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# Investment Firms

# Quarterly Legal and Regulatory Update

Period covered: 1 July 2020 – 30 September 2020

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# 1. MIFID II – EUROPEAN DEVELOPMENTS

## 1.1 ESMA updates Q&As on MiFIR Data Reporting

During the period 1 July 2020 to 30 September 2020, the European Securities and Markets Authority (**ESMA**) published an updated version of its questions and answers publication "On MiFIR Data Reporting" (**Q&As on MiFIR Data Reporting**). Any updates made to the Q&As on MiFIR Data Reporting are listed below:

- **Section 22 - Transaction reporting – Question 13** (new question added on 8 July 2020) this question relates to reporting obligations in the scenario where an investment firm executes a reportable transaction through an execution algorithm provided by another investment firm;

- **Section 2 – Legal Entity Identifier (LEI) of the issuer – Question 6** (new question added 28 September 2020) this question clarifies which LEI should be reported (issuer or operator of the trading venue identifier) under the regulatory technical standard on supply of financial instruments reference data under Article 27 of MiFIR (**RTS 23**) and related RTS and ITS under Market Abuse Regulation (596/2014/EU) (**MAR**) Article 4;

- **Section 22 - Transaction reporting – Question 2** (amended question 28 September 2020) this question relates to national client identifiers for natural persons and provides clarification on how different national identifiers specified in Annex II of regulatory technical standards on reporting obligations under Article 26 of MiFIR (**RTS 22**) are represented. The amendments also provide clarification on the requirements for Swedish national client identifiers; and

- **Section 22 - Transaction reporting – Question 13** (new question added 28 September 2020) this question provides an additional reporting scenario to an existing Q&A where an investment firm executes a transaction through an execution algorithm using the membership of its client to execute the order in the market.

A copy of the Q&As on MiFIR Data Reporting can be accessed here.

## 1.2 ESMA updates Q&As on Transparency Topics

On 8 July 2020, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR transparency topics" (**Q&As on Transparency Topics**). The update made to the Q&As on Transparency Topics is listed below:

- **Section 7 - The Systematic Internaliser (SI) regime – Question 4** (new question added on 8 July 2020) this question provides technical clarifications for the performance of the SI test and specifies how the number of transactions and the nominal amount traded of a derivative must be allocated when a derivative contract changes over the observation period from one sub-class to another.

A copy of the Q&As on Transparency Topics can be accessed here.

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

On 10 July 2020, 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 2019.

Article 2(1)(j) of the MiFID II Directive (2014/65/EU) (**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.

The 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.

### 1.4 ESMA publishes two final reports reviewing key provisions of the MiFID II/MiFIR transparency regime

On 16 July 2020, ESMA published two final reports reviewing key provisions of the MiFID II Directive and the MiFIR transparency regime. The first report reviews the MiFIR transparency regime for equity instruments and contains proposals relating to:

- restricting the use of the reference price waiver to larger orders;
- increasing the minimum quoting obligations and a revised methodology for determining the standard market sizes relevant for the quoting by internalisers;
- simplifying the regime and transforming the mechanism into a single volume cap with the deletion of the trading venue threshold of 4% improving transparency by lowering the EU level threshold; and
- clarifying the scope of the trading obligation specifically in relation to third-country shares.

The first report can be accessed here.

The second report reviews the pre-trade transparency obligations applicable to SIs in non-equity instruments and contains proposals relating to:

- maintaining the publication of the quotes in liquid instruments while deleting the requirements to provide quotes to other clients and to enter into transactions with multiple clients;
- removing the obligation in relation to illiquid instruments;
- harmonising the way in which SIs publish their quotes in equity and non-equity instruments; and
- no change to the applicable legal framework at this stage.

The second report can be accessed here.

The proposals put forward in both reports by ESMA are said to be done so with the aim of simplifying the current complex transparency regime while trying to improve the transparency available. ESMA have stated that they took into account the feedback received from market participants through consultations when drafting both reports.

### 1.5 ESMA provides guidance on waivers from pre-trade transparency

On 17 July 2020, ESMA published an opinion providing guidance on pre-trade transparency waivers for equity and non-equity instruments. The document replaces the previous guidance from the Committee of European Securities Regulators and ESMA's opinions on waivers from pre-trade transparency under the Markets in Financial Instruments Regulation (600/2014/EU) (**MiFIR**).

The guidance provides stakeholders with information on ESMA's assessment of features frequently encountered in the context of issuing opinions on waivers from pre-trade transparency over the last three years and aims to contribute to the consistent application of waivers from pre-trade transparency across the European Union (**EU**). The opinion covers:

- specific types of waivers, including large-in-scale (**LIS**), order management facility (**OMF**) and negotiated transactions (**NT**) waivers;
- combinations of waivers; and
- applying for pre-trade transparency waivers.

ESMA has provided that the opinion will be updated if there are further frequent issues in the context of assessing waiver notifications.

A copy of the opinion can be accessed here.

### 1.6 ESMA updates transparency opinions for third country venues

On 28 July 2020, ESMA updated the list of third country venues for the purpose of transparency under the MiFID II Directive and MiFIR following market participants and national competent authorities (**NCAs**) request for guidance on the treatment of those transactions in third-country trading venues.

ESMA has updated the annex to the opinion on post-trade transparency and provided additional guidance on the implementation of the list of the list of third country venues. The annex lists venues that meet the relevant criteria defined in the opinion.

The updated annex and additional guidance can be accessed here.

### 1.7 EBA and ESMA launch consultation to revise joint guidelines for assessing the suitability of members of the management body and key function holders

On 31 July 2020, the European Banking Authority (**EBA**) and ESMA launched a consultation on revising their joint guidelines on the assessment of the suitability of members of the management body and key function holders.

The review reflects the amendments introduced by the fifth Capital Requirements Directive (2019/878/EU) (**CRD V**) and the Investment Firms Directive (2019/2034/EU)(**IFD**) in relation to the assessment of the suitability of members of the management body.

The draft joint guidelines clarify that the knowledge, experience and skill requirements are important aspects in the fit and proper assessment of members of the management body and key function holders as they contribute to identifying, managing and mitigating money laundering and financing of terrorism risks. The draft joint guidelines determine how diversity is to be taken into account in the process for selecting members of the management body. In particular, institutions should take measures to ensure that gender balance is taken into account when selecting members of the management body. Furthermore, it provides that induction and training are key to ensure initial and ongoing suitability of members of the management body and for institutions to establish training policies and to provide appropriate financial and human resources to be devoted to induction and training.

The draft joint guidelines also take into account the recovery and resolution framework introduced by the Bank Recovery and Resolution Directive (2014/59/EU) (**BRRD**). The draft joint guidelines provide that as part of early intervention measures and during resolution, the suitability of newly appointed members of the management body and of the management body collectively is relevant and requires an assessment.

The draft joint guidelines will apply to NCAs across the EU as well as to institutions on a solo and consolidated basis.

The consultation runs until 31 October 2020 and the finalised guidelines are expected to enter into force six months after their publication.

The consultation paper can be accessed here.

### 1.8 ESMA publishes call for evidence on the review of transparency requirements for equity and non-equity instruments

On 1 September 2020, ESMA published a call for evidence with the intention to review the Commission Delegated Regulation (EU) No 2017/587 (**RTS 1**) and the Commission Delegated Regulation (EU) No 2017/583 (**RTS 2**) starting from the fourth quarter of 2020 to the first quarter of 2021.

ESMA is seeking feedback by 31 October 2020 from market participants on any technical issues or any policy gaps at implementation level or any unclear provisions and is set to use the feedback to the call for evidence to prepare a consultation paper for the RTS 1 and RTS 2 which is set to follow in 2021.

A copy of the call for evidence can be accessed here.

### 1.9 ESMA grants option to postpone annual transparency calculations for non-equity instruments

On 7 September 2020, ESMA announced its decision that trading venues and investment firms may postpone the application of the annual transparency calculations for non-equity instruments other than bonds to 21 September 2020.

The decision also applies to the quarterly calculations for the purpose of the SI regime for non-equity instruments other than bonds. Investment firms that apply the transparency calculations on 21 September may also perform the SI test by 21 September 2020.

Since ESMA published the results of the liquidity assessment for non-equity instruments other than bonds, stakeholders have raised concerns that the application of the non-equity transparency calculations coincides with the quarterly expiry week of many equity derivatives, a week which has high trading volumes and a higher level of volatility due to the rolling over of many contracts. In order to avoid technical issues during this sensitive period, ESMA has agreed that trading venues and investment firms may apply the non-equity transparency calculations from 21 September instead of 15 September 2020.

The transparency requirements based on the results of the annual transparency calculations for non-equity instruments will apply from 15 September 2020, with the option to delay the application to 21 September 2020, until 31 May 2021. The results of the next annual transparency calculations for non-equity instruments will be published by 30 April 2021 and will become applicable from 1 June 2021.

ESMA will publish the next quarterly publication of data for the purpose of the SI regime by 1 November 2020 with an application date of 15 November 2020 for equity and equity-like instrument, bonds and non-equity instruments.

A copy of the ESMA announcement can be accessed here.

### 1.10 ESMA launched a consultation reviewing the reference data and transaction reporting obligations under MiFIR

On 24 September 2020, ESMA published a consultation paper on reviewing the reference data and transaction reporting obligations under MiFIR.

The consultation paper contains ESMA's proposals for possible amendments to the transaction reporting and reference data regime which aims to simplify the current reporting regimes and enhance the quality of the data reported by ensuring consistency among various reporting and transparency requirements relevant for trading venues, SIs, investment firms, data reporting services providers, and asset management companies. The consultation paper contains:

- a possible revision of the traded on a trading venue concept;

- a revision of the scope of indices subject to the reporting obligation considering the more recent Benchmark Regulation (2016/1011/EU);

- a proposal to remove, replace or further clarify specific data that should be reported under the transaction reporting obligation; and

- a proposal to ensure further alignment between the EMIR and MiFIR reporting regimes considering the EMIR Refit Regulation (2019/834/EU) review.

The consultation closes for responses on 20 November 2020 and ESMA intends to submit its final review report to the European Commission (**Commission**) in the first quarter of 2021.

A copy of the consultation paper can be accessed here.

**1.11 ESMA Publishes Final Report on Third-Country Firm Regime**

On 28 September 2020, ESMA published its final report (**Final Report**), accompanied by final draft regulatory and implementing technical standards (**RTS and ITS**) on the provision of investment services and activities in the EU by third-country firms (**TCFs**) under the MiFID II Directive and MiFIR.

On 31 January 2020, ESMA published a Consultation Paper containing the proposed technical standards (see our previous article here). Having considered the responses to the consultation paper ESMA has now published the Final Report and the draft ITS and RTS. The draft RTS and ITS give further effect to changes made to MiFID II Directive and MiFIR in respect of the provision of investment services and activities in the EU by TCFs, brought about by the Investment Firms Regulation (EU) 2019/2033 (**IFR**) and IFD.

Changes introduced by IFR which amend the MiFIR regime for TCFs that intend to provide investment services and activities to eligible counterparties and per se professional clients on a cross border basis (within the meaning of Annex II of the MiFID II Directive) include:

- the introduction of a reporting flow from TCFs to ESMA, on an annual basis;

- the requirement to report granular information on services and activities to ESMA, on an annual basis, and to provide ESMA with access to relevant data; and

- new powers for ESMA to conduct on-site inspections and to temporarily prohibit or restrict the provision of investment services or activities in the EU by a TCF under Article 46 of MiFIR.

ESMA was mandated to prepare draft technical standards in relation to the revised third-country regime under MiFIR. To this end the following final draft RTS are appended to the Final Report:

- RTS to specify the information that TCFs must provide to ESMA for registration of the firm in the ESMA register of TCFs (Article 46(4) of MiFIR); and

- RTS to specify the information that TCFs are required to report annually to ESMA (Article 46(6a) of MiFIR with effect from 26 June 2021).

The IFD introduced changes to the provision of investment services and activities by TCFs to retail clients and professional clients (within the meaning of Section II of Annex II of MiFID II Directive) through branches under MiFID II Directive, including:

- a requirement on ESMA to publish annually a list of branches of TCFs active in the EU, based on information collected from NCAs; and

- the introduction of reporting obligations on the branch of a TCF to report to the competent authority of the Member State where the branch is established.

ESMA was mandated to develop an ITS to specify the format in which the information required to be provided by a TCF branch under Article 41(3) of MiFID II Directive is to be reported. In fulfilment of this mandate a draft ITS is appended to the Final Report specifying the format in which the required new flow of information is to be reported to Member State competent authorities by branches of TCFs.

The draft RTS and ITS have been submitted to the Commission for adoption. The Commission has three months to decide whether to adopt the technical standards and it is expected that they will be approved and published in the Official Journal of the EU before the end of this year before entering into force on 21 June 2021.

Given that the United Kingdom (**UK**) looks set to become a 'third country' for the purposes of EU law with effect from 1 January 2021, the new rules will have a significant impact on UK investment firms doing business in the EU and, potentially, their clients and counterparties.

A link to the Final Report can be found here.

**1.12 ESMA published the final report on the MiFID II/MiFIR transparency regime applicable to non-equity financial instruments**

On 29 September 2020, ESMA published the final report on the MiFID II/MiFIR transparency regime applicable to non-equity financial instruments (**Final Report**).

Following on from its consultation paper on the MiFIR review report on transparency for non-equity instruments, ESMA in its Final Report proposes simplifying and bringing more efficiency to an overly complex regime and to foster a harmonised application across the EU. The Final Report makes several proposals to the Commission to improve the current regime. The main recommendations are:

- deleting the specific waiver and deferral for orders and transactions above the "size-specific to the instrument" threshold;
- streamline the deferral regime with a simplified system based on volume masking and full publication after two weeks as well as removing the supplementary deferral options to NCAs under the MiFIR;
- transform the option to NCAs to temporarily suspend MiFIR transparency provisions into a mechanism coordinated at EU-level;
- including the possibility to suspend on short notice the application of the derivative trading obligation similarly to the mechanism available in EMIR; and
- complementing the criteria used to grant equivalence to third-country trading venues for the purpose of the derivative trading obligation with conditions relating to transparency and non-discriminatory access.

The recommendations seek to bring more transparency into the derivative and bond markets through the adoption of guidance and promote supervision to align market practices with the objectives of MiFIR. ESMA invites the Commission to translate these recommendations into legislative proposals.

The Final Report can be accessed here.

## 2. CENTRAL BANK OF IRELAND

### 2.1 Central Bank publishes statement on use of electronic signatures

On 24 August 2020, the Central Bank published a statement on the use of electronic signatures in regulatory documents and forms, arising out of increased instance of remote working arising from the Covid-19 pandemic.

In its statement, the Central Bank confirms that, in the absence of any specific legal provisions to the contrary, regulated firms may use electronic signatures in submitting regulatory documents and forms to the Central Bank.

The Central Bank emphasised that those signing regulatory documents and forms in electronic form will be accountable for the content of the document in the same way as if they had signed the document in 'wet ink'.

The statement is available here.

### 2.2 Central Bank Act 1942 (Section 32D) Regulations 2020 [S.I. No. 345 of 2020]

On 4 September 2020, the Central Bank Act 1942 (Section 32D) Regulations 2020 (S.I. No. 345 of 2020) (**Regulations**) came into operation.

Each year, the Central Bank sets out the framework for that year's levying process and the basis on which the individual financial supervisory providers' levies will be calculated.

From 4 September 2020, all financial service providers are liable to pay an annual levy as specified in the Regulations. The Schedule to the Regulations prescribes the amount of the levy contribution and, where applicable, any supplementary levy contributions due in respect of each authorisation held during a relevant levy period.

A regulated entity is liable to pay the levy contribution prescribed whether or not a levy notice has been issued by the Central Bank. In particular, at Category D, the Schedule address the amount of the levy contribution for investment firms (other than investment product intermediaries).

The Regulations can be accessed here.

## 3. BENCHMARKS REGULATION

### 3.1 ESMA publishes amendments to the Benchmarks Regulation

On 24 July 2020, the Commission published proposed amendments to Regulation (EU) 2016/1011 (**Benchmarks Regulation** or **BMR**).

The amendments proposed seek to ensure that when LIBOR is phased out (currently anticipated to occur at the end 2021) this does not cause disruptions to the economy and harm financial stability in the EU. Hence the proposed amendments to the Benchmark Regulation include the power of the Commission to designate a replacement benchmark in such an event. It is proposed that the statutory replacement rate, will be operation of law, replace all references to the "benchmark in cessation" in the financial contracts (such as derivative contracts) into by an EU supervised entity (such as banks, investment firms, insurance undertakings, UCITS, UCITS ManCos, AIFMs.

In addition, the Commission is also proposing an amendment to the Benchmark Regulation that will allow EU users to continue using currency benchmarks provided outside the EU, thereby allowing EU companies covering the risk of foreign currency fluctuations in their exporting and foreign investment activities.

A copy of the press release can be accessed here.

The text of the legislative proposal can be accessed here.

### 3.2 ESMA publishes new draft RTS under the Benchmarks Regulation

On 29 September 2020, ESMA published its final report on draft RTS under the BMR. The report contains two new sets of draft RTS supplementing the BMR.

The draft RTS contain additional detailed rules relating to the behaviours and standards expected of administrators in order to enhance the robustness of financial benchmarks. More specifically, the draft RTS introduce provisions ensuring:

- that the governance arrangements of administrators are sufficiently robust;
- the potential manipulation of benchmarks is minimised, by introducing additional rules regarding methodology; and
- that common criteria are used across Member States for the assessment of the mandatory administration of critical benchmarks and the compliance statement for non-significant benchmarks.

The draft RTS will now be submitted to the Commission for endorsement.

The report and new RTS may be accessed here.

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

### 4.1 EBA publishes response to the Commission call for advice on the future of EU AML and CFT framework

On 10 September 2020, the EBA published its response to the Commission's call for advice, issued 3 March 2020, on the future of the EU's AML and CFT framework. The response comprises an opinion together with a report.

In its response, the EBA recommends that the Commission establish a single rulebook to:

- harmonise the EU's legal framework where evidence suggests divergence of national rules, in particular with respect to CDD measures and AML/CFT systems and controls requirements that determine what financial institutions do to tackle money laundering and terrorist financing;
- strengthen the EU's legal framework where current provisions are insufficiently robust, particularly in relation to the powers AML/CTF supervisors have at their disposal to monitor and take the measures necessary to ensure financial institutions' compliance with their AML/CFT obligations and in relation to financial institutions' reporting requirements;
- review of the scope of the EU's CFT/AML legislation to ensure the list of obliged entities is sufficiently comprehensive and in line with international AML/CFT standards; and
- clarify provisions in sectoral financial services legislation to ensure that they are compatible with the EU's AML/CFT objectives.

The opinion, which gives a high-level overview of the EBA's advice, may be accessed here.

The report, which sets out the EBA's detailed response, may be accessed here.

### 4.2 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020

On 22 September 2020, the Criminal Justice (Money t and Terrorist Financing) (Amendment) Bill 2020 (**Bill**) commenced Dáil Éireann, Second Stage. The purpose of the Bill is to transpose the criminal justice elements of the Fifth EU Anti-Money Laundering Directive (**AMLD 5**) by amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 in line with AMLD 5. The Bill seeks to:

- improve the safeguards for financial transactions to and from high-risk third countries;
- bring a number of new 'designated persons' under the existing legislation (notably certain letting agents, virtual currency providers and custodian wallet providers);
- improve the transparency of beneficial ownership of legal entities. Where a designated person is entering a business relationship with another entity, the designated person must take steps to obtain the relevant information from the appropriate register of beneficial ownership prior to commencing the business relationship;
- provide for a new defence in relation to 'tipping off' where the designated person can prove that the entity to whom the information was disclosed was a specified financial institution, which is connected to the designated person or part of the same group structure;
- enhance existing customer due diligence (**CDD**) requirements;
- set new limits on the use of anonymous pre-paid cards. A person supplying such an instrument will now be required to conduct CDD when the value of the requested card is €150 or higher;
- broaden the definition of a politically exposed person (**PEP**) to include 'any individual performing a prescribed function';
- provide for Ministerial guidance which will clarify domestic 'prominent public functions' that will give rise to a person being designated as a politically exposed person PEP; and
- make a number of technical amendments to other provisions of Acts already in force.

The Bill's progress can be tracked here.

## 5. DATA PROTECTION

### 5.1 Implications of Schrems II Ruling

On 16 July 2020, the Court of Justice of the European Union (**CJEU**) published its much anticipated ruling in the Schrems II case1 in which it considered whether the transfer of personal data by Facebook Ireland to Facebook Inc. which is located in the U.S. under the EU-U.S. Privacy Shield or through the use of standard common contractual clauses (**SCC**) was permissible.

The CJEU ruled that: (i) the Privacy Shield was no longer a valid mechanism by which to transfer personal data to the US on the basis that it did not ensure EEA data subjects the same protections they are afforded under Regulation (EU) 2016/679 (**General Data**

1 Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems

**Protection Regulation** or **GDPR**); and (ii) although the SCC remained valid, upon assessment of the data controller, 'supplementary measures' may be required to ensure that the adequate level of protection is given to data subjects.

The ruling has significant implications for personal data transfers between EEA member states and third countries whose data protection regimes have not yet been assessed by the Commission as offering an equivalent level of protection to data subjects. Notably, the UK will become a 'third country' for data protection purposes on 31 December 2020.

### 5.2 Data Protection Commission statement on Schrems II ruling

On 16 July 2020, the Data Protection Commission (**DPC**) published its response strongly welcoming the Schrems II ruling. The DPC's case was that data transfers between the EU and the USA were highly problematic in light of the CJEU's decision in the Safeharbour case of 2015 and the structure of the US legal system.

The DPC indicated that "it *had brought these proceedings – and resisted objections from both Facebook and Mr Schrems -specifically in order to secure a decisive statement of position from the CJEU in relation to the key issues of principle at stake when an EU citizen's personal data is transferred to the United States*".

The DPC indicates that the CJEU's decision in the Schrems II case endorses *"the substance of the concerns expressed by the DPC (and by the Irish High Court) to the effect that EU citizens do not enjoy the level of protection demanded by EU law when their data is transferred to the United States".* The DPC also indicates that whilst the SCCs transfer mechanism used to transfer data to countries worldwide is, in principle, valid, "*it is clear that, in practice, the application of the SCCs transfer mechanism to transfers of personal data to the United States is now questionable*".

The DPC also welcomes the clarity provided by this judgment in regards to the allocation of responsibility between data controllers and NSAs. It looks forward to cooperating with its fellow EU supervisory authorities in giving effect to this judgment.

The DPC statement can be accessed here.

### 5.3 Frequently Asked Questions on the Schrems II case

On 23 July 2020, following the ruling in the Schrems II case, the European Data Protection Board (**EDPB**) published its Frequently Asked Questions (**FAQ**) document. In this FAQ, the EDPB confirmed that the Privacy Shield was invalidated with immediate effect. Therefore data exporters which relied on the Privacy Shield as a legitimate means of transferring personal data from the EEA to the U.S. will need to consider an alternative mechanism for any future transfers.

The EDPB FAQ can be accessed here.

The decision of the CJEU is available here and the press release of the CJEU, here.

### 5.4 Guidance for Data Controllers who Lose Control of Data to a Third Party

On 27 August 2020, the DPC published guidance on its website highlighting the steps that should be taken by data controllers in the event of the loss of control of data to third parties.

GDPR and the Data Protection Act 2018 are the primary pieces of legislation governing the control of personal data and list the responsibilities of data controllers. In a situation where personal data is revealed to a third party, the possibility of that party retaining this information could be damaging to the data subject.

In most scenarios, the third party will return or dispose of the personal data upon request but where this is not the case, the data controller is responsible for rectifying the situation. The breach and all relevant information should be reported to the DPC and the following steps are recommended:

- advise the third party that retention of this data is unlawful;
- if necessary, contact an Garda Síochána; and
- consult with legal advisers regarding possible remedies, including injunctions.

The guidance can be accessed here.

### 5.5 EDPB adopts guidelines on the concepts of controller and processor in the GDPR

On 2 September 2020, the EDPB adopted guidelines entitled "Guidelines 07/2020 on the concepts of controller and processor in the GDPR" (**Guidelines**).

The Guidelines seek to provide guidance on the concepts of controller and processor by clarifying the meaning of these concepts and clarifying the different roles and the distribution of responsibilities between these actors. The Guidelines specifically address the extent to which the GDPR brought changes to these concepts, including the implications of joint controllership under Article 26 GDPR and the relationship between controller and processor under Article 28 GDPR.

The Guidelines replace the previously issued Article 29 Working Party guidance on these concepts (Opinion 1/2010 (WP169)). The new Guidelines aim to give more developed and specific guidance in order to ensure consistent application of the rules throughout the EU and the EEA.

The EDPB is now seeking feedback on the Guidelines in the form of a public consultation. The closing date for receipt of comments is October 19 2020.

The Guidelines are available here, and the public consultation can be accessed here

## 6. SUSTAINABLE FINANCE

### 6.1 EFAMA response to the Commission consultations on MiFID Delegated Acts

On 6 July 2020, the European Fund and Asset Management Association (**EFAMA**) published their response to the Commission's consultation on delegated acts that seek to integrate sustainability risks and sustainability factors into the MiFID II Directive.

In the response, EFAMA supports the creation of a framework for sustainable investing which facilitates the transition to a more sustainable European economy and comments that the Commission's proposals in their current state will not achieve this goal.

EFAMA insists that the Commission makes changes to the current proposal to ensure that the final delegated act is fully aligned with the Sustainable Finance Disclosures Regulation (2019/2088/EU) (**SFDR**) with a clear distinction between Article 8 products (i.e. products promoting environmental and social characteristics) and Article 9 products (i.e. products pursuing sustainability investments). As they assert that only the latter should be required to invest in sustainable investments.

The response also provides that MiFID requirements must not go beyond the existing SFDR requirements regarding the principal adverse impact (**PAI**) and that the proposed delegated act significantly extends the scope of PAI at product-level than what was previously agreed by European co-legislators.

EFAMAs response can be accessed here.

### 6.2 Adopted text of three Commission Delegated Regulations supplementing BMR on sustainable finance issues

On 22 July 2020, the Commission published the adopted text of the following Delegated Regulations supplementing the Benchmarks Regulation ((EU) 2016/1011) (**BMR**) on sustainable finance issues:

- Delegated Regulation supplementing the BMR as regards minimum standards for EU climate transition benchmarks and EU Paris-aligned benchmarks (C(2020) 4757 final). This Regulation can be accessed here.
- Delegated Regulation supplementing the BMR as regards the minimum content of the explanation on how ESG factors are reflected in the benchmark methodology (C(2020) 4748 final) and Annex. The Regulation is available here.
- Delegated Regulation supplementing the BMR as regards the explanation in the benchmark statement of how ESG factors are reflected in each benchmark provided and published (C(2020) 4744 final) and Annexes 1 and 2. This Regulation can be viewed here.

The next step will be for the Council of the EU and the European Parliament to consider the Delegated Regulations. If neither the Council nor the Parliament object to the Delegated Regulations, they will be published in the Official Journal of the EU. The Delegated Regulations will enter into force and apply 20 days after publication in the Official Journal of the EU.

## 7. COVID–19

### 7.1 Notice of information on MiFIR open access provisions for exchange traded derivatives published in Official Journal of the EU

On 3 July 2020, a notice of information was published relating to the postponement of entry into application of MiFIR open access provisions with regard to exchange-traded derivatives as published in the Official Journal of the EU.

The notice provides that the co-legislators have agreed to extend the transitional arrangements in Article 54(2) of MiFIR effective as of 4 July 2020 and that the extension applies to those central clearing counterparties (**CCPs**) or trading venues which made a request to their competent authorities to benefit from the transitional arrangements with respect to exchange-traded derivatives.

A copy of the notice can be accessed here.

### 7.2 Coronavirus response: the Commission adopts legislative proposals on amendments to the CRR and MiFID II Directive

On 24 July 2020, the Commission adopted a capital markets recovery package, to help the EU's financial markets recover from the coronavirus crisis. The package contains targeted adjustments to the Prospectus Regulation (2017/1129/EU) (**Prospectus Regulation**), MiFID II and securitisation rules.

The adopted legislative proposals for a regulation amending the Capital Requirements Regulation (575/2013) (**CRR**) concerns adjustments to the securitisation framework to support the economic recovery and a legislative proposal for a directive amending the MiFID II Directive concerns information requirements, product governance and position limits

The next step is for the European Parliament and the Council of the EU to agree the legislative texts. After the package is adopted and has entered into force, the changes to the Prospectus Regulation and the securitisation framework will apply directly in the Member States. The MiFID II Directive amendments will need to be transposed into national laws before they are applicable.

The Commission has also published a consultation on a draft Commission Delegated Directive amending Delegated Directive (EU) 2017/593 in respect of the regime for research on small and mid-cap issuers and on fixed-income instruments.

Further details on the capital markets recovery package can be accessed here.

### 7.3 Companies (Miscellaneous Provisions) (COVID-19) Act 2020

The Companies (Miscellaneous Provisions) (COVID-19) Act 2020 (**Act**) was signed into law on 1 August 2020. The Act provides relief to companies which have faced difficulties in complying with certain statutory requirements as a result of the COVID-19 pandemic by way of temporary amendments to the Companies Act 2014. Please see Dillon Eustace's briefing concerning the temporary amendments made with effect on 21 August 2020 to the Companies Act 2014 by the Act.

A copy of the Dillon Eustace briefing can be accessed here.

### 7.4 ESMA decision renewing decision to lower reporting threshold for holders of net short positions published in the Official Journal of the EU

On 17 September 2020, ESMA published the decision (EU) 2020/525 renewing the temporarily requirement for holders of net short positions in shares traded on a EU regulated market to notify the relevant NCA if the position reaches or exceeds 0.1% of the issued share capital.

The decision enters into force on 18 September 2020 and applies for a period of three months until 18 December 2020.

A copy of the decision can be accessed here.

## 8. BREXIT

### 8.1 The Commission adopts Communication on readiness at the end of the transition period

On 9 July 2020, the Commission adopted a Communication on readiness at the end of the transition period between the EU and the UK.

The Communication sets out a sector by sector overview of the main areas where changes will occur on 1 January 2021, following the expiration of the transition period, regardless of the outcome of negotiations. The Communication aims to assist public administrators, businesses and citizens prepare for these disruptions.

The Communication covers trade, customs and taxation rules. It also addresses specific sectors, such as financial services, company law, data transfers and protection and intellectual property.

The Communication can be accessed here.

In addition, the Commission is currently reviewing, and where necessary updating, over 100 sector-specific stakeholder preparedness notices, on topics such as:

- Asset Management;

- Banking and Payment Services;
- Insurance and Re-Insurance;
- Data Protection;
- Investment Services; and
- Post-Trade Financial Services.

The updated notices can be accessed here.

**8.2 The Commission updates Brexit readiness notices for insurance and markets in financial instruments**

On 13 July 2020, the Commission updated its webpage on getting ready for the end of the transition period for Brexit. The updated notices for readiness to stakeholders on:

- the withdrawal of the UK and EU rules in the field of insurance/reinsurance; and
- the withdrawal of the UK and EU rules in the field of markets in financial instruments.

These notices replace the versions of the notices published in February 2018 and have been updated to address the legal situation and practical implications that the end of the transition period will have on these sectors.

The Commission also published updated versions of its notices relating to sectors including asset management, banking and payment services and credit rating agencies on 7 July 2020.

The readiness notices can be accessed here.

**8.3 ESMA tells market participants to continue preparations for the end of the UK transition period**

On 17 July 2020, ESMA published a statement reminding all market participants to continue preparations for the end of the UK Brexit transition period on 31 December 2020. Several recommendations are made in this statement regarding the implementation of contingency arrangements and the importance of informing clients of the potential consequences of a no-deal scenario between the UK and the EU.

This statement also confirms that the memorandum of understanding (**MoU**) agreed between ESMA and the Financial Conduct Authority (**FCA**) in 2019 remains valid and will come into effect upon the expiry of the transition period.

ESMA's statement can be accessed here.

**8.4 Commission Implementing Decision (EU) 2020/1308 adopts time limited decision giving market participants the time needed to reduce exposure to UK central counterparties**

On 21 September 2020, the commission implementing decision (EU) 2020/1308 was published in the Official Journal of the EU (**Decision**).

The Decision, provides financial market participants 18 months to reduce their exposure to UK CCPs. The Decision enters into force on 22 September 2020, applies from 1 January 2021 and expires on 30 June 2022.

The Commission announced in a related press release that the Decision provides a limited time for financial market participants to reduce their exposure to UK CCPs and notes that the heavy reliance of the EU financial system on UK CCPs raises financial stability issues and requires the scaling down of EU exposures to such infrastructures. The press release encourages the financial industry to develop strategies that will reduce reliance on UK CCPs.

A copy of the Decision can be accessed here.

A copy of the press release can be accessed here.

## 9. MISCELLANEOUS

### 9.1 The Commission adopts legislative proposal for Regulation on digital operational resilience for the financial sector

On 24 September 2020, the Commission adopted a legislative proposal for a Regulation on digital operational resilience for the financial sector by amending the Credit Rating Agencies Regulation (1060/2009/EU) (**CRA Regulation**), EMIR, MiFIR and the Central Securities Depositories Regulation (909/2014) (**CSDR**).

The legislative proposal aims to introduce a harmonised and comprehensive framework on digital operational resilience for European financial institutions. The legislative proposal sets out requirements applicable to:

- financial entities in respect of ICT risk management;
- contractual arrangements between ICT third-party service providers and financial entities; and
- the oversight framework for critical third-party service providers and rules on cooperation between competent authorities.

The draft legislation will be transferred to the European Parliament and to the Council of the EU for review and adoption.

A copy of the legislative proposal can be accessed here.

### 9.2 The Commission adopts legislative proposal for a Directive supporting EU Digital Finance Strategy by clarifying and amending existing EU financial services legislation

On 24 September 2020, the Commission adopted a legislative proposal for a Directive which will amend or clarify CRD V and the MiFID II Directive among other EU financial services legislation.

Article 5 of the proposed Directive amends CRD V on contingency and business continuity plans to include ICT business continuity and disaster recovery plans; and

Article 6 amends the MiFID II Directive by seeking to change provisions relating to continuity and regularity in the performance of investment services and activities, resilience and sufficient capacity of trading systems, effective business continuity arrangements and risk management.

The legislative proposal forms part of a digital finance package introduced by the Commission to further enable and support the potential of digital finance. The purpose of the proposed Directive is to provide legal certainty to crypto assets and strengthening digital operational resilience, by establishing a temporary exemption for multilateral trading facilities.

A copy of the proposed 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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