



FINANCIAL REGULATION

Investment services, asset management
and market infrastructure

November & December 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 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 November-December period, we highlight Directive (EU) 2019/2034 and Regulation (EU) 2019/2033 of the European Parliament and of the Council of 5 December 2019 on prudential supervision of investment firms, as well as two of the three Regulations proposed by the European Commission in its action plan on sustainable finance: Regulation (EU) 2019/2088, the "Disclosure Regulation", and Regulation (EU) 2019/2089, the "Low Carbon Benchmarks Regulation". We also highlight several updated Q&As issued by ESMA in connection with MiFID II and MiFIR.

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

LEGISLATION

Regulation (EU) 2019/2033 and Directive (EU) 2019/2034 on prudential supervision of investment firms

On 5 December 2019, the EU published in the Official Journal of the European Union (OJEU) Directive (EU) 2019/2034 (“IFD”) and Regulation (EU) 2019/2033 (“IFR”) on the prudential requirements and supervision of investment firms. The Directive lays down rules on the initial capital of investment firms and on the supervisory powers and tools for prudential supervision of investment firms by competent authorities. The Regulation establishes uniform prudential requirements that apply to investment firms authorised and supervised under MiFID II. The new IFD and IFR regime contains provisions with respect to own funds, capital requirements, internal governance, transparency, concentration risk, liquidity, disclosures and reporting.

Regulation 2019/2033 will apply from 26 June 2021, with some exceptions.

Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector

On 9 December 2019, the OJEU published Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the Disclosure Regulation). The Disclosure Regulation lays down harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability-related information on financial products and will affect financial market participants and financial advisers as defined in Article 2 of the Regulation.

The Disclosure Regulation will apply from 10 March 2021.

Regulation (EU) 2019/2089 on low-carbon benchmarks

On 9 December 2019, the OJEU published Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (the Low Carbon Benchmarks Regulation). The Low Carbon Benchmarks Regulation introduces new categories of low-carbon and positive carbon impact benchmarks in order to promote more efficient channelling of investment towards sustainable assets.

The Low Carbon Benchmarks Regulation entered into force on 29 December 2019 and will apply from 10 March 2021.

ESMA

MIFID II: ESMA makes new bond liquidity data available

On 8 November 2019, ESMA began making available new data for bonds subject to the pre- and post-trade requirements of the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR) through its data register.

ESMA's liquidity assessment for bonds is based on a quarterly assessment of quantitative liquidity criteria, which include the daily average trading activity (trades and notional amount) and percentage of days traded per quarter.

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 from 1 November 2018 to 31 October 2019, as well as updates to already published DVC periods.

ESMA announces MIFID scheduled publication dates for 2020

ESMA has published its 2020 calendar of MiFID II/MiFIR publications for the transparency regime and systematic internalisers' calculations for derivatives. ESMA and national competent authorities (NCAs) are working to publish this information from April, however due to ongoing quality issues, the scope of derivatives classes to be published will not be entirely complete.

ESMA updates 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 new Q&As provide a new answer on best execution and classification of financial instruments under Regulatory Technical Standards 27 (RTS-27) if ESMA has not published any calibrated market sizes.

ESMA recommends real-time consolidated tape for equity

ESMA has published a first review report on the development of prices for market data and on the consolidated tape for equity now that MiFID II has been applied for nearly two years. The publication shows that, to date, MiFID II has not delivered on its objective to reduce the cost of market data charged by trading venues and Approved Publication Arrangements (APAs). Moreover, as no consolidated tape has materialised, ESMA recommends the establishment of a European Union-wide real-time consolidated tape for equity instruments.

ESMA publishes data for the systematic internaliser calculations for equity, equity-like instruments and bonds

On 8 November 2019, the ESMA published data for the systematic internaliser calculations for equity, equity-like instruments and bonds under MiFID II and MiFIR. The results are published only for instruments for which trading venues submitted data for at least 95% of all trading days over the six-month observation period. The data publications also incorporate OTC trading to the extent it has been reported to ESMA. The publication also includes data for instruments that were no longer available for trading on EU trading venues at the end of December.

CNMV

 **CNMV extends the list of procedures to be presented by electronic means**

Following the entry into force of a great number of EU laws, on 24 October 2019 the National Securities Market Commission (CNMV) published a decision extending the list of procedures and communications that need to be channelled through its electronic register.

 **CNMV amends Circular 1/2017 on liquidity contracts to facilitate their use**

On 10 November 2019, the CNMV published Circular 2/2019 of 27 November amending Circular 1/2017 on liquidity contracts. The new circular eases certain requirements to facilitate the use of liquidity contracts by (i) establishing a new alternative limit for the maximum daily volume applicable to Alternative Stock Market companies and to primary market companies with a lower level of liquidity, and (ii) eliminating, in general, the restriction on simultaneously maintaining purchase and sale orders for shares during the auction period.

The new Circular will enter into force three months after its publication.

ASSET MANAGEMENT

Europe

ESMA

ESMA publishes report on the responses received to its consultation on the ELTIF Regulation

ESMA has published the final report on the draft RTS under Article 25 of the Regulation on European long-term investment funds (ELTIF). The report provides a feedback statement summarising the responses to the consultation on the draft RTS that was carried out between March and June 2019, but the finalisation of the draft RTS will be postponed until the publication of the new PRIIPs (Packaged Retail and Insurance-based Investment Products) delegated acts.

ESMA consults on position limits and position management in commodity derivatives (MiFID II)

In the context of the MiFID II review, ESMA has launched a consultation paper on the impact of position limits on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivative markets.

This consultation is seeking stakeholders' views on (i) some proposed changes to the legal framework aimed at limiting the scope of commodity derivatives subject to position limits to key contracts, and (ii) an amendment to the quantitative thresholds that trigger publication of weekly position reports by trading venues so that there is more transparency for commodity derivative contracts traded in the EU.

ESMA updates AIFMD Q&As

ESMA has updated its Q&As on the application of the Alternative Investment Fund Managers Directive (AIFMD), providing clarification on reporting requirements on liquidity stress tests for closed-ended unleveraged Alternative Investment Funds (AIFs).

ESMA issues second pan-EU overview on the use of supervisory sanctions for UCITS

ESMA has issued its second annual report on sanctions (penalties and measures) imposed by NCAs under the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive. Results show that, while the number of NCAs issuing sanctions remains stable at 15, compared to the previous report for the period 2016-2017, the total number of sanctions issued has decreased based on a year-on-year comparison.

CNMV

 **CNMV publishes an analysis of the practices to be followed by Spanish management companies when investing in funds managed by the same management company**

In accordance with its 2019 plan, the CNMV has analysed the practices of Spanish management companies when their funds are invested in other funds managed by the same management company or by other management companies of the same group.

The result of the analysis has shown that, when investing in funds managed by them, most management companies do so in “portfolio classes” (also called “clean” classes), which do not include distribution costs, or they refund the part of the management fee that could be attributed to distribution costs when investing in underlying funds with more expensive classes or in funds without classes. However, given that a small number of management companies are not refunding the distribution costs to the investment fund when such costs are included in the invested class, the CNMV is considering proposing a modification of the Spanish rules in this respect.

MARKET INFRASTRUCTURES

Europe

LEGISLATION

Regulation (EU) 2019/2099 on the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

On 12 December 2019, the OJEU published Regulation (EU) 2019/2099 amending Regulation (EU) 648/2012 as regards the procedures and authorities involved in the authorisation of CCPs and requirements for the recognition of third-country central counterparties (CCPs) (EMIR 2.2). The main change introduced by EMIR 2.2 is the introduction of two Tiers to categorise third country CCPs (TC-CCPs). If a TC-CCP is determined as systematically important, it will be considered a Tier 2 CCP for the purpose of EMIR; otherwise, it will be considered Tier 1.

EMIR 2.2 will enter into force on the twentieth day following its publication in the OJEU (1 January 2020) and will apply from that date.

ESMA

ESMA updates the CSDR Q&As

ESMA has updated its Q&As regarding the implementation of the Central Securities Depositories Regulation (CSDR) to clarify the application of requirements related to the credit default swap matching functionality.

The first Q&A clarifies that instructions involving “delivery without matching” at the level of the CSD would no longer be permitted under the future CSDR settlement discipline regime, except for those instructions which relate to transfers of financial instruments between different accounts opened in the name of the same participant or managed by the same account operator. The second Q&A clarifies that the “passive matching” functionality at CSD level would be in line with the RTS on settlement discipline under the CSDR.

ESMA advises European Commission on supervisory regime for third-country CCPs

ESMA has published three sets of technical advice given to the European Commission regarding third-country central counterparties (TC-CCPs) under the revised European Market Infrastructure Regulation (EMIR 2.2).

ESMA's advice details (i) how to specify the criteria to determine whether a TC-CCP is systemically important for the EU or a Member State's financial stability; (ii) how to assess comparable compliance and (iii) the fees to be charged to TC-CCPs for the relevant supervisory and administrative costs.

 **ESMA publishes responses to consultation on aligning MIFIR to the changes introduced by EMIR Refit**

ESMA has published the responses it received to its consultation on aligning the MiFIR requirements to the changes introduced in the revision of the European Market Infrastructure Regulation (EMIR Refit).

 **ESMA updates its Q&As on MIFID II and MIFIR transparency and market structure topics**

ESMA has updated its Q&As regarding market structures and transparency issues under MiFID II and MiFIR. The new Q&As provide clarification on (i) conversion of LIS/SSTI thresholds in lots; (ii) member preferencing and pre-arranged transactions; and (iii) the scope of Commission Delegated Regulation (EU) 2017/584 (RTS7) to trading venues without auto-matching trading systems or that explicitly permit algorithmic trading.

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

ESMA has updated its Q&As on data reporting under MiFIR. The Q&As provide clarifications in relation to the requirements for submission of reference data and transactions under MiFIR. Specifically, the Q&As relate to the reporting of reference rates not included in RTS 22 and 23, under Article 26 and article 27 of MiFIR.

 **ESMA consults on procedural rules to impose penalties on supervised entities**

ESMA has begun a public consultation on future procedural rules regarding penalties for TC-CCPs, trade repositories (TRs) and credit rating agencies (CRAs). ESMA seeks stakeholders' views on future technical advice on the rules to impose penalties and fines on TC-CCPs, TRs and CRAs, which builds on the existing enforcement framework regarding TRs and CRAs as well as on ESMA's supervisory experience gained in recent years.

 **ESMA publishes responses received to FRANDT consultation for providing clearing services under EMIR**

ESMA has published the responses it received from stakeholders on its consultation on its draft technical advice on commercial terms for providing clearing services under EMIR. The objective of the consultation paper is to seek stakeholders' feedback on how to specify the conditions under which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT) when providing CCP clearing services to clients in accordance with Article 4(3a) of EMIR.

 **ESMA publishes second Annual Report on EMIR penalties and supervisory measures**

ESMA has published its second annual report regarding supervisory measures carried out and penalties imposed by NCAs under EMIR.

The report, covering the period from January to December 2018, focuses on NCAs' supervisory measures and enforcement actions, their powers and the interaction between NCAs and market participants when monitoring compliance with the following EMIR requirements: (i) the clearing obligation for certain OTC derivatives (Art. 4 EMIR); (ii) the reporting obligation of derivative transactions to TRs (Art. 9 EMIR); (iii) requirements for non-financial counterparties (Art. 10 EMIR) and (iv) risk mitigation techniques for non-cleared OTC derivatives (Art. 11 EMIR).

ESAs

 **ESAs publish a joint draft RTS to amend Delegated Regulation on the risk mitigation techniques for non-cleared OTC derivatives and a joint statement on the introduction of fallbacks in OTC derivative contracts**

The European Supervisory Authorities (ESAs) have published a joint draft RTS to amend the Delegated Regulation on the risk mitigation techniques for non-cleared OTC derivatives (bilateral margining) as well as a joint statement on the introduction of fallbacks in OTC derivative contracts and the requirement to exchange collateral. Both the RTS and the statement were developed to facilitate further international consistency in the implementation of the global framework agreed by the Basel Committee on Banking Supervision and the International Organisation of Securities Commissions.

OTHERS

Europe

EBA

EBA pushes for early action on sustainable finance

The European Banking Authority (EBA) has published its action plan on sustainable finance outlining its approach and timeline for delivering mandates related to environmental, social and governance (ESG) factors. The workplan will focus first on key metrics and disclosure to support banks' green strategies and then look into evidence for any adjustments to risk weights.

ESMA

ESMA issues 2019 report on accepted market practices under Market Abuse Regulation (MAR)

ESMA has published its second annual report on the application of accepted market practices (AMPs) in accordance with MAR. The report provides an overview on the establishment and application of AMPs in the EU after MAR became applicable, including the AMPs established under the Market Abuse Directive that remained applicable afterwards.

ESMA publishes responses to its consultation on the MAR review

ESMA has published the responses it received by stakeholders on its consultation on the review of the MAR. The responses cover: (i) topics included in Article 38 of MAR; (ii) a set of connected topics arising from the EC's mandate on the scope of MAR (including buy-back programmes, the delayed disclosure of inside information, the usefulness of insider lists, several aspects of PDMR notification requirements, and cross border enforcement of sanctions); and (iii) issues closely linked to some of these topics that were raised by ESMA.

ESMA calls for strengthened supervision on suspicious transaction reporting under MAR

ESMA has published a peer review report on how NCAs handle suspicious transactions and order reports (STOR) under MAR. The report sees a significant increase in suspicious transaction and order reporting and finds that national supervisors can do more to ensure all financial participants play their part in combatting market abuse and therefore recommends measures to further strengthen STOR supervision.

ESMA updates its Q&As on the securitisation regulation

ESMA has updated its Q&As on the Securitisation Regulation (Regulation 2017/2402) to clarify several aspects of the templates contained in the recently published draft technical standards on disclosure. Specifically, the Q&As analyse how several specific fields in the templates should be completed and contain clarifications relating to STS notifications and securitisation repositories.

ESMA, together with the EBA and EIOPA, publishes guidelines to transform the way competent authorities cooperate with each other on AML/CTF matters

The three European Supervisory Authorities (EBA, EIOPA and ESMA - ESAs) have published guidelines on cooperation and information exchange, establishing colleges of AML/CFT supervisors for the first time in the EU to ensure effective cooperation and information exchange between competent authorities.

International

FINANCIAL STABILITY BOARD (FSB)

FSB sets out 2020 work programme

The FSB has published its work programme for 2020. The most important specific FSB work programme items are: fintech, global stablecoins, cross-border payment systems, interest rate benchmarks and evaluation of ongoing work.

FSB reports consider financial implications of BigTech in finance and third party dependencies in cloud services

The FSB has published two reports that consider the financial stability implications of an increased offering of financial services by BigTech firms, and the adoption of cloud computing and data services across a range of functions at financial institutions. Regarding the latter, the report concludes that there are no financial stability risks stemming from the use of cloud services by financial institutions. However, there may be merit in further discussion among authorities to assess: (i) the adequacy of regulatory standards and supervisory practices for outsourcing arrangements; (ii) the ability to coordinate and cooperate, and possibly share information among them when considering cloud services used by financial institutions; and (iii) the current standardisation efforts to ensure interoperability and data portability in cloud environments.

FSB American regional group discusses vulnerabilities, non-bank financial intermediation, stablecoins and cyber incidents

The FSB Regional Consultative Group for the Americas met on 31 October 2019 to discuss global and regional financial vulnerabilities, such as (i) the elevated debt levels for many private and public sector borrowers in a low interest rate environment; (ii) the need to reform interest-rate benchmarks; (iii) the implications of stablecoins for financial stability and (iv) the increased frequency and sophistication of cyber attacks.

 **FSB European regional group discusses vulnerabilities, non-bank financial intermediation, stablecoins, cyber incidents and a joint financial crisis management exercise**

The FSB Regional Consultative Group for Europe met on 12 November 2019 to discuss the same topics and a joint financial crisis management exercise conducted by Nordic and Baltic authorities in January 2019 to test their preparedness for a financial crisis.

BANK FOR INTERNATIONAL SETTLEMENTS (BIS)

 **The Basel Committee is consulting on introducing guidelines on interaction and cooperation between prudential and AML/CTF supervision**

The Basel Committee is consulting on the introduction of guidelines on interaction and cooperation between prudential and AML/CFT supervision. The proposed revisions provide further detailed guidelines to strengthen the interaction and cooperation between prudential supervisors and those responsible for anti-money laundering and countering the financing of terrorism (AML/CFT). Comments should be uploaded here by 6 February 2020.

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