DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Investment Firms

Quarterly Legal and Regulatory Update

Period covered: 1 January 2023 – 31 March 2023

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1. MIFID II

1.1 ESMA and NCAs to look at marketing of financial products

On 16 January 2023, the European Securities and Markets Authority (**ESMA**) commenced the launch of a common supervisory action (**CSA**) with national competent authorities (**NCAs**) on the application of the disclosure rules under Directive 2014/65/EU (**MiFID II**) with regard to marketing communications across the EU. The CSA will take place throughout 2023.

The CSA will involve the review by competent authorities whether marketing communications (including advertisements) are fair, clear and non-misleading and how firms select the target audience for the marketing communications, especially in the case of riskier and more complex investment products. Furthermore, it will provide competent authorities with an opportunity to collect information about possible 'greenwashing practices' observed in marketing communications and advertisements.

ESMA is also aware that younger, less experienced investors, are particularly vulnerable when they operate online. For this reason, the CSA will also closely consider marketing and advertising by firms through distribution channels including apps, websites, social media and collaborations with affiliates such as influencers

ESMA believes this initiative, will help fulfil ESMA's mandate on building a common supervisory culture among NCAs to promote sound, efficient, and consistent supervision throughout the EU.

ESMA's press release on the commencement of the CSA is available here.

1.2 The European Commission publishes Commission Delegated Regulations amending RTS 1 and RTS 2 under MiFIR

On 17 January 2023, the European Commission published delegated regulations to amend Commission Delegated Regulation (EU) 2017/587 (**RTS 1**) (the **RTS 1 Amending Delegated Regulation**) and Commission Delegated Regulation (EU) 2017/583 (**RTS 2**) (the **RTS 2 Amending Delegated Regulation**).

Regulation (EU) No 600/2014 (**Markets in Financial Instruments Regulation** or **MiFIR**) introduced comprehensive pre trade and post trade transparency requirements with regard to trades in both equities (such as shares) and non-equities (such as bonds and derivatives). RTS 1 and RTS 2 contain the regulatory technical standards setting out the pre and post trade transparency requirements for investment firms (and trading venues) in respect of equity instruments and non-equity instruments respectively.

The Amending Delegated Regulations provide for certain amendments to RTS 1 and RTS 2 aimed at improving and harmonising post trade transparency reports, and the data contained within them, to improve and further harmonise data quality of post-trade transparency reports, as well as to increase the level of pre-trade and post-trade transparency.

If the European Parliament and the Council of the European Union (**EU**) do not object to the Amending Delegated Regulations, they will enter into force on the twentieth day following their publication in the Official Journal of the EU. Certain provisions of Article 1 of the Amending Delegated Regulations will apply from 1 January 2024 to allow for investment firms to implement the required changes to their systems to comply.

The RTS 1 Amending Delegated Regulation can be accessed here.

The RTS 2 Amending Delegated Regulation can be accessed here.

1.3 ESMA consults on post-trade transparency

On 19 January 2023, ESMA published a consultation paper on post-trade transparency (**Consultation Paper**). This consultation comes nearly five years since **MiFIR** and Directive 2014/65/EU (**MiFID II**) entered into force and following review of related Level 2 measures.

RTS 1 and RTS 2 further specify the MiFIR pre- and post-trade transparency requirements for equity instruments and non-equity instruments respectively. RTS 1 and RTS 2 Amending Delegated Regulations were published by the European Commission on 17 January 2023 (see section [1.1] above for details).

This Consultation Paper proposes ESMA's Level 3 guidance, in the form of a manual, on the post-trade transparency fields. The Level 3 Guidance provides clarification on certain matters relating to the RTS 1 and RTS 2 Amending Delegated Regulations (see section [1.1] above for details).

The areas tackled in the manual are: (i) the scope of instruments and transactions subject to post-trade transparency, (ii) the relevant entities in charge of the reporting and publication of post-trade transparency information, (iii) when post-trade transparency information has to be made public: real-time vs. deferred publication, (iv) which post-trade transparency information has to be made public, i.e. reporting fields and flags, and (v) the common aspects as well as the differences between the post-trade transparency regime and the transparency calculations in relation to the scope of instruments and transaction.

The manual includes:

- legal references of Level 1 (MiFIR / MiFID II);
- legal references of Level 2 (RTS 1 and RTS 2);
- legal references of Level 3 (Opinions/Guidelines);
- guidance included in previously published Q&As; and
- proposed new Level 3 guidance in the form of a manual on the post trade transparency fields

ESMA has invited respondents to submit feedback on the Consultation Paper by 31 March 2023. ESMA will then publish a final report and manual after both the 3-month scrutiny period of RTS 1 and 2 by the Parliament and Council and the Consultation period.

The consultation paper can be accessed here.

The reply form for responding to the consultation is available here.

1.4 European Commission considers total ban on Inducements as part of Retail Investment Strategy

On 24 January 2023, European Commissioner for Financial Stability, Financial Services and the Capital Markets Union, Mairead McGuinness, re-introduced speculation that the European Commission, is considering a total ban on inducements under the MiFID II framework for financial advisors. Such a proposal would have a major influence on remuneration policies within the financial advice industry and mark a clear shift towards upfront fees for financial advice to retail investors.

In a letter dated 21 December 2022, Commissioner McGuinness defends the concept of an inducements ban, citing that many consumers do not understand the impact of inducements on their investments, and therefore increased disclosure requirements would be insufficient. Rather, prohibition of inducements would "likely increase innovation and competition in the sector, to the benefit of both retail investors and the industry."

This view has been echoed in the opening remarks by Commissioner McGuinness at the European Parliament's ECON Committee on 24 January 2023. In those remarks, Commissioner McGuinness referred to the new Retail Investment Strategy and mentioned that the [Commission] is taking an "ambitious approach" including looking at the issue of inducements by financial advisors. Ms. McGuinness referred to the recent Retail Investment Study which shows that products where inducements are paid are on average 35 percent more expensive for retail investors than investment products where no inducements are paid.

While admitting that the Netherlands cannot be considered representative of the investment landscape across all EU member states, Ms. McGuinness acknowledged that the ban there has led to a "a shift towards less expensive and more diverse products, resulting in better value for money for retail investors".

Currently, neither the Commission or the Council have published an official mandate for the introduction of a ban on inducements, but it could introduce it within its Retail Investment Strategy which is expected to be published in April 2023. Mairead McGuinness' speech can be found here.

1.5 ESMA final report on revised MiFID II product governance guidelines

On 27 March 2023, ESMA published its final report regarding the guidelines on product governance requirements under MiFID II. These guidelines were designed to ensure consumer protection and ensure that firms always act in their investor's best interests.

ESMA announced on 8 July 2022 a consultation on the guidelines, and Annex IV to the report contains a statement summarising the feedback received, including changes / clarifications introduced in the final guidelines.

The new guidelines, contained in Annex V, build on the text of the original 2017 ESMA guidelines, which have been reviewed taking into account the following recent regulatory and supervisory developments: including the European Commission's Capital Markets Recovery Package (encompassing amendments to the Prospectus Regulation[1] and the Securitisation Regulation[2]); the sustainability-related amendments to the MiFID II Delegated Directive[3]; the recommendations on the product governance guidelines by ESMA's Advisory Committee on Proportionality (**ACP**); and the findings of ESMA's 2021 Common Supervisory Action on product governance[4].

The amendments include guidelines for manufacturers and distributors of financial products, with key amendments including:

- In addition to the retention of five categories manufacturers should have regard to in identifying a target market for products[5], ESMA have introduced guidelines on the practice of adopting a common approach for sufficiently comparable product features per cluster of products instead of per individual product (a "clustering approach") for both manufacturers and distributors of financial products.

- When considering the Clients' objectives and needs, the firms should consider the expected investment horizon/recommended holding period of the product

- In identifying a target market, firms should identify any specific sustainability related objective a product is compatible with.

- When identifying the target market manufacturers should define and adequately graduate the level of complexity to be attributed to the products to determine the necessary level of detail with which the target market should be identified. For certain particularly complex and risky products, such as contracts for difference (CFDs) such a target market should be confined to high-risk seeking

[1] Regulation 2017/1129
[2] Regulation 2017/2402/EU
[3] Commission Delegated Directive (EU) 2021/1269 amending Delegated Directive (EU) 2017/593
[4] ESMA35-43-3137
[5] These consist of 1. Type of Clients targeted 2. Knowledge and experience 3. Financial situation with a focus on the ability to bear losses 4. Risk tolerance and compatibility of the risk/reward profile of the product with the target market. 5. Clients' Objectives and Needs

clients understanding the risks involved and who are able to lose money, on average, with their investment and who are seeking speculative investments with only.

- Additional clarity is included in relation to the distribution of products under non-advised sales and the obligations of distributors in relation to such sales.

- On the required periodic review of products, ESMA have issued further detail that firms are quired to use both quantitative and qualitative date to review their investment products. Firms should determine the frequency and depth of product reviews while taking into account the nature of the product and, where appropriate, the service.

These guidelines will now be published in all official EU languages on ESMA's website and will apply two months after their publication, during which time National Competent Authorities (**NCAs**) must notify ESMA whether they comply or intend to comply with the guidelines.

The guidelines can be found here.

A copy of the consultation can be found here.

1.6 ESMA updates MiFID II Q&As on transparency

On 31 March 2023, ESMA published an updated version of their Q&A document under MiFID II and MiFIR on transparency topics.

The updated document includes a new question related to settlement locations in non-equity transactions. Question 25 (Section 4) is a technical question on how to report "Delivery/cash settlement location" in the context of non-equity transparency.

The updated document can be found here.

1.7 ESMA updates MiFIR data reporting Q&As

On 31 March 2023, ESMA published an updated version of their Q&A document on data reporting under MiFIR. The following updates have been made:

- A new Question 8 in the Legal Entity Identifier (LEI) section (Section 2) relating to the LEI which should be used to report in FIRDS the issuer of sovereign bonds issued by an EEA member state.
- A new Question 14 in the transaction reporting section (Section 24) regarding what ISO 3166-1 country code trading venues and relevant investment firms should use to identify stateless natural persons for the purposes of transaction reports.
- An amendment to Question 11 in the transaction reporting section (Section 24) relating to the concept of the underlying to include reference to reverse convertible bonds and reverse convertible notes.

The updated Q&As can be found here.

2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

2.1 Implementation of Competent Authority Discretions under IFD and IFR in the European Union (Investment Firms) Regulations 2021 and Regulation (EU) No 2019/2033 - January 2023

On 31 January 2023, the Central Bank of Ireland (**Central Bank**) issued a notice setting out its requirements and guidance regarding the implementation of certain competent authority discretions arising under:

a) S.I. No. 355 of 2021, European Union (Investment Firms) Regulations 2021 (the **IFD Regulations**) transposing the majority Directive (EU) 2019/2034 on the prudential supervision of investment firms (the **IFD**) into Irish law; and
b) Regulation (EU) 2019/2033 on the prudential requirements of investment firms (**the IFR**) and S.I. No 356 of 2021, European Union (Investment Firms) (No. 2) Regulations 2021 (the **IFR Regulations**).

The implementation notice addresses various areas of interest:

- Section 2 details the Central Bank's policy in respect of the discretion to apply the CRD IV/ CRR regime to MiFID investment firms in certain circumstances. The Central Bank has stated they will exercise their competent authority discretion under Regulation 4(1)(b)(i) or (ii) to apply the CRR to MiFID investment firms where it considers it to be justified in light of its size, nature, scale and complexity on a case-by-case basis.

- Section 3 details the Central Bank's policy in respect of the discretion to require Class 3 MiFID investment firms to perform an assessment of internal capital and liquid assets. Due to the diverse nature and scale of activities undertaken by all MiFID firms, the Central Bank has decided to exercise their discretion and order all Class 3 firms to perform an assessment of their internal capital and liquid assets.

- Section 4 details the Central Bank's policy in relation to specific liquidity discretions.

- Section 5 details the Central Bank's policy in relation to discretions to make adjustments to K-Factors under certain circumstances. The Central Bank declares they will exercise this discretion on a case-by-case basis, which with due regard to Article (15)(4) may include where a MiFID firm seeks authorisation for a new investment activity or where a MiFID investment firm is significantly expanding its investment activities.

- Section 6 details the Central Bank's policy in relation to specific variable remuneration discretions. The Central Bank has committed to exercise this discretion on a case-by-case basis for both on-and-off balance sheet thresholds for variable remuneration and use of alternative payments in the pay out.

Appendix I lists competent authority discretions in the IFD Regulations.

Appendix II lists competent authority discretions in IFR and, by reference, CRR.

The Central Bank's implementation notice can be found here.

2.2 Call for advice to the EBA and ESMA for the purposes of the reports on the prudential requirements applicable to investment firms

On 1 February 2023, the European Commission has published a call for advice to the European Banking Authority (**EBA**) and ESMA. This call for advice is related to the obligation under Article 60 of the IFR and Article 66 of the IFD for the European Commission to submit reports to the European Parliament and the Council by 26 June 2024 on the prudential requirements for investment firms under the IFR/ IFD regime.

Key considerations the Commission is seeking advice on are:

- Categorisation of investment firms including adequacy of prudential requirements, the conditions to qualify as small and non-interconnected investment firms and conditions to qualify as investment institutions;

- Interaction with the CRR/ CRD including considerations such as prudential consolidation, liquidity requirements, K-factor methodology, implications of the adoption of the Banking Package and remuneration / investment policy disclosure;

- Considerations on ESG risks;
- Future proofing the IFR/IFD regime; and
- Specific considerations on commodity and emission allowance dealers and on energy firms.

The Commission recognises that the prudential framework for investment firms has entered into force only relatively recently which may impact the ability of the EBA and ESMA to collect necessary evidence on the topics within the call for advice. The EBA and ESMA may take a flexible approach to this review and should identify topics that are better suited for future review.

The EBA and ESMA should deliver their joint report on this call for advice to the Commission by 31 May 2024.

The publication containing the call for advice can be accessed here.

3. EMIR & SFTR

3.1 Extension of the Intragroup exemptions from clearing and collateral exchange requirements

On 13 February 2023, two Commission Delegated Regulations were published in the Official Journal (**OJ**) confirming the extension of the temporary intragroup exemptions from clearing and margining from 30 June 2022 until 30 June 2025.

The intragroup exemptions (from clearing or collateral exchange requirements) apply to OTC derivative contracts that are concluded between counterparties which are part of the same group and where one counterparty is established in a third country for transactions with third country entities.

The two Commission Delegated Regulations comprise:

- Commission Delegated Regulation (EU) 2023/314 of 25 October 2022 (see here) amending the regulatory technical standards laid down in Delegated Regulation (EU) 2016/2251 as regards the date of application of certain risk management procedures for the exchange of collateral.
- Commission Delegated Regulation (EU) 2023/315 of 25 October 2022 (see here) amending the regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) No 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts.

3.2 ISDA, AIMA, EFAMA and FIA publish a joint statement on EMIR 3.0 Proposals

On 2 February 2023, the International Swaps and Derivatives Association, Inc. (**ISDA**), the Alternative Investment Management Association (**AIMA**), the European Fund and Asset Management Association (**EFAMA**) and the Futures Industry Association (**FIA**) published a joint statement in response to certain of the European Commission's (**EC**) proposed amendments to Regulation (EU) No 648/2012 (**European Market Infrastructure Regulation** or **EMIR**) to make derivatives clearing in the EU more attractive, known as EMIR 3.0.

One of the most noteworthy elements of EMIR 3.0 is the proposal to require EU market participants to clear a proportion of their transactions in certain derivatives at active accounts at clearing counterparties (**CCPs**) in the EEA (**Active Account Requirement**), thereby moving a significant proportion of euro derivatives trading to EU CCPs. The proposal seeks to counter risks to the EU financial stability which the European Commission believes arise from the concentration of clearing in some third-country CCPs, notably in a stress scenario.

The classes of derivatives which are proposed to fall in scope initially, subject to regulatory technical standards, are those set out below:

(i) interest rate derivatives denominated in Euro or in Polish Zloty,
(ii) credit default swaps denominated in Euro, and
(iii) short-term interest rate derivatives denominated in Euro.

The list of classes can be increased as on foot of additional regulatory technical standards following an assessment by ESMA on the basis of whether a class of derivatives poses a threat to financial stability/ are of substantial systemic importance.

The proportion of activity for each class of derivative for which an active account must be used has not yet been specified and this will be determined by regulatory technical standards to be prepared by ESMA. It is also proposed that clearing members and clients that clear through a non-EU CCP will need to provide certain annual reporting to their relevant competent authority. This will also be determined by future regulatory technical standards.

In the Statement, ISDA, AIMA, EFAMA and the FIA state that;

> "*The EC has taken some important steps towards strengthening the competitive position of Europe's growing derivatives markets in the EMIR 3.0 proposal…. However, the EC has proposed that firms subject to the EU clearing obligation should have an active account at an EU CCP, while giving the European Securities and Markets Authority the power to define the portion of certain euro- and Polish zloty-denominated contracts that should be cleared through those accounts via secondary regulation. Changes to capital rules would reinforce this, making it less commercially viable for EU market participants to clear through CCPs based outside the EU. We remain convinced that these measures, as proposed, would be harmful to EU capital markets. They would make EU firms less competitive and would have a negative impact on the derivatives market, EU clearing members and their clients, EU investors and savers, and the Capital Markets Union. For EU firms, this would not only hinder their ability to provide best execution to clients, but would also be costly to implement*".

Currently, the equivalence of U.K. CCPs (ICE Clear Europe, LCH and LME) is set to expire on 25 June 2025. The proposals will result in the movement of a significant portion of trading from ICE Clear Europe, LCH and LME to EU CCPs.

A copy of the joint statement is available here.

A copy of a Dillon Eustace briefing paper containing further details can be accessed here.

3.3 EMIR 3.0 – Proposed amendments to counterparty risk limits for UCITS and Money Market Funds

EMIR 3.0 proposes amendments to the Money Market Funds Regulation[6] to eliminate counterparty risk limits for all derivative transactions that are centrally cleared by a CCP that is authorised or recognised under EMIR. This applies to the counterparty risk limits set out in Article 17(4) and 17(6)(c) of the Money Markets Fund Regulation.

In a related measure, a separate proposed Directive amending the UCITS Directive also seeks eliminate counterparty risk limits for all OTC derivative transactions from counterparty risk limits under Article 52 of the UCITS Directive. This measure aims to establish a level playing-field between exchange traded and OTC derivatives and to better reflect the risk reducing nature of CCPs in derivative transactions

In both instances such an exclusion will only apply where the derivative transaction is centrally cleared by a CCP that is authorised or recognised under EMIR.

[6] Regulation (EU) 2017/1131

A copy of the EMIR 3.0 proposal can be accessed here.

A copy of the proposed amending Directive can be accessed here.

3.4 ESRB publishes letters on the EMIR review

On 21 March 2023, the European Systemic Risk Board (**ESRB**) published a Letter to the Members of the European Parliament on the EMIR 3.0 proposal. On the same date, the ERSB also published a Letter to the Council Working Party on the same proposal.

A copy of the Letter to the Members of the European Parliament on EMIR 3.0 can be found here.

A copy of the Letter to the Council Working Party on EMIR 3.0 can be found here.

3.5 ESMA updates Q&As on data reporting under SFTR: March 2023

On 23 March 2023, ESMA published an update to their Q&As on reporting requirements under Regulation (EU) 2015/2365 (the **SFTR**) regarding transparency of securities financing transactions.

The new Question 15 added by ESMA under Article 4 SFTR relates to reporting of the jurisdiction of the issuer.

The updated Q&A document can be accessed here.

3.6 ESMA updates Q&As on EMIR implementation: March 2023

On 31 March 2023, ESMA published an updated version to their Q&As on the implementation of EMIR. The update includes a new question under Article 9 EMIR on the inclusion of derivatives in the Trade State Report (**TSR**) and the following two amendments to existing questions under Article 9 EMIR:

- Reporting to trade repositories (**TRs**). ESMA clarifies that when a broker is a counterparty to a derivative, it should not report this both in the "broker" and "counterparty" fields. Instead the broker should report the derivative and identify itself as a counterparty.
- Exchange traded derivatives (**ETDs**): which parties obligated to report ETD contracts.

The updated version can be found here

3.7 ESMA issues Consultation Paper on the amendments to EMIR position calculation guidelines

On 28 March 2023, ESMA published a consultation paper on amendments to their Guidelines regarding position calculation under EMIR. The guidelines seek to ensure positions in derivatives calculated by trade repositories are calculated in a harmonised and consistent manner, including the time of calculations, the scope of data to be used and the calculation methodologies.

Section 4 details in table form the proposed amendments to the guidelines and Annex III contains a consolidated version of the guidelines as amended.

The consultation paper can be found here, with ESMA inviting all relevant stakeholders who wish to respond to do so online by the 9 May 2023.

4. CENTRAL BANK OF IRELAND

4.1 New Client Asset Requirements to enter into force on 1 July 2023

On 27 January 2023, the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2023 (the **Revised Investment Firms Regulations**) were published in the Irish Statute Book. The Revised Investment Firms Regulations revoke and replace the Central Bank (Supervision and Enforcement) Act 2013 Section 48(1)) (Investment Firms) Regulations 2017. Part 6 of the Revised Investment Firms Regulations contains amendments to the existing Client Asset Requirements (**CAR**).

In June 2022, the Central Bank published a draft Guidance Note on the Central Bank Client Asset Requirements (the **Guidance Note**). In February 2023, the Central Bank published a draft Addendum to the Guidance Note on the Central Bank Client Asset Requirements (the **Addendum**). The Addendum includes guidance in respect of the transfer of client assets as part of a transfer of business. Both documents are expected to be published in final form shortly.

The current client assets rules apply to investment firms (including UCITS management companies/AIFMs with MiFID 'top-up' permissions in respect of those 'top-up' activities) which hold client assets or which enter into title transfer collateral arrangements (**TTCAs**). Significantly, the scope of the CAR has been extended to credit institutions carrying out MiFID activities.

A number of key changes have been made to the existing CAR requirements, including in the areas of segregation, reconciliation, calculation, client disclosure and consent, prime brokerage services, risk management and reporting. Steps should be taken by in-scope firms to begin preparations to ensure they will be able to fully comply with the revised CAR.

In addition, the Central Bank has updated the Monthly Client Asset Report (**MCAR**) template in order to strengthen the MCAR as a supervisory tool and reflect the revisions to the CAR. The Central Bank has published the revised MCAR and accompanying guidance on its website, available here.

The existing CAR will remain in force until repealed on 1 July 2023. A transitional period has been provided whereby; (i) in-scope investment firms have until 1 July 2023 to comply; and (ii) in-scope credit institutions have until 1 January 2024 to comply.

The Revised Investment Firms Regulations can be accessed here.

The Guidance Note can be accessed here, and the accompanying Addendum can be accessed here.

4.2 Central Bank (Individual Accountability Framework) Act 2023 and Central Bank Consultation Paper on the Individual Accountability Framework (CP 153)

On 9 March 2023, the Central Bank (Individual Accountability Framework) Act 2022 (the Act) was signed into law.

The Act was introduced to promote accountability within the financial services sector and is intended to make individuals in key positions individually responsible for their actions within the scope of their roles. This includes senior management, directors and other decision makers with an impact on the firm's overall performance, with the ultimate goal being an improvement in integrity and stability.

The Act comprises four pillars:

- Introduction of New Business and Individual Conduct Standards: The Act introduces new conduct standards for both firms and individuals working for such firms. All firms regulated by the Central Bank will be required to comply with business conduct rules, including obligations such as acting honestly and with due skill, care and diligence. All individuals performing controlled functions (CFs) in a regulated firm will be required to comply with common conduct standards. Senior executives will also have to comply with additional conduct standards related to running the part of the business for which they are responsible;

- Senior Executive Accountability Regime (**SEAR**): This will require in-scope firms to set out clearly and fully where responsibility and decision-making lie within the firm's senior management;
- Enhancements to the current Fitness & Probity (**F&P**) Regime: This will include clarifying firms' obligations to proactively certify that individuals carrying out CF functions are fit and proper; and
- Amendments to the Administrative Sanctions Procedure (**ASP**): A key change will be the Central Bank's ability to take enforcement action under the ASP directly against individuals for breaches of their obligations rather than only for their participation in breaches committed by a firm.

On 13 March 2023, the Central Bank of Ireland published its Consultation Paper 153 (**CP153**) containing draft regulations and guidance which set out how it proposes to implement the new Individual Accountability Framework (**IAF**) following the signing into law of the Act on 9 March 2023.

CP153 contains draft implementing regulations including (i) SEAR Regulations, (ii) Fitness and Probity Certification Regulations and (iii) Holding Companies Regulations.

CP153 also includes draft Guidance proposed by the Central Bank which seeks to provide further clarity in terms of its expectations for the implementation of SEAR, the conduct standards applicable to CF functions, PCFs and those who may exercise significant influence on the conduct of the firm's affairs and certain aspects of the enhancements to the F&P regime.

The Central Bank has proposed the following implementation timeline:

- Conduct standards applicable to individuals: 31 December 2023.
- F&P Regime - certification (and inclusion of Holding Companies requirements): 31 December 2023.
- SEAR Regulations – obligations on prescribing responsibilities of different roles and requirements on firms to clearly set out allocation of those responsibilities and decision-making are set to apply to in-scope firms: 1 July 2024.

The Central Bank has also confirmed that the business standards which will apply to all regulated firms under the Act are being reviewed as part of the current review of the Central Bank's Consumer Protection Code and accordingly has not yet provided a proposed timeline for implementation of those business standards in CP153.

Interested stakeholders are invited to submit their feedback on CP153 to the Central Bank by the deadline of 13 June 2023 via email to IAFconsultation@centralbank.ie.

A copy of the Act can be found here.

CP153 can be accessed here.

Further information on the contents of CP153 is contained in our briefing which is accessible Eustace here.

You can also view a webinar hosted by Dillon Eustace on CP153 here.

4.3 Dear CEO Letter - Central Bank's key regulation and supervision priorities for 2023

On 16 February 2023, the Central Bank published a Dear CEO letter which was sent to all regulated firms on key regulatory and supervisory priorities for the coming year, against what they deem to be a persisting challenging financial backdrop. The Central Bank has reiterated its outcomes focused approach to regulation and supervision, which remains fundamentally a risk-based approach.

Key regulatory and supervisory priorities for the Central Bank include:

- The provision of a clear, open and transparent authorisation process.
- The assessment and management risks to the financial and operational resilience of firms.
- Consulting and engaging on regulatory developments under the Consumer Protection Framework and Individual Accountability Framework.
- Consultation on the Central Bank's approach to innovation that will include an exploration of new ways of engagement with innovators and their products.
- Ongoing focus on integrity within the financial system including the prevention of market abuse, and supervision of compliance with anti-money laundering and countering the financing of terrorism (**AML/CFT**) obligations and enforcing financial sanctions.
- Ensuring implementation of the EU's Anti-Money Laundering Action Plan including the establishment of a single supervisory authority (the Anti-Money Laundering Authority).
- Implementation of new EU regulations, including digital operational resilience (**DORA**) and markets in crypto assets (**MiCA**).

The Dear CEO letter can be accessed here.

A related Central Bank press release can be accessed here.

4.4 Dear CEO letter - MiFID Structured Retail Product Review – Supervisory Guidance

On 3 March 2023, the Central Bank published supervisory guidance to their Dear CEO letter to investment firms on MiFID structured retail products published in April 2022. The guidance provides clarity on the use of a decrement index and the presentation of back-testing.

- The Use of Decrement Index and Appearance of Prominent Warning: In their Dear CEO letter of April 2022, the Central Bank identified the use of decrement indices as an area of particular complexity. The Central Bank therefore took the opportunity in the guidance to clarify that the required prominent warning for a structured retail product (**SRP**) that uses a decrement index must appear in its own text box "on the front cover of the marketing material or brochure and on the page on which the decrement index is described in further detail". Further requirements for the disclosures in marketing documents relating to the decrement index/ use of fixed dividend deductions are set out therein.

- Presentation of back-testing: The Central Bank has reiterated its focus on the presentation of historical data to ensure it is not ambiguous or misleading. Further details on the Central Bank's requirements for the presentation of past performance information are set out in the letter. For example, the Central Bank has expressed its expectation that firms to avoid using a multitude of "overlapping simulations" which show little if any capital losses, due to this having the potential to detrimentally mislead consumers about the likelihood of future capital losses.

The guidance letter can be accessed here and the Dear CEO letter of April 2022 can be accessed here.

4.5 Updated Fitness & Probity process for Individual Questionnaires

In March 2023, the Central Bank updated its Fitness and Probity (**F&P**) Individual Questionnaire (**IQ**) which must be submitted by any person wishing to be approved by the Central Bank to perform a pre-approved controlled function. It also published draft guidance on a new process for the submission of IQs via the Central Bank Portal.

For more information on the changes to the IQ application process, please see a Dillon Eustace briefing here.

A PDF version of the updated IQ can be accessed here.

The Central Bank's draft guidance on the submission of the IQ can be accessed here, and a presentation on the new F&P application process can be accessed here.

4.6 Dear CEO Letter - Targeted Reviews on Control Frameworks and Risk Appetite Statements in MiFID Investment Firms and Market Operators

On 29 March 2023, the Central Bank published a Dear CEO letter, outlining key findings identified during targeted reviews of Control Frameworks and Risk Appetite Statements (**RAS**) of MiFID Investment Firms & Market Operators (**Investment Firms**).

The Central Bank expects Investment Firms to fully consider the best practices as well as the key findings identified and evaluate their own risk and compliance governance structures, Risk Management Frameworks and their RAS to identify if any improvements are required. The good practices observed are set out in Appendix 1 of the letter and key findings, together with associated Central Bank expectations, are outlined in Appendix 2 of the letter.

The Central Bank refers to; (i) Articles 21 to 24 of the Level 2 Delegated Directive under MiFID II on organisational requirements and operating conditions for Investment Firms[7] which include requirements to establish, implement and maintain adequate policies and procedures, internal control mechanisms and effective reporting; and (ii) to the EBA's Final Report on guidelines on internal governance under Directive (EU) 2019/2034 (**IFD**)[8] which apply to certain classes investment firms subject to IFD.

The key findings / Central Bank expectations broadly cover six areas:

- **Deficiencies in risk management frameworks and governance**: The Central Bank expects Investment Firms to maintain comprehensive, joined-up, embedded and sufficiently mature control functions and control frameworks. Investment Firms should have control functions that are sufficiently resourced, with appropriate levels of experience and seniority that enable the functions to implement and maintain an effective approach to managing risk and compliance matters including providing independent and credible challenge to senior management.

- **Board oversight of risk and compliance matters**: The Central Bank observed practices and behaviours in a number of Investment Firms where Boards failed to sufficiently prioritise or engage with matters relating to risk and compliance and / or failed to recognise the Board's collective responsibility and accountability for these matters. The Central Bank observed indicators which are suggestive of a reactive approach being taken by Investment Firms with respect to risk and compliance matters.

- **Application of RAS as a risk management tool**: The Central Bank noted the underuse of risk appetite statements as a risk management tool to monitor, control and report material risks. Risk appetite is a metric intrinsic to the strategy of a firm and therefore the Central Bank expects a well developed, location specific regime in place. The Board and Senior Management are expected to have developed robust and functional RAS, risk register and policies which reflect the local entity specificities rather than just an overall Group entity.

- **Poor RAS design**: Investment Firms should ensure that qualitative descriptions of risk appetite correctly reflect the risks they are willing to take and are aligned to the overall business strategy. The RAS should reflect the holistic view of all material risks facing the Firm. The desired level of risk that an Investment Firm is willing to take for each risk type should be clearly outlined using quantitative KRIs, qualitative and quantitative risk tolerances and risk limits.

- **Deficiencies in risk appetite reporting to the Risk Committee and Board**: In certain Investment Firms risk appetite reporting to the Risk Committee and or Board was not clear/ concise and therefore could not properly inform decision-making. The RAS should contain quantitative measures that are translated into risk limits applicable to business lines. In addition, the escalation process should be clearly defined and documented and the Investment Firm should establish thresholds for reporting on risk events to Senior Management, Risk Committees and to the Board. In addition, the Central Bank expects firms to have a clearly defined and documented escalation process for risks and an adequate risk appetite reporting procedure.

[7] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016
[8] EBA/GL/2021/14

- **Deficiencies in cascading risk appetite throughout the organisation**: In certain Investment Firms, it was not evident if the Investment Firm's overall risk appetite, risk appetite for material risks and applicable risk limits had been communicated throughout the Firm. Risk appetite information should be communicated throughout the Firm. The Central Bank expects periodic risk appetite training is provided to all employees within the Firm.

The Central Bank notes that the key findings set out in the letter are not exhaustive and it expects MiFID firms to continually evaluate the effectiveness of their own Control Frameworks and associated governance.

The letter can be found here.

5. PRIIPs

5.1 Corrigendum to PRIIPS Level 2 Measures published in Official Journal

On 16 March 2023, a corrigendum to the PRIIPs Level 2 Measures[9] was published in the Official Journal which corrects one of the rules applicable to the calculation of the summary risk indicator detailed in Annex II thereto.

A copy of the corrigendum is available here.

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

6.1 Guidelines on the Definition of 'prominent public functions': Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

On 27 January 2023, the Department of Justice issued guidelines under Section 37(12) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended). The guidelines provide clarification on those functions in Ireland that shall be considered to be "prominent public functions" for the purposes of identifying domestic "Politically Exposed Person".

For the purpose of the guidelines, a "prominent public function" within the State is considered an office or other employment in a public body (not including courts) in respect of which the remuneration is not less than the lowest remuneration in relation to the position of Deputy Secretary General in the Civil Service. The guidelines setting out specific examples of those falling within the scope of "prominent public function".

The guidelines can be found here.

6.2 European Banking Authority Updated Single Rulebook Q&A - Directive 2015/849/EU (AMLD)

During the period 1 January 2023 to 31 March 2023, the European Banking Authority (EBA) updated its Single Rulebook Questions and Answers (Q&As) publication for Directive 2015/849/EU (the 5th Anti-Money Laundering Directive). The Q&As in respect of the following articles have been updated:

- Article 11 – Payment Information Service Providers (PISP) obligations to conduct customer due diligence
- Article 29 - Clarification of the relationship between EBA's Guidelines on outsourcing arrangements and Section 4 of the Directive (EU) 2015/849
- Article 45 - Establishment and appointment of a Central Counterparty Clearing House (**CCP**).

[9] Commission Delegated Regulation (EU) 20217/653 as amended by Commission Delegated Regulation (EU) 2021/2268

The full Q&A document, including changes, can be found here

7. DATA PROTECTION

7.1 EDPB adopts its decision on EU-US Data Privacy Framework

On 28 February 2023, the European Data Protection Board (**EDPB**) adopted its opinion (**Opinion**) on the proposed EU-US Data Privacy Framework having regard to the level of protection afforded in the United States of America on the basis of the examination of the draft decision prepared by the European Commission.

On 13 December 2022, the European Commission published its draft adequacy decision under which it provided a detailed assessment of the US legal framework for state surveillance, intended to replace the previous US Privacy Shield previously invalidated by the CJEU in the Schrems II case. The European Commission's draft decision concludes that the framework ensures an adequate level of protection for personal data transferred from the EU to US companies.

In the Opinion, the EDPB expresses the opinion that the U.S. Executive Order 14086 has led to significant improvements in level of protection for personal data compared to the US Privacy Shield. However, despite noting "substantial improvements" in contrast to the previous legal framework, the EDPB raises a number of concerns relating to "certain rights of data subjects, onward transfers, the scope of exemptions, temporary bulk collection of data and the practical functioning of the redress mechanism" which it suggests should be addressed and clarified by the European Commission "in order to solidify the grounds for the draft adequacy decision".

On 14 February 2023, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs published a draft motion for a resolution rejecting the proposed framework on 14 February 2023 in which it urges the European Commission not to adopt the draft adequacy decision in relation to the US and calls for the introduction of meaningful reforms.

Before the European Commission can proceed with adopting the finalised adequacy decision, it is still subject to approval from a committee composed of representatives of the EU Member States, along with the European Parliament who a right of scrutiny over such adequacy decisions.

For further information please see here.

7.2 Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers under Chapter V of the GDPR

On 14 February 2023, the EDPB adopted revised guidelines on the interplay between Article 3 and Chapter V of the GDPR. The original guidelines were published on 18 November 2021.

The revised guidelines were issued in February 2023 following a public consultation. The original guidelines include various examples of data flows to third countries. The updated guidelines include additional examples in the guidelines to provide a better understanding, including providing further guidance on when personal data could be deemed to be "made available" to a third country controller, joint controller or processor. In the new guidelines, the EDPB states that:

"Some examples of how personal data could be "made available" are by creating an account, granting access rights to an existing account, "confirming"/"accepting" an effective request for remote access, embedding a hard drive or submitting a password to a file. It should be kept in mind that remote access from a third country (even if it takes place only by means of displaying personal data on a screen, for example in support situations, troubleshooting or for administration purposes) and/or storage in a cloud situated outside the EEA offered by a service provider, is also considered to be a transfer provided that the three criteria outlined [above] are met".

In addition, the revised guidelines provide further guidance relating to (i) the transfers of data by a processor in the EEA (as exporter) back to its controller in a third country and (ii) the transfers of data by a processor in the EEA (as exporter to a sub-processor in a third country).

A copy of the original guidelines can be accessed here.

A copy of the revised guidelines can be accessed here.

8. SUSTAINABILITY

8.1 Sustainable finance: Provisional agreement reached on European green bonds (1105/22)

On 28 February 2023, the European Parliament and the Council of the EU announced that provisional agreement had been reached on the EU green bond framework. This provisional agreement follows on from the European Commission's proposal for an EU Green Bond Framework published on 6 July 2021. The key objective of the framework is to create a high-quality voluntary standard for bonds financing sustainable investment.

The agreed text still needs to be formally confirmed by the European Parliament and the Council of the EU and adopted by both institutions before it is considered final. The framework will apply 12 months after its entry into force.

For more information on the provisional agreement and the changes made to the Commission's proposal, please see a Dillon Eustace briefing here.

The provisional agreement can be accessed here.

8.2 Publication of revised SFDR Level 2 Measures

On 17 February 2023, Commission Delegated Regulation (EU) 2023 363 (**Revised SFDR Level 2 Measures**) amending the existing SFDR Level 2 Measures[10] was published in the Official Journal, entering into force on 20 February 2023.

The Revised SFDR Level 2 Measures incorporate updated pre-contractual annexes and periodic report annexes which must be used by financial products falling within the scope of Article 8 or Article 9 of the SFDR which incorporate additional questions regarding exposure of the relevant product to EU taxonomy-aligned fossil gas and nuclear energy economic activities. They also make some other additional changes to the existing SFDR Level 2 Measures.

The Revised Level 2 SFDR Measures are available here.

9. CONFLICT IN UKRAINE

9.1 Adoption of tenth package of sanctions against Russia by the European Union on 25 February 2023

In reaction to Russia's continued military aggression against Ukraine, the European Union adopted additional economic sanctions against Russia which have been introduced through a suite of additional packages adopted by the Council of the European Union announced on 25 February 2023. This package included, amongst others, the following measures:

(i) a new reporting obligation for individuals and legal entities to provide their competent authority and the European Commission with information on the assets and reserves of the Central Bank of Russia which they hold or control or to which they are a

[10] Commission Delegated Regulation (EU) 2922 1288

counterparty. The Central Bank subsequently confirmed that in-scope entities must make the relevant filings within two weeks of 27 April 2023 (i.e. by 11 May 2023) and must be updated every three months thereafter;

(ii) additional reporting obligations on frozen assets (including for dealings before listing) and assets which should be frozen, with in-scope individuals and legal entities being required to report this information to their national competent authority and the European Commission within two weeks of acquiring this information; and

(iii) an extension to the list of those individuals and entities subject to restrictive measures;

For a complete overview of the additional measures introduced on 25 February 2023, please see the related press release which is available here.

The Central Bank's webpage on sanctions reporting is accessible 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.

9.2 Central Bank reminds regulated firms of obligations to ensure compliance with financial sanctions

In its Securities Markets Risk Outlook Report for 2023 published on 2 March 2023, the Central Bank has reminded firms that they must remain in compliance with financial sanctions at all times with respect to any impacted asset or investor.

It expects all financial service providers to have appropriate systems and controls in place to identify relevant sanctioned instruments and individuals to ensure that they are compliant with their obligations in relation to financial sanctions.

A copy of the report is available here.

10. MISCELLANEOUS

10.1 Council of EU agrees negotiating mandate on distance financial services contracts

On 2 March 2023, the Council of the EU announced via a press release that it has agreed on a general approach regarding a proposed Directive on financial services contracts concluded at a distance (**Directive**). This proposed Directive will amend the rules concerning financial services contracts concluded at a distance, repealing the earlier Directive 2002/65/EC (**Distance Marketing Directive**) and inserting its provisions into the Directive 2011/83/EU **(Consumer Rights Directive)** once finalised.

The European Commission first adopted its legislative proposal for the distance financial service contracts Directive in May 2022 and this press release follows a sixth and final presidency redraft by the Council published on 23rd February and will mandate how the Council shall conduct negotiations with the European Parliament.

The Council have published an accompanying note from the Permanent Representatives Committee enumerating the general purpose and aim of the proposal, namely:

- to ensure a streamlined and future-proof framework for financial services concluded at a distance,
- to provide better protection for consumers in the digital environment,
- the reduction of unnecessary burden and the provision of a level playing field for financial service providers, to encourage the cross-border provision of such services.

A copy of the press release can be found here.

The Council's note can be accessed here.

The Commission's proposal for the Directive can be accessed here.

10.2 ESMA letter regarding concerns with changes to the insider list regime under the Market Abuse Regulations

On 10 March 2023, ESMA published a letter addressed to the European Parliament and Council in relation to the changes to the insider list regime in Regulation 596/2014/EU (**the Markets Abuse Regulation, MAR**) proposed by the European Commission on 7 December 2022.

In the letter, ESMA outlines its concerns over the proposal by the European Commission to amend Article 18 of MAR to provide that insider lists need only be comprised of persons with regular access to inside information, or "permanent insiders" and not those who may access such information on an ad hoc basis. ESMA sets out that it believes that this proposal may have two significant detrimental effects:

- The first concern is in relation to the ability of National Competent Authorities to adequately enforce against market abuse. As the new insider lists will not cover those persons working for the issuer who have irregular access to inside information, ESMA is concerned that this will limit the ability of NCAs to quickly identify non-permanent insiders. Moreover, ESMA is concerned that NCAs will not be able to use the list to assess which permanent insider accessed each piece of inside information and when.

- The second concern is the significant detrimental effect on issuers. Firms currently use use insider lists to manage inside information. ESMA is concerned that under the new proposal, insiders will not be aware if they are in possession of insider information. ESMA note that this unawareness could increase the risk of unintended insider dealing, in addition to weakening the issuers' control of the flow of inside information.

The letter can be found here.

The proposed amendments discussed can be found 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.

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