

Regulatory Flash: Q3 2023

Simmons & Simmons Spain

OCTOBER 2023



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Regulatory Flash – Q2 2023

Spain – Q2 2023 – Regulatory update

1. Spanish Regulations

1.1 Central Registry of UBO created by Royal Decree 609/2023 of 11 July

Click [here](#) to see the Law. Click [here](#) to see the Simmons & Simmons update.

Spain has created the Central Registry of Ultimate Beneficial Owners and approves its Regulation by means of Royal Decree 609/2023, of 11 July, which entered into force on 19 September 2023.

The Spanish Central UBO Registry will contain information on Ultimate Beneficial Owners of all Spanish legal entities and entities or structures without legal personality that (i) have the seat of their effective management or their principal activity in Spain or (ii) are administered or managed by individuals or legal entities resident or established in Spain, as well as other structures without legal personality that, although not managed or administered from Spain or another European Union State, and not registered in another European Union State, intend to establish business relations, carry out occasional operations or acquire real estate in Spain.

The UBO Registry will centralise beneficial ownership information currently available in Spain from a variety of sources (Mercantile and Property Registry, Registry of Foundations, General Council of Notaries, etc) in addition to that which will be provided directly to it by obliged subjects, if necessary.

In order to comply with the obligation to identify and verify the identity of the beneficial owner established in the Spanish legislation, obliged entities must access the information recorded in this Spanish Central UBO Registry, without prejudice to the fact that for these exclusive purposes they may make additional queries to the database of beneficial ownership of the General Council of Notaries or to other registers that may contain information on the beneficial ownership of the registered legal persons or entities.

Obliged subjects, and other parties with legitimate interest, will be able to obtain information on the nature and extent of the beneficial interest held and of this beneficial ownership, in particular, whether it is due to the control of the ownership or that of the management body of the same and the percentage of participation, including, in the case of indirect ownership, information on the intervening legal entities and their participation in each of them.

At the date of this flash, the Ministry of Justice has published information on the Spanish Central UBO Registry (Registro Central de Titularidades Reales – RCTIR) on its [Website](#).

In the case of the obliged subjects, access to the RCTIR by these parties is not currently enabled, given that, in accordance with the sole transitory provision.1 of Royal Decree 609/2023, of 11 July, it will be in the coming months when the first total sending of data or making available of the information from the different registers with competence in the registration of legal persons or databases will be carried out, and therefore, until the aforementioned sending or making available is completed, the obliged entities may obtain information from the beneficial owners by accessing said registers and databases in accordance with their specific regulations. In any event, it is foreseen that during the transitional period specific procedures will be implemented for the initial

request for access by the obliged subjects and subsequent consultation. This procedure will be aligned with the development being carried out by the European Commission for the BORIS system (Beneficial Ownership Registers Interconnection System), which, once implemented, will facilitate consultation by regulated entities.

1.2. Urgent Public Hearing for important pieces of financial legislation

As a matter of urgency, the Ministry of Economic Affairs and Digital Transformation put the following Draft Royal Decrees back to the public hearing which ended on 28 September:

- [Draft Royal Decree amending Royal Decree 1082/2012, of 13 July, approving the Regulations implementing Law 35/2003, of 4 November, on Collective Investment Institutions.](#)

It develops the new developments in collective investment incorporated in the Law Create and Grow 18/2022, of 28 September and in the new Law 6/2023, of 17 March, on Securities Markets and Investment Services.

- [Draft Royal Decree on the Legal Regime of Investment Firms and other Entities providing Investment Services.](#)

It develops the authorisation regime, organisational measures, financial and solvency requirements and rules of conduct to be observed by national investment firms and financial advice firms.

- [Draft Royal Decree developing the administrative powers and faculties of the CNMV.](#)

It specifies and details the CNMV's actions in areas such as administrative registers and powers of cooperation and coordination with other supervisory authorities.

- [Draft Royal Decree on Financial Instruments, Admission to Trading, Registration of Negotiable Securities and Market Infrastructures.](#)

This regulation develops matters relating to the registration of negotiable securities and their admission to trading, as well as the regime for central counterparties and central securities depositories.

1.3 1 December 2023 Cut-off date for firms to be compliant with Law 2/2023 on Whistleblowing

We remind you that Law 2/2023 of 20 February on the protection of persons who report violations of the law and the fight against corruption (Law 2/2023) which transposed the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (europa.eu) (Whistleblowing Directive) came into force on 1 March 2023.

However, there was a 3-month period for organisations with more than 250 employees to be compliant.

There was still another deadline for companies with 50 to 250 employees, or even less than 50 employees in certain circumstances (including Non-Spanish companies) to become compliant with Law 2/2023 which ends on 1 December 2023.

In this regard, Spanish and some Non-Spanish companies (see below) are required to adapt their procedures and policies to Law 2/2022 and to ensure that they do comply with the relevant new requirements at the soonest.

Existing Whistle-blower Systems established at the parent company level shall be reviewed and be adapted to Law 2/2023.

The following companies of less than 50 employees are obliged to comply with this Law:

Entities that fall within the scope of European Union law on financial services, products and markets, prevention of money laundering and terrorist financing, transport safety, or environmental protection; and legal persons if, although not domiciled in Spain, they carry out activities in Spain through branches or agents or by providing services without a permanent establishment.

2. Spanish Supervising Authorities

2.1 CNMV limits marketing of CFD and operation of leveraged instruments

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

On 11 July 2023, the Spanish Securities Market Commission - Comisión Nacional del Mercado de Valores (CNMV) issued a [Resolution](#), in which it

- prohibits the marketing of Contracts for Difference (CFD) aimed at retail investors or to the public at large, the sponsorship of events and organisations, brand advertising and the use of celebrities and
- limits the maximum leverage to which retail clients can be exposed in futures and options and obliges the provider to close out the position when the position falls below 50% of the initial collateral, limiting losses.

In each case, the measures apply to entities authorised to provide investment services in Spain, irrespective of the origin of the investment firm and whether it has a branch (so, it includes entities under the freedom to provide services regime). In general, the measures, though, do not apply to Spanish entities when they operate in other States. However, if the underlying instrument is a cryptoasset that is not considered to be a financial instrument as defined under MiFID, the measures will apply to Spanish entities when they provide services in other EU Member States.

The measures are a step forward compared with those adopted in 2019 (see our summary [here](#)) and are intended to strengthen investor protection against certain commercial and advertising practices in the offering of CFDs - these had prevented the regulation and intervention measures in place to date from being effective. The new provisions also improve safeguards for retail clients against certain practices of excessive leverage of other instruments, such as futures and certain options.

The Resolution follows on from the CNMV's analysis of recent marketing practices carried out by entities that trade with CFDs or which obtain benefits from such trading, and following an increase in losses suffered by retail investors as a consequence of these types of investment.

Similar far-reaching measures - albeit different in type and scope - have already been introduced in other jurisdictions (such as France, Belgium, Netherlands and Germany among others).

The CNMV will monitor compliance with the Resolution by the entities subject to its supervision and, considering that a significant part of the activity in Spain is carried out by entities acting under the freedom to provide services regime, it will request collaboration of other EU supervisors to pass on the English version to the entities under their jurisdiction that offer CFDs in Spain without an establishment or an agent.

3. EU

3.1 Retail Investment Strategy (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).

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

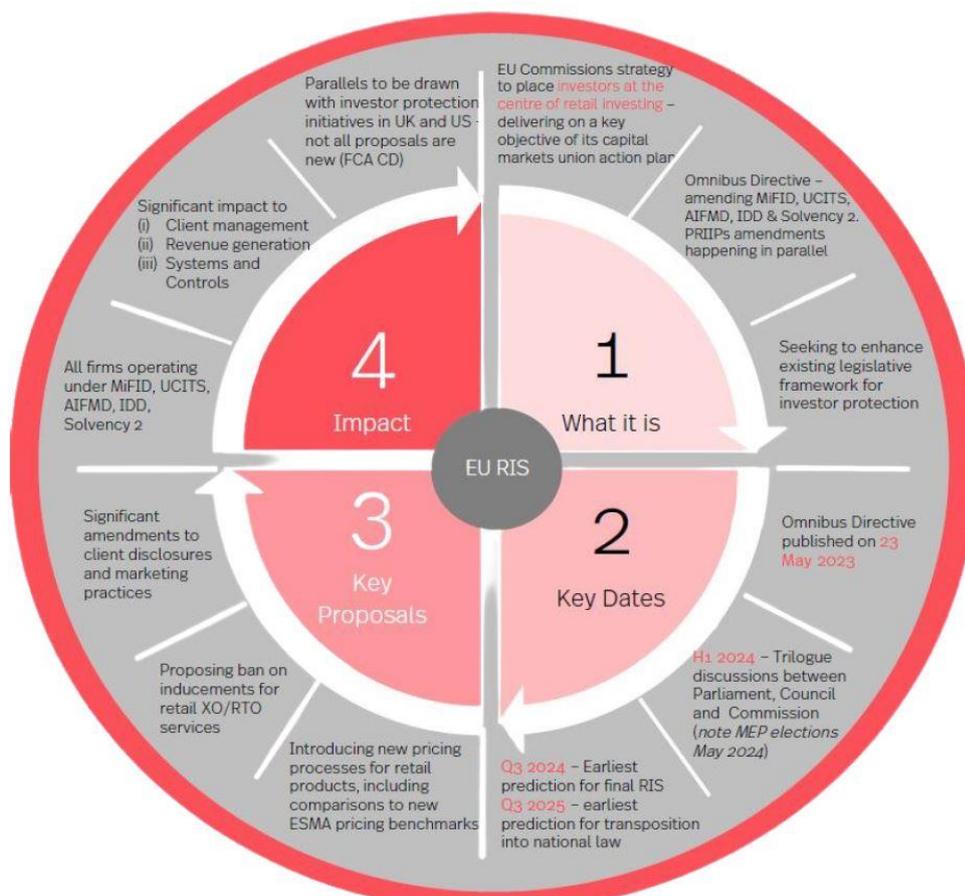
In the following [link](#), you will see the key take-aways. You can also watch a [recording of our webinar](#) on this too.

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. For instance, the Commission proposed to ban inducements for execution only and RTO. On 2 October the Parliament's ECON Committee published its first draft Parliamentary position. Although it is a draft, and not the Parliament's final negotiating position, so may still change, the report stated that here should be no execution only and RTO ban.

See below our infographic on RIS:



3.2 MiCA

You can access the MiCAdeamy 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 has now been published in the EU's Official Journal and entered into force in 20 days, on 29 June 2023.

Our team of experts is here to guide you through the intricacies of this groundbreaking regulation, helping you understand its implications, and plan for compliance effectively.

As part of MiCAdeamy, we are offering a comprehensive range of resources designed to equip you with the knowledge and insights necessary to navigate the world of MiCA with confidence. Our engaging webinars, articles, workshops, and podcasts, will delve deep into the key aspects of MiCA, covering topics such as legal requirements, compliance frameworks, best practices, practical tips for implementation, and insights into the evolving landscape of crypto asset regulations.

To start with, we recommend you take a look at [this publication](#) that gives you a handy checklist of things you should be thinking about over the next 18 months to ensure that you are ready for MiCA, and avoid any nasty surprises down the line.

3.3 ESMA updates its Guidance on the definition of advice under MiFID

Click [here](#) to access ESMA's press release and [here](#) to see the Supervisory Briefing.

On 11 July 2023, ESMA published an update to its Supervisory Briefing on understanding the definition of advice under MiFID II to align the initial CESR Q&A published in 2010 with the new business models and recent technological developments.

The Supervisory Briefing, among other topics, covers:

- The provision of personal recommendations and whether other forms of information could constitute investment advice;
- Guidance on when recommendations will be viewed as based on a view of a person's circumstances;
- Perimeter issues around the definition of personal recommendation;
- Issues around the form of communication, including use of social media posts.

The document includes a Diagram named: the five tests for investment advice and several practical cases that help the National Competent Authorities and the regulated entities to identify and distinguish which investment service is provided depending on the circumstances.

4. ESG

On ESG matters, find in the link the last edition on [ESG View](#) issued by Simmons & Simmons which analyses the most recent developments at Global and EU level and interestingly last [ESG litigation trends](#) and the launching of our [ESG Disputes Radar](#).

Moreover, the European Commission has launched a [public consultation](#) on the functioning and future of the SFDR - the first step in a process which will eventually lead to significant amendments being made to the current SFDR regime.

Our [client note](#), "SFDR 2 - significant new policy direction revealed", provides a summary of the following top 10 things that firms need to know about the consultation.

1. What is covered in the consultation?
2. Do firms need to take action in response to the consultation?
3. What are the options for SFDR 2 to replace article 8/9 with product labels?
4. What is Approach 1 to product labels?
5. How is Approach 1 similar to the UK SDR proposals?
6. What is Approach 2 to product labels?
7. What does the Commission ask about the current SFDR regime?
8. How does the Commission approach SFDR's alignment with other EU regimes?
9. What changes are proposed to entity-level disclosures?
10. What changes are proposed to product-level disclosures?

5. Crypto Review

Visit our [CRYPTO VIEW](#) for recent developments on MiCA, Financial Promotions in the UK, the Travel Rule, etc.

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