

Regulatory Flash: Q1 2023

Simmons & Simmons Spain

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1. Spanish Regulations

1.1. New Securities Markets and Investment Services Law

Click [here](#) to access this Law.

On 18 March 2023, the Law 6/2023 of 17 March on Securities Markets and Investment Services ([Securities Markets and Investment Services Law](#)) was published in the Official State Gazette – *Boletín Oficial del Estado* ([BOE](#)), with date of entry into force 7 April 2023.

The Securities Markets and Investment Services Law repeals the consolidated text of the Securities Market Law, that was approved through the Royal Legislative Decree 4/2015, of 23 October.

The Securities Market Act and Investment Services Law transposes various EU Directives into the Spanish legislation, among others the Investment Firms Directive ([IFD](#)), which establishes a new prudential regime for investment firms.

The main purpose of this Law is to regulate the securities market and investment services and activities in Spain. It refers, among other matters, to the issue and offer of financial instruments, trading centres and systems for the registration, clearing and settlement of financial instruments, the authorisation regime, operating conditions and prudential regime for investment services firms, the provision of investment services and activities in Spain by third-country firms, the authorisation and operation of providers of data provision services, and the provision of investment services and activities in Spain by third-country firms, operating conditions and prudential regime for investment services firms, the provision of investment services and activities in Spain by third-country firms, the authorisation and operation of providers of data supply services, and finally the supervision, inspection and sanctioning regime of the Spanish Securities Market Commission - *Comisión Nacional del Mercado de Valores* ([CNMV](#)).

1.2. Whistleblowing Law

Click [here](#) to access this Law.

On 21 March 2023, the Law 2/2023, of 20 February, on the protection of persons who report violations of the law and fight against corruption ([Whistleblowing Law](#)) was published in the BOE, with date of entry into force 13 April 2023.

The Whistleblowing Law transposes the EU Whistleblowing Directive into the Spanish legislation.

The main purpose of this Law is to strengthen compliance culture in public and private entities by protecting whistle-blowers in an employment or professional context who report violations of the law.

In order to achieve this protection, the Law requires certain entities to have an internal information system as from 13 June 2023 or 1 December 2023 (depending on the kind of company and the number of workers).

This internal information system has to be managed by a responsible specifically appointed by the Board of Directors or equivalent, with a managerial position that shall be independent and autonomous with respect to the rest of the bodies of the entity. It is permitted that this person coincides with the responsible of the compliance function, if it already exists, and if such responsible complies with all the requirements set out in the new Law.

Entities shall also approve a policy setting out the general principles of the system and a communications management procedure, which shall be approved by the governing body. In any case, the internal information system must allow the submission of anonymous complaints.

Entities concerned includes those that, despite not having their domicile in Spain, carry out activities in Spain through branches or agents or by providing services without a permanent establishment.

Finally, whistle-blowers may submit communications through the external channel of the Independent Whistle-blower Protection Authority, not being a prerequisite to exhaust the internal information system.

Click [here](#) to access to the newsletter published by Simmons & Simmons.

1.3. Draft law establishing the Independent Administrative Authority for the Protection of Financial Customers

Click [here](#) to see the Draft law.

The Independent Administrative Authority for the Protection of Financial Customers for the out-of-court settlement of disputes between financial institutions and their customers, is created by means of this Draft-Law.

All natural or legal persons and entities without legal personality, whether Spanish or foreign, that are duly identified as such and are users of financial services provided by financial institutions and, consequently, are subject to the regulations governing them, are under the scope of this Draft law.

The Draft law sets out the regime for admitting complaints and the grounds for rejection.

1.4. Preliminary Draft law for the transposition of CSRD

Click [here](#) to access the document.

On 6 March 2023, the Spanish Government initiated the process for the transposition of the Corporate Sustainability Reporting Directive, also known as CSRD.

The main purpose of this preliminary text, which is entitled "*Law on Information on Sustainability*", is to obtain the opinion of the potentially affected parties and the most representative organizations on the utmost relevant aspects of the future legislation transposing the aforementioned Directive. Member states have until 6 July 2024 to bring into force the laws, regulations and administrative provisions necessary to comply with the CSRD.

It should be recalled that the new Directive (EU) 2022/2464 (published in the Official Journal on 16 December 2022), which replaces Directive 2014/95/EU on disclosure of non-financial and diversity information, regulates the content of the sustainability report in an exhaustive manner, and, as opposed to the previous one, it requires the application of European sustainability standards in the preparation of the information. It also extends the scope of application to include more entities, including branches of third countries, parent companies, and imposes a limited verification of the information on sustainability, with a view to evolving towards a reasonable verification of the information.

2. Spanish Supervisory Authorities

2.1. CNMV's Strategic Areas 2023-2024 and 2023 Activity Plan

The public consultation can be found [here](#) and the relevant press release [here](#).

On 23 February 2023 CNMV shared its strategic guidelines for 2024 and its business plan for 2023. In summary, CNMV foresees to revitalise capital markets to support growth and the transition to a sustainable economy and strengthen the framework for the protection of retail investors in the face of new challenges. For this, CNMV will carry out a strict supervision of securities markets, with special attention to financial stability.

In this regards, CNMV announced some actions such as:

- Review of financial intermediaries including their compliance with obligations for marketing communications and advertising, in line with ESMA's action referred to below in this newsletter.
- Review products and services that promote ESG features or sustainable investment objectives, including aspects related to greenwashing.
- Carrying out of mystery shopping activity focused on online channels, including entities that provide services in Spain on a cross-border basis.
- Review compliance with regulations on sustainability preferences and incorporation of sustainability aspects in product governance.
- Supervision of non-financial information.
- Monitoring, together with ESMA, of sustainability in investment funds and how managers comply with the obligations of integration and disclosure of sustainability risks.
- Monitoring and analysis of sustainability-related claims, for the identification of possible mal-practices related to greenwashing throughout the value chain.
- Monitoring of the effects of financial and technological innovation on securities markets, especially with regard to cybersecurity risks and the adaptation of entities to the DORA Regulation.
- Creation of the Money Laundering Prevention Unit.
- Speeding up of the procedures for authorizing private equity funds through the creation of web forms.
- Implementation of the Pilot regime on DLT.

2.2. CNMV launches a public consultation on additional restriction in the marketing of CFD

The public consultation can be found [here](#) and the relevant press release [here](#).

The CNMV issued a public consultation, which ended 31 January 2023, where the Spanish Supervisor sought to reinforce the control over the marketing of Contracts for Difference (CFD) aimed at retail investors. This measure is a step forward with respect to the measures adopted back in 2019 which we informed in our newsletter and can be consulted [here](#). The measures were proposed after analysing the recent marketing practices carried out by entities that trade with CFD or which obtain benefits from that kind of trading, and also due to the increase of the losses that retail investors have suffered as a consequence of these kind of investments.

In addition to the limits established with regards to the leverage and warning of high risk losses, CNMV is now planning to adopt a more far-reaching measures on these products, as is already the case in other jurisdictions (France, Belgium, Netherlands and Germany among others, albeit different in type and scope).

The main measures proposed relate to:

- The prohibition of retail advertising on these instruments, as well as the additional prohibition of sponsorship and brand advertising of the entities whose main activity is the distribution of these instruments.
- Other restrictions on remuneration to the commercial network and other sales techniques that encourage the distribution of these products to retail investors.
- The possibility of extending some of the measures in force to other derivatives in addition to CFDs, as well as, in the event that the aforementioned measures are deemed insufficient, a direct prohibition of OTC CFD trading through electronic platforms, which would not extend to instruments traded on trading venues.

2.3. CNMV approves the “Code of Good Investor Practices” to encourage long-term engagement

Click [here](#) to see the press release. Click [here](#) to see the code. Click [here](#) to see the instructions issued by the CNMV.

On 22 February 2023, CNMV approved the Code of Best Practices for institutional investors, asset managers and proxy advisors, in relation to their duties with respect to the assets vested or the services rendered; also known as the “Code of Good Practices”.

The aim of the Code, which is based on a proportionate principle, is to promote greater shareholder involvement in the life of the companies in which they invest. The investors that wish to do so, may join the good practices by writing to the CNMV by means of a letter addressed to the CNMV. The CNMV will publish a list of these entities and a link to the Website of each of them, where they must publish the engagement and voting policies, as well as all other information necessary to comply with the Code.

For the purposes of the Code, institutional investors are life insurance and reinsurance companies and occupational pension funds. However, given its voluntary nature, other entities (non-life insurance and reinsurance companies, pension funds other than occupational pension funds, and pension fund management companies, holding or portfolio companies, family groups and other private investors and similar entities), may also adhere to the Code if they so consider.

Within the service providers, the applicability of the Code has been limited to proxy advisors, at least, initially.

2.4. CNMV's public consultation on the Technical Guide for funds with specific return target and fixed income funds with a Buy and Hold Strategy

The public consultation can be found [here](#) and the press release [here](#).

On 13 February 2023, CNMV issued a public consultation, until 31 March 2023, on a Technical Guide on enhancing the transparency of Collective Investment Schemes (CIS) with a specific return objective and on fixed-income CIS with a buy and hold strategy.

The aim of the Guide is to update the criteria included in the Technical Guide 1/2017 on enhancing the transparency of CIS with a long-term specific performance objective, for funds with a term of more than three years. It is considered necessary to update the 1/2017 Circular in order to comply with the market best practices and also to include CIS with a buy and hold strategy. The new Guide criteria will be applicable regardless of the duration of the strategy or the time horizon of the funds.

2.5. Application by CNMV of two EBA Guidelines on Remunerations

Click [here](#) to see the press release issued by the CNMV.

On 21 December 2022 CNMV issued a press release where it informed that the CNMV had informed the European Banking Authority (EBA) that it has the intention to comply with the EBA Guidelines on remuneration. Specifically with the following ones:

- EBA Guidelines on the benchmarking remuneration exercises on remuneration practices and the gender pay gap under the Investment Firms Directive 2019/2034. Click [here](#) to access the document.

These guidelines specify the information to be provided by selected investment firms to competent authorities to compare remuneration trends and practices, including remuneration information and information to be provided to compare the gender pay gap. The guidelines detail how competent authorities will collect this information and how they will submit this information to the EBA.

- EBA Guidelines on data collection exercise regarding high earners according to the Investment Firms Directive 2019/2034. Click [here](#) to access to the document.

Directive (EU) 2019/2034 requires the competent authorities to collect for each entity information on the number of persons who are remunerated each financial year with EUR 1 million or more, in intervals of EUR 1 million, including details on the functions of the position, the business area, the main components of fixed and variable remuneration.

2.6. Sepblac notifies EBA the application of the EBA Guidelines on the prevention of money laundering and terrorist financing function

Click [here](#) to see the EBA Guidelines.

Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias ([Sepblac](#)) has informed EBA that it will follow the Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the anti-money laundering and counter-terrorist financing (AML/CFT) Compliance Officer under article 8 and Chapter VI of Directive (EU) 2015/849, as set out in the EBA/GL/2022/05 Guidelines.

The Guidelines apply from 1 December 2022, and are aimed at ensuring a common approach of the requirements set out in the Directive (EU) 2015/849 with a view to resolving the adverse consequences that have arisen for the EU's financial system due to the requirements being implemented unevenly in the different member states and not always affectively. It also implements the Compliance function as it is defined in the Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. This Regulation includes a reference to a compliance officer and a compliance manager. The compliance officer must "have sufficient knowledge, skills and experience regarding ML/TF risks, and the implementation of AML/CFT policies, controls and procedures, with a good understanding of the credit or financial institution's business model and the sector in which the credit or financial institution operates". In addition, he/she should be given sufficient time, resources and authority to perform his/her duties effectively.

3. EU Regulations

3.1. Proposal of MiFID III

On 20 December 2022, the Council of the European Union agreed negotiating mandate on proposal to strengthen market transparency and thus, to start negotiations with the European Parliament for a review of the Markets in Financial Instruments Regulation ([MiFIR](#)) and the second Markets in Financial Instruments Directive ([MiFID II](#)).

The priorities for this review are to improve transparency and availability of market data, with the aim of empowering investors by enabling them to access market data which is relevant to investing in shares and bonds more easily, improve the level-playing field between execution venues and making EU market infrastructures more robust so that they can remain competitive at an international level.

The Council included the following requests to the Permanent Representatives Committee:

- A proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 600/2014 with regards to enhancing market data transparency, removing obstacles to the emergence of a consolidated tape, optimising the trading obligations, as well as prohibiting receiving payments for forwarding client orders; and
- A proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments.

3.2. Directive on distance marketing of financial services

On 2 March 2023, Council of the European Union agreed negotiation position to update, simplify and modernize the current legal framework set out for financial services contracts concluded at a distance.

The new directive updates current EU legislation (the 2002 directive on distance marketing of consumer financial services) to create a level playing field in the internal market for distance financial services while raising the level of consumer protection.

The general approach maintains the objectives of the European Commission's proposal presented on May 2022 but introduces several improvements making it more coherent with existing sectorial legislation and clarifying some important points of the Directive.

The Council position adds further provisions of the consumer rights directive, applying these to financial services contracts concluded at a distance. These include provisions on telephone contracts, inertia selling (the sending of unsolicited goods or services to potential customers to make a sale), or the possibility for member states to introduce language requirements in national law regarding pre-contractual information.

The revised Directive intends to facilitate the exercise of the right of withdrawal in relation to contracts concluded at a distance with the inclusion of a button (or similar function) in the contracting processes with the label "withdraw from contract here". At a second step, a confirmation button "withdraw now" to ensure that the consumer does not withdraw from the contract by mistake (known as the withdrawal button).

Regarding the use of online tools, like roboadvice or chatbots, the consumer must have the right to request human intervention to understand the effects that the contract may have on his/her financial situation.

3.3. EU list of non-cooperative jurisdictions for tax purposes updated

Click [here](#) to see the announcement.

The EU Council has announced further changes to the EU list of non-cooperative jurisdictions for tax purposes on 14 February 2023. The most recent update saw the addition of four new jurisdictions to the black list, including the British Virgin Islands, Costa Rica and the Russian Federation. The black list now contains sixteen jurisdictions. A number of jurisdictions, which have committed to agreeing necessary changes to their tax systems with the EU, remain on a second grey list. The grey list was also updated and three new jurisdictions were added, Albania, Aruba and Curaçao, and four removed, Barbados, Jamaica, North Macedonia and Uruguay.

4. European Supervisory Authorities

4.1. ESMA updates AIFMD Q&As on whether managers of SPACs are in scope

On 16 December 2022, European Securities and Markets Authority (ESMA) updated its [Q&A on the application of the AIFMD](#) to include a new Q&A within Section XI (Scope) regarding the position of managers of special purpose acquisition companies ("SPACs") under the AIFMD.

The new Q.3 asks whether managers of SPACs are subject to the AIFMD.

By way of answer, ESMA notes:

- SPACs are not yet legally defined in EU law
- ESMA's [Public Statement](#) of July 2021 describes SPACs as "shell companies that are admitted to trading on a trading venue with the intention to acquire a business"

- It further lists the three stages of the typical life-cycle of a SPAC
 - the Initial Public Offering
 - the SPAC searches for a target company to acquire and
 - the business combination with the target company, typically through a merger.
- ESMA, though, accepts that “there are significant variations between the general structuring of relevant vehicles and concrete modalities of their transactions”
 - As a result, it should be assessed on a case-by-case basis whether a given SPAC
 - meets the definition of an “AIF” under Article 4(1)(a) of the AIFMD and
 - qualifies as a “holding company” under Article 4(1)(o) of the AIFMD.
- Such assessment needs to take the specific features and characteristics of the individual structure of the SPAC into account and should be based on substance, not form
- Close attention should be paid to ESMA’s [Guidelines on key concepts of the AIFMD](#) (the ESMA Guidelines).
- During a SPAC’s life-cycle, circumstances might arise which are relevant when assessing whether the SPAC meets the elements described in the ESMA Guidelines.
- The occurrence of some or all such circumstances may indicate that the SPAC is not an AIF including when:
 - a SPAC does not raise capital through the IPO with a view to investing it in accordance with defined investment policy
 - all, or substantially all, the proceeds of the IPO are used for the business combination
 - following the business combination, the SPAC has a general commercial or industrial purpose as defined in the ESMA Guidelines.

4.2. ESMA and NCAs to look at marketing of financial products

On 16 January 2023, ESMA published a [press release](#) in relation to marketing of financial products. The press release states that, ESMA will launch a common supervisory action (CSA) with national competent authorities (NCAs) on the application of MiFID II disclosure rules with regards to marketing communications across the European Union. According to the communication, the CSA will be conducted over the course of 2023.

ESMA is aware of the key role that marketing communications and advertisements can play in determining consumer behaviour and influencing investment decisions and is therefore launching this exercise to assess the application by investment firms and credit institutions of the MiFID II requirements on marketing communication.

As part of the CSA, NCAs will review whether marketing communications (including advertisements) are fair, clear and non-misleading and how firms select the target audience for the marketing communications, especially in the case of riskier and more complex investment products. The CSA will closely consider marketing and advertising by firms through distribution channels, including apps, social media and collaborations with affiliates such as influencers.

The CSA also presents an opportunity for ESMA to collect information about possible greenwashing practices observed in marketing communications and advertisements.

5. ESG

5.1. ESG – SFDR RTS changes on fossil gas and nuclear activities published

The Level 2 SFDR RTS have been changed to take into account amendments regarding fossil gas and nuclear activities, with effect from Monday 20 February 2023.

The amendments to the [SFDR Level 2 RTS](#) brought about as a result of the Complementary Delegated Act (CDA), which covers fossil gas and nuclear activities, have now been [published in the Official Journal](#) - they come into effect on the third day following publication (i.e., Monday 20 February 2023).

The new RTS does not present major substantial changes with respect to the European Commission's draft published in October 2022. The novelties are focused in a series of changes in the templates of the pre-contractual and periodic information of the "sustainable products", the so-called "sustainability annexes".

Specifically: "A yes/no question in the templates, to determine whether the financial product intends to invest in the following economic activities (as defined in the delegated taxonomy regulation): nuclear energy, and fossil gas energy. In case of an affirmative answer to the above question, entities shall include the percentage of investment in those activities in the graphical representations indicating the proportion of environmentally sustainable economic activities.

Visit our [Global updates on ESG matters](#). Click this [link](#) to access ESG View, a monthly summary of key global legislative and industry developments on ESG matters.

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