

Regulatory Flash: Q1 2024

Simmons & Simmons Spain

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Contents

- 1. Spanish Regulation**
 - 1.1 Draft Law on customer services
 - 1.2 Draft Law to create the Financial Customer Protection Authority
 - 1.3 Congress approves the Draft Organic Law on party representation and balanced presence of women and men
- 2. Spanish Supervising Authorities**
 - 2.1 CNMV updates its Questions and Answers on Collective Investment Schemes
 - 2.2 CNMV's Activity Plan
 - 2.3 CNMV reviews the implementation of new obligations on client sustainability preferences
- 3. EU**
 - 3.1 DORA
 - 3.2 Corporate Sustainability Due Diligence
 - 3.3 AIFMD 2.0 overview of the key changes
- 4. Retail Investment Strategy (RIS)**
 - 4.1 Amendments to MiFID and MiFIR published in the DOUE
- 5. MICA**
- 6. Crypto view**
- 7. ESG**
 - 7.1 EU adopts the Directive on Environmental Crimes
 - 7.2 Navigating EU rules on greenwashing and deceptive environmental claims
 - 7.3 Simmons & Simmons ESG view March 2024
- 8. ESMA**
 - 8.1 Consultation Paper: Conditions and criteria for classifying a crypto-asset as a financial instrument
 - 8.2 Consultation Paper: Provision of crypto-asset services on the exclusive initiative of the client
 - 8.3 Final Report: Draft Technical Standards certain requirements of MiCA – first package
- 9. AML**
 - 9.1 The Financial Action Task Force (FATF) updates the list of countries under increase monitoring in the prevention of money laundering and terrorist financing
 - 9.2 The EU Council updates the list of non-cooperative countries and territories for tax purposes
 - 9.3 EU Commission updates the list of high-risk third countries with strategic deficiencies in the prevention of ML/TF
- 10. Artificial Inteligencie**

1. Spanish Regulation

1.1 Draft Law on customer services

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

A new Law on Customer Services was previously attempted, but fell due to the call for General Elections in Spain on 23 July 2023. On 8 March 2024, a new Draft Law (hereinafter, the “**Draft Law**”) was published in the Official Gazette of the Spanish Parliament (*Boletín Oficial de las Cortes Generales del Congreso de los Diputados*).

The purpose of this Draft Law is to establish minimum quality standards and to evaluate customer services provided by companies offering essential general interest services.

This Draft Law will affect companies that carry out certain basic services of general interest to be listed in the regulation, provided that such activities are **offered in Spain** (either by a Spanish entity or by a foreign company with a permanent establishment in Spain or providing services on a cross-border basis). This list will include financial services, which will remain subject to their specific sectorial regulations, this Draft Law will provide supplementary provisions.

Another aspect of this Draft Law is the mandate for 24-hour customer service year-round to address complaints or claims resulting from unattended service maintenance incidents that require continuous operation, as specified in Article 29 of the Draft Law.

In addition, institutions that are part of the same economic group may have a single customer service department or service for the whole group. Institutions, also, must adopt the necessary measures to separate the customer service department or service from the other services of the organisation, thus avoiding any conflict of interest.

This Draft Law establishes that all the measures included must follow the principles of universal accessibility, equal treatment and non-discrimination, ensuring access for disabled and elderly people.

The only observable change between the previous Draft Law and the current one concerns the definition of “personalised service”. This term is now understood to refer to a service that takes into consideration the age, geographical area, level of digital skills of the person, disability, foreign status, and the administrative status of the individual seeking customer service, among other considerations.

This Draft Law has a supplementary application; financial institutions will first be governed by their sector-specific regulations applicable at any given time, this is articles 29 to 29 (7) of Law 44/2002, of 22 November, on Financial System Reform Measures, which is amended by the Second Provision of the Draft Law, including a new wording of article 29 of the Law.

The Law will enter into force on the day following its publication in the Official State Gazette (*Boletín Oficial del Estado*), and a period of six months is established for the companies included in its scope of application to adapt their customer services in accordance with the Law.

1.2 Draft Law to create the Financial Customer Protection Authority

Please see the Preliminary Draft Law [here](#).

The Council of Ministers gave the go-ahead to the Preliminary Draft Law to create the **Financial Customer Protection Authority** with the text that was stalled in July 2023 due to the call for elections. Spain's Minister of Economy, Trade and Enterprise believes that this Law could enter into force before the end of 2024.

The new Authority would integrate the functions of the complaints services of the Bank of Spain (*Banco de España*), the National Securities Market Commission (*Comisión Nacional del Mercado de Valores - CNMV*) and the Directorate General of Insurance and Pension Funds (*Dirección General de Seguros y Fondos de Pensiones - DGSFP*), with customers being able to approach the new body free of charge and obtain a response within a maximum of 90 days, with such resolutions being binding on financial institutions on certain occasions.

The deadline for lodging claims with this new Authority will be one year, and in order to be admitted for processing, the following conditions must be met:

- accreditation of prior submission to the customer service department or the customer ombudsman of the financial institution where the claim is made;
- that one month has elapsed since the submission of the complaint without a reply; and
- not apply as a reason for total or partial rejection or rejection.

Financial institutions must inform clients of this possibility and its requirements in pre-contractual information, on the notice boards of their branches and on their websites. When submitting a complaint, the financial institution should provide this Authority with the pre-contractual and contractual documentation related to the service in question, and the financial institution bears the burden of proof on the facts that trigger the complaint.

This Preliminary Draft Law also intends to charge financial institutions an annual fee for complaints lodged with the Authority, with the fee calculation outlined in the draft law.

In the coming months, this draft law will pass to the Congress of Deputies and will begin its parliamentary processing.

1.3 Congress approves the Draft Organic Law on parity representation and balanced presence of women and men

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

On 15 December 2023, the Congress of Deputies approved the Draft Organic Law on equal representation and balanced presence of women and men, which aims to transpose Directive (EU) 2022/2381, which promotes gender balance on company boards in the private sector, and to continue with the regulatory evolution on gender equality in different public bodies and institutions. This Draft Law provides for the amendment of the Capital Companies Act, and the Securities Markets and Investment Services Act.

This Draft Law will affect both listed entities and entities considered to be in the public interest (as defined in article 8.1 of the Regulation implementing Law 22/2015, of 12 January, on the Auditing of Accounts) as long as two requirements are met, that the average number of employees exceeds 250, and that the annual net turnover exceeds EUR 50 million or the total assets exceeds EUR 43 million.

Therefore, under certain circumstances, The following shall be considered to be public interest entities, the credit institutions, insurance companies, payment institutions and electronic money institutions, investment services companies, collective investment undertakings and the management companies that manage these institutions, and pension funds and the management companies that manage them.

As mentioned above, this Draft Law will amend the Capital Companies Act, notably the current article 529, without introducing new articles. The requirement for listed companies to have a board of directors with at least 40% of members from the least represented sex remains. Additionally, it is worth noting the new criterion that the total number of directors should be the closest whole number percentage to 40%, without exceeding 49% of the board's membership. This Draft Law entrusts the monitoring of compliance with these provisions to the Spanish Securities and Exchange Commission (*Comisión Nacional del Mercado de Valores*, "CNMV"), in the case of listed companies, and to the Women's Institute (*Instituto de las Mujeres*), for public interest entities.

A staggered implementation is scheduled for the obligations of listed companies, starting on 30 July 2024 and ending in 2026. In the case of public interest entities, it will be applied gradually, so that by 30 June 2026 the board and senior management will have to reach 33% of the under-represented sex, rising to 40% by 2028.

2. Spanish Supervising Authorities

2.1 CNMV updates its Questions and Answers on Collective Investment Schemes

You can visit the CNMV's Q&A document [here](#).

A new version of the CNMV's Q&A document on the regulation of collective investment schemes ("CIS"), venture capital firms and other closed-end collective investment vehicles was published on 12 March 2024. This update has been published due to recent updates in the relevant regulation such as [Royal Decree 1180/2023](#) or CNMV's [Technical Guidance 1/2023](#), which we mentioned in previous regulatory updates.

Here are some of the most relevant issues of the updated document:

Regarding collective investment vehicles:

- Pricing policy and periodical review (*section 1.1, question 69 duodecies*).
- Performance management fee model (*section 1.1, question 69 terdecies*).
- Warnings on CIS with a specific return target and funds with buy and hold target (*section 1.1, question 82 ter*) in the case of comparable foreign CIS marketed in Spain, the regulator indicates that marketing institutions must warn investors in equivalent terms.
- Application of Technical Guide 1/2023, as regards the application of the guide to CIS which do not hold a stable fixed income portfolio (*section 1.1, question 82 quarter*) and information on the TAE (equivalent annual rate) of the CIS (*section 1.1, question 82 quinquies and sexies*).

- Sustainability Annex which is not part of the annual accounts or the management report (*section 1.1, question 82 octies*).
- Procedure for the selection of managed CIS not reported in half-yearly reports (*section 1.1, question 82 nonies*).
- Possibility for advice by the EAFNs on derivative instruments (*section 1.4, question 152 bis*).

For closed-end collective investment vehicles:

- Investment of open-ended CIS in liquid assets (*section 1.2, question 103 bis*).
- Acquisition of assets prior to registration and the potential conflict of interest (*section 2.3, question 37 octies*).
- In marketing at the initiative of the client, the PRIIPs' DFI must be provided to retail investors even where no marketing activity has been undertaken by the manager and the acquisition is at the initiative of the client (*section 2.3, question 51*). In addition, where non-retail vehicles are marketed at the initiative of the client, managers must be able to demonstrate from whom the initiative originates (*section 2.3, question 55*).
- Change the category from retail to professional clients (*section 2.3, question 52*).

As regards cross-border activities, the CNMV equates the inclusion of ETFs from third countries on websites to their marketing, which may only be included when they are CIS expressly authorised by the CNMV and registered for marketing in Spain.

2.2 CNMV's Activity Plan

Click [here](#) to access the document and the press document can be seen [here](#).

On 27 February, the CNMV presented its Activity Plan for 2024 (the "Plan"), which includes 42 specific objectives, reinforces the supervision of information on sustainability and the avoidance of greenwashing, prepares to exercise new powers over MiCA and DORA regulations, and contemplates an analysis of the use of artificial intelligence (AI) in algorithmic trading, among others.

The strategic priorities defined in the Plan for 2023 and 2024 are listed below:

- Oversight of securities markets in pursuit of financial stability.
- Strengthening the protection of retail investors in the face of new challenges.
- Revitalising capital markets to support growth and the transition to a sustainable economy.
- Monitor the effects of financial and technological innovation on securities markets.
- A supervisor that is more accessible and connected to society.

The objectives set out in the Plan reflect the CNMV's priorities for action and supervision. These include initiatives to improve its functioning and market supervision, such as assessing fair value determinations and associated uncertainties in real estate investments and financial instruments of listed companies, and amending Circular 3/2018. The aim is to develop standardised models for easier analysis, publication, and supervision of financial information.

Additionally, the Plan includes activities like reviewing institutions' obligations regarding money laundering risk assessment. The CNMV has established a dedicated department for this purpose in collaboration with SEPBLAC.

CNMV is also developing the PRES work programme for supervisory review and evaluation (*programa de trabajo del proceso de revisión y evaluación supervisora*), and enhancing relations with investors and other stakeholders. Notably, the CNMV is undertaking a project to analyse the representation of women in management bodies of supervised institutions. Plans are also underway to publish a study on private finance in Spain and to expand the risk indicators and stress indicator calculations in securities markets dashboards.

2.3 CNMV reviews the implementation of new obligations on client sustainability preferences

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

The Spanish Securities and Exchange Commission (*Comisión Nacional del Mercado de Valores*, "CNMV") has conducted an initial supervision of compliance with the regulation on sustainability preferences by entities providing investment services. The European legislation, mainly MiFID II, stipulates that institutions must ask their clients whether they have preferences on sustainability in their investments, and the regulation obliges them to integrate these preferences when assessing the suitability of the financial products on which they advise the client.

In collecting information from clients, it was noted that the detail of the questions varies quite a lot between different entities, so they have been urged to adjust their procedures. As good practices in this area, it was noted that illustrative examples should be provided for each question or that an annex to the pre-contractual documentation should be prepared with explanations of sustainability-related concepts.

With regard to the information obtained by the institutions, it was observed that the percentage of clients for whom this information has been collected is low, so they have been told that they should complete the process and request information from all their clients. It was observed as good practice to encourage clients to contact the institution to provide the information and that new clients cannot be registered if they have not provided this information.

In relation to the classification of products to consider their alignment with clients' sustainability preferences, it was noted that the use of the European ESG Template ("EET") is quite widespread. The need to modify their practices on issues related to the use of a classification based on product differentiation (as per the transparency obligations of Regulation 2019/2088, "SFDR"), such as considering SFDR Article 6 products as candidates, was brought to the attention of some institutions. It was observed that institutions are not recommending products that match the client's sustainability preferences, in general, they indicate that if there are no products that match the client's preferences, the client is given the option to adapt them and at the same moment they inform the client of the offer of products with sustainable features.

The CNMV has instructed institutions to comply adequately with European regulations and to pay due attention to the future criteria pending clarification by ESMA, which it is expected to address following its recent [Call for evidence](#). This year the CNMV will participate in the joint supervisory action announced by ESMA on client sustainability preferences in the EU.

These new obligations under review have been in force since 2 August 2022 in terms of suitability assessment, and since 22 November 2022 in terms of product governance. Due to their relative novelty, ESMA published guidelines for the implementation of these obligations which apply from 3 October 2023 and the matter is being monitored.

3. EU

3.1 DORA

Visit our Website [here](#) and be prepared to adapt to DORA.

On 17 January 2024, the European Supervisory Authorities published their final draft technical standards which we summarise below.

The Digital Operational Resilience Act (known as “DORA”), approved by Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 emerges as a single European regulation on technological resilience, applicable to all types of financial institutions, in proportion to their size and complexity. It is based on two main pillars, on obligations for financial institutions that outsource their services to ICT providers, and on the supervision of ICT providers established in the EU and considered essential by the supervisory authorities. From 17 January 2025, all these entities must certify that they are capable of resisting and responding to any type of cyber-attack and recovering in the event of a successful cyber-attack.

On 17 January 2024, the European Supervisory Authorities in the financial sector (EBA, EIOPA, and ESMA) published their final draft technical standards in relation to the level 2 requirements.

The joint final draft of technical standards cover the following. Again, we recommend that you visit our [website to see a further review of these pieces of regulation](#):

- [RTS on ICT risk management framework](#)
- [RTS on criteria for the classification of ICT-related incidents](#)
- [RTS to specify the policy on ICT services](#)
- [ITS to establish the templates for the register of information](#)

The final versions of the regulatory technical standards will be available after the European Commission's review. Once adopted in the coming months, they will apply to all financial entities within the scope of DORA. The expected date of application of these technical standards is 17 January 2025.

As part of their DORA compliance programme, and in light of these technical standards, financial entities should:

- review their current inventory of ICT third-party service providers and contractual arrangements, and map them to the templates provided by the ITS;
- establish or enhance the processes and systems to collect, validate, update and report the information required in the templates for the register of information on a regular basis, as well as to monitor any changes in the risk profile or performance of the ICT third-party service providers;
- engage with the ICT third-party service providers to ensure that they are aware of the reporting obligations and expectations, and that they provide the necessary information and cooperation to the relevant entities. Consider whether contractual arrangements with those ICT third party service providers need to be amended to require such reporting; and
- develop or update the policies and procedures to govern the management of the register of information, including the roles and responsibilities, the escalation and reporting mechanisms, and the audit and review activities.

In conclusion, this Regulation aims to prevent and mitigate threats to financial sector companies by improving the existing regulations and, more importantly, to standardise the incident reporting model.

3.2 Corporate Sustainability Due Diligence

You can find more information [here](#).

Visit our Simmons and Simmons [Website for further information on this Directive](#).

You can access the full content of the Proposal for Directive by clicking on this link.

On 15 March, the Corporate Sustainability Due Diligence Directive (“CSDDD” or “CS3D”) was adopted by the Permanent Representatives Committee of the Council of the European Union, after two years of legislative process, and is seen as an heir to the international standard of business conduct set by the 2011 UN Guiding Principles on Business and Human Rights.

The European standard requires companies to prevent, mitigate, alleviate and remedy adverse environmental and human rights impacts resulting from their operations, those of their subsidiaries and operations in their value chain.

Key details of CS3D: It is understood that agreement was found on a compromise text which provided for the following:

- **Scope:** The turnover threshold for determining in scope EU and non-EU companies has been increased to €450 million and the employee threshold for EU companies increased to 1000.

- **Timeframe:** The Directive will apply over a 3-5-year period depending on the size of the company.
- **Chain of activities:** The downstream part of the definition has been limited by deleting references to product disposal.
- **Climate change:** It is no longer an obligation for companies above a certain threshold to promote implementation of a climate change plan through financial incentives.
- **Financial Services:** While the review clause still requires the Commission to present a report on the need for additional due diligence requirements for the provision of financial services, there will no longer be a need for a joint political statement between the co-legislators on why such requirements are needed.

Next steps: The European Parliament's JURI committee voted in favour of the Directive on 19 March. The key next step will be a final vote in plenary by European Members of Parliament in April. Once formally approved by the European Parliament and the Member States, the Directive will enter into force on the 20th day following its publication in the EU Official Journal.

3.3 AIFMD 2.0 overview of the key changes

Click [here](#) to see the text of the Directive.

On 26 March 2024, (the Commission's original proposal came out in November 2021), Directive (EU) 2024/927 was published in the Official Journal.

We have created a series of **Overview notes** looking at the changes in each area as they will affect AIFMs, namely:

- [Application of the changes to non-EU AIFMs](#)
- [Authorisation of AIFMs and delegation](#)
- [The new Loan Origination Regime](#)
- [Liquidity Management Tools](#), and
- [Depositaries](#)

Click on the link above to download the relevant Overview.

The Directive's provisions will apply from **16 April 2026**.

Between now and then, Member States must transpose the Directive's provisions into their national law and ESMA will develop a series of level 2 measures and Level 3 guidelines to supplement the new Directive.

4. Retail Investment Strategy (RIS)

Click [here](#) to see the latest state of play.

The EU Commission published its RIS proposals in May 2023 to make changes to MiFID, UCITS, AIFMD, PRIIPs, IDD and Solvency 2. Currently the EU Parliament and Council are separately considering the Commission's proposals with a view to finalising their own positions on those proposals. The final stage will be for the EU Parliament and Council to come together ('trilogues') with their own positions and agree on a final 'compromise' text.

In short, things are moving slowly. It seems that both the Parliament and Council are struggling to agree internally on their positions, especially on some of more controversial aspects of the proposals - including value for money, benchmarks and inducements. These are closed-door discussions but from what we have been hearing here's a quick overview of where things have got to at each institution.

On 20 March the European Parliament's Committee on Economic and Monetary Affairs (Econ) voted on the report containing amendments to the RIS. The Econ disagrees with the European Commission by removing the proposed prohibition of inducements for the reception and transmission of orders, whereas the European Commission had prohibited the charging of inducements for pure execution or trading services.

The concept of benchmark has now been moved to form part of a supervisory tool which national competent authorities will use when assessing unjustifiable prices of products manufactured or distributed by MiFID firms. The RIS also maintains the requirements that institutions must meet when providing advice to their clients to ensure they are acting in their best interests.

The next step now is to bring this report before the European Parliament at the end of April, for approval of the amendment procedure. The text will then be discussed between the Commission, the Council and the Parliament. The implementation of RIS is expected to be a reality by 2026.

4.1 Amendments to MiFID and MiFIR published in the DOUE

After more than two years in the pipeline, the third amendments of the [MiFID II](#) and [MiFIR](#) is published in the Official Journal of the European Union on 8 March 2024. The bulk of this change is contained in MiFIR.

The changes to the previous regulations seek to promote a more competitive, consolidated and transparent single European trading market, with a consolidated reporting system, strengthened market infrastructures and trading mechanisms. The main points to be developed include improving transparency and investor access to market data, increasing the competitiveness of capital markets in the EU, and increasing the level playing field between trading venues.

Some of the most relevant amendments are as follows:

- Transparency. The systematic internaliser regime is excluded from trading in fixed income instruments, so that its scope is limited to shares and similar instruments. The figure of designated publication entity is also introduced, the regime of pre-transparency exemptions is adapted to introduce limitations to its scope, and a common regime is supported that classifies the deferral in the publication of post-transparency information for bonds, structured products, emission allowances and derivatives.
- The trading obligation is established, referring, to shares, limited to those with an EEA International Securities Identification Number (ISIN) and those referring to derivatives, with those not subject to the clearing obligation not being subject to the trading obligation.
- The obligation to publish quarterly execution venue execution quality reports, and reports on the top five trading venues or brokers on an annual basis, is removed. As a consequence, ESMA is mandated to develop criteria to be taken into account in assessing the effectiveness of entities' execution policies.
- It is prohibited to receive from a third party any remuneration, commission or non-monetary benefit for directing client orders to it for execution.
- The main obstacles preventing the use of consolidated data providers (CPT) to collect market information on financial instruments are to be removed.

The amendments to MiFIR entered into force on 28 March, while the transposition deadline for the directive (MiFID II) is 29 September 2025.

5. MICA

You can access the Simmons & Simmons website on Markets in Crypto Assets Regulation in this [link](#), which contain a series of webinars where experts from our UK and EU offices cover the key points of the MiCA regulation and how it will impact different firms.

On Wednesday 5 October 2022, we saw the agreement on the full text of the Markets in Cryptoassets Regulation (MiCA) by the EU. Following this announcement, we've launched a series of webinars where experts from across our UK and European offices cover the key points of the regulation, and how it will impact different firms in the industry and beyond.

The webinars cover the following topics:

- **Grandfathering provisions across the EU** - Various updates across the EU have been announced with regards to the Markets in Crypto-Assets Regulation (MiCAR) - [Watch on demand](#)
- **MiCA grandfathering** - Discover how passporting fits into the grandfathering process and what happens to VASP registrations upon receiving a MiCA license - [Watch on demand](#)

- **Scope of MiCA: Who? What? When? Where?** – We look at the timing, who will be impacted, what is included in the regulation, and the jurisdictional reach (including passporting) - [Watch on demand](#)
- How MiCA will impact crypto exchanges and custodians - [Watch on demand](#)
- I'm an **issuer** of crypto assets / stablecoins – what do I need to know? - [Watch on demand](#)
- I'm a **regulated financial institution** – what does MiCA say about me? - [Watch on demand](#)
- I work in **DeFi** or **NFTs** – how will this affect me? - [Watch on demand](#)
- **Interaction between MiCA and other regimes:** MiFID, Travel Rule, AML registrations and regulations - [Watch on demand](#)
- **The lesser known parts of MiCA:** market abuse, outsourcing, enforcement and governance - [Watch on demand](#)

6. Crypto View

Visit our most recent [Crypto View](#) issued on 12 March for the latest edition which refers to the price of Bitcoin rocketing to new highs on the back of investment into crypto ETFs, the big news out recently was the FCA confirming that it "will not object" to the creation of a UK listed market segment for crypto ETNs.

We also revisit the previous instance in which a series of Bitcoin ETFs in the United States were approved, subsequently unapproved, and then reapproved. We take a look at this, as well as what this means in some other jurisdictions.

7. ESG

7.1 EU adopts the Directive on Environmental Crimes

On 27 February 2024, the European Parliament adopted the new Directive on the protection of the environment through criminal law (the "ECD") (499 votes in favour, 100 against and 23 abstentions), which extends the list of environmental crimes. The ECD also introduces penalties in relation to such crimes. Click here to see the [press](#) notice.

We invite you to visit our [Simmons and Simmons Website](#) describing the key details of this Directive.

Back in November 2023 and following several months of discussion, the European Council and the European Parliament reached a provisional agreement regarding a proposal for the new ECD and replacing Directive 2008/99/EC (see [here](#) our previous alert).

The newly adopted Directive seeks to improve the effective enforcement of criminal law and to fight against the most serious environmental offences which can have devastating effects on both the environment and human health.

7.2 Navigating EU rules on greenwashing and deceptive environmental claims

Click [here](#) to see the Proposal of the Directive.

On 20 February 2024, the European Council adopted the Directive on empowering consumers for the green transition through better protection against unfair practices and better information (the “Green Transition Directive”) amending the [Unfair Commercial Practices Directive \(UCPD\)](#) and the [Consumer Rights Directive \(CRD\)](#). The Green Transition Directive is intended to work alongside the proposed directive on the substantiation and communication of explicit environmental claims (the “Green Claims Directive”), adopted by the European Parliament’s committees on 14 February 2024.

The Green Claims Directive and the Green Transition Directive will, inter alia, bring significant changes to the approach firms need to take with respect to environmental and social advertising.

[Visit our Simmons and Simmons Website](#) to find more information about the Green Transition Directive and its synergy with the Green Claims Directive.

We also invite you to read the latest edition of ESG View issued by Simmons & Simmons and described below:

7.3 Simmons & Simmons ESG view March 2024

We invite you to read the latest edition of [ESG view](#) issued by Simmons & Simmons which analyses the most recent developments at Global and EU level and interestingly focused on exploring radical collaborations amongst various stakeholders in the World Ocean Summit in Lisbon and including other global updates such as, among others, the adoption of the EU Nature Restoration Law, the next round of Global Plastics Treaty negotiations, and including news of Belgium becoming the first European country to recognise ecocide in its criminal code.

Specifically, the latest ESG View relates to the following:

- NZBA publish second iteration of its [Guidelines for Climate Target Setting](#) (Global – financial institutions): The guidance contains commitments to make intermediate 2030 targets in line with the latest science using low or no overshoot 1.5°C scenarios and covering all or a substantial majority of nine carbon-intensive sectors, among others commitments.
- ICMA has launched a [Taskforce on Green enabling Activities](#) (Global – financial institutions): to explore the possibility of developing dedicated market guidance for the inclusion of such activities into principles for sustainability bonds and loans.
- The European Council approves text of the [Corporate Sustainability Due Diligence Directive](#) (CSDDD) (EU – multi sector).
- [Provisional deal](#) to ban products made with forced labour in the EU market (EU – multi sector): EU Member States will be required to designate one or more competent authorities responsible for, among others, assessing the risk of a violation of the prohibition of products made with forced labour, or investigating the products and economic operators involved. On 13 March, the European Council approved the provisional agreement and the European Parliament is expected to approve during its meeting in April.

8. ESMA

8.1 Consultation Paper: Conditions and criteria for classifying a crypto-asset as a financial instrument

Click [here](#) to see the Consultation paper issued by ESMA on 29 January 2024.

MiCA, the Regulation 2023/1114 of markets in crypto-assets, was published in the Official Journal of the EU on 9 June 2023. ESMA has been empowered to develop technical standards and guidelines specifying certain provisions. Document or Consultation paper (CP) issued by ESMA emerges due to the different approaches to the national transposition of MiFID across Member States, which means that there is no commonly-adopted application of the definition of “financial instrument” under MiFID in the EU (contained in Article 4.1.15 of MiFID), and this entails practical consequences that may emerge with MiCA Regulation regarding the classification of crypto-assets as financial instruments, since according to Article 2(4)(a) of MiCA, the Regulation will not apply to financial instruments. Moreover, MiCA would apply only to crypto-assets that are not covered by existing EU legislation and in particular by MiFID II.

ESMA’s Consultation Paper (CP) has been prepared in order to consult interested parties for the purpose of producing these guidelines. ESMA will consider the feedback received to this consultation and expect to publish a final report by the end of 2024. Guidelines specify conditions and criteria for determining whether a crypto-asset should qualify as a financial instrument and therefore ensuring the common, uniform and consistent application of the provisions in Article 2(4)(a) of MiCA.

It also to be noted that, notwithstanding the above, MiCA does not cover all types of crypto-assets. Non-Fungible-Tokens (NFTs) are outside the scope of MiCA under certain conditions set out in the Regulation.

The Guidelines on the classification of crypto-assets as financial instruments are briefly outlined here:

- General (Guideline 1): The assessment of whether a crypto-asset or financial instrument is involved must be made from a technology-neutral point of view, to ensure that equivalent activities and assets are subject to the same or very similar standards regardless of their form (known as substance over form approach in Recital 11 of MiCA). This should remain a case-by-case exercise and the guidelines are only meant to promote convergent practices in this context.
- Classification as transferable securities (Guideline 2): It must not be a payment instrument, be transferable, fungible and confer rights equivalent to other negotiable securities, including their interchangeability on the capital markets.
- Classification as money-market instruments (Guideline 3): It must be a short-term asset that follows the requirements of Regulation (EU) 2017/1131 on Money Market Funds.
- Classification as units in collective investment undertakings (Guideline 4): It shall be used to accumulate capital from its investments in order to invest it in accordance with a defined investment policy for the benefit of the above.
- Classification as derivative contracts (Guideline 5): Reference is made to the need for a contract and an underlying asset.
- Classification as emission allowances (Guideline 6): Referring to permits for the emission of a certain quantity of greenhouse gases in accordance with Directive 2003/87/EC.

ESMA will consider all comments received by 29 April 2024.

8.2 Consultation Paper: Provision of crypto-asset services on the exclusive initiative of the client

Click [here](#) to see the Consultation paper.

MiCA Regulation provides for crypto-asset services to be provided in the EU by entities having their registered office in a Member State where they carry out substantive activities, including the provision of crypto-asset services. In turn, this Regulation restricts the provision of crypto-asset services to a client located in the EU by a third-country firm in the case where such a service is provided exclusively at the initiative of a client, known as the “reverse solicitation” exemption.

In this regard, ESMA was consulted and issued a set of Guidelines on the situations in which the offer or provision of crypto-asset services would be considered “reverse solicitation”. In these, ESMA includes guidelines on supervisory practices to avoid non-compliance with the provisions of the MiCA Regulation, in the Guideline 3, such as that third-country firms should be able to provide records tracking the relationship with the client and, in particular, whether the client has taken the initiative to receive crypto asset services with respect to a new product.

8.3 Final Report: Draft Technical Standards certain requirements of MiCA – first package

On 25 March, ESMA published the [first Final Report](#) under the Markets in Crypto-Assets Regulation (MiCA).

The report, which aims to foster clarity and predictability, promote fair competition between crypto-asset service providers (CASPs) and a safer environment for investors across the Union, includes proposals on:

- Information required for the authorisation of CASPs;
- The information required where financial entities notify their intent to provide crypto-asset services;
- Information required for the assessment of intended acquisition of a qualifying holding in a CASP; and
- How CASPs should address complaints.

ESMA has submitted the Final Report to the European Commission (EC) and will provide further advice and technical guidance in this area if requested by the EC.

9. AML

9.1 The Financial Action Task Force (FATF) updates the list of countries under increase monitoring in the prevention of money laundering and terrorist financing

On 23 February 2024, FATF published the [Jurisdictions under Increased Monitoring - 23 February 2024 \(fatf-gafi.org\)](#)

The following countries had their progress reviewed by the FATF since October 2023: 1) Bulgaria; 2) Burkina Faso; 3) Cameroon; 4) Democratic Republic of Congo; 5) Croatia; 6) Haiti; 7) Jamaica; 8) Kenya; 9) Mali; 10) Mozambique; 11) Namibia; 12) Nigeria; 13) Philippines; 14) Senegal; 15) South Africa; 16) South Sudan; 17) Syria; 18) Tanzania; 19) Türkiye; 20) Vietnam; 21) Yemen.

Jurisdictions no longer subject to increase monitoring by the FATF: 1) Barbados; 2) Gibraltar; 3) Uganda; 4) United Arab Emirates.

9.2 The EU Council updates the list of non-cooperative countries and territories for tax purposes

Click [here](#) for more information.

The list of non-cooperative countries and territories for tax purposes established by the Council of the European Union is regularly updated as a measure to prevent tax evasion. It is composed of countries which have failed to fulfil their commitments to comply with good tax governance criteria within a specific timeframe, and countries which have refused to do so. These should be considered as risk countries by obliged subjects on AML/TF. The latest update is dated 20 February 2024. The list becomes official upon publication in the Official Journal.

The countries and territories included in the list are the following: 1) American Samoa; 2) Anguilla; 3) Antigua and Barbuda; 4) Fiji; 5) Guam; 6) Palau; 7) Panama; 8) Russia; 9) Samoa; 10) Trinidad and Tobago; 11) US Virgin Islands; 12) Vanuatu.

9.3 EU Commission updates the list of high-risk third countries with strategic deficiencies in the prevention of ML/TF

Click [here](#) to see the Delegated Regulation.

The European Commission issued Delegated Regulation (EU) 2024/163, which amends Delegated Regulation (EU) 2016/1675 to remove from the list the Cayman Islands and Jordan due to progress in correcting its strategic deficiencies and significant progress in its anti-money laundering prevention systems. This list, considered as high-risk countries, applies from 7 February 2024: 1) Afghanistan; 2) Barbados; 3) Burkina Faso; 4) Cameroon; 5) Democratic Republic of the Congo; 6) Gibraltar; 7) Haiti; 8) Jamaica; 9) Mali; 10) Mozambique; 11) Myanmar/Burma; 12) Nigeria; 13) Panama; 14) Philippines; 15) Senegal; 16) South Africa; 17) South Sudan; 18) Syria; 19) Tanzania; 20) Trinidad and Tobago; 21) Uganda; 22) United Arab Emirates; 23) Vanuatu; 24) Vietnam; 25) Yemen.

10. Artificial Intelligence

Click [here](#) to see the Proposal for the Regulation.

Click [here](#) to know more information at [Simmons & Simmons](#) site.

On 13 March, The European Parliament adopted the world's first Artificial Intelligence Regulation with 523 votes in favour, 46 against and 49 abstentions. The regulation aims to safeguard fundamental rights, preserve democracy, the rule of law and promote environmental sustainability in the face of high-risk AI.

It prohibits certain uses for AI applications that may infringe citizens' rights, such as the collection of facial images, the use of biometric systems for classification by sensitive characteristics, used to manipulate behaviour or explore human vulnerabilities, or for citizen scoring systems, among others. However, limits to these prohibitions are also established, such as the public security exemption, with the use of biometric identification systems by security forces being possible under specific and clear circumstances.

The Regulation defines four levels of risk associated with IA systems, according to which will derive certain obligations for each. These are unacceptable risk, high risk, limited risk and minimal risk IA systems.

The European Commission will establish and manage a database to register high-risk IA systems. According to Article 71 of this Regulation, suppliers or their authorised representatives, as well as competent authorities or their designees, will be responsible for entering the relevant data into this database.

The Regulation is in the final stage of legal-linguistic revision, and its final adoption is expected to take place before the end of the current legislative session, bearing in mind that it must be formally adopted by the Council. It is expected to enter into force in stages, coming into force 20 days after its publication in the OJEU (Official Journal of the European Union) and will be fully applicable two years later, with some exceptions.

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