

FINANCIAL REGULATION

Investment services, asset management and market infrastructures

October & November 2020

URÍA MENÉNDEZ

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 an **international, European and national level** the regulatory developments applicable to **investment services, asset management and market infrastructures**. It will also include a section on other **matters of general interest**.

For the October-November period, we highlight the approval by the Spanish Government of Law 7/2020 of 13 November on the digital transformation of the financial system, which regulates the creation of a sandbox which is a controlled testing environment technological innovation in the financial field.

On 28 October the CNMV published Circular 2/2020 on the advertising of investment products and services, which develops the scope, content and format of advertising messages for stock market products and services. It also establishes rules on the procedures and internal controls to be implemented and obligations to register advertising.

We hope you find this newsletter interesting.

INVESTMENT SERVICES

Europe

ESMA

ESMA publishes its 2021 Work Programme

On October, ESMA published its 2021 Work Programme (WP), setting out its priorities and areas of focus for the next 12 months in support of its mission to enhance investor protection and promote stable and orderly financial markets.

For 2021, ESMA's planned activities will respond to the challenges faced by the EU, its capital markets and its citizens, including: (i) developing the retail investor base to support the CMU; (ii) promoting sustainable finance and long-term oriented markets; (iii) dealing with the opportunities and risks posed by digitalisation; (iv) strengthening the EU's role in global capital markets, and (v) ensuring a proportionate approach to regulation.

ESMA issues latest double volume cap data

ESMA updated its public register on 9 November with the latest set of double volume cap (DVC) data under MiFID II. Updates include DVC data and calculations for the period from 1 October 2019 to 30 September 2020, and updates to already published DVC periods.

There were 31 new breaches: (i) 15 equities for the 8% cap, applicable to all trading venues, and (ii) 16 equities for the 4% cap, which applies to individual trading venues. Trading under the waivers for all new instruments in breach of the DVC thresholds should be suspended from 12 November 2020 to 11 May 2021.

ESMA publishes new Q&A on product governance

ESMA has updated its Questions and Answers on the implementation-of-investor-protection topics under MiFID II and MiFIR.

The Q&As on MiFID II and MiFIR investor protection and intermediaries includes three new Q&As on 'product governance' that aim to give guidance on how firms manufacturing financial instruments should ensure that: (i) financial instruments' costs and charges are compatible with the needs, objectives and characteristics of the target market; (ii) costs and charges do not undermine the financial instrument's return expectations; and (iii) the charging structure of the financial instrument is appropriately transparent for the target market, ensuring that it does not disguise charges or is nottoo complex to understand.

LEGISLATION

Implementing Regulation (EU) 2020/1406 of the Commission of 2 October 2020 laying down technical implementing rules concerning procedures and forms for the exchange of information and cooperation between competent authorities, ESMA, the Commission and other entities on market abuse

Implementing Regulation (EU) 2020/1406 of 2 October 2020 provides for cooperation and exchange of information with ESMA under Article 24(2) of Regulation (EU) No 596/2014, and cooperation with other entities under Article 25 of the same Regulation.

The Implementing Regulation regulates the following basic topics: (i) the means of communication to be used in communications; (ii) the manner in which requests for information or cooperation should be made; (iii) the manner in which replies to a request should be given; and (iv) cooperation procedures to ensure coordinated action in cross-border cases.

Directive (EU) 2020/1504 of the European Parliament and of the Council of 7 October 2020 amending Directive 2014/65/EU on markets in financial instruments

On 20 October, Directive (EU) 2020/1504 of the European Parliament and of the Council of 7 October 2020 amending Directive 2014/65/EU on markets in financial instruments was published in the Official Journal of the EU. This Directive amends Directive 2014/65/EU to provide legal certainty as to which persons and services fall within its scope.

Since the amendment is directly linked to Regulation (EU) 2020/1503, the date of application of the Regulation has been deferred to coincide with the date of application of the national rules transposing the Directive.

Spain

CNMV

Circular 2/2020 of 28
October from the CNMV on the advertising of investment products and services

Circular 2/2020 elaborates on both the scope and the content and format that advertising messages for stock market products and services must respect. It also establishes rules on the procedures and internal controls to be implemented by entities and the obligations to register advertising, and the regime applicable if entities decide to voluntarily adhere to self-regulation systems for advertising activity to ensure that the principles and criteria set out in the Circular on the content and format of advertising messages are complied with, a possibility which was provided for in Order EHA/1717/2010.

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Public statement on bad practices in cross-border marketing of investment services by firms located in other EU countries

The CNMV has issued a public statement regarding certain inappropriate but common practices that have been detected in the activity of some firms located in other EU countries that market products in Spain under the European passport (mainly firms acting under the freedom to provide services; that is, without an establishment or branch in Spain).

The CNMV highlights two practices in particular: (i) marketing of investment services and client acquisition activities through unauthorised third parties, and (ii) promotion of CFD transactions via group entities located in third countries that are not authorised to operate in the EU. The public statement contains a series of guidelines for due compliance with applicable rules and regulations.

ASSET MANAGEMENT

Europe

ESMA

ESMA announces update to reporting under the Money Market Funds Regulation

In October ESMA announced an update of the validations of the technical instructions for reporting under the Money Market Funds Regulation (MMFR). Article 37 of the MMFR requires MMF managers to submit data to National Competent Authorities (NCAs), who will then transmit them to ESMA.

The proposed changes are not related to the published XML schemas. The changes only add new warning-type validations or provide clarifications on existing validation rules in order to fix inconsistencies or facilitate understanding of the rules.

ESMA publishes translations of the Guidelines on performance fees in UCITS and certain types of AIFs

ESMA has issued the official translations of its Guidelines on performance fees in Undertakings for the Collective Investment in Transferable Securities (UCITS) and certain types of Alternative Investment Funds (AIFs).

NCAs to which these Guidelines apply must notify ESMA whether they comply or intend to comply with the Guidelines within two months of the date ESMA has published the Guidelines in all of the official EU languages.

ESMA publishes third annual report on use of sanctions for UCITS

ESMA has published its 2019 report on the use of supervisory sanctions by NCAs under the Undertakings for Collective Investments in Transferrable Securities (UCITS) Directive.

While the number of NCAs issuing sanctions (penalties and measures) remains stable at 15, compared to the previous report for the 2016-2018 period, the financial amount of the penalties issued decreased slightly based on a year-on-year comparison. The data gathered under the sanction reports published so far show that the sanctioning powers are not used equally by NCAs and, save for a few notable exceptions, the number and amount of sanctions issued at national level seems relatively low.

ESMA specifies obligations for environmentally sustainable activities

ESMA has published its Consultation Paper containing its draft advice to the EC on Article 8 of the Taxonomy Regulation. It specifies the content, methodology and presentation of the key performance indicators (KPIs) that non-financial undertakings and asset managers are required to disclose.

The key draft proposals for consultation address the following aspects: (i) on non-financial undertakings, the advice covers the content of the three KPIs (the proportion of turnover, and the capital and operating expenditure related to environmentally sustainable activities that must be disclosed) and sets out specific considerations

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relating to the methodology for their preparation and presentation; and (ii) on asset managers, the advice proposes a KPI-calculation model based on eligible investments; this comes with advice on how this KPI should be calculated and presented to allow uniform disclosure on how the activities are directed at funding environmentally sustainable economic activities.

ESMA consults on guidance for funds' marketing communications

ESMA has launched a consultation on guidelines on marketing communications under 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.

The purpose of the draft guidelines is to specify the requirements for marketing communications sent to investors in order to promote UCITS and AIFs. These requirements are that the material must: (i) be identifiable as marketing material; (ii) describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and (iii) contain information which is fair, clear and not misleading.

ESMA tells fund managers to improve readiness for future adverse shocks

ESMA has published a Report on the preparedness of investment funds with significant exposure to corporate debt and real estate assets, for potential future adverse liquidity and valuation shocks.

The Report identifies five priority areas for action which would enhance the preparedness of these fund categories: (i) ongoing supervision of the alignment of the funds' investment strategy; (ii) liquidity profile and redemption policy; (iii) ongoing supervision of liquidity risk assessment and fund liquidity profile reporting; (iv) increased availability and use of Liquidity Management Tools (LMTs); and (v) supervision of valuation processes in a context of valuation uncertainty.

EUROPEAN COMMISSION

Proposal for a regulation amending Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on **European long-term** investment funds

The European long-term investment funds (ELTIFs) are an EU scheme to facilitate investment - through alternative investment funds - in longer-term assets such as transport and social infrastructure projects (energy, hospitals, social housing), property and small firms.

This review will analyse how well ELTIFs are working, and in particular how they are contributing to: (i) the integration of capital markets in Europe (Capital Markets Union), and (ii) the EU's goal of smart, sustainable and inclusive growth. The feedback period for the public consultation on the proposal for a regulation amending Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds will be open from 19 October 2020 until 19 January 2021.

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☑ The Commission launches a public consultation on the review of the **Alternative Investment Fund Managers Directive** (AIFMD)

As part of the European Commission's continuous efforts to forge a Capital Markets Union (CMU), the public consultation launched by the European Commission seeks views on how to achieve a more efficiently functioning EU AIF market as a part of a stable financial system.

The public consultation, which will end on 19 January 2021, will aim to gather views from the AIFMs, AIF distributors, industry representatives, investors and investor protection associations, financial markets authorities and citizens on potential changes to the AIFMD.

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MARKET INFRASTRUCTURES

Europe

ESMA

ESMA publishes updated Q&As on securitisation topics and Guidelines on Portability of Information between Securitisation Repositories On 5 October ESMA published its final report on the Guidelines on portability of information between securitisation repositories under the Securitisation Regulation. These Guidelines set out common provisions that a securitisation repository (SR) should follow when transferring securitisation information to another SR.

The guidelines were re-structured to make them clearer to follow for market participants. They include a set of common provisions that apply to all cases of transfer of securitisation information between SRs, as well as two detailed annexes that cover the specific provisions that SRs should follow if they receive a request from a reporting entity to transfer securitisation information from one SR to another, or if an SR's registration with ESMA is withdrawn.

ESMA has also published new Q&As on securitisation topics. These Q&As provide guidance on how to report certain underlying exposures which benefit from a COVID-related debt moratorium or payment holiday.

ESMA consults on CCP supervisory reviews and evaluation processes

On 23 October ESMA launched a consultation on guidelines addressing the consistency of supervisory reviews and evaluation processes of central counterparties (CCPs) under Article 21 of EMIR.

The consultation paper seeks input from all interested stakeholders on draft guidelines aimed at clarifying common procedures and methodologies for the supervisory review and evaluation process of CCPs by their competent authorities.

The closing date for responses was 16 November 2020. ESMA will consider the feedback it has received to the consultation and aims to finalise the guidelines by Q1 2021.

ESMA consults on standards for CCP activities and model amendments ESMA has launched a consultation on draft Regulatory Technical Standards (RTS) related to changes to CCPs' activities and models. Specifically, the RTS relate to the conditions to be met for a CCP to add additional services or activities to its business that are not already covered by its initial authorisation. The RTS also set out the conditions under which changes to CCP models and parameters are significant under EMIR.

Hence, ESMA seeks input to its RTS regarding: (i) the conditions under which additional services or activities require an extension of authorisation and the corresponding collegiate consultation procedure, and (ii) the conditions under which changes to the models and parameters are significant and therefore require the

authorisation of the competent authority and the corresponding collegiate consultation procedure.

The closing date for responses was 16 November 2020. ESMA will consider the responses to this consultation and will publish the final report in Q1 2021 with a view to submitting draft technical standards to the EC for endorsement.

EMIR Reporting Validation Rules applicable from 8 March 2021

ESMA has postponed the applicability date of the updated EMIR validation rules from 1 February to 8 March 2021. The amended rules, which were published by ESMA on 10 September 2020, will start applying five weeks later than originally planned due to technical issues related to their implementation in light of the UK's withdrawal from the FLI

ESMA adds UK venues to opinions on third-country trading venues

ESMA has updated the list of third-country venues (TCTV) in the context of the opinions on post-trade transparency and position limits under MiFID II and MiFIR (the updated list of venues is included in the Annex of ESMA's opinion). The UK venues have received a positive assessment and have been added to: (i) the annex to the opinion related to post-trade transparency, and (ii) the annex to the opinion related to position limits.

Consequently, from 1 January 2021: (i) EU investment firms will not be required to make transactions public in the EU via an EU APA if they are executed on one of the UK trading venues on the transparency list, and (ii) commodity derivative contracts traded on UK trading venues on the position limits list will not be considered as economically equivalent over-the-counter (EEOTC) contracts for the EU position limit regime.

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

ESMA has published data for the systematic internaliser quarterly calculations for equity, equity-like instruments, bonds and for other non-equity instruments under MiFID II and MiFIR.

Specifically, ESMA has published the total number and total volume of trades over the April-September 2020 period for the purpose of the systematic internaliser (SI) calculations under MiFID II for: (i) 22,022 equity and equity-like instruments; (ii) 120,876 bonds, and (iii) 5,907 sub-classes of derivatives

ESMA makes new bond liquidity data available

ESMA has made available new data for bonds subject to the pre- and post-trade requirements of MiFID II and MiFIR through its data register.

Specifically, ESMA has published the latest quarterly liquidity assessment for bonds available for trading on EU trading venues. For this period, there are currently 499 liquid bonds subject to MiFID II transparency requirements.

ESMA publishes first Q&As on SFTR Reporting

ESMA has published its first set of Questions and Answers relating to reporting under the Securities Financing Transactions Regulation (SFTR). The purpose of this Q&A is to provide greater clarity to market participants on how to comply with their reporting requirements under SFTR.

The Q&A includes clarifications on how certain business events should be reported, such as: (i) reporting of fields related to time and applicable calendars; (ii) reporting of settlement legs; (iii) reporting of SFTs collateralised initially at transaction and then at net exposure level; (iv) reporting of SFTs concluded off venue and cleared on the same day; and (v) reporting of zero collateral for margin loans.

ESMA publishes its first reports on CSDR implementation

ESMA has published its first two reports on the implementation of the Central Securities Depositories Regulation (CSDR) covering central securities depositories' (CSDs) cross-border services and handling of applications as well as internalised settlement.

The Report on cross-border services and handling of applications highlights the findings related to the provision of services by CSDs in other Member States. No major variations in the provision of cross-border services have been detected since the entry into force of the CSDR, but most respondents do foresee a potential increase in the coming years. The Report includes suggestions to simplify the existing process.

The Report on internalised settlement presents the findings related to the settlement activity that does not take place through a securities settlement system operated by a CSD in the EEA. While no major risks have been identified during the period covered by the report, NCAs have identified some risks related to this activity, the most common being operational risk and custody risk, which could be mitigated through adequate identification of the clients' accounts involved, and improving operational processes. ESMA considers that custodians' clients should be informed of the risks and costs associated with internalised settlement, and highlights the importance of continuing to monitor internalised settlement, in order to assess if this activity should be regulated in the future.

ESMA sets out final position on share trading obligation

ESMA has released a public statement that clarifies the application of the EU's trading obligation for shares (STO) following the end of the UK's transition from the EU on 31 December 2020.

The statement outlines that the trading of shares with a European Economic Area (EEA) ISIN on a UK trading venue in UK pound sterling (GBP) by EU investment firms will not be subject to the EU STO. This revised guidance aims to address the specific situation of the small number of EU issuers whose shares are mainly traded on UK trading venues in GBP.

OTHERS

Europe

ESMA

ESMA updates statements on the impact of Brexit on MiFID II/MiFIR and the Benchmarks Regulation

In October ESMA updated two statements on its approach to the application of key provisions of MiFID II/MiFIR and the Benchmark Regulation (BMR).

These statements update previous ones issued in March 2019 and October 2019 reflecting ESMA's approach, should the UK leave the EU under a no-deal Brexit.

translations for Guidelines on securitisation repository data completeness and consistency thresholds

ESMA has issued the official translations of its Guidelines on securitisation repository data completeness and consistency thresholds.

NCAs to which these Guidelines apply must notify ESMA whether they comply or intend to comply with the Guidelines, within two months of the date ESMA has published the Guidelines in all official EU languages.

LEGISLATION

Regulation (EU) 2020/1503
of the European Parliament
and of the Council of 7
October 2020 on European
providers of equity
financing services to
businesses, and amending
Regulation (EU) 2017/1129
and Directive (EU)
2019/1937

Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 regulates for the first time at a European level the services of participative financing which were hitherto regulated in only some Member States. It regulates, among other matters, the authorisation and supervision of providers of equity financing services, the requirements to be met in the provision of such services, cross-border provision of services, investor protection and advertising communications.

In the interests of legal certainty and with a view to replacing national rules with the rules laid down in this Regulation, transitional provisions are incorporated to enable those providing such equity financing services under national law prior to the Regulation to adapt their business activity to the provisions of the Regulation and to have sufficient time to apply for the corresponding authorisation by 10 November 2022.

Spain

CNMV

The CNMV publishes the annual report on investors' complaints and enquiries for 2019

CNMV has published the Annual Report on Investors' Complaints and Enquiries for 2019. This report covers the activity carried out by the supervisor in resolving claims and complaints filed by investors about the entities and products with which they operate, and in dealing with doubts and enquiries in general.

The number of new files registered with the CNMV's Complaints Service totalled 1,077, 5.8% more than in the previous year. In 2019, 1,031 complaint files were closed; 345 of these were rejected and 686 were processed as complaints.

LEGISLATION

Law 5/2020 of 15 October on the Financial Transactions Tax

The configuration of the Spanish Tax on Financial Transactions follows the line taken by neighbouring countries, including France and Italy, thus contributing to greater coordination of these taxes at a European level.

The taxable transaction is the acquisition for value of shares in Spanish companies, regardless of the residence of the persons or entities involved in the transaction (although some exceptions are established). The Law also regulates which parties are responsible for paying the tax.

The Law is pending regulatory development and will not enter into force until 16 January 2021.

Law 4/2020 of 15 October on the Tax on Certain Digital Services

The Spanish Tax on Certain Digital Services has been adopted due to the debates that have taken place at an international level regarding this issue, which have not offered practical solutions, coupled with reasons of social pressure, tax justice and the sustainability of the tax system. This Law constitutes a unilateral solution that allows Spain to immediately exercise its legitimate taxing rights in its territory, since the data and contributions of users that generate value to the company come from there.

The object of the Tax on Certain Digital Services is the provision of digital services in relation to which there is user participation that constitutes a contribution to the value-creation process of the company providing the services, and through which the company monetises those user contributions. In other words, the services covered by this tax are those that could not exist in their current form without the involvement of users.

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Law 7/2020 of 13

November for the digital transformation of the financial system

Law 7/2020 regulating the controlled testing environment (better known as the "regulatory sandbox") for technological innovation projects in the financial system was published in Spain's Official State Bulletin (BOE) on 14 November 2020 and came into force the day after its publication.

The measures included in the Law are intended to accompany the digital transformation of the financial system by focusing it on two main objectives: (i) ensuring that the financial authorities have adequate instruments to continue to fulfil their functions optimally in the new digital context, and (ii) facilitating the innovative process in a more equitable context through better access for all production sectors to financing and through the attraction of talent in a highly competitive international technological environment.

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