

Regulatory Flash: Q2 2023

Simmons & Simmons Spain

JULY 2023



Contents

1. Spanish Regulations

1.1 Law 11/2023, on accessibility to certain products and services

1.2 Draft Law for the transposition of CSRD

2. Spanish Supervisory Authorities

2.1 CNMV Communication regarding the Activity of the Agents

2.2 The CNMV approves the Technical Guideline for funds with specific return target and fixed income funds with a Buy and Hold Strategy

2.3 CNMV publishes its first review regarding the implementation of SFDR

2.4 CNMV adopts ESMA Guidelines on Remuneration

2.5 CNMV adopts ESMA Guidelines on Suitability

3. EU

3.1 Retail Investment Strategy (RIS)

3.2 MICA

3.3 PRIIPs – Commission publishes proposed changes to the KID rules

4. European Supervisory Authorities

4.1 ESAs publish consolidated Q&As on SFDR and PRIIPs KID

4.2 ESMA updates its Q&As on the application of AIFMD and UCITS

4.3 ESMA highlights the risks arising from the provision of unregulated products and/or services by investment firms

5. ESG

6 FATF: Jurisdictions under increased monitoring

Regulatory Flash – Q2 2023

Spain – Q2 2023 – Regulatory update

1. Spanish Regulations

1.1 Law 11/2023, on accessibility to certain products and services

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

Law 11/2023, of 8 May, on the transposition of six EU Directives and specifically Directive 2019/228, on accessibility requirements for products and services (the “Accessibility Law”). The Accessibility Law completes the regulation initiated by Royal Decree 193/2023, of 21 March, on accessibility for people with disabilities to the use of goods and services available to the public.

With this Accessibility Law, it is established and specified the accessibility requirements that must be met by the products and services included in its scope of application. It is worth highlighting that, with regards to products it applies, among others, to consumer banking and e-commerce services, including:

- Consumer credit and real estate credit contracts;
- Investment services (RTO, execution of orders on behalf of clients, discretionary portfolio management and advisory services) and ancillary services (custody, granting of credit for transactions in financial instruments, foreign exchange, analysis);
- Payment services, in accordance with Royal Decree-Law 19/2018;
- Services linked to the payment account;
- E-money services.

In order to design the product in a way that can be used by persons with disabilities, there are certain requirements that must be met. Among others, it is necessary to ensure that information is understandable, without exceeding a level of complexity higher than level B2 (upper intermediate) of the Common European Framework of Reference for Languages.

The effective date of the Accessibility Law for a new product or service would be 28 June 2025. For services using existing products and for services whose contracts were in force before 28 June 2025, the Accessibility Law will apply from 29 June 2030.

1.2. Draft Law for the transposition of CSRD

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

As outlined in our [previous newsletter](#), the Ministry of Economic Affairs and Digital Transformation has now submitted for a public hearing the Preliminary Draft Bill regulating the corporate reporting framework on environmental, social and governance issues in order to transpose Directive (EU) 2022/2464 Corporate Sustainability Reporting Directive, also known as CSRD.

The CSRD, which replaces Directive 2014/95/EU on disclosure of non-financial and diversity information, regulates the content of the sustainability report in an exhaustive manner, and, as opposed to the previous one, it requires the application of European sustainability standards in the preparation of the information. It also extends the scope of application to include more entities, including branches of third countries parent companies, and imposes a limited verification of the information on sustainability, with a view to evolving towards a reasonable verification of the information.

The Preliminary Draft points out that the information required by CSRD corresponds almost entirely to what is already provided for in the Report of Non-Financial Information regulated in Law 11/2018, of December 28. However, it contains the mandatory application of the dual materiality approach as a new feature, which implies the presentation of information regarding the impact generated by the company on sustainability issues, as well as information on how these issues affect the company's evolution, results and situation. The information shall cover the company's entire value chain, shall be both prospective and retrospective, and shall consider short-, medium- and long-term time horizons.

2. Spanish Supervising Authorities

2.1 CNMV Communication regarding the Activity of the Agents

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

On 19 April the CNMV issued a note highlighting some aspects of concern regarding the performance of financial agents (Agents) linked to investment firms. Specifically, CNMV highlighted the following aspects:

- **Remuneration systems for Agents:** Since Agents' remuneration is generally 100% variable, entities must adequately manage the obvious conflicts of interest that arise from this situation in order to ensure that they act in an honest, impartial and professional manner, in accordance with the best interests of clients. Qualitative criteria should be taken into account when determining the remuneration of the Agents, and not only quantitative criteria.
- **Training requirements:** Since some Agents must be adequately formed since some of them not only market products but also give information and advice on products and financial services.
- **Provision of investment advice:** Agents must provide the investment advice service in accordance with the indications issued by the entity of whose behalf is acting.
- **Control procedures:** Entities shall establish adequate and sufficiently thorough control procedures over the agency network.
- **Figure of the prescriber or customer presenter:** Entities are reminded that the activity of marketing investment services and attracting clients is a reserved activity, which may only be carried out by firms authorized to provide investment services or their agents (who may be mere investment agents).

2.2 The CNMV approves the Technical Guideline for funds with specific return target and fixed income funds with a Buy and Hold Strategy.

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

On 26 April 2023, the CNMV approved the Technical Guideline 1/2023 which will amend and restate the previous Guideline 1/2017 with the aim of reinforcing that Guideline with regards to the investor informed consent, as well as extending the obligation to include certain warnings on term risk and on liquidity for funds with specific return target and fixed income funds with a Buy and Hold Strategy.

The 2023 Guideline applies to entities that market in Spain foreign Collective Investment Schemes (CIS) which are equivalent to those Spanish CIS specified in the Guideline.

2.3 CNMV publishes its first review regarding the implementation of SFDR

The document can be found [here](#).

On 4 May 2023, CNMV published the results of its review of the first phase of CIS implementation of sustainability regulations and, more specifically, of SFDR – Regulation 2019/2088 on the sustainability-related disclosures in the financial services sector- (prior to the application of SFDR RTS).

The review focused on compliance with the SFDR of the Funds subject to articles 8 and 9 of the SFDR. To this end, the CNMV's supervisory exercise has focused on reviewing (i) the content of the websites of the SGIIC of article 8 and article 9 Funds; (ii) the content of the management report referring to the 2021 financial year (published in April 2022); and (iii) the consistency of the portfolios of the Funds analyzed with the information published in the prospectus and on the website.

With regards to article 8 Funds, CNMV concludes that a greater level of precision, clarity and specificity of the ESG characteristics that the fund will promote is desirable on the part of the fund managers.

With regards to article 9 Funds, the CNMV considers that a greater level of specificity would be desirable to identify the Sustainable Development Goals (GDS) and the most relevant GDS targets to be impacted.

As per the transparency of the website, the CNMV reminds the entities that they must publish separately all the sections of the website included in the Delegated Regulation, including any possible duplications with the Annex to the prospectus.

The CNMV plans to participate in the design and implementation of the ESMA Joint Supervisory Action on sustainability in UCITS and AIFs, as included in its Activity Plan for 2023. Specifically, it will analyze compliance with the SFDR RTS and the modifications to the UCITS and AIFMD regulatory framework, in relation to the integration of sustainability risks.

2.4 CNMV adopts ESMA Guidelines on Remuneration

The document can be found [here](#) and the ESMA's Guidelines in English can be found [here](#).

On 2 June 2023, CNMV has notified ESMA that it complies with the Guidelines on certain aspects of the MIFID II remuneration requirements and that it will take them into account when carrying out its supervisory service.

The aim of these Guidelines, is to update the previous Remuneration Guidelines published in 2013 under MiFID I in order to clarify and detail some aspects on the implementation of the new provisions established by MiFID II and the Delegated Regulation 2017/565.

In a nutshell, they refer to the design of the policies and remuneration practices, the governance and controlling risks related to compensation policies and practices.

The translations into the different EU language were published on 3 April and they will be applicable six months after such publication.

2.5 CNMV adopts ESMA Guidelines on Suitability

The document can be found [here](#) and the ESMA's Guidelines in English can be found [here](#).

On 2 June 2023, CNMV has notified ESMA that it complies with the Guidelines on certain aspects of the MiFID II suitability requirements and that it will take them into account when carrying out its supervisory service.

The purpose of these Guidelines is primarily to ensure a common, uniform and consistent implementation of MiFID II suitability requirements in relation to the new sustainability-related requirements. The following shall be taken into account:

- All aspects mentioned in the definition of sustainability preferences, contained in article 2.7 of the Delegated Regulation 2017/565 must be taken into account.
- It is necessary to ask the client about their preferences in a sufficiently granular way.
- The assessment of suitability in relation to these preferences should be made after assessing all other factors and after identifying a range of initially suitable products.
- Entities cannot recommend products that do not meet the customer's sustainability preferences, and
- Staff must have the necessary knowledge and skills to explain these aspects to customers "avoiding technical language".

The translations into the different EU language were published on 3 April and they will be applicable six months after such publication.

3. EU

3.1 RETAIL INVESTMENT STRATEGY (RIS)

Click [here](#) to see a Briefing issued by the European Parliament on the legislation in progress on RIS.

On 24 May 2023 the EU Commission published the final [Retail Investment Strategy](#) and Annexes (RIS). It also includes related, but separate documentation, proposing minor amendments to PRIIPs Regulation (you can find Simmons & Simmons' separate briefing [here](#) on that).

In the following [link](#), you will see the key take-aways. You can also watch a [recording of our webinar](#) on this too.

The RIS comes as part of the EU Commission's long-rumbling 2020 [Capital Markets Union Action Plan](#) (CMU Plan) - the stated aims of which are to improve access for retail investors to financial markets, at the same time as ensuring investor protection. The RIS is the first major proposal to come out of this edition of the CMU Plan and it's not been without controversy, especially on the topics of inducements and product governance.

It's wide-reaching scope proposes to make changes, in the retail client arena, to MiFID, PRIIPs and (from a product governance angle) AIFMD and UCITS. It also proposes to amend the Insurance Distribution Directive (IDD) and Solvency 2, most of which are aimed at aligning IDD and MiFID.

It will be important to follow developments as the RIS goes through the Council and Parliament, and to align your business with ongoing lobbying efforts where relevant.

3.2 MICA

You can access the MiCAdamy created by Simmons & Simmons in this [link](#), which will guide you through the intricacies of this ground-breaking regulation, helping you understand the implications and plan for compliance effectively.

The European Parliament voted on the bill in April 2023 and after a formal approval by the Council of the EU, MiCA (Regulation EU 2023/1114, of 31 May) has been published in the EU's Official Journal and will come into force on 29 June 2023.

MiCA will be directly applicable in the EU 18 months after the effective date, with the exception of Titles III and IV (issuance of e-money tokens and asset-backed tokens), which will be applicable 12 months after the effective date.

MiCA will provide issuers and investors with greater confidence, improve transparency and enable cross-border provision of services. Although it represents progress in the regulation of cryptoassets, its implementation depends on technical standards that will take time to develop.

While the new rule regulates all cryptoasset markets included in its scope, it leaves out some relevant issues such as "non fungible" cryptoassets (or "NFT" for short) or the so-called decentralized finance or "DeFi". However, the new Regulation introduces an advertising regime both general for all cryptoasset service providers and specific depending on the type of cryptoasset promoted.

Thus, with regards to general advertising obligations for all cryptoasset service providers, it is established that only those who have been expressly authorized as providers of such type of services may advertise as such. In addition, all advertising developed must be impartial, clear and not misleading.

With regards to the advertising of cryptoassets, they must also be impartial, clear and not misleading, and be identified as such. Although such advertising shall not be subject to prior authorization by the competent authorities, the latter may require a notification prior to its dissemination. Likewise, all advertising is required to be consistent with the explanatory document of the issuance of the specific crypto-asset (called "White-paper"), which contains, among other information, the characteristics and associated risks of such crypto-asset. Additionally, the advertisement itself must inform of the existence of such document and include a link to a website where it can be consulted, among other identifying data of the issuer. Furthermore, it is forbidden to disseminate any type of advertising prior to the publication of the White paper.

Finally, the MiCA Regulation includes a series of obligations depending on the type of cryptoasset promoted, differentiating between three types of cryptoassets: asset-backed tokens (or "*stablecoins*"); "e-money tokens"; and "utility tokens" or cryptoassets other than tokens referenced to assets or electronic money tokens. Thus, for example, the advertising of e-money tokens is required to disclose that all holders of such tokens are entitled to obtain redemption from the issuer at any time and at par. In relation to the advertising of crypto-assets other than asset-backed tokens or e-money tokens, a clear and prominent statement that the advertising has not been reviewed or approved by any competent authority is required to be included, as well as the fact that the offeror of the crypto-asset tokens has not been reviewed or approved by any competent authority, and that the offeror of the crypto-asset tokens has not been approved by any competent authority.

3.3 PRIIPs – Commission publishes proposed changes to the KID rules

Click in the following links to access the [targeted proposals](#) to amend the [Level 1 PRIIPs Regulation](#).

The proposed changes, published on 24 May 2023 by the European Commission would affect the content of the Key Information Document (KID) which must be provided to retail investors before they invest. The proposed changes include:

- new sections in the KID with dashboards:
 - to provide investors with key ESG information on the sustainability aspects of products subject to the [SFDR](#) (including the minimum proportion of the PRIIP's investment associated with environmentally sustainable economic activities under the [Taxonomy Regulation](#));
 - summarising information about the total costs of the PRIIP and the summary risk indicator.
- a simplification of the rules on providing a KID by mandating electronic disclosure (unless the client has requested to receive a paper version);
- specifying how layering can be used in the digital provision of a KID;
- specifying the disclosure of costs information with respect to Multi-Option Insurance Products (MOPs) to promote choice between different products;
- the removal of the comprehension alert ('You are about to purchase a product that is not simple and may be difficult to understand') at the start of the KID;
- confirming that some corporate bonds with make-whole clauses are out of scope of the PRIIPs Regulation:

The proposals were published in conjunction with other documents forming part of the Commission's Retail Investment Strategy. These put forward amendments to product governance of PRIIPs, seemingly through changes to MiFID – we deal with these proposals [here](#) and they are already covered in 3.1 above.

4. EUROPEAN SUPERVISING AUTHORITIES

4.1 ESAs publish consolidated Q&As on SFDR and PRIIPs KID

On 17 May 2023, the ESAs published two new documents:

Consolidated Q&A on the [SFDR](#) and

Consolidated Q&As on the [PRIIPs KID](#)

In each case, the document contains (i) responses given by the European Commission to questions requiring interpretation of EU law (these are coloured blue in the documents); and (ii) responses generated by the ESAs, which relate to the practical application or implementation of the relevant rules (which are left uncoloured).

It should be noted that neither document adds new guidance or interpretation.

Looking at each in turn.

Q&AS ON SFDR

The consolidated document pulls together the following:

- [The Commission's Q&As of 6 April 2023](#), made public on **14 April 2023**. These responded to [the ESAs' questions](#) of 9 September 2022.
- [The Commission's Q&As of 17 May 2022](#). These responded to [the ESAs' questions](#) of 10 December 2021. The answer to Q9 was amended by the Commission's [Annex](#) of **6 April 2023**, made public on **14 April 2023**.
- [The Commission's Q&As of 14 July 2021](#), made public on **26 July 2021**. These responded to [the ESAs' questions](#) of **7 January 2021**.
- A [corrigendum](#) dated **23 November 2021**, corrected the order of Q's 1 and 2, while the answer to Q4 was amended the Commission's [Annex](#) of **6 April 2023**, made public on **14 April 2023** and
- [The ESAs' Q&As of 17 November 2022](#), on the SFDR Level 2 RTS

See our client notes for summaries of the various sets of Q&As and a review of their key impacts on asset managers:

- [Simmons & Simmons client note on the Commission's Q&As made public on 14 April 2023](#)
- [Simmons & Simmons client note on the Commission Q&As of 17 May 2022](#)
- [Simmons & Simmons client note on the Commission Q&As made public on 26 July 2021](#)
- [Simmons & Simmons client note on the ESAs' Q&As of 17 November 2022](#)

Q&As on the PRIIPs KID

Towards the end of last year, there was something of a rush of PRIIPs Q&As.

The Level 2 rules on what the PRIIPs KID must contain were originally set out in 2017 in [Commission Delegated Regulation \(EU\) 2017/653](#) (the KID Delegated Regulation).

This, however, was amended by the [Commission Delegated Regulation \(EU\) 2021/2268](#) (the Amending Delegated Regulation) and the vast majority of these changes took effect from 1 January 2023.

The ESAs published [updated Q&As](#) on 14 November 2022 - these dealt with both

(i) the original rules in the 2017 KID Delegated Regulation and; (ii) amendments made by the Amending Delegated Regulation, which applied from 1 January 2023.

Inevitably, some of the Q&As in the November 2022 update related to requirements which were changed by the Amending Delegated Regulation.

These would, then, need to be revised or deleted in order for them to stay relevant after 1 January 2023, when the Amending Delegated Regulation came into effect.

As a result, the ESAs published further [ESAs' Q&As](#) on 21 December 2022, which dealt with the necessary revisions and deletions.

The new Q&As show the various revisions (by either inserting new, or deleting, obsolete text) so the Q&As all relate to the current Level 1 and Level 2 texts, but add no new guidance.

See our summaries of the ESAS' Q&As of:

- 14 November 2022 [here](#) and
- 21 December 2022 [here](#).

4.2 ESMA updates its Q&As on the application of AIFMD and UCITS

Click [here](#) to access the AIFMD Q&A and [here](#) to see the UCITS Q&A.

On 26 May 2023, ESMA published an update to its Questions and Answers Application of the AIFMD containing one new Q&A (Section XVII – Marketing) that asks whether non-EU AIFMs are allowed to carry on pre-marketing activities under Article 30a of the Directive.

The answer confirms that Article 30a does not cover pre-marketing activities by non-EU AIFMs and highlights that non-EU AIFMs are not allowed to carry out pre-marketing activities pursuant to the AIFMD. However, national laws, regulations and administrative provisions may allow non-EU AIFMs to carry-out pre-marketing activities at national level and where this is the case, non-EU AIFMs do not benefit from a passport allowing them to carry out these activities in other Member States.

ESMA reiterates that such national laws, regulations and administrative provisions should not disadvantage EU AIFMs vis-à-vis non-EU AIFMs.

More recently, on 14 June 2023, ESMA published a further update to its Questions and Answers Application of the AIFMD and UCITS with regards to the notification regime for AIFs and UCITS managers and investment funds of both types, as well as clarifications on the passporting regime.

4.3 ESMA highlights the risks arising from the provision of unregulated products and/or services by investment firms

Click [here](#) to access the document

On 25 May 2023, ESMA published a Statement specifying that regulators have detected that investment firms often offer products and services that fall outside the scope of financial services regulation, including crypto assets, real estate, gold, raw materials, non-transferable loan notes, etc.

ESMA is concerned that this offering by investment firms give rise to both investor protection and prudential risks. The Statement sets out some of the risks that may arise and also provides information on how to mitigate such risks.

Investors may face the risk of misunderstanding the protection they are afforded when investing in unregulated products and or services. Investment firms may also face reputational risks when engaging in unregulated products and/or services. In addition, investment firms' activities related to unregulated products may pose a higher risk to the sound and prudent management of the investment firm as a whole and may jeopardise the investment firm's compliance with its obligations relating to their regulated business.

ESMA considers that, investment firms, in view of their regulated status, should comply with articles 24. 1 and 3 of MiFID II in the sense that investment firms shall ensure that they act fairly, professionally and in the best interest of their clients; and that they must ensure that all information, including marketing communications, addressed to clients or potential clients, is fair, clear and not misleading.

Therefore, among other recommendations, ESMA considers that when engaging in unregulated activities, information provided to the client or potential client, including marketing materials and other documentation, does not include a reference to the investment firm being authorised/regulated by National Competent Authority. Also, that any information on an investment firm's website related to unregulated activities is clearly distinguished from regulated activities.

Finally, the Statement considers that investment firms should be able to demonstrate the measures taken to ensure that unregulated activities do not affect their ability to fully comply with requirements applicable to the provision of investment services. For example, investment firms should ensure that sufficient financial and human resources are dedicated to the compliance function and should identify and manage any potential conflict of interest arising from the provision of both regulated and unregulated activities.

5. ESG

On 12 June, 2023 the Commission published “a new package of measures to build on and strengthen the foundations of the EU sustainable finance framework”, showing that it is still “[Master of the Confusing Webpage](#)”.

The principal items are:

EU Taxonomy Delegated Acts

- The Commission approved in principle a draft Taxonomy Environmental Delegated Regulation, which would:
 - Establish TSCs for activities that can make a substantial contribution to the remaining environmental objectives (i.e., circular economy, biodiversity, pollution, and water) and;
 - Amend the [Disclosures Delegated Act](#), to clarify the disclosure obligations for the additional activities and supplement the requirements in Article 10 of the Disclosures Delegated Act.
- The Commission adopted targeted amendments to the Taxonomy [Climate Delegated Act](#), covering the environmental objectives of climate change mitigation and adaptation and expanding on economic activities which contribute to climate change mitigation and adaptation but have not been previously included.

The proposals were the subject of a public consultation, which ran from 5 April to 3 May 2023 – for further details, see our article [ESG: Commission consults on new Taxonomy Regulation Level 2 measures](#).

Although these new measures have been approved in principle, they don't seem to be accessible as they aren't yet available in all EU official languages. When they are, the Commission will formally adopt and send to the European Parliament and the Council for their scrutiny (four-month period, extendable once by two additional months).

The measures are expected to apply as of **January 2024**.

We will prepare information on the new proposals as soon as the texts are available.

Proposal for a Regulation on ESG ratings providers

The Commission has also published the following documents:

- [Proposal for a Regulation on the transparency and integrity of Environmental, Social and Governance \(ESG\) rating activitiesEN••](#)
- [Annex to proposal for a the Regulation on the transparency and integrity of Environmental, Social and Governance \(ESG\) rating activitiesEN••](#)
- [Impact assessment accompanying the proposalEN••](#)
- [Summary of the impact assessment accompanying the proposalEN••](#)
- [Timeline of the legislative proposal and stakeholder's feedbackEN••](#)

It will now engage in discussions with the European Parliament and Council to agree a final text.

In addition, the Commission has published “an overview of the recent measures and tools put forward to address key implementation issues and questions raised by stakeholders”.

And for those who still have the will to live (and who have exhausted the enjoyment possibilities of the Museum of the European Parliament), there appears to be an [EU Taxonomy Navigator](#) and a [Factsheet](#) for you to read whenever you feel low.

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

6. FATF: Jurisdictions under increased monitoring

On 23 June 2023, FATF published the [Jurisdictions under Increased Monitoring, also known as “grey list”](#).

The list now includes Croatia, Cameroon and Vietnam and has not removed any of the countries included in the last update. Therefore, the jurisdictions that have strategic deficiencies in their regimes to counter money laundering, terrorist financing and proliferation financing are the following:

Albania, Barbados, Burkina Faso, Cameroon, Cayman Islands, Croatia, Democratic Republic of Congo, Gibraltar, Haiti, Jamaica, Jordan, Mali, Mozambique, Nigeria, Panama, Philippines, Senegal, South Africa, South Sudan, Syria, Turkey, Tanzania, UAE, Uganda, Vietnam and Yemen. And the following call for action: Myanmar, North Korea, Iran.

Simmons & Simmons Spain – Funds and Regulatory team

You may contact our Regulatory team in Spain at madrid.fundsandregulatory@simmons-simmons.com



María Tomillo
Partner
T +3491 426 2583
E maria.tomillo@simmons-simmons.com



Andreas Elofs
Of Counsel
T +3491 426 2715
E andreas.elofs@simmons-simmons.com



Gema Fernández
Supervising Associate
T +3491 426 2892
E gema.fernandez@simmons-simmons.com



Jacobo Pérez-Pla
Associate
T +3491 426 2415
E jacobo.perez-pla@simmons-simmons.com



Gonzalo Fernández
Associate
T +3491 426 2893
E gonzalo.fernandez.cortes@simmons-simmons.com