



Investment Firms

Quarterly Legal and Regulatory Update

Period covered: 1 April 2021 – 30 June 2021

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1. MIFID II

1.1 ESMA updates Q&As on Market Structures Topics

On 6 April 2021, the European Securities and Markets Authority (**ESMA**) published an updated version of its questions and answers publication “On MiFID II and MiFIR market structures topics” (**Q&A on Market Structures Topics**). The updates made to the Q&A on Market Structures Topics are listed below:

- Question ID: Part 4 The tick size regime – the answer has been modified to reflect the amendment introduced in Article 49(1) of Markets in Financial Instruments Directive (2014/65/EU) (**MiFID II Directive** or **MiFID II**) that excludes large-in-scale transactions from the mandatory tick size regime.

The Q&A on Market Structures Topics can be accessed [here](#).

1.2 ESMA publishes report on the functioning of Organised Trading Facilities

On 8 April 2021, ESMA published its final report on the functioning of Organised Trading Facilities (**OTFs**). The report contains recommendations and possible amendments to the MiFID II / Markets in Financial Instruments Regulation (600/2014) (**MiFIR**) with reducing the level of complexity for market participants and making the legal framework more effective.

The report analyses the definition of OTFs and the definition of a multilateral system and the trading venue perimeter. The report also examines how many OTFs are authorised in the European Union and their market share and how OTFs apply discretion and reviews of matched principal trading (**MPT**).

In the report, ESMA proposes to the European Commission to move Article 1(7) from MiFID II to MiFIR and that ESMA publishes an Opinion clarifying the boundaries of trading venue’s authorisation. The report also includes a recommendation to add a definition of bulletin boards to MiFID II and to align the provisions regarding the prohibition of the use of MPT among Multilateral Trading Facilities (**MTFs**) and regulated markets.

The report was submitted to the European Commission and is expected to be taken into consideration for further legislative proposals on the MiFID II regime.

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

1.3 ESMA publishes guidelines on Compliance Function Requirements

On 6 April 2021, ESMA published its guidelines on certain aspects of the compliance function requirements under MiFID II.

The guidelines, have replaced the existing ESMA guidelines on certain aspects of the MiFID compliance function requirements and will take into account the new requirements under MiFID II along with the results of supervisory activities carried out by national competent authorities (**NCA**s) in relation to the application of the compliance function requirements.

The purpose of the guidelines is to enhance clarity and to foster convergence in the implementation of certain aspects of the MiFID II compliance function requirements. By helping to ensure that firms comply with the requirements, ESMA expects a corresponding strengthening of investor protection. The general guidelines can be referenced as:

- General Guideline 1 – Compliance risk assessment;

- General Guideline 2 – Monitoring obligations of the compliance function;
- General Guideline 3 – Reporting obligations of the compliance function;
- General Guideline 4 – Advisory and assistance obligations of the compliance function;
- General Guideline 5 – Effectiveness of the compliance function;
- General Guideline 6 – Skills, knowledge, expertise and authority of the compliance function;
- General Guideline 7 – Permanence of the compliance function;
- General Guideline 8 – Independence of the compliance function;
- General Guideline 9 – Proportionality with regard to the effectiveness of the compliance function;
- General Guideline 10 – Combining the compliance function with other internal control functions;
- General Guideline 11 – Outsourcing of the compliance function; and
- General Guideline 12 – Competent Authority review of the compliance function.

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

1.4 European Commission launches consultation on a European Union strategy for retail investors

On 20 April 2021, the European Commission launched a consultation for a retail investment strategy for the European Union. The initiative aims to provide consumers with confidence and trust that market outcomes are improved and that consumer participation is increased which will channel capital to private sector firms that could help the process of economic recovery after the economic effect from COVID-19 pandemic.

Feedback will be taken into account for further development and fine tuning of the initiative were the European Commission will summarise the input received in a synopsis report.

The consultation closed on 18 May 2021 and can be accessed [here](#).

1.5 European Union (Markets in Financial Instruments) (Amendment) (No. 2) Regulations 2021

The European Union (Markets in Financial Instruments) (Amendment) (No 2) Regulations 2021 (**Irish Amending Regulations**) were published on 24 May, 2021. The Irish Amending Regulations amend the European Union (Markets in Financial Instruments) Regulations 2017 (**Irish MiFID Regulations**) which implemented MiFID II into Irish law. With effect from 1 January, 2022 the Irish Amending Regulations remove the references to the authorisation of data reporting services providers (**DRSPS**). These revisions are being made to reflect the changes being implemented under EU law, namely, under Regulation (EU) 2019/2175 (**Omnibus Regulation**) and Directive EU 2019/2177 (**Omnibus Regulation**) which transfer authorisation and supervisory powers in relation to data reporting services providers from competent authorities to ESMA such that ESMA will become the direct supervisor of DRSPs.

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

1.6 ESMA publish opinion on calculating market size of ancillary activity under MiFID II

On 4 May 2021, ESMA published an updated opinion on ancillary activity calculations (**Opinion**). The updated Opinion provides the estimation of the market size of commodity derivatives and emission allowances for 2020.

Article 2(1)(j) of the MiFID II Directive provides an exemption for persons dealing on own account or providing investment services in specific areas, provided that their activity is an ancillary activity to their main business. Commission Delegated Regulation (EU) 2017/592 specifies the criteria for establishing when an activity is to be considered as ancillary for this purpose and lays down rules for calculating the overall market trading activity, which determines whether an activity is ancillary.

The Opinion provides the estimation of the market size of various commodity derivatives and estimations based on data collected from trading venues and data reported to trade repositories under the EMIR Regulation No 648/2012 (**EMIR**).

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

1.7 ESMA publishes results of the annual transparency calculations for non-equity instruments

On 30 April 2021, ESMA issued a press release and the results of the annual transparency calculations for non-equity instruments which will apply from 1 June 2021.

The annual transparency calculations can be accessed through the Financial Instruments Transparency System (**FITRS**) [here](#) and through the Register web interface [here](#).

1.8 ESMA publishes data for the systematic internaliser calculations for equity, equity-like instruments, bonds and other non-equity instruments

On 30 April 2021, ESMA published data for the systematic internaliser (**SI**) quarterly calculations for equity, equity-like instruments, bonds and for other non-equity instruments under MiFID II and MiFIR

The data is available [here](#).

1.9 Central Bank publishes Dear CEO letter thematic review of firms undertaking algorithmic trading

On 11 May 2021, the Central Bank of Ireland (**Central Bank**) issued a Dear CEO letter to firms undertaking algorithmic trading following a thematic review of risk management and control framework requirements as required by regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (Delegated Regulation (EU) 2017/589) (**RTS 6**) for investment firms.

The Dear CEO letter outlines the Central Bank's expectations of firms in relation to the governance, testing and controls surrounding algorithmic trading and to take appropriate action to address the issues identified. The thematic review found certain positive practices and a number of key concerns were identified, such as:

- Governance - firms failed to evidence effective oversight of controls and practices, including minimal Board involvement, in setting or challenging key controls, lack of regular reporting to the Board and an absence of formalised governance documentation;
- Development and Testing - disparities identified at the level of detail within documentation on development, testing and deployment processes;

- Risk and Measurement Control - weaknesses identified around annual self-assessments and lack of clarity for the third line of defence and the role of Internal Audit; and
- Trade Lifecycle Management – lack of appropriate documentation with pre- and post-trade controls.

The Central Bank has engaged with investment firms where the specific concerns have been identified, issuing specific time-frame actions called risk mitigation programmes to address the identified issues.

The Dear CEO letter can be accessed [here](#).

1.10 ESMA launches consultation on its MiFID II / MiFIR Annual Review Report

On 12 May 2021, ESMA launched a consultation seeking input from market participants on its MiFID II / MiFIR annual review report under the transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (Delegated Regulation (EU) 2017/583) (**RTS 2**).

Under Article 17 of RTS 2, ESMA is required to evaluate if it is appropriate to move to the next stage in terms of transparency with regard to the average daily number of trades (**ADNT**) threshold used for the quarterly liquidity assessment of bonds and the trade percentile used for determining the pre-trade size specific to the instrument (**SSTI**) thresholds. These proposals are designed to increase the transparency available to market participants in the bond market.

The consultation closed on 11 June 2021, ESMA expects to publish a final report and submit a draft technical standards to the European Commission for endorsement in July 2021, if necessary.

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

1.11 ESMA updates Q&As on MiFID II and MiFIR investor protection and intermediaries topics

On 28 May 2021, ESMA published an updated version of its questions and answers publication “On MiFID II and MiFIR investor protection and intermediaries topics” (**Q&A on Investor Protection and Intermediaries Topics**). The update made to the Q&A on Investor Protection and Intermediaries Topics is listed below:

- Question ID: Part 9 Information on costs and charges – Question 34 (updated on 28 May 2021): this question concerns when a firm should provide ex-ante information on costs and charges when it provides both investment advice and receipt and transmission orders (**RTO**)/execution services to a client relating to the same transaction(s).

A copy of the Q&A on Investor Protection and Intermediaries Topics can be accessed [here](#).

1.12 ESMA updates Q&As on MiFIR Data Reporting

On 28 May 2021, ESMA published an updated version of its questions and answers publication “On MiFIR Data Reporting” (**Q&As on MiFIR Data Reporting**). The update made to the Q&As on MiFIR Data Reporting is listed below:

- Q&A 18: which concerns the reporting of reference rates.

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

1.13 ESMA final report and guidelines on MiFID II market data obligations

On 1 June 2021, ESMA published its final report containing guidelines on obligations relating to market data under MiFID II and MiFIR.

The aim of the guidelines, which are in Annex III to the report, is to provide financial market participants with a uniform understanding of (i) their requirements to publish market data on a reasonable commercial basis; and (ii) to make market data available free of charge 15 minutes after publication. They also aim national competent authorities (to develop consistent supervisory practices. The guidelines apply to national competent authorities, trading venues, approved publication arrangements, consolidated tape providers and systematic internalisers.

The guidelines will apply from 1 January 2022.

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

2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

2.1 EBA launches consultation on regulatory technical standards on the disclosure of firms' investment policy under the IFR

On 31 March 2021, the European Banking Authority (**EBA**) launched a consultation paper on draft RTS on disclosure of investment policy by investment firms under the Investment Firms Regulation (2019/2033/EU) (**IFR**).

The draft RTS contains templates and tables for the disclosure of information on the investment firm's voting behaviour, influence over the investee companies and the impact of the investment firms' policies on aspects such as the governance or management of those companies. It also includes information on the use of proxy advisory firms that should help address uncertainties about potential conflicts of interest and information on investment firms' voting guidelines, a breakdown by geographical zone, economic sector or topic of the resolution being voted.

These disclosure requirements apply to class 2 investment firms with total assets above EUR 100 million. These firms will have to disclose this information in relation to those companies whose shares are admitted to trading on a regulated market and in which the proportion of voting rights exceeds 5 % of all voting rights issued by the company.

The consultation closed on 1 July 2021 and can be accessed [here](#).

2.2 Ireland exercises national discretions in the Investment Firms Directive

On 24 May 2021, the Department of Finance published its feedback statement (**Feedback Statement**) concerning the outcome of its public consultation on the exercise of national discretions under the Investment Firms Directive (EU) 2019/2034 (**IFD**).

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

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

2.3 EBA and ESMA provisional list of instruments and funds for smallest investment firms under IFR

On 31 May 2021, the EBA and the ESMA published a provisional list of additional instruments and funds that competent authorities may allow some of the smallest investment firms to use as own funds under Article 9(4) of the IFR.

The EBA and ESMA are required under Article 9(4) of IFR to establish, maintain and publish a list of all forms of instruments or funds in each Member State that qualify as own funds for those investment firms which are not legal persons or joint stock companies or which meet the conditions for qualifying as small and non-interconnected investment firms set out in Article 12(1) of IFR.

The EBA, together with ESMA, will assess the terms and conditions of all instruments and funds included in the provisional list against regulatory provisions at a later stage, and subsequently, will update, maintain and publish the list on a regular basis.

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

2.4 Reporting requirements for MiFID Firms updated to address IFR

The Central Bank has updated its web page concerning the reporting requirements for MiFID Firms to reflect the fact that:

- the Capital Requirements Regulation (575/2013) (**CRR**) reporting will commence for all class one minus investment firms under IFR for the period beginning 1 July 2021 (Including monthly liquidity returns);
- IFR reporting will commence for all class two investment firms on 30 September 2021; and
- IFR reporting will commence for all class three investment firms on 31 December 2021.

The web page can be accessed [here](#).

2.5 EBA launches a consultation on draft regulatory technical standards on the calculation of the threshold for investment firms as credit institutions

On 7 June 2021, the EBA launched a second consultation on draft regulatory technical standards (**RTS**) on the calculation of the threshold for investment firms as credit institutions.

The identification of large investment firms, which will be subject to the application of Directive 2013/36/EU (**CRD IV**), depends on the size of the investment firms and of the groups they belong to. The draft RTS sets out a proportionate and technically consistent methodology for the calculation of the level of total assets to be compared to the EUR30 billion threshold (as calculated on an average basis as introduced in the IFD) and further clarify the notion of relevant entity. The draft RTS also clarifies elements related to the application of accounting standards, the treatment of branches and the treatment of intragroup exposures.

The RTS are part of the EBA's roadmap for a new prudential regime for investment firms.

The consultation closes on 17 July 2021.

The analysis of the responses of the consultation will form the final report and submit the RTS in early Q4 of 2021.

The consultation can be accessed [here](#).

2.6 EBA publishes final draft technical standards on supervisory disclosure under the IFD

On 25 June 2021, the EBA published its final draft Implementing Technical Standards (**ITS**) on information on supervisory approaches and aggregate statistical data concerning the new prudential requirements that national competent authorities will have to disclose publicly for all types of investment firms authorised under MiFID.

The EBA has developed the draft ITS to determine the format, structure, contents list and annual publication date of the information on:

- the texts of laws, regulations, administrative rules and general guidance adopted in their Member State in the field of prudential regulation (Annex I of the draft ITS);
- the manner of exercise of the options and discretions available under the IFD and the IFR (Annex II of the draft ITS);
- the general criteria and methodologies that competent authorities use in the supervisory review and evaluation process (**SREP**) (Annex III of the draft ITS);
- aggregate statistical data on key aspects of the implementation of the IFD and IFR in each Member State, including the number and nature of supervisory measures taken in accordance with point (a) of Article 39(2) of the IFD, and of administrative sanctions imposed in accordance with Article 18 of the IFD (Annex IV of the draft ITS).

The draft ITS include the requirements for competent authorities to publicly disclose aggregated information and include detailed templates to harmonise the publication of such information. The instructions for filling in the templates are included in each Annex.

The last section of the final report details initial cost-benefit and impact assessment analysis concerning the draft ITS in order to gather feedback on possible costs and benefits of the proposals and the relative scale of these costs and benefits for different stakeholders.

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

2.7 ECB takes over supervision of systemic investment firms

On 25 June 2021, the European Central Bank (**ECB**) announced that it will take over the supervision of the largest and most systemic investment firms under IFR and IFD, which applies as of 26 June 2021.

The legislation defines systemic investment firms as those that trade financial instruments on their own account or place financial instruments on a firm commitment basis and have total consolidated assets above €30 billion are seen as holding important risks on their balance sheet. These investment firms must apply for a banking licence and as a consequence will be supervised by the ECB. The investment firms that will become subject to ECB supervision are those that provide key market and investment banking services and are exposed, in a similar way to banks, to credit and market risk.

The first set of investment firms newly authorised as banks are expected to be added to the list of supervised banks in the second half of 2021, and become subject to ECB supervision.

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

2.8 Central Bank of Ireland publishes feedback statement to Consultation Paper 135 on the exercise of discretions by the Central Bank under the IFD/ IFR

On 1 June 2021, the Central Bank of Ireland (**Central Bank**) published its Feedback Statement on Consultation Paper 135 (**CP 135**) which signalled the Central Bank's proposed approach and perspectives in relation to provisions contained in the IFD and the IFR where the competent authority can or must exercise its discretion. The consultation under CP 135 closed on 26 March 2021.

The Feedback Statement will be followed by an implementation notice setting out how the Central Bank will exercise key Competent Authority discretions contained in the IFD and IFR. This notice will also include details of how the Central Bank will exercise the Member State remuneration related discretions to be granted to the Central Bank by the Minister of Finance.

The Feedback Statement also confirms the Central Bank's intention to revise the reporting requirements for investment firms set out in Regulation 8 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 (S.I. No. 604/2017) as per the proposals set out in CP135. Investment firms should apply these revised reporting requirements from 1 July 2021.

The Feedback Statement also clarifies that Alternative Investment Fund Managers and UCITS Management Companies with MiFID II top-up permissions should continue to comply with the current prudential regime specified in their condition of authorisation pending further engagement with the Central Bank on the prudential regime applying.

The Feedback Statement can be accessed [here](#).

3. CENTRAL BANK OF IRELAND

3.1 CP140 - Consultation on Cross Industry Guidance on Operational Resilience

On 9 April 2021, the Central Bank published its Consultation Paper 136 on Cross Industry Guidance on Operational Resilience (**CP140**). The draft guidance is contained in Schedule 1 to CP140 (**Guidance**). The Guidance, once finalised, will be cross-sectoral and will apply to all regulated financial services providers regulated by the Central Bank.

The Guidance is intended to outline the Central Bank's expectations of the design and management of operational resilience and to outline the responsibilities of the boards and senior management of regulated firms to consider and appropriately manage operational risk and will focus on risk management, business continuity, incident management, third party risk management, ICT and cyber risk and recovery and resolution planning.

It will supplement (rather than replace) any existing sectoral legislation or guidance and the Central Bank notes that it should be read in conjunction with its existing guidance on cybersecurity and IT risk management as well as its proposed guidance on outsourcing, once finalised.

Under CP140, the Central Bank has proposed that firms will be required to be in a position to demonstrate compliance with the Guidance within two years of the finalised Guidance being issued.

The Central Bank is inviting stakeholders to submit feedback on the Guidance. The consultation period closes on 9 July 2021, and feedback may be submitted by email to Opresilience@centralbank.ie.

Please see the Dillon Eustace briefing paper entitled "Central Bank Consultation on Cross Industry Guidance on Operational Resilience". The Dillon Eustace briefing paper can be accessed [here](#).

CP140 can be accessed [here](#).

3.2 Central Bank publishes the Fitness & Probity Interview Guide

In June 2021 the Central Bank launched a new publication, the Fitness & Probity (**F&P**) Interview Guide, to assist applicants for certain senior roles who have been called to attend an F&P interview with the Central Bank. The Guide sets out for Pre-Approval Controlled Function (**PCF**) applicants and firms the practicalities around attending both assessment and specific interviews.

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

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

4.1 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 (Commencement) Order published

On 13 April 2021, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 (Commencement) Order 2021 (S.I. No. 188 of 2021) was published (**Order**). The Order brings the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 (**Act**) into operation, effective from 23 April 2021, with the exception of Section 8, which is effective from 24 April 2021.

The purpose of the Act is to transpose the criminal justice elements of Directive (EU) 2018/843 (**Fifth EU Anti-Money Laundering Directive** or **AMLD 5**) by amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (**CJA 2010**) in line with AMLD 5.

In addition, following commencement of the Act, crypto-asset services have become, for the first time, subject to regulation in Ireland.

The Order can be accessed [here](#).

The Act can be accessed [here](#).

4.2 European Commissioner speech on AML and CFT Action Plan

On 17 May 2021, the European Commissioner for Financial Services, Financial Stability and Capital Markets Union, Mairead McGuinness gave a speech at the AML Intelligence Boardroom Series, outlining elements of the European Commission's AML and CFT action plan. Central to the action plan is the increased harmonisation of AML rules and a new AML authority at EU level. The European Commissioner explained that the publication of details regarding the proposed new EU AML and CFT framework would be delayed until Q3 2021 due to technical issues and the volume of measures. In the speech, the European Commissioner addressed:

- the single AML and CFT rulebook;
- the new AML and CFT authority, which is expected to start carrying out direct supervision in 2026;
- consultation on information exchange and public-private partnerships;
- international co-operation with FATF and a European Union coordination on global AML issues;
- enforcement of AML framework implementation in each Member State; and
- cross-border connection between national beneficial ownership registers.

The text of the speech can be accessed [here](#).

4.3 Updated Central Bank AML/CFT Guidelines for the financial sector

On 23 June 2021, the Central Bank published updated AML/CFT guidelines for the financial sector (**Guidelines**). The updated Guidelines seek to highlight where the CJA 2010 has been materially amended since the initial publication of the Guidelines on 6 September 2019.

The updated Guidelines can be accessed [here](#).

4.4 Central Bank publishes Guidance for completion of the AML/CFT Risk Evaluation Questionnaire

In May 2021, the Central Bank published Instructions and Guidance for Completion of the AML, CFT and Financial Sanctions (FS) Risk Evaluation Questionnaire (REQ) (Guidance). The REQ seeks to gather:

- Information on the way in which a firm has assessed the AML/CFT/FS risks posed by its business model (based on high level information provided by the firm); and
- Information on the AML/CFT/FS framework put in place by the firm.

The purpose of the Guidance is to provide information to firms who are required by the Central Bank to file a REQ using the ONR. The Guidance focuses on the structure and content of the REQ and provides clarity for relevant fields contained within the REQ. The Guidance also provides information on accessing and submitting the REQ via ONR.

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

4.5 EBA launches consultation on draft guidelines on cooperation and information exchange in the area of AML and CFT

On 27 May 2021, the EBA launched a public consultation on its new draft Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and financial intelligence units under Directive 2013/36/EU (CRD IV) (Guidelines).

These Guidelines put in place the practical framework of cooperation and information exchange among prudential supervisors, AML/CFT supervisors and financial intelligence units, both at Member State and EU level. The Guidelines are relevant to CRD IV firms. The Guidelines facilitate and support cooperation and information exchange throughout the supervisory life cycle, covering authorisations of new institutions, on-going supervision and, where relevant, the imposition of supervisory measures and sanctions.

The EBA has invited comments on the Consultation Paper from stakeholders. The consultation period is open until 27 August 2021.

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

5. DATA PROTECTION

5.1 EDPB launches consultation on Guidance on certification criteria assessment

On 14 April 2021, the EDPB launched a public consultation on guidance regarding certification criteria assessment in accordance with Articles 42 and 43 of GDPR (Guidance). The objective of the Guidance is to identify overarching criteria that may be relevant to all types of certification mechanisms issued in accordance with Articles 42 and 43 GDPR. The Guidance will be an Addendum to Guidelines 1/2018 (Guidelines). The aim of the Guidance is to refine elements of the Guidelines in order to assist:

- stakeholders involved in the drafting of certification criteria in the context of GDPR certification; and
- National Supervisory Authorities (NSAs) and the EDPB to be able to provide consistent evaluations in the context of certification criteria approval (for both national schemes and EU data protection seals).

The EDPB noted that the recommendations contained in the Guidance are not exhaustive. The assessment of certification criteria will be carried out on a case-by-case basis, and specific certification mechanisms may require additional measures not covered by the Guidance.

The Guidance can be accessed [here](#). The consultation period closed on 26 May 2021. It is expected that a final version of the Guidance will be adopted following conclusion of the public consultation.

5.2 European Commission adopts new standard contractual clauses in respect of third-country transfers and controller-processor arrangements

On 4 June 2021, the European Commission, adopted two separate decisions adopting two new sets of standard contractual clauses (**SCCs**) as follows:

- Commission Implementing Decision (EU) 2021/914 containing SCCs for transferring personal data to non-EU countries in the absence of an adequacy decision under Article 46 of the GDPR (**Third Country SCCs**); and
- Commission Implementing Decision (EU) 2021/915 containing SCCs for use between controllers and processors located in the EU in accordance with the requirements of Article 28 (**Controller-Processor SCCs**).

The European Commission's decisions adopting the final sets of SCCs were published in the Official Journal of the European Union (**OJ**) on 7 June 2021.

These "new" SCCs are intended to replace the "old" SCCs, which were developed under the predecessor of the GDPR, the European Union Directive 95/46/EC. The new types of SCCs address (i) Controller-to-Controller, (ii) Controller-to-Processor, (iii) Processor-to-(Sub)Processor and (iv) Processor-to-Controller transfers and incorporate the various types of data transfers in a modular concept. It should be possible for more than two parties to adhere to the SCCs. Additional data controllers and processors should be allowed to accede to the SCCs as data exporters or importers from time to time as appropriate.

Controller –Processor SCCs

These become effective from 27 June 2021.

The Controller-Processor SCCs can be accessed [here](#).

The Third Country SCCs

The Third Country SCCs incorporate elements of the Schrems II decision of the European Court of Justice (*Data Protection Commissioner v Facebook Ireland Limited, Maximilian Schrems*). The SCCs impose an obligation on the data exporter (assisted by the data importer) to consider the level of protection of personal data in the third country. The European Commission's decision makes it clear that the transfer and processing of personal data under SCCs should not take place if the laws and practices of the third country of destination prevent the data importer from complying with the clauses in the SCCs. The SCCs also contain an obligation on the data importer to notify the data exporter of any inability on the part of the data importer to comply with the SCCs (whereupon the exporter must suspend/terminate the agreement). The new SCCs also contain additional provisions, such as the requirement that transfer impact assessments shall be carried out by the data exporter and made available to the competent supervisory authority on request, as well as setting out the factors that the data exporter (with the mandated help of the data importer) must consider in a transfer impact assessment.

From 27 June 2021 the new Third Country SCCs become effective and can be used. Parties can choose to continue to use the old Third Country SCCs until 27 September 2021 provided that (i) the processing operations remain unchanged and (ii) by relying on such clauses, this ensures that the transfer of personal data is subject to appropriate safeguards. After that date, parties must use the new Third Country SCCs. For contracts concluded before 27 September 2021, the parties can continue to rely on the old Third Country SCCs until 27 December 2022. However as and from that date the new Third Country SCCs must be adopted to comply with Chapter V of GDPR.

The Third-Country SCCs decision can be accessed [here](#).

On 24 June 2021, the European Union (Enforcement of data subjects' rights on transfer of personal data outside the European Union) Regulations 2021 were adopted (**Regulations**). The Regulations insert a new Section 117A into the Data Protection Act 2018. Section 117A provides an express right on the part of individuals to enforce third party beneficiary rights conferred on data subjects under SCCs adopted by the Commission. Prior to this, Irish law did not provide for third party beneficiary rights for data subjects.

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

5.3 EDPB adopts final Recommendations on ‘supplementary measures’ relating to third country transfers

On 18 June 2021, the EDPB adopted the final version of its Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data following public consultation (Volume 2.0) (**Recommendations**). The Recommendations were subject to a public consultation, which closed on 21 December 2020.

Recommendations 01/2020 were adopted with the aim of assisting controllers and processors acting as data exporters comply with their duty to identify and implement appropriate “supplementary measures” and promote the consistent application of the GDPR across the EEA, particularly in light of the CJEU’s recent “Schrems II” ruling (*Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems*).

The Recommendations can be accessed [here](#).

5.4 European Commission publishes adequacy decisions for transfers of personal data to the UK

On 28 June 2021, the European Commission adopted two adequacy decisions for transfers of personal data to the UK under the GDPR and the Law Enforcement Directive.

The Decision concludes, following assessment by the European Commission that the UK ensures an essentially equivalent level of protection to that guaranteed under the GDPR and the Law Enforcement Directive. Personal data can now flow freely from the European Union to the UK.

Both adequacy decisions contain a ‘sunset clause’ which limits the duration of adequacy to four years. After four years, it will be possible to renew the adequacy finding if the level of protection in the UK continues to be adequate.

The adequacy decision concerning GDPR can be accessed [here](#).

The adequacy decision concerning the Law Enforcement Directive can be accessed [here](#).

6. SUSTAINABILITY

6.1 European Commission adopts delegated legislation containing finalised amendments to the MiFID II suitability assessment rules

On 21 April 2021, the European Commission announced that it had adopted a delegated act (**Amending Regulation**) amending Delegated Regulation (EU) 2017/565 on organisational requirements and operating conditions for investment firms (**MiFID Level 2 organisational requirements**). The Amending Regulation provides for amendments to the MiFID II suitability assessment rules. The Amending Regulation indicates that from October 2022 where an EU distributor/intermediary (investment firm) is providing investment advice or portfolio management services to the end investor, it must now ask the sustainability preferences of the client as part of the suitability assessment required to be conducted under MiFID rules.

If the client says that it does have sustainability preferences, the distributor can only offer funds which meet one of the following:

- a financial instrument for which the client or potential client determines that a minimum proportion shall be invested in environmentally sustainable investments as defined in Article 2, point (1), of Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (**Taxonomy Regulation**);

- a financial instrument for which the client or potential client determines that a minimum proportion shall be invested in sustainable investments as defined in Article 2, point (17), of the SFDR; or
- a financial instrument that considers principal adverse impacts on sustainability factors where qualitative or quantitative elements demonstrating that consideration are determined by the client or potential client.

This means that from October 2022 an Article 8 fund cannot be sold by an EU distributor providing investment advice/portfolio management unless it either invests in; (i) sustainable investments, (ii) environmentally sustainable investments under the Taxonomy Regulation, or (iii) considers principal adverse impacts on sustainability factors.

The revised MiFID suitability assessment rules also allow the client to indicate the level of sustainability to be pursued by the fund (e.g. 20%/50% in sustainable investments etc.), therefore even if it invests in sustainable investments, a fund may not be able to be offered to such a client if it doesn't meet the levels dictated by the client.

The Amending Regulation also requires investment firms to take into account sustainability risks when complying with the organisational requirements and to integrate sustainability risk into risk management policies.

The Amending Regulation will enter into force 20 days after its publication in the OJ and will apply 12 months after publication in the OJ. It is expected that the new rules will apply from October 2022.

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

6.2 European Commission adopts delegated legislation containing finalised amendments to the MiFID II product governance rules

On 21 April 2021, the European Commission announced that it had adopted a delegated act (**Amending Directive**) amending Delegated Directive (EU) 2017/593 which sets out the product governance requirements applicable to investment firms (**MiFID II POG Rules**). Under the MiFID II POG Rules investment firms which are product manufacturers must identify a potential target market for the relevant product and must ensure that all relevant risks to such identified target market are assessed. Under the Amending Directive the assessment of the potential target market should now include any sustainability related objectives with which the product is compatible. Such product manufacturers must also ensure that any distributors of the product are provided with adequate information of the sustainability factors of the product so that the distributor can, in turn, provide the relevant information to its clients or potential clients.

EU investment firms which act as distributors must be satisfied that the products they offer are compatible with the identified target market under Article 10 of Delegated Directive (EU) 2017/593. The distributors must, under the finalised amendments to the product governance rules, now be satisfied that the products offered are compatible with any sustainability related objectives of the identified target market.

The Amending Directive will enter into force 20 days after its publication in the OJ and will apply 12 months after publication in the OJ. It is expected that the new rules will apply from October 2022.

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

6.3 European Commission consults on draft Delegated Regulation containing disclosure obligations under Taxonomy Regulation for large “Public Interest Entities” under the NFRD

On 7 May 2021, the European Commission issued a public consultation on a draft Commission Delegated Regulation (**Draft Commission Delegated Regulation**) supplementing Article 8 of the Taxonomy Regulation. Article 8 of the Taxonomy Regulation requires entities falling within the scope of Article 19a or 29a of Directive 2014/95/EU (**Non-Financial Reporting Directive** or **NFRD**) to disclose information on how and to what extent their activities are associated with environmentally sustainable economic activities. These disclosure requirements apply generally to large “Public Interest Entities” under the NFRD.

The Draft Commission Delegated Regulation sets down proposals relating to the specific content, methodology and presentation of information which must be disclosed by both non-financial undertakings and financial undertakings falling within the scope of the NFRD under Article 8 of the Taxonomy Regulation, including the key performance indicators which should be used by in-scope financial undertakings such as large banks, asset managers, investment firms and insurers/reinsurers. The Draft Commission Delegated Regulation, once finalised, is intended to require in-scope issuers to provide taxonomy-related information in their annual non-financial statements. This information should assist financial market participants such as UCITS management companies and AIFMs who invest in in-scope issuers in complying with their own disclosure obligations arising under RTS to be issued under the SFDR.

The consultation on the Draft Commission Delegated Regulation closed on 2 June 2021. According to an FAQ published by the European Commission, its current intention is that a finalised version of the Draft Commission Delegated Regulation is adopted by the Commission by end of June 2021 with the obligations thereunder applying from 1 January 2022.

The Draft Commission Delegated Regulation can be accessed [here](#).

The FAQ can be accessed [here](#).

6.4 European Commission adopts Taxonomy Climate Delegated Act

On 4 June 2021, the European Commission adopted a Delegated Regulation supplementing the Taxonomy Regulation by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (**Taxonomy Climate Delegated Act**).

The Taxonomy Climate Delegated Act contains a set of technical screening criteria that define which activities contribute to environmental objectives contained in the Taxonomy Regulation (climate change adaptation and climate change mitigation).

The Taxonomy Climate Delegated Act will enter into force twenty days following its publication in the OJ. It will apply from 1 January 2022.

The Taxonomy Climate Delegated Act can be accessed [here](#). Its accompanying Annex 1, and Annex 2, can be accessed [here](#) and [here](#).

A Q&A on the Taxonomy Climate Delegated Act can be accessed [here](#).

6.5 European Commission launches its EU Taxonomy Compass

On 16 June 2021, the European Commission launched its EU Taxonomy Compass which is intended to assist financial market participants and issuers who fall within the scope of disclosure obligations under the Taxonomy Regulation in navigating the delegated acts which set down in-scope activities and applicable technical screening criteria.

The tool currently contains the technical screening criteria for both substantial contribution and substantial contribution and “Do No Significant Harm” tests for (i) climate change mitigation and (ii) climate change adaptation. It will be updated as and when the delegated acts setting down the technical screening criteria relating to the remaining four environmental objectives have been adopted by the European Commission.

The European Commission explains that it allows users to check “which activities are included in the EU Taxonomy (taxonomy-eligible activities), to which objectives they substantially contribute and what criteria they have to meet. It is important to note that minimum safeguards (social standards) have to be met for an economic activity to be considered taxonomy-aligned. The EU Taxonomy Compass also aims to make it easier to integrate the criteria into business databases and other IT systems”.

The EU Taxonomy Compass can be accessed [here](#). Further information on the tool can be accessed [here](#).

7. MISCELLANEOUS

7.1 ESMA publishes opinion to permanently lower reporting threshold for net short positions

On 20 May 2021, ESMA issued an opinion to permanently lower the threshold to notify net short positions on shares to NCAs from 0.2% to 0.1% under the Regulation (EU) 236/2012 (**Short Selling Regulation**).

In March 2020, ESMA lowered the notification threshold to 0.1% on a temporary basis only expiring on 19 March 2021. ESMA now considers it essential to lower the reporting threshold to 0.1% on a permanent basis.

The opinion can be accessed [here](#).

7.2 European Commission launches consultation on Distance Marketing Directive

On 22 June 2021 the European Commission published a webpage announcing the launch of a public consultation on the Distance Marketing of Consumer Financial Services Directive (**DMD**).

The DMD aims to ensure the free movement of financial services by harmonising consumer protection rules in the single market. Under the DMD, financial services are defined as “any service of a banking, credit, insurance, personal pension, investment or payment nature.”

Since the entry into force of the DMD, the retail financial sector has become increasingly digitised and the progressive introduction of product-specific legislation has reduced its relevance. The Commission is therefore seeking stakeholder views with a view to future-proofing the DMD.

Comments can be made on the DMD by submitting a completed questionnaire. The closing date for participation is 28 September 2021. The Commission intends to publish its proposals for reform in the first quarter of 2022.

Prior to the launch of the consultation, in May 2021, the European Commission published an inception impact assessment on its review of the DMD, in which it explained it was assessing a number of policy options.

The consultation on the DMD can be accessed [here](#) and the text of the impact assessment can be accessed [here](#).

7.3 European authorities issue joint statement on forthcoming cessation of all LIBOR settings

On 24 June 2021, the European Commission, the ECB in its banking supervisory capacity, the EBA and ESMA (together the **Authorities**) published a joint public statement on the forthcoming cessation of all LIBOR settings (**Statement**).

In the Statement, the Authorities strongly encourage market participants to use the time remaining until the cessation or loss of representativeness of USD LIBOR, GBP LIBOR, JPY LIBOR, CHF LIBOR and EUR LIBOR to substantially reduce their exposures to these rates. Market participants are encouraged not to wait until the European Commission to designate a replacement for LIBOR to take this action.

The Statement also encourages market participants to cease using the 35 LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and by 31 December 2021 at the latest. Market participants are also called on to limit the use of any LIBOR setting published under a changed methodology and to include robust fallback clauses nominating alternative rates in all contracts referencing LIBOR.

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.

Keith Waine

E-mail: keith.waine@dilloneustace.ie

Tel : + 353 1 673 1822

Fax: + 353 1 667 0042

Karen Jennings

E-mail: karen.jennings@dilloneustace.ie

Tel : + 353 1 673 1810

Fax: + 353 1 667 0042

Rose McKillen

E-mail: rose.mckillen@dilloneustace.ie

Tel : + 353 1 673 1754

Fax: + 353 1 667 0042

Laura Twomey

E-mail: laura.twomey@dilloneustace.ie

Tel : + 353 1 673 1848

Fax: + 353 1 667 0042

Seán Mahon

E-mail: sean.mahon@dilloneustace.ie

Tel : + 353 1 673 1707

Fax: + 353 1 667 0042

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