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Regulatory Flash: Q3 & Q4 2024

Simmons & Simmons

THE YEAR AHEAD 2025
HORIZON SCANNING.MP4

Contents

1. *Spanish Regulation*

1.1 Draft bill for the Transposition of NIS2

Click here to see the Press Note and here to see the draft

On 14 January 2025, the Spanish Council of Ministers has approved the draft bill on Cybersecurity Coordination and Governance, transposing the EU's NIS-2 Directive, albeit belatedly. This marks a significant advancement in consolidating and coordinating national cybersecurity policies. The draft bill aims to establish a strategic and institutional framework for better coordination among competent authorities and relevant cooperation bodies at both national and EU levels. It also seeks to ensure legal security in managing cybersecurity risks and reporting obligations. The urgency of this initiative is underscored by the expedited administrative process for the draft bill, aimed at facilitating its swift approval and subsequent parliamentary discussion. This move signals a commitment to strengthening Spain's cybersecurity infrastructure in response to evolving cyber threats and aligning with EU directives.

The draft bill mandates public and private entities, especially those in critical sectors such as energy, transport, banking (including banks and financial markets infrastructures), healthcare, and digital infrastructure, to assess risks individually and take actions to enhance their network and information system security levels. These entities are required to report significant incidents and communicate substantial cyber threats to their service recipients, detailing potential responses. A notable inclusion in the draft is the role of the information security officer, tasked with developing and overseeing cybersecurity strategies and policies, ensuring compliance with relevant regulations, and managing cybersecurity incidents.

It's important to note that financial entities covered under Regulation (EU) 2022/2554 (DORA), will not be subject to the provisions of this law related to cybersecurity risk management and notification obligations, nor to supervision and enforcement measures. This exemption, however, does not affect the financial sector's obligation to collaborate and exchange information with control authorities, complementing the provisions of the aforementioned Regulation.

1.2 Draft bill for the modernization and digitalization of the financial sector.

Click here to see the draft bill.

On 17 December 2024, a draft bill was approved aimed at modernizing and digitalizing the financial sector (the Draft Bill), together with a draft decree on the same topic and another one focusing on Distributed Ledger Technology (DLT) indicating a strong push towards embracing cutting-edge technologies. Amongst others, the Draft Bill contains the following matters:

- **Integration of MiCA Regulation and Anti-Money Laundering Directives**

The Draft Bill updates the sanctioning framework and amends existing laws in this area. Notably, it deals with the transition of the registry of virtual currency exchange and electronic wallet custodian services from operational to informational by 30 December 2024. Entities registered can continue their crypto-asset services until 30 December 2025, pending MiCA authorization. The CNMV will be the National Competent Authority instead of the Bank of Spain.

- **Revision of the Spanish Financial Sandbox:**

It revises the Spanish financial sandbox law, making it more accessible for project submissions throughout the year, simplifying procedures, and minimizing administrative burdens. This revision aims to expedite financial innovation by facilitating risk management and early-stage supervisory support.

- **Cyber Resilience:**

The Draft Bill incorporates the EU's DORA regulation requirements to bolster financial entities' defenses against cyber threats. This includes comprehensive governance plans, mandatory reporting of serious incidents, and stringent business continuity measures, alongside a specific sanctioning regime for non-compliance.

Please see in 3.1 our client briefing on implementation day of DORA

- **Transparency and Access to Information ESAP:**

It aligns with the EU Directive 2023/2864 and Regulation 2023/2859, mandating financial and non-financial information disclosure to a centralized "European Single Access Point" (ESAP). This move aims to enhance transparency and ease access to information for investors and stakeholders.

- **Modernization of Payment Services and Systems:**

It modernizes payment services and systems, facilitating direct participation of payment and electronic money entities in payment systems to boost competition and reinforcing the Bank of Spain's supervisory role to ensure greater security and operational resilience.

- **Royal Decree on DLT:**

The draft decree on DLT clarifies the legal regime for financial instruments represented through DLT and outlines the roles and requirements for entities responsible for registering these instruments (*Entidades Responsables de la Inscripción y Registro - ERIR*), marking a significant step towards regulatory clarity in the use of innovative technologies.

1.3 Law to Promote Gender Equality on Corporate Boards.

Click here to see the Law

On 2 August 2024, the BOE (Official State Gazette) published the Organic Law 2/2024, of 1 August, on Parity Representation and Balanced Presence of Women and Men,

marking a milestone in gender equality legislation. This law, aimed at transposing EU Directive 2022/2381 into national law, seeks to promote gender balance on the boards of private sector companies and advances regulation towards gender equality across various public bodies and institutions.

The law encompasses, among others, listed entities and entities of public interest, including a wide range of financial institutions and regulated and supervised companies by the Bank of Spain, the CNMV (National Securities Market Commission), and the DGSFP (Directorate-General for Insurance and Pension Funds). It amends, among others, the Capital Companies Act and the Securities Markets and Investment Services Act. A highlighted feature is the amendment to Article 529 of the Capital Companies Act, which mandates that the boards of listed companies include at least 40% members from the under-represented gender.

The Organic Law published entrusts the monitoring of gender balance evolution to:

- The CNMV and the Women's Institute for listed companies.
- The CNMV, the Women's Institute, and their counterparts in the autonomous communities for entities of public interest.
- The DGSFP for insurance entities considered of public interest.

The law establishes a staggered schedule for the implementation of the obligations, starting on 30 June 2026, for the 35 companies with the highest stock market capitalization value and from 30 June 2027, for the rest of the listed companies. As for public interest companies, the boards must reach 33% of the under-represented gender by 30 June 2026, and 40% by 30 June 2029.

1.4 Draft Order on Securities Lending Regulation.

Click here to see the Draft Order

On 8 January 2025, the Spanish Ministry of Economy, Trade, and Enterprise published a draft order on securities lending for Collective Investment Schemes (CIS) (the Draft Order). This initiative, aims to integrate this operation to enhance the competitiveness of Spanish CIS against their European counterparts, where such practices are already regulated. Despite previous attempts in 2008 and 2018, this is a renewed effort to finalize the regulation.

The Draft Order seeks to address the competitive disadvantages faced by Spanish CIS due to the lack of a regulatory framework for securities lending, a practice that allows for temporary transfer of securities in exchange for a fee and collateral. This move is expected to align Spanish investment practices with European standards, potentially improving settlement efficiency and reducing failed settlements due to delivery failures.

The Draft Order outlines various regulations covering, amongst others, the following key aspects:

- **Scope of application**: Restricted to financial CIS, explicitly excluding Hedge Funds (FIL), that are already permitted to do so. Pension Funds are not mentioned in this Order.

- **Securities eligible for lending**: Focuses on negotiable securities and money market instruments that are free of liens, with lenders retaining full ownership and disposal rights.
- **Borrowers of securities**: Limited to counterparties that meet specified requirements.
- **Exercise of rights inherent to the securities**: The lender will receive or be compensated for economic rights by default, while arrangements for the exercise of voting rights must be explicitly agreed upon.
- **Legal transactions**: It allows for the hiring of specialized agents for activities related to securities lending and permits the passing of associated costs to the CIS. Expenses from defaults and execution of guarantees can also be charged, provided these are in line with standard market practices.
- **Guarantees**: Requires full collateralization of the loan with margins determined based on market practices and includes a list of admissible assets that the CNMV can extend. Additionally, it permits the reinvestment of cash obtained as collateral under certain conditions.
- **Other obligations**: Establishes requirements for information provision, internal control, and additional obligations for depositaries.
- The CNMV is also given the authority to set special rules for the accounting and specific reporting requirements for CIS securities lending transactions.

2. *Spanish Supervising Authorities*

2.1 Procedure for reporting major ICT-related incidents to the CNMV and voluntary notification of significant cyber threats

On 17 January 2025 DORA entered into force. You can read next 3.1 to find out how our team of technology and financial services regulatory experts can help you

With the enforcement of DORA on 17 January 2025, financial entities in Spain are now subject to new reporting requirements for ICT-related incidents and cyber threats. The CNMV has introduced a system for collecting notifications through its Virtual Office, requiring a legal person certificate for submissions. Temporarily, the detailed procedure for reporting major ICT incidents and significant cyber threats can be found in this link.

Additionally, on 12 December 2024, the CNMV released an outcome report from a self-assessment exercise conducted by 245 entities. This exercise evaluated their preparedness for DORA, focusing on operational resilience aspects. The report, which can be found here, includes recommendations, regulatory highlights, and technical support materials for DORA implementation.

The Directorate-General for Insurance and Pension Funds (DGSFP) has also outlined specific DORA-related procedures for entities under its supervision that can be found here. These include the notification of serious cyber incidents or significant threats, as well as annual communication regarding ICT service providers and agreements. Details

and procedures are accessible through the DGSFP's Electronic Office, with further instructions and deadlines to be announced in the first quarter of 2025.

2.2 CNMV Repeals Crypto Asset Advertising Circular due to MICA

On 27 December 2024, CNMV repealed the Circular 1/2022 concerning advertising of crypto assets as investment objects through the publication of a new Circular (1/2024). The initial Circular 1/2022 had established a regulatory framework for the advertising of crypto assets as investments, addressing investor protection challenges amidst the growing presence of crypto assets in the financial system and the lack of a European regulatory framework for these assets.

However, the introduction of Regulation (EU) 2023/1114, MICA, which regulates the issuance and services related to crypto assets, has rendered the national regulation unnecessary. MICA establishes uniform rules aimed at promoting transparency, protecting investors, facilitating innovation and competition, and includes specific regulations concerning the advertising of crypto assets.

The implementation of MICA, providing a uniform set of rules for crypto assets at the European level, eliminates the need for national regulations on the advertising of these assets, such as those established in Circular 1/2022. This move by the CNMV aligns with the broader European regulatory landscape, ensuring that investor protection measures and transparency standards are uniformly applied across member states.

The main outcome of this repeal is that the prior notification to the CNMV for campaigns considered as massive disappears. In any case, the Draft Bill for the digitalization and modernization of the financial sector, mentioned in 1.2 above, maintains the possibility for the CNMV to require authorization or some form of administrative control over the advertising of crypto assets.

2.3 Transitional Period for Crypto-Asset Services in Spain

Press here to access the communication issued by the CNMV

On 19 December 2024, CNMV issued a comprehensive update regarding the implementation of MiCA, highlighting a transitional period for crypto-asset service providers and new notification obligations.

- Transitional Period for Crypto-Asset Services in Spain

Spain opted to shorten the transitional period to 12 months, concluding on 30 December 2025. This decision, formally communicated to the European Securities and Markets Authority (ESMA), aligns with Spain's commitment to a regulated and secure crypto-asset market.

The Bank of Spain’s registry for entities providing virtual currency exchange and electronic wallet custody services, according to Law 10/2010 on the prevention of money laundering and terrorist financing has ceased on 30 December 2024 but will remain for verification purposes of entities registered before this date.

During the transitional period, the following key points should be noted in Spain:

- Entities actively providing crypto-asset services before MiCA's implementation, in compliance with national law, are eligible for the transitional period.
- Both individuals and legal entities registered with the Bank of Spain before December 2024 may continue their services without new authorization until 30 December 2025, or until a decision on their MiCA registration is made, whichever comes first.
- Entities not registered for these specific services by the deadline but providing crypto-asset services that did not require such registry with the Bank of Spain, and acting according to existing legislation, can also continue without new authorization until the specified date or until a decision on their MiCA registration is made.
- Entities initiating MiCA services post 30 December 2024, without meeting transitional criteria, may face penalties and be included in the CNMV's list of unauthorized entities, also known as the "blacklist."
- MiCA service providers currently on the CNMV's "grey list" but registered with the Bank of Spain will be removed from this list. Others on the grey list can be removed once they receive MiCA authorization in any member state.

- Notification Obligations Under MiCA

Title II of the MiCA Regulation, effective from 23 December 2025, introduces notification and information communication obligations for issuers of crypto-assets, excluding asset-referenced tokens and e-money tokens. Issuers must notify the CNMV of their white papers in a standardized format, including a machine-readable version, and provide additional information as required. This regulation aims to ensure transparency and protect investors in the evolving crypto-asset market.

During the transitional period, issuers are required to submit their documentation, including the white paper and any advertising communications, digitally signed by an authorized person, to the CNMV at least 20 business days before publication. These submissions should be made through the CNMV's website CIFRADOC (Sede Electrónica: sede.cnmv.gob.es), ensuring compliance with the new regulatory framework.

For further inquiries or compliance assistance, entities can contact consultastituloIImica@cnmv.es, providing detailed information to facilitate an efficient response.

2.4 CNMV and ICAC publish a statement awaiting the transposition of the CSRD Directive into Spanish law.

The link to the summary can be found here and the link to the whole statement here.

From 2025 onwards, sustainability reporting in the European Union will be performed in accordance with the Corporate Sustainability Reporting Directive 2022/2464 of 14 December (CSRD) and the European Sustainability Reporting Standards (ESRS) and the respective national implementing legislation.

This is a very relevant milestone in the field of sustainability reporting, as for the first time in the financial year 2024 European issuers with more than 500 employees will apply common standards, with a much more demanding content than the previous regulatory framework, consisting of the law 11/2018 of 28 December on the Non-Financial Reporting Statement, and will provide much more comparable information.

To the extent that the transposition into Spanish law of the Directive may not be completed by 31 December 2024, the CNMV will consider ESRS-compliant sustainability reports to be admissible, which will also be considered compliant with Law 11/2018, subject to observance of the considerations (regarding tax information, the transitional regime and certain labour disclosures) set out in the statement.

The CNMV in fact recommends that Spanish issuers that are in a position to do so reliably publish ESRS-compliant non-financial information as early as 2025, subject to taking into account the considerations already mentioned. The joint statement recommends that verifiers take into account the latest national and international developments, namely the text of the unapproved Instituto de Contabilidad y Auditoria de Cuentas (ICAC) verification technical standard, the guidelines issued by COESA and ISSA 5000, subject to their approval prior to the issuance of the verification report.

Draft Law on the Corporate Sustainability Reporting has been approved by Spanish Congress of Deputies and it will follow the relevant legislative process.

You can see the link to the Draft Law here.

2.5 CNMV publishes the Technical Guide 1/2024 on Audit Committees of Public Interest Entities.

The link to the Guideline 1/2024 can be found here.

The Spanish National Securities Market Commission (CNMV) has released Technical Guide 1/2024, focusing on the audit committees of public interest entities, broadly defined to include entities ranging from financial and insurance institutions to large corporations. This guide builds on accumulated experience and ongoing dialogue with the sector, offering a set of recommendations and best practices that extend beyond legal obligations, aimed at enhancing the quality and effectiveness of audit committees.

The guide emphasizes the significance of independence and specialized composition for these committees, suggesting they be made up of external directors with adequate knowledge in accounting, auditing, and both financial and non-financial risks. It also addresses the supervision of financial and non-financial information, including sustainability, detailing criteria for effective interaction with external auditors and sustainability verifiers to ensure their independence and the quality of their work.

Special attention is given to transactions with related parties, urging committees to establish control and transparency mechanisms for their approval and monitoring. The guide also recommends periodic evaluation of the audit committee's performance, as well as open and detailed communication about its activities and findings to other corporate bodies and shareholders.

This guide represents a step forward in strengthening corporate governance and transparency in entities of significant market relevance, contributing to investor confidence and the public interest.

2.6 CNMV updates its Questions and Answers on Collective Investment Schemes.

In its latest update of 15 January 2025 , see here, CNMV updated the Spanish National Securities Market Commission (CNMV) has provided clarifications on several key aspects concerning Collective Investment Schemes (CIS).

- **Investment in Securitization Funds**: Investments in Securitization Funds under Law 5/2015 that do not comply with Delegated Regulation 2017/2402 are not suitable for UCITS and AIFs. These limitations are also applicable to Hedge Funds and Private Funds.
- **Selection and Appointment of the Custodian**: The SGIIC must have a decision-making process for selecting and appointing the custodian, focusing solely on the interests of the UCITS and its investors. It is recommended to evaluate at least two candidates based on objective criteria, including all costs borne by the CIS and the quality of service provided by the custodian.
- **Obligations Regarding the Custodian Contract**: Upon the expiration of the contract between the SGIIC and the custodian, the SGIIC must comply with its legal obligations for appointing a custodian of CIS, ensuring the process is based on predefined objective criteria.

The previous update, Link, on 9 September 2024:

- **Custody and Administration Fees**: According to Article 5.14 of Law 35/2003, custody and administration fees can only be charged in cases where participant registration in the CIS or the marketer is done through global accounts. It's clarified that fund managers can charge these fees when acting as marketers for third-party funds, not for their own.
- **Minimum Investment Requirements**: Article 73, section 7, of Regulation 1082/2012 mandates a minimum investment of either €100,000 or €10,000 if additional criteria are met. This requirement is intended as a barrier to ensure only investors willing to maintain such minimum investments access these products. The investment must be maintained at the acquisition price to comply with the regulation.
- **Verification of Financial Requirements**: The financial status of the investor and the investment's percentage of their total wealth, as outlined in section 7, letter b, of Article 73, need only be verified at the time of initial or subsequent subscriptions, not continuously.
- **Minimum Investment Computation**: The minimum investment requirement must be met by each participant/shareholder individually. For joint accounts, co-holders are considered as a single participant/shareholder, including those under the matrimonial economic regime of community property.

These clarifications aim to provide transparency and ensure investor protection in the management and marketing of CIS.

3. *EU Initiatives: Simmons & Simmons Insight Publications*

3.1 DORA: Implementing day is here

The EU Digital Operational Resilience Act (DORA) becomes fully applicable. DORA: Implementation day is here | Simmons & Simmons

This date marks another significant milestone, after DORA entering into force two years ago. The Act requires financial entities, in the broadest sense, as well as certain IT service providers, to become DORA compliant. Find out here how our team of technology and financial services regulatory experts can help you.

3.2 Funds View- January 2025

See below some EU regulatory developments for private fund sponsors.

3.2.1 AIFMD 2.0: ESMA consults on technical standards for loan originating AIFs

ESMA has published a consultation paper on regulatory technical standards for loan originating AIFs. As a reminder, AIFMD was updated in 2024 and as part of the amended regulation (referred to as AIFMD 2.0), a loan-originating regime for AIFs was introduced.

Under this new regime, a loan-originating AIF must be closed-ended except where the AIFM can demonstrate to its home national competent authority that the AIF's liquidity risk management system "is compatible with its investment strategy and redemption policy". The consultation paper published by ESMA on 12 December 2024 sets out the draft regulatory technical standards (RTS) with which the loan-originating AIFs must comply to maintain an open structure.

The requirements must include, per ESMA's mandate:

- a sound liquidity management system;
- the availability of liquid assets and stress testing; and
- an appropriate redemption policy having regard to the liquidity profile of loan-originating AIFs.

The requirements must also take into account:

- a loan-originating AIF's underlying loan exposures;
- the average repayment time of the loans; and
- the overall granularity and composition of the AIF's portfolio.

The consultation closes on 12 March 2025 and ESMA intends to finalise the draft RTS by Q3 or Q4 2025. For more information, see our update here.

3.2.2. Key Updates and Compliance Priorities for the Digital Operational Resilience Act (DORA) Implementation

The Digital Operational Resilience Act (DORA) took effect on 17 January 2025. The standards and information relating to compliance with the regulation are still being adopted. Among the most recent publications, the following may be of note:

- The implementing regulation which sets out the implementing technical standards (ITS) with regard to standard templates for information communication technologies (ICT) registers. This was published on 2 December 2024. The final ITS notably clarifies that financial entities can choose between using a valid and active European unique identifier (EUID) or legal entity identifier (LEI) to identify their ICT service provider. This follows the rejection of the draft ITS by the European Commission in September 2024 due to the fact that it only allowed for LEIs to be used.
- On 4 December 2024, the Joint Committee of the European Supervisory Authorities (ESAs) published a statement urging financial entities and third-party providers to accelerate their preparatory efforts to ensure their compliance and reminding firms that there will not be a transitional period following the implementation. ESAs confirm that competent authorities as the latter will have to report them to the ESAs by 30 April 2025.

Based on these two recent publications, firms will need to focus on the following priorities:

- Prepare for the new reporting obligations particularly by having registers of third-party providers' contractual arrangements available for competent authorities early in 2025. Insights from the 2024 ESAs dry-run and the ITS on the Register of Information should be used.
- Be prepared to identify and report major ICT incidents starting from 17 January 2025. Financial entities are invited to ensure that they comply with local process with that respect (if any).
- In addition, financial entities which do not have an LEI code yet are strongly encouraged to proceed with the procurement and activation of an LEI code as this identifier is required for reporting purposes.

Competent authorities will oversee compliance with DORA through a risk-based approach, considering each financial entity's risk profile, size, scale and complexity.

3.2.3. ESMA publishes new Q&As on Fund Name Guidelines

On 13 December 2024, ESMA published a set of Q&As on aspects of the practical application of its Guidelines on using ESG or sustainability-related terms in fund names.

The Q&As apply to both UCITS and AIFs and focus on the following three topics:

- **Green bonds**: According to the Guidelines, funds that have sustainability terms in their names should exclude investment in certain types of companies. The new Q&As confirms that these exclusions do not apply to European Green Bonds. For other green bonds (i.e. non-EU green bonds), fund managers can apply a look-through approach to assess whether the activities financed by the bond would fall within the exclusions.
- **Definition of controversial weapons**: For the purposes of the aforementioned exclusions, controversial weapons as defined in Article 12 of Delegated Regulation (EU) 2020/1818 should be excluded. The Q&A further clarifies that, in the absence of any other clarification in that Delegated Regulation, national competent authorities may refer to the list of controversial weapons provided in indicator 14 of Table 1 of Annex I of Commission Delegated Regulation (EU) 2022/1288, namely "anti-personnel mines, cluster munitions, chemical weapons and biological weapons".
- **Clarification on interpretation of "meaningfully investing in sustainable investments"**: Funds using sustainability terms should invest 'meaningfully in sustainable investments. The Q&A establishes a common understanding among national competent authorities that a fund cannot be said to be "meaningfully investing in sustainable investments" where it invests less than 50% of its assets in sustainable investments, as defined in SFDR.

3.2.4 EU Platform on Sustainable Finance calls for changes to SFDR

The EU's Platform on Sustainable Finance has published a report on "Categorisation of Products under the SFDR". This will likely significantly shape the European Commission's (EC) position in its review of the SFDR and how it should be amended. The report makes the following proposals / recommendations:

- Replacing the requirements under Article 6, Article 8 and Article 9 (which the EC is concerned are being used as a labelling and marketing tool) with a categorisation scheme based on a financial product's sustainability strategy. The Platform recommends categorising products based on the following sustainability strategies:
  - **Sustainable**: Contributions through Taxonomy-aligned Investments or Sustainable Investments with no significant harmful activities, or assets based on a more concise definition consistent with the EU Taxonomy.
  - **Transition**: Investments or portfolios supporting the transition to net zero and a sustainable economy, avoiding carbon lock-ins, in line with the EC's recommendations on facilitating finance for the transition to a sustainable economy.
  - **ESG collection**: Excluding significantly harmful investments/activities, investing in assets with better environmental and/or social criteria or applying various sustainability features.

All other products should be identified as **unclassified products**. Financial market participants (FMPs) should still consider sustainability risks for these products. Should an FMP (e.g., on request of an institutional investor) commit to ESG characteristics or sustainable or transition features, this would need to be reflected in the product's legal documentation. However, to clearly distinguish unclassified products from those falling within one of the above-mentioned categories, the Platform recommends prohibiting unclassified products to include description of ESG characteristics or sustainable or transition features in their marketing materials. Further, a disclaimer should state that (i) the product is unclassified, (ii) it does not fulfil the standards required for a categorised product and (iii) any ESG characteristics or sustainable or transition features must only be described in the legal documentation. Unclassified products will be required to make minimum disclosures related to Taxonomy alignment and a limited set of PAIs (GHG emissions (1), carbon footprint (2) and UNGPs (11)) but will not be required to fulfil minimum criteria as regards sustainability features.

- **Disclosure and reporting obligations**: Sustainable, Transition and ESG collection products will have to make mandatory pre-contractual disclosures setting out a description of all mandatory/selected commitments as well as indicators used to measure such commitments. To confirm, this requirement will not apply to unclassified products. Mandatory periodic reporting applicable to Sustainable, Transition, and ESG collection will comprise the performance of mandatory/selected indicators (including mandatory PAIs which apply depending on whether the product has environmental and/or social features) and Taxonomy alignment.

The Platform recommends strengthening the concept of both the definition of 'sustainable investment' (SI) as well as the 'do no significant harm'(DNSH) test and aligning it with the Taxonomy concept. The Platform recommends that anything that is already captured by the EU Taxonomy (i.e. Taxonomy-eligible investments) cannot be considered SI unless it meets the technical screening criteria of the Taxonomy so that only for those activities not yet included should FMPs be allowed to categorise as SI based on substantial contribution to the Taxonomy objectives and DNSH.

For more information, see our update here.

3.2.5 New Commission FAQs on EU Taxonomy

On 29 November 2024, the European Commission published a draft Commission Notice which contains FAQs to provide technical clarifications on the application of the EU Taxonomy.

In particular the FAQs provides additional clarification on the following areas:

- the technical screening criteria for new activities included in the Taxonomy Climate and Environmental Delegated Acts,
- the generic 'do no significant harm' (DNSH) criteria;
- and the related reporting obligations.

The FAQs also include a table setting out the timeframe for reporting under the Environmental Delegated Act and the activities added to the Climate Delegated Act.

Specific points addressed in the FAQs include clarification and/or confirmation that:

- exemptions available in regulations referred to in the technical screening criteria (TSC) will only be available if the TSC are worded in a way that allows the use of exemptions;
- NACE codes are indicative for all sectors apart from the services sector where the codes are included in the description of the activity;
- ESRS disclosures (European Standards for Sustainability Reporting which will be used for reporting under the CSRD) are not sufficient to demonstrate compliance with DNSH;
- entities must assess and report the alignment of activities eligible for more than one environmental objective, with financial undertakings having a specific method for calculating KPIs per objective; and
- where a business combination occurs close to the year-end, entities should use all available information for Taxonomy alignment assessment, including pre-acquisition due diligence, and report based on the post-acquisition assessment.

Please see our update here for more information.

3.2.6 EU publishes ESG Ratings Regulation

The EU's ESG Ratings Regulation was published in the Official Journal on 12 December 2024 and will apply from 2 July 2026.

Although the Regulation mainly applies to ESG rating providers, certain transparency requirements may apply to investment products regulated under UCITS and AIFMD.

Under the Regulation, ESG ratings issued by ESG rating providers which are operating in the EU, will need to obtain authorisation from ESMA (or have a permitted status for a non-EU firm) and comply with the governance and conduct rules.

In addition to the requirements applicable to ESG rating providers, the Regulation also introduces mandatory transparency requirements which will apply to, for instance, investment firms and asset managers that provide ESG ratings as part of other products or services. This includes ESG ratings information relating to investment products regulated under UCITS and AIFMD as well as mandatory SFDR disclosures. These firms will need to publish prescribed disclosures on their websites. ESMA is mandated to develop regulatory technical standards (RTS), which specify further detail on the presentation of these disclosures.

As an initial step, it is important for firms to perform a scoping exercise to determine whether and how the Regulation applies to them.

Our Client Briefing, which is available here, aims to assist you in performing this scoping exercise by explaining core concepts, including application provisions and exemptions. The briefing also provides an overview of the transparency disclosures that may be required.

3.3 RIS – Gold, Frankenstein and Myrrh

We invite you to read the latest edition of EU Retail Investment Strategy View December 2024 issued by Simmons & Simmons.

RIS is climbing the regulatory agenda and making headlines. The debate has intensified, with RIS even labelled as a "Frankenstein" regulation at a EU conference, reflecting widespread concern about its direction.

Current Status: The Commission, Parliament, and Council have outlined their RIS positions. Trilogues are next, aiming to finalize the texts amending major financial directives. For detailed RIS proposals, visit our RIS Hub.

Expected Timing: Trilogues are anticipated to start in Q1 2025, with a final text possibly agreed by Q2 2025. Based on the most ambitious timelines, firms may need to be ready to comply with RIS changes by Q3 2026. The timeline could shift, especially under Poland's upcoming Council Presidency.

Mixed Sentiments: There's a strong call for RIS simplification from EU bodies, the industry, and national regulators, amid concerns over complexity and implementation challenges.

Key Voices:

- The Commission criticizes the dilution of its proposals, with the new Financial Services Commissioner stepping back from the inducements ban.
- ESMA and EIOPA call for simplification, highlighting the heavy burden of the proposals.
- Industry and national regulators echo the need for simplification, pointing out areas like enhanced reporting that require technological upgrades.

However, none of the above parties are directly involved in the legislative process - that falls to Parliament and Council.

Parliament and Council's Stance:

- Parliament seeks simplification, with MEP Yon-Courtin highlighting the importance of industry input and the need for a functional EU financial market. You can watch here the interview we had with Parliament's MEP Yon-Courtin at our Simmons' Global Outlook Event.
- The Council faces political tensions, and its focus under Poland's presidency remains uncertain.

Outlook: The push for simplification is clear, but the path forward varies. The final RIS text will likely reflect a compromise, with ongoing debates about inducements and benchmarks. The timing and focus of the Polish Council Presidency could significantly influence RIS's progress.

For a comprehensive discussion on RIS, including its impact on the industry and EU jurisdictions, check our webinar and the RIS Hub for resources.

3.4 ESG – ESG View

We invite you to read the December edition of ESG view issued by Simmons & Simmons which brings a festive edition – comprising twelve updates mirroring the theme of the Twelve Days of Christmas. This includes round-ups from COP29 and global carbon market developments. You'll also find key regulatory news from Europe and Asia, as well as a sprinkling of key global disputes.

On December, the wheels of the EU omnibus went round and round, with EU Commission President Ursula von der Leyen lighting a regulatory fuse by suggesting a single 'omnibus' package for three flagship sustainability regulations: the Corporate Sustainability Reporting Directive (CSRD), the Corporate Sustainability Due Diligence Directive (CSDDD), and the EU Taxonomy. Whilst there is universal support for tackling regulatory fatigue, the market is also bracing for impact given there is yet little clarity on how the omnibus proposal will leverage the time and resource already committed by business to comply with existing frameworks. It is expected to be discussed further in late February, with a legislative proposal expected to be tabled in the first quarter of 2025

3.5 MICA – Crypto View- MiCA implementation

On 17 January, ESMA published a Public Statement on the provision of crypto-asset services in relation to non-MiCA compliant ARTs and EMTs. This followed a question posed under ESMA's ongoing Q&A on MiCA which was responded to by the European Commission (EC). ESMA's statement seeks to restrict firms from listing and carrying out exchange services in relation to stablecoins that are not issued by EU-authorised credit institutions or EMIs. While MiCA is clear that it is not possible to issue, offer to the public or seek admission to trading for such stablecoins without being appropriately authorised, it has been argued that listing an asset on a trading platform, or carrying out reception and transmission of orders or exchange services in relation to such assets would not amount to issuing (clearly), offering to the public, or seeking admission to trading.

Please read the Crypto View - January 2025 | Simmons & Simmons that analyses this Public Statement.

Click here to see the December edition of Simmons & Simmons Crypto View

MiCA has been fully in effect since 30 December 2024, yet the complete set of secondary legislation initially promised remains outstanding. In a helpful move, ESMA recently published a list of grandfathering periods decided by Member States under Article 143 of MiCA. This publication provides firms with clarity on the duration they can continue operations before the necessity of obtaining a licence arises. The variation in these periods across different Member States, along with some countries still marked as "TBA," is noteworthy. Firms operating cross-border within the EU are advised to review the implications for service provision and marketing, as regulations may differ from the pre-MiCA environment. For further discussion or inquiries on this matter, firms are encouraged to make contact.

Additionally, in a related development, a podcast was recorded by colleagues, to address the more challenging aspects of MiCA that appear to remain unresolved. This discussion aims to shed light on areas of uncertainty and provide insights into navigating the new regulatory landscape.

The following has been published recently:

- **Final Report: Guidelines for reverse solicitation**

Following the Draft Guidelines, it was observed by many, including our firm, that the reverse solicitation regime proposed under MiCA appeared significantly stricter than the regime under MiFID II. ESMA has since confirmed that these guidelines are tailored specifically for MiCA, and that the reverse solicitation provisions under MiFID should be considered independently. Additionally, ESMA has reiterated concerns regarding non-EU execution venues used by EU-authorised brokers for liquidity. Such venues may violate MiCA regulations if they offer crypto-asset services within the Union without qualifying for the exemption provided under Article 61 of MiCA, a point ESMA emphasized in its Opinion published in July. This is a critical consideration for firms engaged in these activities.

In refining the scope of solicitation from the draft guidelines, ESMA addressed initial concerns that passive marketing might be interpreted as solicitation. The Final Guidelines clarify that while "any solicitation, promotion, or advertising in the Union should be captured," the intent is not to encompass solicitations, promotions, or advertisements not aimed at EU-located or established clients. To aid understanding, the Final Guidelines include an annex with examples where third-country firms might be viewed as soliciting clients, offering practical insights.

Overall, the reverse solicitation exemption under MiCA seems to be intended for narrow interpretation. The practical implications of this approach will become clearer as firms adjust to these guidelines.

- **Final Report: Guidelines specifying certain requirements on Investor Protection**

ESMA has indicated that its approach to investor protection under MiCA will closely align with its existing practices under MiFID. A notable point of discussion emerged from the draft guidelines in the Consultation Paper (CP), where it was initially suggested that no crypto-assets could be considered safe. This perspective garnered significant commentary and objections, leading ESMA to revise the final guidance. In the amended guidance, the earlier statement has been removed, acknowledging that Asset-Referenced Tokens (ARTs) and E-Money Tokens (EMTs) are generally expected to be safer compared to other forms of crypto-assets. This adjustment reflects a nuanced understanding of the varying risk profiles associated with different types of crypto-assets.

- **Final Report: Draft Technical Standards on the Detection and Prevention of Market Abuse**

There are no significant changes to the draft technical standards originally published.

- **Final Report: Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments**

It is important to understand that MiCA explicitly excludes crypto-assets that are classified as financial instruments, which instead fall under the purview of MiFID. The Guidelines issued provide a foundational framework to determine whether a particular crypto-asset is governed by MiCA or MiFID regulations. ESMA has recognized the need for enhanced clarity in this area and has committed to providing more detailed examples to facilitate the application of these guidelines. This move towards greater specificity is welcomed, as it helps to demystify the regulatory landscape surrounding crypto-assets. However, it should be noted that despite these clarifications, a certain degree of ambiguity remains, maintaining a balance between regulatory precision and the flexibility needed to accommodate the evolving nature of crypto-assets.

3.6 AI View –fortnightly round-up of Key AI legislative, regulatory, and policy updates from around the world

In the following link you can find fortnightly editions of key AI materials. It is worth highlighting the following:

- **EU AI Act: a Guide for Prohibitions and AI Literacy**: We would like to remind you that It is now less than 2 weeks to go until the provisions prohibiting certain AI practices (Article 5) and requiring AI literacy (Article 4) apply to organisations.

We are advising extensively on both of these aspects, including interpretation and application of the prohibitions (which are not straightforward to apply and guidance is not yet available) and implementation of AI literacy measures (for which we have launched a dedicated 3-tiered AI Literacy Programme to ensure compliance with the Act; see here for further details).

- EDPB publishes opinion on using personal data in AI model development and deployment

On 17 December 2024, the European Data Protection Board (EDPB) issued Opinion 28/2024 (Opinion) providing guidance on the processing of personal data in relation to AI models, emphasising the role of General Data Protection Regulation (GDPR) in protecting data protection rights and promoting responsible innovation. The Opinion covers the following topics:

- Anonymity of AI Models
- Legitimate interest as a legal basis
- Consequences of unlawful data processing

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