# Regulatory Flash: Q2 2024

## Simmons & Simmons Spain

**July 2024**

# Contents

# 1 Spanish Regulation

## 1.1 Draft Law to create the Financial Customer Protection Authority

Please see the Preliminary Draft Law here.

On 19 March 2024, the Council of Ministers gave its approval to the Draft Law for the creation of the Independent Administrative Authority for Financial Customer Defense. This covers the extrajudicial resolution of conflicts between financial entities and their clients. This Draft Law has passed to the Congress of Deputies and has begun its parliamentary processing.

The purpose of this Draft Law is to supplement the institutional claim resolution system by creating a single Authority that enjoys autonomy and independence, and whose resolutions are issued promptly. Such resolutions will adhere to uniform criteria and are binding for financial entities in claims of less than 20,000 euros.

This new Authority will integrate the current claim services of the following supervisory bodies: the Bank of Spain (Banco de España), the National Securities Market Commission (Comisión Nacional del Mercado de Valores - CNMV), and the Directorate General of Insurance and Pension Funds (Dirección General de Seguros y Fondos de Pensiones - DGSFP). Those bodies will cease to perform the function of resolving complaints and claims in accordance with the transitional provisions of this Draft Law.

The Draft Law extends its guardianship and protective function to the users of entities and operators in the Fintech sector, in addition to the provision of crypto-asset services under the terms provided in Regulation (EU) 2023/1114 of the European Parliament and Council , dated 31 May 2023, relating to crypto-asset markets. Equally, there are certain aspects of the financial entities' activities that are excluded from the Authority's purview, for example in relation to conflicts regarding data protection, or claims for compensation related to competition defence regulations.

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

- proof of prior submission to the customer service department or the customer ombudsman of the financial institution where the claim is made,
- one month must have elapsed since the submission of the complaint without a reply, and
- the application to resolve the claim is made after the no admission or the partial or total rejection of the claim.

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

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

## 1.2 Public Consultation on Digitalisation and Modernisation of the Financial Sector

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

Click here to access to this Public Consultation.

The Government has initiated a public consultation for the transposition and implementation of various European and national regulations on financial innovation. These include DORA (Digital Operational Resilience Act), MICA (Markets in Crypto-assets Regulation), AMLD (Anti-Money Laundering Directive), SEPA (Single Euro Payments Area), Settlement, European Single Access Point, among others.

This is a preliminary consultation carried out as part of Spain's legislative process to gather the opinions of individuals and entities that may be interested in the draft bill and the royal decree project concerning the digitalisation and modernisation of the financial sector.

The problems which this piece of legislation intends to solve are as follows:

1. **Cyber Resilience**: By January 2025, it is necessary to have completed national regulatory developments that allow supervisory authorities to act in the field of cyber resilience with full legal certainty. This includes the establishment of a national regime for infringements and sanctions in case of non-compliance with the obligations of the DORA Regulation, and the transposition of the Directive accompanying the DORA Regulation, which modifies various Directives regulating different financial subsectors.
2. **Crypto-assets and Distributed Ledger Technology**: To ensure legal certainty and the highest standard of money laundering prevention in the field of crypto-assets, several changes need to be introduced. These include the removal of the requirement for crypto-asset service providers to register with the Bank of Spain for anti-money laundering purposes, the strengthening of the anti-money laundering regime related to crypto-asset service providers, and the requirement for crypto-asset service providers established in Spain to have a central contact point to ensure compliance with the Spanish preventive framework.
3. **Payment Services and Systems**: It is advisable to improve the competitive environment between banks and FinTech companies by transposing the Directive that allows the latter direct access to payment systems designated in the Settlement Directive. Additionally, it is necessary to complete the designation of competent authorities to ensure compliance with obligations in the Single Euro Payments Area (SEPA Regulation) and to help eradicate what is known as IBAN discrimination.
4. **Financial Sandbox**: It may be advisable to adapt and update the financial sandbox to the needs of promoters, based on the experience gained and lessons learned in its two years of operation. The Sandbox Law has been in force since 2020 and six cohorts of projects have been developed. In addition to the technical adjustments that the regulation may require in terms of deadlines and the intervention of public authorities during the project admission process, it seems appropriate to open the debate on other possible improvements to the Sandbox.
5. **European Single Access Point to Financial and Non-financial Information**: The Directive on the European Single Access Point (ESAP) must be transposed. This Directive accompanies the Regulation that controls the creation of the European electronic single access point to the financial and non-financial information of the participants in the financial markets.

# 2 Spanish Supervising Authorities

## 2.1 CNMV publishes a Q&A on the use of distributed registration technologies in the representation of financial instruments

You can visit the CNMV Q&A document here and the press release can be found here.

On 29 May 2024, the CNMV (Spanish National Securities Market Commission) released a Q&A document to clarify questions regarding the use of Distributed Ledger Technologies (DLT) as a method of representing financial instruments. Until the implementation of Law 6/2023, financial instruments could only be represented by titles or account entries. Now, following a regulatory review, they can also be represented by DLT.

The document includes 28 questions and answers on various related issues and a glossary of terms for easier understanding.

Crypto-assets can be represented using DLT, but not all of them are considered financial instruments: this depends on their specific characteristics. Crypto-assets that can be classified as financial instruments will be regulated under securities market legislation (MiFID) based on technological neutrality.

This representation method can offer advantages in the issuance, trading, and settlement of financial instruments, but necessary measures must be implemented to ensure investor protection and market infrastructure integrity. To ensure this protection, an authorised financial company providing investment services is necessary: *Entidades Responsables de la Administración de la Inscripción y del Registro de valores negociables representados mediante sistemas basados en DLT* (ERIR). including the provision of custody among its authorised activities. Such financial company must take responsibility for the correct functioning of the register.

Additionally, in anticipation of the upcoming implementation of the European Regulation on Crypto-assets (MICA), the CNMV has added a form to its website to gather information from entities considering undertaking activities covered by the MICA Regulation and thus going through the corresponding authorisation process. This form is aimed at entities not currently supervised by the CNMV or registered in the Bank of Spain's register of virtual currency exchange service providers and electronic wallet custodians.

## 2.2 CNMV adopts EBA Guidelines on diversity benchmarking

You can visit the CNMV's website here and the EBA's Guidelines here

The Spanish National Securities Market Commission (CNMV) has reported to the European Banking Authority (EBA) its compliance with the "Guidelines on the benchmarking of diversity practices, including diversity policies and gender pay gap, in accordance with Directive 2013/36/EU and Directive (EU) 2019/2034". These Guidelines will be applicable from June 27, 2024.

The Guidelines specify the information that in-scope firms, except those that are small and not interconnected, must provide to the competent authorities. They also establish the data that the competent authorities must send to the EBA to compare these practices.

The Guidelines detail the selection criteria for the representative sample of entities from which the national authorities will request information, in addition to the content of the information that the entity must send to them to compare diversity practices and the gender pay gap at the management body level. They also specify how the competent authorities should send this information to the EBA for its comparative exercise at the European Union level.

The EBA published the guidelines on 18 December 2023 in English and on 27 March 2024, the translation in each of the official EU languages became available.

## 2.3 CNMV updates its Questions and Answers on Collective Investment Schemes, MIFID and ECR

You can visit the CNMV's Q&A documents here.

On 23 April 2024 CNMV updated the Q&A documents on the implementation of MiFID II, the regulation of collective investment schemes (CIS) and private equity (PE) entities, and other closed-end collective investment vehicles.

With regard to questions on the regulation of collective investment, private equity and other closed-end collective investment vehicles, the following points have been clarified:

- The CNMV warns that investing in crypto-asset products carries high risks that retail investors may not properly assess. Although it has not yet approved any funds with exposure to crypto-assets for retail investors, the CNMV considers it unlikely that it will approve the inclusion of exposures to these instruments in UCITS and quasi-UCITS prospectuses. However, for hedge funds aimed exclusively at professional investors, exposure to cryptocurrencies could be done with certain requirements.
- With regard to warnings on CIS with a specific return target and funds with a buy and hold target in the case of comparable foreign CIS marketed in Spain, the regulator indicates that marketing institutions must warn investors.
- Application of Technical Guide 1/2023 to CIS which do not hold a stable fixed income portfolio (section 1.1, question 82 quarter) and information on the TAE (equivalent annual rate) of the CIS.
- Acquisition of assets prior to registration and the potential conflict of interest.
- In the case of PE that are only marketed to professional investors, the delivery of the PRIIPS KID is not required. Nevertheless, in case of reverse solicitation, the PRIIPs KID must be provided to retail investors even where no marketing activity has been undertaken by the manager and the acquisition is at the initiative of the client.
- Change the category from retail to professional clients in the case of PE.
- With regards to cross-border activities, the CNMV equates the inclusion of ETFs from third countries on web-sites to their marketing, which may only be included when they are CIS expressly authorised by the CNMV and registered for marketing in Spain.

## 2.4 CNMV updates its Questions and Answers on MIFID

The issues related to the implementation of MiFID II are as follows:

- **Inducements**: Placement or underwriting fees are considered inducements if the entity also offers investment services on the product it places or underwrites such as RTO or investment advice. They are not inducements if the entity does not offer investment services or if it applies an implicit margin without receiving payments from the issuer.
- **Conflicts of interest and intermediation costs**: Entities that manage portfolios may not charge commissions on the placement or intermediation of instruments for managed portfolios, but may charge for the execution of market orders. Additionally, the CNMV analyses different situations that can occur in the practice of entities that provide discretionary portfolio management services, depending on whether they involve placements in the primary market or intermediation in the secondary market.
- **Information on costs and expenses**: For packaged insurance-based retail investment products (PRIIPs), entities must additionally disclose any costs not included in the key investor information document (KID), and costs paid that it charges as an inducement. They must report all costs, including the difference between fair value and the price at which the client is trading.

## 2.5 CNMV launches the public consultation for the amendment of several circulars

Click here to access the document.

On 20 May 2024, CNMV initiated the consultation process for a draft Circular that proposes amendments to three existing circulars in different areas:

- **Accounting sector**: There is a proposal to amend Circular 1/2021 to include domestic financial advisory firms and new crypto-asset service providers in the scope of application, establishing obligations to send information to the CNMV. There is also a proposal to introduce modifications to the models of reserved statements and to establish a common reserved statement referring to prevention of money laundering and financing of terrorism.
- **Client asset protection**: The proposal suggests changes to Circular 5/2009 to incorporate crypto-asset custody and crypto-asset portfolio management activities with disposition power into the scope of the Auditor's Annual Report on Client Asset Protection (IPAC).
- **Additional provisions**: There is also a proposal to amend Circular 1/2018 to clarify two aspects of the warning regarding the existence of a significant difference with respect to the estimation of the current value of certain financial instruments.

All comments received will be published after the end of the public hearing period (which ended on 30 June 2024), unless otherwise indicated.

# 3 Retail Investment Strategy (RIS)

Visit our Simmons and Simmons Website for further information.

The European Commission presented its Retail Investment Strategy and Annexes (RIS) on 24 May 2023. This strategy is an integral part of the European Commission's Capital Markets Union (CMU Plan) 2020 Action Plan, which has as its main objective to improve retail investors' access to financial markets and ensure their protection. The RIS is the first major proposal of this edition of the CMU Plan and has generated some controversy, especially on issues related to inducements and product governance.

The RIS proposes a number of significant changes to various financial and insurance regulations. These include the Markets in Financial Instruments Directive (MiFID), the Regulation on Key Information Documents for Packaged Retail Investment Products and Investment Insurance (PRIIPs), the Alternative Investment Fund Managers Directive (AIFMD), the Undertakings for Collective Investment in Transferable Securities (UCITS), the Insurance Distribution Directive (IDD), and Solvency 2.

The legislative process is underway. The Parliament's ECON Committee, responsible for drafting the final report, adopted its report on 20 March. Subsequently, the Parliament voted and approved the negotiating position on 23 April 23, doing so the Council on 12 June.

The stage is set for trilogue discussions to commence. This will involve the Parliament and Council (and to a lesser extent, the Commission) bringing their respective negotiating positions to the table, debating them and ultimately agreeing on a final RIS "compromise" text to be adopted as the RIS level 1 legislation.

Whilst the positions of all three EU bodies are now known, it is difficult to predict whose position on which topics will prevail. There are a couple of wider factors at play this year which could also have an impact: (a) the political configuration of the new EU Parliament which will sit from H2 2024, following the EU MEP elections this Summer; and (b) the priorities of the Council's Hungarian Presidency which will take over from the current Belgian Presidency on 1 July 2024.

But what's very clear is the scale of negotiation that is going to be involved - especially across some core topics of concern to the industry where there is significant divergence in the negotiating positions. Here's a quick snapshot.

- **Inducements**

The Commission proposes an inducements **ban for execution-only (XO) and RTO**. The Parliament seeks to delete the proposed ban. The Council also seeks to delete the proposed ban but would only permit inducements where a new "inducements test" is met.

The Commission proposes to change the existing portfolio management inducement ban wording from cannot "accept and retain" to cannot "pay or receive". Both the Parliament and the Council seek to re-instate the existing wording (cannot "accept and retain").

The Commission proposes a **new "best interests"** test for restricted advice (to replace the existing quality enhancement test). The Parliament seeks changes to the sub-elements of the new best interests test. The Council seeks to link the new best interests test to the suitability regime and to apply a new "inducements test" to the inducements regime.

The Commission proposes a **3-year review clause** for the inducements regime (potentially to bring in a full ban at a later date). The Parliament seeks to delete the proposed review clause. The Council seeks a 5-year review clause.

- **VTM/benchmarks**

The Commission proposes that manufacturers/distributors establish a pricing process for PRIIPs by way of comparison to EU benchmarks published by ESMA, with deviation requiring additional testing to justify divergent pricing (or no approval of the product if it cannot be justified). Similar provisions also apply for AIFMs and Mancos.

The Parliament seeks a pricing process for PRIIPs but seeks to achieve this through a peer grouping analysis defined by the firm. EU benchmarks are repositioned as a supervisory tool to be used by national regulators to assess if pricing is unjustifiable, and national regulators have power to demand removal of a product if price deviation cannot be justified.

The Council seeks a wider value-for-money process for PRIIPs and (similarly to the Parliament) it seeks to achieve this through a peer grouping analysis with data to be provided by ESMA (or through EU benchmarks, where opted for by a firm), with EU benchmarks to be used as a supervisory tool by national regulators to detect deviations.

- **Regulator powers**

The Commission proposes a broadening of ESMA and national regulator supervisory and interventionist powers including on marketing practices, risk warnings, and reporting of a firm's cross border activities in host member states.

The Parliament seeks to go even further, adding some additional national regulator powers and expanding the reporting of cross border activities provisions to also include reporting on home state activities.

On the other hand, the Council seeks to dilute some of the proposed powers around marketing practices and risk warnings.

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

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

# 4 MICA

## 4.1 Consultation Paper: Provision of crypto-asset services on the exclusive initiative of the client.

Click here to see the Consultation paper.

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

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

## 4.2 Draft Technical Standards certain requirements of MiCA – first package

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

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

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

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

The first consultation package will be published in July 2023. This package includes technical standards for the following mandates:

- Article 60(13): RTS on content of notification from selected entities to NCAs
- Article 60(14): ITS on forms and templates for notification from entities to NCAs
- Article 62(5): RTS on the content of the application for authorisation for CASPs
- Article 62(6): ITS on forms and templates for CASP authorisation application

- Article 71(5): RTS on complaint handling procedure
- Article 72(5): RTS on management and prevention, disclosure of conflict of interest
- Article 84(4): RTS on intended acquisition information requirements

## 4.3 CRYPTO VIEW: Spring/Summer 2024

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

# 5 ESG

## 5.1 Simmons & Simmons ESG view June 2024

We invite you to read the latest edition of ESG view issued by Simmons & Simmons which has a wealth of updates impacting businesses globally, for example we cover developments in the carbon market space, changes to global guidelines released by OECD and PRI and a breadth of ESG consultations from multiple jurisdictions. Alas the cloud of greenwashing still looms large in the minds of regulators and courts of law. We also have your regular menu of jam-packed regulatory updates from the EU and policy news from APAC and MENA regions.

## 5.2 ESMA's final guidelines on ESG fund names

Click here to see the Final Report issued by ESMA on 14 May 2024.

Visit our Simmons and Simmons Website to find more information about the "Guidelines on funds' names using ESG or sustainability-related terms".

We also invite you to read our client briefing that provides a summary of the top 10 things that firms need to know about the ESMA Guidelines.

You can watch on demand our Flash Call on this final report.

On 14 May 2024, ESMA published guidelines on fund names that use sustainability-related terms. In recent years, investor demand for investment funds that incorporate ESG factors has experienced strong growth and is expected to continue to increase in the future. This growing demand has raised concerns at ESMA, as the disclosure of misleading sustainability information may give rise to a risk of 'greenwashing'.

The changes made to the Guidelines based on the responses received to ESMA's consultations are as follows:

The existing criteria for the use of ESG terms in fund names have been modified. Funds that have terms related to environmental, social or governance factors or related to sustainability must meet a minimum threshold of 80% of investments that promote environmental or social characteristics or have a sustainable investment objective. In order for the funds to use terms such as 'sustainability' or 'sustainable' they must invest significantly in sustainable investments as stated in Art. 2.17 SFDR. In addition, if the fund intends to combine terms such as 'environment', 'impact', 'transition', 'social' and 'governance', the criteria and exclusions of the guidelines will have to be applied cumulatively.

The Guidelines have proposed to apply some exclusions under the Climate Transition Benchmark (CTB) and the Paris-Aligned Benchmark (PAB). For funds whose names contain terms related to 'transition', 'social' and 'governance', the exclusions for CTB are applicable. Funds with terms related to 'environment', 'impact' and 'sustainability' have to respect the exclusions foreseen under PAB.

Funds using terms related to 'impact', should ensure that their investments under the minimum proportions are made with the intention to generate positive, measurable social or environmental impacts as well as financial return. Funds using 'transition'-related words should demonstrate that the investments are on a clear and measurable path to social or environmental transition.

As for the transition period, the Guidelines start to apply three months after publication on ESMA's website of the guidelines in all official EU languages. Existing funds will have a longer transition period of 6 months from publication to adjust the fund name or modify the investment policy to meet the criteria of the guidelines.

## 5.3 EU adopts the Directive on Environmental Crimes

Click here to see the Directive. On 30 April 2024, the Directive 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC (Environmental Crimes Directive) was published in the Official Journal. The Directive came into force on 20 May with the aim of enhancing the protection of the environment through criminal law. This Directive, which replaces previous versions from 2008 and 2009, establishes EU-wide minimum rules on the definition of criminal offences and penalties related to environmental crime. The Directive applies only to offences committed within the EU, but member states can extend their jurisdiction to offences committed outside their territory.

Penalties include a maximum prison sentence of ten years for intentional offences resulting in death, up to five years for other offences, and at least eight years for qualified offences. Companies face fines of at least 5% of total worldwide turnover or €40 million for the most serious offences, and at least 3% of turnover or €24 million for all other offences. Additional sanctions may include obligations to restore the environment or compensate for damage, exclusion from public funding, or withdrawal of permits.

Member States are required to implement the requirements by 21 May 2026 and publish a national strategy on combatting environmental criminal offences by 21 May 2027.

## 5.4 Corporate Sustainability Due Diligence Directive

Click here to access the document.

On 24 April 2024, the European Parliament approved a new directive, Corporate Sustainability Due Diligence Directive (CSDD) which requires companies to mitigate their negative impact on human rights and the environment. This regulation, known as “due diligence”, was approved with 374 votes in favour, 235 against and 19 abstentions. The Directive will apply to all stages of the supply, production and distribution chain, and seeks to combat problems such as slavery, child labour, labour exploitation, loss of biodiversity, pollution and the destruction of natural heritage.

The companies affected by this regulation are EU companies and parent companies with more than 1,000 employees and a worldwide turnover of more than EUR 450 million. It will also apply to companies with franchise or license agreements in the EU with a worldwide turnover of more than EUR 80 million, if at least EUR 22.5 million is derived from royalties. Non-EU companies reaching the same EU turnover thresholds will also be subject to this directive.

Companies will have to integrate due diligence into their policies, make corresponding investments, seek contractual guarantees from their partners, improve their business plan, and provide support to small and medium-sized partner companies to ensure that they comply with the new obligations. They will also have to adopt a transition plan to make their business model compatible with the 1.5°C global warming limit of the Paris Agreement.

Member States will be required to provide companies with detailed online information on their due diligence obligations through practical portals. They will also create or designate a supervisory authority to investigate and impose sanctions on non-compliant companies. Sanctions will include “naming and shaming” and fines of up to 5% of companies' global net global turnover. Companies will be liable for damages caused by breaches of their due diligence obligations and will have to fully compensate their victims.

The Directive will enter into force twenty days after its publication in the EU Official Journal. Member States will have two years to transpose the new rules into national law and communicate the relevant texts to the Commission. One year later, the rules will start to apply to companies, with a gradual phase-in between three and five years after entry into force.

## 5.5 ESAs Opinion on the assessment of the SFDR

On 18 June 2024, ESMA, EBA and EIOPA (together, the ESAs) published a joint opinion, 'On the assessment of the Sustainable Finance Disclosure Regulation (SFDR)'.

Visit our Simmons and Simmons Website to find more information about the ESAs joint Opinion on the future shape of the SFDR.

The Opinion primarily focuses on the introduction of two voluntary product categories for financial products, "sustainable" and "transition", to reduce greenwashing risks and help consumers understand the product's purpose. In addition, the Opinion also addresses, among others, improving the definition of sustainable investments, simplifying how disclosures are presented to investors and technical suggestions on which products should be within the scope of the SFDR.

The Opinion sets out nine main recommendations for the Commission to consider, including introducing a product classification system, simplifying sustainability indicators, ensuring sustainability disclosures cater to different investor needs, and evaluating the introduction of a framework to assess the sustainability features of government bonds. It also suggests consumer testing and consultation before policy proposals are put forward.

## 5.6 EU Financial Supervisory Authorities warn of Increased Green Washing Risks

On 1 June, the European Supervisory Authorities, EBA, EIOPA, and ESMA, published their respective reports on greenwashing applicable to participants across the financial markets industry. Within the reports, 'greenwashing' is identified as a practice where sustainability-related statements, declarations, actions or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, financial product or financial service and which may be misleading to consumers, investors or other market participants.

Click here to see the Final Report. Visit our Simmons and Simmons Website to see more key findings about ESMA's Final Report.

Outlined below are some key updates from the reports

- National competent authorities (NCAs) are already taking steps to prioritise the supervision of sustainability-related claims, but it was noted that there have been a limited number of reported actual or potential occurrences of greenwashing. This may reflect multiple factors, including low level of signals (e.g. complaints) reaching NCAs, limited financial literacy, constraints on NCAs' resources and expertise for detection, and NCAs' difficulties in accessing good quality data.
- ESMA's report recommended market participants take steps to further integrate ESG risks into risk management systems and controls. Validation and diligence on ESG data should be addressed as robustly as financial information and increasing external verification of ESG data and enhancing transparency on ESG data methodologies were also highlighted.
- Firms were reminded to ensure that governance structures and processes to mitigate greenwashing risks (e.g. committees and guidance) are adopted.
- The EBA's report provides an analysis of greenwashing risks in the banking sector, and among other things urged institutions to substantiate forward-looking sustainability commitments such as net-zero pledges with credible plans and strategies and to provide clear and granular information on their green and sustainable finance targets.
- EIOPA 's opinion sets out four key principles that NCAs should consider when probing undertakings' sustainability claims and provides practical examples of good and bad practice for the insurance and pensions lifecycle.

Across the three reports, greenwashing continues to be a key theme driving the ESA's supervisory approach. ESMA will continue monitoring greenwashing risks and the supervisor intends to publish an opinion with views on how the EU regulatory framework for sustainable finance could further facilitate the investors' journey.

# 6 ESMA

## 6.1 ESMA Report on the 2023 Common Supervisory Action and Mystery Shopping on marketing

On 27 May, ESMA published its final report on the 2023 Common Supervisory Action with national competent authorities (NCAs) and accompanying Mystery Shopping Exercise on the application of marketing disclosures under MiFID.

ESMA's report sets out its findings, following its assessment of the content of firms' marketing communications and its request of NCAs to assess firms' procedures for marketing communications, including sustainability related claims and the use of third parties.

A number of NCAs reported instances where ESG-related information and claims were not backed up with data or sources. Examples include:

- references to ESG ratings or to self-set ESG scorings without providing clients with information to understand such ratings;
- referring to sustainability statements in regulatory documents without linking these documents; and
- making general statements about a fund's impact (e.g. referencing the UN's sustainability goals) without a precise description of what this means in concrete terms for the specific promoted product.

The report identified several areas for improvement, including the need for an approval and review process for marketing communications, and stronger involvement of senior management in the marketing and design process.

Next steps: Given the continued efforts by ESMA and the NCAs in monitoring marketing activities, firms should consider implementing ESMA's recommendations around sustainability (and more generally) into their processes to ensure that they remain compliant with the MiFID II requirements.

# 7 AML

## 7.1 Anti-money laundering: Publication of the new European AML package

On 19 June, the DOUE published its package of new anti-money laundering rules, represented by the **Anti-Money Laundering Regulation (AMLR) and the Sixth Anti-Money Laundering Directive (AMLD6)**. These are designed to safeguard EU citizens and the EU's financial system from the threats of money laundering and terrorism financing.

The AMLR is the first directly applicable instrument in the field of AML/CFT in the EU. It aims to harmonize a set of rules that had some fragmentation among Member States. The AMLR expands the scope of application compared to the previous Directive, including, among others, parent companies of financial entities and providers of crypto-asset services in accordance with the MiCA Regulation. The due diligence measures will be directly applicable through a Regulation rather than a Directive, leaving less room for discretion by the Member States. It also imposes stricter due diligence requirements, regulates beneficial ownership, and sets a cash payment limit of €10,000, among other measures.

AMLD6, which must be transposed into effect no later than 10 July 2027, aims to resolve divergences in the practices and approaches of the EU's competent authorities by defining clear requirements that contribute to smooth cooperation. It includes provisions on risk assessment, the collection of statistics, and supervision, ensuring a risk-based approach to effectively detect and mitigate AML/CFT activities. It also requires that EU member states make information from centralised bank account registers available through a single access point.

As part of the package, a **new European Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA)** is set up. The AMLA will have both direct and indirect supervisory powers over high-risk obligated entities in the financial sector. It will also play a supporting role for the non-financial sector and coordinate and support financial intelligence units. In cases of serious, systematic, or repeated breaches of the directly applicable requirements, the AMLA will have the power to impose financial sanctions on the selected obliged entities. The AMLA is expected to start operations in mid-2025.

The AMLR will apply three years after the entry into force. Member states will have two years to transpose some parts of the AMLD6 and three years for others.

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

On 26 June 2024, FATF published the Jurisdictions under Increased Monitoring - June 2024 (fatf-gafi.org)

The following countries had their progress reviewed by the FATF since February 2024: 1) Bulgaria; 2) Burkina Faso; 3) Cameroon; 4) Democratic Republic of Congo; 5) Croatia; 6) Haiti; 7) Kenya; 8) Mali; 9) Monaco; 10) Mozambique; 11) Namibia; 12) Nigeria; 13) Philippines; 14) Senegal; 15) South Africa; 16) South Sudan; 17) Syria; 18) Tanzania; 19) Venezuela; 20) Vietnam; and 21) Yemen.

Jurisdictions no longer subject to increase monitoring by the FATF are: 1) Jamica; and 2) Türkiye.

# 8 Artificial Intelligence

## 8.1 CNMV's Public consultation on the use of artificial intelligence in the financial sector

The Commission has launched a public consultation on the use of artificial intelligence (AI) in the financial sector. This consultation is aimed at all stakeholders in the sector, including companies and consumer associations, with a particular focus on those companies that provide or use services with AI systems. The objective of the consultation is to gather information on the application and impact of AI in financial services, to facilitate the analysis of market development and risk related to AI and the implementation of the future AI Law in the financial sector.

The consultation consists of a three-part questionnaire: the first focuses on general questions about the development of AI, the second on questions related to practical cases in the financial sector, and the third on the future AI Law in relation to the financial sector. For the purposes of this consultation, the concept of AI refers to an AI system as defined in the future AI Law: a machine-based system designed to operate at various levels of autonomy, which can influence physical or virtual environments.

The deadline to respond to the consultation is 13 September 2024. Responses are requested to be sent to the CNMV by email **documentosinternacional@cnmv.es** or regular mail. Once the consultation is completed, the Commission will publish a report with the results and analysis of the main trends and issues arising from the use of AI applications in financial services.

This document follows the Public Consultation issued by the European Commission on 18 June regarding the use of AI, or the intention to use it, in the financial sector. This comes subsequent to the endorsement and publication of the anticipated AI Regulation 2024/1732 in the Official Journal of the European Union, dated 17 June.

The targeted consultation will gather input from all financial services stakeholders including companies and consumer associations. Views are particularly welcome from financial firms that provide or deploy/use AI systems. This consultation is designed for respondents developing or planning to develop or use AI applications in financial services.

The views from stakeholders will support the Commission services in their assessment of market developments and risks related to AI and in the implementation of the AI Act in the financial sector. The consultation is focused on the objectives of the financial sector acquis and the AI Act and is not intended to focus on other policy objectives such as competition policy. It is intended to improve the effective implementation of these legal frameworks.

## 8.2 CNMV's Public consultation on the use of artificial intelligence in the financial sector

Click here to see the Public Statement on the use of AI in the provision of retail investment services.

On 30 May 2024, ESMA issued a Statement providing initial guidance to firms using Artificial Intelligence technologies (AI) when they provide investment services to retail clients.

When using AI, ESMA expects firms to comply with relevant MiFID II requirements, particularly when it comes to organisational aspects, conduct of business, and their regulatory obligation to act in the best interest of the client.

Although AI technologies offer potential benefits to firms and clients, they also pose inherent risks, such as:

- Algorithmic biases and data quality issues;
- Opaque decision-making by a firm's staff members;
- Overreliance on AI by both firms and clients for decision-making; and
- Privacy and security concerns linked to the collection, storage, and processing of the large amount of data needed by AI systems.

Potential uses of AI by investment firms which would be covered by requirements under MiFID II include customer support, fraud detection, risk management, compliance, and support to firms in the provision of investment advice and portfolio management.

ESMA and the National Competent Authorities (NCAs) will keep monitoring the use of AI in investment services and the relevant EU legal framework to determine if further action is needed in this area.

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