



Investment Firms Quarterly Legal and Regulatory Update

Period covered: 1 January 2022 – 31 March 2022

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1. MIFID II

1.1 ESMA final report on guidelines on aspects of appropriateness and execution-only under MiFID II

On 3 January 2022, the European Securities and Markets Authority (**ESMA**) published a final report on guidelines on aspects of the appropriateness and execution-only requirements under Directive 2014/65/EU (**MiFID II**) (the **Guidelines**), following consultation in January 2021.

The Guidelines relate to the framework as set out in Article 25(3) and (4) of MiFID II and Articles 55 to 57 of the Commission Delegated Regulation (EU) 2017/565 (**MiFID II Delegated Regulation**). Their purpose is to enhance clarity and foster convergence in the application of certain aspects of the appropriateness and execution-only requirements. The Guidelines cover the following issues:

- Information to clients about the purpose of the appropriateness assessment and about execution-only;
- Know your client (**KYC**) and know your product (**KYP**), including arrangements necessary to understand clients and the extent of the information to be collected from clients;
- Matching clients with appropriate products, including arrangements necessary to ensure a consistent appropriateness assessment and the effectiveness of warnings; and
- Other related requirements, including staff qualifications and record-keeping.

The Guidelines will apply from 6 months of the date of their publication on ESMA's website in all EU official languages.

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

1.2 European Commission adopts Delegated Regulation on liquidity thresholds and trade percentiles used to determine SSTI applicable to non-equity instruments

On 12 January 2022, the European Commission adopted a Delegated Regulation (the **Delegated Regulation**) amending the regulatory technical standards (**RTS**) laid down in Delegated Regulation (EU) 2017/583 (**RTS 2**) relating to the adjustment of liquidity thresholds and trade percentiles used to determine the size specific to the instrument (**SSTI**) applicable to certain non-equity instruments, under Regulation (EU) 600/2014 (**Markets in Financial Instruments Regulation or MiFIR**).

RTS 2 imposes transparency requirements for trading venues and investment firms in respect of bonds and other non-equity products, and provides the methodology to assess the liquidity and the SSTI of bonds. Under the RTS 2 phased approach to both the methodology to calculate the liquidity of bonds and SSTI non-equity instruments, ESMA annually assesses if a move to another stricter phase is warranted.

The Council of the EU and the European Parliament will consider the Delegated Regulation for approval. Where neither object, the Delegated Regulation will enter force 20 days after it is published in the Official Journal of the European Union (**OJ**).

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

A copy of RTS 2 can be accessed [here](#).

1.3 Central Bank Statement for MiFID investment firms authorised to provide the MiFID investment services of dealing on own account or underwriting of financial instruments on a firm commitment basis

On 26 January 2022, the Central Bank of Ireland (**Central Bank**) published a statement for MiFID investment firms authorised to provide services of dealing on own account or underwriting of financial instruments on a firm commitment basis (the **Statement**).

The Statement follows the European Banking Authority (**EBA**) final report on RTS required by Directive (2013/36/EU) (**Capital Requirement Directive IV** or **CRD IV**) on the reclassification of investment firms as credit institutions (the **Final Report**), published on 20 December 2021.

The Central Bank provides that all MiFID investment firms authorised to provide the MiFID investment services of dealing on own account or underwriting of financial instruments on a firm commitment basis should give due regard to both the threshold reporting requirements and the threshold calculation methodology for determining the need for reclassification of an investment firm as a credit institution set out in these publications.

MiFID investment firms that anticipate meeting the threshold triggering the requirement to seek re-authorisation as a credit institution are expected to:

- Engage with the Central Bank regarding their re-authorisation within 3 months of the date of entry into force of the Delegated Act; and
- Submit an application for re-authorisation as a credit institution within 6 months of the date of entry into force of the Delegated Act.

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

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

1.4 ESMA issues consultation on Guidelines on certain aspects of MiFID II Suitability Requirements

Under existing MiFID II requirements, EU investment firms which provide the services of investment advice (whether independent or not) or portfolio management to their clients (**In-Scope MiFID Firms**)¹ must carry out a suitability assessment on their clients, taking into account the client's knowledge and experience, financial situation and investment objectives. From 2 August 2022, In Scope MiFID Firms will be required to collect information from their clients regarding their sustainability preferences and to consider them as part of the clients' suitability assessment.

On 27 January 2022, ESMA published a consultation paper on draft guidelines on certain aspects of the suitability requirements under MiFID II (**Consultation Paper**), updating the current guidelines on suitability under MiFID II, dated 28 May 2018. The Consultation Paper sets down ESMA's proposed revisions to the existing guidelines to provide guidance on the incorporation of sustainability preferences into the suitability assessment process as well as taking into account the results of the 2020 common supervisory action (**CSA**) carried out by NCAs on the application of the MiFID II suitability requirements amongst other changes.

The consultation process closes on 27 April 2022. ESMA will consider the feedback and publish a final report in Q3 2022.

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

¹ This will include UCITS management companies and AIFMs which have an extended licence to provide investment advice or individual portfolio management to clients.

1.5 ESMA consults on opinion on MiFID II trading venue perimeter

On 28 January 2022, ESMA published a consultation paper containing proposals aimed at clarifying the MiFID II provisions relating to multilateral systems and the trading venue authorisation perimeter (**Consultation Paper**).

In the Consultation Paper, ESMA considers the definition of multilateral systems and the implications of the changes introduced in MiFID II with regards to trading venue authorisation, in particular the requirement for all multilateral systems to be authorised as trading venues.

It also considers specific cases in which it may be difficult to determine whether a trading venue should be authorised due to the fact that the trading venue perimeter is currently subject to different interpretation. In particular, ESMA looks at request for quote systems and new technology providers that may, in some instances, operate de facto a multilateral system without proper authorisation. ESMA also considers the case of pre-arranged transactions, where the execution ultimately takes place on an authorised trading venue.

The consultation process closes on 29 April 2022. ESMA will consider the feedback and publish a final report in Q3 2022.

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

1.6 ESMA updates MiFID II Q&As on transparency

On 28 January 2022, ESMA published updated Questions and Answers (**Q&As**) on MiFID II and MiFIR transparency topics (**MiFID II transparency Q&As**).

A new Question, within the double volume cap mechanism section, has been included regarding the responsibility to verify the double volume cap (**DVC**) under MiFIR.

A copy of the updated MiFID II transparency Q&As can be accessed [here](#).

1.7 ESMA issues supervisory briefing on supervisory expectations in relation to firms using tied agents in the MiFID II framework

On 2 February 2022, ESMA issued a supervisory briefing on its expectations in relation to firms using tied agents in the MiFID II framework, being of particular relevance to UK investment firms.

The supervisory briefing outlines the expectations of ESMA and national competent authorities (**NCAs**) in relation to the appointment and use of tied agents in the provision of investment services. ESMA outlines the following expectations of firms when appointing tied agents, including:

- Firms should have a clear understanding of how the tied agent fits into the firm's strategy, including what types of clients the tied agent will be dealing with and how the firm will obtain and deal with these clients;
- Before appointing a tied agent, the firm should (i) conduct a proper and comprehensive assessment of the tied agent's suitability, organisational structure, reputation, reporting capability, etc., and (ii) put in place appropriate arrangements to monitor the tied agent's activities for compliance with MiFID II requirements; and
- If the tied agent is a legal person, the firm should assess its resources, including the number of natural persons within the tied agent which are involved in the provision of services or activities on behalf of the firm, the locations of the employees or natural persons working under the control of the tied agent and how those persons or employees are monitored.

ESMA similarly reminds firms of their obligations to monitor the activities of their tied agents so as to ensure that they continue to comply with MiFID II and expects firms using tied agents to devote sufficient company resources to the oversight and monitoring of their tied agents' activities, especially where the tied agent has close links to other entities, including third country entities.

For a detailed analysis of ESMA's supervisory briefing on supervisory expectations in relation to firms using tied agents in the MiFID II framework, please refer to our in-depth [client briefing](#) on the topic.

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

1.8 ESMA becomes supervisor of EU Data Reporting Service Providers

On 7 February 2022, ESMA published a press release announcing that, from 1 January 2022, it has assumed its new mandate as direct supervisor of EU data reporting service providers (**DRSPs**), following publication of its Public Statement outlining its approach for DRSP supervision pending the entry into force of all relevant legislative acts (**Statement**) on 14 December 2021.

Its new role provides ESMA direct authorisation and supervisory powers over DRSPs, except for those entities that, due to more limited market impact, will continue to be supervised by their Member State authority. Supervisory responsibility for DRSPs was transferred from NCAs to ESMA due to:

- The cross-border dimension of data handling;
- The aim of achieving economies of scale; and
- Facilitating data quality convergence for all market participants.

ESMA published their 2022 Annual Work Programme on 27 September 2021, which outlines its supervision priorities for 2022 under the DRSPs' supervision mandate, including its objective of ensuring the effective and consistent application of a data-driven, risk-based, and outcome focused supervisory framework for the DRSPs under its supervision.

To support its new supervisory task, ESMA has developed an IT system based on big data technologies that will facilitate processing, storage and supervisory analysis of large volumes of MiFIR transaction data.

A copy of ESMA's press release can be accessed [here](#).

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

A copy of the 2022 Annual Work Programme can be accessed [here](#).

1.9 ESMA launches common supervisory action with NCAs on MiFID II costs and charges disclosures

On 8 February 2022, ESMA published a press release announcing the launch of a CSA with NCAs on the application of the costs and charges disclosure rules across the EU under MiFID II.

The CSA will allow ESMA and the NCAs to assess firms' application of the MiFID II requirements on costs and charges. It will focus on information provided to retail clients and will involve NCAs reviewing how firms ensure that disclosures satisfy the following criteria:

- Are provided to clients in a timely manner;
- Are fair, clear, and not misleading;
- Are based on accurate data reflecting all explicit and implicit costs and charges; and
- Adequately disclose inducements.

ESMA believe the CSA, which will be conducted during 2022, will help ensure consistent implementation and application of EU rules and enhance the protection of investors in line with its objectives. In addition, ESMA have published a series of Q&As on MiFID II and MiFIR investor protection and intermediaries topics, which will serve as input to this CSA.

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

A copy of ESMA's Q&As can be accessed [here](#).

1.10 European Commission adopts Delegated Regulations on fees for supervising DRSPs and on procedural rules for penalties imposed on DRSPs under MiFIR

On 16 February 2022, the European Commission adopted a Delegated Regulation supplementing MiFIR (**Delegated Regulation**), under Article 38k(10) of MiFIR, following consultation of the text of the draft Delegated Regulation in July 2021. The Delegated Regulation specifies the procedure ESMA must follow to impose fines or periodic penalty payments on DRSPs under its supervision, following ESMA's assumption of its new mandate as direct supervisor of EU DRSPs.

On 10 March 2022, the European Commission adopted a Delegated Regulation supplementing MiFIR (the **Second Delegated Regulation**) under Article 38n(1) of MiFIR, following consultation of the text of the draft Delegated Regulation in July 2021. The Second Delegated Regulation specifies the type of fees, the matters for which fees are due, the amount of the fees, and the manner in which they are to be paid by DRSPs relating to their supervision by ESMA.

The Council of the EU and the European Parliament will now scrutinise both Delegated Regulations.

Both Delegated Regulations will enter into force and apply 3 days after publication in the OJ.

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

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

1.11 European Commission consults on options to enhance retail investors' suitability and appropriateness assessments

On 21 February 2022, the European Commission published a targeted consultation on options to enhance suitability and appropriateness assessments (**Targeted Consultation**).

The Targeted Consultation follows responses received from the European Commission's public consultation on retail investment strategy for Europe, held in May 2021, as part of the Commission's 2020 capital markets union (**CMU**) action plan. Many respondents called for the European Commission to simplify, improve, automate, and standardise the way investors' profiles are currently assessed.

The European Commission is exploring methods of improving the EU suitability and appropriateness regimes to address these issues, including an assessment of the possibility of whether, and how, all retail investors might benefit from a new suitability assessment providing them with more support to better achieve their investment objectives and enhance their participation in the capital markets.

The Targeted Consultation considers a regime for the implementation of a new suitability assessment focused on assessing the retail investor's investment objectives, risk tolerance and personal constraints and establishing a personalised asset allocation strategy for the retail investor's investment portfolio.

The European Commission notes that a key element of this new regime could be the transferability of the client assessment with any financial intermediary the investor chooses, including online brokers and platforms. The consultation aims to assess to what extent, and under what conditions, any subsequent intermediaries should be allowed to depart from the asset allocation.

The consultation process ran until 21 March 2022.

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

A copy of the European Commission 2020 CMU action plan can be accessed [here](#).

1.12 ESMA letter to European Commission on legislative proposals to amend MiFIR and MiFID II Directive

On 11 March 2022, ESMA published a letter to the European Commission, dated 9 March 2022, containing its assessment on the legislative proposals for amendments to MiFIR and MiFID, following their adoption by the Commission in November 2021.

In the letter, ESMA sets out its technical comments on issues, including:

- **Consolidated tape providers (CTPs):** ESMA makes various recommendations in relation to CTPs including extending the timeline for the CTP selection process to 9 months along with adopting a staggered approach for appointing CTPs and recommending that the timeline be extended from 1 year to 3 years. It also highlights certain concerns in relation to proposed fall-back clauses.
- **Equity and non-equity transparency:** ESMA raises concerns relating to the appropriateness of the proposal to amend the non-equity deferral regime, describing it as “overly complex”. It recommends a simpler approach as suggested in its March 2021 review report on non-equity transparency. ESMA also raises concerns on the proposed investment-firm specific suspension in respect of the derivatives trading obligation (**DTO**);
- **Reporting:** ESMA recommends replacing the traded on a trading venue (**ToTV**) concept with the systematic internaliser (**SI**) approach as set out in the March 2021 review report; and
- **Payment for order flow (PFOF):** ESMA raises concerns relating to conflict of interest between the firm and its clients where concerning PFOF, noting that firms will be incentivised to choose the execution venue offering the highest payment rather than the venue offering the best possible result for its clients when executing client orders. ESMA notes in most cases it would be unlikely that receiving PFOF would be compliant with MiFID II.

The MiFIR review proposal is currently being negotiated by the European Parliament and the Council.

A copy of ESMA's letter can be accessed [here](#).

1.13 ESMA updates guidance on Annex to opinion determining third-country trading venues for purpose of transparency under MiFIR

On 14 March 2022, ESMA published updated guidance (the **Guidance**) on the annex to ESMA opinion (**Opinion**) determining third-country trading venues for the purpose of transparency under MiFIR, which was published in July 2020.

ESMA has updated its Guidance, in the context of EU sanctions on Russia, to state that trading venues established in Russia are considered inactive from 14 March 2022 and until further notice and has published an updated annex (the **Annex**) to its Opinion to reflect this change.

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

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

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

1.14 Delegated Regulation on derogation criteria for DRSPs to continue to fall under national supervision instead of ESMA supervision published in OJ

On 24 March 2022, Commission Delegated Regulation (EU) 2022/466 supplementing MiFIR by specifying criteria for derogation of the principle that approved publication arrangements (**APAs**) and approved reporting mechanisms (**ARMs**) are supervised by ESMA (the **Delegated Regulation**) was published in the OJ.

The European System of Financial Supervision (**ESFS**) Regulation (EU) 2019/2175 (the **Omnibus Regulation**) provided ESMA with direct authorisation and supervisory powers over DRSPs, except for those ARMs and APAs that, by way of derogation from MiFIR, are subject to authorisation and supervision by a competent authority of a member state.

The Delegated Regulation entered into force on 27 March 2022.

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

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

1.15 European Commission adopts Implementing Regulation amending ITS on format of position reports by investment firms and market operators under MiFID II

On 24 March 2022, the European Commission adopted an Implementing Regulation amending Implementing Regulation (EU) 2017/1093 laying down implementing technical standards (**ITS**) with regard to the format of commodity derivative position reports by investment firms and market operators (the **Amending Implementing Regulation**).

This follows ESMA's publication of a final report on the draft ITS on 22 November 2021 as required under Amending Directive (EU) 2021/338 containing "quick fix" amendments to MiFID II, which forms part of the post-COVID-19 MiFID II recovery package.

The Amending Implementing Regulation replaces Table 2 of Annex II to Implementing Regulation (EU) 2017/1093 which specifies fields to be reported for all positions across all maturities of all contracts for the purposes of Article 2 of Implementing Regulation (EU) 2017/1093.

The Amending Implementing Regulation will enter into force 20 days after publication in the OJ.

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

1.16 ESMA proposes amendments on the review of transparency requirements under MiFIR

On 28 March 2022, ESMA published the following reports following its review of transparency requirements for both equity and non-equity instruments set out in RTS under MiFIR, following consultation in July 2021.

- Final report on the review of Commission Delegated Regulation (EU) 2017/587 (equity transparency) (**RTS 1**); and
- Final report on the review of Commission Delegated Regulation (EU) 2017/583 (non-equity transparency) (**RTS 2**).

Within the final reports, ESMA proposes targeted amendments to RTS 1 and RTS 2 with a view to clarifying, improving, and simplifying the transparency regime for equity and non-equity instruments. ESMA state that these amendments have received broad support from stakeholders and/or are considered important in the context of establishing a CTP.

At that time it was envisaged that a second, broader review would be carried out following the European Commission's ongoing MiFIR review. However, on 1 April, 2022 ESMA announced that it has postponed the annual review of RTS 2 on non-equity transparency due

to the European Commission's ongoing MiFIR review and the likely significant impacts that it would have on the instruments subject to its report. ESMA believes that the proposals to amend MiFIR are likely to render part of its review redundant due to the proposed removal of the SSTI threshold and the potential impact other provisions relating to the instruments subject to its report.

As such, ESMA's final report on its review of RTS 2 excludes proposals on topics that could overlap with the European Commission's legislative proposals on amendments to the MiFIR transparency provisions.

ESMA has submitted both final reports to the European Commission, which has 3 months to decide whether to endorse the proposed amendments. ESMA will resume the submission of the annual RTS 2 report in 2023.

A copy of ESMA's final report on the review of RTS 1 can be accessed [here](#).

A copy of ESMA's final report on the review of RTS 2 can be accessed [here](#).

1.17 ESMA final report on draft RTS on management body of DRSPs under MiFIR

On 29 March 2022, ESMA published its final report, dated 23 March 2022, on draft RTS on the management body of DRSPs under Article 27(f)(5) of MiFIR (**Final Report**), following consultation in August 2021.

The draft RTS, as contained within the Final Report, specify criteria for the sound and prudent management of DRSPs as well as for their operational effectiveness under MiFIR and apply to all DRSPs, irrespective of whether they are supervised by ESMA or NCAs.

Within the Final Report, ESMA proposes to assess the suitability of the members of DRSP management bodies under criteria including:

- Good repute, honesty and integrity;
- Sufficient time commitment;
- Knowledge, skills and experience;
- Independence;
- Training; and
- Diversity.

The Final Report builds on ESMA's September 2017 guidelines for DRSPs and has been submitted to the European Commission for adoption. The European Commission is then expected to adopt a Delegated Regulation within 3 months. Following adoption, the text will be subject to review by the European Parliament and the Council of the EU.

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

1.18 ESMA final report on guidelines on certain aspects of MiFID II remuneration requirements

On 31 March 2022, ESMA published a final report on guidelines on certain aspects of the remuneration requirements under MiFID II (**Final Report**), following a July 2021 consultation. The Final Report replaces existing guidelines issued by ESMA in October 2013.

In its Final Report, ESMA summarises the responses to its July 2021 consultation on the draft guidelines, explaining how it has taken these responses into account. The guidelines aim to enhance clarity and foster convergence in the implementation of certain aspects of the MiFID II remuneration requirements.

The Final Report guidelines will apply from 6 months of the date of their publication on ESMA's website in all EU official languages.

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

2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

2.1 Two Delegated Regulations setting out RTS on prudential requirements under IFR published in OJ

On 11 January 2022, the following Delegated Regulations containing RTS relating to prudential requirements for investment firms under Regulation (EU) 2019/2033 (**Investment Firms Regulation** or **IFR**) were published in the OJ, following adoption by the European Commission in September 2021:

- Commission Delegated Regulation (EU) 2022/25 supplementing the IFR with RTS that specify the methods for measuring the K-factors referred to in Article 15 of the IFR. These RTS reflect a mandate under Article 15(5)(a) of the IFR and can be accessed [here](#).
- Commission Delegated Regulation (EU) 2022/26 supplementing the IFR with RTS specifying the notion of segregated accounts to ensure client money's protection in the event of an investment firm's failure. These RTS reflect a mandate under Article 15(5)(b) of the IFR and can be accessed [here](#).

The Delegated Regulations entered into force on 31 January 2022.

2.2 Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) (Amendment) Regulations 2022 (S.I. No. 45/2022)

On 4 February 2022, the Government of Ireland published the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) (Amendment) Regulations 2022 (S.I. No. 45/2022) (the **Amending Regulations**) in the Iris Oifigiúil.

The Amending Regulations amend the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 (S.I. No. 604/2017) (the **Investment Firms Regulations**) by amending the Regulation 8 general reporting requirements for investment firms and the relevant information tables in the Schedule to the Investment Firms Regulations by updating the reporting requirements applicable to Class 1 minus firms, Class 2 firms, and Class 3 firms.

The Amending Regulations follow the Central Bank Consultation Paper 135 (**CP135**) and Feedback Statement on CP135 (**Feedback Statement**) where the Central Bank confirmed its intention to amend Regulation 8 of the Investment Firms Regulations and the associated tables in the Schedule to align the reporting requirements with the classification of investment firms under the Directive (EU) 2019/2034 (**Investment Firms Directive** or **IFD**) / IFR.

The Central Bank advised, within the Feedback Statement, that although the Amending Regulations would not be in place by the application date of IFD/IFR, investment firms should apply the revised reporting requirements from 1 July 2021.

The Amending Regulations came into operation on 21 February 2022.

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

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

A copy of the CP135 can be accessed [here](#).

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

2.3 EBA opinion on proposed amendments to draft RTS on fixed overheads requirements under IFR

On 11 February 2022, the EBA published an opinion on the European Commission's proposed amendments to the final draft RTS specifying the methodology for calculating the fixed overhead requirements under the IFR (the **Opinion**).

The EBA submitted its final draft RTS on 16 December 2020, following consultation in June 2020. The European Commission informed the EBA of its intention to endorse the draft RTS with amendments and submitted a modified version of the draft RTS on 29 November 2021. The Commission's modified version contains a substantive change, which represents an additional point for deduction from total expenses on the list detailed in the draft RTS and is specifically aimed at market makers.

The EBA, in their Opinion, has agreed with the proposed amendments within the European Commission's modified version of the draft RTS noting that the amendments, despite their substantive nature, continue to maintain a good balance between the flexibility and risk sensitivity required for the calculation of the fixed overheads requirement and the need for a harmonised regulatory framework.

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

A copy of the European Commission's modified version of the RTS can be accessed [here](#).

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

2.4 Delegated Regulation setting out RTS on K-factor clear margin given calculation under IFR published in OJ

On 22 February 2022, Commission Delegated Regulation (EU) 2022/244 setting out RTS specifying the amount of total margin for the calculation of the K-factor 'clear margin given' (**K-CMG**) under the IFR was published in the OJ.

Similarly, on 20 January 2022, Commission Delegated Regulation (EU) 2022/76 supplementing the IFR with regard to RTS specifying adjustments to the K-factor 'daily trading flow' (**K-DTF**) coefficients was published in the OJ.

The European Commission adopted the above RTS, which reflect a mandate under Article 23(3) and Article 15(5)(c) of the IFR, in September 2021.

The Delegated Regulation (EU) 2022/244 entered into force on 14 March 2022, Delegated Regulation (EU) 2022/76 entered into force on 9 February 2022.

A copy of the Delegated Regulation (EU) 2022/244 can be accessed [here](#).

A copy of the Delegated Regulation (EU) 2022/76 can be accessed [here](#).

2.5 Investment Firms Directive Implementing Regulation published in the OJ

On 8 March 2022, Commission Implementing Regulation (EU) 2022/389 (**Implementing Regulation**) was published in the OJ.

The Implementing Regulation sets down ITS on the format, structure, content lists and annual publication date of the information which must be disclosed by NCAs under the IFD.

The Implementing Regulation entered into force on 28 March 2022.

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

2.6 European Commission adopts Delegated Regulation on RTS on disclosure of investment policy under IFR

On 11 March 2022, the European Commission adopted a Delegated Regulation containing RTS on the disclosure of a firm's investment policy under the IFR, following consultation in March 2021.

The European Commission has adopted the Delegated Regulation under Article 52(3) of the IFR, following submission of the EBA final report setting out the draft RTS in October 2021. The RTS in the Delegated Regulation specify uniform disclosure templates for disclosure requirements under Article 52 of the IFR. More specifically, the disclosure templates concern information on the proportion of voting rights attached to the shares held directly or indirectly by the investment firms, information on their voting behaviour, an explanation of votes and the ratio of proposals put forward and approved, information on the use of proxy advisor firms, and information on their voting guidelines.

The Delegated Regulation will be subject to scrutiny from the Council of the EU and the European Parliament. If neither object, it will enter into force 20 days after its publication in the OJ.

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

3. EMIR & SFTTR

3.1 ESMA consultation on the review of clearing thresholds under EMIR

On 19 January 2022, the European Fund and Asset Management Association (**EFAMA**) published a response to ESMA's consultation on the review of clearing thresholds under Regulation (EU) 648/2012 as amended (**European Market Infrastructure Regulation or EMIR**).

In its reply, EFAMA highlights two areas where the benefit of changes in thresholds and methodologies would outweigh implementation costs, being the following:

- UK exchange traded derivatives (**ETDs**): EFAMA recommend the removal of the need for an equivalence decision under Article 2 of EMIR, but failing that, EFAMA support a solution with a temporary grandfathering of UK ETDs; and
- Foreign exchange (**FX**) derivatives contracts: EFAMA support excluding physically settled FX forwards and swaps from the clearing thresholds calculation, based on the same rationale under which they are excluded from variation margin requirements.

A copy of EFAMA's response can be accessed [here](#).

3.2 ESMA updates Q&As on data reporting under SFTTR

On 28 January 2022, ESMA published updated Questions and Answers on reporting requirements under the Regulation (EU) 2015/2365 (**Securities Financing Transactions Regulation or SFTTR**) (**SFTTR Data Reporting Q&As**).

ESMA has amended Question 2 on reporting and transparency of securities financing transactions to accommodate for settlement fails.

A copy of the SFTTR Data Reporting Q&As can be accessed [here](#).

3.3 European Commission adopts amendments to RTS clearing and derivative trading obligations under EMIR and MiFIR in light of benchmark transition

On 8 February 2022, the European Commission adopted a Delegated Regulation amending the RTS laid down in Delegated Regulation (EU) 2015/2205 supplementing EMIR to reflect the LIBOR transition (the **EMIR Delegated Regulation**).

The EMIR Delegated Regulation follows the ESMA final report on draft RTS on the clearing obligations (**CO**) and derivative trading obligations (**DTO**) in view of the benchmark transition to risk free rates under Article 5(2) of EMIR, which was published on 18 November 2021.

The EMIR Delegated Regulation will amend the RTS to remove from the CO those classes of derivatives that reference the Euro Overnight Index Average (**EONIA**), Pound Sterling (**GBP**) London Interbank Offered Rate (**LIBOR**) or Japanese Yen (**JPY**) LIBOR. It will also bring within the CO classes of over the counter (**OTC**) interest rate derivatives referencing the Euro Short-Term Rate (**ESTR**), Secured Overnight Financing Rate (**SOFR**), Secured Overnight Index Average (**SONIA**) or Tokyo Overnight Average (**TONA**) that certain central counterparties (**CCPs**) have been authorised to clear.

On 8 February 2022, the European Commission also adopted a second Delegated Regulation amending the RTS laid down in Delegated Regulation (EU) 2017/2417 supplementing MiFIR (the **MiFIR Delegated Regulation**). This MiFIR Delegated Regulation provides for the removal from the DTO of derivatives referencing both GBP and US Dollar (**USD**) LIBOR. Subject to the DTO are interest rate swaps (**IRS**) with 3M or 6M tenors denominated in EUR, USD and GBP and Index Credit Default Swaps (**Index CDS**).

Both Delegated Regulations will be subject to scrutiny from the Council of the EU and the European Parliament. If neither object, they will enter into force the day after their publication in the OJ.

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

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

3.4 European Commission consults on review of EU CCP framework

On 8 February 2022, the European Commission published a targeted consultation paper on a review of the EU central clearing framework to improve the attractiveness of EU CCPs in order to reduce the EU's overreliance on systemic third country CCPs (**Consultation Paper**). The paper seeks stakeholders' views on a range of topics, including:

- Clarifying the interaction between EMIR and other relevant legislation such as MiFID II and the UCITS Directive;
- Introducing measures to incentivise EU counterparties to reduce excessive exposures to Tier 2 third country CCPs;
- Introducing a monitoring process to measure the progress of EU counterparties towards reducing their exposures to Tier 2 CCPs;
- Measures aimed at EU CCPs, such as ways to support them in expanding their range of clearing services and improving the current setup of payment and settlement arrangements available to them in the EU;
- Strengthening the supervisory framework for EU CCPs and giving EU-level supervision a stronger role, to better address risks involved in increased cross-border clearing activity, simplify, and accelerate procedures, remove legal uncertainties, and facilitate co-ordination with third country supervisory authorities;
- Widening the scope of clearing members and clients accessing CCPs to include entities such as pension scheme arrangements, private entities that do not access CCPs directly and public authorities; and

- Widening the scope of the products offered for clearing or required to be cleared to include products such as equity derivatives, repurchase and foreign exchange derivatives.

The Consultation Paper follows a statement from the European Commission, published on 10 November 2021, announcing the Commission's proposal for central clearing (**Statement**).

Alongside the Consultation Paper, the Commission published a call for evidence for an impact assessment (**Call for Evidence**), within which the European Commission indicates that it plans to adopt legislative proposals in Q3 2022.

The closing date for responses was 22 March 2022.

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

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

A copy of the Call for Evidence can be accessed [here](#).

3.5 Commission Implementing Decision extending temporary equivalence of UK regulatory framework for CCPs

On 25 March 2022, ESMA published a statement announcing its decision to extend the application of recognition decisions and tiering determination decisions for three CCPs established in the UK until 30 June 2025 (the **Statement**).

This aligns with the Commission Implementing Decision (EU) 2022/174 (**Implementing Decision**) approving the extension of equivalency in respect of the UK's legal and regulatory supervision of UK CCPs until 30 June 2025. The Implementing Decision was adopted by the European Commission on 8 February 2022. The European Commission noted in the Implementing Decision that some transactions cleared in UK CCPs simply cannot be cleared elsewhere at this point in time.

The extension of the temporary equivalence to 30 June 2025 is intended as a sufficiently lengthy provision of time to allow the European Commission to revise the EU supervisory system for CCPs and to encourage the development of the clearing capacity of EU CCPs. UK CCPs can, therefore, be continued to be used by EU counterparties until the expiry of this extended temporary equivalence period.

The Implementing Decision entered into force on 10 February 2022 and will apply from 1 July 2022.

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

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

3.6 ESMA update on third country CCP recognition decisions

On 30 March 2022, ESMA published a number of memoranda of understanding (**MoUs**) following publication, on 25 March 2022, of a series of updates on the recognition of CCPs established in third countries (**TC-CCPs**) under EMIR as amended (the **Statement**), resulting from its completion of tiering and review of the recognition decisions of 25 TC-CCPs on 22 March 2022.

Included within the number of MoUs published by ESMA is the MoU Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Certain Clearing Agencies Established in the United States (the **US MoU**). Within the US MoU, ESMA and the Securities and Exchange Commission (**SEC**) affirm their willingness to cooperate and exchange information to proportionately fulfil their respective supervisory and regulatory responsibilities.

On 23 March 2022, ESMA published a list of TC-CCPs recognised to offer service and activities in the European Union (the **List**). The List details that ESMA has recognised National Securities Clearing Corporation (**NSCC**), which is authorised and supervised by the US

SEC, as a Tier 1 CCP following Commission Implementing Decision (EU) 2021/85 on the equivalence of US CCPs entering into force. ESMA has concluded revised MoUs with relevant third country authorities as a pre-requisite of the recognition process.

ESMA is still waiting for additional clarifications, including from the European Commission on relevant equivalence decisions, to finalise the review of recognition process.

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

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

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

4. PRIIPS

4.1 Proposed Extension to Application Date of PRIIPS Revised Level 2 Measures

On 17 March 2022, the European Commission adopted a Delegated Regulation (the **Delegated Regulation**) which proposes to delay the application of Delegated Regulation (EU) 2021/2268 containing revised Level 2 measures issued under Regulation (EU) No 1286/2014 (**PRIIPS Regulation**) (**Revised Level 2 Measures**) until 1 January 2023.

The Revised Level 2 Measures amend the Original Level 2 Measures to revise some of the existing requirements relating to the presentation and content of the KID.

If implemented in its current form, the Delegated Regulation will mean that all UCITS, qualifying investor alternative investment funds (**QIAIFs**) and retail investor alternative investment funds (**RIAIFs**) which fall within the scope of the PRIIPS Regulation, as a result of making their shares available to EEA retail investors, will be required to prepare and publish a PRIIPS KID which complies with the Revised Level 2 Measures from the same date, being 1 January 2023.

The Delegated Regulation also amends the Original Level 2 Measures to extend the transitional arrangement for manufacturers of PRIIPS that offer investment funds as either the only underlying investment options or alongside other investment options so that such manufacturers will not be required to prepare a PRIIPS KID until 1 January 2023.

This is relevant not only to management companies and/or investment companies but also persons advising on, or selling, units of such funds to retail investors.

The Delegated Regulation must now be scrutinised by the European Parliament and the Council. If neither object, it will enter into force 20 days after its publication in the OJ.

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

A copy of the Revised Level 2 Measures can be accessed [here](#).

A copy of the Original Level 2 Measures can be accessed [here](#).

5. CENTRAL BANK OF IRELAND

5.1 Asset Concentration Report - Guidance Note for Irish Investment Firms (updated 17 February 2022)

On 1 February 2022, the Central Bank published an updated version of its Asset Concentration Report Guidance Note for Irish Investment Firms (the **Guidance**).

The Guidance provides direction for certain investment business firms authorised under the Investment Intermediaries Act 1995 on how to complete their annual Asset Concentration Report submission.

The update concerned the removal of categories of in-scope Irish investment firms, namely MiFID firms that are not subject to Regulation (EU) 575/2013 (**Capital Requirement Regulations** or **CRR**) and MiFID firms that are subject to CRR that fulfil the criteria set out in Regulation 95(1) or 96(1) of the CRR.

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

5.2 Central Bank publishes Securities Markets Risk Outlook Report 2022

On 8 February 2022, the Central Bank published its second Securities Markets Risk Outlook Report (**Report**) in which it identifies the key conduct risks it has identified as facing securities markets in 2022 which include misconduct risk, sustainable finance, governance, conflicts of interest, financial innovation, data, cyber security and market dynamics. The Report also sets down the Central Bank's expectations of what financial service providers and market participants should do to effectively identify, mitigate, and manage these conduct risks as well as detailing the supervisory priorities of the Central Bank for the year ahead.

A copy of the Central Bank's Securities Markets Risk Outlook Report 2022 can be accessed [here](#).

5.3 Central Bank Director General sets out 2022 financial regulation priorities

On 11 March 2022, the Central Bank published a press release setting out its financial regulation priorities for 2022 (the **Press Release**).

Within the Press Release, the Central Bank indicated that in the area of governance, it will continue to work with the Department of Finance on the introduction of the Individual Accountability Framework (**IAF**). At European level, significant areas of focus will include the development of a macro-prudential framework for funds, progressing the AIFMD review, seeking to further the advancement of the capital markets union, and helping shape the overhaul of European anti-money laundering structures.

Similarly, the Central Bank provides that it will continue to step up work on climate change to ensure that the financial system can support the transition to a carbon neutral economy and is suitably resilient to the risks.

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

5.4 Central Bank updates list of Pre-Approval Controlled Functions

Further to its Notice of Intention informing industry of its intention to make certain changes to the Pre-Approval Controlled Functions (**PCF**) under the PCF regime published in September 2021, the Central Bank has now published the Central Bank Reform Act 2010 (Sections 20 and 22) (Amendment) Regulations 2022 (**Amending Regulations**) together with a Feedback Statement.

Changes introduced following publication of the Amending Regulations include:

- Separation of the PCF-2 role into two roles, namely PCF-2A for the role of non-executive director and PCF-2B for the newly specified role of independent non-executive director (INED);

- Removal of PCF-15 (Head of Compliance with responsibility for Anti-Money Laundering and Counter Terrorist Financing Legislation) and introduction of PCF-52 (Head of Anti-Money Laundering and Counter Terrorist Financing Compliance);
- Expansion of the PCF-16 (Branch Manager of branches in other EEA countries) role to include branch managers of regulated firms in non-EEA countries; and
- Removal of PCF-31 (Head of Investment). Individuals that hold the role of PCF-31 will be automatically re-designated as PCF-30 (Chief Investment Officer).

For a detailed analysis of the Central Bank's updates to the PCF regime, please refer to our separate [client briefing](#) on the topic.

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

The Central Bank's Feedback Statement can be accessed [here](#).

The Central Bank's Notice of Intention can be accessed [here](#).

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

6.1 EBA launches AML and CFT central database

On 31 January 2022, the EBA published a press release announcing the launch of the European Reporting System for material CFT/AML weaknesses (**EuReCA**) following the publication of a final report on draft RTS on EuReCA (**draft RTS**) in December 2021.

EuReCA is an AML and CFT central database which will contain information on material weaknesses in individual financial institutions within the EU as identified by competent authorities as well as information on the measures imposed on financial institutions to rectify material weaknesses. EuReCA will also include internal audit findings identified during on-site inspections by prudential authorities.

The EBA will use information from EuReCA to inform its view of AML and CFT risks affecting the EU financial sector and will also share information from EuReCA with competent authorities, including if specific AML and CFT risks or trends emerge.

EuReCA will not commence the process of collecting personal data until the approval of the draft RTS by the European Commission.

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

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

6.2 ECB opinions on proposed Regulations and Directive implementing part of AML and CTF action plan

On 17 February 2022, the Council of the EU published two opinions of the European Central Bank (**ECB**) on legislative proposals that form part of the larger package of measures implementing the European Commission's AML and CFT action plan:

- Opinion on a proposal for a Regulation establishing the Authority for AML and CTF (**AMLAR**); and
- Opinion on a proposal for a Directive and Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (**MLD6** and **AML Regulation**).

The ECB welcome the legislative proposals, however, recommend several amendments within their drafting proposals contained within each respective opinion document.

A copy of the opinion on AMLAR can be accessed [here](#).

A copy of the opinion on MLD6 and AML Regulation can be accessed [here](#).

6.3 European Commission publishes revised list of high-risk third countries under MLD4 (AML Blacklist)

On 21 February 2022, Commission Delegated Regulation (EU) 2022/229 that amends the list of high-risk third countries with strategic AML and counter-terrorist financing (**CTF**) deficiencies produced under Article 9(2) of Directive (EU) 2015/849 (as amended) (the **Fourth Money Laundering Directive or MLD4**) (the **Delegated Regulation**) was published in the OJ, following adoption by the European Commission on 7 January 2022.

The Delegated Regulation amends Delegated Regulation (EU) 2016/1675 by adding nine countries (Burkina Faso, Cayman Islands, Haiti, Jordan, Mali, Morocco, the Philippines, Senegal, South Sudan) to the list of countries which have been identified as having strategic AML and CFT deficiencies. The Delegated Regulation also removes from the list countries that no longer present strategic AML and CFT deficiencies, such as the Bahamas and Iraq. The AML blacklist is largely aligned with, but not identical to, FATF's Ongoing Monitoring (or 'Grey') List.

Certain implications arise as a result of such blacklisting, including;

- Where a customer is established or resident in a jurisdiction on the AML blacklist, any entity which is subject to the EU's AML laws must apply enhanced DD for that customer and put in place ongoing monitoring processes.
- Under Article 4 of Regulation (EU) 2017/2402 (as amended) (the **Securitisation Regulation**), securitisation special purpose entities (**SSPEs**) cannot be established in any third country which appears on the European Commission's "blacklist" published under MLD4.

The Delegated Regulation entered into force on 13 March 2022.

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

7. DATA PROTECTION

7.1 EDPB adopts Guidelines on Right of Access and letter on cookie consent

On 28 January 2022, the European Data Protection Board (**EDPB**) published draft regulatory guidelines (the **Guidelines**) on the right of data subjects to have access to their personal data under Regulation (EU) 2016/679 (**General Data Protection Regulation or GDPR**), following adoption of the Guidelines on 18 January 2022, during its January plenary session.

The Guidelines aim to analyse the various aspects of the right to access to provide more precise guidance on the information the controller has to provide to the data subject, the format of the access request, the main modalities for providing access, and the notion of manifestly unfounded or excessive requests.

The deadline for public consultation responses was 11 March 2022.

In addition, the EDPB adopted a letter in reply to letters calling for a consistent interpretation of cookie consent (the **Letter**). Within the Letter, the EDPB notes its commitment to ensuring a harmonised application of data protection rules throughout the EEA. In this respect, the EDPB has recently set up a taskforce on cookie banners to coordinate the response to complaints concerning cookie banners.

Furthermore, the EDPB has updated the Guidelines on consent in order to ensure a harmonised approach on the conditionality of consent and on the unambiguous indication of wishes.

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

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

8. CROSS-BORDER DISTRIBUTION FRAMEWORK

8.1 ESMA publishes letter to European Commission on reverse solicitation by asset managers

On 3 January 2022, ESMA published a letter, dated 17 December 2021, to the European Commission relating to the European Commission's report on reverse solicitation (the **Letter**) under Regulation (EU) 2019/1156 (**Cross Border Distribution Regulation**).

Under Article 18(2) of the Cross Border Distribution Regulation, the European Commission is required to submit a report to the European Parliament and the European Council on reverse solicitation, outlining the extent to which reverse solicitation is used, its geographical distribution and its impact on the passporting regime. This report must be prepared on the basis of consultation with competent authorities, ESMA and other relevant stakeholders.

ESMA conducted a survey amongst NCAs towards the end of 2021 on the use of reverse solicitation by asset managers and the impact on passporting activities. The Letter outlines ESMA's findings, which include the following:

- Almost all NCAs could not provide an estimate of the share of reverse solicitation as compared to marketing and, therefore, it is not possible to draw any conclusion on the use of reverse solicitation within those Member States. The inability of NCAs to provide an accurate estimate of the share of reverse solicitation stems from the fact that under EU law asset managers are not required to report to their NCAs on the level of subscriptions coming from reverse solicitation; and
- "Several" NCAs believe that reverse solicitation is used in practice to circumvent the rules of third countries and EU passport regimes. They also believe that it creates an uneven playing field between EU asset managers and non-EU asset managers which are operating in the EU using reverse solicitation, however this cannot be confirmed by any tangible data from the NCAs.

The Letter outlines some of ESMA's suggestions on how to fill this information gap and the drawbacks of each approach. It has also suggested that if there was a willingness to address this on a more permanent basis, the European Commission could consider introducing a new reporting requirement allowing information to be collected on reverse solicitation across the EU.

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

9. SUSTAINABILITY

9.1 ESG Rating Providers in the EU

On 3 February 2022, ESMA published a call for evidence on the market characteristics for ESG rating providers in the EU (**ESMA's Call for Evidence**) in order to understand the size, structure, resourcing, revenues and product offerings of the different ESG rating providers operating in the EU. ESMA also sought the views and experiences of the users of the ESG rating providers as well as those entities covered by ESG rating providers.

Subsequent to this, the European Commission itself issued a call for evidence on ESG ratings and sustainability risks in credit ratings on 4 April 2022 (**Commission's Call for Evidence**) as part of its consideration of legislative or non-legislative action to strengthen the reliability and comparability of ESG ratings as well as possible targeted revisions to the legal framework relating to CRAs on incorporation

of ESG risks into their creditworthiness assessments. On the same date, the European Commission also launched a targeted consultation on the functioning of the ESG ratings market in the EU and consideration of ESG factors in credit ratings (**Targeted Consultation**).

The European Commission has indicated that following the completion of an impact assessment in 2022, there may be a legislative or non-legislative proposal put forward by it by Q1 2023.

A copy of the ESMA's Call for Evidence can be accessed [here](#).

A copy of the Commission's Call for Evidence can be accessed [here](#).

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

9.2 ESMA publishes its Sustainable Finance Roadmap for 2022-2024

On 11 February 2022, ESMA published its sustainable finance roadmap for 2022 to 2024 (the **Roadmap**). The Roadmap sets out ESMA's priority areas of focus and serves as a practical tool to ensure that there is coordinated implementation of ESMA's broad sustainable finance mandate from 2022 to 2024. ESMA has noted that the Roadmap is intended to be a living document and, therefore, is subject to regular re-assessment by ESMA itself and NCAs to ensure its continued relevance.

The three priority areas identified by ESMA in the Roadmap are as follows:

- Tackling greenwashing and promoting transparency;
- Building the capacities of both ESMA and the NCAs in sustainable finance; and
- Monitoring, assessing and analysing ESG markets and risks.

These priority areas will focus on the sectors of investment management; investment services, issuers' disclosure and governance, benchmarks, ratings (credit ratings and ESG ratings), trading and post-trading, and financial innovation.

The Annex to the Roadmap sets out a detailed list of actions and deliverables together with indicative timelines.

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

9.3 EU Platform on Sustainable Finance publishes report on Social Taxonomy

Under the Taxonomy Regulation, the European Commission is required to deliver a report on the possible extension of the Taxonomy to including other sustainability objectives, such as social objectives. On 28 February 2022, the EU Platform on Sustainable Finance (**PSF**) published a report entitled "Final Report on Social Taxonomy" (the **Report**) in response to a request for advice from the European Commission.

In the Report, the PSF proposes a structure for a social taxonomy within the present EU legislative environment on sustainable finance and sustainable governance which comprises of the existing and proposed initiatives on the EU Taxonomy, the proposed corporate sustainability reporting directive, Regulation (EU) 2019/2088 (**Sustainable Finance Disclosure Regulation** or **SFDR**) and the European Commission's sustainable corporate governance initiative.

In particular, in order to align with the existing EU Taxonomy framework, the structure for a social taxonomy proposed by the PSF involves the following:

- The development of social objectives;
- Defining different types of substantial contribution;

- The creation of “do no significant harm” criteria; and
- Minimum safeguards with a recommendation that the technical screening criteria (**TSC**) for a social taxonomy being set out in delegated acts.

The social objectives identified by the PSF comprise (i) decent work, (ii) adequate living standards and wellbeing for end-users, and (iii) inclusive and sustainable communities and societies, each of which will need to be supplemented by different sub-objectives which spell out different aspects of the three social objectives.

The Report will now be considered by the European Commission.

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

9.4 European Commission approves draft Taxonomy Complementary Delegated Act on gas and nuclear activities

On 9 March 2022, the European Commission formally adopted the EU Taxonomy Climate Complementary Delegated Act (the **Climate Complementary Taxonomy Act**) following the publication of that legislation on 2 February 2022 which permits certain economic activities involved in nuclear energy and natural gas to be classified as “transitional activities”.

The purpose of the Climate Complementary Taxonomy Act is to set down TSC which must be met in order for an economic activity involving gas or nuclear energy to be classified as environmentally sustainable, including:

- It contributes to the transition to climate neutrality;
- For an economic activity involving nuclear energy, it fulfils nuclear and environmental safety requirements; and
- For an economic activity involving natural gas, it contributes to the transition from coal to renewables.

In its press release announcing the publication of the Climate Complementary Taxonomy Act in February 2022, the European Commission noted that the TSC for the specific gas and nuclear activities are “in line with EU climate and environmental objectives” and will “help to accelerate the shift from solid or liquid fossil fuels, including coal, towards a climate-neutral future, mostly based on renewable energy sources”.

The inclusion of gas and nuclear activities as economic activities covered by Regulation (EU) 2020/852 (**Taxonomy Regulation**) is controversial and several EU Member States have objected to the extension of the EU taxonomy to include economic activities involving nuclear energy and natural gas.

It also follows the publication of a response to the draft legislation by the PSF (**Platform Response**), dated 21 January 2022, in which it was noted that the economic activities covered by the draft legislation were not in line with the Taxonomy Regulation and that most members of the platform were of the view that it created a serious risk of undermining the sustainable Taxonomy framework.

The Climate Complementary Taxonomy Act also amends Commission Delegated Regulation (EU) 2021/2178 supplementing Article 8 of the Taxonomy Regulation to require large listed non-financial and financial companies to disclose the proportion of their activities linked to natural gas and nuclear energy.

It will now be subject to scrutiny from the European Parliament and the Council of Europe. If no objection is raised, the Climate Complementary Taxonomy Act will enter into force 20 days after its publication and will apply from 1 January 2023.

For a detailed analysis of the European Commission’s plans to include gas and nuclear energy within the EU Taxonomy framework, please refer to our separate [client briefing](#) on the topic.

A copy of the Climate Complementary Taxonomy Act, and its accompanying Annexes, can be accessed [here](#).

A copy of the European Commission press release can be accessed [here](#).

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

9.5 ESAs publish revised supervisory statement on the application of the SFDR

On 25 March 2022, the European Supervisory Authorities (**ESAs**) published a joint updated supervisory statement on the application of the SFDR in light of the postponement of the entry into force of the related Level 2 Measures, to be published under the SFDR, until 1 January 2023 (the **Statement**).

The ESAs indicate that until the finalised Level 2 measures, to be published under the SFDR, enter into force on 1 January 2023 (the **Interim Period**), the draft Level 2 measures can be used as a reference for the purposes of applying the disclosure obligations set down under the SFDR itself, noting, however, that the draft Level 2 measures may be subject to further change and that financial market participants should be encouraged by NCAs to use the Interim Period to prepare for the application of these measures.

The ESAs also clarify that they expect disclosures made by financial products falling within the scope of Article 5 or Article 6 of the Taxonomy Regulation during the Interim Period, to specifically include a percentage figure of the extent to which the investments underlying the financial product are taxonomy-aligned.

Separately, the Statement confirms that estimates should not be used to calculate the taxonomy-alignment of in-scope financial products but notes that where information is not readily available from public disclosures by investee companies, financial market participants may rely on equivalent information on taxonomy alignment obtained directly from the investee companies or from third party providers.

For a detailed analysis of the ESA joint updated supervisory statement on the application of the SFDR, please refer to our separate [client briefing](#) on the topic.

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

9.6 EU Platform on Sustainable Finance publishes report on environmental transition taxonomy with traffic light system

On 29 March 2022, the PSF published its report entitled “The Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition” (**Final Report**) in response to the European Commission’s request for advice under the Taxonomy Regulation.

In recognition of the fact that the current Taxonomy framework leaves a wide variety of economic activities non-classified which could be mistakenly interpreted as “not green” and consequently struggle to obtain required investment to support environmental transition, the PSF has proposed extending the Taxonomy framework beyond “green activities” to classify activities using a traffic light system as follows:

- Red: Unsustainable performance requiring an urgent transition to avoid significant harm. These activities could qualify for taxonomy-recognised investment as part of a transition plan to avoid their current significantly harmful performance and move to intermediate performance levels;
- Amber: Intermediate performance activities that could qualify for taxonomy-recognised investment as part of an intermediate or amber transition plan under which they continue to improve to stay out of significantly harmful performance;
- Green: Substantial contribution activities already included in the green Taxonomy under the Climate Complementary Taxonomy Act or to be included in future delegated acts; and

- Low Environmental Impact: Activities that do not have a significant environmental impact and should not be regarded as red, amber or green.

The European Commission will now analyse the advice from the PSF as set out in the Final Report.

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

9.7 EU Platform on Sustainable Finance reports on technical screening criteria for remaining environmental objectives of EU Taxonomy

Under the framework established under the Taxonomy Regulation, the European Commission is required to establish TSC for each of the environmental objectives identified in Article 9 of the Taxonomy Regulation. While the TSC for the first two environmental objectives of climate change mitigation and climate change adaptation have already been set down in Commission Delegated Regulation (EU) 2021/2139, which entered into force on 1 January 2022; the European Commission must, in the form of a separate Commission Delegated Regulation, set down TSC to be used to determine whether an economic activity contributes to one of the four remaining environmental objectives, being:

- Sustainable use and protection of water and marine resources;
- Transition to a circular economy;
- Pollution prevention and control; and
- Protection and restoration of biodiversity and ecosystems.

In a report published on 30 March 2022, the PSF sets down its recommendations relating to the technical screening criteria for the four remaining environmental objectives as well as providing recommendations to review the “Do No Significant Harm” criteria already set down in the Commission Delegated Regulation (EU) 2021/2139 to improve consistency and usability of the Taxonomy as well as other recommendations to improve the design of the Taxonomy and the Taxonomy criteria.

This report will now be considered by the European Commission when finalising the delegated acts containing the TSC for the four remaining environmental objectives with the delegated acts scheduled to apply from 1 January 2023.

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

10. MISCELLANEOUS

10.1 ESMA publishes Final Report on Review of MAR Guidelines

On 5 January 2022, ESMA published a final report on amendments to its guidelines on delay in the disclosure of inside information and interactions with prudential supervision under Regulation (EU) 596/2014 (**Market Abuse Regulation or MAR**) (the **Final Report**).

The Final Report, which follows a consultation process in July 2021, amends the existing 2016 MAR guidelines on the delay in the disclosure of inside information by adding to the existing list of legitimate interests which may be prejudiced if inside information is disclosed immediately to: (i) include redemptions, reductions and repurchases of own funds, pending regulatory authorisation; and (ii) the draft Supervisory Review and Evaluation Process decisions or preliminary information related thereto.

The Final Report also clarifies that Pillar 2 Capital Requirements are highly likely to meet the definition of inside information under MAR and that Pillar 2 Capital Guidance may be inside information under MAR whenever assessed as price sensitive, providing examples of situations in which Pillar 2 Capital Guidance is expected to be price sensitive.

The Final Report notes that the revisions to the existing MAR guidelines introduced via the Final Report will apply after the translation procedure and the regular comply or explain procedure have been carried out.

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

10.2 Delegated Regulation amending notification threshold under SSR published in OJ

On 11 January 2022, Commission Delegated Regulation (EU) 2022/27 amending Regulation (EU) 236/2012 (**Short Selling Regulation or SSR**) as regards the adjustment of the relevant threshold for the notification of significant net short positions (**NSPs**) in shares under Article 5(2) of the SSR was published in the OJ, following its adoption in September 2021.

The Delegated Regulation adjusts the relevant threshold for the notification to competent authorities of significant NSPs in shares, as set out in Article 5(2) of the SSR, from 0.2% to 0.1% of the issued share capital of the company concerned, and each 0.1% above that.

ESMA recommended the temporary adjustment of the threshold be made permanent in light of the COVID-19 pandemic and the increased visibility obtained by competent authorities on volumes of NSPs.

On 26 January 2022, ESMA published a statement explaining how to report NSPs in shares under the revised threshold (the **Statement**). In the Statement, ESMA explains that the last day of application of the old reporting threshold of 0.2% being 28 January 2022, with NSPs to be reported to relevant competent authorities (**RCA**s) the following trading day.

ESMA highlights that position holders will have to send notifications to the RCA on 1 February 2022 if certain specified cases apply, as detailed in a table in the Statement.

The Delegated Regulation entered into force on 31 January 2022.

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

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

10.3 EU Sanctions against Russia / Belarus

In reaction to Russia's military aggression against Ukraine, the European Union has adopted a series of packages of economic sanctions against Russia and Belarus (the **Sanctions**) which require all firms to implement appropriate procedures to ensure that they are in a position to comply with the Sanctions at all times.

The Central Bank's webpage providing further information on the Sanctions can be accessed [here](#)

The European Commission's webpage relating to the Sanctions can be accessed [here](#).

10.4 Whistleblowing Legislation to enhance the protection afforded to whistle-blowers

On 23 March 2022, the Irish Government published an updated version of the Protected Disclosures (Amendment) Bill 2022 (**Bill**) incorporating agreed amendments following governmental debate at Committee Stage. The Bill has now progressed to its Report Stage. The updated version of the Bill contains provision for the review of the operation of the Act within five years of the date on which it is passed.

The Bill proposes to transpose Directive (EU) 2019/1937 (**Whistleblowing Directive**) into national law, building on an already comprehensive national whistleblower protection legal framework as provided by the Protected Disclosures Act 2014 (the **Act**). The Bill will amend the Act to give effect to the Whistleblowing Directive and to broaden the provisions of the protected disclosures regime.

Key provisions under the Bill include:

- The introduction of an obligation on organisations with over 50 employees to establish internal reporting channels and procedures for their workers to make protected disclosures. Notably, organisations with between 50 and 249 employees are afforded a temporary derogation from this requirement which expires on 17 December 2023;
- Amending the definition of “relevant wrongdoing” under the Act to include a ‘breach’ defined as “an act or omission that is unlawful” and falls within the scope of a range of specified EU acts and to exclude from the definition any matters concerning interpersonal grievances or matters which solely concern the reporting person;
- Extending the protective scope of the Act to include volunteers, shareholders, trainees, board members and job applicants within the definition of “worker” along with a provision to protect those who make anonymous disclosures and whose identity subsequently becomes known and is penalised for having made the disclosure;
- The reversal of the burden of proof in claims for penalisation for making a protected disclosure, placing the onus of proof on the employer to prove that an alleged act of penalisation was based on duly justified grounds; and
- Introducing new offences including the attempt or act of hindering a worker in making a report, failing to establish and maintain an internal reporting channel, and penalising, threatening to penalise, or causing/permitting another to penalise or threaten penalisation. Similarly, the Bill proposes to extend the compensatory caps to provide for limited compensation for workers not in remuneration.

While the Bill is currently progressing through the stages of the Dáil and has not been finalised, the Republic of Ireland, along with many other EU Member States, has missed the December 2021 deadline for transposition of the Whistleblowing Directive. As such, the Bill is expected to be transposed over the coming months, requiring employers to take action to ensure compliance with the changes to the Act as introduced by the Bill.

A copy of the updated version of the Bill can be accessed [here](#).

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

A copy of the Whistleblowing Directive 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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