



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

Period covered: 1 July 2021 – 30 September 2021

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## 1. PAYMENTS

### 1.1 EBA updates Single Rulebook Q&A on PSD2

During the period 1 July 2021 to 30 September 2021, the European Banking Authority (**EBA**) updated its Single Rulebook Questions and Answers publication (**Single Rulebook Q&A**) on the Revised Payment Services Directive (2015/2366/EU) (**PSD2**). The Q&As in respect of the following articles have been updated:

- Article 4(30) – Definitions: strong customer authentication;
- Article 24 – Professional secrecy;
- Article 66 – Rules on access to payment account in the case of payment initiation services;
- Article 97 - Authentication; and
- Article 98 – Regulatory technical standards on authentication and communication.

The Single Rulebook Q&A can be accessed [here](#).

### 1.2 EBA consults on the draft guidelines on the limited network exclusion under PSD2

On 15 July 2021, the EBA launched a public consultation on draft guidelines providing clarity on the application of the limited network exclusion requirements laid down in PSD2. The excluded payment instruments include store cards, fuel cards, membership cards, public transport cards, parking tickets, meal vouchers and others.

The EBA identified inconsistencies on how this exclusion is applied across the EU. The proposed guidelines aim to bring about convergence on a range of aspects of PSD2's application, including on how a network of service providers or a range of goods and services should be assessed in order to qualify as 'limited' for the purposes of the exclusion requirements, the use of payment instruments within limited networks, the provision of excluded services by regulated financial institutions and electronic money issuers, and the submission of notification to competent authorities.

The consultation period runs until 15 October 2021. The final guidelines will be published following the end of the consultation period.

The consultation paper can be accessed [here](#) and the consultation is available [here](#).

### 1.3 European Commission Regulation for the codification of cross-border payment rules in the EU

On 30 July 2021, Regulation (EU) 2021/1230 (the **New Regulation**) of 14 July 2021 on cross-border payments in the Union was published in the Official Journal of the EU (**OJ**).

The New Regulation codifies Regulation (EC) No 924/2009 on cross-border payments in the Community and repeals Regulation (EC) No 2560/2001. The New Regulation supersedes the existing rules on cross-border payments but the content of the acts being codified is fully preserved.

The New Regulation entered into force on 19 August 2021, 20 days following publication in the OJ. The New Regulation can be accessed [here](#).

Irish legislation has been updated for the purpose of giving effect to the New Regulation by way of:

- the European Communities (Cross Border Payments) (Amendment) Regulations 2021 (S.I. No. 417 of 2021) amending the European Communities (Cross Border Payments) Regulations 2010 (S.I. No. 183 of 2010), which can be accessed [here](#); and
- the European Union (Payment Services) (Amendment) Regulations 2021 (S.I. No. 418 of 2021) amending the European Union (Payment Services) Regulations, which can be accessed [here](#).

The Irish regulations came into effect on 24 August 2021.

#### 1.4 EBA report on the use of digital platforms in the EU banking and payments sector

On 21 September 2021, the EBA published a report on the use of digital platforms in the EU banking and payments sector (the **Report**). The EBA published the Report following a sharp acceleration in the digitalisation of both front and back-office processes in the EU banking and payments sector, and observing rapid growth in the use of digital platforms to 'bridge' customers with financial institutions.

The EBA found that the majority of competent authorities currently have a limited understanding of platform-based business models, particularly in the context of interdependencies between financial institutions and technology companies outside the perimeter of competent authorities' direct supervision. As a result, the EBA intends, as a priority in 2022, to help competent authorities deepen their understanding of platform-based business models and the opportunities and risks arising by supporting competent authorities in:

- developing common questionnaires for regulated financial institutions on digital platform and enabler use; and
- sharing information about financial institutions' reliance on digital platforms and enablers in order to facilitate coordinated EU-wide monitoring.

Following from this more comprehensive monitoring by competent authorities, the EBA will:

- develop a framework to facilitate the aggregation of information about financial institutions' dependencies on digital platforms and enablers in order to identify cumulative dependencies in the context of the marketing and distribution of financial products and services; and
- establish indicators that could help in assessing potential concentration, contagion and potentially future systemic risks that could be taken into account in the context of supervision.

The proposals will be considered in the context of the European Supervisory Authorities (**ESAs**) work following the European Commission's [Call for Advice](#) on digital finance and related issues in February 2021. The proposals intend for the EBA to continue to enable greater supervisory knowledge sharing for financial sector supervision, consumer protection, data protection and competition.

The Report also emphasises the EBA's previous recommendation to the European Commission to update its interpretative communications relating to when a digital activity should be considered as a cross-border provision of services.

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

#### 1.5 Delegated Regulation supplementing PSD2 with RTS on framework for home-host co-operation and information exchange

On 28 September 2021, Commission Delegated Regulation (EU) 2021/1722 supplementing PSD2 with regard to regulatory technical standards (**RTS**) was published in the OJ. The Delegated Regulation establishes the framework for co-operation and the exchange of information between competent authorities of the home and the host member states in the context of supervision of payment institutions (**PIs**) and electronic money institutions (**EMIs**) exercising cross-border provision of payment services.

The Delegated Regulation will enter into force, and apply, on 18 October 2021, being 20 days after its publication in the OJ.

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

## 2. DIGITAL FINANCE & CRYPTO-ASSETS

### 2.1 ECON adopts report on proposed Regulation on pilot regime for market infrastructures based on DLT

On 13 July 2021, the European Parliament's Economic and Monetary Affairs Committee (**ECON**) published a press release on the adoption of its report on the temporary pilot regime for financial services based on distributed ledger technology (**DLT**) following the publication of the European Commission's proposal in September 2020 (the **Report**).

The Report proposes the following amendments:

- **Eligible financial instruments.** The Report provides that DLT market financial instrument services delivered via the pilot regime should be limited and subject to thresholds for shares, bonds, exchange-traded funds (**ETFs**) and UCITS. The Report also provides that DLT operators will only be allowed to admit new financial instruments until their total market value reaches EUR 5 billion.
- **Investor protection.** There should be adequate safeguards in place to ensure the effective protection of investors related to the use of DLT, including clearly defined lines of liability to clients for any losses due to operational failures. The Report allows for new entrants to access the pilot regime provided they ensure compliance with the same requirements as authorised investment firms or market operators.
- **The role of the European Securities and Markets Authority (ESMA).** The Report provides that ESMA should have a direct supervisory mandate for granting permissions and exemptions to a DLT market infrastructure across the EU, after consulting national competent authorities (**NCA**s). ESMA should publish annual interim reports about the most important trends, risks, and vulnerabilities during the pilot regime's implementation, recommending the first report be published after the first year with a final report published after five years.

The press release can be accessed [here](#) and the European Commission's proposal can be accessed [here](#).

The Report was published on 17 August 2021 and can be accessed [here](#).

### 2.2 Eurosystem launches digital euro project

On 14 July 2021, the European Central Bank (**ECB**) published a press release announcing that it has decided to launch the investigation phase of the digital euro project. The investigation phase will last 24 months and looks to address key issues regarding design and distribution. The objective is to create a riskless, accessible, and efficient form of digital central bank money.

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

## 3. CENTRAL BANK OF IRELAND

### 3.1 Senior Executive Accountability Regime

On 27 July 2021, the Department of Finance in Ireland published the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021 (**General Scheme**). The General Scheme provides for the establishment of the Individual Accountability

Framework (**IAF**) which includes the Senior Executive Accountability Regime (**SEAR**) to be modelled on the United Kingdom's Senior Manager and Certification Regime.

The purpose of the IAF is to create a framework to facilitate individual accountability and responsibility, particularly for individuals performing senior executive functions (**SEFs**) within Irish Regulated Financial Service Providers (**RFSPs**).

The General Scheme can be accessed [here](#).

Please see our Dillon Eustace briefing paper entitled "Individual Accountability Framework and SEAR – Key Questions" which can be accessed [here](#) for further details.

### 3.2 Central Bank announces intention to change list of PCF functions

On 22 September 2021, the Central Bank published a Notice of Intention informing industry of its intention to make certain changes to pre-approval controlled functions (**PCFs**) under the Central Bank's Fitness and Probity regime. The proposed amendments to the PCF functions will apply to Irish RFSPs.

The Notice of Intention confirms that the Central Bank intends to introduce the following modifications to its PCF roles:

- PCF-2 (Non-Executive Director) will be divided into two individual positions to reflect the distinction between non-executive directors which are independent and those which are not. Under the new rules, PCF-2A relates to Non-Executive Directors and PCF-2B introduces the new PCF of Independent Non-Executive Director.
- There will no longer be a PCF-15 (Head of Compliance with responsibility for AML). Under the new rules, the PCF-12 (Head of Compliance) remains in place and a PCF-52 will be introduced as the new PCF of Head of Anti-Money Laundering and Counter Terrorist Financing. An individual can perform both PCF-12 and PCF-52.
- PCF-16 will be expanded so that managers of branches of Irish regulated entities established in non-EEA countries (which now includes the UK) will become PCF functions requiring the approval of the Central Bank prior to being appointed to the role.
- PCF-31 (Head of Investment) has been removed in light of the overlap with PCF-30 (Chief Investment Officer).

Such modifications to the PCF roles will be required to be implemented by new regulations amending the Central Bank Reform Act 2010 (as amended) (**Amending Regulations**). The Notice of Intention sets out the required action to be taken by individuals performing the amended PCF roles once the Amending Regulations come into effect. It notes that RFSPs will have six weeks from the date on which the Amending Regulations enter into force to make the appropriate filings with the Central Bank for PCF redesignation.

The following process will apply in respect of the amended PCFs:

- All PCF-2 will be automatically redesignated as PCF-2A. In the case of any non-executive director who is independent, the relevant RFSP will be required to notify the Central Bank that such individual should be redesignated as a PCF-2B and confirm that the necessary due diligence to assess independence has been undertaken.
- All those designated as PCF-15 will be required to notify the Central Bank of how they should be designated under the new regime (e.g. PCF-12, PCF-52 or both). RFSPs should assess whether anyone within their organisation performs the role of Head of Anti-Money Laundering and Counter Terrorist Financing, and if so, the relevant RFSP will need to confirm to the Central Bank that they have conducted the relevant assessment required under Section 21 of the Central Bank Reform Act 2010 before filing for the PCF.
- All individuals designated as PCF-31 will automatically be redesignated as a PCF-30 (without any action taken by the PCF-31 holders).

Any new appointments to these PCF functions which are made after the Amending Regulations enter into force will need to comply with the full application process.

The Notice of Intention can be accessed [here](#).

### 3.3 Central Bank Levy

On 24 September 2021, the Central Bank Act 1942 (Section 32D) Regulations 2021 (S.I. No. 487 of 2021) (**Regulations**) came into operation setting out the levy contribution payable by financial service providers in respect of the “levy period” meaning the period 1 January 2020 to 31 December 2020.

Category N of the Schedule to the Regulations addresses the amount of the levy contribution for payment institutions and e-money institutions.

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

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

### 4.1 FATF second report on review of revised AML and CTF standards on virtual assets and virtual asset service providers

On 5 July 2021, the Financial Action Task Force (**FATF**) published a report on its second 12-month review of the implementation of its revised standards on AML/CFT on virtual assets and virtual asset service providers (**VASPs**) (the **Report**).

The Report looks at how jurisdictions and the private sector have implemented the revised standards since the FATF's first 12-month review. It also looks at changes in the typologies, risks and the market structure of the virtual assets sector.

The Report finds that many jurisdictions are making progress in implementing the revised FATF standards. However, 70 of 128 reporting jurisdictions have not yet implemented the revised FATF standards into national law. These gaps in implementation mean that there is not yet a global regime to prevent the misuse of virtual assets and VASPs for money laundering or terrorist financing.

There is evidence of progress in the supervision of VASPs and implementation of AML/CFT obligations by VASPs. In particular, there is evidence of progress in the development of technological solutions to enable the implementation of the ‘travel rule’ for VASPs (the travel rule is a key AML/CFT measure, which mandates that VASPs collect, retain and exchange information about the originators and beneficiaries of virtual asset transfers.) However, the lack of implementation of the travel rule requirements by jurisdictions is acting as a disincentive to the private sector, particularly VASPs, to invest in the necessary technology solutions and compliance infrastructure to comply with the travel rule.

There were also concerns about the significant amount of peer-to-peer transfers and associated AML/CFT risks. However, the Report did not find any clear evidence of a shift towards peer-to-peer transactions.

The Report advises that all jurisdictions need to implement the revised FATF standards, including travel rule requirements, as quickly as possible. The FATF will undertake the following actions focused on virtual assets and VASPs:

- focus on implementing the current FATF Standards on virtual assets and VASPs, including through finalising the revised FATF Guidance on virtual assets and VASPs by November 2021;
- accelerate the implementation of the travel rule; and

- monitor the virtual asset and VASP sector, but not further revise the FATF Standards at this point in time (except to make technical amendments regarding proliferation financing).

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

#### 4.2 Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets (*'the travel rule'*)

On 20 July 2021, the European Commission published its proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast) (implementing the so-called 'travel rule').

The proposal for the recast of the Regulation (EU) 2015/847 on Transfers of Funds expanding traceability requirements to crypto-assets is one of four legislative proposals forming part of the AML/CFT legislative package launched under the European Commission's AML Action Plan. The Regulation on Transfers of Funds was initially adopted to ensure traceability of fund transfers and ensure the transmission of information throughout the payment chain by imposing obligations on payment service providers to accompany fund transfers with information on the payer and the payee. However, the Regulation on Transfers of Funds does not cover the transfer of virtual assets.

Up to this point, virtual assets have not been governed by EU legislation on financial services, allowing for greater money laundering and financing of terrorism risks. The Commission considers that virtual asset transfers have the same money laundering and terrorist financing risks as wire fund transfers, and as a result has proposed that the Regulation on Transfers of Funds be expanded to cover virtual assets adequately.

Market participants can provide feedback and access the text of the proposal [here](#). The consultation period is open until 29 November 2021.

#### 4.3 The EU's new AML framework – overview of the draft legislation

On 20 July 2021, the European Commission published a set of four legislative proposals with the aim of strengthening the EU's AML/CFT rules (**AML Legislative Package**). The proposals also aim to create a more consistent and harmonious AML/CFT framework across the EU.

The AML Legislative Package consists of four legislative proposals:

- A new EU Authority for AML and CFT, which can be accessed [here](#);
- A Single EU Rulebook for AML/CFT, which can be accessed [here](#);
- A sixth Directive on AML/CFT, repealing Directive (EU) 2015/849 (**Fourth Money Laundering Directive** or **MLD4**), which can be accessed [here](#); and
- A revised Regulation on Transfers of Funds to trace transfers of crypto-assets, which can be accessed [here](#). See [section 4.2](#) above for more details.

The European Commission is seeking the views of stakeholders on each of the proposed legislative measures. The consultation period closes on 25 October 2021.

Please see the Dillon Eustace briefing paper entitled "The EU's new AML framework – overview of the draft legislation" which can be accessed [here](#).

#### 4.4 EBA publishes draft guidelines on role of AML/CFT compliance officers

On 2 August 2021, the EBA launched a public consultation on draft 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 AMLD4 (**Draft Guidelines**).

The purpose of the Draft Guidelines is to set clear expectations of the role and responsibilities of the AML/CFT compliance officer and the management body with regards to AML/CFT (or the senior manager where no management body exists).

The Draft Guidelines, when finalised, will apply to all financial services firms regulated by the Central Bank.

The Draft Guidelines can be accessed [here](#). The EBA has invited comments from stakeholders on the Draft Guidelines. Comments may be submitted via a consultation form, which can be accessed [here](#). The closing date for receipt of comments is 2 November 2021.

Please see the Dillon Eustace briefing paper entitled “EBA publishes draft guidelines on role of AML/CFT compliance officers” which can be accessed [here](#).

## 5. DATA PROTECTION

### 5.1 EDPB adopts final version of guidelines on the concepts of controller and processor in the GDPR

On 7 July 2021, the European Data Protection Board (**EDPB**) adopted the second and final version of its Guidelines on the concepts of Controller and Processor (**Guidelines**).

The Guidelines seek to provide guidance on the concepts of controller and processor by clarifying the meaning of these concepts and clarifying the different roles and the distribution of responsibilities between these actors.

The Guidelines specifically address the extent to which Regulation (EU) 2016/679 (**General Data Protection Regulation** or **GDPR**) introduced changes to these concepts, including the implications of joint controllership under Article 26 GDPR and the relationship between controller and processor under Article 28 GDPR.

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

The Guidelines had been subject to a public consultation in Q3 2020.

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

### 5.2 Data Protection: International Data Transfers

On 14 September 2021, Dillon Eustace published a briefing paper entitled Data Protection: International Data Transfers (**Briefing**).

Under the GDPR, data controllers and data processors are only permitted to transfer personal data outside the European Economic Area (**EEA**) in accordance with one of the safeguards set down in Chapter V of the GDPR.

Since the Court of Justice of the European Union (**CJEU**) issued its ruling in the Schrems II<sup>1</sup> case in July 2020, there have been a number of significant developments in the area of international data transfers, including the publication of new Standard Contractual

<sup>1</sup> Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems

Clauses (**New SCCs**), the publication of two new sets of recommendations by the EDPB and the adoption by the European Commission of a time limited adequacy decision in favour of the UK.

The Briefing addresses the New SCCs and the related requirements to carry out an assessment of the laws and practices of the third country of destination and the supplementary measures which may be needed in order to legitimise the transfer of personal data using the New SCCs.

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

### 5.3 Data Protection Commission launches revised breach notification web-form

On 15 September 2021, the Data Protection Commission (**DPC**) published an overview of its revised breach notification web-forms (**DPC Briefing**). Data controllers currently use a web-form, available on the DPC website, to notify personal data breaches in accordance with Article 33 of the GDPR and Section 86 of the Data Protection Act 2018.

The purpose of the revised breach notification web-form is:

- to improve ease-of-use for data controllers;
- to streamline the method of notifying “cross-border” personal data breaches and “national” personal data breaches into a single channel; and
- to expand the questions that are asked in order to reduce the requirement for the DPC to issue follow-up enquiries to data controllers.

On foot of this review, data controllers will be required in the coming weeks to use a revised web-form.

The DPC briefing 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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