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Gómez-Acebo & Pombo



Financial Regulatory

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The aim of this newsletter is to bring together key legislation, supervisory criteria and docu-

mentation published in the period January-May 2023.

Editorial

The future of finance is digital¹, which is why the EU's package of proposals on digital finance included a number of measures aimed at further exploiting and boosting the potential of digital finance in terms of innovation and competition, while seeking to reduce risks.

The adoption of Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (DORA) is a key element of the digital finance package and establishes uniform requirements for the security of the networks and information systems that underpin the business processes of financial institutions.

ICT risk management and governance is a major concern for both financial institutions and competent authorities, and the new regulation seeks to ensure that financial institutions have high levels of digital operational resilience, which is defined as the ability of a financial institution to build, secure and review its operational integrity and reliability by ensuring, directly or indirectly through the use of services provided by third party ICT service providers, the full range of ICT-related capabilities necessary to preserve the secu-

rity of the networks and information systems that a financial institution uses and that underpin the continued provision of financial services and their quality, including in the event of disruptions.

Within the set of legislative actions of the digital finance package, it should also be noted that the European Parliament approved on 20 April 2023 the proposal for a regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937, which has not yet been approved by the Council.

The text approved by the European Parliament is structured in different blocks which establish: (i) the common legal framework that should apply by default to all those crypto-asset markets to which the financial regulation does not apply; (ii) the regulation of certain crypto-assets that can play a payment role, such as asset-referenced tokens and e-money tokens; (iii) the requirements that new intermediaries operating in these markets, which are currently inadequately regulated in most of the EU Member States, must meet in order to carry out their activities; (iii) the requirements to be met by new intermediaries operating in these markets, which are currently inadequately regulated in most jurisdictions; (iv) measures to prevent market abuse when crypto-assets

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU, COM(2020) 591, 23 September 2020.

are traded on a platform other than a trading platform; and (v) the powers of the various authorities.

During the first quarter of the year, various pieces of legislation were also approved with the aim of developing more sustainable finance and a major reform of the regulation of the markets in financial instruments took place with the aim of facilitating the development of Spanish securities markets, reorganising the matters regulated at the legal level and adapting national legislation to recent developments in European law.

The passage of the Securities Markets and Investment Services Act is a milestone as it recognises for the first time the representation of tradable securities through systems based on distributed ledger technology (DLT) and adopts additional measures for the implementation in Spain of Regulation (EU) No 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology.

Without prior recognition of this new mechanism for the representation of tradeable securities, Spanish issuers would not be able to access market infrastructures based on distributed ledger technology and certain types of shares, debt and units in collective investment schemes represented through systems based on these distributed ledger technologies would not be easily traded.

Notwithstanding the above, the approval of this new Act goes further and introduces relevant changes, which we have already commented on in other publications. These include the ad-

aptation of the framework for supervision of investment firms at the national level following the separation of prudential requirements according to the firm's size and other requirements related to systemic risks and their economic importance.

Likewise, it is important to note that the regime for special purpose acquisition companies (SPACs) is developed, the legislation applicable to regulated markets on takeover bids are extended to multilateral trading systems, and rules are included on the voluntary exclusion of a financial instrument from trading that until now only applied to regulated markets.

Other amendments have an impact on improving the competitiveness of Spanish securities markets or reinforcing the protection of retail investors, such as the *ex lege* delegation to the regulated market's operator of the admission to trading of fixed-income securities and the introduction of verification mechanisms to prevent entities that lack any authorisation to carry out this reserved activity from being advertised as supposedly legitimate.

Given that the implementation of this basic legal framework is entrusted to the relevant "general" regulations on the main blocks of matters that make up this sector of administrative activity, which have not yet been approved, we will analyse additional issues in detail in the coming months.

José Francisco Canalejas
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The aim of this newsletter is to bring together the most important legislation, supervisory criteria

and documentation published in the period January-May 2023.

Legislation

Spanish

The Securities Markets and Investment Services Act 6/2023 of 17 March²

Royal Decree-law 2/2023 of 16 March on urgent measures to increase pensioners' rights, reduce the gender gap and establish a new framework for the sustainability of the public pension system³

Draft Bill xx/202X, of xx xxxxxx, regulating the framework for corporate reporting on environmental, social and governance issues⁴

Royal Decree Bill regulating the content of reports on the estimation of the financial impact of risks associated with climate change for financial institutions, listed companies and other large companies⁵

Amendments to the Bill regulating client services⁶

Bank of Spain Circular 1/2023, of 24 February, to credit institutions, branches in Spain of credit institutions authorised in another European Union Member State and financial credit establishments, on the information to be sent to the Bank of Spain on covered bonds and other loan mobilisation instruments, and amending Circular 4/2017 of 27 November to credit institutions on public and sensitive financial reporting standards and model financial statements, and Circular 4/2019 of 26 November to credit financial institutions on public and sensitive financial reporting standards and model financial statements⁷

European

Commission Delegated Regulation (EU) 2022/2579 of 10 June 2022 supplementing Directive 2013/36/EU of the EP and of the Council with regard to regulatory technical standards specifying the information to be provided by an

² <https://www.boe.es/buscar/doc.php?id=BOE-A-2023-7053>

³ <https://www.boe.es/buscar/act.php?id=BOE-A-2023-6967>

⁴ https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/consulta/ficheros/APL_informacion_corporativa.pdf

⁵ https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/audienciapublica/Paginas/ECO_Tes_20230505_AP_RD_Riesgos_Cambio_Climatico.aspx

⁶ https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-104-4.PDF

⁷ https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-5481

undertaking in the application for authorisation in accordance with Article 8a of that Directive⁸

Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on the digital operational resilience for the financial sector and amending Regulations (EC) 1060/2009, (EU) 648/2012, (EU) 600/2014, (EU) 909/2014 and (EU) 2016/1011⁹

Directive (EU) 2022/2556 of the European Parliament and of the Council of 14 December 2022 amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 as regards digital operational resilience for the financial sector¹⁰

Commission Implementing Regulation (EU) 2023/266 of 9 February 2023 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 December 2022 until 30 March 2023 in accordance with Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance¹¹

Commission Delegated Regulation (EU) 2023/363 of 31 October 2022 amending and cor-

recting the regulatory technical standards laid down in Delegated Regulation (EU) 2022/1288 as regards the content and presentation of information in relation to disclosures in pre-contractual documents and periodic reports for financial products investing in environmentally sustainable economic activities¹²

Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules¹³

Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937¹⁴

Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849¹⁵

⁸ <https://www.boe.es/doue/2022/335/L00061-00063.pdf>

⁹ <https://www.boe.es/buscar/doc.php?id=DOUE-L-2022-81962>

¹⁰ <https://www.boe.es/doue/2022/333/L00153-00163.pdf>

¹¹ <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:32023R0266>

¹² <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:32023R0363>

¹³ <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:32023R0606>

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114>

¹⁵ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2023.150.01.0001.01.ENG&toc=OJ%3AL%3A2023%3A150%3ATOC

Other documents of interest

National authorities

Bank of Spain

Climate aspects of the Bank of Spain's investment portfolios, March 2023

Spanish Securities Market Authority (CNMV)

CNMV, *Quarterly Journal* 4Q, 2022, 26 January 2023

Technical Guide 1/2023 on enhancing transparency of CISs with a specific performance objective and fixed income CIS with a buy-and-hold strategy (26 April 2023)

Code of Best Practices for institutional investors, asset managers and proxy advisors in relation to their duties in respect of assets entrusted or services rendered

MiFID II Q & A Update, (tied agents), 19 April 2023

Communication: Information to the industry on the operation of entities providing investment services through agents, 19 April 2023

Communication: the CNMV reminds listed companies to better explain their *Alternative Performance Measures* (APMs) to avoid misleading investors

Results of the review of the first phase of the implementation of sustainability regulations in CISs

Conclusions of the review of the obligation to report suspicious transactions of market abuse in 2022

Directorate-General for Insurance and Pension Funds (DGSFP)

DGSFP Decision of 29 December 2022 on the maximum number of years of difference between the central year of the observation period of certain survival tables and the date of calculation of the provision.

DGSFP Decision of 11 January 2023 publishing the maximum interest rate to be used in the calculation of the life insurance provision, applicable to the financial year 2023.

Directorate-General for Industry and SMEs

Directorate-General for Industry and SMEs Decision of 10 April 2023 making the draft UNE standards that the Spanish Association for Standardisation has in the pipeline for the month of March 2023, including PNE-ISO 32210 *Sustainable Finance. Guidance on the application of sustainability principles in financial sector organisations*, BOE 13 April, publicly available for objection. Consultation period: 20 calendar days.

European authorities

Commission of the European Union

Public consultation on the amendment of Commission Delegated Regulation 2021/2139 of 4

June supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, 5 April 2023, end of consultation period: 3 May 2023.

Public consultation on taxonomy criteria for economic activities making a substantial contribution to one, or more, of the following environmental objectives: a) sustainable use and protection of water and marine resources, b) transition to a circular economy, c) pollution prevention and control, and d) protection and restoration of biodiversity and ecosystems.

European Retail Investment Strategy (“RIS”), which has resulted in the adoption of the following:

Proposal for a Directive amending Directives 2009/65/EC (UCITS), 2009/138/EC (Solvency II), 2011/61/EU (AIFMD), 2014/65/EU (MiFID) and 2016/97/EU (IDD) to strengthen the European framework for the protection of retail investors.

Proposal for a Regulation amending Regulation (EU) No. 1286/2014 (PRIIPS) for the modernisation of the DFI.

European Supervisory Authorities

EBA

EBA, EIOPA, ESMA, Joint Consultation Paper, Review of SFDR Delegated Regulation regarding PAI and financial product disclosures, JC 2023-09, 12 April 2023.

EBA Annual Report on the Convergence of Supervisory Practices in 2022.

ESMA

ESMA Newsletter December 2022, 18 January 2023.

ESMA, Public consultation on Level 3 technical issues in post-trade, 19 January 2023.

ESMA Market Report: Costs and Performance of EU Retail Investment Products 2023, ESMA50-165-2357, 17 January 2023.

ESMA launches a common supervisory action with national competent authorities on the application of MiFID II disclosure rules with regard to marketing communications across the European Union.

Amendment to the Guidelines on MiFID II product governance requirements, ESMA35-43-3448, 27 March 2023.

Update on COM responses to questions from the three European supervisors on the interpretation of Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

ESMA, opinion addressed to the European Commission with suggestions for clarification of the concept of “undue costs” in the Directives on undertakings for collective investment in transferable securities (UCITS Directive) and on alternative investment fund managers (AIFMD Directive). 17 May 2023

EIOPA

New survey to map financial innovation in insurance.

Monthly technical information for Solvency II relevant risk free interest rate term structures – end of December 2022.

Cost and Past Performance Report.

Supervisory Convergence Plan - 2023.

Report on insurers' inclusion of adaptation measures to climate change in their non-life underwriting practices.

Consultation on Draft amending Regulatory Technical Standards adapting the base euro amounts for professional indemnity insurance and for financial capacity of insurance intermediaries under IDD.

Consultation on technical advice for the review of the IORP II Directive.

Digitalisation market monitoring survey.

Supervisory statement on differential pricing practices in non-life insurance lines of business.

Comparative study on the modelling of market and credit risk in companies' internal models.

ECB

Guide on qualifying holding procedures. March 2023.

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