



Investment Firms Quarterly Legal and Regulatory Update

Period covered: 1 July 2023 – 30 September 2023

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1. MiFID II

1.1 ESMA highlights areas for improvement in firms' disclosure of cost and charges under MiFID

On 6 July 2023, the European Securities and Market Authority (**ESMA**) published a Statement on its 2022 Common Supervisory Action (**CSA**) and mystery shopping exercise on Directive 2014/65/EU (**MiFID II**) requirements on information on costs and charges (**Statement**).

The Statement forms part of ESMA's ongoing efforts to ensure supervision of costs and charges disclosure and enhancement of investor protections. The Statement discusses ESMA's findings on completion of two exercises including a common supervisory action (**CSA**) which involved 27 EEA National Competent Authorities (**NCAs**) and a mystery shopping exercise which involved 10 NCAs, both coordinated by ESMA.

The CSA focused on ex-post costs and charges information provided to retail clients and the mystery shopping exercise focused on the ex-ante costs and charges information provided to retail clients.

The two exercises involved on-site and remote visits to firms and the key findings are as follows:

- In terms of ex-post (i.e. after the event) costs and charges disclosures, the CSA exercise identified that while firms overall comply with the majority of the ex-post cost and charges disclosure requirements under MiFID II, there is considerable room for improvement. For instance, the CSA exercise found that costs are not always shown by firms as a percentage in addition to being shown as a nominal amount, implicit costs are not always presented in disclosures, and the content and format of ex-post disclosures vary significantly between firms.
- In terms of ex-ante (i.e. before the event) costs and charges disclosures, the mystery shopping exercise revealed that retail investors are often not provided with proper MiFID ex-ante information in a durable medium, with the information provided often incomplete or being provided orally. Furthermore, the mystery shopping exercise revealed that at times, ex-ante information on costs and charges is often disclosed late in the client's decision-making process.

Based on the key findings detailed in the Statement, ESMA proposes to review and develop new Q&A responses to address several of the shortcomings identified and to work towards a possible standardised EU format for the provision of information about costs and charges to clients.

A copy of the Statement can be accessed [here](#).

1.2 Report on sanctions and measures imposed under MiFID II in 2022

On 7 July 2023, ESMA published their annual report on sanctions imposed under MiFID II in 2022. In their report, ESMA has found that both the number of Member States in which sanctions and measures were imposed, and the total amount of administrative fines, have increased in 2022 in comparison to 2021. However, ESMA points out that this figure should be read in context, noting that the figures include particularly high sanctions from merely a few member states.

The annual report features a table with a breakdown of the sanctions imposed upon each member state. In total, in 2022, 281 sanctions and measures were imposed across 25 Member States, amounting to an aggregated figure of EUR 21,034,117 in administrative fines.

The annual report can be accessed [here](#).

1.3 Manual on post-trade transparency under MiFID II/ MiFIR

On 10 July 2023, ESMA published a manual on post-trade transparency under MiFID II/ MiFIR (**Manual**).

The Manual is a soft-law Level 3 tool similar to the Q&As and aims to promote common approaches and practices in the areas of post-trade transparency and the transparency calculations, addressing matters such as:

- Scope of instruments and transactions subject to post-trade transparency;
- The responsible parties for reporting and publishing post-transparency information; and
- When post-trade information has to be made public.

Relevant ESMA Q&As previously published on the in-scope topics are incorporated into the Manual and new “Level 3” guidance is also included therein.

A copy of the Manual can be accessed [here](#).

1.4 ESMA publishes Final Report on revised technical standards for passporting services

On 11 July 2023, ESMA published their final report (**Final Report**) on the review of the technical standards for passporting under Article 34 of MiFID II (Freedom to provide investment services and activities).

The Final Report follows ESMA’s completion of a consultation in February 2023 with stakeholders regarding ESMA’s proposals for the review of the current regulatory technical standards (**RTS**) pursuant to Commission Delegated Regulation (EU) 2017/1018 and the current implementing regulatory standards (**ITS**) pursuant to Commission Implementing Regulation (EU) 2017/2382.

The Final Report contains revised draft technical standards, including draft RTS and revised draft ITS, which outline:

- i) The information to be notified by, inter alia, investment firms seeking to provide cross-border services without establishing a branch; and
- ii) Standard forms, templates and procedures for the transmission of information related to the provision of such cross-border services.

The revised draft technical standards, if adopted by the European Commission, will add new information requirements to the list of details that investment firms are required to provide both at the passporting notification stage and latterly if there is to be any change of the investment services being provided on a cross-border basis. The revisions to the current RTS and ITS aim to improve NCAs’ oversight of investment firms’ cross border activities.

The revised draft technical standards have been submitted by ESMA to the European Commission who are now considering whether to adopt the revised draft technical standards as formal legislative proposals.

The Final Report can be accessed [here](#).

The existing RTS can be accessed [here](#).

The existing ITS can be accessed [here](#).

1.5 Supervisory briefing on understanding the definition of advice under MiFID II

On 11 July 2023, ESMA published a supervisory briefing on understanding the definition of advice under MiFID II (**Supervisory Briefing**). The Supervisory Briefing is the first update on the definition of advice under the MiFID regime since the publication of the Questions and Answers document on this matter by ESMA’s predecessor (the **Committee of European Securities Regulators** or **CESR**) in 2010.

The Supervisory Briefing sets down ESMA’s supervisory expectations in relation to credit institutions, investment firms as well as UCITS management companies and AIFMs which have additional MiFID “top-up” permissions to provide investment advice.

The Supervisory Briefing outlines the definition of advice in the context of whether personal advice, information presented as ‘investment research’, general recommendations and generic comments could constitute as “investment advice”. It also provides guidance on the presentation of a recommendation as suitable for a client or based on a client’s circumstances. The Supervisory Briefing outlines perimeter issues around the definition of personal recommendation, including disclaimers to the client and failing to use known client information in an attempt to try avoiding the qualification as investment advice.

ESMA also notes that as the Supervisory Briefing is based on an earlier CESR Q&A on “Understanding the definition of Advice under MiFID”, it does not represent new policy.

For more information, please see Dillon Eustace’s briefing on the matter [here](#).

The Supervisory Briefing can be accessed [here](#).

1.6 ESMA Public Statement – Importance of MiFID II retail investor protection requirements in the context of securities lending in relation to retail client financial instruments

On 12 July 2023, ESMA published a Public Statement (**Public Statement**) (i) highlighting its concerns to firms that engage in securities lending and other securities financing transactions (**SFTs**) in relation to retail client financial instruments, and (ii) reminding applicable firms of the strict investor protection requirements under MiFID II and ESMA’s compliance expectations thereof.

As part of the Public Statement, ESMA highlights the key MiFID II investor protection provisions which apply to SFTs in the area of client consent, provision of collateral and information disclosure. These requirements include:

- Safeguarding of client assets requirements under Article 16(8) of MiFID II, as supplemented by Article 5 of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 (**the MiFID Delegated Directive**), whereby a regulated firm is required to prevent the use of a client’s financial instruments on own account except with the client’s express consent.
- Requirements under Article 24(1) of MiFID II requiring firms to act honestly, fairly and professionally in accordance with their clients’ best interests; and
- Provision of information requirements and written agreement requirements under Articles 49(7), 58(c) and 63(2)(b) and (c) of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 (**the MiFID Delegated Regulation**).

ESMA also highlight the following “adverse practices” to demonstrate their expectations on the practical application of the relevant MiFID II investor protection requirements to retail clients in the context of SFTs:

- Revenues from securities lending should directly accrue to the retail client, net of a normal compensation for the firm’s services; and
- Express prior consent should not be sought by way of the firm’s general terms and conditions.

The Public Statement can be found [here](#).

1.7 ESMA Report on Pre-Hedging – ESMA does not find evidence to ban pre-hedging but warns on risks

On 12 July 2023, ESMA published its Report to their Call for Evidence on pre-hedging practices (**Pre-Hedging Report**). This Pre-Hedging Report followed a commitment from ESMA in September 2020 to provide guidance on pre-hedging in its final Market Abuse Review (**MAR**) report, and the publishing of a call for evidence on pre-hedging in July 2022.

The Pre-Hedging Report’s main discussion points include:

- The market definition of “pre-hedging”, in which the majority of respondents agreed that pre-hedging can broadly be described as any trading activity undertaken by an investment firm, where (i) the investment firm is dealing on its own account, and the trading activity is undertaken (ii) to mitigate an inventory risk which is foreseen due to a possible incoming transaction, (iii) before that foreseeable transaction has been executed, and (iv) at least partially in the interest and benefit of the client or to facilitate the trade.
- ESMA provides two defined examples of such trading activities, including i) a liquidity provider trading, in the context of a request for quote (**RFQ**), ahead of the acceptance of a quote from the client and ii) a liquidity provider trading ahead of a pending order.
- Pre-hedging from the perspective of Regulation (EU) No 596/2014 (**Market Abuse Regulation, MAR**) and whether an RFQ can be considered “inside information” as defined in Article 7(1)(a) of MAR. ESMA, along with many respondents, agreed that the case-by-case approach appears necessary to assess whether an RFQ can be considered as inside information.
- The relationship between pre-hedging and MiFID/MiFIR, including the type of clients affected by the practice, the possible conflict of interest that may arise, and the obligation to act in the best interest of clients in this context. In respect of the types of clients affected by pre-hedging practices, ESMA noted in the call for evidence that pre-hedging often takes place in the “wholesale markets” space, mostly between investment firms and eligible counterparties, but can happen with “professional clients”. ESMA concludes that any future guidance on pre-hedging should address the RFQs from both professional clients and eligible counterparties.

ESMA’s Pre-Hedging Report concludes that while pre-hedging is a voluntary market practice which may give rise to conflicts of interest of abusive behaviours, ESMA ultimately does not find evidence to ban pre-hedging at this stage. However, ESMA notes that the risks of pre-hedging practices as outlined in the Pre-Hedging Report should be considered in the development of future ESMA guidance.

The Pre-Hedging Report can be found [here](#).

1.8 MiFIR Transaction Reporting - Updated Operational and Technical Arrangements

On 14 July 2023, the Central Bank of Ireland (**Central Bank**) published an updated version (version number 11.0) of the Operational and Technical Arrangements for Transaction Reporting under Regulation (EU) No 600/2014 (**MiFIR**), including updated Appendices for MiFIR Transaction Reporting (**Updated Operational and Technical Arrangements**).

The Central Bank has advised that the Updated Operational and Technical Arrangements document should be read alongside the MiFIR Transaction Reporting – Technical Reporting Instructions (**Reporting Instructions**) published on the ESMA website.

You can access the Updated Operational and Technical Arrangements document and Appendices [here](#).

You can also access the Reporting Instructions [here](#).

1.9 Guidelines on MiFID II product governance requirements

On 3 August 2023, ESMA published new Guidelines on MiFID II product governance requirements (**2023 Guidelines**).

The 2023 Guidelines take account of recent regulatory and supervisory developments and replace the previous version of the guidelines on MiFID II product governance requirements published by ESMA in 2017 and which applied from 3 January 2018 (**Previous Guidelines**). The 2023 Guidelines were preceded by a public consultation and ESMA’s Final Report on the proposed amendments to the Previous Guidelines in March 2023, which we discussed in our Quarterly Legal and Regulatory Update in Q1 of 2023.

The 2023 Guidelines aim to promote consistent and effective supervisory practices by firms and NCAs in the application of the MiFID II requirements on product governance. The 2023 Guidelines further clarify the obligations of firms to substantiate and document choices

regarding product governance arrangements, particularly in regard to target market identification and related distribution strategies. ESMA therefore envisages compliance with the 2023 Guidelines to bolster investor protection.

The key amendments made by the 2023 Guidelines include:

- A requirement for firms, in identifying a target market, to specify any sustainability-related objectives a product is compatible with.
- The new practice of firms identifying a target market for multiple products with similar features (**Clustering approach**), where appropriate, noting that the Clustering approach will not be appropriate for complex products.
- Increased obligations for distributors when distributing products under non-advised sales.
- A requirement for distributors to proactively provide manufacturers with relevant information to assist manufacturers' periodic reviews of products, as opposed to only providing such information at the request of manufacturers.

The 2023 Guidelines will require firms, in their capacities as product manufacturers and distributors, to review their internal product governance procedures and policies.

The publication of the 2023 Guidelines triggers a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the 2023 Guidelines.

The 2023 Guidelines can be found [here](#).

1.10 NCA Common Supervisory Actions in the area of MiFID II suitability requirements

On 3 October 2023 ESMA announced that it intends to conduct a separate common supervisory action with NCAs to assess the progress made by in-scope firms in complying with MiFID II suitability requirements with a particular focus on how firms have integrated sustainability into their suitability assessments and product governance arrangements (**MiFID II Suitability Requirements CSA**). This will include assessing how information on clients' sustainability preferences is collected and which arrangements firms have put in place to understand and correctly categorise investment products with sustainability factors for the purpose of the suitability assessment.

The MiFID II Suitability Requirements CSA will be carried out by ESMA and the NCAs during 2024. Investment firms should review their governance arrangements on suitability assessments to ensure that they are in line with the supervisory expectations set down in the related ESMA Guidelines on MiFID II Suitability Requirements and Product Governance.

A copy of the ESMA press release announcing the commencement of the MiFID II Suitability Requirements CSA is available [here](#).

A copy of the ESMA Guidelines on MiFID II Suitability Requirements is available from [here](#).

2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

2.1 Consultation Paper on the Guidelines on the application of the group capital test for investment firm groups

On 25 July 2023, the European Banking Authority (**EBA**) published a consultation paper on draft guidelines (**Draft Guidelines**) regarding the group capital test for investment firm groups under Regulation (EU) 2019/2033 (**Investment Firms Regulation or IFR**).

The Draft Guidelines set qualitative and quantitative criteria that NCAs should consider in assessing whether the conditions set out in the IFR for receiving authorisation to use the Group Capital Test are met.

The Draft Guidelines provide clarity on the following matters:

- The approach to be taken investment firm groups constituted exclusively of small and non-complex investment firms and ancillary services undertaking;
- The conditions necessary to consider the structure of an investment firm group as “sufficiently simple”;
- The conditions to evaluate the significance of the investment group’s risks to both clients and market;
- The additional conditions that NCAs should utilise when granting authorisation to reduce own funds requirements;
- The concepts of “notional own funds” and “satisfactory level of prudence” under Article 8; and
- The minimum information that NCAs should require when assessing the eligibility of an investment firm group in satisfying the Group Capital Test.

Responses to the consultation paper can be submitted using the [“Send your comments” function](#) on the EBA’s website.

The consultation period remains open until 25 October 2023.

The consultation paper can be found [here](#).

2.2 New RTS on liquidity measurement of investment firms under IFD enters into force

On 12 September 2023 the new RTS for the specific liquidity measurement of investment firms under Directive (EU) 2019/2034 (**Investment Firms Directive** or **IFD**) came into effect. The new RTS is set out in Delegated Regulation 2023/1651 was published in the Official Journal of the European Union on 23 August 2023.

The IFD enables NCAs to increase an investment firm’s Pillar 2 liquidity requirements if, following the assessment of liquidity risk, the respective NCA concludes that the investment firm is exposed to material liquidity risks, which are not adequately covered by the minimum liquidity requirements as stipulated in the IFD. The RTS specifies how liquidity risk and elements of liquidity risk are to be measured, depending on the nature and scale of the investment firms’ operations. The RTS addresses the key factors that may raise concern and affect the liquidity risk of an investment firm.

A copy of the Delegated Regulation 2023/1651 containing the RTS can be accessed [here](#).

2.3 New RTS specifying the measurement of risks or elements of risks not covered or not sufficiently covered by the own funds requirements set out in the IFR enters into force

On 20 September 2023, Commission Delegated Regulation 2023/1668 setting out RTS specifying the measurement of risks or elements of risks not covered or not sufficiently covered by the own funds requirements set out in the IFR came into effect. The RTS aims to assist competent authorities to identify, assess and quantify material risks that investment firms are exposed to or pose to their counterparties, which are not covered or insufficiently covered by the own funds requirements as prescribed by the IFR.

The Delegated Regulation 2023/1668 came into force on 20 September 2023.

A copy of the Delegated Regulation 2023/1668 can be accessed [here](#).

2.4 Single Rulebook Q&A on Regulation (EU) 2019/2033 (IFR) – update

The Single Rulebook Q&A on the Investment Firms Regulation (**IFR**) was updated on 25 August 2023. The update concerns Article 20 (1) of the IFR and measuring COH for the purposes of calculating K-COH, which can be accessed [here](#).

The Single Rulebook Q&A document can be accessed [here](#).

3. EMIR & SFTR

3.1 EBA publishes validation requirements on initial margin models

On 3 July 2023, the EBA published its final draft Regulatory Technical Standards (**RTS**) on Initial Margin Model Validation (**IMMV**) under Regulation 648/2012 (the **European Markets Infrastructure Regulation** or **EMIR**). The draft RTS set out the supervisory procedures to ensure the prudent use of initial margin models for OTC derivatives. In an accompanying opinion (**Opinion**), and as part of the ongoing negotiations on EMIR, the EBA calls on co-legislators to (i) amend EMIR to restrict the scope of application to large institutions; and (ii) to give the EBA a central validator role for the EU uncleared OTC derivatives framework.

In a letter of 3 October, 2023 to the European Commission, Council of the European Union and the European Parliament, ISDA has indicated its support for this proposal and recommending that the scope of the IMMV requirement should be limited to firms that have an aggregate month-end average notional amount of non-centrally cleared OTC derivatives (that is, Average Aggregate Notional Amount (**AANA**)) for the months March, April and May of the preceding year that exceeds the phase-four threshold of EUR 750 billion.

A copy of the final RTS along with the Opinion can be accessed [here](#).

3.2 EMIR REFIT – New reporting requirements to take effect on 29 April 2024

Counterparties and trade repositories (**TRs**) will become subject to new reporting standards as mandated under EMIR Refit with effect from 29 April, 2024.

On 7 October 2022, six Delegated Regulations and Implementing Regulations containing regulatory technical standards (**RTS**) and implementing technical standards (**ITS**) respectively supplementing EMIR were published in the Official Journal of the European Union. Those standards seek further alignment of data standards, formats, methods, and arrangements for reporting, as well as further harmonisation of the procedures to be applied by TRs for the validation of data reported as to their completeness and correctness and of the procedures for the reconciliation of data with other TRs. The standards also require TRs to grant non-reporting counterparties access to all data reported on their behalf on reasonable commercial terms upon request. Please see our previous client briefing for further details on the ITS and RTS issued [here](#).

ESMA has also issued validation rules, reconciliation tolerances and template for notification of errors and omissions in reporting document as well as XML EMIR Reporting Schemas. A copy of the validation rules and such schemas are available on ESMA's updated webpage entitled "EMIR Reporting" which is available [here](#).

In addition, on 20 December 2022, ESMA published a Final Report containing guidelines for reporting trades in derivatives and obligations for TRs under EMIR as revised (**Reporting Guidelines**) which is available [here](#).

Under the new reporting rules, the entity responsible for reporting (**ERR**) must notify its competent authority and, if different, the competent authority of the reporting counterparty of any of the following instances:

- any misreporting caused by flaws in the reporting systems that would affect a significant number of reports;
- any reporting obstacle preventing the report submitting entity from sending reports to a TR within the reporting deadline; or
- any significant issue resulting in reporting errors that would not cause rejection by a trade repository.

The Reporting Guidelines contain metrics and thresholds that reporting entities must use to assess the significance of a reporting error. The Central Bank of Ireland (**CBI**) is the national competent authority in Ireland. The notification must be made promptly, as soon the

reporting entity becomes aware of the notifiable event. The Reporting Guidelines contains details on the information to be included. The ERR is only relevant in the case of OTC derivatives

According to the Reporting Guidelines, for UCITS and/or AIFs, the ERR is deemed to be:

- The UCITS ManCo (as the UCITS ManCo is responsible, and legally liable, for reporting OTC trades on behalf on the UCITS as set out in EMIR Refit); and
- The AIFM (as the AIFM is responsible, and legally liable, for reporting OTC trades on behalf on the AIF as set out in EMIR Refit).

4. CENTRAL BANK OF IRELAND

4.1 Commencement Order for Central Bank Individual Accountability Framework

On 27 June 2023, the Minister for Finance published Central Bank (Individual Accountability Framework) Act 2023 (Commencement of Certain Provisions) (No. 2) Order 2023¹ S.I. No. 349 of 2023 (**Statutory Instrument**).

The Statutory Instrument confirms that certain sections of the Central Bank (Individual Accountability Framework) Act 2023 (**IAF Act**) shall come into operation on 29 December 2023. The sections of the IAF Act which will apply from that date include:

- (i) The application of new individual “common” conduct standards to all those performing controlled functions and the application of “additional” conduct standards to all those performing pre-approved controlled functions or CF1 roles; and
- (ii) The application of the enhanced fitness and probity regime, including the obligation on regulated firms to certify to the Central Bank that those performing both CF and PCF roles within their organisation are fit and proper to do so.

A copy of the Statutory Instrument can be found [here](#).

4.2 Central Bank Publishes Updated Guidance Note on the Outsourcing Register Template

In July 2023, the Central Bank published a revised guidance note regarding its Outsourcing Register Template which must be used by all regulated financial service providers (**RFSPs**) to record all relevant outsourcing arrangements in place. All RFSPs which have a PRISM impact rating of medium/low or above will be required to submit their completed reporting template to the Central Bank via the Central Bank of Ireland portal while all other RFSPs must be in a position to provide their completed outsourcing register to the Central Bank upon request. The Central Bank confirmed that the reference date for all data contained in the outsourcing register is 31 December 2022 meaning that RFSPs should complete their register with data complete as of 31 December 2022 and only include contracts / written agreements with a start date before that date.

The Central Bank has not yet confirmed the exact date by which the outsourcing registers for in-scope RFSPs must be submitted to it but has indicated that this will be in Quarter 4 of 2023. The data provided to the Central Bank will be used by it to conduct an analysis and assess the inter-connectedness of the financial sector with third party service providers and potential concentration risk at an institutional and sectoral level.

A copy of the Central Bank’s guidance on completing the outsourcing register is available [here](#).

4.3 Updated Central Bank Guidance on Client Asset Requirements and on Investor Money Requirements

On 4 July 2023, the Central Bank published revised Guidance (**Revised CAR Guidance**) on Client Asset Requirements (**CAR**) to accompany the requirements as set out in Part 6 of the revised Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)

¹ Statutory Instrument 349 of 2023

(Investment Firm) Regulations 2023 (**Revised Investment Firms Regulations**). The Revised Investment Firms Regulations revoke and replace the Central Bank (Supervision and Enforcement) Act 2013 Section 48(1)) (Investment Firms) Regulations 2017 (**Previous Investment Firms Regulations 2017**).

For information on the amendments made by the Revised Investment Firms Regulations to CAR please refer to a Dillon Eustace briefing [here](#). CAR has applied to investment firms since 1 July 2023. Credit institutions providing MiFID services and holding client assets will become subject to the CAR regime from 1 January 2024.

The Revised CAR Guidance has been published by the Central Bank on the Central Bank's web page entitled "Guidance on Client Asset Requirements" - see [here](#).

In addition, on 4 July 2023, the Central Bank published revised Guidance on Investor Money Requirements (**IMR Guidance**) to accompany the investor money requirements as set out in Part 7 of the Revised Investment Firms Regulations. The purpose of the IMR Guidance is to update the Investor Money Requirements Guidance as published by the Central Bank in 2018 and has been updated to provide additional guidance for fund service providers, particularly with respect to how they structure and document key information in their Investor Money Management Plans.

The IMR Guidance can be accessed [here](#).

The Revised Investment Firms Regulations can be accessed [here](#).

4.4 Updated Central Bank Guidance Note on Monthly Client Assets Report

On 13 July 2023, the Central Bank published an updated Guidance Note for Irish Investment Firms (**Updated Guidance Note**) on the Monthly Client Assets Report (**MCAR**).

The Updated Guidance Note provides guidance to investment firms subject to the CAR as set out in Part 6 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2023 (**Revised Investment Firms Regulations**) on how to complete the MCAR template which is to be submitted to the Central Bank on a monthly basis via the Central Bank's Online Portal. The purpose of the MCAR is to provide the Central Bank with an overview of the client asset position of each firm, facilitating analysis of movements and trends in client assets. The MCAR is required to be submitted within 20 business days after each calendar month-end.

The Updated Guidance Note can be accessed [here](#).

The updated MCAR template in excel format is available [here](#).

4.5 Central Bank Letter on Market Abuse Thematic Review - MAR requirements of Trading Venues

On 26 July 2023, the Central Bank published a letter calling upon trading venue operators (**Trading Venues**) to take action as a result of certain findings of the Central Bank arising from its themed inspection carried during 2022 (**MAR Review**). The MAR Review examined the effectiveness of Trading Venues in the area of market surveillance and their compliance with Regulation (EU) No 596/2014 (**Market Abuse Regulation or MAR**).

The Central Bank letter identifies three key issues relating to Trading Venues' market abuse monitoring and prevention including:

- Insufficient governance and oversight from boards and senior management such as inadequate Management Information (**MI**) procedures and a lack of formal surveillance training provided by Trading Venues to all staff;

- Lack of effective procedures, systems and staff in place at Trading Venues to prevent, monitor, detect and identify market abuse issues; and
- Concerns regarding the decreasing number of Suspicious Transaction Order Reports (**STORs**) received from Trading Venues despite the increasing quantity of transactions and increasing number of overall STORs received by the Central Bank.

The MAR Review calls for Trading Venues to ensure that the findings of the MAR review are discussed, minuted and actioned and that Trading Venues embark on a review of their trade surveillance procedures.

The Central Bank have cautioned that non-compliance by Trading Venues with MAR requirements will result in the Central Bank exercising its legal and enforcement powers as required.

The Central Bank letter can be accessed [here](#).

4.6 Updated Fitness and Probity Interview Guide

On 9 August 2023, the Central Bank issued a revised version of its Fitness and Probity Interview Guide which has been updated to provide additional guidance relating to (i) the use of information and the importance of full disclosure and (ii) the recording of the interview and the ability to bring a legal representative to any such interview with the Central Bank.

This guidance is relevant for those requested to attend an interview with the Central Bank as part of a fitness and probity assessment to assess the individual's appropriateness to discharge a senior position within a regulated firm.

The updated F&P Interview Guide can be accessed [here](#).

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

5.1 Cameroon and Vietnam added to the list of high-risk third countries concerning AML/CFT regimes

On 28 September 2023, Commission Delegated Regulation (EU) 2023/2070 of 18 August 2023 amending Delegated Regulation (EU) 2016/1675 (**Delegated Regulation**) to add Cameroon and Vietnam to the list of high-risk third countries (**Amending Regulation**) was published in the Official Journal of the European Union. This follows the update by the Financial Action Task Force (**FATF**) in June 2023 list of "Jurisdictions under Increasing Monitoring" to include Cameroon, Croatia and Vietnam.

In accordance with Directive (EU) 2015/849 (**AMLD4**) in-scope entities in all Member States will be required to apply enhanced customer due diligence measures regarding business relationships or transactions involving Cameroon and Vietnam, as well as the other high-risk third countries.

A copy of the Amending Regulation can be accessed [here](#).

5.2 Remote Customer Onboarding Guidelines take effect on 2 October 2023

The EBA's Final Guidelines on the use of Remote Customer Onboarding Solutions (**Remote Customer Onboarding Guidelines**) came into effect on 2 October 2023. The Remote Customer Onboarding Guidelines were published by the EBA on 22 November 2022.

The Remote Customer Onboarding Guidelines apply to all credit and financial institutions that are within the scope of AMLD4. Such market participants who use technology to onboard clients online (such as through mobile apps, or via websites) will need to ensure that their policies, processes and practices for remote customer onboarding comply with the new Guidelines. The definition of a "financial institution" includes a "collective investment undertaking marketing its units or shares".

A copy of the Remote Customer Onboarding Guidelines is available [here](#).

5.3 EBA ML/TF Risk Factor Guidelines due to come into effect on 3 November 2023

On 3 November 2023, the EBA's final revised Guidelines on money laundering and terrorist financing (**ML/TF**) risk factors, taking into account changes to the EU AML/CFT legal framework and addressing new ML/TF risks (**Revised Guidelines**) will come into effect.

The Revised Guidelines strengthen the requirements on individual and business wide risk assessments, as well as CDD measures, adding new guidance on the identification of beneficial owners, the use of innovative solutions to identify and verify customers' identities, and how financial institutions should comply with legal provisions on enhanced customer due diligence related to high-risk third countries. The Revised Guidelines are addressed to both financial institutions and supervisory authorities.

A copy of the final Revised Guidelines can be accessed [here](#).

6. DATA PROTECTION

6.1 Data Transfers to the United States of America

On 10 July 2023, the European Commission adopted an adequacy decision (**Adequacy Decision**) pursuant to the GDPR on the adequate level of protection of personal data afforded under the EU-U.S. Data Privacy Framework (**Framework**). The Adequacy Decision enables the personal data of EEA subjects from EEA data controllers or EEA data processors to be transferred to certain entities participating in the Framework without implementing additional safeguards.

On 18 July 2023, the European Data Protection Board (**EDPB**) published an information note on data transfers under the GDPR to the United States pursuant to the Framework (**Information Note**).

The Information Note clarifies several implications of the Adequacy Decision such as:

- The conditions to be met to enable personal data to be transferred to the U.S. under the Framework;
- Rights of redress for EU data subjects under the Framework; and
- The annual review of the Adequacy Decision.

The Adequacy Decision was published in the Official Journal of the European Union on 20 September 2023 and can be accessed [here](#).

The EDPB's Information Note can be accessed [here](#).

For more information about the Adequacy Decision, please see Dillon Eustace's briefing on the matter [here](#).

7. SUSTAINABILITY

7.1 European Commission publishes consultation on SFDR

On 14 September 2023, the European Commission (**Commission**) launched a targeted consultation on the SFDR framework (**Consultation**).

The Consultation is intended to assess potential shortcomings in the existing SFDR framework, focusing on the need for legal certainty, the useability of the regulation and its ability to play its part in tackling greenwashing. It is divided into four sections which require stakeholders to provide their feedback on (i) the current requirements of the SFDR, (ii) its interaction with other sustainable finance legislation, (iii) potential changes to the existing disclosure obligations for financial market participants and (iv) the potential establishment

of a categorisation system for financial products which could either build on and develop the distinction between Articles 8 and 9 or alternatively be based on a different approach focused on the type of investment strategy. Other proposals put forward by the Commission in the Consultation include the possibility of imposing uniform disclosure obligations on all products, whether or not they include any sustainability related claims and a third-party assurance framework for product categorisation.

The timeframe for implementation of any changes to the SFDR has not yet been confirmed by the Commission and it may not begin to apply for a number of years (potentially 2027 at the earliest)

The Consultation will run until 15 December 2023.

A copy of the Consultation can be found [here](#).

A copy of Dillon Eustace's briefing identifying some key takeaways from the Consultation is accessible [here](#).

A copy of the speech delivered by the EU Commissioner for Financial Services on the Consultation on 10 October 2023 is available [here](#).

A copy of the ESMA Guidelines on Product Governance is available [here](#).

7.2 Joint ESA Report on Voluntary Reporting on Principal Adverse Impacts under the SFDR

On 28 September 2023, the European Supervisory Authorities (**ESAs**) published a joint report on the extent of voluntary disclosure of principal adverse impacts under the SFDR (**Report**). The Report sets down lessons learned from the second year of implementation of the voluntary PAI disclosures framework as well as providing an overview of good and bad practices covering both scenarios where financial market participants consider PAI and report on same as well as where they have chosen to explain why they do not consider principal adverse impacts.

A copy of the Report is available [here](#).

7.3 Adoption of the European Sustainability Reporting Standards (ESRS) by the European Commission

On 31 July 2023, the European Commission announced that it had adopted a delegated act containing finalised ESRS reporting standards which must be used by those entities falling within the scope of the Corporate Sustainability Reporting Directive (**CSRD**) (**ESRS Standards**) which were submitted to the European Parliament and the Council of Europe for scrutiny.

The ESRS Standards contain detailed reporting templates which must be used by in-scope entities in order to provide investors with information on risks and opportunities arising from a wide range of environmental, social and governance issues, including climate change, biodiversity and human rights.

The CSRS and related ESRS Standards are intended to help financial market participants (including fund management companies) to comply with their disclosure obligations under other legislative frameworks introduced under the EU's Sustainable Action Plan, including the SFDR to the extent that they invest in companies falling within the scope of CSRD. However, with the exception of ESRS 2 which is mandatory for all in-scope companies, all other standards and individual disclosure requirements and datapoints within them are subject to a materiality assessment which may result in in-scope companies not reporting on certain data points required under the SFDR. The European Commission has advised that further clarifications will be provided under the SFDR and other frameworks regarding the approach to be taken when an in-scope company has assessed a datapoint as not material.

The reporting obligations introduced under the CSRD will be phased in over time for different types of companies with the first tranche of companies being required to comply with the reporting standards for the financial year beginning on or after 1 January 2024.

A copy of the European Commission's press release announcing its adoption of the ESRS is available [here](#)

8. MISCELLANEOUS

8.1 New recognition of Dematerialised Securities

On 7 July 2023, the European Union (Dematerialised Securities) Regulations 2023 published in Iris Oifigiúil (**2023 Regulations**). The 2023 Regulations 2 make several amendments to the Companies Act 2014 in order to give further effect to provisions contained in Regulation (EU) 909/2014 (**the Central Securities Depository Regulation**) with regard to the legal position of dematerialised securities.

The dematerialisation of all newly issued applicable securities has been required since 1 January 2023 and will apply for all other applicable securities from 1 January 2025.

The 2023 Regulations can be accessed [here](#).

8.2 ESMA publishes first consultation package on technical standards specifying certain requirements of MiCA

On 12 July 2023, ESMA launched a public consultation (**First Consultation Package**) on technical standards specifying certain requirements under Regulation (EU) 2023/1114 on markets in crypto assets (**MiCA**).

The First Consultation Package is the first of three such consultation packages that ESMA intends to publish as part of the MiCA consultation process, with the subsequent consultation packages expected to be published in October 2023 and Q1 2024.

Under MiCA, ESMA is tasked with developing a number of technical standards and guidelines. Many of these will be developed in close cooperation with the EBA (and much of the content of this First Consultation Package aligns with the technical standards issued by the EBA referenced above). The First Public Consultation covers 5 draft RTS and 2 ITS on the following topics:

- (i) the notification by certain financial entities of their intention to provide crypto-asset services;
- (ii) the authorisation of crypto-asset service providers (**CASPs**);
- (iii) complaints handling by CASPs;
- (iv) the identification, prevention, management and disclosure of conflicts of interest; and
- (v) the proposed acquisition of a qualifying holding in a crypto-asset service provider (**CASP**).

The First Consultation Package closed on 20 September 2023. ESMA are now considering the feedback to the First Consultation Package and are expected to publish a final report and submit the technical standards to the European Commission for adoption by 30 June 2024 at the latest.

A copy of the First Consultation Package can be accessed [here](#).

Further information on ESMA's MiCA consultation process is available [here](#).

8.3 Irish Funds' Crypto-Assets Supplemental White Paper

On 17 July 2023, Irish Funds published a Crypto-Assets Supplemental White Paper (**Supplemental White Paper**) dated June 2023. The Supplemental White Paper explores the feasibility of the Irish authorised crypto asset fund market by discussing some of the issues and key risks considered relevant for crypto asset funds.

The Supplemental White Paper is published in light of the many significant crypto-asset related developments and was issued to build upon the findings in the Irish Funds' white paper in May 2022 entitled "*Crypto Assets - Opportunities, Risks and Future Possibilities for Regulated Investment Funds in Ireland*".

In particular, the Supplemental White Paper was published by Irish Funds to address operational challenges for service providers or asset servicers to crypto asset funds. The Supplemental White Paper outlines actions that asset servicers can take in three key areas to prepare for servicing Irish authorised crypto-asset funds and crypto-assets.

The Supplemental White Paper also outlines the Irish Funds' Fintech Working Group's recommended next steps to address some of the risk and challenges identified in the paper and to further develop the crypto asset funds market in Ireland.

The Supplemental White Paper can be accessed [here](#).

The Irish Funds Crypto Assets - Opportunities, Risks and Future Possibilities for Regulated Investment Funds in Ireland White Paper from May 2022 can be accessed [here](#).

8.4 Department of Finance public consultation on MiCA

On 9 August 2023, the Department of Finance, on behalf of the Irish government, published a public consultation (**DoF Public Consultation**) with regard to the exercise of national discretions under certain provisions in MiCA.

The Department of Finance are looking for feedback on whether they should exercise the following discretions under MiCA and how those discretions should be transposed in Irish law:

- Article 88(3): contains a national discretion concerning the requirement to provide a record to the competent authority of the explanation of the delay of the public disclosure of inside information;
- Article 111(1): relates to administrative penalties and other administrative measures and allows for discretions regarding the obligation to lay down administrative sanctions where the associated wrongdoing is already subject to criminal penalties under national law;
- Article 143(3): contains the 18-month transition period for existing CASPs to continue to operate, with a discretion for member states not to apply the transition period or reduce its duration for those CASPs operating under existing national law;
- Article 143(6): allows member states the option to apply a simplified authorisation procedure for applications submitted in the first 18 months that MiCA applies for applications for authorisations submitted between 30 December 2024 and 1 July 2026.

The DoF Public Consultation closed on 15 September 2023 and the feedback received is to be considered when deciding how to transpose the national discretions under MiCA into Irish law. The outcome of the DoF Public Consultation is expected to be published by the end of October 2023.

The DoF Public Consultation paper can be found [here](#).

8.5 ESAs Joint Technical Advice under DORA

On 29 September 2023, the ESAs published joint technical advice (**Joint Technical Advice**) to the European Commission in respect of two delegated acts to be adopted under the Digital Operational Resilience Act (**DORA**).

The Joint Technical Advice was published by the ESAs in response to the Commission's request in December 2022 for the ESAs' input on certain aspects of DORA. Under DORA, an ICT third-party provider (**TPP**) that is considered to be critical to the stability and integrity of the EU financial system will be designated by the ESAs as a critical ICT TPP (**CTPP**) and will be charged fees relating to the conduct of oversight tasks by whichever of the ESAs is its lead overseer. The Joint Technical Advice relates to each of the criticality criteria and to the types of expenditure to be covered by oversight fees and the fee calculation.

The Joint Technical Advice is available [here](#).

For information on DORA more generally, which will apply from 17 January 2025, you can access the text of DORA [here](#) and our previous briefing on DORA [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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