



# Regulatory insights

October 2023



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# European updates

## ESG & Sustainability Finance

### ESMA launches a Common Supervisory Action on MiFID II sustainability requirements

On 3 October 2023, ESMA announced the launch of a Common Supervisory Action ("**CSA**") with NCAs regarding the integration of sustainability in firms' suitability assessment and product governance processes and procedures under MiFID II.

The goal of the CSA will be to assess the progress made by intermediaries in the application of the key sustainability requirements which came into force in August 2022. The CSA will cover:

- ❑ how firms collect information on their clients' "sustainability preferences";
- ❑ the arrangements firms have put in place to understand and correctly categorise investment products with sustainability factors for the purpose of the suitability assessment;
- ❑ how firms ensure the suitability of an investment with respect to sustainability;
- ❑ how firms specify any sustainability-related objectives a product is compatible with as part of the target market assessment of the investment product.

**ESMA and the NCAs will carry out the CSA during 2024.**

### EU Parliament adopts European Green Bond Regulation

On 5 October the EU Parliament plenary has adopted the regulation on European green bonds (**EuGB**). The European Green Bond Regulation establishes uniform requirements for issuers of bonds that wish to use the designation EuGB for their environmentally sustainable bonds that are aligned with the EU taxonomy.

The disclosure requirements, which are set out in template formats, can also be used by companies issuing bonds which are not yet able to adhere to all the standards of the EuGB, but still wish to signal their green aspirations.

Until the taxonomy framework is fully up and running, issuers of an EuGB would need to ensure that at least 85% of the funds raised by the bond are allocated to economic activities that align with the EU's Taxonomy Regulation. The other 15% can be allocated to other economic activities provided the issuer complies with the requirements to clearly explain where this investment will go.

The Council adopted the regulation on 23 October 2023. It will be signed, and published in the EU's Official Journal before entering into force 20 days later. It will start applying 12 months after its entry into force.



## EU taxonomy - European Commission and Platform on Sustainable Finance launch stakeholder request mechanism

On 17 October 2023 the EU Commission and the Platform on Sustainable Finance have launched a [stakeholder request mechanism](#) to consider suggestions from stakeholders regarding activities in the EU taxonomy.

The stakeholder request mechanism allows stakeholders to submit suggestions, based on scientific and technical evidence, on new economic activities that could be added to the EU taxonomy, or on potential revisions of technical screening criteria of existing activities.

The Platform on Sustainable Finance will assist the EU Commission in the analysis of submitted requests and provide recommendations to it. The stakeholder request mechanism will be continuously running, allowing respondents to submit their input at any given time.

On 15 December 2023, all requests will be processed by the Platform's Technical Working Group. After 15 December 2023, the tool will continue to run, and a second cut-off-date will be communicated soon after.

### ECON publishes draft reports on proposed Directive on retail investment protection and Regulation amending PRIIPs

On the 5 October 2023 the ECON has published two draft reports on each of the legislative proposals adopted by the EU Commission as part of its retail investment strategy, namely a proposed [Omnibus Directive](#) amending MiFID2, IDD, Solvency II, the UCITS Directive and AIFMD, and a proposed [Regulation](#) amending the PRIIPs Regulation.

The reports suggest several amendments to the EU Commission's proposed package. These include:

- ❑ extending the timing for the review on the new **inducements regime** to five years starting from the end of the transposition period of the Directive, in order to see its effects on the market. The report notes that the ECON is strongly against a full ban on inducements; at a glance'.
- ❑ revisions to the **best interests test**, including for insurance-based investment products, stipulating that financial advice shall be given based on the performance, level of risk, costs and charges of the product or, where applicable, the underlying investment option(s);
- ❑ the introduction of a new obligation for companies to register in the same Member State where their head office is located, in order to avoid forum shopping and boost the Commission's proposal on cross-border supervision
- ❑ deleting the Value for Money benchmarks until a more balanced approach can be agreed upon; and
- ❑ deleting the new section in the Key Information Document entitled 'Product at a glance'.

The European Commission adopted the proposed legislation in May 2023.

### EU Council publishes final compromise texts on MiFIR2 and MiFID3

The EU Council's Committee of Permanent Representatives (Coreper) has published the final compromise texts for the EU Commission's proposals for a [Regulation](#) and [Directive](#) amending the Markets in Financial Instruments Regulation and Directive (MiFIR2/MiFID3).

The changes to the EU's trading rules are broadly intended to increase the global competitiveness of the EU's capital markets and give investors greater access to market data.

The final texts have been sent with a letter to the EU Parliament's Committee on Economic and Monetary Affairs (ECON) confirming that, should the EU Parliament adopt those texts at first reading, the Council would approve the Parliament's position.

The Council and the Parliament reached provisional agreement on the proposals on 29 June 2023.



### EBA publishes its technical advice on the classification of asset-reference tokens and e-money tokens and related fees under MiCA

On 29 September 2023, the EBA published its [response](#) to the EU Commission's Call for Advice on two delegated acts under the Markets in Crypto-assets Regulation ((EU) 2023/1114) ("**MiCA**"). The response contains technical advice in relation to the criteria for determining the significance of asset-referenced tokens (ARTs) and electronic money tokens (EMTs), and the supervisory fees that may be charged by the EBA to issuers of significant ARTs and EMTs.

In response to the first request, the EBA recommends a set of core and ancillary indicators for each criterion for determining significant ARTs and EMTs. These core indicators would provide for a provisional assessment of significance, while the ancillary indicators would be employed should the core indicators lead to an inconclusive determination. The EBA notes that these would encompass diverse elements of interconnectedness and international scale, and would take account of data availabilities.

In response to the second request, the EBA's advice addresses

- ❑ the type of supervisory fees;
- ❑ the matters for which fees are due;
- ❑ the amount of the fees and the manner in which they are to be paid; and
- ❑ the methodology for calculating the maximum amount per entity that can be charged by the EBA.

The EBA highlights that flexibility will be needed to estimate the amount of fees from year-to-year given the ever-evolving market for crypto-assets, and the fact the number of tokens within its direct supervision, and supervisory priorities, may evolve substantially over time.

### ESMA consults on draft RTS and ITS on MiCA

On 5 October 2023 ESMA has published a second [Consultation Paper](#) (ESMA75-453128700-438) on draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) under MiCA. The first consultation package was published in July 2023.

The proposed RTS and ITS cover a number of matters, including:

- ❑ sustainability indicators for distributed ledgers;
- ❑ disclosures of inside information;
- ❑ technical requirements for white papers;
- ❑ trade transparency measures; and
- ❑ record-keeping and business continuity requirements for cryptoasset service providers.

In addition to the Consultation Paper, ESMA has published a [proof of concept](#) which demonstrates how the proposed format requirements included in the draft ITS could apply in practice with editable forms, formats and templates.

ESMA intends to submit the draft RTS and ITS to the European Commission for endorsement by 30 June 2024. A third consultation package will be published in Q1 2024.

The consultation closes on 14 December 2023.

## ESMA publishes statement on implementation timeline of MiCA

On 17 October 2023 ESMA published a [statement](#) clarifying the timeline for the implementation of MiCA and encouraging market participants and NCAs to begin preparing for the transition.

ESMA stresses the importance for holders of crypto assets and (current or prospective) clients of crypto asset services in the EU to be aware that, in addition to the risks inherent in crypto assets, MiCA rules on the provision of crypto asset services will not apply until December 2024. Furthermore, under a “grand-fathering” clause, member states can still grant current providers of crypto asset services in their jurisdictions a “transitional period” up to an additional 18-months after MiCA becomes applicable. During this period, these providers may continue to operate without a MiCA license. ESMA warns that holders of crypto assets and clients of crypto asset service providers may therefore not benefit from the full rights and protections afforded to them under MiCA until 1 July 2026.

## EBA launches consultations on draft RTS and guidelines on MiCA

On 19 October 2023 EBA published several consultation papers on draft Regulatory Technical Standards (RTS) and guidelines pertaining to MiCA.

More specifically, these comprise:

- ❑ [draft RTS](#) setting out the procedure for the approval of white papers for asset-referenced tokens (ARTs) issued by credit institutions;
- ❑ [draft RTS](#) on the minimum content of the governance arrangements in the remuneration policy as specified under Article 45(4) MiCA; and

- ❑ [draft guidelines](#) on the minimum content of the governance arrangements for issuers of ARTs.

The consultations will all close on 22 January 2024.

## EBA and ESMA consult on two sets of joint guidelines under MiCA

On 20 October 2023 EBA and ESMA published a [Consultation Paper](#) on two draft Joint Guidelines covering suitability assessment of members of the management body, and suitability of shareholders and members with qualifying holdings of issuers of asset referenced tokens (ARTs) and of crypto-asset service provider (CASPs). The guidance aims to provide clarity and harmonisation with respect to the criteria to assess the suitability of the management body, the shareholders and members with qualifying holdings, thus reducing the risk of arbitrage in the application of the rules.

The draft Joint Guidelines on the suitability assessment of the members of the management body of issuers of ARTs and CASPs provide common criteria to assess the appropriate knowledge, skills and experience of members of the management body as well as their good repute, honesty and integrity and if they are able to commit sufficient time to perform their duties.

The draft Joint Guidelines on the suitability assessment of shareholders or members, whether direct or indirect, with qualifying holdings in issuers of ARTs or CASPs provide competent authorities common methodology to assess the suitability of the shareholders and members with direct or indirect qualifying holdings for purposes of granting authorisation as issuers of ARTs or as CASPs, and for carrying out the prudential assessment of proposed acquisitions.

The consultation closes on 22 January 2024.

## European Commission adopts Delegated Regulation in the context of the Crowdfunding Regulation

On 29 September 2023, the EU Commission adopted its [Delegated Regulation](#) on regulatory technical standards ("RTS") regarding certain obligations on crowdfunding service providers ("CSPs") under the Crowdfunding Regulation. The Delegated Regulation specifies requirements for the credit scoring of crowdfunding projects and the pricing of crowdfunding offers, as well as the risk management policies and procedures of CSPs. In particular the following is addressed:

- ❑ necessary disclosures to investors regarding the methods used to calculate the credit score for crowdfunding projects and suggest the price for crowdfunding offers;
- ❑ factors which must be regarded so as to ensure that the pricing of the loans that CSPs facilitate on their platforms is fair and appropriate;
- ❑ information and factors that CSPs must have regard to when assessing the credit risk for a crowdfunding project or project owner;
- ❑ information and factors that CSPs must have regard to when conducting a loan valuation at different points in the life cycle of the loan;
- ❑ the need for methods for assessing creditworthiness to be proportionate to the size, type and maturity of the loan; and
- ❑ governance arrangements that CSPs must put in place to support information disclosure to investors and the risk management framework.

The Delegated Regulation will enter into force on the 20th day following its publication in the Official Journal of the European Union.

## ESAs publish their response to a Call for Advice regarding critical ICT third-party providers under DORA

On 29 September 2023, the ESAs published their [joint response](#) to the EU Commission's Call for Advice on two delegated acts under the digital operational resilience for the EU financial sector ((EU) 2022/2554) (DORA). The two delegated acts address:

1. additional criteria for critical ICT third-party service providers ("CTPPs"); and
2. the determination of oversight fees levied on CTPPs.

The ESAs propose, in relation to the criteria for critical CTPPs, 11 quantitative and qualitative indicators, as well as the necessary information to establish and interpret them. They recommend minimum relevance thresholds for quantitative indicators as a base when designating critical CTPPs. The ESAs note that this advice excludes any details of the designation procedure itself due to it exceeding the Call for Advice's scope. Notwithstanding this the ESAs intend to define these details no later than six months after the adoption of the delegated act by the EU Commission.

In relation to oversight fees, the ESAs propose, among other things, how the amount to be imposed should be calculated and paid, the basis for the expenditures' calculation and the available information for determining applicable turnover. They also put forward a financial contribution for voluntary opt-in requests. The ESAs will specify other practical aspects in relation to the estimation of oversight expenditures and operational aspects as part of the implementation of the oversight framework.

DORA will enter into force on 17 January 2025 and the EU Commission must adopt the delegated acts by 17 July 2024.



## ESMA assesses market developments in DeFi and explores the smart contracts system

On 11 October 2023 ESMA published two articles on decentralised finance (DeFi), one on [developments and risks in the EU market](#) and another on a [methodology for the categorisation of smart contracts](#).

The first article on DeFi developments and risks in the EU shows that DeFi raises serious risks to investor protection, because of the highly speculative nature of many DeFi arrangements and important operational and security vulnerabilities. Risks to financial stability are not meaningful at this point owing to DeFi's small size but require monitoring. In addition, DeFi's unique features have led to new market manipulation issues that need to be addressed.

DeFi has seen significant development over the last few years, although it remains very small in size (the Total Value Locked in DeFi protocols reached USD 45bn as of end-June 2023 representing less than 4% of the total crypto-assets market capitalisation), and has brought attention from consumers, but also from global regulators because of the risks it raises.

The second article introduces a methodology for the categorisation of smart contracts which leverages on the latter's source code and on topic modelling. It explores the rate of deployment of smart contracts belonging to the identified categories over time, contributing to an enhanced and nuanced understanding of DeFi, and also to identifying related significant risks.

ESMA defines five major smart contract categories and monitors their relative incidence over time. It notes a significant difference in terms of heterogeneity between the first and the second surge in smart contract deployment (occurring in 2017-2018 and in 2021-2023, respectively), reflecting the adoption of increasingly complex and interdependent protocols that have come to characterise DeFi.

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AML Anti-Money Laundering	10
CSRD Corporate Sustainability Reporting Directive	10
CySEC Cyprus Securities and Exchange Commission	10
CP Consultation Paper	10
EBA European Banking Authority	10
EC European Commission	10
ESG environmental, social, and governance	10
EMIR European Market Infrastructure Regulation	10
ESAs European Supervisory Authorities (EBA, EIOPA and ESMA)	10
ESMA European Securities and Markets Authority	10
EIOPA European Insurance & Occupational Pensions Authority	10
EU European Union	10
MiFID Markets in Financial Instruments Directive	10
NCA National Competent Authority	10
RTS Regulatory Technical Standards	10
SFDR Sustainable Finance Disclosure Directive	10
OECD Organisation for Economic Co-operation and Development	10
UCITS Directive directive 2009/65/EC on Undertakings for Collective investments in Transferable Securities	10
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