



Payments, E-Money and Crypto-Assets Quarterly Legal and Regulatory Update

Period covered: 1 April 2022 – 30 June 2022

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1. PAYMENTS

1.1 EBA updates Single Rulebook Q&A on PSD2

During the period 1 April 2022 to 30 June 2022, the European Banking Authority (**EBA**) updated its Single Rulebook Questions and Answers (**Q&As**) publication on Directive (EU) 2015/2366 (**Revised Payment Services Directive** or **PSD2**) (the **Single Rulebook Q&A**). The Q&As in respect of the following articles have been updated:

- Article 68 - Limits of the use of the payment instrument and of the access to payment accounts by payment service providers; and
- Article 97 – Authentication.

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

1.2 EBA publishes final report on the amendment of its regulatory technical standards on the exemption to strong customer authentication for account access

On 5 April 2022, the EBA published its final report containing draft regulatory technical standards (**RTS**) amending Commission Delegated Regulation (EU) 2018/389 (**SCA RTS**) on the amendment of its technical standards on strong customer authentication (**SCA**) and common and secure open standards of communication under PSD2.

The draft RTS introduce a new mandatory exemption to SCA. The exemption will apply to account providers and will require them not to apply SCA when customers use an account information service provider (**AISP**) to access their payment account information, provided that certain conditions are met. The amendment aims to reduce frictions for customers using such services, and to mitigate the impact that the frequent application of SCA and the inconsistent application of the current exemption have on AISP services.

The draft RTS also propose additional changes to limit the scope of the voluntary exemption under Article 10 of the SCA RTS to instances where a customer accesses the account information directly and looks to extend the timeline for renewal of SCA from 90 days to 180 days for information which is accessed either through an AISP or directly by a customer.

The final report follows a public consultation which attracted more than 1,200 responses. The EBA has the power to make some changes itself, but further proposed amendments to address these issues would require changes to PSD2 itself, which is beyond EBA capabilities.

The next step is for the draft RTS will be submitted to the European Commission for endorsement, following which it will be sent to the European Parliament and the Council of the EU for their consideration and approval.

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

1.3 Targeted consultation on the review of PSD2

On 10 May 2022, the European Commission opened a targeted consultation on the review of PSD2. The consultation seeks views from individuals and entities with in-depth technical knowledge and working experience in the field of payments.

The consultation paper notes that the payments market has evolved since the implementation of PSD2 with new market players bringing new payment solutions, services and technologies and that the payment needs of payment service users have changed as a result. The aim of the consultation is ultimately to assess whether the PSD2 legislation remains fit for purpose.

The consultation period ended on 5 July 2022.

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

1.4 E-money Amendment Regulations include a new Regulation regarding non-notification of qualifying holding acquisitions

On 10 May 2022, the European Communities (Electronic Money) (Amendment) Regulations 2022 (**E-money Amendment Regulations**) were published by the Minister for Finance. The E-money Amendment Regulations came into force and apply from that date. They amend the European Communities (Electronic Money) Regulations 2011 (**E-money Regulations**). In addition to some administrative provisions, a new Regulation 38A has been introduced into the E-money Regulations.

The new Regulation 38A applies in conjunction with the existing Regulation 38. Regulation 38 addresses the procedure for an acquisition or disposal of a qualifying holding in an electronic money institution (**EMI**). A person must notify the Central Bank of Ireland (the **Central Bank**) in writing of a proposed acquisition or disposal of a qualifying holding in an EMI under Regulation 38 of the E-money Regulations.

Regulation 38A provides for an application to court in circumstances where an acquisition of a qualifying holding in an EMI is concluded without notification being made to the Central Bank. If the court is satisfied that the failure to so notify was inadvertent and it is in the interest of justice to do so, an order may be made requiring (i) the person to provide all necessary information to the Central Bank in respect of such qualifying holding and (ii) the Central Bank to make an assessment of the qualifying holding in accordance with Regulations 40-42 of the E-money Regulations.

The E-money Amendment Regulations can be accessed [here](#).

2. DIGITAL FINANCE & CRYPTO-ASSETS

2.1 Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology is published in the OJ

On 2 June 2022, Regulation (EU) 2022/858 (**DLT Regulation**) of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology (**DLT**), and amending Regulations (EU) No 600/2014 (**MiFIR**) and (EU) No 909/2014 (**Central Securities Depositories Regulation** or **CSDR**) and Directive 2014/65/EU (**MiFID II**) was published in the Official Journal of the EU (**OJ**).

The DLT Regulation aims to develop the trading and settlement for 'tokenised' securities. The DLT Regulation entered into force twenty days following its publication in the OJ, on 22 June 2022 and the majority of its provisions will apply from 23 March 2023.

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

2.2 Travel Rule Regulation: Provisional agreement reached on proposed Regulation on transparency of crypto-asset transfers

On 29 June 2022, the European Council published a press release announcing provisional agreement on the updating of rules on information accompanying the transfer of funds by extending those rules to crypto-assets, the so called "travel rule". The European Parliament also published a press release on the agreement. The proposed travel rule Regulation will ensure financial transparency on exchanges of crypto-assets and will enable the EU to monitor and deal with the risks these technologies are exposed to with regard to money laundering and terrorist financing (**ML/TF**).

The rules set out new obligations on crypto-asset service providers (**CASPs**) regarding the collection and provision of information about the originator and the beneficiary of the transfer of crypto-assets they operate. To comply with the travel rule Regulation CASPs will have to implement internal policies, procedures and controls to ensure compliance with EU restrictive measures and to obtain all relevant information for transfers of crypto-assets.

It was agreed that urgency is required to ensure the traceability of the transfer of crypto-assets and the co-legislators chose to align the application of the travel rule Regulation with the markets in crypto-assets (**MiCA**) Regulation.

The European Council's press release can be accessed [here](#). The European Parliament's press release can be accessed [here](#).

2.3 MiCA Regulation: Political agreement reached on proposed Regulation on markets in crypto-assets

On 30 June 2022, the European Council published a press release announcing that it has reached political agreement with the European Parliament on the proposed MiCA Regulation. The European Parliament has also released a press release on the agreement. The MiCA Regulation will bring crypto-assets, as well as issuers of certain types of crypto-assets and CASPs under the regulatory framework in the EU.

The Council's press release noted the particular importance of the following aspects of the agreement:

- Actors in the crypto-asset market will be required to disclose information on their environmental and climate footprint and ESMA will develop RTS specifying the content, methodologies and presentation of the information of such disclosures;
- CASPs will be required to seek authorisation with a national competent authority (**NCA**) to operate in the EU. This authorisation process will be completed within three months and NCAs will regularly transmit relevant information regarding their largest CASPs to ESMA; and
- Non-fungible tokens (NFTs) will not be included in the scope of MiCA if they do not fall under existing crypto-asset categories.

We await the publication of the text of the agreed MiCA Regulation.

The European Council's press release can be accessed [here](#). The European Parliament's press release can be accessed [here](#).

3. CENTRAL BANK OF IRELAND

3.1 Central Bank updates its Frequently Asked Questions on PSD2

On 1 June 2022, the Central Bank updated their PSD2 Frequently Asked Questions, adding to the question regarding the notification requirements on firms benefiting from the limited network exclusion. The limited network exclusion is provided for under Regulation 4(1)(k) (i) or (ii) of the European Union (Payment Services) Regulations 2018 (the **Payments Services Regulations**). The limited network exclusion exemption applies to specific payment instruments that can be used only in a limited way such as store cards and gift cards, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers etc.

Previously service providers that benefited from the limited network exclusion only had to notify the Central bank if the total value of payments exceeded €1m in any 12 month period. The updated FAQs now clarify that the Central Bank should also be notified when, for any given period shorter than 12 months, the total value of payment transactions executed exceeds the amount of €1m for that period.

The Central Bank also added that their decision on whether a notification meets the relevant exclusion criteria will be based on the clarifications provided in the EBA Guidelines on limited network exclusion under PSD2, which apply from 1 June 2022. The Central Bank expects service providers to submit their limited network exclusion notifications based on the requirements set out in the EBA guidelines.

The Central Bank's updated Frequently Asked Questions on PSD2 can be accessed [here](#).

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

3.2 Template Outsourcing Register for submission to the Central Bank

As set out in the Central Bank's Cross-Industry Guidance on Outsourcing issued on 17 December 2021, regulated firms whose PRISM Impact Rating is Medium Low or above (or its equivalent) are required to submit their Outsourcing Registers to the Central Bank on an annual basis via a new online return. The Central Bank is currently testing the template Outsourcing Register which will be made available through the Online Reporting System (**ONR**). It is understood that firms will have two months to complete the return from the date that templates are made available.

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

4.1 Joint ESAs report on the withdrawal of authorisation for serious breaches of AML/CFT rules

On 1 June, the European Supervisory Authorities (**ESAs**) published a joint report on the withdrawal of authorisation of financial entities for serious breaches of anti-money laundering and combating the financing of terrorism (**AML/CFT**) rules. The report identifies 26 instances on which such a withdrawal occurred in the past 10 years.

The report emphasises that withdrawal of authorisation of a regulated entity for a breach of AML/CFT rules should be a last resort measure and that competent authorities should respect proportionality requirements in respect of same. Nonetheless, the report makes some recommendations and supports some amendments to the current EU AML/CFT regime including:

- specifically empowering competent authorities in the sectoral acts to withdraw authorisation (or registration) for AML/CFT breaches on the basis this would promote legal certainty for regulated entities (as this is currently only legislated for under Directive 2013/36/EU (**CRD**));
- recommending that competent authorities would, as a condition for granting authorisation, expressly consider the applicant's exposure to ML/TF risk. The ESAs believe this would enable sound and effective risk management and compliance with AML/CFT requirements;
- that competent authorities should consider the context of a breach, and that assessments should be made on a case-by-case basis. The report clarifies the criteria of a serious breach of AML/CFT rules that shall be considered and assessed in such circumstances; and
- emphasising the importance of cooperation and exchange of information between the competent prudential supervisors and resolution authorities.

The report concludes with an overview of how the assessment of ML/TF risks is embedded in prudential regulation and supervision within the CRD framework, which has been recently updated and revised to embed AML/CFT requirements.

The report is accessible [here](#).

4.2 EBA publishes final guidelines on role of AML/CFT compliance officers

On 14 June 2022, the EBA published its final guidelines (**Guidelines**) on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT compliance officer under Article 8 and Chapter VI of Directive (EU) 2015/849 (the **Fourth Money Laundering Directive** or **MLD4**).

The key areas addressed in the Guidelines are:

- Role and responsibilities of the management body in the AML/CFT framework and of the senior manager responsible for AML/CFT;
- Role and responsibilities of the AML/CFT compliance officer; and
- Organisation of the AML/CFT compliance function at group level.

The Guidelines will apply from 1 December 2022.

The Guidelines can be accessed [here](#). For more information, please see our Dillon Eustace article on this topic [here](#).

5. DATA PROTECTION

5.1 EDPB adopts statement on the new Trans-Atlantic Data Privacy Framework

On 6 April 2022, the European Data Protection Board (**EDPB**) adopted a statement on the political agreement in principle between the European Commission and the United States on a new Trans-Atlantic Data Privacy Framework.

The EDPB welcomed as a positive first step the U.S. highest authorities' commitment to establish measures protecting the privacy and personal data of individuals in the European Economic Area (**EEA**) when those data are transferred to the U.S.

There is not yet a legal framework on which data exporters can base their data transfers to the U.S. Data exporters must still ensure compliance with the CJEU's case law, in particular the Schrems II decision of 2020.

Under Regulation (EU) 2016/679 (**GDPR**), the European Commission must request an opinion of the EDPB before adopting an adequacy decision recognising the U.S. data protection laws as equivalent and satisfactory. On receipt of all supporting documents from the European Commission, the EDPB will prepare its opinion. The EDPB stated that it will in particular analyse whether the collection of personal data for national security purposes is limited to what is strictly necessary and proportionate, in the context of the new framework.

A copy of the EDPB's statement can be accessed [here](#).

5.2 European Commission publishes Questions and Answers on the new Standard Contractual Clauses

On 25 May 2022, the European Commission published Questions and Answers on the new Standard Contractual Clauses (**SCCs**) (the **SCC Q&As**) following its adoption of the new SCCs in June 2021. The SCC Q&As aim to provide practical guidance on the use of the SCCs to assist stakeholders in their compliance with their obligations under the GDPR.

The new SCCs for data transfers to third countries replace the previous SCCs adopted by the Commission under Directive 95/46/EC (**Data Protection Directive**). The new SCCs have a modular structure covering data transfers between the following parties: Controller to Controller (Module 1), Controller to Processor (Module 2), Processor to Processor (Module 3), and Processor to Controller (Module 4). The new SCCs also include a docking clause which allows new parties to join the SCCs throughout the life cycle of the contract.

The SCC Q&As clarify that the new SCCs cover the Article 28 requirements for controller to processor contracts, so companies do not need to enter a separate contract to comply with Article 28 of the GDPR.

The SCC Q&As confirm the scope of the SCCs, that they apply to controllers or processors that are subject to the GDPR and the transfer of personal data to controllers or processors outside the EEA whose activities are not subject to the GDPR. The SCC Q&As further confirm that the new SCCs cannot be used for data transfers to controllers or processors whose processing operations are

directly subject to the GDPR by virtue of the extraterritorial application of Article 3 of the GDPR. The European Commission has confirmed that it is developing an additional set of SCCs for this scenario.

There are 44 Q&As in total which also include general Q&As on how the SCCs should be executed, whether the text of the SCCs can be changed, whether they can be incorporated into a broader contract and whether additional provisions can be added.

Companies using the old SCCs have until 27 December 2022 to incorporate the new SCCs into their relevant contractual agreements.

The SCC Q&As can be accessed [here](#).

6. MISCELLANEOUS

6.1 EU Sanctions against Russia

In reaction to Russia's military aggression against Ukraine, the European Union has adopted additional suites of economic sanctions against Russia and Belarus which have been introduced through packages adopted by the Council of the EU on 8 April 2022 and 3 June 2022 respectively (**Sanctions**).

The latest measures introduced under the Sanctions include (i) an extension of the prohibitions on the export of banknotes and on the sale of transferable securities (or collective investment schemes providing exposure to such transferable securities) denominated in any official currency of the EU to Russian or Belarusian nationals or entities (ii) further freezing of assets of Russian and Belarusian individuals and entities, (iii) an extension on the prohibition of SWIFT services to certain Russian and Belarusian banks and subsidiaries, (iv) a full transaction bank and asset freeze on additional Russian banks and (v) measures which strengthen provisions on national penalties for any breach of the Sanctions.

The package of sanctions announced on 8 April 2022 can be accessed [here](#).

The package of sanctions announced on 3 June 2022 can be accessed [here](#).

6.2 EBA provides its advice to the EU Commission on non-bank lending

On 4 May 2022, the EBA published a report on non-bank lending in response to the European Commission's February 2021 call for advice on digital finance and related issues. As part of the call for advice, the EBA was specifically asked to carry out an analysis of the non-bank lending sector. The EBA's report outlines its finding on non-bank lending and provides advice and proposals on policy options to the European Commission.

While non-bank lending in the EU remains limited in extent compared to bank lending, the EBA recognises that FinTech activity has increased in recent years. The EBA notes the rapid increase in crypto-asset lending since 2020, when decentralised finance (**DeFi**) began to grow, which it believes has contributed to the extension and reach of non-bank lending activities albeit in alternative means other than conventional fiat funds.

The report notes that regulatory regimes applicable to non-bank lending remain largely unharmonised across the EU, and this may create challenges for all stakeholders, including regulators. In the report, the EBA identifies areas with specific risks and puts forwards proposals to address them, including:

- strengthening the provisions in terms of authorisation and admission to activities and clarifying the identification of the responsibilities of the home and host supervisory authorities regarding the provision of cross-border non-bank lending;

- ensuring that the consumer protection framework remains fit for purpose with respect to the entrance of new players in the market. To achieve this, the EBA recommends (i) that disclosure requirements for high-quality, clear and easily accessible information on products and services are adapted to the growing use of distance marketing (See [Section 6.3](#) below regarding the proposed new Directive to address this) and (ii) strengthening the requirements for creditworthiness assessments and ensuring that they are conducted in the interest of consumers;
- covering all non-bank lenders in a more comprehensive way in the EU-wide AML/CTF framework, to achieve greater harmonisation and capture these entities as 'obliged entities' under EU AML/CFT legislation;
- enhancing the monitoring and reporting infrastructure at EU level to avoid a situation where macroprudential risks remain unaddressed and consider the introduction of activity-based macro-prudential measures to cover all credit providers.

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

6.3 European Commission legislative proposal for Directive on distance financial services

On 11 May 2022, the European Commission published a new proposal to amend the rules concerning financial services contracts concluded at a distance. The aim of the proposal is to simplify and modernise the legislative framework.

The Commission proposes to repeal Directive 2002/65/EC (the **Distance Marketing Directive**) and to amend Directive 2011/83/EU (the **Consumer Credit Directive**). A series of legislative evaluations have concluded that the Distance Marketing Directive has seen its relevance and added value decrease. This follows the introduction into force of subsequent product-specific legislative acts and horizontal legislation relating to consumer's rights with regard to financial services. These subsequent legislative acts include the Directive 2011/83/EU (**Consumer Rights Directive**), Directive 2014/17/EU (**Mortgage Credit Directive**) and the GDPR.

Certain aspects of the Distance Marketing Directive remain relevant to ensure a high level of consumer protection, such as the right to pre-contractual information for certain particularly expensive investments and the right to withdraw from a contract (although this right is strengthened in the proposal). It is therefore proposed to bring these relevant aspects within the scope of the horizontally applicable Consumer Rights Directive.

A copy of the proposal is accessible [here](#).

6.4 ESMA's planned consultations for the remainder of 2022

On 27 June 2022, ESMA released an updated overview of the planned consultation papers for 2022. The following planned Consultation papers may be of interest:

- Consultation on Guidelines on standard forms, formats and templates (under Distributed Ledger Technology (DLT) Pilot Regime) is planned for Q3/Q4, and;
- ESMA notes that depending on the outcome of negotiations on legislative processes, a consultation on MiCA might be envisaged in 2022. Political agreement was reached on 30 June (see [Section 2.3](#) above) and so ESMA may open a consultation on MiCA in 2022.

You can access ESMA's planned consultation papers [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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