



Payments, E-Money and Crypto-Assets Quarterly Legal and Regulatory Update

Period covered: 1 July 2023 – 30 September 2023

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1. PAYMENTS

1.1 EBA updates Single Rulebook Q&A on PSD2

During the period 1 July 2023 to 30 September 2023, the European Banking Authority (**EBA**) updated its Single Rulebook Questions and Answers (**Q&As**) publication on Directive (EU) 2015/2366 (the **Revised Payment Services Directive** or **PSD2**) (the **Single Rulebook Q&A**). The Q&As in respect of the following articles have been updated:

- Article 4 – Definitions;
- Article 72 – Evidence on authentication and execution of payment transactions;
- Article 97 – Authentication; and
- Article 98 - Regulatory technical standards on authentication and communication.

A copy of the Single Rulebook Q&A can be accessed [here](#).

2. DIGITAL FINANCE & CRYPTO-ASSETS

2.1 EBA consults on draft technical standards concerning requirements for ARTs under MiCA

On 12 July 2023, the EBA opened three consultations on draft technical standards under Regulation (EU) 2023/1114 (**MiCA**). The draft technical standards set out information requirements for the application for authorisation of issuers of asset referenced tokens (**ARTs**), requirements for issuers of ARTs in respect of their complaint handling procedures and information for the assessment of a proposed acquisition of qualifying holdings in issuers of ARTs.

The EBA has published the following consultation papers on the draft technical standards:

- Draft Regulatory Technical Standards (**RTS**) to specify the requirements, templates and procedures for handling complaints under Article 31 of MiCA (EBA/CP/2023/13).

The consultation paper (EBA/CP/2023/13) can be accessed [here](#).

- Draft RTS on the detailed content of information necessary to carry out the assessment of a proposed acquisition of qualifying holdings in issuers of asset-referenced tokens under Article 42(4) of MiCA (EBA/CP/2023/14).

The consultation paper (EBA/CP/2023/14) can be accessed [here](#).

- Draft RTS on information for application for authorisation to offer to the public and to seek admission to trading of asset-referenced tokens and Draft Implementing Technical Standards (**ITS**) on standard forms, templates and procedures for the information to be included in the application, under Article 18(6) and (7) of MiCA (EBA/CP/2023/15).

The consultation paper (EBA/CP/2023/15) can be accessed [here](#).

MiCA will become applicable for issuers of ARTs on 30 June 2024.

The public consultations on the draft technical standards are open until 12 October 2023.

2.2 ESMA published first consultation package on technical standards specifying certain requirements of MiCA

On 12 July 2023, the European Securities and Markets Authority (**ESMA**) launched a public consultation (**First Consultation Package**) on technical standards specifying certain requirements under 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 at [2.1](#) 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](#).

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

2.3 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. In summary, the Supplemental White Paper discusses:

- Practical steps to enhance existing anti-money laundering (**AML**) controls to continue to meet AML obligations by updating systems, processes and procedures to include digital assets and new providers such as CASPs;
- The need for awareness of the complexities inherent in crypto-assets when calculating the net asset value of a fund (**NAV**), due to many variables such as the "24/7" nature of crypto-asset trading; and
- Certain technical attributes of crypto-assets including the decentralised nature of blockchain technology and the related risks.

The Supplemental White Paper also outlines the Irish Funds' Fintech Working Group's recommended next steps to address some of the risks 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](#).

2.4 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 for 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; and
- 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 i.e., 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](#).

2.5 EBA technical advice on classification of asset-reference tokens and e-money tokens and related fees under MiCA

On 29 September 2023, the EBA published technical advice (**EBA Technical Advice**) on two delegated acts to be adopted by the European Commission under MiCA concerning criteria for the classification of ARTs and e-money tokens (**EMTs**) as significant and the fees to be charged by the EBA to issuers of significant ARTs and EMTs.

The publication of the EBA Technical Advice is in response to the European Commission's call for advice in December 2022 on delegated acts required under both Articles 43(11) and Article 137(3) of MiCA (**Delegated Acts**).

By way of background:

- MiCA provides that in order to address increased risks from ARTs or EMTs, the issuers of such tokens are obliged to comply with additional obligations under MiCA when classified as significant and their regulatory supervision is assigned to the EBA.
- Article 43(11) of MiCA requires the European Commission to adopt a delegated act to further specify the criteria for an ART to be classified as significant.
- Article 137(3) of MiCA requires the European Commission to adopt a delegated act to further specify, in the context of the fees to be charged by the EBA to issuers of significant ARTs and EMTs: the types of fees, the matters for which fees are due, the amount of the fees, the manner in which they are to be paid, and the methodology to calculate the maximum fee per entity.

Within the EBA Technical Advice, the EBA:

- Proposes a set of core and ancillary indicators for determining the circumstances in which ARTs and EMTs and their issuers can be considered significant in respect of the criteria relating to interconnectedness with the financial system and the international scale of activities outside the European Union;
- Outline the scope of fees for the EBA's supervisory tasks, the method of calculation of the supervisory fees payable by issuers of ARTs and EMTs and the practical issues related to the payment of fees; and
- Outline the EBA's intention to develop guidelines, in the absence of changes to Level 1 legislation, to address gaps identified by the EBA in the reporting obligations for issuers of ARTs and EMTs under MiCA.

The European Commission is expected to utilise the EBA Technical Advice when developing the Delegated Acts which are to be adopted by the 30 June 2024 application date.

The EBA Technical Advice can be accessed [here](#).

3. CENTRAL BANK OF IRELAND

3.1 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 (**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 (**CFs**) and the application of "additional" conduct standards to all those performing pre-approved controlled functions (**PCFs**) 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 of Ireland (**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](#).

3.2 Updated Fitness and Probity Interview Guide

On 9 August 2023, the Central Bank issued a revised version of its Fitness and Probity Interview Guide (**F&P 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](#).

3.3 Updated Instructions and Guidance – Submission of VASP registration applications via the Central Bank Online Portal

On 6 September 2023, the Central Bank published updated Instructions and Guidance for the Submission of Virtual Asset Service Providers Registration Forms and Documentation via the Central Bank's Online Portal (**Updated Guidance**).

¹ Statutory Instrument 349 of 2023

The Updated Guidance replaces the Central Bank's old instructions and guidance published in 2021, to reflect that applications for registration as a Virtual Asset Service Provider (**VASP**) are no longer made via the Central Bank's Online Reporting System (**ONR**) and are instead made via the Central Bank's Online Portal.

You can access a copy of the Updated Guidance [here](#).

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

4.1 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 to its 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](#).

4.2 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](#).

4.3 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 Customer Due Diligence (**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](#).

5. DATA PROTECTION

5.1 Data Transfers to the United States of America

On 10 July 2023, the European Commission adopted an adequacy decision (**Adequacy Decision**) pursuant to Regulation (EU) 2016/679 (**the General Data Protection Regulation or 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 European Economic Area (**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 [here](#).

5.2 EDPS Opinion on PSD3 and PSR

On 22 August 2023, the European Data Protection Supervisor (**EDPS**) published its Opinion 39/2023 (**EDPS Opinion**) on the Proposal for a Regulation on payment services in the internal market (**PSR**) and the Proposal for a Directive on payment services and electronic money services in the Internal Market (**PSD3**).

On 28 June 2023, the European Commission issued proposals for the Payment Services Regulation and the Payment Services Directive (together, **the Proposals**), to bring payments and the wider financial sector into the digital age.

The EDPS Opinion comes as the Proposals are concerned with the processing of personal data as part of payment services processes and aims to ensure the Proposals are consistent with the GDPR. The EDPS Opinion highlights its considerations for GDPR compliance in response to the Proposals.

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

For more information on the Proposals more generally, please refer to our Q2 QLU which can be accessed [here](#).

6. MISCELLANEOUS

6.1 Minister McGrath publishes the Financial Consumer Protection Roadmap

On 13 September 2023, the Minister for Finance Michael McGrath published the Financial Consumer Protection Roadmap which outlines consumer protection policies being developed by government relating to financial products and services. The roadmap

discusses developments in respect of MiCA, the review of the Revised Payment Services Directive and Directive 2002/65/EC (the **Distance Marketing Directive**) and provides a roadmap with indicative dates for their transposition in Irish law.

The Financial Consumer Protection Roadmap can be accessed [here](#).

6.2 ESAs Joint Technical Advice under DORA

On 29 September 2023, the European Supervisory Authorities (**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 European 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](#).

6.3 The approach of the Irish courts to cryptocurrency and recent international developments in the crypto-asset sphere

We refer you to our four-part series of client briefings entitled "*The Approach of the Irish Courts to Cryptocurrency and What Lies Ahead*" for a discussion on the increasing litigation involving cryptocurrency and related matters such as the Irish court's adaptation of traditional legal remedies to assist cryptocurrency holders and its movement towards an explicit recognition of cryptocurrency as a form of property. Part 4 of this four-part series further discusses recent developments internationally in respect of cryptocurrency including the advancement of MiCA.

You can access the four-part series at the following links:

- Part 1 of our client briefing series can be accessed [here](#).
- Part 2 of our client briefing series can be accessed [here](#).
- Part 3 of our client briefing series can be accessed [here](#).
- Part 4 of our client briefing series can be accessed [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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