

Regulatory Watch: Asset Management

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TABLE OF CONTENTS

France

- 3 AMF president's speech: nine months since the entry into force of MiFID II and the post-Brexit relationship with the UK
- 3 Closing speech of the AMF president
- 4 Rules of good conduct when AIFs or UCITS are marketed by Asset Management Companies
- 4 Shareholders' rights and voting at the General Meeting
- 5 Marketing of complex financial instruments
- 5 The AMF updates its policy on voting at General Meetings
- 6 Questions-Answers on the rules applicable to financial investment advisers
- 6 Agreements concluded by investment service providers with non-professional clients regarding asset management for third parties
- 7 Procedures for reporting regulatory violations by whistleblowers to the AMF.
- 7 Guide on MMF for the asset management companies
- 8 The AMF unveils its priorities for 2019
- 9 Decisions of the AMF's Enforcement Commission
- 10 Summary of thematic inspections of the own funds of asset management companies
- 11 Summary of thematic inspections of the valuation of unlisted holdings in private equity management companies
- 12 Summary of five inspections carried out relating to clients' investment knowledge and experience
- 13 Analysis on the trends of Initial Coin Offerings (ICOs)
- 13 Corporate governance and executive compensation
- 13 Brexit conference
- 14 Key figures for asset management

UK

- 15 Brexit: opening of the notification window for the temporary permissions regime

European Union

- 16 ESMA publishes the responses to its consultations on Prospectus
- 16 ESMA updates Q&As on MiFID II and MIFIR investor protection and intermediaries
- 17 ESMA updates Market Abuse Q&As
- 17 ESMA updates the Q&As on market structure and transparency topics
- 18 ESMA updates the Q&As on Benchmark regulation
- 18 ESMA published MiFID II supervisory briefing on Suitability
- 18 ESMA opens a consultation paper on reporting rules for (MMF) Money Market Funds
- 19 ESMA published the answers to the consultation paper relating to the Stress tests rules for the MMF
- 19 ESMA tells firms to provide clients with information on the implications of Brexit
- 19 ESAs consults on proposed changes to the key information document for PRIIPS

USA

- 20 SEC Suspends Trading in Company for Making False Cryptocurrency-Related Claims about SEC Regulation and Registration
- 20 SEC Adopts Rules that increase information Brokers must provide to investors on order handling
- 20 SEC Adopts FAIR Act Rules promoting research reports on Investment Funds
- 20 Three Broker-Dealers to pay more than \$6 Million in Penalties for providing deficient blue sheet data

France

AMF president's speech: nine months since the entry into force of MiFID II and the post-Brexit relationship with the UK

On October 1st, 2018, at the second edition of the Annual European Compliance and Legal Conference held in London, the president of the AMF, Robert Ophèle, gave a [speech](#) about the implementation of MiFID II and the post-Brexit relationship with the UK.

This speech highlighted the challenges related to the implementation of MiFID II, especially, the need for “level 3 guidance” by national authorities and the possibility to apply some of MiFID II aspects to “Third-country firms”.

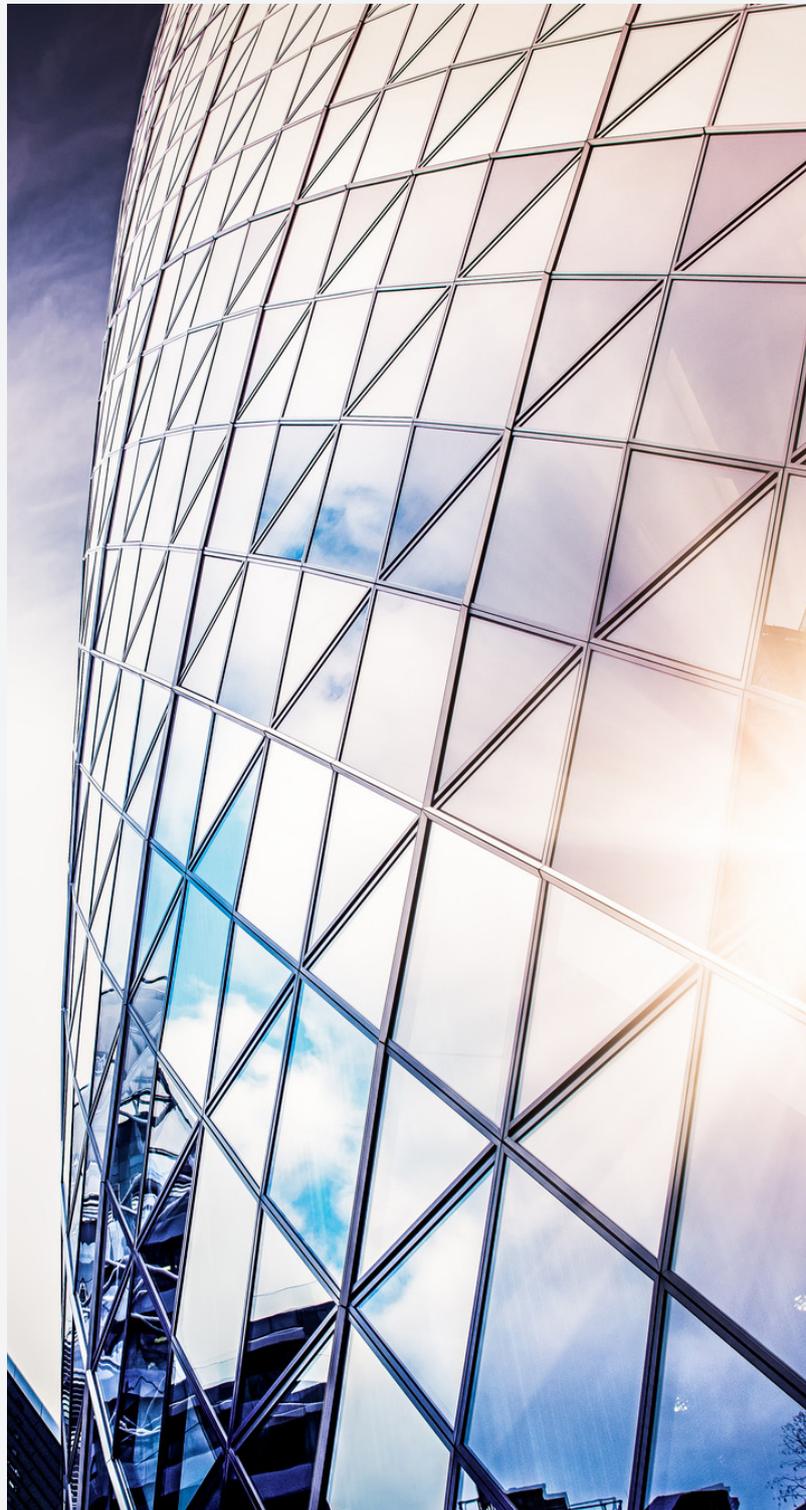
Finally, Robert Ophèle spoke briefly on the subject of possible calibrations to MiFID II following the exit of the UK from the EU.

Closing speech of the AMF President

On October 3rd, 2018, the AMF [published](#) the closing speech of the AMF president Robert Ophèle.

The President raised several points, including:

- **Data protection:** in the context of an international exchange, negotiations have been initiated at the IOSCO (International Organization of Securities Commissions) to organize the process, more particularly, to define the administrative methods.
- A “controller of connection data requests” has been recommended, the project has been incorporated into the law on the fight against fraud and will make it possible to respect the deadlines set by the Constitutional Council.
- **Crypto-assets regulation:** the President of the AMF reminded the audience of the importance of regulation of these assets in primary markets and for regulation of platforms and marketing activities.



Rules of conduct when AIFs or UCITS are marketed by Asset Management Companies

On October 23rd, 2018, the AMF modified the [instruction DOC-2008-04](#).

The changes made were:

- Exemption from the application of the instruction for the subscription and redemption of units or shares of UCITS or AIFs for the benefit of the management team, managers or the management company or carried interest units, or for the benefit of the persons mentioned in Article L 533-22-2 of the French Monetary and Financial Code.
- The provisions relating to the agreement concluded with the client are applicable to both non-professional and professional clients: it will, therefore, be necessary to conclude an agreement even with a non-professional client.

Shareholders' rights and voting at the General Meeting

On October 5th, 2018, the AMF [published](#) the report of "*Droits des actionnaires et vote en assemblée Générale*" group.

This document was initiated by the European "Shareholders' rights" Directive, seven new proposals were discussed to:

- Ensure greater transparency of proxy voting and remote voting
- Remind issuers that they must take into account any vote cast via a voting form that meets legal and regulatory requirements
- Require the publication of the number of rejected voting rights by listed issuers on a regulated market
- Recommend that the judicial officer who intervenes in General Meetings specify in their report the scope of their mission
- Allow proxy holders, who so request, to use several voting boxes at General Meetings of companies listed on a regulated market
- Fight against the charging of fees that discourage shareholders from voting or registering their shares
- Establish a guide for handling votes in General Meetings.



Marketing of complex financial instruments

On October 8th, 2018, the AMF updated [the marketing of complex financial instruments guidelines](#).

The following points were added:

- A technical appendix which aims to better understand criteria 4 relating to the mechanisms included in the formula for calculating the gain or loss of the financial instrument
- Provisions taking into account MiFID 2 regulations
- Review of criteria 4 relating to ESG indicators used for the underlying index.

The AMF updates its policy on voting at General Meetings

On October 5th, 2018, the AMF published a [press release](#) which presents the update of its Recommendation 2012-05 on shareholders General Meetings in listed companies. This update integrated the seven proposals of the report of “*Droits des actionnaires et vote en assemblée Générale*” group on July 24th, 2018.

The AMF, through these recommendations addressed to issuers, securities professionals and shareholders, intends to:

- Remind issuers to take into account any votes cast
- Recommend to shareholders and issuers using the services of a judicial officer at a meeting to require him to specify in his report the scope and limits of his mission
- Facilitate the exercise by proxy holders of instructions received from their principals
- Fight against the charging of fees that discourage shareholders from voting or registering their shares
- Strengthen the confidence of market participants in the management of votes.

- The AMF drafts also legislative or regulatory amendments proposal which aim to:
- Increase the transparency of proxy and remote voting
- Increase the transparency of votes.



Questions-Answers on the rules applicable to financial investment advisers

On October 23rd, 2018, the AMF published an updated version of the [Q&A on the rules applicable to financial investment advisers](#).

The Recommendation position aims at specifying which are the activities covered by the “financial investment adviser” status and which aren't. It also specifies the conditions applicable to the banking or financial canvassing for advisory services.

More particularly, the AMF updated its answers to questions 1.1 on the optional nature of “financial investment adviser” status, 1.2 on investment services provided by the “financial investment adviser”, 1.5 on cross-border activity and 4.4 on benefits and remuneration.

Agreements concluded by investment service providers with non-professional clients regarding asset management for third parties

On October 23rd, 2018, the AMF published its new instruction [DOC-2018-11](#), which applies to the agreements concluded by investment service providers (including asset management companies), with non-professional clients for the provision of the portfolio management service to third parties. The instruction specifies the provisions on the necessary indications for management mandates.

The investment service providers must be in compliance with the provisions of the instruction no later than four months after its publication (i.e. until 23 February 2019), with the exception of one paragraph (concerning the termination of the mandate) which applies immediately.



Procedures for reporting regulatory violations by whistleblowers to the AMF.

On December 14th, 2018, the AMF published its [new instruction](#) on the procedures for reporting regulatory violations by whistleblowers to the AMF.

The instruction DOC-2018-13 specifies certain steps and procedures for alerts under the Implementing Directive (EU) 2015/2392 on Regulation (EU) 596/2014 on market abuse, in order to enable persons reporting possible violations of the Regulation to the AMF to do so in the most effective and informed manner possible.

The instruction sets out the communication channels available to whistleblowers for reporting, the procedures for reporting, recording and confidentiality rules for such reports as well as the protective provisions provided for any person issuing an alert.

Guide on MMF for the asset management companies

On November 29th, 2018, the AMF published its [guide](#) on the MMF Regulation (Regulation 2017/1131/EU on money market funds) that gathers relevant information for asset management companies who aim to or are required to get one or more of their funds authorised as money market fund.

The guide deals with subjects like the conditions of agreement, investment policy, assessment of credit quality, risk management, as well as the information to be provided to the investors and competent authorities.



The AMF unveils its supervision priorities for 2019

On January 10th, 2019, the AMF published a [press release](#) on the priorities for the year of 2019.

In terms of the AMF's supervision priorities for 2019, the asset management companies can expect new topics for spot inspections that will put particular emphasis on examining their cybersecurity arrangements and the quality information provided as part of AIFMD reporting. Regarding market intermediaries and distributors, supervisory priorities will concern transaction reporting to trade repositories and private client discretionary portfolio management activities with the MIFID 2 provisions.

Other supervisory priorities include anti-money laundering and the financing of terrorism measures implemented by asset management companies, securities lending and short-selling practices, and the voting at General Meetings of shareholders. In its monitoring of financial investment advisors, the AMF will be maintaining a vigilant approach towards the risks of mis-selling of unregulated or atypical products.

Concerning its other priorities, the AMF is committed to a strong and competitive EU of 27 and remains mobilized with a view to avoiding the adverse effects of a no-deal exit of the United Kingdom. Furthermore, the AMF will continue to support stakeholders and the innovation by facilitating the implementation of the Prospectus 3 Regulation and the Shareholders' Rights Directive, as well as by the enforcement of the AMF's responsibility on cryptoassets.

Lastly, in accordance with its Strategic Plan 2018-2022, the modernization of the AMF will continue by the adaptation of its expertise in data processing, cyber-risk management and analysis of the impact of various activities on global warming.



Decisions of the AMF's Enforcement Commission

On October 5th, 2018, the AMF published a [settlement agreement](#).

The AMF sanctioned a financial investment adviser for various allegations, such as:

- The financial investment adviser marketed the funds of an asset management company not authorized in France, its delegated management company was not authorized in France either, and the funds did not fulfil the marketing conditions.
- Misleading information was provided to professional and non-professional investors, in particular, that the fund was approved by the FCA while it was not the case,
- The investors were not categorized in accordance with the regulations.

The company was sanctioned with 40,000 euros fine and with the publication of the agreement. The financial investment advisor has made a commitment to carry out the procedures adapted to its activity and to collect information regarding its clients.

On October 25th, 2018, the AMF published a [decision](#) sanctioning 5 individuals related to a market abuse case concerning a company whose shares were listed for trading on Euronext. For the transmission and utilization of insider information. They were sanctioned with a total fine of €345,000 and by the publication of the agreement.

On November 8th, 2018, the AMF published a [decision](#) sanctioning an asset management company, its portfolio manager and its client, for market manipulation. The company was fined €250,000, the portfolio manager €25,000, and the client €650,000.

On December 6th, 2018, the AMF published a [decision](#) sanctioning an investment service provider with a €400,000 fine, and the private individual who was the seller of the products.

The company was accused of not having adequate policies, procedures and measures relating to its activity, and of not maintaining an efficient and independent compliance function. The lack of operational procedures made it impossible to determine that the operations could have resulted in double charges. In addition to these failings here were inadequate compliance controls. However, a new tool was implemented from 2015. The ineffectiveness of controls was demonstrated by the fact that the control function was unable to identify potential anomalies.

On December 28th, 2018, the AMF published a [decision](#) sanctioning an investment services provider company with a €50,000 fine.

The findings were the following:

- Absence of sufficient customer knowledge before the provision of advice: the AMF noted the lack of procedures and complete and formalized collection of information, and the incompleteness of the engagement letters.
- Failure to formalize the provision of advice: the AMF notes that the written reports were either incomplete or absent.
- Failure to formalize the company's relationship with an external provider as part of delegation of its investment advisory activity.
- Inappropriate management of conflicts of interests and information on the remuneration related to the investment advisor activity: the AMF noted a failure of appropriate measures to prevent conflicts of interests in an efficient way and of insufficient information provided to clients concerning the remunerations.

SPOT Inspections: Summary of thematic inspections of the own funds of asset management companies

On November 22th, 2019, the AMF published a [summary](#) of theme-based inspections – called SPOT controls - focusing on the monitoring and investment of the own funds of asset management companies. During the inspection, the AMF reviewed the following aspects of the organization of 5 asset management companies:

- the organisation and procedures implemented by asset management companies;
- the calculations of regulatory capital;
- the investment of own funds;
- the relevant controls in place.

The conclusions of the AMF are the following:

- Procedures used to determine regulatory capital are sometimes insufficient,
- Investment of and controls on regulatory capital are insufficiently detailed,
- Calculation of the regulatory capital is properly performed, as is the investment of own funds in liquid assets.
- The 30 % excess capital required to be maintained in liquid assets is not always respected,
- Internal controls are insufficiently formalized and incomplete.

The AMF recommends firms review their procedures, forecast future reg cap requirements prior to making any substantial disbursements, and to perform second-level controls adapted to the situation of the asset management company.



SPOT Inspections - Summary of thematic inspections of the valuation of unlisted holdings in private equity management companies

On December 21st, 2018, the AMF published its summary of thematic inspections focusing on the valuation of holdings in unlisted securities.

As a result of the control, the AMF concluded the following:

- Procedures governing the valuation of holdings were insufficiently clear with regard to the criteria used to select the valuation methods and their operational implementation.
- Audit trails retained to justify the valuation choices were also incomplete.
- Due diligence checks carried out by external experts were not properly recorded.

Despite the points above the AMF found that the holdings were valued at fair value, and the consistent valuation methodologies were used.

The AMF also noted the following best practices:

- In order to reduce and the risk of conflicts of interest, advice should be sought from the investor committee (where such a committee exists) in particular, in cases of valuation of holdings transferred between funds,
- Valuation methods used should be detailed in fund reporting as should the assumptions used for each portfolio investment, or referenced a description available elsewhere,
- Firms should take into account relevant decisions from the AMF enforcement committee, in particular when assessing internal controls.



SPOT Inspections - Summary of five inspections carried out relating to clients' investment knowledge and experience

On October 18th, 2018, the AMF published a [summary](#) of SPOT controls focusing on gathering information on clients, in application of the rules set out under MiFID I and MiFID II.

These inspections focused in particular on:

- Procedures for establishing new client relationships,
- Procedures for gathering and updating information relating to individual clients' investment knowledge and experience,
- The current questionnaire forms used to gather this information.

The AMF noted the following good practice:

- Using different questions for different categories of financial instrument, in order to assess client knowledge and experience;
- Sending the client a questionnaire to assess their knowledge about the proposed financial product;
- Sending the client a document summarising how a complex or risky financial product works and the risks associated with it;
- Asking questions about the number and average amounts of transactions realized;
- Determining the profile of the client, especially in relation to their responses to questions about their investment knowledge and experience;
- Providing for regular updates of the client knowledge and experience questionnaire;
- Ensuring that the client's preferred investment horizons

correspond to the recommended holding period for the proposed financial instruments;

- Warning the client that, if they refuse to disclose the amount of their assets held in other firms, the advice offered will be based only on the information available and that it might not be optimal for the client's situation.

Bad practices were also noted, including the following examples:

- Self-assessment only by the client of their own investment knowledge
- A choice of responses that does not allow for the client to indicate they have no investment knowledge at all
- Asking the client to select their own profile via self-assessment.



Analysis on the trends of Initial Coin Offerings (ICOs)

On November 14th, 2018, the AMF published a [press release](#) on its study concerning Initial Coin Offerings.

France accounts only for a modest share of this new type of fundraising activity, raising 89 million euros in 2017.

The nature of projects has diversified beyond the technology sector to include health, energy and retail.

In the study, the AMF observed that ICOs are considered by small companies, and that technology projects are still the largest sector, with the majority of firms using ICOs to establish blockchain applications or trading facilities. The AMF notes that future ICOs appear to be diversifying into additional sectors with the objective of raising between 1 and 180 million euros.

In the context of the new PACTE law, an optional visa for ICOs was introduced, with the aim of offering better protection for investors.

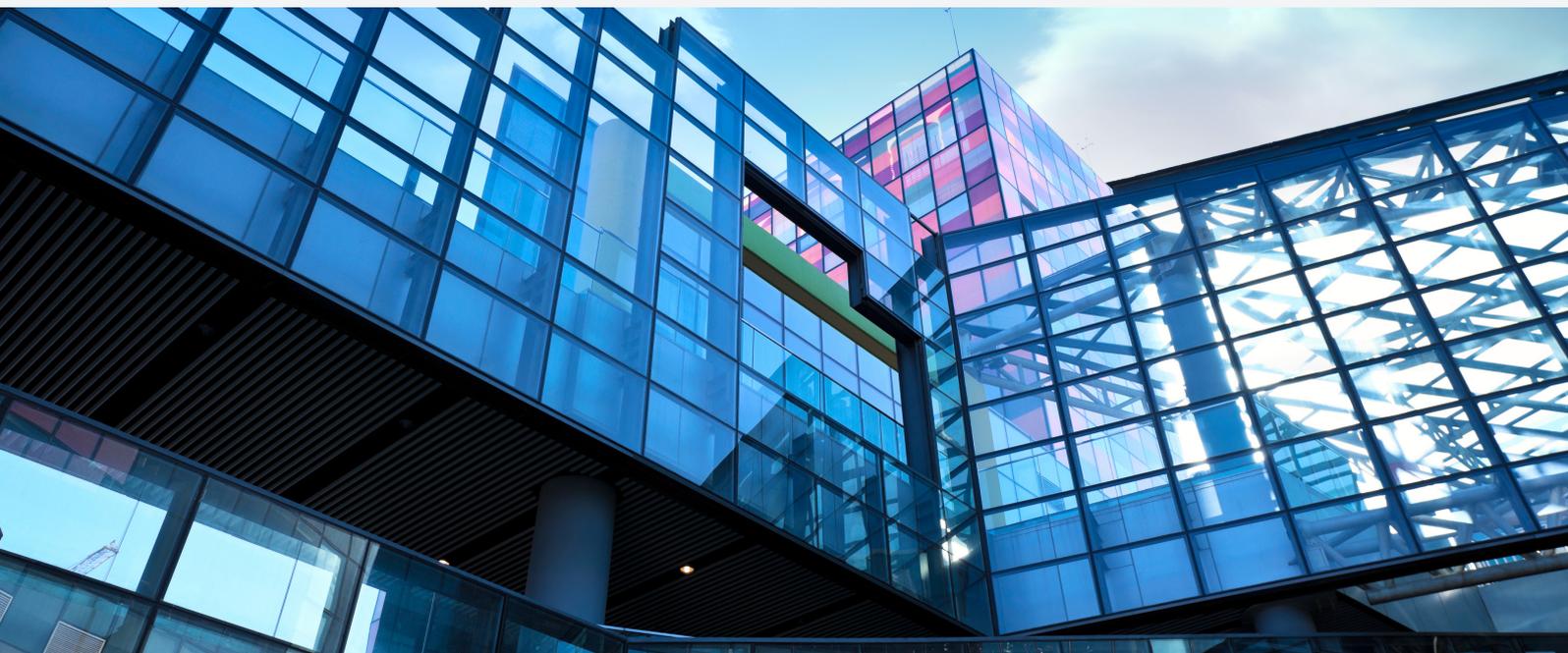
Corporate governance and executive compensation

On November 26th, 2018, the AMF published a [press release](#) on the new report on corporate governance and executive compensation. This year's report highlights two specific areas of interest in 2018: changes in top management and say on pay.

Brexit conference

On December 14th, 2018, the AMF held a conference in the subject of Brexit and its consequences on the managers of French funds.

If you would like to have a better understanding on the impact of Brexit on your activities, do not hesitate to contact us.



Key figures for asset management

On December 12th, 2018, the AMF published 3 studies on:

- [Management company financial data and profitability](#)
- [The control mechanism of asset management companies](#)
- [Own funds of asset management companies](#)

The conclusion of these studies is that the asset management companies achieve better operating profits in 2017 which can be explained by the increased management fees and the expanding retrocessions.

Furthermore, only 22 asset management companies were observed to have insufficient regulatory capital in 2018, as against 28 in 2016. The number of asset management companies having a 30 % surplus of capital has also increased. Failures concerning non-compliance with regulatory capital requirements were particularly noted at firms with less than €150 million of assets under management.

The population of compliance and internal control staff at asset management companies was stable over 2017. Outsourcing of permanent and periodic control function appears to be increasing, with a bigger proportion of firms outsourcing the periodic control function.



UK

Brexit: opening of the notification window for the temporary permissions regime

On January 7th 2019, the Financial Conduct Authority (FCA) has **opened** the period during which the EEA-based firms can notify the FCA about their intention to apply under the Temporary Permissions Regime which allows them to continue their activities in the United Kingdom temporarily in case of a hard Brexit.

This notification period is open until 28 March 2019. After this period, fund managers and funds who did not submit an application will not be able to use the Temporary Permissions Regime to operate in the United Kingdom.



EUROPEAN UNION

ESMA publishes responses to its consultations on the Prospectus Regulation

On October 30th, 2018, ESMA [published](#) the responses to its consultation on Prospectus Regulation.

The consultation was launched on July 13th, 2018 in the form of two consultation papers on the following topics:

- Guidelines on risk factors under the Prospectus Regulation. The responses are [published](#) on ESMA's website according to each respondent's sector of activity.
- Technical advice on minimum information content for prospectus exemption. The responses are [published](#) on ESMA's website according to each respondent's sector of activity.

ESMA updates Q&As on MiFID II and MIFIR investor protection and intermediaries

On October 3rd, 2018, ESMA [published](#) an update on its Q&As regarding two sections: Best Execution and Investment advice on an independent basis.

ESMA updated its answers to the following questions:

1. Question 19 relating to Best Execution, on which ESMA provides details on the identification of counterparties by management companies using the RFQ trading system
2. Question 2 on Investment advice on an independent basis, it states that an asset management company can hold itself out as providing investment advice on an independent basis only if that investment firm assesses "a sufficient range of financial instruments available on the market which must be sufficiently diverse with regard to their type and issuers or product providers to ensure that the client's investment objectives can be suitably met and must not be limited to financial instruments issued or provided by:

- c. the investment firm itself or by entities having close
- d. other entities with which the investment firm has such close legal or economic relationships.



ESMA updates Market Abuse Q&As

On October 1st, 2018, ESMA [published](#) an update of its Q&As regarding the implementation of the Market Abuse Regulation (MAR).

This update covers the questions Q5.3, Q5.4 and A5.5 relating to the possibility for credit / financial institutions to delay disclosure of inside information.

ESMA defines thus the conditions under which this delay is possible as well as the need to declare such delay to the NCA (National Competent Authority) who has the right to refuse it.

On November 12th, 2018, ESMA [published](#) a second update of its Q&As regarding the implementation of the Market Abuse Regulation (MAR).

This update covers the question Q7.10 which clarifies the scope of the trade restrictions imposed on persons holding managerial positions under Article 19(11) of the MAR.

ESMA updates the Q&As on market structure and transparency topics

On November 14th, 2018, ESMA [published](#) an update of its Q&As on market structure and transparency topics under MiFID II and MIFIR.

This update of the Q&As on market structure covers the question 29 from the “Direct Electronic Access (DEA) and algorithmic trading” section which discusses the requirement imposed on market makers to post simultaneous two-way quotes of comparable size and its effect on the ability of market makers to voluntarily post additional liquidity on either side of the order book.



ESMA updates the Q&As on Benchmark regulation

On December 18th, 2018, ESMA [published](#) an update of the Q&As on Benchmark regulation (BMR).

This update covers the questions Q5.12 and Q5.13 relating to the methodology and the parameters to be considered as input data.

The objective of the Q&A is to promote common supervisory approaches and practices in the application of BMR.

ESMA published MiFID II supervisory briefing on Suitability

On November 13th, 2018, ESMA [published](#) a new version of its supervisory briefing on Suitability under MiFID II.

This version takes into account the guidelines published by ESMA on May 28th, 2018 on this subject.

This supervisory briefing covers the following topics:

- Determining situations where the suitability assessment is required;

- Information to clients about the purpose of the suitability assessment;
- Obtaining information from clients;
- Arrangements necessary to understand investment products;
- Arrangements necessary to understand the suitability of an investment;
- Suitability report;
- Qualifications of firm staff; and
- Record keeping.

ESMA opens a consultation paper on reporting rules for (MMF) Money Market Funds

On November 13th, 2018, ESMA opened a [public consultation paper](#) on how European Money Market Funds should report certain information to National Authorities.

This document aims at facilitating the regulatory reporting for European Money Market Funds.



ESMA published the answers to the consultation paper relating to the Stress tests rules for the MMF

On December 11th, 2018, ESMA [published](#) the answers received on the consultation paper relating to the stress tests rules for the MMF which was launched on September 28th, 2018.

ESMA tells firms to provide clients with information on the implications of Brexit

On December 19th, 2018, ESMA asked asset management companies to provide clients with information on the implications of Brexit.

This demand aims at avoiding any potential disruption arising from client confusion. Firms that will be impacted by Brexit should ensure that they provide clear information on, at least, the following areas:

- Impact of UK departure for the given firm and its business, and the implications this has for the relationship between the client and the firm;

- Actions the firm is taking such as organizational arrangements to deal with client inquiries;
- Implications for clients of any corporate restructuring and, in particular, any relevant changes to contractual terms; and
- Contractual and statutory rights of clients in these circumstances, including the right to cancel the contract and any right of recourse, where applicable.

ESAs consults on proposed changes to the key information document for PRIIPS

On November 8th, 2018, ESAs (European Supervisory Authorities) opened a [consultation paper](#) on the proposed changes to the Key Information Document (KID) for PRIIPS.

These proposed changes are in the context of ongoing discussions between the European co-legislators on the application of the KID by certain investment funds.



USA

SEC Suspends Trading in Company for Making False Cryptocurrency-Related Claims about SEC Regulation and Registration

On October 22th, 2018, the SEC [announced](#) the suspension of trading in the securities of a company, following its false statements.

These statements concern its partnership with a claimed SEC-qualified custodian for use with cryptocurrency transactions and a purportedly registered public offering of preferred stock.

In two press releases issued in August 2018, the company claimed that it had partnered with an SEC qualified custodian for use with cryptocurrency transactions that would be “under SEC Regulations,” while the SEC affirmed that they do not endorse or qualify custodians for this type of transaction.

SEC Adopts Rules that increase information Brokers must provide to investors on order handling

On November 2nd, 2018, the SEC [announced](#) that it had voted to adopt amendments of the Rule 606 of Regulation National Market System that will require broker-dealers to disclose to investors new and enhanced information about the way they handle investors' orders. These amendments aim to make it easier for investors to evaluate how their brokers handle their orders and ultimately to make more informed choices about them.

SEC Adopts FAIR Act Rules promoting research reports on Investment Funds

On November 30th, 2018, the SEC [announced](#) the adoption of rules and amendments designed to promote research on

mutual funds, ETFs and registered close-end funds.

These changes reduce obstacles to providing research on investment funds by harmonizing the treatment of such research with research on other public companies. The SEC took this action in furtherance of the mandate in the Fair Access to Investment Research Act of 2017 (FAIR Act).

The rules and amendments generally establish a safe harbor for a broker or dealer to publish or distribute research reports on investment funds under certain conditions.

Three Broker-Dealers to pay more than \$6 Million in Penalties for providing deficient blue sheet data

On December 10th, 2018, the SEC [announced](#) its agreement with three broker-dealers accused of providing incomplete and inaccurate securities trading information (blue sheet data). The broker-dealers agreed to pay more than 6 million dollars.



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About Duff & Phelps

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