DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Investment Firms

Quarterly Legal and Regulatory Update

Period covered: 1 October 2022 – 31 December 2022

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1. MIFID II

1.1 ESMA consults on rules for passporting for investment firms

On 17 November 2022, the European Securities and Markets Authority (**ESMA**) published a consultation paper (**Consultation Paper**) on the review of the technical standards under Article 34 of Directive 2014/65/EU (**MiFID II**). The technical standards which are the subject of the Consultation Paper became effective as and from 3 January 2018 and address the following: (i) the information to be notified by firms which wish to provide cross-border investment services without the establishment of a branch; and (ii) establish standard forms, templates, and procedures for the transmission of that information.

The main amendments proposed in the Consultation Paper will require investment firms to furnish the following additional information at the passport notification stage:

- the marketing means the firm will use in host Member States;
- the language(s) for which the investment firm has the necessary arrangements to deal with complaints from clients from each of the host Member States in which it provides services;
- the Member States in which the firm will actively use its passport, as well as the categories of clients targeted; and
- the investment firm's internal organisation in relation to the cross-border activities of the firm.

The Consultation Paper can be found here. For more information, please see Dillon Eustace' in depth briefing paper which can be accessed here.

1.2 European Commission publishes new measures to make EU capital markets more attractive

On 7 December 2022, the European Commission published new measures to amend MiFID II to make public capital markets in the European Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (**SMEs**) and repealing Directive 2001/34/EC (**Listing Directive**).

The measures include an exemption to the MiFID II unbundling provisions for investment research on issuers whose market capitalization did not exceed EUR 10 billion during the preceding 36 months, provided that certain conditions are met. Directive (EU) 2021/338 first amended the rules on investment research, initially allowing for an exemption up to EUR 1 billion and requesting that the European Commission would review such rules by 31 July 2021 at the latest. Following that review, the new measures propose increasing from EUR 1 billion to EUR 10 billion the threshold of companies' market capitalisation below which the unbundling rules do not apply, allowing for more SMEs to benefit from a larger research coverage and increasing visibility for potential investors.

The measures also include proposals to simplify the listing and post-listing requirements to attract SMEs to the EU public markets (**Listing Act Measures**). These include: (i) the repeal of the Listing Directive; (ii) amendments to Regulation (EU) No 596/2014 (**MAR**); and (iii) amendments to Regulation (EU) 2017/1129 (**Prospectus Regulation**), amongst other measures.

The EC considers that the amendments to MiFID II and the Listing Act Measures are in line with the overarching objectives of MiFID II to increase transparency and reinforce investor protection.

A copy of the Proposal can be accessed here.

1.3 ESMA updates Questions and Answers on MiFID II and MiFIR market structures topics

On 16 December 2022, ESMA published updated Questions and Answers (**Q&As**) on MiFID II and Markets in Financial Instruments Regulation (600/2014) (**MiFIR**) market structure topics.

The update includes one new Q&A concerning multilateral and bilateral systems. Question 33 in Section 5 clarifies that an investment firm acting as single liquidity provider on a regulated market and/or on a multilateral trading facility can operate as a systematic internaliser (**SI**) but only if the two activities are fully separated.

A copy of the Q&As on MiFID II and MiFIR market structure topics can be accessed here.

1.4 ESMA publishes opinion on amendments to Commission Delegated Regulation (EU) 2017/587 (RTS 1) and Commission Delegated Regulation (EU) 2017/583 (RTS 2)

On 19 December 2022, ESMA published an opinion on amendments to Commission Delegated Regulation (EU) 2017/587 (**RTS 1**) and Commission Delegated Regulation (EU) 2017/583 (**RTS 2**) supplementing MiFIR (**Opinion**).

The Opinion endorses the EC's proposed amendments to the regulatory technical standards (**RTS**) regarding equity transparency (RTS 1) and non-equity transparency (RTS 2) as set out in an annex to the opinion. The amendments introduce a new flag in RTS 2, amend the definitions of certain fields in the post-trade transparency reporting, and include transitional provisions including postponing the application date of certain provisions to 1 January 2024 in both RTS 1 and 2.

The Opinion is submitted officially to the EC who will have three months to endorse the reviewed RTS.

A copy of the Opinion can be accessed here.

1.5 Council of EU publishes texts of general approach on proposed amendments to MiFIR and MiFID II

On 20 December 2022, the Council of the EU (the **Council**) announced it had agreed its general approach on the proposed Regulation amending Regulation (EU) No 600/2014 (**Markets in Financial Instruments Regulation** or **MiFIR**) (**Draft Regulation**) and the proposed Directive amending the MiFID II Directive (**Draft Directive**). On 21 December 2022, the Council published the proposed compromise texts of the draft Regulation and the draft Directive.

The draft proposals include the following:

- Changes to the trade data transparency regime;
- Proposal for a single consolidation tape provider (**CTP**) for each asset class;
- Requirement for CT's to provide reliable consolidated data close-to-real ime
- Adjustments to the share trading / derivatives trading obligations;
- The regulatory technical standard (**RTS**) 27 best execution reporting requirement is being deleted;
- Clarifies the limitation on the dark trading;
- Prohibition on systematic internalisers (**SIs**) offering payment for retail order flow (**PFOF**);
- Obligation for regulated markets, investment firms and market operators to have in place arrangements to ensure they meet data quality standards set out in MiFIR; and
- Imposition of sanctions for infringements of certain new provisions in MiFIR, including mandatory contributions to CTPs.

A copy of a press release by the Council of the EU from 20 December 2022 can be accessed here.

A copy of the negotiating mandate for the Draft Regulation can be accessed here and a copy of the negotiating mandate for the Draft Directive can be accessed here.

A copy of the draft Regulation can be accessed here and the draft Directive can be accessed here.

A copy of the "I" item note can be accessed here.

2. IFD/IFR

2.1 EBA publishes final technical standards on the measurement of liquidity risks for investment firms

On 14 November 2022, the European Banking Authority (**EBA**) published its final report on the draft regulatory technical standards (**RTS**) on specific liquidity measurement for investment firms in accordance with Article 42(6) of Directive 2019/2034 (**Investment Firms Directive** or **IFD**). Under Article 42(1) of IFD, competent authorities may impose specific liquidity requirements on an investment firm based on the outcome of the supervisory review and evaluation process (**SREP**).

The EBA was mandated to develop the RTS under Article 42(6) to specify how the liquidity risk and elements of liquidity are to be quantified in a manner consistent with the size, structure and internal mechanism of the investment firms and nature, scope, and complexity of their activities.

The EBA developed the draft RTS to establish a homogenous approach that defines the relevant elements of liquidity risk to be considered in the context of specific liquidity requirements. The RTS focus on covering many elements that raise concerns in respect of liquidity risk and which the competent authority shall consider when assessing the materiality of those risks.

The EBA will submit the draft RTS to the European Commission for endorsement before being published in the Official Journal of the European Union (**OJ**). The RTS will apply from 20 days after the publication in the OJ.

A copy of the draft RTS can be found here.

2.2 Guidelines on the criteria for the exemption of investment firms from liquidity requirements in accordance with IFR become applicable

On 28 November 2022, guidelines published by the EBA on the criteria for the exemption of investment firms from liquidity requirements in accordance with IFR (the **Guidelines**) became applicable. The EBA published its final report on the Guidelines in July 2022.

Under Article 12(1) of IFR small and non-interconnected investment firms may be exempted from the liquidity requirements. The Guidelines consider three main elements when considering when these firms may be exempt:

- the set of investment services and activities provided by investment firms which are eligible for the exemption;
- the criteria for the exemption, and;
- guidance for competent authorities when granting and withdrawing an exemption.

The Guidelines specify the set of investment services and activities which may qualify an investment firm for an exemption. The Guidelines also provide competent authorities with additional areas to have due consideration for, such as ancillary services provided by the investment firms.

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A copy of the Guidelines can be accessed here.

2.3 Guidelines on the data collection exercises regarding high earners under CRD and IFD become applicable

On 31 December 2022, guidelines published by the EBA on the data collection exercises regarding high earners under Directive 2013/36/EU (**Capital Requirements Directive** or **CRD**) and IFD (**Guidelines**) became applicable.

The EBA published its final updated Guidelines on the data collection exercise on high earners on 30 June 2022.

The CRD and the IFD require competent authorities to collect information on the number of natural persons, per institution and investment firm respectively, who are remunerated EUR 1 million or more per financial year, in pay brackets of EUR 1 million. The information should also include details on their job responsibilities, the business area and the main elements of the salary, bonus, long-term award, and pension contribution. Guidance is provided to ensure that the data is of the appropriate quality for deriving reliable and consistent information.

The annual collection of data regarding high earners under the updated Guidelines should start in 2023 for the financial year that ends in 2022.

A copy of the Guidelines can be accessed here.

2.4 Guidelines on the benchmarking exercises on remuneration practices and the gender pay gap under IFD become applicable

On 31 December 2022, guidelines published by the EBA on the benchmarking exercises on remuneration practices and the gender pay gap under IFD (**Guidelines**) became applicable. The EBA published its final report on the Guidelines on 30 June 2022.

Under Article 34(2) of IFD, the EBA is mandated to benchmark remuneration trends and practices of investment firms in Member States. Specific guidelines have been provided to benchmark the gender pay gap. The Guidelines seek to allow competent authorities to monitor their implementation and their development at different levels of pay.

The accompanying compliance table, listing the competent authorities that comply or intend to comply with the Guidelines on the benchmarking exercises on renumeration practices and the gender pay gap under IFD was issued on 26 October 2022, and updated on 22 December 2022.

Remuneration benchmarking data will be collected under the new Guidelines in 2023 for the financial year 2022. The first data on the gender pay gap will be collected in 2024 for the financial year 2023.

A copy of the Guidelines can be accessed here.

3. EMIR & SFTR

3.1 EMIR - Update on recent regulatory developments

During the period 1 October 2022 to 31 December 2022, there were a number of Regulation (EU) No 648/2012 (**EMIR**) related regulatory developments took place. Please see our Dillon Eustace briefing on the topic which can be accessed here.

4. CENTRAL BANK OF IRELAND

4.1 Central Bank update Monthly Client Assets Report template

On 5 October 2022, the Central Bank of Ireland (the **Central Bank**) published a revised Monthly Client Assets Report (**MCAR**) template to provide investment firms the opportunity to begin preparations to ensure that they can report the new and enhanced client asset information required by the template, following the publication of the revised Client Asset Requirements in July 2022. The CBI published an explanatory guidance note accompanying the revised template.

Investment firms are advised by the Central Bank to begin preparations to ensure that they can report the new and enhanced client asset information required by the revised MCAR template. However, investment firms are not required to commence using the template for the purpose of MCAR reporting at this time, and the Central Bank advises that they should continue to submit the existing MCAR until further notice.

A copy of the revised template can be accessed here.

A copy of the Guidance note can be accessed here.

4.2 Central Bank "Dear Chair" Letter -Protecting Consumers in a Changing Economic Landscape

On 17 November 2022, the Central Bank published a "Dear Chair" Letter in which it emphasised the importance of financial services firms meeting the obligations set out in the Central Bank's Consumer Protection Outlook Report in March 2022 in light of the materialisation of a more challenging economic outlook since the Report's publication.

The Central Bank outlines additional steps to be taken by firms in the following areas:

- Affordability and suitability;
- Provision of relevant, clear and timely information;
- Effective operational capacity; and
- Sales and product governance.

A copy of the "Dear CEO" Letter is available here.

4.3 Central Bank (Individual Accountability Framework) Bill 2022

On 7 December 2022, the Central Bank (Individual Accountability Framework) Bill 2022 (**Bill**) completed the Committee Stage in the Dáil. The Bill will soon move into the Report Stage in the Dáil and is expected to be put before the Seanad for its consideration early this year.

Under the Bill, a new individual accountability framework will include the establishment of a "Senior Executive Accountability Regime" (**SEAR**) as well as well as the introduction of new enforceable conduct standards (or standards of behaviour) expected of regulated entities, their senior executive functions and other staff, enhancements to the fitness and probity regime and a unified enforcement process which aims to break the existing "participation link" whereby the relevant regulated entity must be found to have committed a breach before individuals within it can be held to account.

For more information on the key amendments to the Bill put forward at Committee Stage, please refer to our recent briefing here.

You can access a copy of the text of the Bill and follow the progress of the Bill here.

5. CONFLICT IN UKRAINE

In reaction to Russia's continued military aggression against Ukraine, the European Union has adopted additional economic sanctions against Russia and Belarus which have been introduced through a suite of additional packages adopted by the Council of the European Union announced on 5th October 2022 and 16 December 2022 respectively.

These packages included, amongst others, an extension to the list of those individuals and entities subject to restrictive measures. Commission Regulation (EU) 2022/2474 also provide individual national competent authorities with the power to authorise specific transactions which are necessary for the divestment and withdrawal by European companies from those Russian state-owned entities subject to the transaction ban subject to such conditions as the relevant national competent authority deems necessary.

For a complete overview of the additional measures introduced by the Council on 6 October 2022, please see the related press release which is available from here.

For a detailed overview of the additional measures introduced by the Council on 16 December 2022, please see the related press release which is available from here.

A consolidated version of the European Commission's frequently asked questions on the range of measures introduced in response to Russia's continued military aggression against Ukraine is available here.

6. PRIIPs

6.1 PRIIPS KID- Questions and Answers (updated 21 December 2022)

On 14 November 2022, the ESAs published a revised version of their Q&A on the PRIIPs Key Investor Document (**PRIIPs KID**) in which they provided additional guidance on a number of matters, including:

- the obligation on funds to disclose in the "What is this product?" section of the PRIIPs KID as to whether the fund is actively or passively managed;
- disclosure obligations imposed on index-tracking and index-tracking leveraged UCITS funds
- the product categories which must be used for performing market risk assessment;
- the calculation and disclosure of performance scenarios;
- the calculation and disclosure of costs incurred by the relevant fund;
- how past performance signposted to in the PRIIPs KID should be presented on the relevant website/other document; and
- use of "representative" share class PRIIPs KID.

On 21 December 2022, the ESAs subsequently published an updated Q&A on the PRIIPs KID.

The revised Q&A included by the ESAs address the new Level 2 measures introduced via Commission Delegated Regulation (EU) 2021/2268 which apply from 1 January 2023 onwards. It provides updated guidance on the calculation methodology (i) for performance scenarios and (ii) for costs (including transaction costs) as well as providing additional guidance on the presentation of costs.

The updated PRIIPs KID Q&A dated 22 December 2022 is available here.

6.2 New Central Bank Webpage on PRIIPs KID

The Central Bank has created a webpage which sets down the filing requirements for PRIIPs KID for UCITS funds. The Central Bank's webpage on PRIIPs KID is available here.

7. SUSTAINABILITY

7.1 Publication of ESA Q&A on SFDR

On 17 November 2022, the ESAs published a Questions and Answers on the SFDR Delegated Regulation (**Q&A**).

In the Q&A, the ESAs provide additional guidance to financial market participants, including advices on the following matters:

- PAI disclosures to be made by financial market participants falling within the scope of Article 4(1) of the SFDR;

- Calculation of "current value of all investments" under the PAI and Taxonomy frameworks;
- Disclosures to be made by financial products falling within the scope of Article 8 or Article 9 of the SFDR; and
- Taxonomy-aligned investment disclosures and calculation of Taxonomy alignment.

A copy of the Q&A is available here.

7.2 European Commission adopts Commission Delegated Regulation amending existing SFDR Level 2 Regulations to incorporate additional disclosure obligations relating to exposure to investments in Taxonomy-aligned gas and nuclear economic activities.

On 31 October 2022, the European Commission adopted amending SFDR Level 2 Regulations (which include revised pre-contractual and periodic reporting annexes) (**Draft Amending SFDR Level 2 Regulations**) which will require financial markets participants with financial products falling within the scope of the Taxonomy Regulation to use such updated pre-contractual and periodic reporting annexes in order to provide information on investments in taxonomy-aligned fossil gas and nuclear economic activities. In particular, disclosures must make clear the proportion that such investments represent within all investments, and in environmentally sustainable economic activities. The recitals to the Draft Amending SFDR Level 2 Regulations also indicate that such information must be disclosed on the website of the financial market participant.

The European Parliament and the Council of Europe have 3 months from date of receipt from the EC to scrutinise the amending SFDR Level 2 Regulations (i.e. until 31 January 2023) which provide that they should take effect on the third day following their formal publication in the OJ.

A copy of the amending SFDR Level 2 Regulations is available here and a copy of the annexes thereto is available here.

7.3 ESA Call for Evidence on Greenwashing

The ESAs also published a Call for Evidence on potential greenwashing practices in the whole EU financial sector on 15 November 2022 (**Call for Evidence**).

In the Call for Evidence, the ESAs seek input from stakeholders across the EU financial sector on examples of potential greenwashing practices at both entity and product level, any available data to help the ESAs gain a concrete sense of the scale of greenwashing and identify areas of high greenwashing risks and views from stakeholders on how to understand greenwashing and what the main drivers of greenwashing might be.

The responses received from stakeholders will inform an interim progress report which the ESAs must each provide to the EC by May 2023 and a final report which must be provided to the EC by May 2024 detailing greenwashing risks and occurrences in the EU financial sectors and on the supervisory action taken and challenges faced to address those risks.

Reponses to the Call for Evidence must be submitted by 10 January 2023.

A copy of the Call for Evidence is available here.

7.4 EU Corporate Sustainability Reporting Directive is published in the OJ

On 16 December 2022, the EU Corporate Sustainability Reporting Directive (**CSRD**) was published in the OJ.

The CSRD amends both the scope and the reporting obligations imposed under the existing Non-Financial Reporting Directive (**NFRD**) so that all EU large companies, all EU listed companies[1] and certain non-EU companies meeting specific thresholds will be required to incorporate sustainability-related information relating to environmental matters, social and human rights and governance factors in the non-financial statement included in their annual financial statements, using specific mandatory reporting templates prepared by the European Financial Reporting Advisory Group.

The CSRD will be phased in as follows for financial years starting on or after:

- 1 January 2024 for companies already subject to the NFRD;
- 1 January 2025 for companies that are not presently subject to the NFRD;
- 1 January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance undertakings.

A copy of the CSRD is available here.

7.5 Draft Commission notice on the interpretation and implementation of certain legal provisions of the EU Taxonomy Climate Delegated Act

On 19 December 2022, the EC issued a draft notice on the interpretation and implementation of certain legal provisions of the EU Taxonomy Climate Delegated Act[2] which sets down the technical screening criteria required to be used to assess whether an activity contributes substantially to the environmental objectives of: (i) climate change mitigation or (ii) climate change adaptation and does no significant harm to any of the other environmental objectives (**Notice**).

The Notice is intended to facilitate the effective application of the EU Taxonomy Climate Delegated Act and to provide technical clarifications responding to FAQs on the technical screening criteria set out therein.

The Notice is divided into the following three sections:

- Horizontal questions on process, updates and further development;
- Sector-specific questions on technical screening criteria; and
- Questions on recurring DNSH ("do no significant harm") criteria

The Notice has been approved in principle by the EC and its formal adoption will take place at a later date as soon as the language versions are available.

A copy of the Notice is available here.

7.6 European Commission publishes notices on the interpretation and implementation of the Disclosures Delegated Act under Article 8 of the Taxonomy Regulation

During the period under review, the European Commission published two separate notices on the interpretation and implementation of the Disclosures Delegated Act[3] which applies to those entities which fall within the scope of Article 8 of the Taxonomy Regulation. Where financial products do not fall within the scope of Article 8 of the Taxonomy Regulation, any financial market participant which

[1] Irish corporate funds which are listed on an EU regulated market do not fall within the scope of the CSRD.
[2] Delegated Regulation (EU) 2021/2139 of 4 June 2021 as amended by Commission Delegated Regulation (EU) 2022/1214
[3] Regulation (EU) 2021/2178

falls within the scope of the NFRD reporting requirements (as extended under the CSRD) will be subject to the disclosure obligations set down in Article 8 of the Taxonomy Regulation.

The first of these notices was published on 6 October 2022 and provides general guidance on the disclosure obligations arising under Article 8 of the Taxonomy Regulation, with the notice covering: (i) General FAQ, (ii) Non-Financial Undertakings, (iii) Financial Undertakings, (iv) Asset Managers, (v) Insurers, (vi) Credit Institutions, (vii) Debt Markets and (viii) Interaction with Other Regulations.

The second notice, which was published by the European Commission in draft form on 19 December 2022, is intended to provide specific guidance to non-financial undertakings falling within the scope of Article 8 of the Taxonomy Regulation (who must commence reporting their Taxonomy key performance indicators as of 1 January 2023). It contains General FAQs as well as specific FAQs on turnover, CapEX and OpEX key performance indicators.

A copy of the notice published by the European Commission on 6 October 2022 is available here.

A copy of the draft notice published by the European Commission on 22 December 2022 is available here.

8. ANTI-MONEY LAUNDERING (AML) AND COUNTERING THE FINANCING OF TERRORISM (CFT)

8.1 EBA publishes guidelines on remote customer onboarding

On 22 November 2022, the EBA published its final guidelines (**Guidelines**) on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive 2015/849 (**Fourth Money Laundering Directive** or **MLD4**).

The Guidelines set common EU standards on the development of comprehensive, risk-sensitive initial customer due-diligence (**CDD**) processes in the remote customer onboarding context. The EC asked the EBA to issue the Guidelines due to differing supervisory expectations in respect of remote onboarding across Member States. The Covid-19 pandemic accelerated non-face-to-face customer take-on demand, creating more risks and challenges for financial institutions in their CDD processes.

The Guidelines set out steps credit and financial institutions should adhere to when choosing remote customer onboarding tools and what they should do to ensure that the chosen tool is adequate and reliable and enables them to act in accordance with their initial CDD obligations.

The Guidelines will apply 6 months following their publication in the official languages of the European Union on the EBA website.

A copy of the Guidelines is available here.

8.2 CJEU judgment on public access to beneficial ownership registers and the implications for AML/CFT rules

On 22 November 2022, the Court of Justice of the European Union (**CJEU**) published a ruling regarding public access to information on the beneficial owners of companies and certain other entities (**In-Scope Entities**) pursuant to MDL4, deeming such access invalid (the **Judgment**).

In its Judgment, the CJEU found that the unrestricted nature of public access to beneficial ownership registers is repugnant to the fundamental rights to respect for private life and to the protection of personal data, as enshrined in Articles 7 and 8 of the of the Charter of Fundamental Rights of the European Union (the **Charte**r).

The CJEU ruled that the public access constituted an infringement to individual's rights that was not limited to what was strictly necessary and was not proportionate to the objective of the beneficial ownership register of combatting money laundering and terrorist

financing. The CJEU noted that the principal of transparency could not be considered an objective of general interest capable of justifying the interference with fundamental individual rights.

On 6 December 2022, the co-rapporteurs of the upcoming 6th Anti-Money Laundering Directive (**MDL6**), released a statement in light of the Judgment, in which they emphasised the importance of access to the beneficial ownership registers by competent authorities and financial intelligence units (**FIUs**). The co-rapporteurs condemned certain reactive closures to registers, even to competent authorities in the wake of the Judgment, but vowed that the reformative Judgment would be enshrined in any future beneficial ownership rules.

On 6 December 2022, the Central Bank published an updated guidance on beneficial ownership register of certain financial vehicles in response to the CJEU' Judgment, in which they removed reference to access by the public of certain information on the register.

The Guidance refers to the recent Judgment, stating access requests by members of the public will not be processed, pending clarification of the legislative position by the law-making body. Chapters 3 and 4 have been updated to reflect the recent Judgment.

A copy of the CJEU press release on the Judgment is available here.

A copy of the statement by the co-rapporteurs of MDL6 is available here.

A copy of the updated guidance by the Central Bank is available here.

8.3 Application of Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer under Article 8 and Chapter VI of MLD4

On 1 December 2022, the final guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT compliance officer under Article 8 and Chapter VI of MLD4 (**Guidelines**) came into effect.

The key areas addressed in the Guidelines are:

- Role and responsibilities of the management body in the AML/CFT framework and of the senior manager responsible for AML/CFT;
- Role and responsibilities of the AML/CFT compliance officer; and
- Organisation of the AML/CFT compliance function at group level.

The Guidelines, which were published by the EBA on 14 June 2022 are available here. For more information, please see our Dillon Eustace briefing on this topic which is available here.

8.4 Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures

On 2 December 2022, the EC published a proposal for a Directive on the definition of criminal offences and penalties for the violation of European Union restrictive measures (the **Proposal**). The Proposal sets out definitions for various criminal offences related to violations of sanctions and sets out minimum penalties for such violations for legal and natural persons.

The Proposal aims to harmonise criminal offences and penalties in respect of EU sanctions and restrictive measures across the EU. Currently, the responsibility to legislate for offences and penalties for sanctions breaches rests with individual Member States, each with a different system of criminal law and so enforcement of such violations is not presently harmonised.

Interested stakeholders can provide feedback on the Proposal until 30 January 2023.

A copy of the Proposal from the European Commission website is available here.

8.5 EBA consults on new guidelines amending the ML/TF Risk Factors Guidelines and proposing a new set of guidelines on policies and controls for the effective management of ML/TF risks when providing access to financial services

On 6 December 2022, the EBA launched a public consultation (the **Consultation**) amending the guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (EBA/2021/02) (The **ML/TF Risk Factors Guidelines**) and proposing new guidelines on the effective management of money laundering and terrorist financing (**ML/TF**) risks when providing access to financial services.

The EBA aim, through these guidelines, to ensure that all customers are not impeded access to financial services without just cause. The draft guidelines set out in the consultation paper have been developed at the European Commission's request following the publication of the EBA's Opinion and annexed report on de-risking, and the EBA's Opinion on the application of customer due diligence measures to customers who are asylum seekers from higher-risk third countries or territories in 2016.

The first of the draft guidelines under consultation builds on the existing ML/TF Risk Factors Guidelines, adding a new annex, setting out what financial institutions should consider when assessing the ML/TF risks associated with a business relationship with customers that are Not-for-Profit organisations (NPOs).

The second of these draft guidelines under consultation addresses the effective management of ML/TF by financial institutions when facilitating access to financial services. These draft guidelines identify the relationship between the access to financial services and the obligation of financial institutions to comply with AML/CFT regulations, including situations where vulnerable customers may have valid reasons to be unable to provide traditional forms of identification.

The deadline for submission of comments on the Consultation is 6 February 2023.

A copy of the consultation paper is available here.

8.6 European Council agrees its position on MLD6

On 7 December 2022, the European Council (the **Council**) agreed its position on an anti-money laundering regulation and a new directive which will replace the existing MDL4 (as amended by Directive 2018/843, the fifth AML Directive) (**MLD6**).

The Council's intention for MLD6 is to close existing loopholes allowing for money laundering and terrorist financing by:

- extending the AML rules to the entire crypto sector, obliging crypto-asset service providers (**CASP**s) to conduct CDD on their customers for any transactions over 1,000 EUR;
- ensuring that large transactions are not used for ML/TF by limiting large cash payments to a maximum EU-wide limit of 10,000 EUR with Member States being given flexibility to impose a lower maximum limit if they wish;
- having third countries with AML deficiencies listed by the Financial Action Task Force (**FATF**) also being listed by the EU, creating two EU lists, the so called "black list" and a "grey list" reflecting the FATF listings;
- clarifying beneficial ownership rules to allow for more transparency and harmonisation across the EU. Both ownership and control needs to be assessed to identify natural persons. The Council has clarified rules applicable to multi-layered ownership and control structures and for the identification of beneficial owners for different types of entities, including non-EU entities;
- new third party financing intermediaries i.e. jewellers, horologists and goldsmiths will also be covered by the new AML rules.

MLD6 and the new recast regulation for the transfer of funds will form the new strengthened EU AML rulebook.

The next step in the legislative process is to begin trialogue negotiations with the European Parliament with the aim of agreeing on a final version of the text.

The Council's press release is available here.

A copy of the proposal for the AML/CFT regulation is available here.

A copy of the proposal for MLD6 is available here.

9. DATA PROTECTION

9.1 The EU-U.S. Data Privacy Framework: European Commission starts process to adopt adequacy decision for safe data flows with the United States

On 13 December 2022, the European Commission published a draft commission implementing decision on the adequate level of protection of personal data under the EU-US Data Privacy Framework (**Draft Adequacy Decision**). The new privacy framework is based on a self-certification process similar to the original EU-U.S. Privacy Shield which was struck down by the CJEU in the Schrems II[4] ruling of 16 July 2020.

The Draft Adequacy Decision follows the Executive Order signed by President Biden and regulations issued by the US Attorney General introducing the new binding safeguards to address concerns raised by the CJEU in Schrems II by limiting access to EU data by US intelligence agencies and establishing a redress mechanism, namely the Data Protection Review Court (**DPRC**). In relation to the limiting of access to EU data, the Executive Order requires that US intelligence activities should be subject to appropriate measures for safeguards; that the surveillance activities shall be necessary to advance a validated intelligence activity and only conducted in a manner that is proportionate to the intelligence activity itself. The Draft Adequacy Decision follows the European Commission's publication of Questions and Answers on the new EU-U.S. Data Privacy Framework on 7 October 2022.

US companies will be able to certify their participation in the EU-U.S. Data Privacy Framework by committing to comply with a detailed set of privacy obligations (such as purpose limitation and data retention, as well as specific obligations concerning data security and the sharing of data with third parties).

The Draft Adequacy Decision states that the new privacy framework will provide comparable safeguards to those of the EU. The proposal text has been sent to the European Data Protection Board (**EDPB**) for its opinion.

A copy of the Draft Adequacy Decision is available here.

A copy of the EU-U.S. Data Privacy Framework Q&As are available here.

10. MISCELLANEOUS

10.1 Companies Act 2014 (Section 12A(1)) (Covid-19) (No.2) Order 2022

On 7 December 2022, a statutory instrument further extending the interim period of two measures of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (**Act**), which makes temporary amendments to the Companies Act 2014 to address certain issues arising from the Covid-19 pandemic, until 31 December 2023 was signed into law.

[4] Case: C-311/18

The measures which have been extended until 31 December 2023 are:

- Increase to the threshold at which a company is deemed unable to pay its debts from €10,000/€20,000 to €50,000; and
- Provision to allow companies to hold AGMs and general meetings virtually.

The below measures were not extended and as a result ceased to be effective as at 31 December 2022:

- Provision to allow documents required to be executed under seal to be executed in counterpart; and
- Extension of the time period for the examinership process from 100 to 150 days, subject to court approval.

A copy of the Order is available here.

10.2 DLT Pilot Regime Regulation

On 27 September 2022, ESMA published a report (**Report**) on Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on DLT (**DLT Pilot Regime Regulation**). The DLT Pilot Regime Regulation will apply from 23 March 2023 and allow for certain DLT market infrastructures to be temporarily exempted from specific requirements of Union financial services legislation (namely, MiFIR, Regulation (EU) No 909/2014 (**CSDR**) and MiFID II).

The DLT Pilot Regime Regulation required ESMA to assess whether the regulatory technical standards (**RTS**) developed under MiFIR relative to certain pre-and post-trade transparency and data reporting requirements require amendment. On 4 January 2022, ESMA published a call for evidence on distributed ledger technology (**DLT**). Based on the feedback received, ESMA indicates in the Report it is not necessary to amend the pre-and post-trade transparency and data reporting requirements in the RTS to allow for use on tokenised securities. However, ESMA recognised that supervisory guidance on certain technical elements would contribute to a consistent application of the DLT Pilot Regime.

On 15 December 2022, ESMA published a final report (**Final Report**) containing its final draft guidelines on the DLT Pilot Regime Regulation following a public consultation in Q3 2022. The guidelines (**Guidelines**) set out standard forms, formats and templates to apply for permission to operate a DLT market infrastructure. The Guidelines will also apply from 23 March 2023.

On 16 December 2022, ESMA published a new Q&A document on the implementation of the DLT Pilot Regime Regulation and its interaction with other EU financial services legislation. The Q&As relate to the topics of transaction reporting, financial instruments reference data, and order record keeping.

The DLT Pilot Regime Regulation can be accessed here.

The Report on the DLT Pilot Regime Regulation can be accessed here.

The Final Report containing the Guidelines on the DLT Pilot Regime can be accessed here.

The ESMA Q&As on the implementation of the DLT Pilot Regime can be access here.

10.3 Council adopts Digital Operational Resilience Act (DORA)

On 27 December 2022, Regulation (EU) 2022/2554 on digital operational resilience was published in the OJ which creates a harmonised regulatory framework strengthening the information and communication technology (**ICT**) security of financial entities (**DORA Regulation**).

Also published in the OJ on the same date was Directive (EU) 2022/2556 which will, once transposed into national law, amend various other EU directives, including MiFID II, to bring them in line with the DORA Regulation (**DORA Directive**).

Together, the DORA Regulation and the DORA Directive create a regulatory framework on digital operational resilience whereby all financial services firms, including investment firms, will be required to make sure they can withstand, respond to and recover from all types of ICT-related disruptions and threats. The aim of the framework is to replace multiple ICT risk management frameworks with a single unified approach by imposing a common set of standards on in-scope firms to manage and mitigate ICT risks.

The DORA Regulation comprises of five key pillars:

- ICT risk management requirements - Firms will be required to develop and maintain resilient ICT systems to mitigate against cyber risks;
- ICT-related incident management, classification and reporting- Firms will be required to implement a process for monitoring and logging ICT-related incidents;
- Digital operational resilience testing- Firms will be required to periodically test their ICT risk management framework;
- Managing of ICT third-party risk- Firms will be required to implement strong controls around third-party risk management;
- Information-sharing arrangements- Firms will be encouraged to share cyber security information with regulators and other financial institutions.

Firms will be required to comply with the legislation in a manner which is proportionate taking into account their size and overall risk profile and the nature, scale and complexity of their services, activities and operations.

Both the DORA Regulation and the DORA Directive will enter into force on 16 January 2023 and will apply from 17 January 2025.

A copy of the DORA Regulation is available here.

A copy of the DORA Directive is available here.

A Dillon Eustace briefing on the new DORA framework is available here.

If you have any questions in relation to the content of this update, to request copies of our most recent newsletters, briefings or articles, or if you wish to be included on our mailing list going forward, please contact any of the team members below.

Keith Waine
E-mail: keith.waine@dilloneustace.ie
Tel: + 353 1 673 1822

Karen Jennings
E-mail: karen.jennings@dilloneustace.ie
Tel: + 353 1 673 1810

Laura Twomey
E-mail: laura.twomey@dilloneustace.ie
Tel: + 353 1 673 1848

Caoimhe Costello
E-mail: Caoimhe.Costello@dilloneustace.ie
Tel: + 353 1 673 1856

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