



FINANCIAL REGULATION

Investment services, asset management
and market infrastructure

January - March 2020

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, EU and Spanish level that affect investment services, asset management and market infrastructures. It will also include a section on other matters of general interest.

For the January to March period, we highlight the European Commission's public consultation aimed at gathering feedback from stakeholders on how issues should be prioritised in a potential reform of MiFID II and MiFIR, as well as the recommendations to financial market participants issued by the European Securities and Markets Authority, together with national competent authorities (NCAs), regarding business continuity planning and market disclosure of any significant information concerning the effects of COVID-19, among others.

Also, we highlight the CNMV's ban until 17 April 2020 on entering into transactions on securities and financial instruments that create or increase a net short position on Spanish shares admitted to trading on the Spanish Stock Exchanges and the *Mercado Alternativo Bursátil –MAB–*.

In Spain, the government has submitted to parliament the draft law on the digital transformation of the financial system, which creates a regulatory sandbox designed to ensure the innovative and secure development of new projects regarding financial services provision.

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

EU

LEGISLATION

Public consultation on the review of the MiFID II/MiFIR regulatory framework

The European Commission has launched a public consultation aimed at reviewing the regulatory framework applicable to investment firms and market operators after three years of application of the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR).

It is seeking to gather feedback from stakeholders on areas that would merit targeted adjustments. In addition, the Commission would welcome indications on how issues should be prioritised in a potential reform of the MiFID II/MiFIR rulebook. The feedback period ends on 20 April 2020.

ESMA

MiFID II: ESMA makes new bond liquidity data available

On 31 January 2020, ESMA made available new data for bonds subject to the pre- and post-trade requirements of MiFID II and 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 January 2019 to 1 January 2020, as well as updates to already published DVC periods.


ESMA starts publishing questions received through its online Q&A process

ESMA has started publishing on its website questions received through its web-based tool. They refer to: (i) questions for which a Q&A will be put on the agenda of ESMA's relevant Standing Committee; (ii) rejected questions, i.e. questions that were tabled for discussion in an ESMA Standing Committee but to which ESMA does not intend to provide an answer; and (iii) questions forwarded to the Commission.

 **ESMA launches a common supervisory action with NCAs on MiFID II suitability rules**

ESMA has launched a common supervisory action with national competent authorities (NCAs) on the application of MiFID II suitability rules across the European Union.


This initiative will allow ESMA and the NCAs to gauge the progress made by intermediaries in the application of the assessment of suitability and will also help in the analysis of whether, and how, the costs of investment products are taken into account by firms when recommending an investment product to a client.

 **ESMA consults on the new MiFIR and MiFID II regimes for third-country firms**

ESMA has launched a consultation on draft technical standards on the provision of investment services and activities in the EU by third-country firms under MiFIR and MiFID II.

The consultation will gather responses related to: (i) draft regulatory technical standards to specify the information that third-country firms must provide to ESMA to register in its register of third-country firms and that they must report annually; (ii) draft implementing technical standards to specify the format in which the registration and annual reporting information should be submitted, and (iii) draft implementing technical standards to specify the format in which the new flow of information under MiFID II is to be reported to NCAs by branches of third-country firms.

The closing date for responses from stakeholders is 31 March 2020.


 **ESMA issues opinions on position limits under MiFID II**

ESMA has published seven opinions on position limits regarding commodity derivatives under the Markets in Financial Instruments Directive and Regulation (MiFID II/MiFIR).

In five of the seven opinions, ESMA found that the proposed position limits were consistent with the objectives established in MiFID II, but required the Portuguese *Comissão do Mercado de Valores Mobiliários* to revise the proposed position limits for the OMIP SPEL base contracts. In a subsequent opinion, ESMA agreed with the Portuguese supervisor's revision of position limits.

 **ESMA updates Q&A on MiFID II and MiFIR investor protection**

ESMA has included a new section in its Q&A on MiFID II and MiFIR investor protection, regarding practices for firms selling financial instruments subject to the Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD 2).

 **ESMA recommends action by financial participants for COVID-19 impact**


ESMA, together with NCAs, are closely monitoring the impact of the COVID-19 outbreak on financial markets in the EU.

In particular, ESMA recommends: (i) business continuity planning, for market participants to be ready to apply their contingency plans; (ii) market disclosure of any significant information concerning the impact of COVID-19; (iii) financial reporting, since issuers should provide transparency on the actual and potential impact of COVID-19; and (iv) in relation to fund management, asset managers should continue to comply with risk management requirements.

 **ESMA issues a public statement on actions to mitigate the impact of COVID-19 on the EU financial markets**


With regard to reporting obligations pursuant to SFTR or MiFIR, ESMA expects NCAs to exercise their supervisory powers over counterparties, entities responsible for reporting and investment firms in a proportionate manner.

Furthermore, ESMA does not consider it necessary to register any trade repository (TR) ahead of 13 April 2020, but it expects TRs to be registered sufficiently ahead of the next phase of the reporting regime, i.e. 13 July 2020.

 **ESMA publishes results of the annual transparency calculations for equity and equity-like instruments**

On 28 February 2020, ESMA made available the results of the annual transparency calculations for equity and equity-like instruments.

As always, market participants are invited to monitor the release of transparency calculations for equity and equity-like instruments on a daily basis to obtain the calculations for newly traded instruments. Furthermore, in the coming weeks ESMA will release the annual transparency calculations for additional instruments that are yet to be published as they are subject to specific data quality review.

 **ESMA clarifies position on call tapping under MiFID II**

ESMA has issued a public statement to clarify issues regarding the application by firms of the MiFID II requirements on the recording of telephone conversations.

ESMA reminds firms of the MiFID II requirements in this area. It also recognises that, considering the exceptional circumstances created by the COVID-19 outbreak, some scenarios may emerge where, notwithstanding steps taken by firms, the recording of conversations required by MiFID II may not be practicable. If firms are unable to record voice communications in these exceptional circumstances, ESMA expects them to consider alternative measures that they could take to mitigate the risks related to the failure to record.

Spain

CNMV

 **CNMV has updated its Q&A on MiFID II implementation**

On 27 January 2020, the CNMV published an update of its Q&A on MiFID II implementation.

The update concerns: (i) inducements; (ii) financial instruments information and safeguards; (iii) costs and expenses information; and (iv) the scope of application of MiFID II.

ASSET MANAGEMENT

EU

ESMA

ESMA launches a common supervisory action with NCAs on UCITS liquidity risk management

ESMA has launched a common supervisory action (CSA) with NCAs on the supervision of UCITS managers' liquidity risk management across the EU.

In support of this aim, NCAs have agreed to assess simultaneously whether market participants in their jurisdictions adhere to the UCITS liquidity risk management rules in their day-to-day business. This will be done on the basis of a common methodology developed together with ESMA. The CSA assessment framework, including scope, methodology, supervisory expectations and timeline, is the result of a joint effort to carry out comprehensive supervisory actions in a convergent manner.

ESMA publishes responses to joint consultation paper on PRIIPs KID

ESMA has published the responses received to the Joint Consultation Paper concerning amendments to Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 (PRIIPs KID Delegated Regulation).

The responses cover, amongst other topics: (i) presentation of performance information; (ii) methodology for performance scenarios; (iii) options to change methodologies to calculate costs; (iv) the possible use of the PRIIPs KID by UCITS from 1 January 2022; and (v) expected costs and benefits of the proposed amendments.

ESMA publishes its response to the Commission's consultation on the BMR review

ESMA has published its response to the European Commission's consultation on the Benchmarks Regulation (BMR) review, which entered into application on 1 January 2018.

ESMA's response concerns: (i) the critical benchmarks regulatory framework; (ii) the scope of the BMR; and (iii) the third country regime.


ESMA launches a consultation on draft Regulatory Technical Standards under BMR

ESMA has launched a consultation on draft Regulatory Technical Standards (RTS) under BMR covering governance, methodology, infringements reporting and critical benchmarks.

In fact, Article 5 of Regulation (EU) 2019/2175 introduced changes to the BMR including a new mandate for ESMA to develop draft RTS to further specify some of the BMR's requirements.

ESMA will consider the responses to this consultation when preparing the draft RTS to be submitted to the European Commission for adoption in the final legal text. The closing date for responses from stakeholders is 9 May 2020.


ESRB

 **The European Systemic Risk Board (ESRB) publishes a letter about considerations regarding the AIFMD**

The ESRB has published a letter to the European Commission on the shortcomings of the current AIFMD framework. The letter shares considerations regarding: (i) the suitability of the reporting framework and access to data for monitoring systemic risk, (ii) the need to operationalise existing macroprudential policy instruments, and (iii) the ongoing development of the macroprudential policy framework “beyond banking” in general and for investment funds in particular.


Spain

CNMV

 **CNMV approves the Technical Guide on the procedures for the selection of intermediaries**


On 3 February, the CNMV approved Technical Guide 1/2020 on the procedures to be followed by management companies when selecting intermediaries, in order to obtain the best possible result for collective investment schemes and other managed portfolios.

During the consultation phase (which took place between 24 May 2019 and 17 June 2019), numerous comments and observations were received from stakeholders. These, together with the report issued by the CNMV Advisory Committee, were taken into account to draft the final wording of the Technical Guide.

 **CNMV issues a public statement regarding information obligations of the management companies of collective investment schemes in light of COVID-19**

The CNMV's considerations cover the following matters: (i) the preparation, audit and approval of the annual accounts of CIS, their management companies and venture capital entities; (ii) the publication and dispatch to investors of the CIS quarterly report referring to the first quarter of 2020; (iii) reporting to the CNMV of reserved information of CIS and venture capital entities and statistical information statements on assets and liabilities of EU CIS; (iv) the reporting procedure required by AIFMD and Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds; (v) the internal audit report; (vi) the information requests that the CNMV may address to CIS management companies; and (vii) the notification of relevant facts.

MINISTRY OF ECONOMIC AFFAIRS AND DIGITAL TRANSFORMATION

 **Ministry of Economic Affairs and Digital Transformation publishes results of a public consultation on Directive 2019/1160's transposition**

The Ministry of Economic Affairs and Digital Transformation has published the results of a public consultation regarding the transposition of Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and of 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.

These Directives, as well as 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, include a series of measures that seek to overcome the current obstacles that hinder fund managers' ability to fully benefit from the internal market and to improve misalignments between UCITS and AIFMD.

MARKET INFRASTRUCTURES

EU

ESMA

ESMA consults on MiFIR transparency regime for systematic internalisers

ESMA has launched a consultation on the MiFIR pre-trade transparency regime for systematic internalisers (SI) active in non-equity instruments, in the context of the monitoring it will perform under MiFIR on the application of the pre-trade transparency obligations applicable to SIs in respect of bonds, structured finance products, emission allowances and derivatives (non-equity instruments).

ESMA clarifies rules for CCP membership criteria and due diligence

ESMA has published a report based on a survey it conducted into membership arrangements and due diligence by central counterparties (CCPs) towards their clearing members.

The survey focused on the following three topics: (i) whether individuals (i.e. a physical person, either as an individual trader or in a business capacity) can be clearing members of EU CCPs and, if so, how the CCPs assess the financial resources and operational capacities of such individuals; (ii) what membership criteria EU CCPs apply and whether they apply specific criteria to non-financial counterparties as defined in EMIR; and (iii) how EU CCPs conduct their on-going monitoring of compliance with membership requirements (due diligence of Clearing Members), especially with respect to entities other than banks and investment firms.

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, amongst others, the following topics: (i) sales of subordinated eligible liabilities and the assessment of suitability; (ii) whether Article 44a of Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD 2) should be applied only if there is an active offering on the part of the firm; (iii) information to be collected from clients in order to comply with Article 44a(1) and 44a(2) of BRRD 2; (iv) monitoring and calculation of the 10% threshold referred to in Article 44a(2)(a) of BRRD 2; and (v) what happens if a transaction relating to subordinated eligible liabilities is deemed unsuitable by the firm, but the retail client wishes to proceed anyway.

ESMA updates the CSDR Q&As

ESMA has updated its Q&As regarding practical aspects of the implementation of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories (CSDR). They clarify (i) that the costs of the penalty mechanism that are charged to participants by a CSD should not be allocated on the basis of the number or value of penalties imposed on participants; (ii) various aspects of the settlement instructions sent by CCPs, and (iii) in respect of the buy-in process, that the

length of the extension period should be determined based on the liquidity classification of the relevant financial instrument as of the intended settlement date of the transaction.

ESMA consults on the use of no data options in securitisation reporting

ESMA has published a consultation paper on guidelines on securitisation repository (SR) data completeness and consistency thresholds.

The consultation's objective is to help market participants and securitisation repositories to understand ESMA's expected maximum use of *No Data options* contained within a securitisation data submission.

The public consultation is open until 16 March 2020.

ESMA publishes the final report on MiFIR alignments following the introduction of EMIR Refit

ESMA has published a final report suggesting amendments to the trading obligation under MiFIR following the introduction of EMIR Refit.

ESMA will submit this final report to the European Commission, which recommends aligning the scope of counterparties subject to the clearing and trading obligations.

ESMA updates on progress on compliance with the MiFIR pre-trade transparency requirements in commodity derivatives

ESMA has published a statement to provide an update on the implementation of the Supervisory Briefing on pre-trade transparency in commodity derivatives.

The Supervisory Briefing aims to increase supervisory convergence among NCAs in their implementation of the requirements and to provide a common timetable for the enforcement of the commodity derivatives pre-trade transparency regime, with the objective of ensuring a level playing field across EU trading venues.

EMIR: ESMA advises Commission on C6 energy derivatives

On 2 March 2020, ESMA issued a report on C6 energy derivatives and related obligations under EMIR.


The report assesses the adequacy of mandating C6 energy derivative contracts, which currently benefit from a special exemption regime, subject to the clearing obligation and margin requirements of EMIR. ESMA also analyses the potential impact of including these contracts in the calculation to determine which counterparties are subject to clearing.

ESMA consults on MiFIR transparency regime for non-equity instruments

On 10 March 2020, ESMA launched a consultation paper reviewing the transparency regime for non-equity instruments and the trading obligation for derivatives under MiFIR.


The paper contains ESMA's proposals for possible amendments to the transparency regime based on in-depth data analyses of the effects of the current regime since January 2018.

ESMA's objective with this review is to simplify the current complex trade reporting regime in order to create a uniform set of rules in the EU while trying to improve the overall trade transparency available to market participants for non-equity instruments.

 **ESMA's supervision focuses on outstanding credit ratings, data quality and third-country CCPS**


ESMA has published its 2020 Supervision Work Programme, detailing the areas on which its supervision of Credit Rating Agencies (CRAs), Trade Repositories (TRs) and the monitoring of third-country Central Clearing Counterparties (TC-CCPs) and Central Securities Depositories (TC-CSDs) will focus.

ESMA is also preparing for its new supervisory responsibilities under SFTR, Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (SECR), the BMR and MiFIR.

 **ESMA sets out approach on MiFIR tick-size regime for systematic internalisers**

ESMA has issued a public statement to ensure coordinated supervisory actions by NCAs on the application of the new tick-size regime for systematic internalisers under the MiFIR and Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms (IFR).

This approach is needed in response to developments related to the COVID-19 pandemic and related actions taken by the EU Member States.

 **ESMA consults on post-trade risk reduction services under EMIR REFIT**

ESMA has launched a public consultation on Post-Trade Risk Reduction services (PTRR) under EMIR.

ESMA seeks detailed feedback on how the clearing obligation affects these PTRR services and whether there should be an exemption to the clearing obligation for trades directly resulting from PTRR services. ESMA also seeks feedback on the scope of a possible exemption to the clearing obligation and if an exemption should be subject to conditions or restrictions.

OTHERS

EU

ESMA

ESMA sets out its strategy on sustainable finance

ESMA has published its Strategy on Sustainable Finance. The strategy sets out how ESMA will place sustainability at the core of its activities by embedding Environmental, Social and Governance (ESG) factors in its work.

The key priorities for ESMA highlighted in the strategy include: (i) completing the regulatory framework on transparency obligations; (ii) reporting on trends, risks and vulnerabilities (TRV) of sustainable finance; (iii) participating in the EU Platform on Sustainable Finance; and (iv) ensuring entities that ESMA supervises directly adhere to ESG guidelines.

ESMA updates governance and reporting obligations following the UK's withdrawal from the European Union

ESMA has published a statement to clarify issues relating to its governance of and the reporting obligations for UK entities from 1 February 2020 following the UK's withdrawal from the EU.

From 1 February 2020:

- the UK Financial Conduct Authority (FCA) will no longer be a member of ESMA's Board of Supervisors or participate in any of ESMA's other governance bodies;
- rights and obligations of UK entities under EU law will continue to apply – such as reporting and notification obligations under MiFIDII/MiFIR, EMIR, CSDR, AIFMD, MMFR; and
- ESMA will continue to directly supervise registered CRAs, TRs and SRs established in the UK during this period.

ESMA requires net short position holders to report positions of 0.1% and above

ESMA has decided to temporarily require the holders of net short positions in shares traded on an EU regulated market to notify the relevant NCA if the position reaches or exceeds 0.1% of the issued share capital after the entry into force of the decision (16 March 2020).

ESMA considers that lowering the reporting threshold from 0.2% to 0.1% is a precautionary measure taken in the exceptional circumstances created by the COVID-19 pandemic.

Spain

LEGISLATION

Government sends the draft Law on the digital transformation of the financial system to the Cortes Generales

On 18 February 2020, the Council of Ministers approved the draft Law creating a regulatory sandbox, or controlled testing space, to accompany the digital transformation of the financial system.

The project, which has been sent to the *Cortes Generales* for parliamentary processing, establishes a regulatory sandbox and a suitable legal environment to ensure that innovation in the financial field is carried out efficiently and safely for users.

The Council of Ministers has approved the draft Law on financial transaction tax

On 28 February 2020, the Council of Ministers approved the draft Law on financial transaction tax.

The purchase of shares of those companies with over one billion euros value on stock market will be taxable at 0.2%, regardless of the residence of the investment firms and credit entities involved in the purchase of shares.

CNMV

CNMV resolution on the suspension of administrative deadlines according to the Royal Decree approving the state of emergency

The CNMV has approved a resolution on the suspension of administrative deadlines pursuant to Royal Decree 463/2020 (COVID-19 Decree) declaring the state of emergency, which was published in the Spanish Official Gazette (BOE) on 25 March.

The resolution describes the criteria that the CNMV has followed since the state of emergency was declared to guarantee the continuity of its activity, with the aim of clarifying the doubts that have arisen as a result of the suspension of administrative deadlines.

The suspension of deadlines does not affect the CNMV's general supervisory activities, nor does it affect the authorisations processed by entities and markets that are likely to be favourable to the interested party or any other procedures approved by the Executive Board of the CNMV.

CNMV temporarily bans the creation or increase of net short positions on shares

The CNMV has decided to ban from 17 March until 17 April 2020 transactions involving securities and financial instruments which entail the creation or increase of a net short position on Spanish shares admitted to trading on Spanish trading venues (Stock Exchanges and Mercado Alternativo Bursátil –MAB-) for which the CNMV is the competent authority

FAQs on the CNMV's temporary ban on the creation and increase of net short positions

The CNMV has published a set of frequently asked questions regarding its temporary ban on the creation and increase of net short positions on shares admitted to trading on trading venues for which the CNMV is the competent authority.

Joint statement of the Spanish Association of Registrars and the CNMV in relation to annual accounts and the proposal and allocation of companies' result in the context of the COVID-19 health crisis

On 26 March 2020, owing to the extraordinary situation created by the COVID-19 outbreak, the Spanish Association of Registrars and the CNMV issued a joint statement on annual accounts and the proposal and application of companies' result.

They indicate that companies may, among other alternatives, choose between: (i) redrafting their annual accounts (AA) and modifying the proposed allocation of their results (PAR); (ii) companies that have not already called a general meeting to approve their AA may make a new PAR adjusted to take into account the situation created by the COVID-19 health crisis, without having to re-draft their AA; or (iii) in the case of companies that have already called general meetings, the management body may propose the decision on the PAR set out in the meeting call be deferred until a subsequent meeting.

Royal Decree-Law 10/2020 on measures to reduce population movements during the COVID-19 health crisis

On 29 March 2020, Royal Decree-Law 10/2020 regulating a period of recoverable paid leave for employees who do not provide essential services was published. The purpose of the mandatory leave is to restrict the movement of workers in an attempt to stop the spread of COVID-19.


Employees providing services in sectors classified as essential are not eligible for this leave. Some of the services provided by financial services companies, including banking, insurance and investment companies, are considered essential, such as activities related to payment infrastructures and financial markets.

International

IOSCO

IOSCO publishes key considerations for the regulation crypto-asset trading platforms


On 12 February 2020, the Board of the International Organization of Securities Commissions published a report that describes the issues that IOSCO has identified regarding crypto-asset trading platforms (CTPs). The report sets out key considerations intended to assist regulatory authorities in evaluating CTPs within the context of their regulatory frameworks.

 **IOSCO publishes a report examining how existing regulatory principles could apply to stablecoins**

On 23 March 2020, IOSCO published a report identifying the possible implications of global stablecoin initiatives for securities markets regulators.

The report, entitled *Global Stablecoin Initiatives*, examines the regulatory issues arising from the use of global stablecoins and explores how existing IOSCO principles and standards could apply to these arrangements.

FSB

 **FSB coordinates financial sector work to buttress the economy in response to COVID-19**

The Financial Stability Board (FSB) is actively cooperating to maintain financial stability during market stress related to COVID-19.

The FSB encourages authorities and financial institutions to make use of the flexibility within existing international standards to provide continued access to funding for market participants and for businesses and households facing temporary difficulties from COVID-19, and to ensure that capital and liquidity resources in the financial system are available where they are needed.

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