



FINANCIAL REGULATION
Investment services, asset management
and market infrastructure

July & August 2019

INTRODUCTION

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 regulatory developments at an international, European and national level that are applicable to certain fields of financial activity, that is, investment services, asset management and market infrastructures. It will also include a section covering other matters of general interest.

For the July-August period, we highlight Directive (EU) 2019/1160 and Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment schemes as well as several updated Q&As issued by ESMA 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.

INVESTMENT SERVICES

Europe

ESMA

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 for the period 1 June 2018 to 31 May 2019. It has also updated already published DVC periods.

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

ESMA has updated its Q&As on the implementation of investor protection topics under MiFID II and MiFIR. The updated Q&As provide new answers on best execution regarding the classification of financial instruments under regulatory technical standards issued in connection with Article 27(10)(a) of MiFID II if ESMA has not published any calibrated market sizes.

ESMA ceases renewal of product intervention measures relating to contracts for differences.

ESMA had taken product intervention measures relating to contracts for differences, imposing a temporary restriction on their marketing, distribution or sale, in Decisions (EU) 2018/796, (EU) 2018/1636, (EU) 2019/155 and (EU) 2019/679.

As most national competent authorities (“**NCAs**”) have taken permanent national product intervention measures relating to contracts for differences that are at least as stringent as ESMA’s measures, ESMA will not renew its temporary restriction. As a result, the measures applicable under ESMA Decision (EU) 2019/679 automatically expired on 31 July 2019.

ESMA ceases renewal of product intervention measure relating to binary options.

ESMA had taken product intervention measures regarding binary options, imposing a temporary prohibition on their marketing, distribution or sale, in Decisions (EU) 2018/795, (EU) 2018/1466, (EU) 2018/2064 and (EU) 2019/509.


As most NCAs have taken permanent national product intervention measures relating to binary options that are at least as stringent as ESMA’s measures, ESMA will not renew its temporary prohibition. As a result the marketing, distribution or sale of binary options to retail clients will be subject to national regulation.

ESMA consults on MiFID II compliance function requirements.

ESMA has launched a consultation on draft guidelines on certain aspects of the compliance function requirements under MiFID II.


The consultation paper includes proposals on the draft guidelines that confirm and broaden the existing guidelines, issued in 2012, in order to (i) consider the changes to the compliance function requirements brought by MiFID II; (ii) give relevance to the results of supervisory activities conducted by NCAs on the compliance function

requirements; and (iii) provide additional details on some aspects that were already covered under ESMA's 2012 guidelines.


 **ESMA updates Q&As on MiFIR data reporting.**

The Q&A provide clarifications in relation to the requirements for submission of reference data under MiFIR.


Specifically, the Q&As (i) relate to reporting obligations for financial instruments without a defined expiry date (e.g. Perpetual FX Rolling Spot Futures), and (ii) provide a new answer on how operators should populate field 24 of regulatory technical standards of article 23. The amendments to the existing Q&As on MiFIR data reporting took effect on 29 July 2019.

 **ESMA publishes 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.

 **ESMA makes available new data for bonds subject to the pre- and post-trade requirements of MiFID II and MiFIR.**

ESMA has made available the latest quarterly liquidity assessment for bonds available for trading on EU trading venues. For this period, there are currently 594 liquid bonds subject to MiFID II transparency requirements.

 **ESMA updates its Q&As regarding the benchmark regulation.**

ESMA has issued an update of its Q&As on the European Benchmarks Regulation (BMR). The new Q&As provide clarification on the following issues: (i) the commodity benchmark definition; and (ii) the contribution to the euro short-term rate (€STR).

ESAs

 **The ESAs publish recommendations on the supervision of retail financial services provided across borders.**


The ESAs have published a report on the cross-border supervision of retail financial services. In this report, the ESAs identified the main issues that NCAs face when supervising financial institutions that provide cross-border retail financial services within the EU and make recommendations to both NCAs and EU institutions on how to address them.

The report calls for more clarity on when activities carried out through digital means fall under passporting rules, and for the high-level principles on cooperation identified in the recommendations to be considered as the basis for any new legislation or possible amendment to current legislation.

ASSET MANAGEMENT

Europe

LEGISLATION


 **Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings.**

This Directive is complemented by the Regulation (EU) 2019/1156 of the European Parliament and of the Council (see below). The main objectives of this Directive regarding cross-border distribution of collective investment schemes are the following: (i) fill in the regulatory gap and align the procedure for notifying NCAs of changes regarding undertakings for collective investment in transferable securities (“UCITS”) with the notification procedure laid down in Directive 2011/61/EU (the AIFM Directive); (ii) establish rules to modernise and specify the requirements for UCITS providing facilities to retail investors; (iii) in order to ensure the consistent treatment of retail investors, the requirements relating to facilities are also applied to alternative investment fund managers (“AIFMs”) where Member States allow them to market units or shares of alternative investment funds (“AIFs”) to retail investors in their territories; and (iv) a harmonised definition of pre-marketing and the conditions under which an EU AIFM can engage in pre-marketing are also established.

 **Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings.**


This Regulation seeks to: (i) to safeguard investor protection and secure a level playing field between AIFs and UCITS, and to this end extends the application of the standards for marketing communications to both AIFs and UCITS; (ii) ensure equal treatment of managers of collective investment schemes, fees and charges levied by competent authorities for the supervision of cross-border activities are proportionate to the supervisory tasks and publicly disclosed; and (iii) standardise the information to be communicated every quarter to ESMA.

ESMA

 **ESMA consults on performance fee guidelines for retail funds.**

ESMA has launched a public consultation on draft guidelines on performance fees under the UCITS Directive.

ESMA’s draft guidelines propose common criteria to promote supervisory convergence in the following areas: (i) general principles on performance fee calculation methods; (ii) consistency between the performance fee model and the fund’s investment objectives, strategy and policy; (iii) frequency for performance fee crystallisation and payment; (iv) the circumstances where a performance fee should be payable; and (v) disclosure of the performance fee model.


 **ESMA publishes responses to its consultation on draft RTS under the ELTIF Regulation.**

ESMA has published the responses received to its consultation on draft regulatory technical standards (RTS) under Article 25 of the European Long-Term Investment Fund (ELTIF) Regulation regarding cost disclosure.

MARKET INFRASTRUCTURES

Europe

ESMA

 **ESMA publishes responses to its call for evidence on position limits in commodity derivatives.**

ESMA has published the responses received to its call for evidence on position limits in commodity derivatives.

 **ESMA updates its Q&As on MiFID II and MiFIR market structure and transparency topics.**


The new Q&As provide clarification on the following topics: (i) the use of pre-arranged transactions for non-equity instruments; (ii) the hedging exemption under Article 8 MiFIR; (iii) the treatment of constant maturity swaps; and (iii) the application of the tick size regime to periodic auction systems.

 **ESMA addresses derivatives trading obligation concerns following entry into force of EMIR Refit.**


ESMA has published a public statement addressing the misalignment between the scope of counterparties subject to the EMIR clearing obligation (CO) and those subject to the MiFIR derivatives trading obligation (DTO).

Following the entry into force of the EMIR review (the so-called EMIR Refit) on 17 June 2019, some counterparties are exempted from the CO while still being subject to the DTO. ESMA addresses the possible implementation challenges that this misalignment creates for counterparties exempted from the CO. In addition, ESMA clarifies the application date of the DTO for those counterparties impacted by the modified application date of the CO under EMIR Refit.


The statement advises NCAs not to prioritise their supervisory actions in relation to the DTO towards counterparties exempted from the CO following the entry into force of EMIR Refit.

 **ESMA updates its EMIR Q&A.**

The changes refer to the (i) removal of references to the frontloading requirement, as frontloading is no longer a requirement under the EMIR Refit; (ii) removal of references to backloading, following the elimination of the backloading requirement; (iii) identification and reporting obligations for funds, and block trades and allocations; and (iv) clarification on the applicability of reporting to intragroup transactions.

 **ESMA updates register of derivatives to be traded on-venue under MiFIR.**

ESMA has updated the public register of those derivative contracts that are subject to the MiFIR trading obligation, adding to the list three recently authorised French venues where some types of derivatives subject to the trading obligation are available for trading.

 **ESMA updates the CSDR Q&As.**

ESMA has updated its Q&As regarding the implementation of the Central Securities Depository Regulation (CSDR).

The updated Q&As provide answers to questions regarding practical aspects on the implementation of the new CSDR regime. Specifically, they clarify aspects regarding the scope of financial instruments subject to internalised settlement reporting.

OTHERS

Europe

ESMA

ESMA publishes report on the licensing of FinTech firms across Europe.

The report is based on two surveys conducted by ESMA since January 2018, which gathered evidence from NCAs on the licensing regimes of FinTech firms in their jurisdictions.

The key findings from the surveys are that (i) the primary area where regulatory gaps and issues have been identified by NCAs and where FinTech firms do not fit neatly within the existing rules is related to crypto-assets, virtual tokens (ICOs) and Distributed Ledger Technology (DLT); (ii) NCAs do not typically distinguish between FinTech and traditional business models in their authorisation and licensing activities since they authorise a financial activity and not a technology; and (iii) there is a need for greater clarity around the governance and risk management processes associated with both cyber security and cloud outsourcing.

ESMA updates its Q&As on the Securitisation Regulation.

ESMA has updated its Q&As on the Securitisation Regulation (SR) to clarify various aspects of the draft disclosure technical standards, including how some specific fields in the templates should be completed.

ESMA has published several additional resources to assist market participants in the implementation of ESMA's draft technical standards on disclosure requirements for the SR.

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