



FINANCIAL REGULATION

Investment services, asset management
and market infrastructure

September & October 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 procedure. 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 September-October period, we highlight several updated Q& A issued by ESMA in connection with MIFID, EMIR, CSDR and MFIR 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

ESAs

ESAs seek to promote consistent application of the PRIIPs regulation to bonds

The ESAs have issued a Supervisory Statement in order to promote a consistent application by national competent authorities of the scope of the Regulation for packaged retail and insurance-based investment products (PRIIPs Regulation) to bond markets. The Statement aims to achieve uniform levels of retail investor protection and a level playing field amongst product manufacturers and distributors within the EU.

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 the markets in MIFID II for the period 1 September 2018 to 31 August 2019 as well as updates to already published DVC periods.

MIFID II: ESMA publishes responses to its call for evidence on impact of the inducements and costs and charges requirements

ESMA has published responses to its call for evidence on impact of the inducements and costs and charges disclosure requirements under MiFID II.

This call for evidence is primarily of interest to firms which are subject to Article 24(4) and (9) of MiFID II when providing investment services and/or ancillary services and consumer groups and investors.

ESMA launches call for evidence on the effects of product intervention measures regarding CFDs and binary options

ESMA has launched a call for evidence on the practical effect and impact of product intervention measures (marketing, distribution or sale) regarding contracts for differences (CFDs) and binary options on market participants and clients.

ESMA updates its Q&As regarding investor protection issues

ESMA has issued an update of its Q&As on the implementation of investor protection topics under MiFID II and MiFIR. The new Q&As clarify the following issues: (i) best execution - disclosure of reports to the public; and (ii) drafting change on understanding the term "ongoing relationship".

EUROPEAN COMMISSION

 **European Commission launches a public consultation on the functioning of the EU benchmark regime**

The European Commission has launched a public consultation to get feedback from stakeholders who have experience of the regulatory regime for benchmarks in their capacity as benchmark administrator, benchmark contributor or benchmark user.

The consultation focuses primarily on a number of topics that the Benchmark Regulation itself puts forward for review, such as the regime for critical benchmarks and the effectiveness of the mechanism for authorisation and registration of EU benchmark administrators. At the same time, a couple of broader topics are explored, such as the categorisation of benchmarks and the rules for third country benchmarks.

ASSET MANAGEMENT

Europe

ESMA

ESMA publishes study on the exposure of the EU fund industry to CLOs

ESMA has published a report on the exposure of investment funds to the market of leveraged loans and collateralised loan obligations (CLOs). The findings show that the EU fund industry's exposure continues to be limited to EUR 130 billion (less than 1% of EU fund industry net assets).

ESMA analyses use of derivatives by UCITS equity funds

ESMA has conducted a study on the use of derivatives by UCITS equity funds in collaboration with researchers from the Technical University of Munich (TUM).

The analysis included in this study provides new insight into the type of derivatives that are traded by UCITS equity funds, why some of them trade derivatives whilst others do not, what makes some traders more active and to what extent the trading in derivatives is a reaction to daily changes in the market. UCITS equity funds mainly use forward contracts on currencies (80% of trades) and futures or options on equities (26%).


ESMA publishes stress simulation framework for investment funds

ESMA has developed a framework to be used for stress simulations in the investment fund sector. In applying this stress simulation test, ESMA has (i) simulated a pure redemption shock, where a large number of investors request to reduce or withdraw their parts in the fund within a short timeframe, and (ii) modelled the impact of the funds' liquidation on financial markets. In both cases, results show that, under current conditions, funds would be able to cope with such extreme shocks.

However, vulnerabilities are identified, especially for High Yield (HY) bond funds (they could experience a liquidity shortfall in a situation in which their holdings of liquid assets alone would not suffice to cover the redemptions assumed in the shock scenario, and recourse to less liquid assets would need to be taken); and for asset classes with more limited liquidity, such as HY bonds and Emerging Markets bonds (funds sales could have a material impact on prices, ranging from 150 to 300 basis points, and generate material second round effects).

ESMA identifies a deteriorating outlook for the asset management industry and continued very high market risk

ESMA has published the second Trends, Risks and Vulnerabilities (TRV) report for 2019, identifying a deteriorating outlook for the asset management industry and continued very high market risk due to potentially inflated asset valuations, subdued economic growth prospects, and flattening yield curves. Additionally, the TRV looks in more detail at three vulnerabilities facing the financial markets: (i) leveraged loans and collateralised loan obligations (CLOs), (ii) performance and cost of active and passive EU equity UCITS and (iii) use of derivatives by UCITS equity funds.

 **ESMA study finds high impact of costs on performance, especially for active equity funds**

The ESMA has carried out a study of the performance of active equity funds as compared to passive equity funds, ETFs and relevant benchmarks. The study, included in the latest Trends, Risks and Vulnerabilities (TRV) report, has found that actively managed funds have in past years underperformed, in net terms, both passive equity funds and equity ETFs, as well as their own benchmarks, primarily due to the large impact of ongoing costs.

MARKET INFRASTRUCTURES

International

FSB

FSB reports on implementation of OTC derivative reforms

The FSB has published its annual progress report on the implementation of the agreed G20 reforms to over-the-counter (OTC) derivatives markets. Overall there has been limited additional implementation of the reforms between end-November 2018 and end-September 2019.

Europe

ESMA

ESMA updates MiFID II Q&As on transparency and market structures issues

The amended Q&As for market structures clarify the interpretation of the application of tick size regime to periodic auctions.

The updated Q&A for transparency issues clarifies that for ETFs there is only one average daily turnover (ADT) band from which to choose the highest threshold to be used to calculate the average value of transactions (AVT).

ESMA updates its CSDR Q&As


ESMA has updated its Q&As regarding the implementation of the Central Securities Depository Regulation (CSDR). These new Q&As (i) answer questions regarding practical issues on the implementation of the new CSDR regime; (ii) clarify the scope of the cash penalties regime and more precisely the exemption applicable to insolvent participants, specifying that it applies only to settlement fails caused by that participant or to those relating to the liquidation of its position.

ESMA updates its EMIR Q&A

The changes refer to practical questions regarding data reporting issues related to (i) notification processes; (ii) representation duties; (iii) reporting in the scenario where a Clearing Member defaults; and, (iv) specificities as regards derivatives reported at position level.

ESMA consults on the commercial terms for providing client clearing services under EMIR

ESMA has published a consultation paper on draft technical advice to the European Commission on specifying the conditions under which commercial terms are to be considered fair, reasonable, non-discriminatory and transparent (FRANDT) where clearing service providers offer clearing services to clients.

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

The new Q&As clarify the requirements for submission of reference data and transactions under MiFIR. In particular, they relate to reporting of FX forward financial instruments under Articles 26 and 27 of MiFIR.

 **ESMA consults on MiFIR alignment following the introduction of EMIR REFIT**

ESMA has launched a consultation on possible amendments to the trading obligation under MiFIR following the introduction of EMIR REFIT.


In line with the close interconnection between those two obligations, EMIR REFIT mandates ESMA to assess whether the derivative trading obligation (DTO) under MiFIR should be aligned with changes to the clearing obligation (CO) introduced by EMIR REFIT, and to submit its findings in a report to the Commission.

 **ESMA publishes guidelines on standardised procedures and messaging protocols related to CSDR**


ESMA, following a public consultation, has drafted final guidelines aiming at clarifying the scope of the requirements contained in Article 6(2) of the Central Securities Depositories, focused on the preparation of the settlement process in order to limit the number of settlement fails.

 **ESMA agrees position limits under MIFID II**

ESMA has agreed with the proposed position limits regarding commodity derivatives for EEX Italian Power Base contracts and EEX Italian Power Peak contracts, finding them consistent with the objectives established in MiFID II.

 **ESMA consults on MAR review and adopts RTS on its application**

ESMA has issued two new publications related to the Market Abuse Regulation (MAR): (i) a final report on a set of Regulatory Technical Standards (RTS) covering cooperation arrangements for information exchange between national competent authorities and their counterparts in third countries, and (ii) a consultation paper on the review of the MAR including proposals that affect issuers of financial instruments admitted to trading or traded on a trading venue and their management, investment firms and asset management companies.

 **ESMA sees significant room for improvement in national regulators' supervision of derivatives data**

ESMA has issued the results of a peer review it conducted into supervisory actions of six National Competent Authorities (NCAs) regarding their approaches at enhancing the quality of derivative data reported under the European Market Infrastructure Regulation (EMIR).

The review delivered mixed results for the six NCAs. The majority of NCAs had a supervisory approach to EMIR data quality in place. However, two NCAs lagged behind when it comes to integrating EMIR data quality controls into their overall supervisory approach (the Cypriot Securities and Exchange Commission and the UK Financial Conduct Authority).

 **MiFID II/MiFIR: ESMA publishes responses to its Consultation on cost and market data and consolidated tape**

ESMA has published responses to its Consultation on MiFID II/MiFIR review report on the development in prices for pre- and post-trade transparency data from regulated markets, multilateral trading facilities (MTFs), organised trading facilities (OTFs), approved publication arrangements (APAs) and consolidated tape providers (CTPs) as well as the functioning of the consolidated tape (CT) for equity instruments as provided for in Articles 90(1)(g) and 90(2) of MiFID II and Article 52(7) of MiFIR.

 **ESMA publishes Annual Report on the application of waivers and deferrals under MiFIR**

ESMA has published its Annual Report on the application of waivers and deferrals under MiFIR. Specifically, the report analyses the application of: (i) equity waivers, (ii) the deferral regime to equity instruments, (iii) the deferral regime to non-equity waivers; and, (iv) the deferral regime to non-equity instruments.

The report also includes an analysis based on waiver applications received in the course of 2017 and 2018 and for which ESMA issued an opinion to the competent authority before 31 December 2018, as well as an overview of the deferral regimes applied across the different Member States, distinguishing between on-venue and OTC application.

 **ESMA responds to European Commission on annual review of RTS 2 (MiFIR)**

Due to the remaining uncertainties around a potential no-deal Brexit, ESMA agrees with the European Commission that is not advisable to perform the annual review of RTS 2 (Commission Delegated Regulation EU 2017/583) in the course of 2019, reiterating its intention to perform it by 30 July 2020, incorporating an analysis of the empirical data available to ESMA and looking specifically into what effects the UK leaving the Union may have on bond market liquidity.

 **ESMA issues opinion on accepted market practice by Spanish CNMV**

ESMA has issued an opinion supporting a revised Accepted Market Practice (AMP) on liquidity contracts notified by the National Securities Market Commission (CNMV). The opinion considers that the revised CNMV's AMP is compatible with Article 13(2) of the Market Abuse Regulation (MAR) and with CDR 2016/908 and contains various mechanisms to limit the threat to market confidence with respect to liquidity contracts and therefore maintains its previous positive opinion.

OTHERS

International

FSB

FSB sets out work to consider regulatory issues of stablecoins

The Financial Stability Board (FSB) has published an issues note on regulatory issues of stablecoins. The paper was delivered to G20 Finance Ministers and Central Bank Governors for their October meeting and responds to G20 Leaders' Osaka Declaration, which noted the importance of monitoring developments in crypto-assets and remaining vigilant to existing and emerging risks, and asked the FSB and other standard-setting bodies to advise on additional multilateral responses as needed.

Europe

ESAs

ESAs highlight money laundering and terrorist financing risks in the EU financial sector

The three European Supervisory Authorities (EBA, EIOPA and ESMA) have published their second joint Opinion on the risks of money laundering (ML) and terrorist financing (TF) affecting the EU financial sector. The ESAs found that the monitoring of transactions and suspicious transactions reporting still raise concerns, particularly in sectors where a financial institution's business model is based on frequent transactions.

Spain

CNMV

CNMV publishes the comments received during the public consultation related to the technical guide on the authorisation procedure for new firms to speed up processes

On 9 September 2019, the National Securities Market Commission (CNMV) submitted for public consultation the proposed technical guide on the authorisation procedure for new firms to speed up processes. The deadline for submitting comments ended on 30 September 2019.

 **CNMV publishes annual report on investors' complaints and enquiries for 2018**

The National Securities Market Commission (CNMV) has issued its annual report on investors' complaints and enquiries for 2018. This report covers how the CNMV has handled claims and complaints from investors regarding the entities and products with which they operate, and dealt with doubts and enquiries in general.

CONTACT LAWYERS¹



Isabel Aguilar Alonso
+34915860365
isabel.aguilar@uria.com



Pilar Llesma Rodrigo
+34915860365
pilar.llesma@uria.com



Juan Carlos Machuca Sigüero
+442072601802
juancarlos.machuca@uria.com

1.- Newsletter drafted by Ibai Puente González, María Saenz de Buruaga Azcargorta and Mónica Sánchez Pilar.

**BARCELONA
BILBAO
LISBOA
MADRID
PORTO
VALENCIA
BRUXELLES
LONDON
NEW YORK
BOGOTÁ
CIUDAD DE MÉXICO
LIMA
SANTIAGO DE CHILE
BEIJING**

www.uria.com

This newsletter provides general information and does not constitute legal advice