



FINANCIAL REGULATION

Investment services, asset management
and market infrastructures

December 2020 & January 2021

INTRODUCTION

Thank you for your interest in Uría Menéndez's *Financial Regulation Newsletter*.

As a result of a continuously evolving regulatory landscape, it is very important for institutions to identify, assimilate and implement changes in timely and correctly. The purpose of this newsletter is to help financial institutions by periodically compiling the international, European and national regulatory developments applicable to **investment services, asset management and market infrastructures**. It also includes a section on other **matters of general interest**.

In this newsletter for the December and January period, we highlight the approval of Royal Decree-Law 38/2020 of 29 December, which establishes a framework to ensure the continuity of financial services contracts provided in Spain by financial institutions established in the UK. Also, CNMV has approved a technical guide on non-professional advisors of collective investment schemes. The technical guide sets out the criteria which the CNMV considers must be complied with, as well as the obligations of the management company or self-managed investment company.

Also, in December ESMA announced that Euroclear UK & Ireland Limited, the central securities depository established in the UK, would be recognised as a third-country central securities depository following the end of the UK's transition from the EU. This decision allows Euroclear UK & Ireland Limited to continue providing certain services in the EU. ESMA's recognition decision will apply from 1 January until 30 June 2021.

We hope you find this edition an interesting read.

INVESTMENT SERVICES

Europe

ESMA

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. Updates include DVC data and calculations for the 1 November 2019 to 31 October 2020 period, and updates on already published DVC periods.

There were 22 new breaches: (i) 12 equities for the 8% cap, applicable to all trading venues, and (ii) 10 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 11 December 2020 to 10 June 2021.

ESMA agrees position limits under MiFID II

ESMA has published two opinions on position limits regarding commodity derivatives under MiFID II/MIFIR. In particular, ESMA's opinions agree with the proposed position limits regarding: (i) EEX Phelix DE Power Base contracts; and (ii) EEX Phelix DE/AT Power Base contracts.

ESMA found that the proposed position limits are consistent with the objectives established in MiFID II and with the methodology developed for setting those limits. ESMA will continue to assess the notifications received and issue opinions in order to ensure that the position limits are set in accordance with the MiFID II framework.

ESMA supports IFRS Foundation's efforts on international standardisation in sustainability reporting

ESMA has published its response to the International Financial Reporting Standards (IFRS) Foundation's consultation on sustainability reporting. In September 2020, the IFRS Foundation issued a consultation paper to better identify stakeholders' needs in the area of sustainability reporting and further understand how to address current demands.

ESMA recommends establishing high-quality international standards while also catering for the needs of jurisdictions that are at different stages in their sustainability efforts. Regarding the content of the future standards, ESMA stresses the importance of relying on a broad notion of materiality that emphasises the concept of *double materiality*, widely known and applied in Europe. ESMA also highlights the need to develop standards addressing all aspects of the ESG spectrum (ethical, social and governance), rather than limiting the focus on climate only.

 **ESMA reminds firms of the MiFID II rules on reverse solicitation**

ESMA has published a statement reminding firms of the MiFID II requirements on the provision of investment services to retail or professional clients by firms not established in the EU.

Following the end of the UK transition period on 31 December 2020, some questionable practices by firms regarding reverse solicitation, where the product or service is marketed at the client's own exclusive initiative, have emerged. In its statement ESMA reminds firms that where a third-country firm solicits clients or potential clients in the EU or promotes or advertises investment services or activities together with ancillary services in the EU, it should not be deemed as a service provided at the client's own exclusive initiative, regardless of any contractual clause or disclaimer stating otherwise (for example, where a non-EU firm responds at the own exclusive initiative of the EU client).

 **ESMA consults on the appropriateness and execution-only requirements under MiFID II**

ESMA has launched a consultation on the guidelines for the application of certain aspects of the appropriateness and execution-only requirements under MiFID II. Under MiFID II, investment firms, providing non-advised services are required to request information on the knowledge and experience of clients or potential clients to assess whether the investment service or product envisaged is appropriate, and to issue a warning in case the investment service or product is deemed inappropriate. The execution-only framework allows for an exemption to this assessment in certain conditions, including that the firm issues a warning to the client.

The consultation paper builds on relevant parts from ESMA's guidelines on certain aspects of the MiFID II suitability requirements, while adjusting these to the appropriateness and execution-only framework. In addition, it takes into account the insights of supervisory activities conducted by NCAs on the application of the appropriateness and execution-only requirements.

ESMA invites feedback from interested stakeholders on the proposed guidelines by 29 April 2021 and will consider this feedback with a view to issuing its final guidelines in Q3 2021.

ASSET MANAGEMENT

Europe

ESMA

ESMA updates guidelines on stress tests for money market funds

ESMA has published the 2020 update of guidelines on Money Market Funds (MMF) stress tests under the Money Market Funds Regulation (MMFR). The updates take into account MMFs recent experience during March 2020, particularly in relation to redemption scenarios.

For some parameters, the 2019 scenarios have been exceeded by the extreme market movements observed during the COVID-19 crisis and the relevant factors will be updated accordingly. This is notably the case of the redemption scenario, as some funds exceeded the 25% redemption rate for professional investors specified in the guidelines.

ESMA publishes final guidance to address leverage risk in the AIF sector

ESMA has published its final guidance to address leverage risk in the Alternative Investment Fund (AIF) sector.

ESMA's guidelines set out common criteria in order to promote convergence in the way National Competent Authorities (NCAs): (i) assess the extent to which the use of leverage within the AIF sector contributes to the build-up of systemic risk in the financial system; and (ii) design, calibrate and implement leverage limits.

The guidelines provide NCAs with a set of indicators to be considered when performing their risk assessment and a set of principles that NCAs should take into account when calibrating and imposing leverage limits.

ESMA updates reporting under the MMFR

ESMA has updated its validation rules regarding the MMFR. This relates to the requirements of Article 37 of MMFR that require MMF managers to submit data to NCAs, who will then transmit this to ESMA.

The proposed changes are not related to the published XML schemas. The changes only provide clarifications on existing validation rules in order to fix inconsistencies and make the rules easier to understand. It also extends the Classification of Financial Instruments (CFI) codes for eligible assets.

 **ESMA calls for legislative action on ESG ratings and assessment tools**

ESMA has written to the EC sharing its views on the main challenges in the area of ESG ratings and assessment tools. ESMA highlights the need to match the growth in demand for these products with appropriate regulatory requirements to ensure their quality and reliability.

ESMA identifies the following key points for consideration: (i) the market for ESG ratings and other assessment tools is currently unregulated and unsupervised; (ii) there should be a common definition of ESG ratings that covers the broad spectrum of possible ESG assessments currently on offer; (iii) the supervisory and regulatory regime should be adapted to the current market structure and accommodate both large multi-national providers who may be subject to existing regulatory frameworks, as well as smaller entities; and (iv) ESG rating providers can be part of larger groups providing services and smaller players would also benefit from having access to an EU-wide regime.

 **ESMA launches a Common Supervisory Action with NCAs on the supervision of costs and fees of UCITS**

ESMA has launched a Common Supervisory Action (CSA) with NCAs on the supervision of costs and fees of UCITS across the EU. The CSA will be conducted during 2021.

The CSA's aim is to assess the compliance of supervised entities with the relevant cost-related provisions in the UCITS framework, and the obligation of not charging investors with undue costs. For this purpose, the NCAs will take into account the supervisory briefing on the supervision of costs published by ESMA in June 2020.

Throughout 2021, NCAs will share knowledge and experiences through ESMA to ensure supervisory convergence in how they supervise cost-related issues, and ultimately enhance the protection of investors across the EU.

CNMV

 **CNMV approves technical guide on non-professional advisors of collective investment schemes (CIS)**

The CNMV has approved a technical guide on the appointment by SGICs or self-managed SICAVs, as CIS advisors, of persons or entities that are not authorised under the Securities Market Act and its implementing regulations to carry out investment advisory activities on a regular and professional basis.

The technical guide sets out the criteria which the CNMV considers must be complied with, as well as the obligations of the management company or self-managed investment company. They include: (i) verifying that the adviser is of good repute, has adequate knowledge of and experience in investment matters, as well as the technical resources necessary to properly perform the activity; (ii) establishing procedures to monitor advisers' activities, aimed at preventing and managing potential conflicts of interest, as well as to ensure that the adviser recommendations that are implemented comply with prevailing regulations; and (iii) formalising the relationship with the adviser in a written agreement and obtaining adequate documentary evidence of all aspects required by the technical guide.

 **Draft accounting circular for investment firms, management companies of collective investment institutions and management companies of venture capital entities repealing Circular 7/2008**

The Circular whose Draft is submitted for public consultation aims to replace and repeal Circular 7/2008, of 26 November, on accounting standards, annual accounts and confidential information statements of Investment Firms, Management Companies of Collective Investment Institutions and Management Companies of Venture Capital Entities.

The main purpose of the draft is to approve a new regulatory framework that allows that the applicable accounting principles, criteria and rules correspond to those of the general accounting regulations (Commercial Code and its development through the General Accounting Plan and the Rules for the Preparation of Consolidated Annual Accounts), and that the models of annual accounts and reserved statements are adapted to the activity of the entities subject to this circular.

MARKET INFRASTRUCTURES

Europe

ESMA

ESMA publishes draft technical standards under EMIR REFIT

ESMA has published a Final Report on technical standards (RTS and ITS) under the EMIR REFIT Regulation. The report covers data reporting to Trade Repositories (TRs), procedures to reconcile and validate the data, access by the relevant authorities to data and registration of the TRs.

The key proposals included in the technical standards are: (i) alignment with international standards, in order to foster global data harmonisation and facilitate compliance for those entities that are subject to derivative reporting requirements in non-EU jurisdictions; (ii) end-to-end reporting in ISO 20022 XML, in order to eliminate the risk of discrepancies due to inconsistent data; (iii) harmonised data quality requirements across TRs; (iv) simplified rules for the extension of registration from SFTR (reporting under the Securities Financing Transaction Regulation) to EMIR; and (v) a standardised process for data access.

ESMA updates Guidelines on written agreements between CCP college members

ESMA has published the final report on its revised Guidelines regarding written agreements between members of central counterparty (CCP) colleges. The revised Guidelines take into account changes to the composition, functioning and management of CCP colleges which were introduced by amendments to the regulatory technical standards (RTS) on CCP colleges, and by EMIR 2.2.

The objective of the Guidelines is to ensure common, uniform and consistent application of the RTS on CCP colleges and articles 18 and 19 of EMIR. The Guidelines specifically aim to establish a standard written agreement to support the smooth functioning of a CCP college.

ESMA publishes transparency calculations update after the end of the Brexit transition period

ESMA has published its first Financial Instruments Transparency System (FITRS) file following the end of the Brexit transition period.

In particular, the equity transparency calculation results delta file (DLTECR) published by ESMA contains updated transparency calculation results for equity instruments that previously had a UK venue as their most important market.

 **ESMA recognises Euroclear UK & Ireland Limited (EUI) after Brexit transition period**

In December ESMA announced that Euroclear UK & Ireland Limited (EUI), the central securities depository (CSD) established in the United Kingdom (UK), would be recognised as a third-country CSD (TC-CSD) after the exit of the UK from the EU on 31 December 2020. ESMA's recognition decision will apply from 1 January until 30 June 2021.

This decision allows EUI to continue providing the following services in the EU: (i) notary and central maintenance services in respect of securities constituted under the law of Ireland; and (ii) central maintenance services in respect of underlying securities constituted under the laws of Cyprus, Luxembourg and the Netherlands, which are represented in the EUI CREST system by means of depository interests.

 **ESMA recommends more time to implement a mix of solutions for PSAs to clear**

ESMA has published a second report on the clearing solutions for Pension Scheme Arrangements (PSAs) under EMIR. The report reaffirms ESMA's strong commitment to a broad implementation of the clearing obligation, including by PSAs, while at the same time recognising that more time is needed to make sufficient progress on the various solutions that would collectively enable PSAs to clear their derivative contracts.

Last year, EMIR REFIT further extended the temporary exemption from the clearing obligation for PSAs until June 2021. This second report indicates that it is less likely to expect a 'silver bullet' to solve the issues that have emerged at this stage, after the many efforts from stakeholders and regulators since the start of the exemption. Instead, the situation should improve not due to one single measure but because of a mix of existing solutions. Although some of these existing solutions need to be developed further or might need regulatory consideration, their addition should provide the conditions for PSAs to be able to clear and meet variation margin calls in varied market conditions.

 **CFTC and ESMA sign enhanced MOU related to certain recognised central counterparties**

The Commodity Futures Trading Commission (CFTC) and ESMA have announced the signing of a new Memorandum of Understanding (MOU) regarding cooperation and the exchange of information with respect to certain registered derivatives clearing organisations established in the United States that are central counterparties (CCPs) recognised by ESMA under EMIR.

Through the MOU, ESMA and the CFTC express their desire for enhanced cooperation with respect to the U.S. The MOU reflects ESMA's and the CFTC's commitment to strengthening their mutual cooperative relationship.

ESMA updates EMIR Q&A'S

ESMA has updated its Q&A on reporting issues under EMIR. This document aims at ensuring that the supervisory activities of the competent authorities under EMIR follow the responses adopted by ESMA. It should also help investors and other market participants by providing clarity on EMIR requirements.

The updated Trade Repository Q&A 3b explains how to report the direction of derivatives in specific cases that are described. A new Q&A for Trade Repositories clarifies the steps to be taken for the due termination of derivatives when the reporting counterparty ceases to exist. It also specifies how to deal with non-terminated reports of inactive (dissolved) counterparties to ensure that accurate information is provided to the authorities.

ESMA updates SFTR Q&A'S

ESMA has updated its Q&A related to reporting under the Securities Financing Transactions Regulation (SFTR). This document aims at ensuring that the supervisory activities of the competent authorities under SFTR follow the responses adopted by ESMA. It should also help investors and other market participants by providing clarity on SFTR requirements.

The Q&As were updated to clarify: (i) reporting of events that were not duly reported on time; (ii) updates to records of outstanding SFTs by the Trade Repositories based on reports made by the counterparties; and (iii) operational aspects concerning the reporting by financial counterparties on behalf of small non-financial counterparties pursuant to the Article 4(3) of SFTR.

LEGISLATION

Targeted consultation on the review of the Regulation on improving securities settlement in the EU and on central securities depositories

Regulation (EU) No 909/2014 on central securities depositories (CSDR) aims at increasing the safety and improving settlement efficiency as well as providing a set of common requirements to ensure the safety of EU central securities depositories (CDR). CSDR requires the Commission to prepare a report on its implementation and submit it to the European Parliament and the Council, if necessary with proposed legislative changes. With this targeted consultation, the EC invites stakeholders to provide input on the implementation of CSDR in view of its forthcoming report.

The consultation seeks feedback on a wide range of specific areas where targeted action may be necessary to ensure the fulfilment of the CSDR's objectives in a more proportionate, efficient and effective manner. Recent developments, in particular the pressure put on markets by the COVID-19 pandemic, should also be taken into account, where relevant, when responding to the consultation.

OTHERS

Europe

ESMA

ESMA renews its decision requiring net short position holders to report positions of 0.1% and above

ESMA has renewed its decision to temporarily require the holders of net short positions in shares traded on a EU regulated market, to notify the relevant national competent authority (NCA) if the position reaches, exceeds or falls below 0.1% of the issued share capital.

This decision extends the measure taken on 17 September and will expire on 19 March 2021. ESMA believes that this decision will continue to support the ability of NCAs to deal with threats to the orderly functioning of markets and financial stability at an early stage.

ESMA withdraws the registrations of six UK-based credit rating agencies and four trade repositories

ESMA has withdrawn the registrations of the following United Kingdom (UK) based credit rating agencies (CRA): (i) AM Best Europe-Rating Services Ltd; (ii) DBRS Ratings Ltd; (iii) Fitch Ratings Ltd; (iv) Fitch Ratings CIS Ltd; (v) Moody's Investors Service Ltd; and (vi) The Economist Intelligence Unit Ltd. It has also withdrawn the registrations of the following UK-based trade repositories (TR): (i) DTCC Derivatives Repository Plc; (ii) UnaVista Limited; (iii) CME Trade Repository Ltd; and (iv) ICE Trade Vault Europe Ltd.

ESMA's decisions follow the end of the transition period of the UK's withdrawal from the EU, which occurred on 31 December 2020.

ESMA reminds users of scheduled IT operations at the end of the Brexit transition period

In December ESMA published a reminder of the operations planned on its databases and systems at the end of the Brexit transition period on 31 December 2020. These operations took place during a maintenance window starting on 31 December 2020 at 21:30 CET

ESMA focuses on the following key points: (i) ESMA will continue receiving files but will not produce feedback files during the maintenance window for its Financial Instruments Reference Data System (FIRDS), Financial Instrument Transparency System (FITRS) and Double Volume Cap System (DVCAP); (ii) the maintenance window of the FIRDS system was Thursday 31 December 2020 at 21:30 CET to Thursday 7 January 2021 at 12:00 CET; and (iii) the maintenance window of the FITRS and DVCAP systems was from Thursday 31 December 2020 at 21:30 CET to Monday 11 January 2021 at 12:00 CET.

EUROPEAN SUPERVISORY AUTHORITIES

ESAs highlight the change in the status of simple, transparent and standardised (STS) securitisation transactions at the end of the UK transition period

The Joint Committee of the European Supervisory Authorities (ESAs) – ESMA, EBA and EIOPA – wish to highlight the impact in the change of status of ‘Simple, Transparent and Standardised’ (STS) securitisation transactions after the end of the UK transition period on 31 December 2020.

For a securitisation transaction to qualify as an STS securitisation, the Securitisation Regulation requires that the originator, sponsor and the securitisation special purpose vehicle (SSPE) be established in the EU. Accordingly, those securitisation transactions currently labelled as “STS securitisations” will lose the STS status where one or all the securitisation parties (originator, sponsor and/or the SSPE) are established in the UK after the end of the transition period.

The loss of the STS status means that the preferential capital treatment available for investments in this type of securitisations will come to an end. This will affect EU institutional investors, such as credit institutions and insurance entities, holding positions in STS securitisations where the originator, sponsor or the SSPE are established in the UK. The ESAs therefore advised these investors assess the impact of this change of status on their balance sheet and investments ahead of 31 December 2020.

Spain

LEGISLATION

Royal Decree-Law 38/2020 of 29 December adopting measures to adapt to the UK’s third State status

Article 13 of Royal Decree-Law 38/2020 of 29 December (RDL 38/2020) establishes a framework to ensure the continuity of financial services contracts provided in Spain by financial institutions established in the UK.

The loss of the EU passport implies that financial institutions established in the UK will have to adapt to the third country regime in order to continue providing services in Spain, including those services resulting from contracts entered into before, but expiring after 1 January 2021.

With the aim of reinforcing legal certainty, customer protection and avoiding any risk to financial stability, Article 13 of RDL 38/2020 ensures that the validity of the contracts is not affected by the end of the transitional period. In addition, a temporary regime is established until 30 June 2021 to ensure that the adaptation to the third country regime does not entail a disruption in the provision of services associated with these contracts or, alternatively, to facilitate the termination of the contracts if the institution does not wish to continue its activity in Spain. The temporary regime is available for activities subject to authorisation. Activities linked to the management of contracts for the provision of financial services which do not require authorisation may continue to be carried out without the need for the temporary regime.

CNMV

 **CNMV newsletter: includes the market situation report and three articles on investment fund stress testing, the sandbox and the central counterparty resolution regime**

The CNMV has published its newsletter for the fourth quarter of 2020. This edition includes the market situation report, which describes the trend in national and international financial markets in 2020 as a whole, focusing on the events of the last quarter.

In addition, the newsletter contains: (i) the results of the stress tests conducted by the CNMV on investment funds in Spain; (ii) the two key innovation facilitating instruments adopted in several countries (innovation hub and controlled testing spaces - sandbox); and (iii) the framework for the resolution of central counterparties, in particular the assessment and treatment of available financial resources.

 **The Ministry of Consumer Affairs, Bank of Spain and the CNMV sign an agreement to improve consumer protection through financial education**

The Ministry of Consumer Affairs, the CNMV and the Bank of Spain have signed a cooperation agreement to develop the Financial Education Plan (PEF). The aim of the three institutions is to broaden and develop the scope of the PEF and bring it to consumers in order to reduce financial exclusion and bridge the digital divide among vulnerable sectors.

The signing of the agreement involves incorporating new avenues of training and educational work in the financial sector aimed at young people, senior citizens, over-indebted households and single-parent families. The framework document, which is valid for four years, now needs to be specifically implemented. This task will fall on a monitoring committee made up of members of the three institutions.

 **CNMV's Q&A regarding the scope of Article 13 of the RDL 38/2020**

Article 13 of the RDL 38/2020 refers to contracts for the provision of banking, securities, insurance or other financial services, pursuant to which an entity provides services in Spain while domiciled in the UK and authorised or registered by the competent authority of the UK, and which were concluded prior to 1 January 2021.

Consequently, in view of the CNMV's competences in the area of authorisation of new entities, the following will be understood to fall within the scope of Article 13 of the RDL 38/2020: investment firms, CISMCS and closed-ended CISMCS of the UK providing investment services in Spain either under the freedom to provide services regime or by means of an establishment (understood as such, branches and tied agents domiciled in Spain).

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