



## Investment Firms

# Quarterly Legal and Regulatory Update

Period covered: 1 January 2021 – 31 March 2021

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## 1. MiFID II – EUROPEAN DEVELOPMENTS

### 1.1 Directive amending the MiFID II Directive published in the Official Journal of the EU

On 11 February 2021, the Council of the European Union adopted a Directive (2021/338/EU) amending the MiFID II Directive (2014/65/EU) as regards information requirements, product governance and position limits, to help the recovery from the COVID-19 pandemic (**Amending Directive**).

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

The areas addressed by the Amending Directive form part of the European Commission's (**Commission**) Capital Markets Recovery Package. In addition, the Amending Directive extends the transposition deadline for the CRD V Directive (2019/878/EU) to 26 June 2021.

On 26 February 2021, the Amending Directive was published in the Official Journal of the EU and entered into force on 27 February 2021.

Member states are required to transpose the Amending Directive into national law by 27 November 2021. The measures will become applicable on 27 February 2022.

The Amending Directive can be accessed [here](#).

### 1.2 ESMA reminds firms of the MiFID II rules on reverse solicitation

On 13 January 2021, the European Securities and Markets Authority (**ESMA**) issued a statement to remind firms of the MiFID II requirements on the provision of investments services to retail or professional clients by firms not established or situated in the EU (**Statement**).

The Statement provides that it has come to the attention of ESMA that, following the end of the United Kingdom (**UK**) transition period on 31 December 2020, there have been some questionable practices by firms of reverse solicitation, where the product or service is marketed at the client's own exclusive initiative. Some firms appear to be trying to circumvent MiFID II requirements by including general clauses in their terms of business or through the use of online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client.

In the Statement, ESMA highlights that the provision of investment services in the EU without proper authorisation in accordance with EU and national law applicable in Member States exposes service providers to the risk of administrative or criminal proceedings, and investors may lose protections granted to them under relevant EU rules, including coverage under the investor compensation schemes in accordance with the Investor Compensation Schemes Directive (97/9/EC).

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

### 1.3 ESMA publishes consultation on MiFID II appropriateness and execution-only requirements

On 29 January 2021, ESMA published a consultation paper on draft guidelines regarding certain aspects of the MiFID II appropriateness and execution-only requirements (**Consultation Paper**). The Consultation Paper will be of particular relevance to investment firms and

credit institutions providing investment services and activities, investment firms and credit institutions when selling structured deposits and external alternative investment fund managers (**AIFMs**) when providing investment services.

The Consultation Paper contains draft guidelines which have been created by ESMA in order to clarify and promote convergence in relation to the application of certain aspects of the appropriateness and execution-only requirements. In addition, the Consultation Paper takes into account the results of supervisory activities conducted by national competent authorities (**NCA**s) on the application of the appropriateness and execution-only requirements, in particular resulting from the 2019 common supervisory action (**CSA**) on appropriateness.

When formulating the draft guidelines (set out in Annex III of the Consultation Paper) ESMA has used its MiFID II suitability requirements guidelines as a starting point, adjusting key aspects, such as 'know your product' and 'know your client', to the appropriateness and execution-only requirements. Furthermore, certain guidelines that were not relevant for the appropriateness assessment have been deleted, while others have been added on aspects not relevant for the suitability assessment.

ESMA has stated that it will also undertake a review of the guidelines on suitability after the ongoing CSA on the application of those requirements has been completed.

The deadline for comments on the Consultation Paper is 29 April 2021. ESMA expects to publish the final report and guidelines in Q3 2021.

A link to the Consultation Paper can be found [here](#).

Please see the Dillon Eustace briefing paper entitled "ESMA consults on MiFID II appropriateness and execution-only requirements" for further information, which can be accessed [here](#).

#### 1.4 ESMA launches a common supervisory action with NCAS on MiFID II product governance rules

On 1 February 2021, ESMA launched a CSA with NCAs on the application of MiFID II product governance rules across the EU.

The CSA will be conducted during 2021 and will allow ESMA and the NCAs to assess the progress made by manufacturers and distributors of financial products in the application of key requirements. The CSA will analyse:

- how manufacturers ensure that financial products' costs and charges are compatible with the needs, objectives and characteristics of the target market and do not undermine the financial instrument's return expectations;
- how manufacturers and distributors identify and review the target market and distribution strategy of financial products; and
- the information exchanged between manufacturers and distributors and how frequently this is carried out.

The CSA contributes to fulfilling ESMA's mandate on building a common supervisory culture among NCAs to promote sound, efficient, and consistent supervision throughout the EU. ESMA's promotion of supervisory convergence is done in close cooperation with NCAs.

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

#### 1.5 ESMA publishes its annual report on the application of waivers and deferrals for equity instruments

On 2 February 2021, ESMA published its annual report on the application of waivers and deferrals for equity instruments under the Markets in Financial Instruments Regulation (600/2014) (**MiFIR**)(**Report**).

The Report includes an analysis based on waivers for equity and equity-like instruments and provides:

- The distribution of waiver types is similar to 2018 and the UK is the country that submitted the highest number of waiver notifications;
- The large in scale (LIS) waiver is the most used and shares are the instrument type for which waivers are requested most frequently;
- The volume under the waivers, both in turnover and number of transactions, is mainly executed in shares. Exchange traded funds (ETFs) are the instruments with the highest percentage of dark trading with respect to the overall volume traded in those instruments, with most of the turnover executed in the dark trading relating to the LIS waiver, while in terms of transactions the majority is executed under the reference price waiver; and
- NCAs are broadly applying the same regime across the different types of equity instruments.

ESMA will publish the next annual report in the second half of 2021 covering the analysis of the application of the waivers and deferral regimes in 2020.

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

## 1.6 ESMA updates Q&As on Market Structures Topics

On 3 February 2021, ESMA published an updated version of its questions and answers publication “On MiFID II and MiFIR market structures topics” (**Q&A on Market Structures Topics**). The updates made to the Q&A on Market Structures Topics are listed below:

- Question ID: Part 3 Direct Electronic Access (DEA) and algorithmic trading – the question clarifies the classification of DEA trades; and
- Question ID: Part 5.3 Systematic internalisers – the question clarifies matched principal trading by investment firms

The Q&A on Market Structures Topics can be accessed [here](#).

## 1.7 ESMA issues statement clarifying application of position limits pending MiFID II change

On 19 March 2021, ESMA published a statement on its supervisory approach to position limits for commodity derivatives (**Statement**). The Statement clarifies the application of position limits and coordinates the supervisory actions of NCAs, pending the legislative change introduced by the MiFID II Recovery Package for commodity derivatives, which will apply in early 2022.

Position limits, under the amended legal provisions, will only continue to apply to agricultural commodity derivatives and critical or significant commodity derivatives. ESMA believes that it is necessary to take into account the upcoming rule changes, as well as the impact of position limits on the development of new and less liquid commodity derivatives, the role of liquidity providers in developing those derivatives and the competitive environment in which EU commodity derivatives markets operate.

ESMA therefore expects NCAs to not prioritise their supervisory actions towards:

- entities holding positions in commodity derivatives, other than agricultural commodity derivatives, with a net open interest below 300,000 lots; and
- positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as per MiFID II.

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

## 1.8 ESMA publishes final reports on framework for Data Reporting Service Providers

On 26 March 2021, ESMA published three final reports providing advice to the Commission on the fees, fines and penalties applicable to data reporting service providers (**DRSP**) and criteria for determining whether certain DRSPs may be exempted from ESMA supervision (derogation criteria) under MiFIR.

In the reports, ESMA agrees with stakeholders that two of the four derogation criteria appear to be more significant for assessing whether the activity of an approved publication arrangement (**APA**) or authorised reporting mechanism (**ARM**) is of relevance for the internal market. ESMA proposes a framework for determining DRSPs eligibility for exemption from ESMA supervision where the assessment of more significant criteria is cumulative while the assessment of the remaining two criteria is non-cumulative. ESMA has adjusted the quantitative thresholds which should be applied in the assessment of these criteria.

The final report on ESMA advice on the criteria for DRSP can be accessed [here](#).

ESMA also proposes both application and authorisation fees and an annual supervisory fee for DRSPs. ESMA has adopted an approach to the calculation of fees for 2022, the first year of its supervision of DRSPs. It has also proposed a simplified timeline for payment of the fees.

The final report on technical advice on ESMA's fees to DRSP can be accessed [here](#).

ESMA, in its final report on technical advice on fines and penalties for DRSPs, builds on the existing enforcement framework on Trade Repositories Commission Delegated Regulation (EU) 667/2014 (**TR Commission Delegated Regulation**) and Credit Rating Agencies Regulation (EU) 946/2012 (**CRA Regulation**) as well as on the experience gained in its implementation. It also takes into account the previous technical advice on procedural rules for imposing fines and penalties to Third Country Central Counterparties (**TC-CCPs**) issued on 31 March 2020.

The final report on procedural rules for penalties imposed on DRSPs can be accessed [here](#).

ESMA will submit the final reports to the Commission and will continue working with the NCAs on the transfer of supervisory responsibilities for the relevant DRSPs as of 1 January 2022.

## 1.9 Commission Delegated Regulation on thresholds for weekly position reporting under MiFID II published in the Official Journal of the EU

On 26 March 2021, the Commission Delegated Regulation (EU) 2021/527 amending the Commission Delegated Regulation (EU) 2017/565 on the thresholds for weekly position reporting under the MiFID II Directive was published in the Official Journal of the EU (**Delegated Regulation**).

The Delegated Regulation amends certain parts of the minimum thresholds for the weekly reporting of positions held by specified persons in commodity derivatives.

The Delegated Regulation entered into force on 29 March 2021.

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

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

On 26 March 2021, the Commission Delegated Regulation (EU) 2021/529 establishing regulatory technical standards (**RTS**) amending Delegated Regulation (EU) 2017/583 on adjustment of liquidity thresholds and trade percentiles used to determine the size specific to the instruments (**SSTI**) applicable to certain non-equity instruments under MiFIR (**Delegated Regulation**) was published in the Official Journal of the EU.

Delegated Regulation (EU) 2017/583 provides the methodology to assess the liquidity and the SSTI of bonds. Both liquidity and SSTI are relevant for the application of transparency waivers and deferrals. It also introduced a phased approach in which ESMA assesses annually, for four years, if a move to the next stricter phase is necessary.

ESMA has submitted its first annual assessment and recommends a move to phase two for bonds, but not with regard to other non-equity financial instruments, in order to make progress towards a more transparent trading environment for bonds. This is due to ESMA not having enough data for the other classes of instruments. The Delegated Regulation aims to realise a move to phase two with regard to the liquidity assessment of bonds.

The Delegated Regulation enters into force on 15 April 2021.

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

## 1.11 ESMA publishes final report on the review of transaction and reference data reporting obligations under MiFIR

On 30 March 2021, ESMA published the final report on its review of transaction and reference data reporting obligations under MiFIR (**Report**). In the Report, ESMA highlights recommendations and legislative amendments to MiFID II/MiFIR aiming to simplify the current reporting regimes and to ensure quality and usability of the reported data, such as:

- the replacement of the trading on a trading venue (**TOTV**) concept with the Systematic Internaliser (**SI**) approach for Over the Counter (**OTC**) derivatives;
- the removal of the short sale indicator;
- the alignment with reporting regimes such as Market Abuse Regulation (EU) 596/2014 (**MAR**), the Regulation on OTC derivatives, central counterparties and trade repositories (EU) 648/2012 (**EMIR**) and the Benchmark Regulation (EU) 2016/1011 (**Benchmarks Regulation or BMR**);
- the reliance on international standards, including Legal Entity Identifier (**LEIs**), International Securities Identification Number (**ISINs**) and Classification of Financial Instruments (**CFIs**); and
- the inclusion of three additional data elements with a view to harmonise the way they are reported and avoid inconsistent and duplicative reporting of the same information at the national level. In particular, these are indicators for:
  - (i) buyback programs;
  - (ii) information on MiFID II client categories; and
  - (iii) transactions pertaining to aggregated orders.

The Commission is expected to adopt legislative proposals based on these recommendations and ESMA is ready to provide additional technical advice on the proposals contained in the Report.

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

## 1.12 ESMA updates Q&As on MiFID II and MiFIR investor protection and intermediaries topics

On 29 March 2021, ESMA published an updated version of its questions and answers publication “On MiFID II and MiFIR investor protection and intermediaries topics” (**Q&A on Investor Protection and Intermediaries Topics**). The update made to the Q&A on Investor Protection and Intermediaries Topics is listed below:

- Question ID: Part 12 Inducements – Question 8 (updated on 29 March 2021). The question concerns one of the conditions specifying when an inducement can be considered as designed to enhance the quality of the relevant service to the client. In particular, the new Q&A provides guidance on the application of three important elements contained in Article 11(2)(a) of the MiFID II Delegated Directive, notably the condition that the inducement is justified by the provision of (1) an additional or higher-level service, (2) to the relevant client, (3) proportional to the level of inducements received.

A copy of the Q&A on Investor Protection and Intermediaries Topics can be accessed [here](#).

## 2. INVESTMENT FIRMS REGULATION AND INVESTMENT FIRMS DIRECTIVE

### 2.1 EBA publishes two final draft RTS under the Investment Firms Directive

On 21 January 2021, the European Banking Authority (**EBA**) published two final draft RTS under Articles 30(4) and 32(8) of the Investment Firms Directive (2019/2034/EU) (**IFD**). Firstly:

- the final draft RTS on the use of instruments and possible alternative arrangements for risk takers' variable remuneration, introduces uniform minimum trigger events for write-down and conversion of Additional Tier 1, Tier 2 and other instruments and sets out requirements to ensure that the credit quality of investment firms is reflected in the instruments and that these instruments are appropriate for the purposes of variable remuneration. The EBA has reviewed the draft RTS after three months of public consultation and has now submitted as mandated the draft RTS to the Commission for adoption.

The final draft RTS on the use of instruments and possible alternative arrangements for risk takers' variable remuneration can be accessed [here](#). Secondly:

- the final draft RTS on the identification of material risk takers is based on a combination of qualitative and quantitative criteria specified in the RTS. Ensuring that all risk takers are identified, members of staff are identified as having a material impact on the institution's risk profile as soon as they meet at least one of the qualitative or quantitative criteria in the RTS, or where necessary because of the specificities of the firm's business model. Following the consultation phase, the qualitative criteria have been revisited to enhance the application of proportionality. The final draft RTS also clarifies how the criteria should be applied on a consolidated and individual basis. Calculating the amount of remuneration for the application of the quantitative requirements has been introduced similarly to the remuneration framework applicable under the Capital Requirements Directive 2013/36/EU (**CRD IV**).

The final draft RTS to identify material risk takers can be accessed [here](#).

### 2.2 EBA publishes final draft implementing technical standards on the supervisory reporting and disclosures of investment firms

On 5 March 2021, the EBA published final draft Implementing Technical Standard (**ITS**) on the supervisory reporting and disclosures of investment firms. The ITS specify templates, reporting dates and definitions relating to all supervisory reporting and disclosures



requirements for investment firms under the Investment Firms Regulation (2019/2033/EU) (IFR).

The draft ITS will be submitted to the Commission for endorsement before being published in the Official Journal of the EU. The EBA will also develop the data point model (DPM), XBRL taxonomy and validation rules based on the final draft ITS. The first reference date for the application of the reporting ITS is expected to be 30 September 2021 for class 2 investment firms and 31 December 2021 for class 3 investment firms.

The final draft ITS on the supervisory reporting and disclosures of investment firms can be accessed [here](#).

### 2.3 EBA publishes consultation on RTS on disclosure of investment policy under IFR

On 31 March 2021, the EBA published a consultation paper on draft RTS on disclosure of investment policy by investment firms. The draft RTS' purpose is to help stakeholders understand investment firms' influence over the companies in which they have voting rights and the impact of investment firms' policies on aspects such as the governance or management of those companies.

Article 52 of the IFR sets out a requirement for investment firms to disclose the following information:

- proportion of voting rights attached to shares held;
- voting behaviour;
- use of proxy advisor firms; and
- voting guidelines.

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

The consultation closes on 1 July 2021 and the consultation paper can be accessed [here](#).

## 3. CENTRAL BANK OF IRELAND

### 3.1 Central Bank launches CP135 on competent authority discretions under the IFD and IFR

On 14 January, the Central Bank of Ireland (**Central Bank**) published the paper 'Consultation on Competent Authority Discretions in the Investment Firms Directive and the Investment Firms Regulation' (CP135). CP135 sets out the Central Bank's proposed approach in relation to the competent authority discretions provided for in the IFD and the IFR and includes proposed changes to the general reporting requirements for investment firms to align them with the IFD and IFR.

CP135 sets out the various competent authority discretions that are available to the Central Bank under the IFD and the IFR. Though the IFR will become directly applicable and will not require transposition, nonetheless, a number of discretions are also contained in the IFR. The discretions discussed in CP135 relate to:

- the prudential regime that will apply to larger investment firms;
- the application of the new liquidity risk requirements;



- requirements relating to the assessment of internal capital of smaller investment firms; and
- the practical implementation of the new prudential regime for investment firms (in relation to the adjustment of K-Factors).

When the consultation process is complete, the Central Bank intends to publish an 'Implementation of NCA Discretions in IFD/IFR Regulatory Notice' by the end of June 2021. The Central Bank's approach towards the exercise of the discretions will be confirmed in this notice.

CP135 can be accessed [here](#).

Please see the Dillon Eustace briefing paper entitled "Central Bank consults on the new prudential regime for MiFID Firms" which can be accessed [here](#).

### 3.2 Central Bank update on Securities Markets, Investment Management, Investment Firms and Fund Service Providers

In April 2020, the Central Bank communicated that it would allow a level of flexibility for regulated firms in certain specified areas as a result of the COVID-19 crisis. The Central Bank has determined that certain measures previously communicated in respect of Securities Markets, Investment Management, Investment Firms and Fund Service Providers have since expired on their terms and will not be extended.

This includes those setting out expectations relating to:

- Regulatory remittance dates for investment firms, fund service providers and investment funds;
- Pillar 3 disclosures; and
- The submission of assurance reports in respect of investment firms and fund service providers' arrangements for the safeguarding of client assets or investor money.

The Central Bank has also revised its expectations in respect of risk mitigation programme (**RMP**) implementation dates and clarified its expectations as regards the application of pillar 2 guidance by investment firms subject to the Capital Requirement Regulation (575/2013) (**CRR**) or the CRD IV Directive (2013/36/EU) (**CRD IV**).

The Central Bank stated that it continues to apply relevant announcements made by the European Supervisory Authorities (**ESAs**), to the extent they have not expired on their terms, and to allow limited and time-bound flexibility in specified areas.

The Central Bank's current expectations are set out [here](#).

### 3.3 Central Bank issues updated reporting requirements for Investment Firms

In January 2021, the Central Bank issued an update to the reporting requirements for Investment Firms (**Reporting Requirements**). Investment firms are required to report certain information on a periodic basis to the Central Bank.

The information is required by relevant legislation, supplementary requirements and as advised in writing to the investment firm by the Central Bank. The Reporting Requirements document lists all returns applicable to investment firms such as:

- each return type and name;
- scheduling requirements;

- the type of firm each return applies to; and
- any available guidance notes/templates for each return.

The Reporting Requirements document can be accessed [here](#).

### 3.4 Central Bank publishes Securities Markets Risk Report

On 8 February 2021, the Central Bank published its first Securities Risk Outlook Report 'Conduct Risks in an Uncertain World' (**Report**).

The Report is intended to inform regulated financial service providers, as well as investors, of the main conduct risks the Central Bank sees to the securities markets, namely:

- The impact of external shocks (Covid-19 and Brexit);
- The migration towards greener securities markets;
- Increasing complexity;
- Transparency;
- Misconduct risk in securities markets; and
- Data quality.

The Report outlines the specific proactive steps which the Central Bank expects financial service providers to take to manage conduct risks in the context of their business activities. The Central Bank will take supervisory action in circumstances where firms have failed to have regard to the risks outlined in the Report.

The Report also identifies the key supervisory priorities of the Central Bank for 2021 which include follow-up action on its review of the implementation of the Fund Management Company Guidance, the European Systemic Risk Board (**ESRB**)/ESMA Review of Corporate Bond and Property Funds and upcoming common supervisory action on costs and fees in UCITS funds. Other areas of focus mentioned in the Report include the development and integration of the framework for sustainable finance, reviews of MiFID, AIFMD and the Market Abuse Directive and work on potential reform for money market funds. The Central Bank also note that liquidity management and data quality will continue to be a focus during the year ahead.

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

### 3.5 Central Bank proposes new cross-industry guidance on outsourcing

On 25 February 2021, the Central Bank published Consultation Paper 138 on Cross-Industry Guidance on Outsourcing (**CP138**). The draft Guidance is contained in Schedule 1 to CP138 (**Guidance**). The publication of CP138 follows on from the publication of the Central Bank discussion paper 'Outsourcing – Findings and Issues for Discussion' in November 2018.

The Guidance sets out the Central Bank's minimum supervisory expectations regarding effective governance, risk management and business continuity processes that should be applied by firms when using outsourcing as part of their business model and aims to reduce the occurrence of risks such as financial instability and consumer detriment. The Guidance also seeks to remind boards and senior management of their responsibilities when considering outsourcing as part of their business model.

The Guidance, once finalised, will apply to all financial services providers regulated by the Central Bank. The Central Bank intends to publish the finalised Guidance in 2021.

The Central Bank is inviting stakeholders to submit feedback on the Guidance. The consultation period closes on 26 July 2021, and feedback may be submitted by email to [outsourcingfeedback@centralbank.ie](mailto:outsourcingfeedback@centralbank.ie).

Please see the Dillon Eustace briefing paper entitled “Central Bank proposes new cross-industry guidance on outsourcing”. The Dillon Eustace briefing paper can be accessed [here](#).

CP138 can be accessed [here](#), and the Guidance can be accessed [here](#).

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

### 4.1 EBA publishes revised Guidelines on AML/TF Risk Factors

On 1 March 2021, the EBA published its final revised Guidelines on ML/TF risk factors, taking into account changes to the EU AML/CFT legal framework and addressing new ML/TF risks (**Revised Guidelines**). The Revised Guidelines strengthen the requirements on individual and business wide risk assessments, as well as customer due diligence (**CDD**) measures, adding new guidance on the identification of beneficial owners, the use of innovative solutions to identify and verify customers’ identities, and how financial institutions should comply with legal provisions on enhanced CDD related to high-risk third countries. The Revised Guidelines are addressed to both financial institutions and supervisory authorities.

Please see the previous Dillon Eustace briefing paper on this topic which can be accessed [here](#).

The next steps are for the Revised Guidelines to be translated into the official EU languages and published on the EBA website. The deadline for competent authorities to report whether they comply with the Revised Guidelines will be two months after the publication of the translations. The Revised Guidelines will apply three months after publication in all EU official languages. We expect that the Central Bank will report that they intend to comply in full. Upon the date of application, the Revised Guidelines will repeal and replace the original guidelines (JC/2017/37).

The announcement published by the EBA can be accessed [here](#).

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

### 4.2 EBA issues opinion on the risks of ML and TF affecting the EU’s financial sector

On 3 March 2021, the EBA issued an opinion on the risks of money laundering and terrorist financing affecting the EU’s financial sector (**Opinion**).

The Opinion examines cross-sectoral risks such as those associated with virtual currencies, crowdfunding platforms, the provision of financial products and services through FinTech firms, weaknesses in CFT systems and controls, supervisory divergence, de-risking, and divergent approaches to tax-related crimes. The Opinion goes on to examine sector-specific risks.

The Opinion also addresses ML/TF risks that have arisen in the context of the Covid-19 pandemic. The Opinion notes that the pandemic illustrates how new ML/TF risks can emerge unexpectedly, impacting firms’ ability to ensure adequate AML/CFT compliance and NCAs’ ability to ensure the ongoing supervision of firms in the current context of restrictions on movement. The Opinion recommends that risks associated with Covid-19 require immediate attention and monitoring by NCAs.

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

#### 4.3 EBA issues consultation paper on risk-based supervision under AMLD 4

On 17 March 2021, the EBA issued a consultation paper on draft guidelines on the characteristics of a risk-based approach to AML and TF supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis, produced under the Directive on the prevention of the use of the financial system for the purposes of ML or TF ((EU) 2015/849) (**AMLD 4**)(**Guidelines**).

The Guidelines propose to amend the first iteration of the guidelines published in 2016. The proposed amendments address the key challenges for supervisors when implementing the risk-based approach. The Guidelines, amongst other recommendations:

- emphasise the need for NCAs to conduct comprehensive risk assessment at sectoral and sub-sectoral level to support their identification of risk areas that require more attention;
- explain the different supervisory tools available to NCAs and provide guidance on selecting the most effective tools for different purposes; and
- emphasise the importance of a robust follow-up process and set out different aspects that NCAs should consider when determining the most effective follow up action.

The EBA is seeking feedback from stakeholders on the Guidelines, the consultation period is open until 17 June 2021. The EBA intends to finalise the Guidelines following conclusion of the consultation. The Guidelines will become applicable three months after publication in the official EU languages, at which time the existing guidelines will be repealed.

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

#### 4.4 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021

On 18 March 2021, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020 (**Act**) was signed into law.

The purpose of the Act is to transpose the criminal justice elements of the Directive amending AMLD 4 on the prevention of the use of the financial system for the purposes of ML or TF ((EU) 2018/843)(**Fifth EU Anti-Money Laundering Directive** or **AMLD 5**) by amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 in line with AMLD 5.

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

## 5. DATA PROTECTION

### 5.1 EDPB adopts joint opinions on new standard contractual clauses

On 14 January 2021, the European Data Protection Board (**EDPB**), and the European Data Protection Supervisor (**EDPS**) adopted joint opinions on two sets of standard contractual clauses (**SCCs**). The SCCs were first published by the Commission on 12 November 2020 (**Opinions**). The Opinions relate to SCCs:

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

The Third Country SCCs will replace the existing SCCs in place and aim to ensure that the level of protection of personal data ensured by the GDPR, when transferred to a third country, is not undermined. The Controller-Processor SCCs are new and aim to ensure harmonisation and legal certainty in relation to the contract between a controller and processor that a controller is obliged to impose under Article 28 GDPR.

The EDPB and the EDPS welcomed the Controller-Processor SCCs, however requested several amendments, including clarity regarding the “docking clause” and other aspects relating to obligations for processors. The EDPB also suggested that the Annexes to the SCCs clarify as much as possible the roles and responsibilities of each of the parties with regard to each processing activity.

The EDPB and the EDPS also welcomed the Third Country SCCs, however requested amendments regarding the scope of the SCCs, certain third-party beneficiary rights, certain obligations regarding onward transfers, and the notification to the Supervising Authority. The EDPB and the EDPS advised that where ad-hoc supplementary measures are required in order to ensure that data subjects are afforded a level of protection equivalent to the GDPR regime, the Third Country SCCs should be used alongside the EDPB recommendations on supplementary measures (**EDPB Recommendations**). The next step is for the Commission to formally adopt a decision incorporating the finalized SCCs.

The EDPB joint opinion on Third Country SCCs can be accessed [here](#).

The EDPB joint opinion on Controller-Processor SCCs can be accessed [here](#).

The EDPB Recommendations are available [here](#).

## 5.2 EDPB adopts Guidelines on examples regarding data breach notification

On 14 January 2021, the EDPB adopted Guidelines 01/2021 on Examples regarding Data Breach Notification (**Guidelines**).

The Guidelines address a range of data breach notification cases such as ransomware, data exfiltration attacks, internal human risk source, lost or stolen devices and documents, postal errors and social engineering. In each case, the Guidelines highlight good and bad practices, offer advice on how risks should be identified and assessed, and offer advice regarding when the controller should notify the Supervising Authority and/or the data subjects.

The purpose of the Guidelines is to help data controllers in deciding how to handle data breaches and what factors to consider during risk assessment.

The Guidelines are intended to compliment the Article 29 Working Party Guidelines on Personal Data Breach Notification under the GDPR, issued in October 2017, by offering more practical advice.

The EDPB sought stakeholder’s views on the Guidelines. The consultation period closed on 2 March 2021.

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

## 5.3 Council agrees its position on new ePrivacy rules

On 10 February 2021, the Council of the EU agreed its negotiating mandate on the Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (**draft ePrivacy Regulation**)(**Negotiating Mandate**).

The draft ePrivacy Regulation will repeal Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (**ePrivacy Directive**).

The draft ePrivacy Regulation aims to build on the existing ePrivacy Directive which ensures the confidentiality of communications and respect for private life in the electronic communications sector. The draft ePrivacy Regulation reflects the technological developments that have occurred since the last revision of the ePrivacy Directive in 2009, for example the increased reliance on internet-based communication services such as Voice over IP and instant messaging.

The Council of the EU will now commence talks with the European Parliament on the final text.

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

#### 5.4 Commission publishes draft adequacy decision for transfers of personal data to the UK

On 19 February 2021, the Commission published a draft adequacy decision for transfers of personal data to the UK under the Regulation on the protection of natural persons with regard to the processing of personal data ((EU) 2016/679) (**General Data Protection Regulation** or **GDPR**) (**Decision**).

The Decision concludes, following assessment by the Commission that the UK ensures an essentially equivalent level of protection to that guaranteed under the GDPR.

The Commission is now required to obtain an opinion from the EDPB and obtain the green light from a committee composed of representatives of the EU member states. Following this, the Commission may proceed to adopt the Decision.

Once the Decision is adopted, it will be valid for a first period of four years. After four years, it will be possible to renew the adequacy finding if the level of protection in the UK continues to be adequate.

Until the Decision is adopted, data flows between the EEA and the UK may continue pursuant to the interim regime agreed in the EU-UK Trade and Cooperation Agreement. This interim period expires on 30 June 2021.

The Commission has followed a similar procedure in respect of the Directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences ((EU) 2016/680) (**Law Enforcement Directive**).

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

## 6. COVID-19

### 6.1 ESMA allows decision on reporting net short positions to expire

On 15 March 2021, ESMA issued a press release announcing it has decided not to renew its decision to require holders of net short positions in shares traded on EU regulated markets to notify the relevant NCA if the position reaches, exceeds or falls below 0.1% of the issued share capital. This reporting decision has applied since 16 March 2020 and will expire on 19 March 2021.

ESMA also notes that the European Free Trade Association Surveillance Authority (**EFTA Surveillance Authority**) has published a corresponding press release stating it is allowing temporary requirements to expire on 19 March 2021.

ESMA has provided that it, along with NCAs, will continue to monitor developments in financial markets as a result of the COVID-19 pandemic and is prepared to use its powers to ensure the orderly functioning of markets, financial stability and investor protection.

The ESMA press release can be accessed [here](#) and the EFTA Surveillance Authority press release can be accessed [here](#).

## 7. MISCELLANEOUS

### 7.1 ESMA issues letter to the Commission for legislative action on ESG ratings and assessment tools

On 29 January 2021, ESMA published a letter it has sent to the Commission on its views on the challenges in the area of environmental, social and governance (**ESG**) ratings and assessment tools (**Letter**). ESMA has highlighted the need to match appropriate regulatory requirements with the demand for these products to ensure their quality and reliability.

ESMA has identified the following key points:

- there should be a common definition of ESG ratings that covers the broad spectrum of possible ESG assessments as this will future-proof any regulatory framework and mitigate against possible obsolescence;
- the market for ESG ratings and other assessment tools is currently unregulated and unsupervised, there are increased risks of greenwashing, capital misallocation and products mis-selling;
- a supervisory and regulatory regime should be adapted to the current market, this should accommodate both large and smaller providers who may be subject to existing regulatory frameworks; and
- ESG rating providers can be part of larger groups providing services such as green bond certification and credit ratings.

ESMA's letter builds on its response to the Commission's consultation on the Renewed Sustainable Finance Strategy in July 2020, where specific issues in relation to the ESG ratings and assessment tools were raised.

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

### 7.2 ESAs submit draft RTS on amendments to the PRIIPs KID to the Commission

On 3 February 2021, the ESAs submitted to the Commission the draft final report on RTS on amendments to the existing rules contained in Commission Delegated Regulation (EU) 2017/653 on key information documents (**KIDs**) for packaged retail and insurance-based investment products (**PRIIPs**) (**Final Report**).

The submission of the RTS follows the adoption of the draft final report by the European Insurance and Occupational Pensions Authority (**EIOPA**) Board of Supervisors on the same day. The EIOPA's Board of Supervisors had previously failed to adopt the draft final report, however, it went on to support the proposal following the receipt of further details provided by the Commission on their approach to the broader review of Regulation (EU) No 1286/2014 (**PRIIPs Regulation**), namely that the review will thoroughly examine the application of the PRIIPs framework including topics such as the creation of a digitalised KIID and the scope of products under the PRIIPs Regulation.

Once adopted by the Commission, and provided no objections are raised by the Council of the EU or the European Parliament, the RTS will enter into force.

UCITS funds which are marketed to retail investors are not currently required prepare a PRIIP KID under the PRIIPS Regulation. This exemption is due to expire on 31 December 2021. The Commission is still considering whether to extend the current exemption beyond this date. On 1 February 2021, the European Fund and Asset Management Association (**EFAMA**) published a statement calling for an extension to the UCITS exemption for at least a further 12 months (**Statement**).

The Statement outlines the difficulties faced by UCITS managers (and the need to revise the Undertakings for Collective Investment in Transferrable Securities Directive (Directive 2009/65/EC) (**UCITS Directive**) to remove the obligation to publish a UCITS KIID to avoid a



scenario whereby a UCITS must produce both a UCITS KIID and a PRIIPs KID) if it was the case that they were expected to produce a PRIIPs KID from 1 January next year.

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

The EFAMA Statement 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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