



# Investment Firms Quarterly Legal and Regulatory Update

Period covered: 1 January 2020 – 31 March 2020

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## 1. MIFID II – EUROPEAN DEVELOPMENTS

### 1.1 Non-EU Investment Firms - ESMA consults on technical standards

On 31 January 2020, the European Securities and Markets Authority (“**ESMA**”) issued a consultation paper entitled “Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR” (“**Consultation Paper**”).

ESMA seeks submissions on the following proposed measures:

- Draft regulatory technical standards concerning the information for registration of third country firms and the information to be reported annually by third country firms registered with ESMA;
- Draft implementing technical standards with regard to the format of applications for registration of third country firms and the format of the information to be reported annually to ESMA by registered third country firms; and
- Draft implementing technical standards to specify the format in which the new flow of information provided under the MiFID II Directive (2014/65/EU) (“**MiFID II Directive**”) is to be reported to Member States’ competent authorities by branches of third-country firms.

The deadline for feedback on the Consultation Paper closes on 28 April 2020. ESMA has stated that it expects to publish the draft technical standards and send its final report to the European Commission (“**Commission**”) for endorsement in Q3 2020.

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

For further information on the topic, Dillon Eustace have published a more detailed article that can be found [here](#).

### 1.2 ESMA consults on the MiFIR pre-trade transparency regime for systematic internalisers active in non-equity instruments

On 3 February 2020, ESMA launched a consultation on the MiFIR pre-trade transparency regime for systematic internalisers (“**SIs**”) active in non-equity instruments (“**Consultation Paper**”).

Under MiFIR, ESMA and the respective national competent authorities (“**NCA**s”) must monitor the application of the pre-trade transparency obligations applicable to SIs in respect of bonds, structured finance products, emission allowances and derivatives (i.e. non-equity instruments). The monitoring carried out focuses on the sizes of quotes that are made available to clients of the investment firm and other market participants relative to the trading activity of the firm.

ESMA has stated that the proposals set out in the Consultation Paper aim to provide a simplified and more efficient framework for SIs active in non-equity instruments. In the body of the Consultation Paper; Section 3 assesses the effectiveness of the regime for SIs on liquid and illiquid instruments and discusses preliminary recommendations to address possible inefficiencies; and Section 4 contains the outcome of the quantitative monitoring of sizes at which quotes are made.

The Consultation Paper remains open to submissions until on 15 April 2020 and ESMA intends to collect stakeholders view on the findings and proposals and expects to publish a final report and submit it to the Commission by July 2020.

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

### 1.3 ESMA issues Technical Advice to the Commission on the effects of product intervention measures

On 3 February 2020, ESMA issued a Final Report containing technical advice to the Commission on the effects of product intervention measures under MiFIR. Currently, ESMA and NCAs are empowered under MiFIR to temporarily prohibit or restrict in the European Union (“**EU**”) the marketing, distribution or sale of certain financial instruments. These intervention powers are explicitly addressed to investment firms and credit institutions (together referred to as “**MiFID firms**”).

ESMA recommends that such intervention powers should apply restrictions/prohibition directly to AIFMs and UCITS management companies as well as to MiFID firms in order to address the risk of arbitrage.

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

#### 1.4 ESMA consults on the transparency regime for equity and equity-like instruments, the double volume cap mechanism and the trading obligations for shares

On 4 February 2020, ESMA launched a consultation on reviewing the MiFIR transparency regime for equity and equity-like instruments, the double volume cap (“DVC”) mechanism and the trading obligations for shares (“Consultation Paper”).

Under Article 52(1) to (3) of Markets in Financial Instruments Regulation (EU) 600/2014 (“MiFIR”) it requires ESMA to submit a report to the European Parliament and to the European Council on the impact in practice of the transparency obligations established pursuant to Articles 3 to 13 of MiFIR and on the impact of the volume cap mechanism established under Article 5 of MiFIR.

ESMA provided that in order to provide a comprehensive and meaningful assessment, it has decided at its own initiative to also include an assessment of other key transparency provisions and the share trading obligation under Article 23 of MiFIR and the transparency provisions applicable to SIs under Articles 14-21 of MiFIR.

The Consultation Paper contains proposals aiming at simplifying the structure of the transparency regime while trying to improve the overall trade transparency available to market participants.

Section 3 of the Consultation Paper contains analysis of the pre-trade transparency regime for equity and equity-like instruments and analyses of the trading obligation for shares and the recent development of closing auctions. Three issues are investigated:

1. the evolution of trading executed on- and off-venue (including SIs);
2. the split between lit and dark trading on-venue through the use of waivers; and
3. the evolution in the use of the different types of waivers.

Three conclusions are drawn from the analysis:

1. the introduction of the share trading obligation by MiFID II/MiFIR, for shares has not seen a significant change in the share of trading volume executed on-venue, on SIs and over-the-counter (“OTC”) and a large portion of the trading volume is still executed off-venue;
2. the trading volume executed on-venue has increased but not enough to compensate the increase in the volume executed under the waivers. There is a large share of trading volume executed on-venue which is not subject to pre-trade transparency; and
3. the use of waivers, mainly due to the application of the DVC mechanism has changed. The large-in-scale (“LIS”) waiver is now the one most in use.

The Consultation Paper closes on 14 April 2020 after which, ESMA will consider the feedback it received and expects to publish a final report to the Commission in July 2020.

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

#### 1.5 ESMA launches a common supervisory action with NCAs on MiFID II suitability rules

On 5 February 2020, ESMA issued a press release setting out the launch of a Common Supervisory Action (“CSA”) with NCAs on the application of MiFID II suitability rules across the EU. The CSA is set to be conducted during 2020.

The CSA will focus on the application of the MiFID II requirements on the assessment of suitability and will allow ESMA and the NCAs to gauge the progress made by intermediaries in the application of this requirement. It will also help in the analysis of how the costs of investment products are taken into account by firms when recommending an investment product to a client.

ESMA believes that this CSA and the related sharing of practices across NCAs will help to ensure consistent implementation and application of EU rules and enhance the protection of investors as well as improve NCAs' understanding of supervisory approaches in line with ESMA objectives.

The CSA contributes to fulfilling ESMA's mandate on building a common supervisory culture among NCAs to promote sound, efficient and consistent supervision throughout the EU.

In 2018, ESMA updated its guidelines on the topic and has also recently published a supervisory briefing on suitability, both of which will be taken into account in the CSA set to be undertaken this year.

The press release can be accessed [here](#).

## 1.6 ESMA publishes its final report on the alignment of MiFIR with the changes introduced by EMIR Refit

On 7 February 2020, ESMA published its final report on the alignment of MiFIR with the changes introduced by EMIR Refit ("**Final Report**").

Under the EMIR Refit Regulation (EU) 2019/834 ("**EMIR Refit**"), the Commission is required to prepare a report assessing the necessity and appropriateness of aligning the trading obligation for derivatives under MiFIR with changes made under EMIR Refit to the clearing obligation for derivatives.

As EMIR Refit was not accompanied by direct amendments to MiFIR, this has led to a misalignment between the scope of counterparties subject to the clearing obligation ("**CO**") and the derivatives trading obligation ("**DTO**"). In practice, this means that small financial counterparties are exempted from the CO while still being subject to the DTO.

In the Final Report, ESMA has recommended that the changes introduced by EMIR Refit to the scope of the CO for financial counterparties is replicated in MiFIR and has provided that the references to financial counterparties subject to both CO and DTO should be exactly the same in both EMIR and MiFIR. ESMA has also recommended that the new mechanism set out in the EMIR Refit to suspend the CO (Article 6a of the revised EMIR) should be mirrored in MiFIR, adapting the criteria to trigger such a mechanism to the specificities of the DTO.

The Final Report is set to be submitted to the Commission by 18 May 2020 and is expected to feed into the report that the Commission will prepare for the European Parliament and the European Council on the necessity and appropriateness of aligning the trading obligation for derivatives under MiFIR with changes made under EMIR Refit to the clearing obligation for derivatives by 18 December 2020.

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

## 1.7 Commission launches a consultation and impact assessment on MiFID II post-implementation review

On 17 February 2020, the Commission launched a public consultation paper on its review of the regulatory framework for investment firms and market operators under the MiFID II Directive and MiFIR ("**Consultation Paper**").

Pursuant to Articles 90 and 52 of the MiFID II Directive and MiFIR respectively the Commission is required to carry out a post-implementation review of MiFID II.

Among other things, the Consultation Paper is seeking feedback from stakeholders on the experience of two years of the application of MiFID II. Specifically on whether a targeted review of MiFID II would be appropriate to address the most urgent shortcomings.

In section 2 of the Consultation Paper the Commission is seeking views on technical aspects of the existing MiFID II regime. The feedback is set to allow the Commission to assess the impact of possible changes to EU legislation on the basis of proposals already put forward by stakeholders in the context of previous consultations and studies and in the context of exchanges with experts.

The Commission has also invited stakeholders to provide feedback to any further regulatory aspects or issues not mentioned in section 1 or 2 of the Consultation Paper.

As is outlined the Commission is considering potential changes to investor protection rules, potential actions to foster research coverage for small and medium-sized enterprises (“SMEs”) and the possible introduction of transparency tool that allows investment managers, investment advisers and their clients to have access to “live” asset prices across the EU in a consolidated format.

Feedback on the Consultation Paper closes on 20 April 2020.

The Commission had also launched a consultation on an impact assessment on the MiFID II review, where feedback could be made on the impact assessment until 16 March 2020.

A copy of the Consultation Paper can be accessed [here](#) and the webpage for the consultation on the impact assessment on the MiFID II review can be accessed [here](#).

## 1.8 ESMA publishes latest DVC Data

ESMA published the updates of the latest set of data regarding the DVC under the MiFID II Directive for the period 1 February 2019 to 1 January 2020.

The MiFID II Directive introduced the DVC to limit the amount of dark trading in equities allowed under the reference price waiver and the negotiated transaction waiver. The DVC mechanism is set out in Article 5 of MiFIR with the aim of limiting the trading under the reference price waiver (Article 4(1)(a) of MiFIR) and the negotiated transaction waiver for liquid instruments (Article 4(1)(b)(i) of MiFIR) in an equity instrument.

The data files published by ESMA provide the information needed for the implementation of the DVC mechanism. This includes the identifiers of the instruments and trading venues associated with a suspension of the relevant waivers, and the period in which the DVC will be applicable. Trading under the waivers for all new instruments in breach of the DVC thresholds should be suspended from 11 March 2020 to 10 September 2020. The instruments for which caps already existed from previous periods will continue to be suspended.

In the update published on 6 March 2020, ESMA amended the suspension files relating to the DVC data which it had originally published on 7 August 2018. The suspension file, which is required under MiFIR, contains a list of International Securities Identification Numbers (“ISINs”) which are suspended from trading. As of 6 March 2020, there was a total of 384 instruments suspended.

The data files and the suspension files can be found [here](#).

## 1.9 ESMA consults on MiFIR transparency regime for non-equity instruments

On 10 March 2020, ESMA launched a consultation paper reviewing the transparency regime for non-equity instruments and the trading obligation for derivatives under MiFIR (“**Consultation Paper**”).

The Consultation Paper contains ESMA’s proposals for possible amendments to the transparency regime based on in-depth data analyses of the effects of the current regime since January 2018.

The objective set by ESMA for this review is to simplify the current complex trade reporting regime in order to create a uniform set of rules in the EU while trying to improve the overall trade transparency available to market participants for non-equity instruments.

ESMA’s data analyses revealed the following main developments since 2018 were:

- a. the overall level of pre-trade transparency appears to be limited due to the high share of financial instruments benefitting from a waiver; and
- b. the available deferral options for post-trade transparency appears detrimental to attaining the objective of improving the functioning of the EU internal market.

The Consultation Paper also includes ESMA's report on the impact of the newly established trading obligation for derivatives and the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms.

The consultation closes on 17 May 2020 and ESMA intends to submit its final review report of the transparency regime applicable to non-equity instruments to the Commission in July 2020.

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

### 1.10 ESMA sets out approach on MiFIR tick-size regime for SIs

On 20 March 2020, ESMA issued a public statement to ensure co-ordinated supervisory actions by NCAs on the application of the new tick-size regime for SIs under MiFIR and the Investment Firms Regulation (EU) 2019/2033 ("IFR"). ESMA has provided that this approach is needed in response to developments related to the COVID-19 pandemic and the related actions taken by the EU Member States.

In the public statement, ESMA expects NCAs not to prioritise their supervisory actions in relation to the new tick-size regime from 26 March until 26 June 2020 and to apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area.

It was provided that ESMA and the NCAs will continue to monitor developments in financial markets as a result of the COVID-19, including the application of relevant EU requirements by market participants and are prepared to use its powers to ensure financial stability, orderly functioning of EU markets and investor protection.

The public statement can be accessed [here](#).

## 2. EUROPEAN MARKETS INFRASTRUCTURE REGULATION ("EMIR")

### 2.1 The Central Bank publishes the first edition of the EMIR Q&A

On 21 January 2020, the Central Bank of Ireland ("Central Bank") published the first edition of its Questions & Answers ("EMIR Q&As") concerning Regulation 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories ("EMIR" or the "European Markets Infrastructure Regulation").

The EMIR Q&A includes ten Q&As. The Q&A's clarify that supervision of EMIR compliance by financial counterparties is incorporated into the Central Bank's risk-based approach for supervision ("PRISM") where relevant. Other topics covered include guidance concerning the issuance of legal entity identifiers, requests/ notifications for intragroup exemptions, monthly unconfirmed trades reports and notifications concerning the clearing obligation.

The EMIR Q&A's can be accessed [here](#).

## 3. SECURITIES FINANCING TRANSACTIONS REGULATION ("SFTR")

### 3.1 ESMA clarifies SFTR reporting requirements

On 6 January 2020, ESMA published its Final Report and Guidelines on reporting under articles 4 and 12 of Regulation (EU) 2015/2365 on reporting and transparency of securities financing transactions ("SFTR" or "Securities Financing Transactions Regulation").

The Final Report and the Guidelines provide clarification regarding the compliance with the technical standards under the SFTR and ensure the consistent implementation of the new SFTR rules. The Guidelines apply from 7 January 2020. ESMA has also published amended validation rules for SFTR reporting to reflect the above.

The recent publications can be found [here](#).

### 3.2 ICMA publishes a guide to on reporting repo transactions under the SFTR

On 24 February 2020, the International Capital Market Association (“**ICMA**”) published a guide by its European Repo and Collateral Council (“**ERCC**”) on reporting repo transactions under the SFTR.

A copy of the ICMA’s Guide can be accessed can be accessed [here](#).

### 3.3 ESMA clarifies position on SFTR in light of COVID-19

On 19 March 2020, ESMA issued a statement clarifying that the phase-in deadline for reporting by MiFID firms, credit institutions and relevant third country entities was deferred from 13 April, 2020 until 13 July 2020. ESMA clarified that competent authorities are not expected to prioritise this matter in their supervisory actions. Further ESMA also expects competent authorities “to generally apply their risk-based approach in the exercise of supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

On 26 March 2020, ESMA issued a press release revising its earlier statement of 19 March on co-ordinated supervisory actions on the application of SFTR. This clarifies that SFTs concluded between 13 April 2020 and 13 July 2020, as well as those subject to backloading under SFTR fall within the issues that competent authorities are not expected to prioritise in their supervisory actions. It advises that the application of a risk-based approach in the exercise of supervisory powers in this area be done in a proportionate manner.

The ESMA statement is available [here](#).

The press release is available [here](#).

## 4. BENCHMARKS REGULATION

### 4.1 ESMA launches a public consultation on new draft RTS concerning the Benchmarks Regulation

On 9 March 2020, ESM launched a public consultation on new draft RTS under Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (“**Benchmarks Regulation**” or “**BMR**”).

The consultation addresses requirements relating to governance, methodology, infringements reporting and critical benchmarks.

Initially the deadline for feedback by stakeholders was set for 9 May 2020. This deadline has been extended to 8 June 2020 by ESMA in light of COVID-19.

Details for the instructions for feedback can be accessed [here](#).

## 5. SHAREHOLDERS RIGHTS DIRECTIVE (“SRD II”)

### 5.1 Shareholders Rights Directive transposed into Irish law

On 5 February 2020, the second Shareholders Rights Directive (EU) 2017/828 (“**SRD II**”) was transposed into Irish law via the EU (Shareholders’ Rights) Regulations 2020 S.I. No. 81 of 2020 (“**Regulations**”) which amends the Companies Act 2014. The Regulations entered into Irish law on 30 March, 2020.

The new measures contained in SRD II aim to promote greater shareholder involvement in the corporate governance of public companies. The Regulations introduce into Irish law a range of new rules on investor engagement and investment strategy transparency for institutional investors and asset managers that invest on their behalf. The Regulations apply to:

- institutional investors (EU life insurers and EU pension funds); and
- asset managers.

The definition of asset manager captures the following types of entities where they invest on behalf of institutional investors:

- MiFID firms providing portfolio management services;
- AIFMs;
- UCITS management companies; and
- self-managed UCITS.

The requirements on investments apply in the context of investments made in companies which have a registered office in an EEA Member State and whose shares are admitted to trading on a regulated market in an EEA Member State.

The key requirements for asset managers is to put in place a shareholder engagement policy on its investment strategy and how it monitors the companies it invests in and for asset managers to disclose how the shareholder engagement policy has been implemented and provide a general description of voting behaviours and to provide annual reporting to institutional investors on how investments have performed and specific metric reporting. Furthermore, the shareholder engagement policy must include policies on how to manage actual or potential conflicts of interests, in particular situations in which the institutional investors or asset managers or their affiliated undertakings have significant business relationships with the investee company.

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

## 6. PROSPECTUS REGULATION

### 6.1 ESMA publishes updated Prospectus Regulation Q&A

On 18 February 2020, ESMA published an updated version of its questions and answers on Regulation EU 2017/ 1129 (“**Prospectus Regulation**”). The revised Prospectus Regulation includes two Q&A’s relating to the length of the prospectus summary.

The link to this Q&A can be found [here](#).

## 7. CENTRAL BANK OF IRELAND

### 7.1 Dear CEO – Wholesale Market Conduct Risk – Industry Communication 2020

On 21 January 2020, Derville Rowland, Director General Financial Conduct of the Central Bank, issued a letter to CEOs regarding the previous 2019 industry communication on securities markets conduct risk. It outlined the background supervisory process carried out by the Central Bank in 2019 to assess wholesale market conduct risk. The attached appendix to the letter describes the findings, which found that entities may not be adequately identifying the market conduct risk they are exposed to and therefore, are not appropriately mitigating or managing it.

There are three key findings addressed in this letter, namely:

- **Inadequate Market Conduct Risk Frameworks:** The 2019 communication emphasised the Central Bank's expectation that regulated entities demonstrate and evidence their market conduct risk identification processes. It found that some lacked a structured market conduct risk identification process. Some entities' frameworks were not fit for purpose and often relevant controls were insufficiently communicated to employees. It highlighted that centralised group risk management functions were acceptable, depending on the entity's specific circumstances. Failings identified with this group approach include a failure to capture Irish entity-specific risk in sufficient detail, lack of contribution/challenge by the Irish entity and a particular lack of input from Irish entities' frontline staff.

The Central Bank highlighted that staff in some regulated entities did not have a clear understanding of the management information they should generate. It also identified a lack of knowledge among staff of what constitutes market conduct risk.

- **Inadequate Governance of Market Conduct Risk:** The Central Bank's key finding here was that senior management (including CEOs) failed to demonstrate an understanding of their entities' market conduct risk framework and the impact it can have on how the entities operate. The Central Bank also noted a poor flow of information regarding conduct risk between branches of Irish entities and the entities themselves. It noted an almost exclusive focus in some instances of Pre-Approval Controlled Function ("PCF") holders on generating profit, limiting oversight and control.

The Central Bank expects regulated entities to assess their governance structures on a periodic basis and that they should ensure ownership of the governance of market conduct risk, regardless of group arrangements. The entities must also satisfy themselves of the fitness and probity of PCF holders and staff on an ongoing basis.

- **Failure to Identify the Risk of Market Abuse:** The Central Bank identified a particular issue with the outsourcing of trade surveillance and oversight of this. Monitoring and supervision was often insufficient. It also described the submission of Suspicious Transaction and Order Reports ("STOR") as "ineffective", highlighting inconsistencies in the decision-making process. Concern was also raised regarding the quality of communications between regulated entities and issuer investors relations functions. Instances were identified where staff may seek information without considering the extent to which it can be considered inside information. Generally, the quality of STOR submissions to the Central Bank was considered to be good.

Regulated entities should assess the effectiveness of their trade surveillance systems. The Central Bank expects consistent monitoring and supervision where trade surveillance functions have been outsourced. Clear lines of responsibility should be communicated to staff. It also urges consideration of the quality and volume of the regulated entities' STOR submissions. The Central Bank also urged that it is ensured there is no breach of prohibitions against disclosure of unlawful inside information and insider dealing.

The letter from Derville Rowland, Director General Financial Conduct of the Central Bank can be found [here](#).

### 7.2 PRISM – Central Bank Revises Prudential Impact Models

In February 2020, the Central Bank published its "PRISM Impact Review - Revised Prudential Impact Models" document ("PRISM Impact Review").

Where a regulated entity's PRISM rating is revised upwards following PRISM Impact Review the firm can expect more hands-on supervision from the Central Bank. This will also result in the firm having to pay a higher industry funding levy. Under the PRISM supervisory framework firms which are judged to have the greatest impact on consumers and/or the economy if they were to fail are subject to the highest level of supervision and structured engagement with the Central Bank.

The PRISM Impact Review has revised the prudential impact models in the asset management, credit union, fund service provider, insurance, payments, e-money and market infrastructure sectors. Previously, the key driver of impact in the prudential impact models was size. However, after analysis, the Central Bank has concluded that size is not generally the sole factor in determining how impactful a firm is. The Central Bank has introduced new metrics to some of the impact models in the above sectors to capture other aspects of impact such as connectivity, substitutability, and the scale and spread of the financial service provider's failure. As a result of the PRISM Impact Review, the number of impact models in the above sectors has been reduced from 28 to 16.

The Central Bank has confirmed that no changes are planned to the industry funding levy methodologies in the 2020 billing cycle, as a result of the PRISM Impact Review. However, the Central Bank has signalled that there may be changes in future, noting that it intends to test alternative levy methodologies for insurers, asset managers, fund service providers and firms in the market infrastructure, payment and e-money sectors. However, it has confirmed that if there are to be any changes to the approach used to determine the industry funding levy in future, these will be clearly communicated.

A copy of the PRISM Impact Review can be accessed [here](#).

For further information on the topic Dillon Eustace have published an article [here](#).

### 7.3 Additional Pre-Approval Control Functions

On 25 February 2020, the Central Bank issued a notice of intention ("**Notice**") proposing to: (i) introduce three new PCFs, namely, Chief Information Officer PCF-49, Head of Material Business Line PCF-50 and Head of Market Risk PCF-51; and (ii) split PCF-39 Designated Person into six PCF roles aligned to the specific managerial functions.

The Central Bank indicates in the Notice that amended regulations will be put in place reflecting the introduction of these new roles pursuant to Section 22 of the Central Bank Reform Act 2010. Once the amended regulations have been implemented, regulated financial service providers ("**RFSPs**") will need to assess persons in situ (i.e. persons in the new PCF roles) to ensure that such person comply with the Fitness and Probity Standards 2014 ("**Standards**") (and that such persons have agreed to abide by such Standards). RFSPs will be required to submit confirmation of such an assessment to the Central Bank. The exact timings and specifics of the confirmation remain unclear. It would however appear that a period of six weeks will be provided after the implementation of the amended regulations to submit the in situ confirmation.

The Central Bank had invited comments from stakeholders on this proposal prior to 14 April, 2020.

A copy of the Dillon Eustace briefing entitled "Additional Pre-Approval Control Functions and the impact on the Asset Management Industry" can be accessed [here](#).

## 8. CYBERSECURITY

### 8.1 Central Bank issues Industry Letter on the Thematic Inspection of Cybersecurity Risk Management in Asset Management Firms

On 10 March 2020, the Central Bank published a letter to industry on the key findings of their recent thematic inspection ("**Thematic Inspection**") of cybersecurity risk management in Asset Management Firms ("**Industry Letter**").

The Central Bank has indicated that the Industry Letter must be brought to the attention of all Board Members and Senior Management by 30 April 2020, where the findings are to be considered and, if necessary, improvements should be made to cybersecurity risk management practices.

Please see the Dillon Eustace briefing on this topic which can be accessed [here](#).

## 9. ANTI-MONEY LAUNDERING (“AML”) / COUNTER-TERRORIST FINANCING (“CTF”)

### 9.1 Anti-Money Laundering Risk Factor Guidelines to be revised

On 5 February 2020, the European Banking Authority (“EBA”) issued a consultation paper in relation to a revision of the guidelines issued by the European Supervisory Authorities in January 2018 on simplified and enhanced customer due diligence (“CDD”) and the factors credit and financial institutions should consider when assessing money laundering and terrorist financing risk (“Risk Factor Guidelines”).

Please see the Dillon Eustace briefing entitled “Anti-Money Laundering - Risk Factor Guidelines to be revised - consultation open” which can be accessed [here](#).

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

## 10. SUSTAINABLE FINANCE

### 10.1 Political agreement on the Taxonomy Regulation confirmed

On 5 February 2020, the European Council’s Committee of Permanent Representatives (“COREPER”) confirmed political agreement with the European Parliament on the proposed text of the EU Regulation the establishment of a framework to facilitate sustainable investment (“Taxonomy Regulation”). The final Regulation is expected to be published in the Official Journal in May 2020.

The Taxonomy Regulation seeks to establish an EU-wide classification system (or taxonomy) intended to provide firms and investors with a common framework for identifying to what degree economic activities can be considered to be “environmentally sustainable”.

The Taxonomy Regulation applies to a number of issuers and undertakings, including “financial market participants” making available “financial products” (as defined in the related Disclosures Regulation) which covers a broad range of investment funds, product manufacturers and managers, including insurance undertakings, pension funds, AIFMs and UCITS management companies.

The Taxonomy Regulation can be accessed [here](#).

### 10.2 ESMA Strategy on Sustainable Finance

On 6 February 2020, ESMA published its strategy on sustainable finance. The report outlines ESMA’s practical objectives when it comes to sustainable finance. These include:

- working with EBA and the European Insurance and Occupational Pensions Authority (“EIOPA”) to produce joint technical standards supplementing Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (“Disclosures Regulation”).
- including a dedicated chapter in its trends, risks and vulnerabilities (“TRV”) report on the TRV associated with sustainable finance.
- using data available to it to analyse financial risks associated with climate change with a view to possibly introducing climate related stress testing in certain market areas.
- participating in the EU Platform on Sustainable Finance.
- pursuing convergence of national supervisory practices on environmental, social, and governance (“ESG”) factors.

- ensuring compliance with ESG factors within the entities that ESMA supervises directly.

The ESMA report on sustainable finance strategy can be found [here](#).

## 11. COVID-19

### 11.1 Short Selling reporting threshold lowered due to Covid-19

On 16 March 2020, ESMA announced that it has lowered the reporting threshold for net short positions in shares admitted to trading on an EU regulated market under Regulation (EU) No. 236/2012 (“**EU Short Selling Regulation**” or “**SSR**”). The reporting threshold has been lowered temporarily to 0.1%. These temporary measures announced by ESMA will force investors to reveal more information about their short-selling positions by halving the threshold for disclosures.

The ESMA decision can be found [here](#).

### 11.2 Bans on short selling announced in several European countries

On 16 March 2020, the Italian regulator notified ESMA of its intention to prohibit short selling on shares traded on the Italian MTA regulated market. The ban has been imposed for a period of 3 months and is subject to a number of exceptions. ESMA has issued an opinion confirming that it considers the emergency measure proposed as necessary.

Similarly the French regulator, the Belgian regulator, the Greek regulator and the Austrian regulator have followed this approach in banning short selling in shares admitted to the regulated markets for which it is the relevant competent authority. The exemptions to the ban vary slightly from regulator to regulator.

A copy of the ESMA opinion in respect of the Italian ban can be accessed [here](#).

A copy of the ESMA opinion in respect of French ban can be found [here](#).

A copy of the ESMA opinion in respect of the Belgian ban can be found [here](#).

A copy of the ESMA opinion in respect of the Greek ban can be found [here](#).

A copy of the ESMA opinion in respect of the Austrian ban can be found [here](#).

### 11.3 ESMA clarifies position on call taping under MIFID II

On 20 March 2020, ESMA issued a public statement to clarify issues regarding the application by firms of the MiFID II requirements on the recording of telephone conversations (“**Statement**”).

In the Statement, ESMA reminds firms of the MiFID II requirements. ESMA recognises that, considering the exceptional circumstances created by the COVID-19 outbreak, some scenarios may emerge where, the recording of relevant conversations required by MiFID II may not be practicable. If firms, under these exceptional scenarios, are unable to record voice communications, ESMA expects them to consider what alternative steps they could take to mitigate the risks related to the lack of recording.

Firms are expected to deploy all possible efforts to ensure that the above measures remain temporary and that recording of telephone conversations is restored as soon as possible.

ESMA, in co-ordination with NCAs, continues to monitor developments in financial markets, including the application of relevant EU requirements by market participants, as a result of the COVID-19 situation and is prepared to use its powers to ensure financial stability, orderly functioning of EU markets and investor protection.

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

#### **11.4 Central Bank issues statement on provision of essential services by financial services firms during the COVID-19 emergency**

On 31 March 2020, the Central Bank issued a statement on provision of essential services by financial services firms. The Central Bank notes that it expects “financial service firms’ boards and senior management to actively monitor developments in order to be in the best position to pre-empt and respond to rapidly changing circumstances” and sets out its specific expectations in this regard.

This includes keeping business continuity plans under constant review to ensure that they remain fit for purpose and notifying the Central Bank, as soon as possible, where they believe circumstances present a risk to the maintenance of essential services to consumers, industry or markets.

The statement 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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