UCITS should clearly indicate in the KIID whether their strategy is “active” (or “actively managed”) or “passive” (or “passively managed”); (ii) a UCITS managed in reference to a benchmark is one where the benchmark plays a role in the management of the UCITS; and (iii) investors should be provided with an indication of how actively managed the UCITS is, compared to its reference benchmark index.

With regard to past performance obligations, the following was clarified: (i) where funds name a target in their investment objectives and policies, the performance should be disclosed against the target; and (ii) the performance disclosed in the KIID regarding a benchmark index should be consistent with performance disclosures in other investor communications.

#### **ESMA updates AIFMD Q&A**

The Q&A provides clarification on (i) the treatment of short-term interest rate futures for the purposes of the Alternative Investment Fund Managers Directive (AIFMD) leverage exposure calculations according to the gross and commitment methods; and (ii) the required frequency of the calculation of leverage by an AIFM managing an EU AIF that employs leverage.

#### **ESMA issues first pan-EU overview of use of supervisory sanctions for UCITS**

ESMA has issued its first annual report on sanctions imposed by national competent authorities (NCAs) under the UCITS Directive.

The report provides an aggregated overview of the penalties and measures issued under the UCITS Directive for 2016/2017, based on data submitted to ESMA by NCAs.

#### **ESMA publishes responses to its consultation on liquidity stress test guidelines for investment funds**

ESMA has published the responses to its consultation on draft guidelines on liquidity stress testing for investment funds.

#### **ESMA consults on draft ELTIF technical standards**

ESMA is seeking stakeholders' input on its draft RTS on various subjects that are critical for the functioning of the European Long-Term Investment Fund (ELTIF) Regulation. The draft RTS are to determine the (i) criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purposes; (ii) circumstances in which the life of an ELTIF is considered to be sufficient in length; (iii) criteria to be used for certain elements of the itemised schedule for the orderly disposal of the ELTIF assets; (iv) costs disclosure; and (v) facilities available to retail investors.

## MARKET INFRASTRUCTURES

### Europe

#### LEGISLATION

##### **Commision Delegated Regulation 2019/667 of 19 December 2018 amending Delegated Regulation 2015/2205, Delegated Regulation 2016/592 and Delegated Regulation 2016/1178**

Commission Delegated Regulation 2019/667 of 19 December 2018 amending Delegated Regulation 2015/2205, Delegated Regulation 2016/592 and Delegated Regulation 2016/1178 to extend the dates of deferred application of the clearing obligation for certain over-the-counter derivative contracts has now entered into force.

#### ESMA

##### **ESMA publishes response to its consultations on the CSDR guidelines**

ESMA has published the responses received to its consultations on the CSDR Guidelines regarding (i) standardised procedures and messaging protocols used between investment firms and their professional clients under Article 6(2) of the CSDR; and (ii) settlement fails reporting under Article 7(1) of the CSDR.

##### **ESMA's application of the trading obligation for shares following a no-deal Brexit**

ESMA has issued this statement in response to requests from many market participants for additional clarity and certainty on the application of the MiFIR trading obligation (TO) for shares in the absence of an equivalence decision for the UK by the European Commission, should the UK leave the EU through a no-deal Brexit.

ESMA recognises that this approach may lead to an overlap of trading obligations for a number of shares and potentially a greater level of fragmentation of trading should the UK apply an identical approach. However, the lack of clarification by ESMA would by default lead to the application of the MiFIR TO to every share traded in the EU27. ESMA's approach seeks to limit potential market disruption while also ensuring Article 23 MiFIR is adequately and consistently applied across the EU.

##### **ESMA statement on the new EMIR Refit regime for the clearing obligation**

This ESMA statement is addressed to all financial and non-financial counterparties subject to EMIR and sets out its approach on when they need to (i) determine whether they are subject to the clearing obligation under the new regime introduced by the EMIR amendment (Refit), and (ii) notify ESMA and their relevant competent authority that they are indeed subject to the clearing obligation once the Refit comes into force.

 **ESMA adds new venues to register of derivatives to be traded on-venue under MiFIR**

ESMA has updated the public register of trading venues on which derivative contracts that are subject to the MiFIR TO may be traded. The new venues are located in France and the Netherlands.

## OTHERS

### Spain

#### CNMV

 **The CNMV updates the code of conduct on investments of non-profit organisations**

The main novelties are as follows: (i) the term “short-term financial investments” now includes all investments in financial instruments except investments subject to legal or contractual restrictions on free transferability and those made by founders and permanent contributors; (ii) recommendation to obtain external advice in the case of portfolios with a significant volume as well as to have an investment committee and internal control function; (iv) the appropriateness of establishing an investment policy; and (v) the annual report must be “detailed and clear” and transactions that are not in conformity with the principles and recommendations of the code must be specified, as well as that the annual report must be published on the website.

 **New limits on maximum positions to be held by holders in warrants and commodity derivative contracts traded on stock exchanges and the Spanish financial futures market (MEFF)**

The maximum net position that a holder may have is as follows: (i) in commodity warrants (gold, silver and Brent crude) traded on the Stock Exchanges: 2.5 million warrants; (ii) in peak load electricity contracts traded on the MEFF Exchange: 660,000 megawatt hours; and (iii) in base load electricity contracts traded on the MEFF Exchange: 10.0 terawatt hours in contracts for the next maturity and 3.4 terawatt hours in contracts for the remaining maturities.

 **Q&A on a UK withdrawal from the EU without an agreement being reached and Royal Decree Law 5/2019 of 1 March on contingency measures for a no-deal Brexit**

The CNMV has provided a Q&A on a UK withdrawal from the EU without an agreement being reached and on Royal Decree Law 5/2019 of 1 March on contingency measures for a no-deal Brexit.

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## BANK OF SPAIN

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 **Bank of Spain briefing note on financial services in Royal Decree Law 5/2019 of 1 March on contingency measures for a no-deal Brexit**

The Bank of Spain has provided a briefing note on article 19 (regarding financial services) of Royal Decree Law 5/2019 of 1 March on contingency measures for a no-deal Brexit, focusing on (i) the scope of such article; (ii) the authorisations required once the UK has left the EU; (iii) existing contracts; and (iv) transitional arrangements.

## Europe

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### EBA

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 **The EBA's Board of Supervisors agrees a template for the MoU to facilitate supervisory cooperation between the EU and UK supervisory authorities in case of a no-deal Brexit.**

The EBA's Board of Supervisors has agreed a template for the MoU outlining provisions of supervisory cooperation and information exchange between the EU supervisory authorities and the UK Prudential Regulatory Authority and the Financial Conduct Authority in the event of a no-deal scenario.

Its aim is to ensure that there are no breakdowns in the supervision of cross-border financial institutions if this scenario arises.

### ESAs

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 **The ESAs publish joint advice on information and communication technology (ICT) risk management and cybersecurity**

Given the need for legislative improvements regarding ICT, the ESAs have called for the streamlining of aspects of incident-reporting frameworks across the financial sector and suggest that a legislative solution for an appropriate oversight framework to monitor the activities of critical third-party service providers should be considered.

In relation to a coherent cyber-resilience testing framework, the ESAs have advised focusing on achieving a minimum level of cyber resilience across the sectors, proportionate to the needs and characteristics of the relevant entities and that an EU-wide coherent testing framework should be established on a voluntary basis.

 **The Joint Committee of the ESAs publishes its 2018 Annual Report**

The ESAs Annual Report provides a detailed account of the joint work achieved, namely (i) their continued joint efforts in assessing the potential benefits and risks for consumers and financial institutions related to developments in financial technology and in overseeing market developments and cross-sectoral risks, including those posed by Brexit; and (ii) their enhanced focus on ensuring consistent application of rules on anti-money laundering and combating the financing of terrorism (AML/CFT) across the EU and improving standards of AML/CFT supervision.

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**ESMA**

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 **Update on no-deal Brexit preparations**

ESMA has stated that, following the European Council's decision on 11 April extending Article 50(3), its published measures and actions – issued on the basis of a possible no-deal Brexit scenario on 29 March 2019 and subsequently updated to read 12 April 2019 – should now be read as referring to the new potential no-deal Brexit date of 31 October 2019, unless the European Council decides otherwise.

 **ESMA updates its MAR Q&A**

This update of the Q&A clarifies the range of firms subject to the Market Abuse Regulation (MAR) provision on detecting and reporting suspicious orders and transactions and provides new detailed answers on (i) the meaning of parent and related undertakings; and (ii) disclosure of inside information concerning emission allowances, referring to installations of other undertakings of the group of emission allowance market participants (EAMPs).

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