DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Investment Firms

Quarterly Legal and Regulatory Update

Period covered: 1 January 2024 – 31 March 2024

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1. MIFID II

1.1 ESMA published updated manual on post-trade transparency under MiFID II

On 8 January 2024, the European Securities and Markets Authority (**ESMA**) published an updated version of its manual on post-trade transparency (**MiFID Post-Trade Transparency Manual**) under the Markets in Financial Instruments Directive 2014/65 (EU) (**MiFID II**) and the Markets in Financial Instruments Regulation 600/2014 (**MiFIR**).

The MiFID Post-Trade Transparency Manual includes the following updates:

- A correction related to the type of transactions subject to post-trade transparency; and
- Includes guidance on non-equity transparency calculations.

ESMA has outlined that the MiFID Post-Trade Transparency Manual will soon be further updated upon the review of MiFID II and MiFIR and related delegated legislation.

A copy of the updated MiFID Post-Trade Transparency Manual can be accessed **here**.

1.2 Updated ESMA opinion on assessment of pre-trade transparency waivers under MiFIR

On 8 January 2024, ESMA published an updated version of its opinion on the assessment of pre-trade transparency waivers for equity and non-equity instruments (**Opinion**).

In its updated Opinion, ESMA provides guidance on the main issues identified by ESMA to date in the processing of notified waivers issued by National Competent Authorities (**NCAs**) under Articles 4(4) and 9(2) of MiFIR.

The updated Opinion aims to clarify the MiFIR requirements for NCAs in respect of pre-trade transparency waivers.

A copy of the Opinion can be accessed **here**.

1.3 ESMA launches common supervisory action on MiFID II pre-trade controls

On 11 January 2024, ESMA issued a press release to announce the launch of a common supervisory action (**CSA**) with NCAs on the implementation of pre-trade controls (**PTCs**) by investment firms using algorithmic trading techniques.

The CSA will be completed during 2024 and will address how firms using algorithmic trading techniques are using PTCs and assess firms' frameworks relating to PTCs.

A copy of ESMA's press release can be accessed **here**.

1.4 Error & omission notification forms for MiFIR transaction reporting

On 12 January 2024, the Central Bank published an Operational and Technical Arrangements document which sets out the arrangements for submitting Error & Omission Notification forms under Article 15(2) of Commission Delegated Regulation 2017/590 for MiFIR Transaction Reporting Purposes.

A copy of the Operational and Technical Arrangements document can be accessed **here**.

1.5 Updated version of guidance for completion of Annual Conduct of Business Return

On 18 January 2024, the Central Bank published an updated version of its Annual Conduct of Business Return - Guidance for Completion document (**Guidance**).

The Annual Conduct of Business Return (**Return**) is applicable to all investment firms authorised under the Irish MiFID Regulations and branches established in Ireland by firms authorised in another Member State and providing services in Ireland under the Irish MiFID Regulations. The reporting date for the Return is 31 December and the Return is required to be submitted (via the Central Bank's Online Portal) by the last working day of March in the following year.

The updated version of the Guidance reflects updates made to the latest version of the Return such as the new section on marketing spend as well as the requirement for firms to provide details on complaints involving crypto-assets and initial coin offerings.

A copy of the updated Guidance is available **here**.

1.6 ESMA updates Q&As on MiFIR

On 2 February 2024, ESMA published a press release to announce that it had updated its Questions and Answers (**Q&A**) document on the Markets in Financial Instruments Regulation (**MiFIR**) transaction reporting.

The updated Q&A on MiFIR transaction reporting addresses how different national identifiers specified in Annex II of Commission Delegated Regulation (EU) 2017/590 (**RTS 22**) are represented.

A copy of ESMA's press release can be accessed **here**.

The updated Q&A can be accessed in the ESMA Q&A IT-tool which can be accessed **here**.

1.7 ESMA publishes updated Annex to transparency opinion setting out third-country trading venues under the MiFIR post-trade transparency regime

On 12 February 2024, ESMA published an updated version of the Annex to its published opinion on determining third-country trading venues for the purpose of transparency under MiFID II/MiFIR (**Transparency Opinion**).

The Annex to the Transparency Opinion sets out a list of trading venues that meet the criteria to be classified as a third-country trading venues for the purposes of the MiFIR post-trade transparency regime.

A copy of the updated Annex can be accessed **here.**

A copy of the Transparency Opinion can be accessed **here**.

1.8 ESMA issues statement on deprioritisation of best execution reporting supervisory actions

On 13 February 2024, ESMA issued a public statement (**Statement**) on the deprioritisation of supervisory actions on the obligation to publish RTS 28 reports in light of the agreement on the MiFID II and MiFIR review.

Article 27(6) of the MiFID II Directive obliges investment firms to publish information annually on the identity of execution venues and on the quality of execution. The format and content of such information to be published is specified in Commission Delegated Regulation (EU) 2017/576 (**RTS 28 reports**).

The adopted level 1 texts of the MiFID II review (as adopted by the European legislators in June 2023) provides for the deletion of Article 27(6) of the MiFID II Directive.

In its Statement, ESMA outlines that the obligation to produce RTS 28 reports will continue apply to firms throughout 2024 and until the amending MiFID II Directive is transposed into member states. ESMA therefore expects national competent authorities not to prioritise supervisory actions towards investment firms in relation to the publishing of RTS 28 reports.

A copy of the Statement can be accessed **here**.

1.9 Updated version of guidance for completion of Investments Product Template

On 16 January 2024, the Central Bank published an updated version of its guidance document on completing the Investments Product Template (version 2).

The Investments Products Template (**Template**) is applicable to all investment firms authorised under the European Union (Markets in Financial Instruments) Regulations 2017 (**Irish MiFID Regulations**) and branches established in Ireland by firms authorised in another Member State and providing services in Ireland under the Irish MiFID Regulations.

The Template is designed to gather data on sales to retail clients/consumers.

1.10 Updated version of guidance for completion of Investments Product Template

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The Template is designed to gather data on sales to retail clients/consumers.

A copy of the Central Bank's updated guidance can be accessed **here**.

1.11 Directive and Regulation improving MiFID II market data access and transparency

Amending Legislation Adopted and Published in the Official Journal

On 8 March 2024, the legislation amending the MiFID II regime to improve access to market data and transparency was published in the Official Journal of the European Union, including:

- Directive (EU) 2024/790 amending the MiFID II Directive (**Amending Directive**); and
- Regulation (EU) 2024/791 amending the Markets in Financial Instruments Regulation (**MiFIR**) (**Amending Regulation**).

The legislative amendments aim to provide investors with increased access to consolidated market data and improve trade transparency. More specifically, the Amending Regulation:

- Establishes EU-level "consolidated tapes" that bring together market data provided by platforms on which financial instruments are traded in the EU, aiming to publish the information as close as possible to real time;

- Imposes a general ban on the practice of brokers receiving payments for forwarding client orders for execution, otherwise known as "payment for order flow" (**PFOF**), with such a practice to be phased out by 30 June 2026; and
- Introduces new rules on trading in commodity derivatives.

The Amending Directive makes the consequential changes to ensure consistency with the amendments made to MiFIR.

Both the Amending Regulation and the Amending Directive entered into force on 28 March 2024. The Amending Regulation is effective immediately (from 28 March 2024), however, member states will have 18 months (until 29 September 2025) to transpose the Amending Directive.

The Amending Directive can be accessed **here**.

The Amending Regulation can be accessed **here.**

ESMA Communication on Transition to the revised MiFIR Rulebook

On 21 March 2024, ESMA published a communication (**Communication**) on the transition to the new rules under the Amending Regulation. In its Communication, ESMA outlines that:

i) there is a need for guidance from ESMA and the Commission, particularly in relation to transitional provisions under the Amending Regulation;
ii) ESMA is carrying out an assessment with the Commission of the provisions of the Amending Regulation that will benefit from further guidance; and
iii) ESMA will draft technical standards in a swift and transparent manner to assist with the alignment of the Commission delegated regulations with the Amending Regulation as soon as possible.

A copy of ESMA's Communication can be accessed **here.**

2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

2.1 Commission adopts Delegated Regulation setting out RTS on details of the scope and methods for prudential consolidation of an investment firm group under IFR

On 13 March 2024, the European Commission (**Commission**) adopted a Commission Delegated Regulation (**Delegated Regulation**) setting out regulatory technical standards specifying the details of the scope and methods for prudential consolidation of an investment firm group under Regulation (EU) 2019/2033 (the **Investment Firms Regulation** or **IFR**).

The Delegated Regulation addresses:

- The scope and methods of consolidation;
- The methodology for the calculation of the own funds requirement in a consolidated situation; and
- The rules applicable for minority interest and additional Tier 1 and Tier 2 instruments issued by subsidiaries in the context of prudential consolidation.

The Delegated Regulation will now be scrutinised by the Council of the European Union (**Council of the EU**) and the European Parliament before being published in the Official Journal of the European Union.

A copy of the Delegated Regulation can be accessed **here.**

3. EMIR & SFTR

3.1 EMIR Refit Reporting Regime

The new EMIR Refit reporting regime comes into effect on 29 April 2024.

The new EMIR Refit[1] reporting regime introduces:

- greater alignment of data standards, formats, methods, and arrangements for reporting including the use of ISO 20022 XML methodology;
- increase in data fields;
- a requirement for the reporting of outstanding derivatives to be updated by 26 October 2024;
- a new requirement for an entity that is responsible for reporting under EMIR to notify its NCA (and, if different, the NCA of the reporting counterparty) of certain types of significant errors or omissions in its reporting, as soon as it becomes aware of them.

The EMIR Refit reporting regime has been established by the following:

- **New RTS**: Commission Delegated Regulation (EU) 2022/1855 of 10 June 2022 (RTS) and Commission Delegated Regulation (EU) 2022/1860 of 10 June 2022 (ITS) which are available **here** and **here**.
- **New validation rules**; New validation rules which are available **here**.
- **New Guidelines:** ESMA final report on Guidelines for reporting under EMIR applicable from 29 April 2024 which are available **here.**

An earlier Dillon Eustace briefing on the topic is available **here**.

The main reporting changes introduced under the new regime include:

- a standardised reporting format must be used;
- XML EMIR Reporting Schemas must be used for incoming messages and outgoing messages to trade repositories (**TRs**);
- a significantly increased number of reporting fields must be addressed;
- enhanced pairing and matching obligations of TRs;
- TRs are required to report to each report submitting entity (**RSE**) on rejections of trades, reconciliation breaks and other data quality issues within strict timelines;
- a new obligation on the entity responsible for reporting (**ERR**) to notify the relevant national competent authorities in the event of significant reporting issues; and
- A transition period of 180 days to allow for the reporting of any derivatives outstanding as at 29 April 2024 under the new regime.

3.2 ESMA updates Q&As on EMIR

On 2 February 2024, ESMA published a press release to announce that it had updated its Questions and Answers (**Q&A**) on EMIR, with updates made in relation to the following topics:

- ETDs Reporting Question;

- Reporting under STM/CTM model;

[1] Regulation 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories (**EMIR**) as amended by Regulation (EU) 2019/834 under the European Commission's Regulatory Fitness and Performance programme (**EMIR Refit**)

- Update of the client codes;
- Reporting of a Counterparty falling within scope of Article 1(4)(a) and (b);
- Portability of Schedules; and
- Subsidiaries.

A copy of ESMA's press release can be accessed **here**.

The updated Q&A can be accessed in the ESMA Q&A IT-tool which can be accessed **here**.

3.3 Delegated Regulation extending temporary emergency measures on CCP collateral requirements published in Official Journal

On 6 March 2024, Commission Delegated Regulation (EU) 2024/818 (**Delegated Regulation**) was published in the Official Journal.

The Delegated Regulation amends the Commission Delegated Regulation (EU) 153/2013 to extend temporary emergency measures which expand the pool of eligible collateral that CCPs can accept to include uncollateralised bank guarantees for non-financial counterparties acting as clearing members and public guarantees for all types of counterparties (subject to certain conditions). The measures have been extended until 1 September 2024.

The Delegated Regulation aims to avoid a potential discontinuity in the treatment of guarantees before the outcome of the EMIR 3.0 negotiations is known.

A copy of the Delegated Regulation can be accessed **here**.

3.4 Council of EU and European Parliament reach provisional agreement on EMIR 3.0

On 7 February 2024 the Council announced that it had reached provisional agreement with the Parliament on the proposal for a regulation amending EMIR seeking to make derivatives clearing in the EU more attractive. This proposal is commonly referred to "EMIR 3.0".

EMIR 3.0 contains a number of legislative measures to improve EU clearing services. These measures are comprehensive and include by way of example:

- Changes to the methodology applying to a counterparty when determining its aggregate positions for applying the clearing threshold;
- A requirement for counterparties who are subject to a clearing obligation (FC+/ NFC+) that exceed the clearing thresholds in any of the categories of derivative contracts identified by ESMA as of "substantial systemic importance" to have an operationally active account at an EU CCP (**Active Account Requirement**).
- Various reforms of other aspects of the EMIR regime, including various exemptions, changes to reporting obligation and risk mitigation measures and changes to CCP requirements.

The Active Account Requirement as envisaged in the original proposals in 2022 proved to be contentious within industry. The revised position on the Active Account Requirement as now agreed between the Council and the Parliament is less onerous than the requirements originally proposed and includes the following:

- The requirement will apply to counterparties who are subject to a clearing obligation (FC+/ NFC+) and exceed the clearing thresholds in any of the categories of derivative contracts identified by ESMA as of substantial systemic importance (initially interest rate derivatives denominated in Euro and Polish Zloty and short-term interest rate derivatives (**STIR**) denominated in Euro);

- Certain rules apply to group entities including the fact that derivative contracts of third-country subsidiaries of Union groups (with the exception of intragroup transactions) should be included also to prevent that those groups move their clearing activities outside the Union in order to avoid the requirement;
- The requirement can be met by counterparties establishing accounts at EU CCPs that are permanently functional provided that the active accounts include operational elements so that the counterparty can be ready for quickly clearing a significant number of trades;
- In scope counterparties will be obliged to clear trades in the account with an EU CCP in the most relevant sub-categories of derivatives of substantial systemic importance defined in terms of class of derivative, size and maturity (the representativeness requirement). A de-minimis threshold will apply to the representativeness requirement;
- Such counterparties clear on an annual average basis, at least five trades in each of the most relevant subcategories per class of derivative contracts and per reference period;
- counterparties that are already clearing a majority/significant amount of their transactions in interest rate derivatives denominated in Euro and Polish Zloty and STIR denominated in Euro at EU CCPs will not be subject to the operational requirements; and
- 18 months following the entry into force of EMIR 3.0, ESMA will assess whether the Active Account Requirement should be expanded to include quantitative clearing thresholds, under which in-scope counterparties would have to clear a predetermined share of in-scope financial transactions with an EU CCP.

The proposed regulation also seeks to amend the Money Market Funds Regulation[2] to eliminate counterparty risk limits for all derivative transactions that are centrally cleared by a CCP that is authorised or recognised under EMIR. It also seeks a number of targeted amendments to the Capital Requirements Regulation[3].

A separate directive published alongside EMIR 3 seeks to amend the UCITS Directive, the IFD[4] and the CRD[5]. The changes to the UCITS Directive seek to eliminate counterparty risk limits for all OTC derivative transactions that are centrally cleared by an EU CCP or a third country CCP recognised under EMIR. The proposed directive seeks also proposes revisions to the IFD[6] and the CRD[7] which are aimed at encouraging investment firms and credit institutions to systematically address any excessive concentration risk that may arise from their exposures towards CCPs.

The provisional political agreement on the proposed regulation is subject to approval by the Council and the Parliament before going through the formal adoption procedure. The European Parliament plenary is scheduled to vote on the final texts during the week of 22 April 2024. The proposed regulation and the proposed directive will enter into force following their publication in the Official Journal which could take place in Quarter 2 of 2024. The Active Account Requirement will apply to in-scope counterparties from within six months of the regulation entering into force or from when the counterparty becomes subject to the clearing obligation.

A copy of the press release of the Council is available **here**.

The final compromise text of the proposed regulation is available **here**.

A "I" item note on the compromise text of the proposed regulation is available **here**.

The final compromise text of the proposed directive is available **here**.

[2] Regulation (EU) 2017/1131 as amended
3 Regulation (EU) No 575/2013 as amended
[4] Directive 2019/2034 as amended
[5] Directive 2013/36/EU as amended
[6] Directive 2019/2034 as amended
[7] Directive 2013/36/EU as amended

4. CENTRAL BANK OF IRELAND

4.1 Central Bank of Ireland publishes its first Regulatory Supervisory Outlook Report

On 29 February 2024, the Central Bank of Ireland (**Central Bank**) published its first "Regulatory & Supervisory Outlook" report (**Report)**. The Report sets out the Central Bank's perspective on the key trends and risks as well as outlining its regulatory and supervisory priorities for the next two years across all of the sectors regulated by it.

A copy of the Report is available **here.**

4.2 Central Bank publishes a consultation paper on its Consumer Protection Code

On 7 March 2024, the Central Bank published a Consultation Paper 158 titled "Consultation Paper on the Consumer Protection Code" (**Consultation Paper)**.

The Consultation Paper outlines how the Central Bank proposes to revise and enhance its existing consumer protection code to clarify how firms should meet existing "best interests" obligations as well as to reframe, clarify and enhance consumer protection across a range of issues, including for example (i) digitalisation, (ii) informing effectively, (iii) frauds and scams, (iv) vulnerability and (v) climate risk. The revised consumer protection code will consolidate a range of existing Central Bank rules and codes.

The Central Bank has proposed that the revised code will take the form of two new Central Bank regulations.

The first of these, titled the Central Bank Reform Act 2010 (Section 17A) Regulations, will house the "business standards" referenced in the Central Bank (Individual Accountability Framework) Act 2023. These will replace and enhance the "General Principles" of the existing code and will be supplemented by "Supporting Standards for Business" which will provide further detail on firms' obligations. These requirements will apply to all Irish regulated financial service providers.

The draft regulation is set out in Annex 3 to the Consultation Paper.

The second regulation, titled "Central Bank (Supervision and Enforcement Act) 2013 (Section 48) (Consumer Protection) Regulations" sets out cross-sectoral requirements and other sector-specific requirements. These requirements will apply to the regulated business of firms done with customers who meet the definition of "consumer" (i.e. individuals and small businesses). The draft regulation is set out in Annex 4 to the Consultation Paper.

The consultation closes on 7 June 2024.

A copy of the Consultation Paper is available **here**.

For a detailed overview of the Consultation Paper, please refer to our briefing on the topic which is available **here**.

4.3 Central Bank of Ireland announces independent review into its Fitness & Probity approval process

On 14 February 2024, the Irish Financial Services Appeal Tribunal (**IFSAT**) published a judgement in relation to a decision by the Central Bank to refuse an individual's application to perform a pre-approved control function. In its judgement, IFSAT described the decision-making process followed by the Central Bank in the approval process of the relevant individual as "flawed" and noted that the individual had been denied fair procedures at each stage of the process. IFSAT returned the application to the Central Bank for reassessment by it.

Following this judgement, the Central Bank announced that it has commissioned an independent review of its Fitness and Probity approval process which will be conducted in accordance with published terms of reference. The outcome of this review will be published once completed. The Central Bank has noted that it will continue to operate its fitness and probity approval process in accordance with agreed service standards while this review is being carried out.

For a detailed overview of the IFSAT judgement, please refer to our briefing on the topic which is available **here.**

A copy of the IFSAT judgement is available **here.**

The public statement published by the Central Bank following the IFSAT judgement is available **here.**

A copy of the terms of reference issued by the Central Bank for the review is available **here.**

4.4 Central Bank of Ireland amends the scope of PCF-16 Branch Manager outside of the State

In February 2024, the Central Bank published an information note qualifying the scope of the role of "PCF 16 Branch Manager outside of the State" under its Fitness & Probity regime.

In that communication, the Central Bank confirmed that the role of branch manager of a branch established outside of the State (i.e. an "outgoing" branch) will only constitute a PCF-16 role for the purposes of its Fitness & Probity regime where the business arising from the branch amounts to 5% or more of, as applicable, the assets or revenues or gross written premium of the relevant regulated financial service provider. As a result, only those individuals proposed to be appointed to the role of branch manager of an outgoing branch which meets this materiality threshold will be required to be prior approved by the Central Bank before assuming the role.

Where an outgoing branch of an Irish regulated financial service provider does not meet the applicable materiality threshold, the relevant firm was required to end-date the relevant PCF-16 role, by way of resignation, on the Central Bank's Portal by 29 March 2024.

A copy of the relevant information note is available **here**.

4.5 Central Bank of Ireland imposes fine for breach of obligations under Market Abuse Regulation

On 27 February 2024, the Central Bank fined Goodbody Stockbrokers Unlimited Company (**Goodbody)** €1,225,000 pursuant to the EU Market Abuse Regulation[8] for its failure to put in place an effective trade surveillance framework to monitor, detect and report suspicious orders and transactions in relation to market abuse as required under Article 16(2) of the EU Market Abuse Regulation in the period between July 2016 and January 2022.

In its public statement announcing the imposition of the fine, the Central Bank noted that it had published Dear CEO letters to industry in 2019 and 2020 in which it outlined the key provisions of the legislation governing market abuse, re-emphasised earlier industry messaging and provided further clarity on its findings from reviews into compliance by in-scope firms. It further noted that these Dear CEO letters provided "*key opportunities for firms to review their approach and take steps to ensure compliance with MAR*". However, the Central Bank investigation found that notwithstanding this, Goodbody failed to identify critical market abuse risks to which it was potentially exposed, had significant gaps in its control environment for market abuse monitoring, failed to implement an appropriate governance framework and failed to implement an appropriate "three lines of defence" model.

A copy of the public statement issued by the Central Bank on the imposition of the fine on Goodbody is available **here.**

[8] Regulation 596/2014/EU

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

5.1 Status update on EU AML Package

The EU AML Package comprises:

- the proposed Regulation (**AMLA Regulation or AMLAR**) establishing the Anti-Money Laundering Authority (**AMLA**);
- the proposed Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (**AML Regulation**) (**also known as the EU AML/CFT single rulebook**);
- the proposed Sixth Anti-Money Laundering Directive (**MLD6**); and
- a Regulation to trace transfers of crypto-assets (**Recast Transfer of Funds Regulation**).

On 18 January 2024, the Council of the EU and European Parliament announced that provisional political agreement has been reached on the AML Regulation and on the MLD 6. Political provisional agreement has therefore now been reached on all aspects of the EU AML Package.

The final compromise texts reflecting the provisional political agreement reached on the AML Regulation and MLD6 were published by the Council on 13 February 2024. A copy of the provisional agreement on the AML Regulation and MLD6 can be accessed **here** and **here**.

The final compromise text reflecting the political agreement reached on the AMLA Regulation was also published by the Council on 12 February 2024. A copy of the provisional agreement on the AMLA Regulation can be accessed **here**.

The European Parliament is expected to vote on its final approval of the AMLA Regulation, the AML Regulation, and the MLD6 during its plenary session to be held between 22-25 April 2024. The publication of the final texts of the AML Regulation, MLD6 and the AMLA Regulation is expected in summer 2024.

Location of AMLA Seat Finalised

On 22 February 2024, the Council published a press release announcing that an agreement was reached between it and the Parliament on Frankfurt as the seat for the new Anti-Money Laundering Authority (**AMLA**). The AMLA will begin its operations in mid-2025 and until then the Commission will establish the authority and begin its initial operations.

A copy of the Council's press release can be accessed **here**.

A copy of the Parliament's related press release can be accessed **here**.

Commission requests EBA technical advice

On 12 March 2024, the EBA published a "call for advice" (**Call for Advice**) from the European Commission in respect of regulatory technical standards and guidelines that should be developed by AMLA and adopted by the Commission under the proposed new EU AML framework.

The Call for Advice is provisional until the AMLA Regulation, the AML Regulation and the MLD6 are finalised and enter into force.

The EBA is required to deliver its advice to the Commission by 31 October 2025.

A copy of the Call for Advice can be accessed **here**.

5.2 Updates to the EU list of high-risk third countries under MLD4

Removal of Cayman Islands and Jordan from EU list of high-risk countries

On 18 January 2024, a Commission Delegated Regulation (EU) 2024/163 (**Delegated Regulation**) was published in the Official Journal of the EU. The Delegated Regulation removes Cayman Islands and Jordan from the list of high-risk third countries published by the European Commission[9].

The Delegated Regulation entered into force on 7 February 2024.

A copy of the Delegated Regulation can be accessed **here**.

Addition/removal of further countries from EU list of high-risk countries

On 14 March 2024, the Commission adopted a further delegated regulation C (2024)1754 (**Draft Delegated Regulation**) to amend the list of high-risk third countries.

The Draft Delegated Regulation adds Kenya and Namibia to the List and removes Barbados, Gibraltar, Panama, Uganda and the United Arab Emirates from the list.

The Draft Delegated Regulation will now be scrutinised by the Council and the Parliament before being published in the Official Journal of the European Union and taking effect 20 days thereafter.

A copy of the Delegated Regulation can be accessed **here**.

6. DATA PROTECTION

6.1 European Commission launches a call for evidence on GDPR review

On 11 January 2024, the European Commission launched a call for evidence seeking the views of EU citizens and stakeholders on the application of the General Data Protection Regulation (**GDPR**).

Under Article 97 of the GDPR, the European Commission is obliged to review the GDPR every 4 years, following the initial review completed by 25 May 2020. Article 97 requires the Commission to produce a report on its review, which is to focus in particular on the application and functioning of the requirements for the international transfer of personal data to third countries and the co-operation and consistency mechanism between national data protection authorities.

Responses to the call for evidence will inform the Commission's report on the GDPR review, which is due to be submitted to the European Parliament and Council of the EU by mid-2024.

The consultation period for feedback closed on 8 February 2024.

A copy of the call for evidence is available **here**.

[9] As set out in Annex to Commission Delegated Regulation (EU) 2016/1675 supplementing MLD4 as revised

7. PRIIPs

7.1 Publication of revised ESA Q&A on the PRIIPS Regulation

On 15 March 2024, the ESAs[10] published a revised version of their Q&A on the PRIIPs KID (**ESA Q&A**).

In it, the ESAs provide new guidance on the following elements of the PRIIPs KID which will be relevant to all UCITS funds and AIFs which prepare a PRIIPs KID:

- Past Performance: The obligation to publish updated past performance data of the relevant UCITS on the website (which must be signposted in the PRIIPs KID) within 35 business days of 31 December in each year. The ESAs also confirm that in the case of an AIF which prepares a PRIIPS KID, it is expected that the updated past performance of the relevant AIF is published within the same timeframe.
- Redemption provisions: The interplay on disclosures relating to redemption terms arising in the section of the PRIIPs KID entitled "What is this product" and "How long should I hold it and can I take money out early" and what information should be disclosed in each of these sections;
- Ability to compulsorily redeem shares of the relevant fund in certain circumstances**:** The type of information the ESAs expect to be provided to investors in order to comply with the disclosure obligation to provide information on whether the relevant PRIIPS manufacturer can compulsorily redeem shares in the relevant fund without investor consent and the circumstances in which this right can be exercised;
- Clarification on circumstances in which the template currency risk disclaimer must be included in the PRIIPs KID;
- Alignment of costs disclosed in the "Costs over Time" table and the "Composition of Costs" Table;
- Distinction between a "benchmark" and a "proxy" under the PRIIPS rules;
- Prohibition on the use of an artificially created synthetic proxy: Confirmation that an artificially created synthetic proxy cannot be considered an appropriate proxy for the purposes of determining a fund's SRI figure or for calculating a fund's forward looking performance scenarios; and
- Confirmation that when calculating the SRI of the relevant fund, it is possible to supplement historical data for a daily share class with data from a suitable benchmark/proxy for a 5 year range provided that the fund has a minimum of 2 years of observed returns;
- Clarification on what is meant by "open to subscription" in Article 8(3) of the PRIIPS delegated regulation; and
- Clarification on the rules applicable to calculation of future looking performance scenarios in the case of AIFs which are subject to a lock-up period.

A copy of the revised ESA Q&A on PRIIPs KID is available **here.**

7.2 ECON Committee of European Parliament approves amendments to the PRIIPS Regulation

As part of its Retail Investment Strategy announced in May 2023, the European Commission has proposed that a number of changes be made to the PRIIPS Regulation.

These proposals are currently being considered by the Parliament and the Council.

On 20 March 2024, the European Parliament's Economic and Monetary Affairs Committee (**ECON Committee)** approved a revised draft of the proposal. Amendments to the proposals originally put forward by the European Commission proposed by the ECON Committee include:

(i) extending the PRIIPS KID from 3 to 4 pages; and

[10] The ESAs are the: European Banking Authority (EBA) European Insurance and Occupational Pensions Authority (EIOPA) European Securities and Markets Authority (ESMA)

(ii) imposing an obligation on the ESAs in conjunction with national competent authorities to develop an independent online comparison tool to allow investors to compare products and filter categories of products by Member States. They have proposed that a link to the tool should be disclosed in each PRIIPS KID once the tool is available.

The proposals put forward by the ECON Committee must now be voted by the Parliament at plenary session. The Council must also consider the proposals under the ordinary legislative procedure.

A copy of the revised proposals adopted by the ECON Committee is available **here.**

The original proposal put forward by the European Commission on amendments to the PRIIPS Regulation is available **here.**

A Dillon Eustace briefing providing an overview of the European Commission's original proposals to amend the PRIIPS Regulation is available **here**.

8. SUSTAINABILITY

8.1 Political agreement reached on proposal for regulation of ESG rating activities

On 5 February 2024, the Council of the EU (**Council**) announced that it had reached provisional agreement with the European Parliament (**Parliament**) on a proposed regulation governing ESG rating providers in order to improve the quality, reliability and comparability of ESG ratings.

Under the new framework, ESG rating providers established within the EU will need to obtain an official authorisation from ESMA while ESG rating providers established in third countries but operating within the EU must either be (i) located in a third country which is in receipt of an equivalence decision under the framework, (ii) endorsed by an ESG rating provider established in the EU or (iii) recognised by ESMA provided that the ESG rating provider has a consolidated annual net turnover for the latest consecutive three years of less than €15 million.

In-scope ESG rating providers will be required to comply with specific organisational, conflicts of interest and governance requirements as well as complying with detailed transparency obligations which should provide investors with information on the methodologies, models and key rating assumptions used in their rating activities

All financial market participants falling within the scope of the SFDR will be required to include a link in any marketing communications which reference ESG ratings to website disclosures providing information about the methodologies used in such ESG ratings. Under the proposed regulation, regulated financial undertakings which incorporate ratings into products already regulated under EU law (such as funds subject to the SFDR) and which disclose those ratings to a third party (e.g. in marketing communications for example) will not be required to be authorised under the regulation but will be subject to certain disclosure obligations relating to the methodology used etc.

The draft regulation is now subject to approval by the Council and the Parliament before going through the formal adoption procedure. It will then be subject to certain transitional provisions, start applying 18 months after its entry into force.

A copy of the text provisionally agreed by the Council and the Parliament is available **here.**

A copy of the press release published by the Council is available **here**.

8.2 Significant changes to draft Corporate Sustainability Due Diligence Directive approved by EU Council

On 14 December 2023, the Parliament and the Council announced that they had reached provisional political agreement on a proposed Corporate Sustainability Due Diligence Directive (**CSDDD**).

However, subsequent to this, substantive changes were made to the CSDDD as a result of significant concerns being raised by certain EU Member States. On 15 March 2024, those changes to the CSDDD were approved by the Council's Permanent Representative Committee (**Council PRC**).

Based on the text approved by the Council PRC, the CSDDD will oblige EU large companies (with at least 1000 employees and turnover of €450 million) and non-EU companies with a turnover of at least €450 million in the EU to (i) adopt and implement a climate transition plan and (ii) carry out appropriate due diligence to identify and, where necessary, mitigate the adverse impacts of their activities on human rights (including child labour and the exploitation of workers) and on the environment (including pollution and biodiversity loss). This latter obligation will apply not only to the relevant company's operations but also those of its subsidiaries and their value chains. In-scope regulated financial undertakings will only be covered with respect to upstream activities (i.e. their own operations and upstream supply chains only).

If approved by the Parliament in a vote in April 2024, the text of the finalised CSDDD will then need to be formally approved by the Council before being published in the Official Journal. Member States will have two years from the date of entry into force to transpose its provisions into national law. Companies will be required to comply with the CSDDD in accordance with the applicable transition provisions outlined in the CSDDD with smaller companies having a longer transitional period within which to align with the CSDDD.

A copy of the draft CSDDD approved by the Council PRC is available **here**.

A copy of the related press release from the Council is available **here**.

8.3 ESG Round-Up

(i) Delay of adoption of sustainability reporting for certain sectors and certain third-country undertakings under the CSRD.

On 8 February 2024, the Parliament and the Council reached political agreement on the Commission's proposal to postpone the deadline for adopting sector-specific European sustainability reporting standards under the CSRD framework by two years until mid-2026.

Entities falling within the scope of the CSRD continue to be required to comply with the "general" sector-agnostic sustainability reporting standards which apply to all in-scope companies regardless of their economic sector in accordance with the timeframes set down in the CSRD and related ESRS.

The provisional agreement reached between the Council and the Parliament must be endorsed and formally adopted by both institutions before being published in the Official Journal.

(ii) ESMA publishes consultation paper on EU Green Bond Regulation

Under the EU Green Bond Regulation[11], ESMA is tasked with developing technical standards and guidelines specifying certain provisions in order to give effect to the provisions of that regulation.

On 26 March 2024, it launched a consultation on draft technical standards under the EU Green Bond Regulation relating to the registration and review of external reviewers who are empowered under the regulation to provide an independent opinion on whether an issuer of European green bonds complies with the Taxonomy requirements of the European Green Bond Regulation.

The consultation closes on 14 June 2024 and ESMA expects to publish a final report in Quarter 4 2024 and submit draft technical standards to the European Commission for endorsement by 21 December 2024 at the latest.

[11] Regulation (EU) 2023/2631

A copy of the ESMA consultation paper is available **here.**

A copy of the EU Green Bond Regulation is available **here.**

(iii) EFRAG publishes technical explanations on ESRS Sustainability Reporting Standards under the CSRD.

On 5 February 2024, the European Financial Reporting Advisory Group (**EFRAG**) released a first set of technical explanations provided to assist stakeholders in the implementation of the ESRS which are available **here**.

On 1 March 2024, EFRAG released a second set of technical explanations which are available **here**.

(iv) ESMA publishes analysis on impact investing

On 1 February 2024, ESMA published an analysis entitled "Impact investing-Do SDG funds fulfil their promises?" in which it analyses a suite of funds which claim to contribute to achieving the United Nations Sustainable Development Goals (SDG funds) and proposes and summarises a methodological approach towards identifying such funds and assessing the extent to which their holdings align with their claims of fulfilling the United Nations Sustainable Development Goals

A copy of the analysis is available **here.**

(v) *ESMA publishes revised edition of consolidated Q&A on SFDR*

On 12 January 2024, ESMA published a revised edition of the consolidated Q&A on SFDR which consolidates responses given by the European Commission (colour coded in blue) and the ESAs (not colour coded) on the implementation of the SFDR and related delegated acts into the one document.

A copy of the revised edition of the Q&A is available **here.**

9. MISCELLANEOUS

9.1 Commission adopts delegated regulations supplementing the Digital Operational Resilience Act (DORA)

On 22 February 2024, the Commission adopted the following delegated regulations supplementing DORA:

- Draft Commission Delegated Regulation specifying the criteria for the designation of ICT third-party service providers as critical for financial entities (which can be accessed **here**); and
- Draft Commission Delegated Regulation determining the amount of the oversight fees to be charged by the lead overseer to critical ICT third-party service providers and the way in which those fees are to be paid (which can be accessed **here**).

On 13 March 2024, the Commission adopted three further delegated regulations under DORA, including:

- Draft Commission Delegated Regulation setting out RTS specifying the criteria for the classification of ICT-related incidents (which can be accessed **here**);
- Draft Commission Delegated Regulation setting out RTS specifying ICT risk management framework and the simplified ICT risk management framework (which can be accessed **here**); and
- Draft Commission Delegated Regulation setting out RTS specifying the detailed content of the policy on ICT services performed by ICT third-party providers (which can be accessed **here**).

The draft delegated regulations will now be scrutinised by the Council and the Parliament before finalised versions of the delegated regulations are published in the Official Journal of the European Union.

9.2 Reporting obligation on transfer of funds by EU entities (partly) owned by Russian entities or persons outside of the European Union

As of 1 May 2024, under Council Regulation (EU) 2023/2878, any EU legal entity, legal person or legal body whose "proprietary rights" are directly or indirectly owned for more than 40% by (i) a legal person, entity or body established in Russia, (ii) a Russian national; or (iii) a natural person residing in Russia (each an "**In-Scope EU Entity**") must report any transfer of "funds" outside of the European Union made by them which exceeds €100,000 to their relevant national competent authority within two weeks of the end of each calendar quarter.

This "outgoing transfer" reporting obligation is intended to provide national competent authorities better visibility on the flow of funds related to Russian-owned entities out of the EU, without jeopardising the activities of entities that are (partly) Russian-owned and operating legitimately in the EU.

All transfers of funds outside of the European Union during the relevant quarter must be aggregated to determine whether the threshold has been exceeded. "Funds" for this purpose include without limitation cash, other payment instruments, deposits with banks, dividends, shares, bonds and notes. Both direct and indirect transfers of amounts exceeding €100,000 must also be taken into account.

On 12 April 2024, the Commission published a revised edition of its FAQ on EU restrictive measures relating to actions in Ukraine to include specific guidance on the above-mentioned reporting obligation which is contained in Chapter 13 of Part C entitled "Reporting on outgoing transfers" (**Revised FAQ**).

The Revised FAQ confirms that the first reporting by In-Scope EU Entities should cover the period from 1 January and 31 March 2024 and states that the obligation to the relevant competent authority does not apply until 1 May 2024. It also confirms that information of any transfers made by In-Scope EU Entities during the second quarter 2024 should be reported to the relevant competent authority by 15 July 2024.

The Commission has also published a reporting template which can be used by In-Scope EU Entities for the purposes of reporting the relevant information to its national competent authorities. However, the Commission has noted that this is a recommendation and that In-Scope EU Entities are not obliged to use this specific template for the purposes of complying with this reporting obligation.

A copy of Council Regulation (EU) 2023/2878 is available **here.**

A copy of the revised edition of the Commission's FAQ is on EU restrictive measures relating to actions in Ukraine is available **here**.

A copy of the Commission's reporting template is available **here.**

The Central Bank's webpage on EU restrictive measures relating to actions in Ukraine is available **here**.

9.3 Reporting obligation on credit and financial institutions which initiate transfer of funds on behalf of EU entities (part) owned by Russian entities or persons outside of the European Union

As of 1 May 2024, credit institutions and financial institutions must report to their national competent authority information on all transfers of funds outside of the EU of a cumulative amount exceeding €100,000 that they initiated, directly or indirectly, for an In-Scope EU Entity (as described in Section 13.2 above) during the previous semester within two weeks of the end of the relevant semester.

The Revised FAQ (referenced in Section 13.2 above) confirms that the first report to be made by in-scope credit institutions and financial institutions should cover the period from 1 January 2024 to 30 June 2024 and should be submitted to the relevant competent authority by 15 July 2024. It also confirms that this reporting obligation imposed on credit and financial institutions applies regardless of whether or not the In-Scope EU Entity has already reported the relevant transfer to its national competent authority.

As noted in Section 13.2 above, the Commission has also published a reporting template which can be used by in-scope credit institutions and financial institutions for the purposes of reporting the relevant information to their national competent authorities. The Commission has noted that this is a recommendation and that in-scope credit institutions or financial institutions are not obliged to use this specific template for the purposes of complying with this reporting obligation.

Links to all relevant documents are provided at Section 9.2 above.

9.4 Further package of economic sanctions against Russia announced by the Council of European Union

On 23 February 2024, the Council announced that it had adopted the 13th package of sanctions against Russia.

The focus of this package is the targeting of Russia's military and defence sector and combating sanctions circumvention through further designations and it contained 194 individual designations, including 106 individuals and 88 entities.

The European Commission's webpage on sanctions adopted following Russia's military aggression against Ukraine is available **here.**

The Central Bank's webpage on EU restrictive measures relating to actions in Ukraine is available **here.**

9.5 ECON Committee adopts its report on EU Retail Investment Strategy

As part of its Retail Investment Strategy announced in May 2023, the European Commission has proposed that a number of changes be made to the MiFID II Directive[12], the Insurance Distribution Directive (IDD)[13], the UCITS Directive[14], AIFMD[15] and the Solvency II Directive[16] by way of an omnibus directive.

These proposals are currently being considered by the Parliament and the Council.

On 21 March 2024, the ECON Committee of the European Parliament published a press release announcing that it had adopted a draft report containing its amendments to the omnibus directive originally proposed by the European Commission. This report has now been tabled for approval by the Parliament during its first plenary session in April 2024 with the ECON Committee noting that the file will be followed up by the new Parliament after the European elections which are being held on 6-9 June 2024.

The draft text of the omnibus directive states that EU Member States will have to transpose its provisions into national law 12 months after it enters into force. Some provisions will have an 18-month transposition deadline. It is therefore currently anticipated that the final version of the omnibus directive will not be fully in effect until 2026 at the earliest.

A copy of ECON's press release can be accessed **here**.

[12] Directive 2014/65/EU
[13] Directive 2016/97
[14] Directive 2009/65/EC
[15] Directive 2011/61/EU
[16] Directive 2009/138/EC

9.6 ESMA publishes feedback statement on Call for Evidence on shortening the securities settlement cycle

On 5 October 2023, ESMA published a call for evidence seeking feedback from relevant stakeholders on the possibility of shortening the securities settlement cycle in the European Union from the current T+2 model to T+1 or T+0 (**Call for Evidence**). This follows moves from other global regulators to shorten the securities settlement cycle, with the US Securities and Exchange Commission recently implementing rules which move the US securities settlement cycle to T+1 on 28 May 2024.

On 21 March 2024, ESMA published its feedback statement in respect of the Call for Evidence (**Feedback Statement**) in which it noted that views of respondents on shortening the settlement cycle were quite mixed. It also noted that there are several questions which need to be further assessed and better understood before it concludes whether a shortening of the EU settlement cycle should be implemented.

The Feedback Statement also provided ESMA's view on potential breaches by UCITS funds as a result of the move to a T+1 settlement cycle for US and Canadian securities from end-May 2024. It provides guidance on the scope of the UCITS limits for investments in deposits and notes that it will continue to monitor market developments and consider whether any actions or guidance are needed to ensure supervisory convergence on how breaches of UCITS borrowing rules arising from a mismatch in settlement cycle are dealt with by EU national competent authorities.

ESMA must now prepare a report to the European Commission on the appropriateness of shortening the EU settlement cycle, the cost-benefit analysis of such a change, how such changes would be implemented and the impact of such a change on EU markets and stakeholders. This must be submitted to the European Commission by 17 January 2025.

Separately, on 28 March 2024, the UK Accelerated Settlement Taskforce also published a report outlining its recommendations to move to a T+1 settlement cycle no later than 31 December 2027 and that the UK and other EU jurisdictions should collaborate closely to see if a coordinated move to T+1 is possible.

A copy of the Feedback Statement is available **here.**

A copy of the report published by the UK Accelerated Settlement Taskforce is available **here.**

9.7 European Parliament approves the European Union Artificial Intelligence Act

On 13 March 2024, the European Parliament approved the European Union's first Artificial Intelligence Act (**EU AI Act)**.

The EU AI Act is intended to set down a comprehensive legal framework for the use, marketing and supply of artificial intelligence **(AI)** systems across the European Union. It provides a risk-based classification for AI systems with different requirements and obligations tailored depending on the level of potential risks and level of impact associated with the relevant system. It will apply to all EU-based users of AI systems where the software forms part of the user's own systems (save where used in the course of a personal non-professional activity) as well as those who provide, import or distribute AI systems within the European Union.

Those AI systems that are considered to create an unacceptable risk to people's safety, livelihoods and rights are banned. Those AI systems categorised as "high-risk" on the basis that they can potentially have a detrimental impact on people's health, safety or on their fundamental rights are permitted, but will be subject to a set of requirements and obligations to gain access to the EU market.

AI systems considered to pose limited risks of impersonation or deception because of their lack of transparency (such as chatbots or deepfakes) will be subject to information and transparency requirements which include making the user aware that they are interacting with the AI system, while all other AI systems presenting only minimal risk will not be subject to further obligations under the EU AI Act.

Specific rules are set down for "general purpose AI models" or "GPAI" models (such as large language models and generative AI applications) with more stringent requirements for GPAI models with "high-impact capabilities" that could pose a systemic risk and have

a significant impact on the internal market. The framework is not intended to apply to cover simpler, traditional software systems with the legislation noting that a key characteristic of an AI system is its capability to infer.

Under the EU AI Act, each Member State will be required to designate one or more competent authorities, including a national supervisory authority, which is tasked with supervising the application and implementation of the regulation. The framework also establishes the administrative sanctions that can be imposed on those failing to comply with the EU AI Act.

The EU AI Act is now expected to be adopted at first reading by the Council before being published in the Official Journal. It will enter into force 20 days after its publication in the Official Journal and will, subject to the specific transitional provisions set down in the legislation, generally apply two years from the date of entry into force.

The Commission is expected to issue various implementing and delegated regulations and guidelines related to the EU AI Act in the coming months.

A copy of the EU AI Act approved by the Parliament is available **here.**

The press release published by the Parliament announcing its approval of the EU AI Act is available **here.**

9.8 ESMA issues warning on posting investment recommendations on social media

On 6 February 2024, ESMA published a warning in relation to posting investment recommendations on social media (**Warning**). The Warning seeks to raise awareness on:

i) requirements established under the Market Abuse Regulation[17] and related implementing delegated regulation[18] regarding posting investment recommendations on social media; and
ii) the risks of market manipulation when posting on social media.

The Warning addresses:

- what constitutes an investment recommendation under the MAR framework;
- consequences of non-compliance with MAR including administrative or criminal sanctions;
- differing and additional obligations applying to professionals (such as investment firms) and experts;
- the risks arising from market abuse; and
- practical examples of different types of investment recommendations and the unlawful disclosure of inside information.

A copy of the Warning can be accessed **here.**

[17] Regulation 596/2014 as amended
[18] Commission Delegated Regulation 2016/958

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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