



Investment Firms Quarterly Legal and Regulatory Update

Period covered: 1 October 2021 – 31 December 2021

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1. MIFID II

1.1 ESMA call for evidence on certain retail investor protection topics under MiFID II

On 1 October 2021, the European Securities and Markets Authority (**ESMA**) published a call for evidence on a number of retail investor protection topics under Directive 2014/65/EU (**MiFID II**) to assist the European Commission in the preparation of legislative proposals implementing aspects of the retail investment strategy and to make appropriate adjustments to the legislative framework.

ESMA is requesting information from stakeholders on three topics:

- Disclosures: identification of any significant overlaps, gaps, redundancies and inconsistencies across investor protection legislation that might have a detrimental effect on investors;
- Digital disclosures: an assessment of how regulatory disclosures and communications can work best for consumers in the digital age, and proposes options as to how existing rules might be adapted, such as allowing layered information; and
- Digital tools and channels: an assessment of both risks and opportunities with respect to retail investing stemming from both the increasing availability of digital tools and the increasing levels of direct investor participation, in particular via online trading platforms and robo-advisors.

The call for evidence closed on 2 January 2022. ESMA intends to deliver its advice to the European Commission by 30 April 2022.

A copy of the call for evidence can be accessed [here](#).

1.2 Delegated Regulation specifying criteria for ancillary activity test under MiFID II published in the Official Journal

On 20 October 2021, Commission Delegated Regulation (EU) 2021/1833 supplementing MiFID II by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level was published in the Official Journal of the European Union (**OJ**).

Persons dealing on own account, or providing investment services to clients, in commodity derivatives, emission allowances or derivatives thereof are subject to an exemption under MiFID II if they are carrying on an ancillary activity to their main business on a group basis and the main business is not the provision of investment services or banking activities under Directive 2013/36/EU (**CRD IV**) (**Ancillary Activity Exemption**).

The new Delegated Regulation replaces Commission Delegated Regulation 2017/592 (**RTS 20**). It deletes the overall market size test of Article 2 RTS 20 and introduces the new de-minimis threshold test.

The Delegated Regulation came into force on 09 November 2021.

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

1.3 ESMA updates MiFID II Q&As on investor protection and intermediaries: November 2021

On 19 November 2021, ESMA published an updated version of its Questions and Answers (**Q&As**) on investor protection and intermediaries under MiFID II and Regulation (EU) No 600/2014 (**Markets in Financial Instruments Regulation** or **MiFIR**).

The updated version contains a new Q&A in the Product Governance section which confirms that the mere presence of a make-whole clause is not sufficient for a bond to be exempted from the MiFID II product governance requirements. It confirms that bonds with a

make-whole clause and no other embedded derivative which are marketed to retail and/or professional clients are exempt from such requirements whilst bonds with a make-whole clause and with one or more embedded derivative which are marketed to retail and/or professional clients are subject to MiFID II product governance requirements.

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

1.4 European Commission legislative proposals to amend MiFIR and MiFID II

On 25 November 2021, the European Commission adopted both a legislative proposal for a Regulation amending MiFIR (the **draft Regulation**) and a legislative proposal for a Directive amending MiFID II (the **draft Directive**).

The European Commission notes that the proposed amendments aim to empower investors by enabling them to access market data they need to invest in shares or bonds more easily and by making EU market infrastructures more robust.

The draft Regulation includes the following:

- Changes to the trade data transparency regime;
- Proposal for a single consolidation tape provider (**CTP**) for each asset class;
- Adjustments to the share trading / derivatives trading obligations;
- The regulatory technical standard (**RTS**) 27 best execution reporting requirement is being deleted; and
- Prohibition on systematic internalisers (**SIs**) offering payment for retail order flow (**PFOF**).

In respect of the adjustments to the share trading obligations, it is proposed that the scope of the share trading obligation (**STO**) shall be limited to EEA ISINs (i.e. shares that are admitted to trading on an EEA regulated market), but with trading on third-country venues allowed where the trade is in the local currency. It is also proposed to establish an EU "official list" of shares subject to the STO. In respect of the derivative trading obligation (**DTO**), it is proposed to align this with the requirements under the Regulation on over the counter (**OTC**) derivatives, central counterparties (**CCPs**) and trade repositories Regulation (EU) No 648/2012 (**European Market Infrastructure Regulation** or **EMIR**) including by: (i) exempting small financial counterparties from scope and (ii) allowing for the possibility of the suspension of the DTO where the clearing obligation has been temporarily suspended; and (iii) allowing for the possibility of the suspension of the DTO for certain investment firms that would be subject to overlapping obligations when interacting with non-EU counterparties on non-EU platforms.

Most of the amendments proposed by the draft Directive relate to the draft Regulation proposals summarised above, including requirements on Member States to:

- Oblige regulated markets, investment firms and market operators to have in place arrangements to ensure they meet data quality standards set out in MiFIR; and
- Impose sanctions for infringements of certain new provisions in MiFIR, including mandatory contributions to CTPs.

The Council of the EU and the European Parliament will now consider the legislative proposals.

A copy of the draft Regulation can be accessed [here](#) and the draft Directive can be accessed [here](#).

1.5 ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders come into force

On 31 December 2021, the joint Guidelines published by ESMA and the European Banking Authority (**EBA**) in July 2021 on the assessment of the suitability of members of the management body and key function holders of MiFID entities came into force (**Guidelines**).

Under the Guidelines, all institutions must assess the members of the management body and those institutions that are subject to the CRD IV Directive must also assess all key function holders that have a significant influence over the direction of the institution under the overall responsibility of the management body. Competent authorities are also required to assess the members of the management body for all institutions and have further assessment obligations for significant Capital Requirement Directive institutions.

The Central Bank of Ireland (**Central Bank**) has confirmed to ESMA and the EBA of its intention to comply with the Guidelines by 31 December 2021 on the basis that the requirements of the Guidelines can be met through the application of the Central Bank's Fitness and Probity Regime and Corporate Governance Requirements.

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

1.6 MiFID II Covid Recovery amendments due to come into force by 28 February 2022

On 28 February 2022, a Directive (2021/338/EU) containing "quick fix" amendments to MiFID II to help the recovery from the COVID-19 pandemic (**Amending Directive**) is due to come into force.

The Amending Directive simplifies information requirements in a targeted manner, while safeguarding investor protection. The changes reduce the information on costs and charges that must be provided to professional investors and eligible counterparties. Paper-based investment information will also be phased out, except for retail clients if they ask to continue to receive it. It will also allow banks and financial firms to bundle research and execution costs when it comes to research on small and mid-cap issuers. This should help to increase research on such issuers and their access to funding. Other changes include adaptations to the position limit regime for commodity derivatives to support the emergence and growth of euro-denominated commodity derivatives markets.

In addition, the Amending Directive suspends the reporting requirement contained within Article 27(3) of MiFID II for trading venues, systematic internalisers and other execution venues on how orders were executed on terms most favourable to the client for two years. Separately, on 25 November 2021, the European Commission adopted a legislative proposal for a Directive amending MiFID II (the **draft Directive**) which includes further changes to MiFID II including the deletion of this reporting requirement laid down in Article 27(3) of MiFID II. Please see [Section 1.4](#) for more information.

On 3 January 2022, the European Union (Markets in Financial Instruments) (Amendment) Regulations 2022 (**MiFID Regulations**), which transposes the Amending Directive into national law, was signed into law. Its measures will come into effect on 28 February 2022.

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

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

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

2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

2.1 EBA final report and draft RTS on disclosure of investment policy under IFR

On 19 October 2021, the EBA published its final report on draft RTS on the disclosure of investment policy by investment firms under Article 52 of Regulation (EU) 2019/2033 (IFR). The EBA consulted on the draft RTS in March 2021.

Article 52 of the IFR requires certain investment firms to publicly disclose information on their investment by disclosing the following information: (i) proportion of voting rights attached to shares held, (ii) voting behaviour, (iii) use of proxy advisor firms and (iv) voting guidelines. The objective of investment policy disclosure is to publicise information about the intended influence of investment firms on companies in which they hold shares. This information will be published on a yearly basis, along with the financial statements.

The draft RTS includes two annexes. Annex I contains templates and tables for the purpose of the disclosure of information on investment policy by investment firms. Annex II contains detailed instructions, which provide legal references and guidance concerning specific positions for these templates and tables.

Only investment firms that do not meet the conditions for qualifying as small and non-interconnected investment (SNI) firms set out in Article 12(1) IFR (class 2 investment firms) have to disclose such information about their investment policy. The IFR also sets out two materiality thresholds for the application of the investment policy disclosure requirements.

The final draft RTS have been submitted to the European Commission for adoption.

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

2.2 EBA and ESMA consult on draft guidelines on SREP under IFD

On 18 November 2021, the EBA and ESMA published a consultation paper on joint guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) under Directive (EU) 2019/2034 (IFD).

The guidelines, drafted pursuant to the mandate of Article 45(2) of the IFD, set out the criteria for assessment of the main SREP elements including business model, governance arrangements and firm-wide controls, risks to capital and capital adequacy, and liquidity risk and liquidity adequacy.

A scoring framework has been introduced to ensure consistency of assessments and enable comparability of outcomes across investment firms. The outcome of assessments forms the basis for taking necessary measures to address specific risks and concerns. The guidelines also clarify the monitoring of key indicators and the application of SREP in the cross-border context.

The guidelines specify common procedures and methodologies for SREP which are proportionate to the different sizes and business models of investment firms, and the nature, scale, and complexity of their activities. This includes the classification of investment firms into distinct categories, being different frequency, depth and intensity of the assessments, and the engagement of the competent authority.

In addition, the guidelines refer to a consultation paper, published on 18 November 2021, on draft RTS on Pillar 2 add-ons for investment firms under Article 40(6) of IFD. These RTS clarify how competent authorities should measure risk that investment firms face, or may pose to others, that are not sufficiently covered within their own requirements as set out in the IFR.

The draft RTS should be read together with the SREP guidelines, which are the subject of a separate consultation by the EBA and ESMA.

The deadline for responses to both consultations is 18 February 2022.

A public meeting to discuss the draft guidelines and the draft RTS will be held on 18 January 2022.

A copy of the consultation paper for the SREP guidelines can be accessed [here](#) and the consultation paper on the draft RTS can be accessed [here](#).

2.3 EBA final report and guidelines on internal governance under IFD

On 22 November 2021, the EBA published a final report on guidelines on internal governance under Article 26(4) of the IFD (the **Governance Guidelines**), specifying the governance provisions that class 2 investment firms should comply with, following consultation in December 2020.

The Governance Guidelines specify the IFD governance provisions relative to the tasks, responsibilities and organisation of the management body and investment firms, including the need to create transparent structures that allow for supervision of all their activities. They also specify requirements aimed at ensuring the sound management of risks.

The Governance Guidelines will enter into force on 30 April 2022. They will apply to EU competent authorities, as well as to credit institutions and investment firms on an individual and consolidated basis.

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

2.4 EBA final report and guidelines on sound remuneration policies under IFD

On 22 November 2021, the EBA published a final report on guidelines on sound remuneration policies under Articles 30(4) and 32(9) of the IFD (the **Remuneration Guidelines**) providing further details on how provisions under the IFD on remuneration policies and variable remuneration of identified staff should be applied by class 2 investment firms.

The Remuneration Guidelines have been developed in cooperation with ESMA and are, as far as possible, consistent with the existing Guidelines under the CRD. Relevant differences between the IFD and CRD have been taken into account.

The Remuneration Guidelines will enter into force on 30 April 2022.

The Remuneration Guidelines will apply to competent authorities across the EU, credit institutions and investment firms on an individual and consolidated basis.

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

2.5 Delegated Regulations on RTS under IFD published in OJ

On 7 December 2021, the following Delegated Regulations containing RTS relating to IFD were published within the OJ:

- Commission Delegation Regulation (EU) 2021/2153 supplementing the IFD with regard to RTS specifying the criteria for subjecting certain investment firms to the requirements of Regulation (EU) No 575/2013 (**CRR**), which can be found [here](#);
- Commission Delegation Regulation (EU) 2021/2154 supplementing the IFD with regard to RTS specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages, which can be found [here](#);
- Commission Delegation Regulation (EU) 2021/2155 supplementing the IFD with regard to RTS specifying the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration, which can be found [here](#).

The European Commission adopted Delegated Regulation (EU) 2021/2153 on 6 August 2021 and adopted Delegated Regulation 2021/2154 and 2021/2155 on 13 August 2021. They entered into force and applied from 12 December 2021.

2.6 EBA consults on RTS and guidelines on liquidity requirements under IFD and IFR

On 10 December 2021, the EBA published the following consultation papers relating to liquidity requirements under the IFD and IFR:

- Consultation paper on draft RTS on the specific liquidity measurement for investment firms under Article 42(6) of the IFD, which can be found [here](#);
- Consultation paper on draft guidelines on liquidity requirements exemption for investment firms under Article 43(4) of the IFR, which can be found [here](#).

The draft RTS set out details of the types of risk that competent authorities should assess, including liquidity risk stemming from trading activities or from loss in income from portfolio management, liquidity risk relating to funding and inadequate management and controls of liquidity risk. Competent authorities are required to consider those elements under both normal and severe, but plausible conditions.

The draft guidelines specify that the exemption should be based on the assessment of financial resource needs for orderly wind-down of a SNI firm. They also provide guidance for competent authorities on a process of granting an exemption.

The deadline for responses is 10 March 2022. The EBA intend on publishing final guidelines by mid-2022.

2.7 Commission Implementing Regulation laying down ITS on reporting and disclosure under IFR published in OJ

On 22 December 2021, Commission Implementing Regulation (EU) 2021/2284 of 10 December 2021 laying down implementing technical standards (ITS) on supervisory reporting and disclosures for investment firms under IFR (**Implementing Regulation**) was published in the OJ.

The ITS set out standard specifying templates, reporting dates and definitions applicable to both reporting and disclosure requirements under the IFR, in particular, those set out at Articles 49(2) (“**Own Funds**”) and 54(3) (“**Reporting Requirements**”) thereof.

The Implementing Regulation enters into force on 11 January 2022.

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

3. EMIR & SFTR

3.1 EBA consults on draft RTS on initial margin model validation under EMIR

On 4 November 2021, the EBA published a consultation paper on its draft RTS on Initial Margin Model Validation (IMMV) under EMIR (Consultation Paper). The Consultation Paper sets out the supervisory procedures for initial and ongoing validation of initial margin models.

The deadline for responses is 4 February 2022.

For a detailed analysis of the EMIR IMMV and its effect on Irish undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs), please refer to our in-depth [client briefing](#) on the topic.

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

3.2 ESMA final report on RTS clearing and derivative trading obligations under EMIR and MiFIR in light of benchmark transition

On 18 November 2021, ESMA published a final report on draft RTS on the clearing obligations (**CO**) and derivative trading obligations (**DTO**) in view of the benchmark transition to risk free rates under Article 5(2) of EMIR and Article 32 of MiFIR, following public consultation in July 2021.

ESMA's proposed amendments to the draft RTS aim to ensure a smooth benchmark transition while maintaining an effective scope for the CO and DTO, in line with the G20 objectives. In particular, it is proposed that the scope of the CO and DTO be amended to accompany the benchmark transition for OTC derivatives away from Euro Overnight Index Average (**EONIA**) and the London Inter-Bank Offered Rate (**LIBOR**) to introduce Risk-Free Rates, which include the Euro Short-Term Rate (**€STR**) and Secured Overnight Financing Rate (**SOFR**).

ESMA submitted draft RTS, set out in Annex II of the final report, to the European Commission. Following their endorsement, they will then be subject to non-objection by the European Parliament and the Council of the EU.

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

3.3 ESMA updates Q&As on EMIR implementation

On 19 November 2021, ESMA published a revised version of its Q&As on the implementation of EMIR to include new Q&As concerning the calculation of the clearing threshold and the definition of "hedging", as set out below:

The two new revised Q&As confirm as follows:

- Where a financial counterparty calculates its positions to determine clearing thresholds under Article 4(a)(3) EMIR, it should include the OTC derivative contracts that are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity entered into by the non-financial counterparties (**NFCs**) that are part of the same group in the calculation, as Article 4(a)(3) does not provide for a hedging exemption.
- NFCs whose core activity is to buy, sell or own financial instruments can benefit from the hedging exemption set out in Article 10(3) EMIR when using OTC derivative contracts to hedge certain risks as it applies to all NFCs, irrespective of what their core activity is.

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

4. PRIIPS

4.1 ESAs call for advice on PRIIPs Regulation

On 21 October 2021, the Joint Committee of the European Supervisory Authorities (**ESAs**) published a call for evidence to assist it in providing advice to the European Commission relation to the European Commission's review of Regulation (EU) 1286/2014 (**PRIIPS Regulation**).

The Commission published a call for advice to the joint committee in August 2021 and requests that the joint committee deliver its advice to the Commission Services by 30 April 2022. The joint committee explains in its call for evidence that the ESAs believe that changes to the PRIIPs Regulation are needed in areas beyond those addressed in the Commission's mandate. Therefore, it is requesting feedback on a range of additional issues, including:

- General survey on the use of the key information document (**KID**), complexity and readability of the KID and the operation of the comprehension alert;

- Use of digital media; and
- Scope of the PRIIPs Regulation and differentiation between different types of PRIIPs.

The call for evidence closed on 16 December 2021 and can be accessed [here](#).

4.2 EBA updates Q&As on the PRIIPS KID

On 17 December 2021, the ESAs published a revised version of their Q&A on the packaged retail and insurance-based investment products (PRIIPS) KID (the **ESA Q&As**).

The ESA Q&As includes a new Q&A which confirms that where an AIF invests in linear products but where the leverage changes throughout time, that AIF should be categorised as a Category 2 PRIIP for the purposes of determining the market risk assessment to be carried out. The ESAs have also included a new Q&A on what should be shown as the “Total Costs” in Table 1 of the costs-related disclosures required to be included in the PRIIP and confirms that this figure should be shown in monetary terms and consider all of the costs indicated in the list of costs and the calculation methodologies in Annex VI, Part 1 of Commission Delegated Regulation 2017/653. The Q&A also confirms that the methodology “reduction in yield” described in Part 2 of Annex VI should only be used to calculate the summary costs indicators in percentage terms.

The ESA Q&As also includes a new Q&A to address how the obligation to review the KID should apply to the different holding periods disclosed in the moderate performance scenarios disclosed in the KID. Unrelated to funds, four new Q&A on the costs associated with subscription products for PRIIPS have also been included.

A copy of the updated ESA Q&A can be accessed [here](#).

4.3 PRIIPS KID Update

On 20 December 2021, Regulation (EU) 2021/2259, which amends the PRIIPS Regulation, was published in the OJ (**Amending PRIIPS Regulation**).

Under the Amending PRIIPS Regulation, the exemption currently afforded to UCITS from being required to prepare a PRIIPS KID, which had previously been extended to expire on 30 June 2022, has been further extended until 31 December 2022. This means that UCITS which are marketed to retail investors in the EEA will be required to prepare a PRIIPS KID from 1 January 2023.

In a related development, Directive (EU) 2021/2261 (**Amending Directive**) which amends the Directive 2009/65/EC (as amended) (**UCITS Directive**) was signed into law on 15 December 2021. Under the Amending Directive, the obligation to produce a UCITS key investor information document (**KIID**) under the UCITS Directive will be deemed satisfied where the UCITS provides a PRIIPS KID which complies with the PRIIPS Regulation. This is to avoid a scenario where a UCITS is required to produce both a UCITS KIID and a PRIIPS KID.

The Amending Directive requires Member States to transpose the Amending Directive into local law by 30 June 2022 and to apply these measures from 1 January 2023.

On 20 December 2021, Commission Delegated Regulation 2021/2268, which amends the existing RTS published under the PRIIPS Regulation contained in Commission Delegated Regulation (EU) 2017/653 (**Amending PRIIPS Level 2 Measures**) was published in the OJ.

The Amending PRIIPS Level 2 Measures make significant changes to the existing rules governing the methodology and presentation of performance scenarios, the presentation of costs, the methodology for the calculation of summary cost indicators and the methodology required to calculate transaction costs, as well as introducing new disclosure obligations for in-scope UCITS and AIFs.

The Amending PRIIPS Level 2 Measures apply from 1 July 2022 meaning that any PRIIPS KID currently published in respect of AIFs which are marketed to EEA retail investors will need to be updated by that date to comply with the revised disclosure obligations.

As noted above, UCITS funds which are marketed to EEA retail investors will be required to publish a PRIIPS KID from 1 January 2023 which will need to comply in full with the Amending PRIIPS Level 2 Measures.

Please refer to our in-depth [client briefing](#) which considers the implications of the above for Irish UCITS funds and the PRIIPS KID disclosure requirements.

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

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

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

Key Action Points

AIFMs: An analysis should be carried out by the AIFM of any AIF which currently produces a PRIIPS KID to establish what changes will need to be made to the existing PRIIPS KID in order to ensure that a revised PRIIPS KID which complies with the Amending PRIIPS Level 2 Measures is prepared, approved and published by **1 July 2022**.

UCITS Management Companies: Management companies of UCITS funds which are marketed to EEA retail investors will need to ensure that the PRIIPS KID published in respect of any such funds **from 1 January 2023** onwards complies in full with the Amending PRIIPS Level 2 Measures.

5. OPERATIONAL RESILIENCE

5.1 CP140 - Consultation on Cross Industry Guidance on Operational Resilience

On 1 December 2021, the Central Bank published its Cross Industry Guidance on Operational Resilience (**OR**) (**Guidance**) as part of its Feedback Statement on Consultation Paper 140.

The Guidance applies to all regulated fund service providers (**RFSPs**) and consists of 15 industry guidelines built around core principles and three pillars of OR, being: (a) Identify and Prepare; (b) Respond and Adapt; and (c) Recover and Learn.

The purpose of the Guidance is to:

- Communicate to the boards (**Boards**) and senior management of RFSPs, the Central Bank's expectations with respect to the design and management of OR;
- Emphasise Board and senior management responsibilities when considering OR as part of their risk management and investment decisions; and
- Require that Boards and senior management take appropriate action to ensure that their OR frameworks are well designed, operating effectively and sufficiently robust. This should ensure that the risks to the RFSP's operational continuity do not transmit into the financial markets and that the interests of the customers and market participants are safeguarded during business disruptions.

RFSPs should be able to demonstrate that they have applied the Guidance within an appropriate time frame, which will depend on a range of factors, including nature, scale, and complexity of a RFSP's business and the RFSP's overall impact on customers and the wider economy.

The Central Bank expects RFSPs to be actively and promptly addressing OR vulnerabilities and to be in a position to evidence actions/plans to apply the Guidance at the latest within two years of its being issued.

For a detailed analysis of the Central Bank's Feedback Statement on Consultation Paper 140 on Cross Industry Guidance on Operational Resilience, please refer to our in-depth [client briefing](#) on the topic.

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

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

5.2 European Parliament publishes text of adopted ECON report on proposed Regulation on digital operational resilience and proposed Directive supporting EU Digital Finance Strategy

On 7 December 2021, the European Parliament published the text of the report adopted by its Economic and Monetary Affairs Committee (**ECON**) on the proposed Regulation on digital operational resilience for the financial sector (**DORA**). According to the Parliament's procedure file, the report has now been tabled for the Parliament to consider in plenary.

This follows the adoption by the EU Council on 24 November 2021 of its position on two proposals that are part of the EU's digital finance package: the 'Regulation on Markets in Crypto Assets' (**MiCA**) and DORA. This agreed position now forms the EU Council's negotiating mandate for trilogue negotiations with the European Parliament.

Alongside the proposed Regulation, the European Commission adopted a legislative proposal for a Directive (**DORA Directive**) amending the UCITS Directive, Directive 2011/61/EU (**Alternative Investment Fund Managers Directive** or **AIFMD**), Directive (EU) 2009/138/EC (**Solvency II Directive**), CRD IV, MiFID II, and Directive (EU) 2015/2366 (**PSD2**). The EU's digital finance package also includes a proposal for Regulation on a pilot regime for market infrastructures based on distributed ledger technology (**DLT**).

DORA aims to consolidate and upgrade information communications technology (**ICT**) risk requirements throughout the financial sector to ensure that all participants of the financial system are subject to a common set of standards to mitigate ICT risks for their operations and have the necessary safeguards in place to mitigate cyber-attacks and other risks.

A copy of the European Parliament text of the report can be accessed [here](#).

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

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

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

6. CENTRAL BANK OF IRELAND

6.1 Funding Strategy and Guide to the 2021 Industry Funding Regulations

On 15 October 2021, the Central Bank published its Funding Strategy and Guide to the 2021 Industry Funding Regulations with the objective of providing guidance in relation to the calculation of industry-wide annual levies which have been set to recover the Central Bank's Financial Regulation costs in 2020.

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

6.2 Central Bank publishes Dear Chair Letter on Climate Risk

On 3 November 2021, the Central Bank issued a 'Dear CEO letter' (**Letter**) to regulated financial service providers outlining its supervisory expectations in five key areas as they seek to comply with statutory and regulatory obligations on climate and broader environmental, social and governance (**ESG**) issues. It noted that it will be focused on ensuring compliance with climate and wider ESG related statutory and regulatory obligations and on effective risk management. The five key areas identified by the Central Bank in the Letter are governance, risk management framework, scenario analysis, strategy and business model risk, and disclosures.

The Central Bank notes, in its Letter, that its supervisory expectations do not replace or override any legal, regulatory, or supervisory requirements applicable to the relevant firm and that these expectations are not binding on firms.

The Letter does not set down a time frame within which action must be taken to address the supervisory expectations of the Central Bank.

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

Key Action Points

Fund management companies should consider how they will address these supervisory expectations in their organisational and risk management framework and be in a position to demonstrate to the Central Bank, if required, how same have been satisfied.

6.3 Central Bank issues a 'Dear CEO letter' on MiFID II Suitability Requirements

On 1 December 2021, the Central Bank issued a 'Dear CEO letter' (**Letter**) on MiFID II Suitability Requirements. In the Letter, the Central Bank outlines the findings of a review of MiFID authorised investment firms and credit institutions providing investment services to assess compliance with the suitability requirements under MiFID II (**Review**). The Review was conducted as part of a Common Supervisory Action (**CSA**) coordinated by ESMA in performing their supervisory activities throughout the EU/EEA. The findings incorporate the Central Bank's own supervisory analysis findings, and engagement with other national competent authorities (**NCA**s). The findings were included in ESMA's public statement published on 21 July 2021¹.

The Review identified several instances where further action is required by investment firms, including:

- Firms need to adopt a client-focused approach: The review found a failure by investment firms to establish a risk-based and client-focused approach to suitability that prioritises positive outcomes for clients and puts the necessary safeguards, procedures, and controls in place to ensure clients' best interests are protected;
- Firms must improve their assessment of clients' knowledge and experience, financial situation, and investment objectives: The review found that it was not evident how investment firms considered all relevant information in their assessment, particularly relating to clients' financial situation and their capacity to withstand losses;
- Suitability Reports need to be sufficiently detailed and personalised: The review found that suitability reports relied on automated templates and standardised wording that provides little value to clients, while information on client's financial situation was occasionally missing or limited; and
- Controls on 'Exception' Processes need to be stricter: The review found issue with the quality of oversight of the 'exception' process whereby a client insists on proceeding with the transaction on their own initiative and against the advice of the investment firm. In such an event, the client should be clearly informed of the potential risks involved by proceeding and firms must be able to demonstrate that the transaction was initiated by the client.

¹ ESMA's Public Statement entitled "ESMA presents the results of the 2020 Common Supervisory Action (CSA) on MiFID II suitability requirement" (ESMA35-43-2748)

In the Letter, the Central Bank indicates that all Irish authorised MiFID firms and credit institutions who provide portfolio management and advisory services to retail clients (each a **Relevant Firm**) must conduct a review of their individual sales practices and suitability arrangements. This review must include details of actions taken to address ESMA's findings and the Letter. This review must be completed, and an action plan discussed and approved, by the board of each Firm by the end of Q1 2022.

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

A copy of ESMA's findings of the CSA on MiFID II suitability requirements can be accessed [here](#).

Key Action Points

Each Relevant Firm must, prior to the end of Q1 2022, (i) complete a thorough documented review of their individual sales practices and suitability arrangements; and (ii) ensure that an action plan is discussed and approved by the board of each such Firm to address ESMA's findings and the "Dear CEO Letter."

6.4 Central Bank publishes finalised Cross-Industry Guidance on Outsourcing

On 17 December 2021, the Central Bank published its finalised Cross-Industry Guidance on Outsourcing (**Guidance**) together with a Feedback Statement providing the rationale for some of the approaches taken by it in finalising the Guidance (**Feedback Statement**), following its consultation on the topic of outsourcing earlier this year.

The Guidance, which applies from 17 December 2021, is intended to assist regulated firms in developing their outsourcing risk management framework to effectively identify, monitor and manage their outsourcing risks.

It sets down the Central Bank's supervisory expectations on key matters relating to outsourcing arrangements which include (i) governance and the role of the Board and senior management, (ii) the application of the Guidance to intragroup arrangements, (iii) the need to have a documented outsourcing strategy and outsourcing policy, (iii) conducting outsourcing risk assessments and due diligence on outsourced service providers (**OSPs**), (iv) provisions which should be included in contractual arrangements with certain OSPs and (v) business continuity and disaster recovery arrangements.

For a detailed analysis of the Central Bank Cross-Industry Guidance on Outsourcing and the implications of the Guidance on Irish fund management companies, please refer to our in-depth [client briefing](#) for fund management companies on the topic.

For a detailed analysis of the Central Bank Cross-Industry Guidance on Outsourcing and the implications of the Guidance on Irish depositaries and fund administrators, please refer to our separate in [client briefing](#) on the topic.

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

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

Key Action Points

Management companies and other fund service providers should assess their existing arrangements against the Central Bank's Guidance on Outsourcing to identify what changes will need to be made in order to comply with the Guidance, the key stakeholders involved and the time frame within which necessary steps will be taken.

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

7.1 EBA Revised Guidelines on money laundering and terrorist financing risk factors enter into force

On 7 October 2021, the EBA's Revised Guidelines on AML and CFT risk factors (**Revised Guidelines**) entered into force, following its translation into all official EU languages.

The Revised Guidelines strengthen the requirements on individual and business wide risk assessments, as well as customer due diligence (CDD) measures, including new guidance on the identification of beneficial owners, the use of innovative solutions to identify and verify customers' identities, and how financial institutions should comply with legal provisions on enhanced CDD related to high-risk third countries.

The Revised Guidelines are addressed to both financial institutions and supervisory authorities.

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

7.2 EBA publishes draft guidelines on use of Remote Customer Onboarding Solutions under MLD4

On 10 December 2021, the EBA published a Consultation Paper containing draft guidelines on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive (EU) 2015/849 (**Fourth Money Laundering Directive** or **MLD4**) (**Draft Guidelines**).

The Draft Guidelines set out a common understanding by NCAs of the steps financial service providers should take to ensure safe and effective remote customer onboarding practices in line with applicable AML and CFT legislation and the EU's data protection framework.

Once adopted, the Draft Guidelines will apply to all financial service providers that are within the scope of MLD4.

The EBA has invited comments from stakeholders on the Draft Guidelines, the closing date for responses is 10 March 2022. The EBA will finalise the Draft Guidelines following the consultation period.

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

7.3 EBA publishes final report on RTS setting up an AML/CFT central database

On 20 December 2021, the EBA published a final report on its draft RTS on a central database on AML/CFT in the EU (**Draft RTS**).

The EBA has a mandate to establish and keep up to date a central AML/CFT database. The central AML/CFT database will contain information on material AML/CFT weaknesses in financial sector operators that NCAs have identified. It will also contain information on the measures NCAs have taken in response to those material weaknesses.

The Draft RTS specify when weaknesses are material, the type of information NCAs have to report, how information will be collected and how the EBA will analyse and disseminate the information contained in the database. They also set out the rules necessary to ensure confidentiality, the protection of personal data and the effectiveness of the database.

The EBA will submit the Draft RTS to the European Commission for approval. Once approved, the Draft RTS will be directly applicable in all Member States.

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

8. DATA PROTECTION

8.1 GDPR adequacy decisions in respect of the UK published in the OJ

On 11 October 2021, the two European Commission adequacy decisions for transfers of personal data to the UK, adopted in June 2021, were published in the OJ.

The Decisions conclude, following assessment by the Commission, that the UK ensures an essentially equivalent level of protection to that guaranteed under Regulation (EU) 2016/679 (**General Data Protection Regulation** or **GDPR**) and Directive (EU) 2016/680 (**Law Enforcement Directive**). Personal data can now flow freely from the European Union to the UK.

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

A copy of the adequacy decision concerning GDPR can be accessed [here](#).

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

8.2 EDPB adopts Guidelines on restrictions of data subject rights under Article 23 GDPR following public consultation

On 13 October 2021, the European Data Protection Board (**EDPB**) adopted a final version of the Guidelines 10/2020 on Restrictions under Article 23 of the GDPR (**Guidelines**), following public consultation.

Article 23 of the GDPR permits Member States to restrict data subject rights on the grounds of necessity and proportionality. The Guidelines provide a thorough analysis of the criteria that apply to restrictions, the assessments that need to be observed, how data subjects can exercise their rights after the restrictions are lifted, and the consequences of infringements of Article 23 GDPR.

The Guidelines make it clear that restrictions of data subject's rights must observe the requirements stated in Article 23 GDPR and that Member States issuing the legislative measures setting those restrictions, and the controllers applying them, should be aware of the exceptional nature of the restrictions.

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

9. CROSS-BORDER DISTRIBUTION FRAMEWORK

9.1 Central Bank publishes Notice of Intention relating to ESMA Guidelines on Marketing Communications

On 1 October 2021, the Central Bank published a Notice of Intention in which it provides that it requires all Irish authorised UCITS management companies and AIFMs (which will include self-managed UCITS and internally managed AIFs) to comply with the ESMA Guidelines on Marketing Communications under the Regulation on Cross-Border Distribution of Funds (**Guidelines**) from 2 February 2022.

As explained in the Notice of Intention, the objective of the Guidelines is to establish common principles on the identification of marketing communications, the description of risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and the fair, clear and not-misleading character of marketing communications, taking into account on-line aspects of such marketing communications.

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

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

Key Action Points

Management companies should ensure that all marketing communications published in respect of UCITS and AIF funds under management comply with the Guidelines from 2 February 2022 onwards.

9.2 ESMA publishes revised UCITS Q&A relating to advance notice requirement for marketing of new share class requirements of UCITS notified for cross-border marketing

On 17 December 2021, ESMA published a revised version of its Q&As on the application of the UCITS Directive to include a new Q&A on advance notice for the marketing of new share classes of UCITS notified for cross-border marketing.

In its response, ESMA confirmed that if a UCITS intends to market a new share class in a Member State where it has already been notified for marketing, the UCITS should give written notice to the competent authorities of both the UCITS home and host Member State, at least one month before the marketing of the new share class starts.

A copy of the revised UCITS Q&A can be accessed [here](#).

Key Action Points

Management companies should note that they are required to give written notice to the competent authorities of both the UCITS home and host Member State, at **least one month** before the marketing of the new share class starts.

10. SUSTAINABILITY

10.1 ESAs final report and draft RTS on content and presentation of taxonomy-related sustainability disclosures under SFDR

On 22 October 2021, the ESAs published their final report containing draft RTS which concern the content and presentation of disclosures which will apply to investment funds falling within the scope of the detailed taxonomy-related disclosure obligations set down in Regulation (EU) 2020/852 (**Taxonomy Regulation**). This follows the joint consultation paper on taxonomy-related disclosures published in March 2021.

The draft RTS must now be considered by the European Commission which must decide whether to endorse them within 3 months of their publication date being 22 January 2022. If endorsed, the draft RTS will be amalgamated with the finalised draft RTS under the Sustainable Finance Disclosure Regulation (EU) 2019/2088 (**SFDR**).

While high-level disclosures set down in the Taxonomy Regulation apply from 1 January 2022, the Draft RTS are expected to apply from 1 July 2022, to coincide with the expected application date of the SFDR RTS.

For a detailed analysis of the ESAs final report on draft RTS under the Taxonomy Regulation, please refer to our in-depth [client briefing](#) on the topic.

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

10.2 Central Bank announces fast-track process for Taxonomy and SFDR L2 related updates

On 15 November 2021, the Central Bank issued a Notice confirming its intention to establish a fast-track filing process while also clarifying filing requirements for pre-contractual document updates required under the Taxonomy Regulation and the SFDR Level 2 Measures.

The fast-track process is only available in respect of funds which are already approved by the Central Bank and the filing must follow the prescribed format set out in its communication. Documents should be dated as of date of submission to the Central Bank.

The “Level 1” Taxonomy Regulation requirements apply from 1 January 2022 and will require updates to pre-contractual documentation for UCITS and AIFs. “Level 2” SFDR disclosure requirements, which include taxonomy-related disclosures, (**SFDR Level 2 Measures**) were at the time of the issue of the Notice anticipated to take effect from 1 July 2022. However, the SFDR Level 2 Measures have since been delayed until 1 January 2023. Please see [Section 10.4](#) for further details.

For a detailed analysis of the Central Bank’s Notice on the fast-track filing process for pre-contractual document updates required under the Taxonomy Regulation and the SFDR Level 2 Measures, please refer to our in-depth [client briefing](#) on the topic.

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

10.3 European Commission publishes ESAP Proposal

On 26 November 2021, the European Commission published a legislative proposal relating to the creation of a European Single Access Point (**ESAP**) which is intended to provide public and free access to EU-level financial and sustainability-related information (which is required to be reported under existing EU legislation/comprises of additional categories of information voluntarily reported by stakeholders) from one single access point.

The European Commission has proposed that information must be made available in a data-extractable format, enabling comparability, under open terms of use. It is hoped that this will assist investors in making better-informed investment decisions and allow for a better assessment of sustainability-related risks and impacts of companies and financial market participants.

ESMA is mandated under the proposal to establish the ESAP by 31 December 2024 with the “start date” for filing information on ESAP dependent on the legislative framework under which the relevant institution is regulated.

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

10.4 Delay of entry into force of the SFDR Level 2 Measures

On 29 November 2021, the European Commission issued a letter, dated 25 November 2021, to the European Parliament and European Council (**Commission Letter**) confirming that SFDR Level 2 Measures, which includes the Taxonomy-related disclosures applicable to in-scope financial products, will now apply from 1 January 2023.

The Commission Letter provides that those fund management companies which are required, or voluntarily choose to, report on the principal adverse impacts (**PAI**) of their investment decisions on sustainability factors under Article 4 of the SFDR, will be required to comply with the detailed disclosure obligations imposed under the SFDR Level 2 Measures by 30 June 2023 in respect of a reference period running from 1 January 2022 to 31 December 2022.

It remains to be seen if the Central Bank will proceed with its fast-track process in respect of SFDR filings in light of the delay of entry into force of the relevant disclosure obligations until 1 January 2023.

For a detailed analysis of the implications of this Delay of SFDR Level 2 Measures, please refer to our in-depth [client briefing](#) on the topic.

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

10.5 Publication of the Climate Delegated Act under Article 10 and 11 of the Taxonomy Regulation

On 9 December 2021, Commission Delegated Regulation (EU) 2021/2139 (**Climate Change TSC Delegated Regulation**) was published in the OJ, following significant political discussions by EU Member States, and applied from 1 January 2022.

The Climate Change TSC Delegated Regulation, which was adopted by the European Commission on 4 June 2021, sets down the technical screening criteria (**TSC**) which must be used by fund management companies whose funds fall within the scope of Article 5 or Article 6 of the Taxonomy Regulation in order to determine (i) whether an economic activity is “contributing substantially” to climate change mitigation or climate change adaptation and (ii) whether that economic activity does any significant harm to any of the other environmental objectives set down in Article 9 of the Taxonomy Regulation.

The TSC for climate change mitigation are set out in Annex I to the Climate Change TSC Delegated Regulation while the TSC for climate change adaptation are set out in Annex II thereto.

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

10.6 Publication of Commission Delegated Regulation issued under Article 8 of the Taxonomy Regulation

On 10 December 2021, Commission Delegated Regulation 2121/2178, which supplements Article 8 of the Taxonomy Regulation, (**Delegated Regulation**) was published in the OJ.

The Delegated Regulation specifies the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2014/95/EU (**Non-Financial Reporting Directive** or **NFDR**) concerning environmentally sustainable economic activities. It additionally sets down content and presentation of the information to be disclosed by all undertakings (whether financial undertakings or non-financial undertakings), as well as giving the methodology to comply with that disclosure. The information which must be disclosed is specified for the various types of undertakings in the annexes to the Article 8 Commission Delegated Regulation.

The Article 8 Commission Delegated Regulation had been adopted by the European Commission on 6 July 2021 and applies from 1 January 2022.

The European Commission also published an FAQ document on 21 December 2021 which provides non-binding implementation guidance on disclosures to be made by entities falling within the scope of Article 8 of the Taxonomy Regulation.

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

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

11. MISCELLANEOUS

11.1 ESMA statement on making investment recommendations on social media

On 28 October 2021, ESMA issued a public statement on investment recommendations made on social media. The statement was published following a rise in investments recommendations being made on social media platforms and a growing concern regarding potential risks to retail investors.

The statement defines an investment recommendation, details the process of publication on social media platforms and explains the consequences of potential breaches of Regulation (EU) No 596/2014 (**Market Abuse Regulation** or **MAR**).

MAR consists of various requirements relating to investment recommendations and provides that persons disseminating investment recommendations must disclose their interests and must take reasonable care to ensure that such information is objectively presented. As such, ESMA considers that investment recommendations made on social media must be produced and disseminated in an objective and transparent way so that investors can distinguish facts from opinions prior to making an investment decision and can easily identify the source of the information and any conflicts of interest of those making recommendations.

In addition, Delegated Regulation (EU) 2016/958 provides for further disclosure requirements where an expert publishes investment recommendations, including the provision of a summary of their basis of valuation and an indication of the location where detailed information about the valuations or methodology are easily accessible.

ESMA notes that where rules relating to investment recommendations are not adhered to, there may be fines or further supervisory actions, which in cases of dissemination of false or misleading information could include the referral to public prosecutors for market manipulation.

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

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

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

11.2 ESMA publishes Guidelines on Settlement Fails Reporting under Article 7 CSDR

On 8 December 2021, ESMA published its Final Report on Guidelines on Settlement Fails Reporting under Article 7 of Regulation (EU) No 909/2014 (**Central Securities Depository Regulation** or **CSDR**) (**Guidelines**).

The Guidelines apply in relation to Article 7(1) of the CSDR and Articles 14 and 39 of the Commission Delegated Regulation (EU) 2018/1229 (**RTS on Settlement Discipline**).

The Guidelines apply from the date of entry into force of the RTS on Settlement Discipline. The Central Bank is obliged, within two months, to notify ESMA whether they intend to comply with the Guidelines. Central securities depositories (**CSDs**) are not required to report whether they comply with the Guidelines.

CSDR entered into force in 2014 with an objective of improving securities settlements in the European Union. One of the cornerstones of the CSDR is the introduction of an obligation on CSDs to impose cash penalties on participants to their securities settlement systems that cause settlement fails. Another of the key measures of the new settlement discipline regime established under the CSDR is the introduction of new mandatory buy-in rules. However, the European Commission announced in November 2021 that the application of these new rules has been delayed and will not apply from 1 February 2022.

The new cash penalties regime, which is intended to serve as an effective deterrent for participants that cause settlement fails and to incentivize those in the settlement chain to settle trades in a timely manner, enters into force from 1 February 2022. The CSDR defines a settlement fail as “the non-occurrence of settlement, or partial settlement of a securities transaction on the intended settlement date, due to a lack of securities or cash and regardless of the underlying cause”.

The CSDR itself is supplemented by a number of RTS which include Commission Delegated Regulation 2017/389 as well as the RTS on Settlement Discipline.

For a detailed analysis of the new settlement cash penalties regime, please refer to our in-depth [client briefing](#) on the topic.

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

A copy of the RTS on Settlement Discipline 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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