DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Investment Firms

Quarterly Legal and Regulatory Update

Period covered: 1 October 2020 – 31 December 2020

TABLE OF CONTENTS

1. MIFID II – EUROPEAN DEVELOPMENTS

1.1 ESMA updates Q&As on Investor Protection and Intermediaries Topics

During the period 1 October 2020 to 31 December 2020, the European Securities and Markets Authority (**ESMA**) published an updated version of its questions and answers publication "on MiFID II and MiFIR investor protection and intermediaries topics" (**Q&As on Investor Protection and Intermediaries Topics**). The updates made to the Q&As on Investor Protection and Intermediaries Topics are set out below:

- **Question ID: Part 16 Product governance – Questions 2** (updated on 6 November 2020) this question asks how should firms manufacturing financial instruments ensure that these financial instruments' costs and charges are compatible with the needs, objectives and characteristics of the target market under Article 9(12)(a) of the MiFID II Delegated Directive (2017/593/EU) (**MiFID II Delegated Directive**);

- **Question ID: Part 16 Product governance – Questions 3** (updated on 6 November 2020) this question asks how should firms manufacturing financial instruments ensure that costs and charges do not undermine the financial instrument's return expectations, as required by Article 9(12)(b) of the MiFID II Delegated Directive;

- **Question ID: Part 16 Product governance – Questions 4** (updated on 6 November 2020) this question asks how should firms manufacturing financial instruments ensure that the charging structure of the financial instrument is appropriately transparent for the target market, such as that it does not disguise charges or is too complex to understand as required by Article 9(12)(c) of the MiFID II Delegated Directive; and

- **Question ID: Part 9 Information on costs and charges – Question 33** (new question on 21 December 2020) this question asks how firms can present ex-post costs and charges information to clients in a fair, clear and not misleading manner.

A copy of the Q&As on Investor Protection and Intermediaries Topics can be accessed here.

1.2 ESMA updates statements on the impact of Brexit on MiFID II Directive, MiFIR and the Benchmarks Regulation

On 1 October 2020, ESMA updated two statements on its approach to the application of key provisions of the Markets in Financial Instruments Directive (2014/65/EU) (**MiFID II Directive or MiFID II**) and the Markets in Financial Instruments Regulation (600/2014) (**MiFIR**) and the Benchmark Regulation (EU) 2016/1011 (**Benchmarks Regulation or BMR**) which reflects ESMA's approach. As the United Kingdom (**UK**) has agreed a deal with the European Union (**EU**) in relation to Brexit, these statements will be updated in due course.

The statements are set out below:

- Statement (ESMA80-187-610) on the consequences of Brexit for the ESMA register for benchmark administrators and third-country benchmarks under the BMR; and

- Statement (ESMA70-155-10962) on its approach under MiFID II to the C(6) carve-out, the ESMA opinions on third-country trading venues for the purpose of post-trade transparency, and the position limits regime and post-trade transparency for over the counter (**OTC**) transactions. The statement also covers the implementing technical standards on main indices and recognised exchanges under the Capital Requirement Regulation (575/2013) (**CRR**).

The statement on the impact of Brexit on the application of MiFID II Directive and MiFIR can be accessed here and the statement on the impact of Brexit on the BMR can be accessed here.

1.3 ESMA publishes statement on trading obligation for shares following transition period

On 26 October 2020, ESMA published a statement on the impact of the end of the transition period on 31 December 2020 on the trading obligation for shares. The statement reminds market participants of the application of the EU trading obligation for shares (**STO**) as of 1 January 2021, after the end of the transition period.

The statement clarifies that in the absence of an equivalence decision in respect of the UK by the European Commission (**Commission**), the potential adverse effects of the application of the STO after the end of the transition period are expected to be the same as in the no-deal Brexit scenario considered in guidance published by ESMA in May 2019.

The statement confirms that:

- after the end of the transition period, ESMA will assume that all EU shares (i.e. International Securities Identification Number (**ISIN**) with an EU/EEA ISIN), will be within the scope of the EU STO. GB ISINs will be outside the scope of the EU STO;

- on the assumption that trading of shares with an EEA ISIN on a UK trading venue in GB by EU investment firms occurs on a non-systematic, ad-hoc, irregular and infrequent basis, it is expected that those trades will not be subject to the EU STO, in accordance with Article 23 of MiFIR; and

- ESMA has sought to minimise disruption and to avoid overlapping STO obligations and their potentially adverse effects for market participants, bearing in mind the legal requirements of Article 23 MiFIR. The approach put forward by ESMA will effectively avoid such overlaps if the UK adopts an approach that does not include EEA ISINs under the UK STO. ESMA, however, notes that the scope of the UK STO after the end of the transition period remains unclear at this stage.

The ESMA statement is available here.

The Financial Conduct Authority in the UK (**FCA**) has confirmed that UK market participants will continue to be able to access any EU trading venue and systematic internaliser after the Expiry of the Transition Period provided that the venue has ensured that it has the relevant regulatory permissions.

1.4 ESMA updates Opinions on Third-Country Venues

On 6 November 2020, ESMA updated its Guidance on the Annex to the ESMA Opinion determining third-country trading venues for the purpose of transparency under MiFIR. The Guidance has been updated to include information on cases where market identifier codes (**MIC**) are not populated. The updated Guidance can be accessed here.

On 27 October 2020, ESMA updated the list of third-country venues in respect of its:

- Opinion determining third-country trading venues for the purpose of transparency under MiFID II and MiFIR; and

- Opinion determining third-country trading venues for the purpose of position limits under the MiFID II Directive.

The purpose of the update is to add the UK to the Annex of each Opinion, following a positive assessment by ESMA of UK venues against the criteria of each Opinion.

As a result, from 1 January 2021:

- EU investment firms will not be required to make transactions public in the EU via an EU Approved Publications Arrangements (**APAs**) if they are executed on one of the UK trading venues on the transparency list; and

- Commodity derivative contracts traded on UK trading venues on the position limits list will not be considered as economically equivalent over-the-counter (**EEOTC**) contracts for the EU position limit regime.

In addition, ESMA has updated its Guidance on the Annex to its Opinion determining third-country trading venues for the purpose of transparency under MiFIR. The update concerns the identification of bonds and US treasuries, and the treatment of venues without a MIC.

The updated Annex to the Opinion determining third-country trading venues for the purpose of position limits under MiFID II can be accessed here.

The updated Annex and Guidance on the Annex to the Opinion determining third-country trading venues for the purpose of transparency under MiFIR can be accessed here and here, respectively.

1.5 ESMA consults on MIFID II/ MIFIR obligations on market data

On 6 November 2020, ESMA launched a consultation paper on draft guidelines on obligations relating to market data under MiFID II Directive and MiFIR and seeks input from market participants.

The draft guidelines build on the assessments and recommendations from a 2019 ESMA report on market data and provides guidance on the requirement to publish market data on a reasonable commercial basis and the requirement to make market data available free of charge 15 minutes after publication. The draft guidelines seek to ensure improved and uniform application of the MiFID II/MiFIR obligations on market data.

The draft guidelines, set out in Annex IV to the consultation paper, cover some of the following topics:

- provision of market data on the basis of cost;
- obligation to provide marker data on a non-discriminatory basis;
- obligation to keep data unbundled;
- transparency obligations; and
- obligation to make market data available free of charge 15 minutes after publication.

The consultation closes on 11 January 2021 and ESMA expects to publish the final report and guidelines by Q2 2021.

The consultation paper can be accessed **here**.

1.6 ESMA decision on the assessment of third country trading venues under MiFIR

On 9 November 2020, ESMA published a decision of the Board of Supervisors, dated 5 November 2020, on delegation to the ESMA Chair of the assessment regarding third country trading venues for the purposes of Articles 20 and 21 MiFIR (**Decision**). The Decision takes into account the amendments reflected in the updated ESMA Opinion related to post-trade transparency, dated 28 May 2020.

The Decision delegates to the Chair of ESMA the task to assess whether a third-country venue meets the criteria to be considered a third-country entity as a trading venue for the purposes of Article 20 and Article 21 MiFIR. The Board of Supervisors retains the powers to perform controversial assessments.

The Decision specifies the criteria to be used by the Chair when making the assessment and outlines the conditions under which delegation may be made. The Decision repeals and replaces ESMA's decision on the assessment dated 26 September 2018.

A copy of the Decision is available here.

1.7 ESMA identifies costs and performance and data quality as new union strategic supervisory priorities

On 13 November 2020, ESMA issued a press release identifying costs and performance for retail investment products and market data quality as the Union Strategic Supervisory Priorities for national competent authorities (**NCAs**). ESMA is now responsible for identifying Supervisory Priorities to address key market risks impacting Member States. The specific topics on which NCAs will undertake into their supervisory work programmes supervisory action in 2021 are:

- costs and fees charged by fund managers; and
- improving the quality of transparency data reported under MiFIR.

ESMA has set out its reasons for selecting these two priorities in its statement. In relation choosing costs and performance, ESMA considers this as a key part of investor protection and has provided that the problems linked to cost and performance are multifaceted due to the lack of transparency and undue costs or differences observed in the application of certain MiFID requirements across Member States.

In relation to choosing data quality, ESMA has stated that it is a core element of securities markets regulation and is a vital component of NCAs' data-driven approaches to supervision, improving reporting datasets and that data quality is important to investors, market participants and regulators which helps deter and detect market abuse.

A copy of the press release can be accessed here.

1.8 ESMA consults on supervisory fees for Data Reporting Services Providers

On 20 November 2020, ESMA launched a consultation seeking stakeholders' input on its proposals relating to fees for data reporting service provides (**DRSPs**) in relation to the new competences granted to ESMA under MiFIR as amended by Regulation 2019/2175 (**ESA Review**). This new regulation concerns the powers, governance and funding of the European Supervisory Authorities (**ESAs**).

The proposed fee framework for DRSPs draws on the existing fee frameworks for trade repositories and securitisation repositories which set out application as well as annual supervisory fees. ESMA is proposing both application and authorisation fees, as well as an annual supervisory fee for DRSPs. It has also proposed a timeline for the payment of the fees.

The consultation closed on 4 January 2021 and ESMA will aim to publish its final report in Q1 2021.

The consultation paper can be accessed here.

1.9 ESMA published a consultation on derogation criteria for DRSPs

On 20 November 2020, ESMA published a consultation seeking stakeholders' input on its proposals for technical advice to provide to the Commission on criteria to identify Authorised Reporting Mechanisms (**ARMs**) and APAs on derogation from MiFIR, on account of their limited relevance for the internal market, and are subject to authorisation and supervision by a competent authority of a Member State.

By way of background, the ESA Review amended MiFIR to transfer authorisation and supervisory powers relating to DRSPs from NCAs to ESMA from 1 January 2022, except for those DRSPs benefiting from a derogation. Accordingly, the consultation relates to these DRSPs relying on a derogation.

The consultation closed on 4 January 2021 and ESMA will aim to publish its final report in Q1 2021.

The consultation paper can be accessed here.

1.10 EFAMA publishes response to ESMA consultation on data and transaction reporting obligations under MiFIR

On 20 November 2020, the European Fund and Asset Management Association (**EFAMA**) published its reply to ESMA's consultation paper on MiFIR review report on the obligations to report transactions and reference date (**Response**). In the Response, EFAMA express disagreement with the extension of the scope of the reporting requirements imposed by Article 26 of MiFIR to Undertakings for the Collective Investment in Transferable Securities (**UCITS**)' and alternative investment fund (**AIFs**)' management companies.

EFAMA argue that this would be a breach of the principle of proportionality because:

- it would apply to none-core activities of UCITS and AIFS and would only identify a few (if any) market activities to report;
- ESMA does not demonstrate the existence of market abuses detected;
- ESMA and the NCAs can already associate the transactions with the decision makers in most cases notably through the reporting provided by trading venues under Article 26(5) of MiFIR;
- Contrary to ESMA views, introducing MiFIR reporting for UCITS management companies and AIFMs would not create a level playing field. Market participants have the free choice to operate either as investment firm or in consideration of the requirements for UCITS' or AIFs' management companies. Licenses and requirements are different and market participants can switch licenses at any time but each model has specificities; and
- extending the scope of Article 26 MiFIR would create disadvantages in comparison to UK UCITS Management Companies when applying for portfolio management mandates outside the 27 EU Member States.

The Response notes that should ESMA impose additional reporting to UCITS' and AIFs' management companies, this burden should be minimised. EFAMA suggests the introduction of two new reporting fields as a way to deliver ESMA's required information albeit with a lower reporting burden.

ESMA intends to submit its final review report, in respect of its consultation, to the Commission in the first quarter of 2021.

The Response can be accessed here.

1.11 ESMA publishes public statement on the impact of the end of the transition period on the trading obligation for derivatives

On 25 November 2020, ESMA published a public statement on the impact of the end of the transition period on 31 December 2020 on the trading obligation for derivatives (**DTO**) under Article 28 of MiFIR (**Statement**).

The Statement confirms that ESMA remains of the view that most EU investment firms will be able to meet their obligations under the DTO by trading on EU trading venues or eligible trading venues in third countries. This confirms the approach outlined in ESMA's previous statement concerning the DTO, published on 7 March 2019. ESMA notes that most UK trading venues that offer trading in derivatives subject to the DTO have established new trading venues in the EU.

ESMA acknowledges that this may cause difficulties for UK branches of EU investment firms as they are likely to be subject to the DTO in both the EU and the UK. It notes that such entities may require "changes to current business practices in order to ensure compliance with EU law".

ESMA confirms that it will monitor the situation to assess whether markets would be sufficiently liquid for the purpose of the derivatives trading obligation after the end of the transition period.

The Statement can be accessed here.

1.12 Proposed Directive amending the MiFID II Directive

On 22 September 2020, the European Parliament's Committee on Economic and Monetary Affairs (**ECON**) published a draft report on the proposal for a Directive amending the MiFID II Directive on information requirements, product governance and position limits to help the recovery from the COVID-19 pandemic. The proposal is designed to contribute to the EU's recovery by facilitating investments in the real economy and freeing up resources for both firms and investors. The changes apply mostly to professional clients and eligible counterparties such as insurers, pension funds or public institutions. The draft report, sets out the amendments, which covers:

- disclosure of costs and charges;
- best-execution reports;
- product governance;
- ex-post information about costs and charges;
- professional investors;
- the loss reporting threshold;
- research; and
- the ancillary activity exemption.

The Commission has proposed, a number of amendments to provisions in the MiFID II Directive to simplify information requirements and address the needs of the commodity derivatives market. The new rules will reduce the level of information that will have to be provided to professional investors such as institutional investors and banks and in some limited cases, to retail investors. This includes the phase-out of paper-based information, unless retail clients ask to receive it. These amendments would exempt non-complex bonds sold to both retail and professional investors from certain product governance-related information requirements under certain conditions. Furthermore, the Council of the EU supports the Commission's proposal to suspend best execution reports by trading venues under Delegated Regulation (EU) 2017/575 (RTS 27) to free-up resources.

On 9 December 2020, the European Parliament published a press release announcing that ECON and the Council of the EU have reached political agreement on the proposed Directive amending the MiFID II Directive. The press release highlights a number of changes agreed, including:

- professional clients will no longer receive information on costs and charges;
- retail clients will be able receive information in digital format instead of on paper, but should be given at least eight weeks' notice and the choice to continue receiving information on paper or switch to a digital format;
- certain product governance requirements will no longer apply to corporate bonds; and
- changes to the position limits regime for commodity derivatives.

The progress of the proposal for a Directive amending the MiFID II Directive can be tracked here.

1.13 Commission adopts Delegated Regulation on thresholds for weekly position reporting under MiFID II

On 15 December 2020, the Commission adopted a Delegated Regulation amending the Commission Delegated Regulation 2017/565 as regards the thresholds for weekly position reporting under the MiFID II Directive.

Under the MiFID II Directive, trading venues must publish a weekly report with the aggregate positions held by different categories of persons in a commodity derivative, emission allowance or emission allowance derivative when both the number of position holders and the size of open position in a specific instrument exceed a minimum threshold. The purpose of this rule is to provide transparency to market stakeholders.

The Commission Delegated Regulation 2017/565 currently specifies that the applicable minimum thresholds. However the thresholds in respect of the size of open positions do not appear to have fully delivered on the objective of providing market transparency to stakeholders. The Commission proposes to amend the thresholds through this Delegated Regulation which follows technical advice from ESMA.

The next step will be for the Council of the EU and the European Parliament to consider the Delegated Regulation and will enter into force on the third day following its publication in the Official Journal of the EU.

A copy of the Delegated Regulation can be accessed here.

1.14 Implementing Decision amending earlier Decision recognising certain Singapore derivatives trading venues under MiFIR published in OJ

On 17 December 2020, the Commission Implementing Decision (EU) 2020/2127 which amends the Commission Implementing Decision (EU) 2019/541 on the equivalence of the legal and supervisory framework applicable to approved exchanges and recognised market operators in Singapore under the MiFIR was published in the Official Journal of the EU.

The Commission Implementing Decision (EU) 2020/2127 amends the Implementing Decision 2019/541 to include additional approved exchanges and recognised market operators that have been established in Singapore and authorised by the Monetary Authority of Singapore (**MAS**) after the original Implementing Decision was adopted.

The Commission Implementing Decision (EU) 2020/2127 came into force on 20 December 2020.

The Commission Implementing Decision (EU) 2020/2127 can be accessed here.

1.15 Commission adopts Delegated Regulation on liquidity thresholds and trade percentiles used to determine SSTI applicable to non-equity instruments under MiFIR

On 18 December 2020, the Commission adopted a Delegated Regulation establishing regulatory technical standards (**RTS**) amending Delegated Regulation (EU) 2017/583 as regards adjustment of liquidity thresholds and trade percentiles used to determine the size specific to the instruments (**SSTI**) applicable to certain non-equity instruments under MiFIR (**RTS 2**).

The RTS 2 provides the methodology to assess the liquidity and the SSTI of bonds. Both liquidity and SSTI are relevant for the application of transparency waivers and deferrals.

The RTS 2 introduced a phased approach in which ESMA assesses annually, for four years, if a move to the next stricter phase is necessary. The current phase is at Stage S1, ESMA has submitted its first annual assessment and recommends a move to phase two

for bonds, not with regard to other non-equity financial instruments, in order to make progress towards a more transparent trading environment for bonds. This is due to ESMA not having enough data for these other classes of instruments.

The next step is for the Council of the EU and the European Parliament to consider the Delegated Regulation. If neither object, the Delegated Regulation will be published in the Official Journal of the EU and will enter into force on the twentieth day following its publication in the Official Journal of the EU.

The Delegated Regulation can be accessed here.

1.16 ESMA guidelines on outsourcing to cloud service providers

On 18 December 2020, ESMA published its final report on guidelines on outsourcing to cloud service providers (**CSPs**) (**Guidelines**).

The purpose of the Guidelines is to help firms identify, address and monitor the risks that may arise from their cloud outsourcing arrangements and to support a convergent approach to the supervision of cloud outsourcing arrangements across competent authorities in the EU. The Guidelines provide guidance to firms on:

- the risk assessment and due diligence that they should undertake on their CSPs;
- the governance, organisational and control frameworks that they should put in place to monitor the performance of their CSPs and how to exit their cloud outsourcing arrangements without undue disruption to their business;
- the contractual elements that their cloud outsourcing agreement should include; and
- the information to be notified to competent authorities.

In addition, the Guidelines provide guidance to competent authorities on the supervision of cloud outsourcing arrangements, with a view to fostering a convergent approach in the EU.

The Guidelines will be translated in the official EU languages and published on ESMA's website. The publication of the translations will trigger a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the Guidelines.

The Guidelines are available here.

1.17 ESMA launches consultation on the impact of algorithmic trading

On 18 December 2020, ESMA launched a consultation seeking input from stakeholders on the impact of requirements under the MiFID II Directive / MiFIR regarding algorithmic trading, including high-frequency algorithmic trading. The consultation paper covers:

- the overall approach to algorithmic trading and high-frequency trading, in particular the authorisation regime attached to these types of market participants;
- provisions for algorithmic and high-frequency traders;
- provisions applicable to trading venues allowing or enabling these market participants; and
- other provisions that aim at better framing the activity of algorithmic and high-frequency traders (for example, tick size and market making).

ESMA also addresses new issues that have recently emerged in EU markets, which are very closely linked to algorithmic trading. For example the deployment of mechanisms called speedbumps, and the issue relating to the sequence of trade confirmations to individual participants versus the public disclosure of transactions.

The consultation closes on 12 March 2021. The feedback received by ESMA will go towards its final review report for submission to the Commission by July 2021.

A copy of the consultation can be accessed here.

1.18 ESMA updates guidance on waivers from pre-trade transparency

On 23 December 2020, ESMA updated its opinion providing guidance on pre-trade transparency waivers for equity and non-equity instruments under MiFIR. The updated opinion covers:

- request for quote systems;
- guidance on how trading venues should apply for a waiver to their NCA; and
- updates on frequently encountered issues when assessing waiver notifications.

The opinion aims at contributing to the consistent application of pre-trade transparency waivers across the EU. ESMA has provided that it is aware that with the evolution of markets new trading systems and new functionalities may be developed and, with them, new issues might emerge that ESMA will analyse and address and, if necessary, update this opinion.

The ESMA opinion can be accessed here.

1.19 ESMA consults on technical advice on penalties imposed on DRSPs

On 23 December 2020, ESMA published a consultation paper on technical advice on penalties imposed on data reporting services providers (**Consultation**). This Consultation sets out ESMA's preferred options for the procedural rules on penalties imposed on DRSPs under its direct supervision.

By way of background, Regulation (EU) 2019/2175 amended MiFIR to transfer authorisation and supervisory powers relating to most DRSPs from NCAs to ESMA from 1 January 2022. Under MiFIR the Commission has the power to adopt a delegated regulation specifying the rules of procedure for the exercise of the power to impose fines or periodic penalty payments and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. Accordingly, in June 2020, the Commission made a call for advice from ESMA on the drafting of the delegated regulation.

In the Consultation, ESMA sets out its preferred options for the procedural rules on penalties imposed on DRSPs under its direct supervision. Some of issues covered are the following:

- the procedure for the imposition of fines and supervisory measures and the rights of the person subject to investigation;
- the procedure for interim decisions that may be imposed by ESMA where urgent action is needed;
- the procedure for the imposition of periodic penalty payments; and
- the limitation periods for the imposition of penalties and for the enforcement of penalties.

ESMA is looking for feedback from APAs, ARMs and Consolidated Tape Providers (**CTPs**) and from investment firms or market operators operating a trading venue to provide the data reporting services of an APA, ARM or CTP.

The deadline for responses is 23 January 2021. ESMA intends to publish a final report and to submit the technical advice to the Commission in Q1 2021.

The Consultation can be accessed here.

2. INVESTMENT FIRMS REGULATION (IFR) AND INVESTMENT FIRMS DIRECTIVE (IFD)

2.1 The European Banking Authority publish final report on draft RTS on prudential requirements under IFR and IFD

On 16 December 2020, the European Banking Authority (**EBA**) published a final report setting out seven draft RTS relating to prudential requirements for investment firms under the Investment Firms Regulation ((EU) 2019/2033) (**IFR**) and the Investment Firms Directive ((EU) 2019/2034) (**IFD**).

This final report sets out the policy choices of regulatory requirements for draft RTS and outlines their legislative basis. The EBA has stated that the regulatory requirements ensure a proportionate and technically consistent prudential framework for investment firms.

The first draft RTS set out in the final report relates to the authorisation of certain credit institutions and the remaining six relate to capital requirements for investment firms at solo level. The RTS are set out below:

- Draft RTS (under Article 8a(6), point (a) of the CRD IV Directive (2013/36/EU)) on the information to be provided for the authorisation of credit institutions as defined in point (1)(b) of Article 4(1) of the CRR;
- Draft RTS to specify the calculation of the fixed overheads requirement and define the notion of a material change (Article 13(4) of the IFR);
- Draft RTS to specify the methods for measuring the K-factors (Article 15(5)(a) of the IFR);
- Draft RTS to specify the notion of segregated accounts (Article 15(5)(b) of the IFR);
- Draft RTS to specify adjustments to the K-DTF coefficients (Article 15(5)(c) of the IFR);
- Draft RTS to specify the amount of total margin for the calculation of K-CMG (Article 23(3) of the IFR); and
- Draft RTS on the criteria for subjecting certain investment firms to the CRR (threshold of €5 billion) (Article 5(6) of the IFD).

Each of the RTS will come into force on the twentieth day after its publication in the Official Journal of the EU. The final report can be accessed here as well as an accompanying press release here.

2.2 EBA consults on draft guidelines on sound remuneration policies under IFD

On 17 December 2020, the EBA published a consultation paper on draft guidelines on sound remuneration policies under the Investment Firms Directive (EU) 2019/2034 (**Consultation**).

The IFD mandated the EBA to develop guidelines on remuneration policies for all staff as part of investment firm's internal governance arrangements, remuneration policies for identified staff and guidelines that facilitate the implementation of waivers by Member States.

The EBA have provided that the guidelines set out in the Consultation specify further the application of the remuneration requirements and the principle of proportionality.

Parts of the guidelines set out in the Consultation are applicable to all staff, ensuring that investment firms have in place sound and gender-neutral remuneration policies and other parts of the guidelines focus on the specific provisions applicable for remuneration policies for identified staff (i.e. staff whose professional activities have a material impact on the investment firms' risk profile or the assets it manages).

The guidelines are addressed to competent authorities, and investment firms that are not deemed to be small and non-interconnected investment firms under Article 12(1) of the IFR.

Please note that there will a public hearing on the draft guidelines on 17 February 2021 (link to the relevant registration form can be accessed here). The Consultation is open for responses until the 17 March 2021. It is expected that the EBA will finalise the guidelines before the end of June 2021.

The Consultation can be accessed here.

2.3 EBA consults on guidelines on internal governance under IFD

On 17 December 2020, the EBA published a consultation paper on internal governance under Directive (EU) 2019/2034 (**Consultation**). To further harmonise investment firms' internal governance arrangements, processes and mechanisms within the EU in line with the requirements introduced by IFD, the EBA is mandated by the IFD, to develop guidelines in this area. The guidelines will apply to investment firms that are not deemed to be small and non-interconnected investment firms under Article 12(1) of the IFR.

The guidelines set out in the Consultation specifies a number of governance provisions laid down in the IFD, including the tasks and responsibilities of the management body as well as the organisation of investment firms. Furthermore, the Consultation provides details on the establishment of a risk culture, a code of conduct and the management of conflicts of interest, also in relation to related parties' transactions, to ensure that firms have appropriate decision management and oversight processes for such transactions.

The guidelines in line with the guidelines on internal governance for credit institutions and with international standards aim to foster a sound risk culture implemented by the management body to strengthen the management body's oversight of the firm's activities and to strengthen the risk management frameworks of investment firms.

The Consultation closes on 17 March 2021. The EBA will hold a public hearing on the draft guidelines on 17 February 2021 (link to the relevant registration form can be accessed here).

The EBA has provided that it expects that the guidelines will apply from 26 June 2021.

The Consultation can be accessed here.

3. EMIR & SFTR

3.1 ESMA publishes updated statement on issues affecting EMIR and SFTR reporting

On 10 November 2020, ESMA published an updated statement on issues affecting the European Market Infrastructure Regulation (EU) 648/2012 (**EMIR**) and the Securities Financing Transactions Regulation (EU) 2015/2365 (**SFTR**) in respect of reporting after the end of the UK's transition period on 31 December 2020.

The statement updates the previously published statement, from 1 February 2019, which was issued in preparation for a no-deal Brexit scenario. The updated statement provides certain clarifications relating to issues affecting reporting, recordkeeping, reconciliation, data access, portability and aggregation of derivatives under Article 9 EMIR and of security financing transactions reported under Article 4 SFTR, after the end of the transition period.

On expiry of the Transition Period, UK trade repositories will no longer appear on this ESMA register and as a result cannot be used to fulfil trade reporting obligations under EMIR or SFTR.

The statement can be accessed here.

3.2 ESMA publishes final report on RTS and ITS under EMIR Refit Regulation

On 17 December 2020, ESMA published its final report on draft RTS and implementing technical standards (**ITS**) on reporting, data quality, data access and registration of Trade Repositories (**TRs**) under Regulation (EU) 2019/834 amending EMIR (**EMIR Refit Regulation**) (**Report**).

The Report addresses data reporting to TRs, procedures to reconcile and validate the data, access by the relevant authorities to data and registration of the TRs. The following technical standards are included in the Annexes to the Report:

- Draft RTS on details of the reports to be reported to TRs under EMIR;
- Draft ITS on standards, formats, frequency and methods and arrangements for reporting to TRs under EMIR;
- RTS on registration and extension of registration of TRs under EMIR;
- ITS on registration and extension of registration of TRs under EMIR;
- RTS on procedures for ensuring data quality; and
- RTS on operational standards for aggregation and comparison of data and on terms and conditions for granting access to data.

Steven Maijoor, ESMA Chair, noted that the Report is "*an important milestone toward ensuring the full alignment of EU derivatives reporting with globally agreed recommendations, and in establishing the highest standards for data quality worldwide*."

The draft technical standards have been submitted to the Commission for endorsement. ESMA envisages that there will be an 18-month implementation period following the entry into force of the technical standards.

The Report can be accessed here.

3.3 ESMA publishes updated guidelines on reporting under SFTR

On 21 December 2020, ESMA published a corrected version of its Guidelines on reporting under Articles 4 and 12 SFTR (**Guidelines**).

The Guidelines, first published 6 January 2020, provide clarification regarding the compliance with the technical standards under the SFTR and ensure the consistent implementation of the SFTR rules.

The corrections are shown in the Guidelines in tracked changes.

The Guidelines can be accessed here.

3.4 Commission adopts Delegated Regulations under EMIR on risk management and clearing obligations

On 21 December 2020, the Commission adopted two Delegated Regulations under EMIR:

- Commission Delegated Regulation amending regulatory technical standards laid down in Delegated Regulation (EU) 2016/2251 (**Risk Management RTS**) as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral, which can be accessed here; and

- Commission Delegated Regulation amending regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 (**Clearing RTS**) as regards the date at which the clearing obligation takes effect for certain types of contracts, which can be accessed here.

The Delegated Regulations provide a window of time within which counterparties may novate legacy OTC derivative contracts from a UK to an EU counterparty without triggering the EMIR bilateral margining requirements and the EMIR clearing obligations under certain conditions. The measures set out in the Delegated Regulations in respect of Brexit-related novations are time limited and will expire 12 months from their entry into force. Separately, the Delegated Regulations also address an extension to the temporary exemption from certain EMIR obligations for intragroup transactions and equity options.

The Delegated Regulations will now be considered by the Council of the EU and the European Parliament. If they do not formulate any objections, the Delegated Regulations will enter into force on the day following their publication in the Official Journal of the EU.

Please see the Dillon Eustace briefing paper entitled "EMIR Update: Extension of relief on Brexit-related novations" for further information, which can be accessed here.

4. CENTRAL BANK OF IRELAND

4.1 New Central Bank Pre-Approval Control Functions to take effect

On 9 October 2020, the Central Bank of Ireland (**Central Bank**) published the Central Bank Reform Act 2010 (Sections 20 & 22) (Amendment) Regulations 2020 (Amending Regulations) which expand the Pre-Approval Controlled Functions (**PCFs**) regime by (i) introducing three new PCF roles (PCF 49, PCF 50 and PCF 51); and (ii) splitting the current PCF-39 Designated Person role into six PCF roles aligned to specific managerial functions (i.e. PCF-39A to PCF-39F).

Please see the Dillon Eustace briefing paper entitled "New Central Bank Pre-Approval Control Functions to take effect that impact the Asset Management industry" for details on the changes introduced. The Dillon Eustace Briefing Paper can be accessed here.

The Central Bank has published an FAQ in respect of the introduction of the new and revised PCFs, which can be accessed here.

The updated list of Central Bank PCF roles can be accessed here.

The Amending Regulations can be accessed here.

Key Action Points	PCF-49: If the individual discharging the relevant PCF-49 role changes after 5 October 2020, the prior approval of the Central Bank will be required by completing and submitting an individual questionnaire.

4.2 Central Bank issues the outcome of a MiFID II - Best Execution thematic inspection

On 10 November 2020, Central Bank published a 'Dear CEO' letter setting out the outcome of a thematic inspection of investment firms' compliance with the MiFID II best execution requirements.

The MiFID II best execution requirements seek to ensure that investment firms take sufficient steps to obtain the best possible outcome for their clients when executing orders, taking into account price, costs, speed, likelihood of execution and settlement, size, nature and any other relevant consideration.

The 'Dear CEO' letter reminds firms that the best execution requirements play a critical role in the investor protection framework and are fundamental to the delivery of positive outcomes for clients. Work in this area forms a key part of the Central Bank's ongoing strategy for the MiFID sector.

The 'Dear CEO' letter can be accessed **here**.

A Dillon Eustace briefing paper, setting out more detail on this issue, can be accessed **here**.

4.3 Central Bank issues second "Dear CEO" letter on Fitness and Probity

On 17 November 2020, the Central Bank issued a second "Dear CEO" on fitness and probity, following thematic on-site inspections which it conducted on a sample of firms in the insurance and banking sectors (**Letter**). The Central Bank's first "Dear CEO" letter on the topic was issued in April 2019.

The Central Bank has highlighted that it expects all firms to take appropriate action to deal with the issues addressed in the Letter, and that the Letter should be read in conjunction with its prior "Dear CEO" letter, the Fitness and Probity Standards and associated fitness and probity guidance.

Please see the Dillon Eustace briefing paper entitled "Central Bank issues second "Dear CEO" letter on fitness and probity", which looks at some of the Central Bank's key findings. This briefing paper can be accessed here.

The Letter can be accessed here.

Key Action Points	Please see the additional Dillon Eustace briefing paper entitled "Fitness and Probity - Action points for Irish funds and their management companies" for details of suggested action points. This briefing paper can be accessed here.

4.4 Central Bank updates Q&A on the payment of distributions and variable remuneration by MiFID investment firms during the COVID-19 pandemic

On 21 December 2020, the Central Bank updated its Questions & Answers (**Q&As**) on the payment of distributions and variable remuneration by investment firms during the pandemic.

On 18 December 2020, the European Systemic Risk Board (**ESRB**) published an amending Recommendation on the restriction of distribution policies. The Central Bank notes the publication and is aligned with the view that financial institutions should continue to apply a conservative approach to dividends and other distributions in light of the continued uncertainty surrounding the pandemic.

The Central Bank will communicate with investment firms again on this matter in the coming weeks and expect investment firms to continue to follow the Central Bank's existing guidance beyond 01 January 2021.

The Central Bank's Q&As website can be accessed here.

5. BENCHMARKS REGULATION

5.1 Three Delegated Regulations supplementing BMR on sustainable finance issues published in OJ

On 3 December 2020, three delegated regulations supplementing the BMR in relation to sustainable finance issues were published in the Official Journal of the EU:

- Delegated Regulation (EU) 2020/1816 supplementing the BMR as regards the explanation in the benchmark statement of how environmental, social and governance (**ESG**) factors are reflected in each benchmark provided and published, which can be accessed here;
- Delegated Regulation (EU) 2020/1817 supplementing the BMR as regards the minimum content of the explanation on how ESG factors are reflected in the benchmark methodology, which can be accessed here; and
- Delegated Regulation (EU) 2020/1818 supplementing the BMR as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, which can be accessed here.

The three delegated regulations entered into force on 23 December 2020, i.e. twenty days following their publication in the OJ.

5.2 Update on proposed Regulation amending the BMR to address benchmark cessation risks and exempt certain third-country FX benchmarks

On 9 December 2020, the Council of the EU published the final compromise text of the proposed Regulation amending the BMR regarding the exemption of certain third country foreign exchange (**FX**) benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation (**Proposed Regulation**).

The draft text of the Proposed Regulation was first published by the Commission on 24 July 2020. The European Parliament and the Council had reached political agreement on the Proposed Regulation on 30 November 2020.

The agreed amendments empower the Commission to designate a replacement benchmark that covers all references to a widely used reference rate that is phased out, such as the London Interbank Offered Rate (**LIBOR**), when this is necessary to avoid disruption of the financial markets in the EU.

The Commission will be granted power to replace:

- "critical" benchmarks, which influence financial instruments and contracts with an average value of at least €500 billion and could thus affect the stability of financial markets across Europe;
- benchmarks with no, or very few, appropriate substitutes whose cessation would have a significant and adverse impact on market stability; and
- third country benchmarks whose cessation would significantly disrupt the functioning of financial markets or pose a systemic risk for the financial system in the EU.

In its statement welcoming the political agreement, the Commission noted "regarding other '-IBOR' rates, it is still in market participants' best interests to actively prepare for the transition to alternative reference rates, as this offers them the greatest degree of control over the fate of contracts if a reference rate ceases to be published."

In addition, the European Parliament and the Council agreed to postpone the entry into application of the rules on third country benchmarks until 31 December 2023 with the possibility of an extension by the Commission by a maximum of two years until 31 December 2025, however such an extension must be "duly motivated." This means that EU market participants will continue to be able to use benchmarks administered in a country outside the EU until at least the end of 2023.

This postponement will be welcomed by trade associations such as the European Banking Federation (**EBF**), EFAMA, and International Swaps and Derivatives Association (**ISDA**) who, alongside other representatives, wrote to the Commission on 20 November 2020 requesting that the transition period be extended to the end of 2025 (**Trade Association Letter**). The Trade Association Letter noted concerns such as the lack of ability for EU supervised entities to rely on non-EU benchmarks qualifying under the existing third country regimes and the accompanying competitive disadvantage as reasons for the request for an extension period. In particular, the Trade Association Letter noted an extension was needed to allow time for a comprehensive review of the regime and to allow the Commission to identify other third countries which may be able to benefit from an equivalence decision.

The Parliament and the Council intend to adopt the amendments without further discussion as soon as possible. Once approved, the Proposed Regulation will apply immediately after publication in the Official Journal of the EU.

The final text of the Proposed Regulation can be accessed here, and the accompanying press release can be accessed here.

The European Parliament press release announcing the key elements of the political agreement can be accessed here.

The ECON Report can be accessed here.

The Council's negotiating mandate can be accessed here.

The ECB Opinion can be accessed here.

The Trade Association Letter is available here.

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

6.1 Central Bank publishes sixth issue of Anti-Money Laundering Bulletin focusing on transaction monitoring

On 2 October 2020, the Central Bank published the sixth issue of its Anti-Money Laundering Bulletin focusing on transaction monitoring (**Bulletin**).

The Bulletin highlights the importance of transaction monitoring, which the Central Bank states will continue to be a key focus area in its ongoing supervision of compliance by designated persons with anti-AML and CFT requirements. The Bulletin sets out the Central Bank's findings following supervisory engagements across multiple credit and financial institutions and sets out the Central Bank's expectations with regard to the application of transaction monitoring controls.

Please see the Dillon Eustace briefing paper entitled "Central Bank issues AML Bulletin on Transaction Monitoring" which provides a detailed summary of the Bulletin.

The Dillon Eustace briefing paper can be accessed here.

A copy of the sixth edition of the Bulletin can be accessed here.

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

On 8 September 2020, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020 (**Bill**) was initiated in Dáil Éireann. As of 17 December 2020, the Bill is currently in the Seanad second stage, whereby the general principles of the Bill are being debated. The purpose of the Bill is to transpose the criminal justice elements of the Fifth EU Anti-Money Laundering Directive (EU) 2018/843 (**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 PEP; and
- make a number of technical amendments to other provisions of Acts already in force.

The Bill's progress can be tracked here.

7. DATA PROTECTION

7.1 EDPB adopts Guidelines on Data Protection by Design and Default

On 20 October 2020, the European Data Protection Board (**EDPB**) adopted a final version of its Guidelines on Data Protection by Design & Default (**Guidelines**).

The Guidelines address the obligation upon controllers, irrespective of size and complexity of processing, to effectively implement the data protection principles and data subjects' rights and freedoms by design and default, as set out in Article 25 of the General Data Protection Regulation ((EU) 2016/679) (**GDPR**).

The Guidelines offer general guidance on the obligation upon controllers, which requires the implementation of appropriate measures and necessary safeguards that provide effective implementation of the data protection principles. In addition, controllers should be able to demonstrate that the implemented measures are effective.

The Guidelines also contain guidance on how to effectively implement the data protection principles in Article 5 GDPR, listing key design and default elements as well as practical cases for illustration.

The Guidelines can be accessed here.

7.2 EDPB adopts Recommendations on 'supplementary measures' relating to third country transfers

On 10 November 2020, the EDPB adopted two sets of Recommendations, namely:

- Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data; and
- Recommendations 02/2020 on the European Essential Guarantees for surveillance measures.

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 "Schrems II" ruling. The Recommendations contain a roadmap of the steps data exporters must take to find out whether they need to put in place supplementary measures to be able to transfer data outside the EEA in accordance with EU law, and help them identify those measures that could be effective.

Recommendations 01/2020 can be accessed here.

Recommendations 01/2020 were subject to a public consultation, which closed on 21 December 2020.

Recommendations 02/2020 provide data exporters with guidance to determine whether the legal framework governing public authorities' access to data for surveillance purposes in third countries can be regarded as a justifiable interference with the rights to privacy and the protection of personal data, and therefore as not impinging on the commitments of the Article 46 GDPR transfer tool the data exporter and importer rely on.

Recommendations 02/2020 can be accessed here.

7.3 Commission publishes new draft Standard Contractual Clauses

On 12 November 2020, the Commission published two new draft sets of standard contractual clauses (**SCC**):

- for transferring personal data to non-EU countries (**Third Country SCC**); and
- between controllers & processors located in the EU (**Controller-Processor SCC**).

The Third Country SCCs will replace the existing SCCs in place. The purpose of the Third Country SCCs is to ensure that the level of protection of personal data ensured by the GDPR on the protection of natural persons with regard to the processing of personal data when transferred to a third country, is not undermined. The Third Country SCCs have been updated to bring them in line with the requirements set out in the GDPR and the CJEU's recent "Schrems II" ruling.

Controllers and processors will have twelve months to implement the new Third Country SCCs from the date they come into force.

The Controller-Processor SCCs are new and aim to ensure harmonisation and legal certainty in relation to the contract between a controller and processor that a controller is obliged to impose under Article 28 GDPR. These SCCs are not mandatory and are intended to provide guidance. Parties may choose to rely on the Controller-Processor SCCs or negotiate an individual contract containing the compulsory elements laid out in Article 28(3) and (4) of the GDPR.

The consultation period ended on 10 December 2020. The Commission has requested a joint opinion from EDPB and the European Data Protection Supervisor (**EDPS**) on the implementing acts of both sets of SCCs. The SCCs are expected to be formally adopted by the Commission in early 2021.

The draft Third Country SCC, and its accompanying implementing decision, can be accessed here.

The draft Controller-Processor SCC, and its accompanying implementing decision, can be accessed here.

7.4 EDPB issues statement on the ePrivacy Regulation and the future role of Supervisory Authorities and the EDPB

On 19 November 2020, the EDPB issued a statement on the proposed ePrivacy Regulation and the future role of Supervisory Authorities and the EDPB (**Statement**).

The Statement concerns the proposed Regulation concerning the respect for private life and the protection of personal data in electronic communications (**ePrivacy Regulation**) which is intended to replace Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (**ePrivacy Directive**).

In the Statement, the EDPB emphasises that the future ePrivacy Regulation must not lower the level of protection offered by the current ePrivacy Directive, noting that it should complement the GDPR by providing additional guarantees for confidentiality for all types of electronic communication.

The EDPB expresses concern regarding discussions in the Council concerning the enforcement of the future ePrivacy Regulation which could lead to fragmentation of supervision, procedural complexity and a lack of legal certainty. The EDPB notes that many provisions of the future ePrivacy Regulation concern the processing of personal data, and states that oversight should be entrusted to the same national authorities which are responsible for the enforcement of the GDPR.

The EDPB concludes by inviting the Member States to support a more effective ePrivacy Regulation, as initially proposed by the Commission.

The Statement can be accessed here and the proposed ePrivacy Regulation can be accessed here.

7.5 Transfers of Personal Data to Third Countries or International Organisations

On 9 December 2020, the Data Protection Commission updated its webpage entitled "Transfers of Personal Data to Third Countries or International Organisations" (**Webpage**).

The Webpage addresses, amongst other items, Article 46 - Transfers subject to appropriate safeguards, taking into account the CJEU's recent "Schrems II" ruling (Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems) and recent publications by the EDPB.

The Webpage can be accessed here.

7.6 Post Brexit - transfers of personal data from the EEA to the UK

Under the EU-UK Trade and Cooperation Agreement (**Agreement**) concluded on 24 December 2020, a "grace period" during which the transfers of personal data from EEA Member States to the UK will not be considered a "third country" transfer under the GDPR was agreed. The Agreement provides that the specified period will last for no longer than six months from 31 December 2020.

This means that during the specified period, personal data can continue to flow from the EEA to the UK without any additional safeguards, such as SCCs being required. This is subject to an important caveat: if, during this period, the UK amends the data protection laws it has in place on 31 December 2020, or exercises certain powers under the Data Protection Act 2018 or the UK GDPR without the agreement of the EU Partnership Council, the specified period shall automatically end.

Please see the Dillon Eustace briefing paper entitled "Brexit: Welcome reprieve for data transfers from the EEA to the UK" which can be accessed here.

Key Action Points	The Irish Data Protection Commission has noted that the Commission intends to adopt an adequacy decision within the specified period. However, if this is not forthcoming, Irish investment firms which transfer personal data to the UK will need to put in place alternative transfer mechanisms to safeguard against any interruption to the free flow of EU to UK personal data when the specified period expires, currently expected to occur on 30 June 2021.

8. SUSTAINABLE FINANCE

8.1 Commission publishes FAQ on the Commission Platform on Sustainable Finance

On 1 October 2020, the Commission published a frequently asked questions document (**FAQ**) in relation to the setting-up and work of the Commission Platform on Sustainable Finance (**Platform**).

The Platform is an advisory body that will advise the Commission on the development of technical screening criteria for the EU taxonomy and policy development, among other things, as required by the Taxonomy Regulation.

The FAQ addresses, amongst other items, the general role of the Platform, how members are appointed and where the work of the Platform may be followed.

The FAQ can be accessed here.

8.2 SFDR Update – Delay of entry into force of delegated measures

On 29 October 2020, the Commission published a letter addressed to the ESAs on the application of Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (**Sustainable Finance Disclosure Regulation or SFDR**) and related RTS (**Letter**).

The original timeframe for application required the joint development by the European Insurance and Occupational Pensions Authority (**EIOPA**), ESMA and the EBA of most of the draft RTS by 30 December 2020 and the application of the SFDR's provisions from 10 March 2021.

The Letter notes that the draft RTS will enter into force at "a later stage", without confirming what that date will be. Further in the Letter, the Commission acknowledges that "in terms of substance, the application of the Regulation is not conditional on the formal adoption", confirming that all application dates specified by the SFDR, with effect from 2021, will be maintained. Financial market participants and

financial advisers subject to the SFDR will be required to comply with high level and principle-based requirements of the SFDR from this time.

As a result, there is now a staggered timeframe for complying with the obligations under the SFDR. The SFDR applies to "Financial Market Participants" which includes AIFMs, UCITS ManCos, investment firms which provide portfolio management, an institution for occupational retirement provision (**IORP**), a manufacturer of a pension product, an insurance undertaking which makes available an insurance-based investment product (**IBIP**) and a pan-European personal pension product (**PEPP**) provider. Certain obligations apply to a "Financial Product" which is defined exclusively as a segregated portfolio, an AIF, an IBIP, a pension product, a pension scheme, a UCITS and a PEP.

The Letter can be accessed here.

Key Action Points	Financial market participants should note that although the RTS will not apply until a later date, the disclosure obligations set under the SFDR will still apply from 10 March 2021.

8.3 The EBA launched a consultation paper to incorporate ESG risks into the governance, risk management and supervision of credit institutions and investment firms

On 3 November 2020, the EBA launched a consultation paper on ESG risks management and supervision aiming to collect feedback for the preparation of its final report on the topic. The consultation paper provides a comprehensive proposal on how ESG factors and ESG risks could be included in the regulatory and supervisory framework for credit institutions and investment firms.

The consultation paper identifies for the first time common definitions of ESG risks, building on the EU taxonomy, provides an overview of current evaluation methods and outlines recommendations for the incorporation of ESG risks into business strategies, governance and risk management as well as supervision.

The consultation runs until 3 February 2021.

The consultation paper can be accessed here.

8.4 ESMA publishes consultation paper on disclosure obligations under Article 8 of the Taxonomy Regulation

On 5 November 2020, ESMA published a consultation paper containing ESMA's draft advice to the Commission on Article 8 of Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (**Taxonomy Regulation**).

Article 8 of the Taxonomy Regulation obliges undertakings subject to Directive 2014/95/EU (**Non-Financial Reporting Directive** or **NFRD**) to publish information on how and to what extent their activities are associated with economic activities that qualify as environmentally sustainable under the Taxonomy Regulation. These disclosure requirements apply generally to "Large Undertakings" (see below) which (i) is a "Public-Interest Entity"; and (ii) has, on average, more than 500 employees during the financial year.

A "**Large Undertaking**" is defined in the Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (2013/34/EU) (**Accounting Directive**) as one which, on its balance sheet date, exceeds at least two of the three following criteria: (a) a balance sheet total of €20,000,000; (b) a net turnover of €40,000,000; (c) an average of 250 employees during the financial year.

"**Public-interest Entities**" are defined in the Accounting Directive as being: (a) EU companies listed on an EU regulated market; (b) credit institutions; (c) insurance undertakings; or (d) entities designated as such by a Member State (e.g. those that are of significant public relevance because of the nature of their business, their size or the number of their employees).

Article 8(4) of the Taxonomy Regulation requires the Commission to adopt, by 1 June 2021, a delegated act specifying the content and presentation of the key performance indicators (**KPIs**) that non-financial undertakings and asset managers are required to disclose.

The consultation period closed on 4 December 2020. ESMA will deliver its final advice to the Commission by 28 February 2021.

The consultation paper is available here.

8.5 Commission consults on Delegated Regulation on climate change mitigation and adaptation under Taxonomy Regulation

On 20 November 2020, the Commission published for consultation the text of Commission Delegated Regulation supplementing the Taxonomy Regulation ((EU) 2020/852) relating to climate change mitigation and adaptation. The Taxonomy Regulation was published in the Official Journal of the EU on 22 June 2020 and entered into force 20 days later.

The purpose of the Delegated Regulation is to establish 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. The consultation closed on 18 December 2020. The Taxonomy Regulation requires the Delegated Regulation to be adopted before 31 December 2020.

The next steps are for the Delegated Regulation to be adopted by the Commission, then it will be subject to a four month objection period by the European Parliament and the Council, which can be extended by two months at their request.

The text of the Commission Delegated Regulation can be accessed here.

8.6 Three Delegated Regulations supplementing BMR on sustainable finance issues published in OJ

On 3 December 2020, three delegated regulations supplementing the Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds Benchmarks Regulation Q&A in relation to sustainable finance issues were published in the OJ:

- Delegated Regulation (EU) 2020/1816 supplementing the BMR as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published, which can be accessed here;
- Delegated Regulation (EU) 2020/1817 supplementing the BMR as regards the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology, which can be accessed here; and
- Delegated Regulation (EU) 2020/1818 supplementing the BMR as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, which can be accessed here.

The three delegated regulations entered into force on 23 December 2020, i.e. twenty days following their publication in the OJ.

9. COVID–19

9.1 Supervisory flexibility - Securities Markets, Investment Management, Investment Firms and Fund Service Providers

On 10 November 2020, the Central Bank updated its section of its website entitled "COVID-19 – Prudential Regulatory Flexibility Measures". The section sets out the regulatory flexibility that will be applied by the Central Bank in certain areas for securities markets, investment management, investment firms and fund service providers. The following key points are of relevance for investment firms:

- Risk Mitigation Programmes (**RMPs**): In the website section, the Central Bank has indicated that it now expects firms to meet specific RMP submission dates.

- Pillar Two Guidance/ Pillar Three: In the website section, the Central Bank has indicated that it expects investment firms subject to CRR/CRD IV to hold capital in accordance with any Pillar 2 Guidance. It also expects investment firms subject to CRR/CRD IV should assess the need for additional Pillar 3 disclosures.

The website page can be accessed here.

10. BREXIT

10.1 ESMA updates BREXIT statements for the end of UK transition period

On 10 November 2020, ESMA updated three statements which address the impact on reporting under the European Market Infrastructure Regulation (EU) 648/2012 (**EMIR**) and the Securities Financing Transactions Regulation (EU) 2015/2365 (**SFTR**) on the operation of ESMA databases and IT systems after 31 December 2020, the end of the UK's transition from the EU. The statements that have been updated are:

- the statement on issues affecting EMIR and SFTR reporting – covering issues affecting reporting, recordkeeping, reconciliation, data access, portability and aggregation of derivatives under Article 9 EMIR and of securities financing transactions reported under Article 4 of SFTR;

- the statement on the use of UK data in ESMA databases and performance of MiFID II calculations – covering MiFID II/MiFIR publications performed by the various ESMA databases, as well as the annual ancillary activity calculations; and

- the statement on ESMA's Data Operational Plan – covering actions related to Financial Instruments Reference Data System (**FIRDS**), Financial Instrument Transparency System (**FITRS**), Double Volume Cap System (**DVCAP**), transaction reporting systems, and ESMA's registers and data.

The statements can be accessed here.

11. MISCELLANEOUS

11.1 ESMA publishes 2021 Work Programme

On 2 October 2020, ESMA published its work programme for 2021 (**Programme**). The Programme sets out ESMA's priorities and areas of focus for the next 12 months, in support of its mission to enhance investor protection and promote stable and orderly financial markets. ESMA's activities for 2021 will focus on:

- **Supervisory convergence** - ESMA will prioritise building an EU common risk-based and outcome-focused supervisory culture. Areas of focus include EMIR, ESG reporting and ESG data reporting, fund liquidity risk/ liquidity management tools and retail investment product costs and charges.

- **Risk assessment** - ESMA will focus on integrating financial innovation and ESG into their risk analysis. ESMA will also focus on data for risk-based supervision to support policy and convergence work. ESMA will continue to monitor the impact on the markets of the Covid-19 pandemic and of Brexit, intervening when necessary in support of investor protection, orderly markets and financial stability.

- **Single rulebook** - ESMA will continue to engage in a programme of regular post-implementation reviews of laws and technical standards. More particularly, ESMA will seek to contribute to the legislative reviews of MiFID and AIFMD, assess whether changes to the rulebook are needed to develop the Capital Markets Union and will review technical standards under EMIR where necessary.

- **Direct supervision** - under its direct supervision activity, ESMA will focus on third country central counterparty supervision under EMIR 2.2. Furthermore, ESMA will prepare for new supervisory mandates regarding Benchmarks and Data Service Providers, as well as continuing direct supervision in the areas of Credit Rating Agencies, Trade Repositories and Securitisation Repositories.

The Programme can be accessed here.

11.2 ESMA publishes report on post trade risk reduction services

On 10 November 2020, ESMA published a report on post trade risk reduction services (**PTRR**) with regard to the clearing obligation under EMIR (**Report**). The Report takes into account feedback received from stakeholders during a public consultation held earlier in the year.

ESMA is obliged, under EMIR, to prepare a report for the Commission on whether any trades that directly result from PTTR services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1) of EMIR.

In the Report, ESMA acknowledges that the benefits of allowing certain PTRR transactions to be exempted from the clearing obligation would reduce risk in the market, allow for legacy trades to be compressed, increase participation in PTRR services of counterparties less interested to participate today (due to complex structures) and overall reduce complexity in the market by using simpler trades for rebalancing. ESMA is of the view that, in the absence of compelling evidence or reasoning to the contrary, those positive effects outweigh, inter alia, the increased operational burden on market participants and regulators and the increase in gross risk in the non-cleared netting sets (in case of portfolio rebalancing).

ESMA concludes that any such exemption should be limited and subject to certain requirements in order to reduce any risk of circumvention of the clearing obligation.

The Report can be accessed here.

11.3 Central Bank consults on Client Asset Requirements

On 3 December 2020, the Central Bank published the paper 'Consultation on enhancements to the Central Bank Client Asset Requirements, as contained in the Central Bank Investment Firms Regulations' (**CP133**).

The Central Bank has carried out an assessment of the Irish client asset landscape and, based on this assessment, is now proposing to make amendments to the Client Asset Requirements (**CAR**), as is set out in Part 6 of the Investment Firms Regulations (S.I. No 604 of 2017) (**Investment Firms Regulations**).

Please see the Dillon Eustace briefing paper entitled "Central Bank consults on Client Asset Requirements", which addresses the proposed changes. It can be accessed here.

Any stakeholders wishing to submit a response have until 10 March 2021.

CP133 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

Enda McGeever
E-mail: enda.mcgeever@dilloneustace.ie
Tel : + 353 1 673 1751
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

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.