TRAINING & DEVELOPMENT PROGRAMME

2023 Review and 2024 Horizon Scan
Finance and Financial Services
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McCann FitzGerald 2023 and 2024: Review and Horizon-Scan

Finance and Financial Services

1. ESG Aspects of Finance

1.1 Corporate Sustainability Reporting Directive

On 5 January 2023, following its publication in the Official Journal of the EU on 12 December 2022, the Corporate Sustainability Reporting Directive[1] (the "**CSRD**") entered into force.

The CSRD will amend the Non-Financial Reporting Directive[2] (the "**NFRD**") to introduce more detailed reporting requirements in respect of sustainability issues such as environmental rights, social rights, human rights, and governance factors. The CSRD will oblige in-scope companies to disclose information on their societal and environmental impact connected with their own operations and with their value chain.

The CSRD will apply to:

- all EU large companies meeting two of the following criteria: (i) 250 employees; (ii) €40 million net turnover; and/or (iii) €20 million balance sheet total;
- EU SMEs listed on a regulated market (other than micro undertakings);
- EU parent companies, where the group of companies satisfies the large group criteria (i.e. collectively meets the large company criteria above on a consolidated basis); and
- Non-EU parent undertakings that have net turnover over €150m in the EU and either: (i) an EU branch with net turnover over €40m; or (ii) an EU subsidiary which is a large company or listed SME.

The CSRD will apply on a phased basis:

- reporting in 2025 on financial year 2024 for companies already subject to the NFRD;
- reporting in 2026 on financial year 2025 for companies that are not currently subject to the NFRD;
- reporting in 2027 on financial year 2026 for listed SMEs except micro undertakings, small and non-complex credit institutions, and captive insurance undertakings. An opt-out will be possible for in scope SMEs for the first two years; and
- reporting in 2029 on financial year 2028 for in scope third-country undertakings.

The provisions of the CSRD are required to be transposed into Irish law by 6 July 2024.

For more information, see our briefings here and here.

[1] Directive (EU) 2022/2464 (here).

[2] Directive 2014/95/EU (here).

1.2 The European Sustainability Reporting Standards

The CSRD introduces mandatory reporting standards (the "**European Sustainability Reporting Standards**" or "**ESRS**"), which are to be developed by the European Financial Reporting Advisory Group (the "**EFRAG**"), a body established to provide technical advice on aspects of environmental policy to the European Commission.

On 22 December 2023, Delegated Regulation (EU) 2023/2772 (here) was published in the Official Journal of the EU. The Delegated Regulation contains the first set of ESRS, for use by all EU companies subject to the reporting obligations of the CSRD.

The ESRS will help investors understand the sustainability impact of the companies in which they invest. There are 12 ESRS, covering the spectrum of sustainability concerns; they comprise two cross-cutting standards and ten topical standards:

- ESRS 1: General requirements
- ESRS 2: General disclosures
- ESRS E1: Climate change
- ESRS E2: Pollution
- ESRS E3: Water and marine resources
- ESRS E4: Biodiversity and ecosystems
- ESRS E5: Resource use and circular economy
- ESRS S1: Own workforce
- ESRS S2: Workers in the value chain
- ESRS S3: Affected communities
- ESRS S4: Consumers and end-users
- ESRS G1: Business conduct

Delegated Regulation 2023/2772 came into application on 1 January 2024. It applies in relation to financial years beginning on or after 1 January 2024, in line with the dates for the application of the CSRD.

Sector-Specific ESRS

A proposal has been published by the European Commission (here) delaying the date of adoption of the sector-specific ESRS by two years, from 30 June 2024 to 30 June 2026.

According to the European Commission, the proposal allows in-scope companies to focus on implementation of the first set of ESRS (above) and would ensure that EFRAG has enough time to develop sector-specific ESRS that are efficient and that limit the reporting burden on companies to the greatest extent allowable.

1.3 Taxonomy-related Developments

The EU Taxonomy Regulation[3] establishes a classification system for environmentally sustainable activities, which are to be determined by reference to the extent of their contribution to environmental objectives[4] and technical criteria. In so doing, it seeks to create a common

[3] Regulation (EU) 2020/852 (here).

[4] Climate change mitigation; climate change adaptation; protection and restoration of biodiversity and ecosystems; sustainable use and protection of water and marine resources; pollution prevention and control; transition to a circular economy.

language to be used when assessing whether economic activities have a substantial positive impact on the environment.

For a more detailed overview of the EU Taxonomy Regulation, see our briefings here and here.

In 2023, the principal Taxonomy-related developments were the following:

- the adoption of a delegated act[5] setting out technical screening criteria for the four non-climate environmental objectives – namely protection of water and marine resources; the restoration of biodiversity and ecosystems; pollution prevention and control; and the transition to a circular economy; and

- the adoption of a delegated act[6] amending the existing Climate Delegated Act[7] and setting out technical screening criteria for determining the conditions under which certain economic activities qualify as contributing substantially to climate change mitigation or climate change adaptation, and for determining whether those activities cause no significant harm to any of the other environmental objectives.

The European Commission has also published a draft Commission Notice (here) providing guidance in relation to reporting under the EU Taxonomy.

1.4 Sustainable Finance Disclosure Regulation

The Sustainable Finance Disclosure Regulation[8] ("**SFDR**") sets out sustainability disclosure requirements for financial market participants and was enacted to address the twin objectives of increasing transparency of sustainability-related disclosures and to increase comparability of disclosures for end-investors.

For a more detailed overview of the SFDR, see our briefing here.

SFDR-related developments in 2023 include:

- The European Securities and Markets Authority ("**ESMA**") published in October a risk analysis report (here) on ESG-related names and claims in the EU fund industry. According to ESMA, the results show that funds increasingly use ESG-related language in their names, and that investors consistently prefer funds with ESG-related words in their name. According to ESMA, the use of ESG language is strongly correlated with disclosures under the SFDR regime; funds disclosing under Article 9 of the SFDR contain more ESG language in their information documents compared to the information documents of funds making fewer disclosures.

- The European Commission consulted on the implementation of the SFDR regime (see here); the Commission's consultation paper included proposals to put in place a new, pan-EU ESG fund labelling regime (also referred to as "SFDR 2.0").

- Further proposals to amend the regulatory technical standards ("**RTS**") under SFDR, as it relates, amongst other matters, to Principal Adverse Impact ("**PAI**") disclosures, the "Do No Significant Harm" ("**DNSH**") test and reporting requirements. For more information, see our briefing here.

[5] Delegated Regulation (EU) 2023/2486 (here).

[6] Delegated Regulation (EU) 2023/2485 (here).

[7] Delegated Regulation (EU) 2021/2139 (here).

[8] Regulation (EU) 2019/2088 (here).

1.5 The Corporate Sustainability Due Diligence Directive

On 14 December 2023, the Council of the EU and the European Parliament reached a provisional political agreement (see here) on the Corporate Sustainability Due Diligence Directive ("**CSDDD**") (originally proposed text here).

The CSDDD proposes to impose obligations on large companies as regards the actual and potential adverse impacts on human rights and the environment of their operations, those of their subsidiaries, and those carried out by their business partners. It proposes to introduce obligations for in-scope entities to identify and, where necessary, prevent, end or mitigate adverse impacts of their activities on human rights and on the environment, and, in the case of certain larger companies, to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C, in line with the Paris Agreement.

The provisional agreement on the CSDDD awaits formal approval by the co-legislators. Once published in the Official Journal of the EU, the CSDDD will enter into force 20 days after publication; EU Member States will then have two years to transpose it into national law.

The CSDDD is proposed to come into application incrementally. It is envisaged that it will first apply to very large companies (over 1,000 employees and €300 million net worldwide turnover), three years after entry into force.

For more information, see our briefing here.

1.6 EU Green Bond Standard

On 30 November 2023, the EU Green Bond Regulation[9] was published in the Official Journal of the EU. The Regulation creates a new voluntary "European green bond" or "EuGB" label, which can be used by bond issuers to market environmentally sustainable bonds that align with the EU Taxonomy Regulation.

Issuers who choose to market bonds as "European green bonds" will be subject to uniform requirements that aim to harmonise the EU market for green bonds, and to ensure that investors can more confidently direct funds towards financial products that align with their sustainability preferences.

According to EU institutions, the creation of a harmonised EU green bond standard will help combat greenwashing, as well as enable investors to direct funds more confidently towards environmentally sustainable financial products. By increasing investor trust and confidence, the EU Green Bond Regulation aims to grow the market for sustainable finance products more generally and, in doing so, support EU climate transition efforts.

Following its entry into force, the EU Green Bond Regulation will begin to apply from 21 December 2024. EU Member States will be required to adopt measures before that time to comply with the provisions of the Regulation relating to administrative sanctions and the powers of national competent authorities.

A transition period will apply, in respect of certain provisions of the EU Green Bond Regulation, for the first 18 months of application, during which time external reviewers will be able to provide services in accordance with the Regulation provided they notify ESMA and make "best efforts" to comply with the relevant provisions of the Regulation.

[9] Regulation (EU) 2023/2631 (here).

1.7 Other Notable ESG-related Developments

EU Regulation on ESG Ratings Providers

Following finalisation by the Council of the EU and the European Parliament of their respective negotiating mandates, inter-institutional negotiations on the proposal to introduce an EU Regulation on ESG ratings activities (originally proposed text here) are expected to begin in January 2024.

In accordance with the proposal, ESG rating providers operating in the EU would be required to comply with certain requirements, including authorisation requirements. Such providers would be required to obtain authorisation, either from ESMA, or by virtue of an equivalence decision in the case of ratings providers operating outside of the EU.

According to EU institutions, the proposal Regulation on ESG ratings providers is necessary to ensure reliability and transparency in the ESG ratings market, and to ensure availability of meaningful ESG data. The proposal also aims to increase confidence in the market for sustainable investment products more generally, and to help scale up EU climate transition efforts.

Integration of ESG-related Risk in the Prudential Framework

On 12 October 2023, the European Banking Authority (the "**EBA**") published a report (here) on the role of ESG-related risks in the prudential framework of credit institutions and investment firms. Employing a risk-based approach, the EBA's report assesses how the current prudential framework captures ESG-related risks.

The report recommends enhancements to accelerate the integration of ESG-related risks across the Pillar 1 framework. The proposed enhancements aim to support the transition to a more sustainable economy, whilst ensuring the continued resilience of the banking sector.

On this note, as part of the agreed Basel III reforms to the EU capital requirements framework, EU co-legislators have reached agreement in respect of the further integration of ESG-related risks in the prudential framework. Under the now-published texts (see section 6.8 below) amending the EU capital requirements regime:

- banks will have to draw up transition plans under the prudential framework that will need to be consistent with the sustainability commitments banks undertake pursuant to other provisions of EU law, such as the CSRD;

- bank supervisors will oversee how banks handle ESG risks and include ESG considerations in the context of the annual supervisory examination review process ("**SREP**");

- ESG reporting and disclosure requirements will apply to all EU banks, with proportionality for smaller banks; and

- banks will enjoy a favourable risk weight treatment only where they finance an infrastructure project with a positive or neutral environmental impact assessment attached to it.

It is expected that changes to the EU capital requirements framework will apply from 1 January 2025.

Draft EBA Guidelines on Management of ESG-related Risk

On 18 January 2024, the EBA launched a public consultation (here) on draft guidelines, published in accordance with Article 87a(5) of the Capital Requirements Directive[10] ("**CRD IV**"), on the management of ESG-related risks.

The EBA's draft guidelines set out requirements for credit institutions relating to the identification, measurement, management and monitoring of ESG risks, including by adopting plans aimed at addressing the risks arising from the transition towards an EU climate-neutral economy.

The EBA's consultation runs until 18 April 2024.

Sustainability-related Amendments to the Central Bank of Ireland's Minimum Competency Code 2017

On 24 November 2023, the Central Bank of Ireland (the "**CBI**") published a notice of intention (here) confirming that it intends to recognise sustainability knowledge and competence as part of the Minimum Competency Code 2017, with effect from 1 January 2025.

First, the CBI intends to update the competencies for retail financial products in Appendix 3 of the Code to include competencies relating to sustainability generally for all retail financial products. There will also be additional amendments to incorporate the suitability requirements under the Markets in Financial Instruments Directive II[11] ("**MiFID II**") and the Insurance Distribution Directive[12] (the "**IDD**").

Secondly, the CBI intends to recognise sustainability training for Continuing Professional Development ("**CPD**") purposes, where it is directly relevant to a person's role.

Changes to the Code are being introduced pursuant to the powers set out by section 50 of the Central Bank Reform Act 2010.

Proposed EBA Voluntary "Green Loan" Label

On 15 December 2023, the EBA published a response (here) to the European Commission's call for advice on green loans and mortgages, together with a related EBA Opinion (here).

The EBA is proposing the introduction of a voluntary EU label for green loans, based on a common EU definition and the integration of the concept of a "green mortgage", and its key sustainability features, in the EU Mortgage Credit Directive[13].

Transition Finance

On 7 July 2023, the European Commission published, in the Official Journal, Commission Recommendation 2023/1425 (here) on facilitating finance for the transition to a sustainable economy.

The European Commission Recommendation is addressed to undertakings that wish to contribute to the green transition, as well as to financial intermediaries and investors, and Member States and supervisory authorities. It offers practical guidance to financial market participants who wish to obtain or provide transition finance.

[10] Directive 2013/36/EU (here).

[11] Directive 2014/65/EU (here).

[12] Directive (EU) 2016/97 (here).

[13] Directive 2014/17/EU (here).

2. Individual Accountability Framework

The Central Bank (Individual Accountability Framework) Act 2023 (the "**IAF Act**") (here) was signed into Irish law on 9 March 2023. The new framework (the "**IAF**") is intended to confer powers on the CBI to strengthen and enhance individual accountability in the management and operation of regulated financial service providers ("**RFSPs**").

The IAF comprises four pillars, the majority of which are now in operation:

I. The Senior Executive Accountability Regime (not yet in operation)

Once in operation, the Senior Executive Accountability Regime ("**SEAR**") will require in-scope RFSPs to set out clearly and fully where responsibility and decision-making lie within the firm's senior management, including by the preparation of "statements of responsibility" for each senior executive and "responsibility maps" for the entire firm.

SEAR will be implemented on a phased basis; the regime will initially apply, from **1 July 2024**, to credit institutions (excluding credit unions), certain insurance undertakings and investment firms, and third country branches of such firms.

The CBI also has the power to extend SEAR's application to other sectors.

Notably, the CBI recently deferred SEAR's applicability to (independent) non-executive directors ("**(I)NEDs**") of in-scope RFSPs until **1 July 2025**. The other aspects of the IAF, including the Conduct Standards, have applied to (I)NEDs of in-scope RFSPs since 29 December 2023.

II. Conduct Standards (in operation since 29 December 2023)

The Conduct Standards set out a single set of applicable standards of behaviour which apply to relevant individuals in all regulated firms, irrespective of sector. They include "Common Conduct Standards", which apply to persons in controlled functions ("**CFs**"), and "Additional Conduct Standards", which apply persons in pre-approval controlled functions ("**PCFs**") or persons performing the CF1 role (i.e. individuals with the ability to exercise a significant influence on the conduct of the affairs of the firm).

It is a defence to any enforcement action relating to an alleged breach of the Conduct Standards if an individual can show that she or he took any steps that it was reasonable in the circumstances to take.

The "Business Standards" are currently set out in the Consumer Protection Code 2012; they are being considered as part of the CBI's current review of the Code (see section 6.4 below). The CBI intends to update the Business Standards separately as part of its review.

III. Enhanced Fitness and Probity Regime (in operation since 29 December 2023)

The CBI's Fitness and Probity ("**F&P**") regime has been updated to introduce certification, enhanced due diligence and reporting obligations in respect of the fitness and probity of persons in CF and PCF roles.

Certification

Enhanced certification requirements are contained in SI No 2 of 2024 (here).

In accordance with enhancements to the F&P regime, the annual certification obligation requires that a firm must not permit a person to perform a CF / PCF role unless a certificate of compliance with standards of fitness and probity is in force.

From 1 January 2025, and annually thereafter, a firm must submit to the CBI confirmation of compliance with the certification requirements. A certificate of compliance is valid for 12 months.

Following consultation by the CBI (see our briefings here and here), finalised Regulations designating further CF and PCF roles have been published:

(i) SI No 663 of 2023 (here), which applies to RFSPs; and

(ii) SI No 664 of 2023 (here), which applies in relation to holding companies.

The CBI has introduced three new PCF roles as follows:

1. PCF-53: Head of Client Asset Oversight;

2. PCF-54: Head of Material Business Lines for Insurance Undertakings; and

3. PCF-55: Head of Material Business Lines for Investment Firms.

The CBI has also introduced two new PCF roles in relation to holding companies based in Ireland:

1. HCPCF1: the Office of the Chair of the Board of the Holding Company; and

2. HCPCF2: the Office of Director of the Holding Company.

To reflect the regulatory changes, the CBI has made available updated consolidated lists in respect of: (i) CF roles (here); and (ii) PCF roles (here).

Under the modified regime, the CBI will also have the power to investigate former CF or PCF holders for six years after performing CF / PCF functions.

IV. Enhanced CBI Enforcement Powers

The IAF Act amends the CBI's Administrative Sanctions Procedure[14] (the "**ASP**"), removing the so-called "participation link". The CBI will no longer have to first find that a firm has committed a regulatory breach before it can bring an enforcement action against individuals in that firm. Thus, focus will be on individuals, as well as on the firm as a whole.

The IAF Act also amends the ASP and the F&P Standards, providing that breaches of the new Conduct Standards will be prescribed contraventions of financial services legislation, and that the CBI will be able to bring enforcement action against the individual(s) responsible.

The ASP Guidelines (here) confirm that the CBI's approach to deciding whether or not to bring enforcement action is unchanged; it will remain "proportionate" and "risk-based".

For more information on the IAF, see our online hub (here), where a number of briefings can be accessed, along with our IAF brochure (here).

3. EU Credit Servicing Regime

On 27 December 2023, the Minister for Finance signed the European Union (Credit Servicers and Credit Purchasers) Regulations 2023[15], transposing the provisions of the EU Credit Servicing Directive[16]. The Irish Regulations came into operation on 30 December 2023.

The EU-based regime for credit servicing, transposed via the Irish Regulations, applies only to non-performing loans ("**NPLs**") originated by EU credit institutions, and transferred on or after 30 December 2023. The primary goal of the EU Directive is to assist EU credit institutions in efficiently selling NPLs so that those credit institutions are not hampered in discharging their key role of providing finance to EU businesses. As part of that overarching goal, amongst other

[14] Part 4, IAF Act 2023. Relevant provisions commenced on 19 April 2023 (see our briefing here).

[15] SI No 644 of 2023 (here).

[16] EU Directive (EU) 2021/2167 on credit servicers and credit purchasers (here).

matters, the Directive contemplates the standardisation of information for potential credit purchasers as well as the creation of a new authorisation regime for credit servicers, which can be passported throughout the EU.

Significantly, the new EU-based regime will operate alongside Ireland's existing domestic credit servicing regime. Accordingly, all sellers, purchasers and servicers of loan portfolios in Ireland need to ensure they can identify which regime applies and also (assuming the EU regime is relevant) that they have fully analysed and integrated the requirements of the 2023 Irish Regulations into their business.

Our briefing (here) provides analysis on the scope of the new EU-based regime, as compared to the pre-existing Irish regime, including the below high level comparison table:

Scope / Impacted Party	**EU Regime**	**Irish Regime**
In-scope types of finance	Non-performing credit in the form of a deferred payment, a loan or other similar financial accommodation	Credit in the form of a deferred payment, cash loan or other similar financial accommodation (including the letting of goods) ("**credit**"). Hire purchase agreements and "consumer-hire agreements" (e.g. finance leases) ("**hire agreements**").
"Borrower"	All types (but with more of a focus on consumers and SMEs)	Natural persons and, in the case of "credit", certain corporate SMEs.
Seller	EU credit institution focus	Entity authorised to provide credit or hire agreements in the State[17]
Purchaser	No authorisation required – some obligations	Authorisation required for (i) holding legal title to a credit agreement/hire agreement, and/or (ii) making key decisions or setting strategy for the management of a portfolio of such agreements.
Credit servicer	Authorisation required	Authorisation required
Credit servicing scope	• collection/recovery of payments from borrowers • renegotiating terms and conditions with borrowers • dealing with complaints • telling borrowers about changes to interest rates, charges or payments due	• holding legal title to a credit/hire agreement • managing or administering a credit/hire agreement (including the activities within the Directive's scope) • making of key decisions or setting strategy in relation to management of portfolio of credit/hire agreements
Application in time	NPL sales by EU credit institutions on or after 30 December 2023.	Applies to existing and future credit and hire agreements.

[17] For completeness, the credit servicing regime only refers to the creditor being authorised in the State in relation to SME borrowers. No such specific reference is made in the case of natural person borrowers but this is generally an academic point given that the provision of credit and/or hire agreements to natural persons (not just consumers) requires authorisation in almost all instances.

While the new regime offers interesting opportunities for the development of a competitive and effective EU-wide credit servicing market, it also presents a challenge for persons involved in the Irish market as a result of the existence of dual EU and Irish regimes. It will be critical for in-scope sellers, purchasers, and credit servicers to successfully navigate the complexity and ensure that the requirements of the applicable regime are adhered to.

4. ELTIFs

4.1 ELTIF 2.0 – a revitalised framework for retail investors

On 10 January 2024, Regulation (EU) 2023/606 (here), or "ELTIF 2.0", came into application, following its entry into force on 9 April 2023. The amending Regulation introduces changes to the regulatory framework for European long-term investment funds ("**ELTIFs**"). The ELTIF framework was first established in 2015 by the original "ELTIF Regulation".

ELTIFs are EU alternative investment funds ("**AIFs**"), managed by alternative investment fund managers ("**AIFMs**") that invest in long-term investments, such as social and transport infrastructure projects, real estate, and SMEs. ELTIFs are the only type of EU-based funds that can be distributed on a cross-border basis to both professional and retail investors.

Since adoption of the initial framework in 2015, relatively few ELTIFs have been launched in the EU. In 2020, the European Commission launched a public consultation to understand the reasons behind the slow uptake of ELTIFs. That process culminated in the adoption and subsequent entry into operation of ELTIF 2.0.

ELTIF 2.0 introduces a number of targeted changes to the ELTIF framework:

Expansion of the scope of eligible assets and investments in which an ELTIF can invest	• ELTIF 2.0 aims to enhance the flexibility of asset managers to invest in broad categories of real assets by introducing "real assets" as a specific "eligible investment".[18] It also includes the possibility to invest in FinTech assets, subject to certain conditions, and the possibility to lend. • The new regime removes the minimum investment value of €10 million and increases, from €500 million to €1.5 billion, the market capitalisation threshold for listed qualifying portfolio undertakings ("**QPUs**"). Crucially, for non-EU fund managers, the revised regime includes the possibility to invest in non-EU QPUs.[19] • ELTIFs may now enter into minority co-investment in investment opportunities, and invest in STS securitisations. • The regime permits "fund of funds" strategies and master-feeder structures.
Portfolio composition and diversification requirements	• Under the original ELTIF framework, ELTIFs were required to invest at least 70% of their capital in eligible investment assets; this requirement is lowered by ELTIF 2.0 to 55%, with the aim of enabling fund managers to better manage the liquidity of ELTIFs. • ELTIF 2.0 relaxes the diversification requirements for ELTIFs' exposures to single QPUs, single real assets, collective investment undertakings and certain other eligible investment assets, contracts, and financial instruments.

[18] "Real assets" include immovable property, such as communication, environment, energy or transport infrastructure, social infrastructure, including retirement homes or hospitals, as well as infrastructure for education, health and welfare support or industrial facilities, installations, and other assets, including intellectual property, vessels, equipment, machinery, aircraft or rolling stock.

[19] Note, however, non-EU QPUs in jurisdictions identified as high-risk for anti-money laundering or listed on the EU list of non-cooperative jurisdictions for tax purposes are prohibited.

	• ELTIF 2.0 also provides that certain investment limits will not apply where ELTIFs are marketed solely to professional investors and diversification requirements. • Up to 20% of an ELTIF's capital may now be invested in STS securitisations.
Borrowing	ELTIF 2.0 increases the flexibility of managers to raise further capital during the life of an ELTIF: • Firstly, ELTIF 2.0 replaces the concept of "capital" with "net asset value" as the point of reference for determining the borrowing limit. • Secondly, ELTIF 2.0 provides that ELTIFs marketed to retail investors should be permitted to borrow up to 50% of the net asset value of the ELTIF. ELTIFs marketed solely to professional investors will now be permitted to borrow up to 100% of the net asset value of the ELTIF.
Removal of obstacles for retail investors	ELTIF 2.0 removes the requirement that retail investors invest an initial minimum investment of €10,000 in one or more ELTIFs. It also removes the restriction that such investors may not invest an aggregate amount exceeding 10% of their financial instrument portfolio in ELTIFs. These changes, together with the removal of the local facilities requirement and other complementary amendments, are significant enhancements to the ELTIF regime, which advance the efficient and effective use of the "retail-distribution passport" and improve retail investors' access to ELTIFs.

ELTIF 2.0 came into application on 10 January 2024. There are, however, grandfathering provisions in place, for a period of five years, in respect of ELTIFs authorised in accordance with, and complying with, the provisions of the initial ELTIF framework before 10 January 2024.

For more information on ELTIF 2.0, see our briefing here.

4.2 Regulatory Technical Standards under ELTIF 2.0

On 19 December 2023, ESMA published (here) finalised draft RTS under ELTIF 2.0, addressing the following:

- the criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purpose;
- the circumstances in which the life of an ELTIF is considered compatible with the life-cycles of each of the individual assets, as well as different features of the redemption policy of the ELTIF;
- the circumstances for the use of the matching mechanism, i.e. the possibility of full or partial matching (before the end of the life of the ELTIF) of transfer requests of units or shares of the ELTIF by exiting ELTIF investors with transfer requests by potential investors;
- the criteria to be used for certain elements of the itemised schedule for the orderly disposal of the ELTIF assets; and
- costs disclosure.

ESMA has submitted the draft RTS to the European Commission for endorsement. It was initially expected that application of the Level 2 RTS would coincide with the entry into application of

ELTIF 2.0. However, the European Commission is now expected to make a decision as to whether or not to endorse ESMA's draft RTS within three months of receipt.[20]

4.3 Inclusion of ELTIF Chapter in CBI's AIF Rulebook

The CBI has confirmed that it intends to include a standalone ELTIF Chapter in its AIF rulebook. That chapter has been published in draft form as part of the CBI's now-closed consultation (here).

The new ELTIF Chapter will comprise: Part I which sets out: (i) ELTIF restrictions; (ii) supervisory requirements; (iii) prospectus requirements; (iv) general operational requirements; and (v) requirements regarding financial reports; and Part II which deals with requirements related to the marketing of ELTIFs to retail investors.

The CBI intends to publish a revised AIF Rulebook as quickly as possible, to facilitate the authorisation of ELTIFs under the ELTIF Regulation. It is hoped that the revised Rulebook will be finalised by the time that the Level 2 RTS under ELTIF 2.0 are in place.

For more information, see our briefings here and here.

5. Selected Case Law

5.1 *Bank of Ireland Mortgage Bank v Hade*[21]

This Court of Appeal decision has brought clarity to legal requirements for the enforcement of security in respect of non-housing loans. The decision follows an appeal of an earlier High Court ruling. Although it was accepted that the relevant loans at issue were not strictly "housing loans", the High Court had held that the Bank agreed to treat them as such and so the receiver had acted unlawfully in taking possession of the properties without the necessary court orders applying to housing loans. The High Court awarded exemplary damages of €550,000 against the receiver for that unlawful action.

The High Court decision suggested some uncertainty in the settled legal requirements for receiver sales pursuant to security that might be construed as a "housing loan mortgage" and the Land Registry paused registration of applications for registration of title from receivers pending the outcome of an appeal. In response to this, the Law Society of Ireland's Conveyancing Committee issued a practice note (here) on 12 May 2023 on the High Court decision advising that "*until an appeal is determined, the Conveyancing Committee recommends that practitioners acting in the sale of a property by a receiver should consider carefully before entering into a contract whether Sections 97 and 100 of the 2009 Act have application, and whether necessary court orders should be obtained*".

Among the issues to be determined by the Court of Appeal were: (1) whether the borrowers had acted as consumers when taking out the loan facilities; (2) whether the mortgages could be treated as housing loan mortgages, and whether that would require the receiver to have sought a court order for possession; and (3) whether the award of exemplary damages to Mr Hade was correct.

The Court of Appeal held that the High Court was correct in determining that the borrowers had not acted as consumers when entering into the loan facilities, because the monies were advanced to refinance and buy properties which were intended to be let for a profit. However, the Court of Appeal disagreed with the High Court's finding that the Bank had agreed to treat the mortgages as housing loan mortgages. Rather the Bank had contractually agreed to constrain certain rights by reference to the Land and Conveyancing Law Reform Act 2009 (which includes the "housing loan mortgage" concept). In addition, the Court of Appeal disagreed with the High Court in relation to certain aspects of its interpretation of the 2009 Act and held that it does not in any

[20] That period may be extended by one month.

[21] [2023] IECA 293 (here).

event require a court order for possession by a receiver of a property subject to a housing loan mortgage.

For those and other reasons, the appeal of the receiver to the award of exemplary damages against him was allowed.

While the Land Registry has not published any update to its practice since the judgment of the Court of Appeal, it is hoped the Court's decision will signal a return to normal business when it comes to receiver sales.

For more information, see our briefing here.

5.2 *In the Matter of Mac-Interiors Ltd*[22]

On 11 July 2023, the High Court delivered a ruling which confirmed and clarified a "significant and previously undecided point" regarding the jurisdiction of the Irish courts to appoint an examiner to a non-EU registered company with its centre of main interests ("**COMI**") in Ireland.

The High Court, for the first time, made orders appointing an examiner to a foreign registered, non-EU company. In making the orders, Quinn J noted that the Court had jurisdiction to appoint the examiner on the basis that, notwithstanding that the company did not meet the definition of a "company" under section 2(1) of the Companies Act 2014[23], the 2014 Act was to be read in the light of the EU Insolvency Regulation[24], which applies directly in Ireland without need for transposing legislation. Moreover, section 508(2) of the Companies Act 2014 expressly provides that Part 10 of the Act is "subject to the Insolvency Regulation".

The High Court's ruling confirms that Article 3(1) of the EU Insolvency Regulation confers on the Irish courts the power to open insolvency proceedings in respect of a debtor whose COMI is in Ireland, regardless of its place of incorporation.

On the facts of the case, it was found that the company's COMI was in Ireland, and that preconditions for the appointment of an examiner had been met. Accordingly, the Court exercised its jurisdiction to appoint an examiner to the (non-EU) Northern Irish company.

For more information, see our briefing here.

5.3 *Promontoria Oyster DAC (the Objecting Creditor) v Fergus O'Connor (the Debtor)*[25]

In this ruling the Supreme Court clarified the meaning of the term "insolvent" for the purposes of the Personal Insolvency Act 2012 (as amended) in the context of a question as to whether Mr O'Connor could qualify for a Personal Insolvency Arrangement ("**PIA**") that Promontoria had objected to. The unusual fact pattern in this case was that, while Mr O'Connor could not meet his debts as they fell due, his assets significantly exceeded his liabilities and the PIA did not require him to sell those assets.

In a considered discussion of the law around personal insolvency, Baker J held that it was clear that the insolvency concept relevant for the purposes of the Personal Insolvency Act 2012 is a "cash flow test" rather than a "balance sheet test". On that basis, the fact that a debtor has assets exceeding their liabilities does not preclude them from being insolvent for the purposes of the Act (and thus having access to a PIA under it) if they cannot meet their debts as they fall due. Baker J also clarified that the scope of assets to be considered for the insolvency test extends beyond cash/receivables of the debtor and will extend to readily realisable assets (which can include real

[22] [2023] IEHC 395 (here).

[23] Being a company formed and registered in Ireland.

[24] Regulation (EU) 2015/848 (here).

[25] [2023] IEHC 31 (here).

estate). The assessment of the particular assets that are sufficiently realisable so as to be taken into account for the cash flow insolvency test should be considered on a case-by-case basis.

While Baker J did find that the debtor was insolvent for the purposes of the 2012 Act, her judgment also raised some concerns about the extent of consideration that had been given to the proposed PIA in the High Court proceedings and consequently she remitted the matter back to the High Court for further assessment of the fairness of the PIA. The judgment is also of interest in that it includes important analysis about the role played by a Personal Insolvency Practitioner ("**PIP**") in the operation of the 2012 Act, in particular with regard to the requirement for a PIP's independence throughout.

5.4 *Promontoria (Oyster) DAC v Fox & anor*[26]

In this ruling, the Court of Appeal clarified that certain registered liens over Land Registry property continue to secure further advances, offering important clarification to lenders, loan purchasers and credit servicing firms dealing with secured property.

Historically, an informal method of creating security over Land Registry property was for the property owner to deposit a "land certificate" with a lender. Land certificates (and this method of creating security) were abolished by the Registration of Deeds and Title Act 2006. The 2006 Act allowed a three-year transitional period (expiring 31 December 2009) during which a secured lender could register a statutory lien with the Land Registry to replace the deposit of land certificate.

The Court of Appeal was asked to consider two appeals relating to the High Court's earlier refusal to grant well charging orders to Promontoria over Land Registry properties in respect of which Promontoria held registered liens, pursuant to an earlier loan sale. The complicating factor in Promontoria's application was that the original lender had advanced new monies which Promontoria argued were secured by the lien after the date on which the lien was registered.

The specific question for determination in the proceedings was whether a creditor could rely on a registered lien as security for further advances to a debtor, i.e. as security for additional loans advanced after 31 December 2009.

Pilkington J's judgment focuses on the legislative intention of the 2006 Act in abolishing land certificates and allowing for the registration of liens in their place. Pilkington J agreed with the High Court that the legislative intention of the 2006 Act was to move towards a universal land registration system. However, based on detailed analysis of the relevant legislation, the Court of Appeal ultimately reversed the High Court decision, holding that:

> "*After 2009 the only way to create security is by charge as it is no longer possible to create a lien. But it does not follow that existing liens cannot secure advances after 2009... In my view additional monies advanced subsequent to the date of the registration of the liens as burdens on the relevant folios and after the time fixed for registration of those liens on 31 December 2009, in compliance with the terms of section 73 of the 2006 Act, can be, and, if agreed by the parties, are secured by the registered liens.*"

For more information, see our briefing here.

5.5 *In the Matter of Latzur Limited (In Receivership) & anor and In the Matter of The Companies Act 2014 & anor*[27]

The Court of Appeal discharged previous declarations made by the High Court and made a declaration pursuant to section 438 of the Companies Act 2014 that the applicant's appointment

[26] [2023] IECA 76 (here).

[27] [2023] IECA 60 (here).

as receiver over the assets and undertaking of Latzur Limited was on the foot of a floating charge, and not a fixed charge. Accordingly, debts owing to Revenue ranked as preferential debt *vis-à-vis* a claim by the creditor company.

Collins J's ruling explores a number of significant issues regarding the crystallisation, de-crystallisation, and re-crystallisation, of floating charges in the context of an unsuccessful examinership under company legislation.

5.6 *Ulster Bank v FSPO*[28]

On 22 June 2023, the High Court issued a judgment in relation to a challenge by Ulster Bank of three related decisions of the Financial Services and Pensions Ombudsman (the "**FSPO**") under section 64 of the Financial Services and Pensions Ombudsman Act 2017 (the "**FSPO Act**"). In its ruling, the Court rejected the Bank's appeal; it found no serious or significant error in the FSPO's findings, in respect of the first and second decisions ("**Decisions A and B**"). In relation to the third FSPO decision ("**Decision C**"), there was a procedural issue, and the High Court remitted it to the FSPO for further consideration.

In its ruling, the High Court reiterated the breadth of the FSPO's jurisdiction afforded by the provisions of the FSPO Act. According to the Court, that jurisdiction means that errors made by the FSPO may have been made within jurisdiction and may not necessarily merit the overturning of a decision. Whether the Court would have reached the same decision on the evidence before the FSPO is irrelevant. The only issue is whether there was a "serious or significant error", or "series of errors", perpetrated by the FSPO in reaching the decision.

The Court also emphasised the curial deference that it will afford the FSPO, not just in relation to matters of fact but also contractual interpretation, even though this is a mixed matter of fact and law.

For more information, see our briefing here.

5.7 *WM and Sovim SA v Luxembourg Business Registers*[29]

In November 2022, the CJEU ruled that public access to information on companies' beneficial owners, accessible in Ireland via the Central Register of Beneficial Ownership of Companies, "*constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data*". The public access rights under Regulation 25 of the 2019 Irish AML Regulations[30] were incompatible with that ruling and so, following an administrative restriction on access initially (see our briefing here), the Minister for Finance introduced Regulations[31] restricting the basis for access to the Central Register as a matter of legislation.

Under the 2023 Regulations (see section 6.1 below), persons seeking to access the Central Register must first demonstrate that they have a "legitimate interest" from an anti-money laundering and countering the financing of terrorism ("**AML/CFT**") perspective, justifying access.

For more information on the impact of the *Sovim* ruling, see our briefing here.

[28] [2023] IEHC 350 (here).

[29] C-37/20 and C-601/20 (here).

[30] European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (SI No 110 of 2019) (here).

[31] European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) (Amendment) Regulations 2023 (SI No 308 of 2023) (here).

6. Honourable Mentions

6.1 Anti-Money Laundering

Central Register of Beneficial Ownership of Companies

In the wake of the CJEU's decision in *Sovim* (see section 5.7 above), SI No 308 of 2023 was signed into Irish law by the Minister for Finance, introducing a new "legitimate interest" requirement that applies to any person seeking to inspect information contained in the Central Register of Beneficial Ownership of Companies.

A person may not access the Central Register unless the person can demonstrate to the Registrar of Beneficial Ownership of Companies and Industrial and Provident Societies that: (i) the person is engaged in the prevention, detection or investigation of money laundering or terrorist financing offences; (ii) they are seeking to inspect the information for those purposes; and (iii) the access would be in respect of an entity that is connected with a person convicted of an AML offence or who holds assets in a high-risk third country. "Legitimate interest" is demonstrated to the Registrar through the making of a submission and, if required by the Registrar, the supplying of information or documents including those relating to the requester's previous activities, if any, in relation to AML.

For more information, see our briefing here.

Proposed EU AML Package

On 18 January 2024, the Council of the EU and the European Parliament announced that they have reached a provisional political agreement on the proposed sixth EU Anti-Money Laundering Directive ("**AMLD6**") (proposal here) and on a new EU Anti-Money Laundering Regulation (proposal here).

Those legislative texts form part of a package of EU measures published in July 2021 to strengthen EU rules on AML/CFT. The Council of the EU and the European Parliament already reached a provisional agreement on another part of the EU AML package, the proposed Regulation establishing a new EU Anti-Money Laundering Authority (the "**AMLA**") (see here). Ireland has submitted a bid to host the new AMLA (see here).

The Regulation on information accompanying transfers of funds and certain crypto-assets[32] (the "**recast revised WTR**"), which was part of the EU's initial AML package, has been finalised and was published in the Official Journal of the EU on 9 June 2023, coinciding with the publication of the Markets in Crypto-Assets ("**MiCA**") Regulation[33] (see section 6.2 below).

The recast revised WTR applies from 30 December 2024, in line with the timeline for MiCA.

Following the provisional agreement on AMLD6 and on the proposed new AML Regulation, the texts will be finalised and presented to Member States' representatives in the Committee of Permanent Representatives and the European Parliament for approval. If approved, the Council and the Parliament will have to formally adopt the texts before they are published in the Official Journal and enter into force.

For more information on the EU's AML package, see our briefing here.

6.2 Markets in Crypto-Assets Regulation

On 9 June 2023, the MiCA Regulation was published in the Official Journal of the EU. The MiCA framework introduces common rules for the crypto industry, which aim to protect investors and

[32] Regulation (EU) 2023/1113 (here).

[33] Regulation (EU) 2023/1114 (here).

ensure market integrity, whilst allowing the sector to continue to innovate. The Regulation contains safeguards for environmental protection and the prevention of financial crime and market abuse.

The MiCA Regulation was published in parallel with the recast revised WTR (see section 6.1 above), which regulates, for AML/CFT purposes, information accompanying transfers of crypto-assets.

The MiCA Regulation will mostly apply from 30 December 2024 but the requirements relating to Asset-Referenced Tokens ("**ARTs**") and Electronic Money Tokens ("**EMTs**") will apply from 30 June 2024.

For more information, see our briefing here.

In late-2023, the Department of Finance consulted on the domestic transposition of certain national discretions contained in the MiCA Regulation (see our briefing here).

As an EU Regulation, MiCA has direct effect in EU Member States, including in Ireland. The Regulation does, however, leave certain matters to each Member State's discretion. Ireland's decisions on those matters is to be implemented through national legislation.

On the key issue of the transitional period for crypto-asset service providers ("**CASPs**") operating in accordance with the existing national framework,[34] the Minister for Finance has decided to exercise the discretion available and to set the transitional period to a maximum period of 12 months.

6.3 Benchmarks

Despite LIBOR transition having largely completed in previous years, 2023 still included some important developments relating to benchmarks.

Transition Period

The EU Benchmarks Regulation[35] ("**BMR**") includes rules regarding the use, within the EU, of benchmarks administered in third countries (e.g. the United Kingdom). The BMR contemplated an initial transition period for the use of such benchmarks and also allowed for extensions to that transition period.

An assessment by the European Commission highlighted that a majority of third-country benchmark administrators had not taken sufficient steps to prepare for new rules under the BMR to take effect. Consequently, to avoid the risk of significant disruption to EU markets (because third country benchmarks would not be permitted to be used), a further and final extension was made to the transition period.

That extension of the transition period took effect against the backdrop of a wider review of the BMR. Acknowledging issues raised by market participants in relation to the scope of the BMR rules for third country benchmarks, the European Commission published a proposal for a Regulation amending BMR (see here). The proposed amendments would limit the categories of in-scope third country benchmarks to those which are classified as critical benchmarks, significant benchmarks, EU climate transition benchmarks and EU Paris-aligned benchmarks.

[34] "Virtual asset service providers" ("**VASPs**") registered with the CBI, in accordance with section 26 of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021. For more information on the Irish regulatory framework for VASPs, see our briefing here.

[35] Regulation (EU) 2023/1114 (here).

While the Commission's proposed Regulation is still going through the legislative process, the general expectation is that it will be enacted and in effect prior to the expiry of the current (final) transition period on 31 December 2025.[36]

"Synthetic" LIBOR

Since 1 January 2022, the UK's Financial Conduct Authority (the "**FCA**") has required LIBOR's administrator, ICE Benchmark Administration Limited (the "**IBA**") to publish certain LIBOR settings using a "synthetic" methodology. The 1- and 6-month synthetic sterling LIBOR settings were published for the final time on 31 March 2023; these settings have now ceased permanently. The 3-month synthetic sterling LIBOR setting is expected to cease at the end of March 2024. 1-month, 3-month, and 6-month synthetic US dollar LIBOR settings will cease to be published in September 2024.

6.4 Consumer-related Developments

CBI Review of the Consumer Protection Code 2012

On 31 July 2023, the CBI published an engagement update (here) following on from its earlier discussion paper (here) on the review of the Consumer Protection Code 2012.

Over the course of 2024, the CBI intends to introduce a revised and modernised Consumer Protection Code, which includes consolidating existing rules with the Code of Conduct on Mortgage Arrears. A consultation can be expected in early-2024.

Following adoption of the revised Code in 2024, work on further enhancements to the Code will be undertaken over the course of 2024, with additional Regulations planned for 2025.

More information is available on the CBI's website (here).

Financial Services and Pensions Ombudsman (Amendment) Bill 2023

On 13 December 2023, the Minister for Finance Michael McGrath gained Cabinet approval for the publication of the Financial Services and Pensions Ombudsman (Amendment) Bill 2023 (here).

The Bill will strengthen protections for financial consumers by introducing amendments to the legislation that underpins the FSPO, to ensure that it continues to carry out its statutory functions in line with the Constitution. The need to introduce targeted amendments arose following the Supreme Court's decision in *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General*,[37] which concerned the WRC and its "quasi-judicial role". In the ruling, the Supreme Court determined that determined that two aspects of the Workplace Relations Act 2015 were incompatible with the Constitution: the blanket prohibition on public hearings; and the lack of capacity of Adjudication Officers of the Workplace Relations Commission (the "**WRC**") to take evidence on oath.

Importantly for regulated entities exiting the Irish market, the Bill also proposes ensuring that the FSPO will have the statutory power to investigate persons not otherwise subject to the FSPO's jurisdiction, if they were subject to it at the time of the event giving rise to the complaint.

Distance Marketing Financial Services Directive

On 28 November 2023, a revised Directive[38] concerning financial services contracts concluded at a distance was published in the Official Journal of the EU.

[36] Further background information is available in our briefing here.

[37] [2021] IESC 24. See our briefing here.

[38] Directive (EU) 2023/2673 (here).

The Directive revises the legal framework for distance financial services contracts, in the context of rapid technological development in the market. According to EU institutions, the Directive will boost online consumer protection and provide traders with legal clarity. The Directive acts as a "safety net", meaning that all financial services not covered by specific sectoral legislation will be covered by the new rules, once the Directive enters into application.

EU Member States are required to adopt and publish, by 19 December 2025, the laws, regulations, and administrative provisions necessary to comply with the Directive, and to apply those measures from 19 June 2026.

Consumer Credit Directive II

On 30 October 2023, the revised Consumer Credit Directive[39] ("**CCD II**") (here) was published in the Official Journal of the EU. CCD II, which will repeal and replace Directive 2008/48/EC following its entry into application on 20 November 2026, is considerably broader in scope, compared to its precursor.

Significantly, CCD II extends consumer protections to financial products such as "buy-now-pay-later" loans, which have become more common in recent years due to market changes prompted by digitalisation and shifting consumer preferences.

Key provisions of CCD II are outlined below:

- Enlarged Scope: The revised Directive will apply to credit agreements involving amounts less than €200, which according to EU authorities can often manifest as short-term, high-cost credit agreements. The upper-limit for inclusion within the CCD's scope is to be increased to €100,000. Credit agreements involving amounts above that threshold remain excluded.[40] The European Commission will undertake an evaluation of the upper threshold every four years, together with an evaluation of the Directive's scope more generally.

- Inclusion of Additional Financial Products: The scope of the regime is to be extended to cover aspects of the consumer credit market not contemplated by the 2008 Directive, primarily to account for market developments since that time. CCD II will apply to "potentially detrimental" financial products, such as hiring or leasing agreements with an option to buy, credit agreements in the form of an overdraft facility and where credit has to be repaid within one month, interest-free credit agreements, and credit agreements that require repayment within three months. Buy-now-pay-later schemes will be covered by the revised Directive. Furthermore, where providers of crowdfunding credit services directly provide credit to consumers, such creditors will be within the scope of the revised Directive.

- Rules Governing the Provision of Credit Information: Pursuant to CCD II, information made available to consumers, such as adequate explanations, pre-contractual information, information on consultations of databases, information about the borrowing rate, and other general information, is required to be provided free of charge. Certain standardised information is required to be provided to consumers for comparison purposes. Information is to be provided in a clear, concise and prominent manner, and should, where applicable, be adapted to digital formats.

- Stricter Advertising Rules: CCD II lays down specific provisions on the advertising of credit agreements. For example, the total amount of credit and the repayment duration chosen by a creditor should correspond closely with the terms advertised. The Directive contains certain advertising restrictions, to seek to guard against over-indebtedness.

[39] Directive (EU) 2023/2225 (here).

[40] The Directive would, however, allow a Member State to introduce national legislation covering agreements in excess of €100,000.

- Unsolicited Granting of Credit: CCD II prohibits the unsolicited granting of credit, which includes the provision of pre-approved credit cards that have not been requested by a consumer.

- Creditworthiness Assessment: Under CCD II, the creditworthiness assessment is required to be proportionate, and conducted in the interests of the consumer. The revised text specifies that lenders are to take into consideration all necessary and relevant factors that could influence a consumer's ability to repay credit. Repayment schedules should additionally be tailored to a consumer's specific needs and capacity to repay. Information collected as part of the creditworthiness assessment should be necessary and proportionate to the nature, duration, value and risks of the credit for the consumer, and in line with EU data minimisation principles. Consumers will have the right to request the review of the assessment of creditworthiness.

- Right of Withdrawal: Consumers will also have the right to terminate a credit agreement within 14 days with no penalty and no obligation to provide justification. Additionally, consumers have the right to discharge their obligations before the date agreed in the credit agreement, along with the ancillary right to a reduction in the total cost of credit. Creditors, however, will be entitled to fair and objectively justified compensation for costs linked to early repayment, taking into account any savings they have made.

- Provisions on Artificial Intelligence: CCD II specifies that, where creditors and credit intermediaries personalise the price of their offers on the basis of automated decision-making, they should clearly inform the consumer of that fact. Consumers will have the right to obtain an explanation of the functioning of the automated processing used and a right to obtain human intervention.

- Right to be Forgotten for Cancer Survivors: To ensure equal access to insurance related to credit agreements, the revised CCD contains a provision that insurance policies will not be based on personal data concerning a consumer's cancer diagnosis, after a relevant period of time following the end of that person's medical treatment.

CCD II provides for maximum harmonisation. This means that, following its entry into application, EU Member States will not be able to maintain or introduce national provisions diverging from those required by the Directive. According to the European Commission, maximum harmonisation across EU consumer credit markets is necessary to ensure a high and equivalent level of consumer protection, and to achieve a well-functioning internal market.

6.5 Screening of Third Country Transactions Act 2023

On 31 October 2023, the Screening of Third Country Transactions Act (here) was signed into Irish law. The Act gives effect to the EU FDI Regulation[41] and forms part of a broader EU efforts to screen foreign direct investment that could potentially undermine security or public order.

The legislation introduces a new mandatory notification regime which requires parties to notify qualifying foreign acquisitions of Irish targets (whether assets or undertakings), active in certain sectors, to the Minister for Enterprise, Trade and Employment. Qualifying acquisitions may not be implemented until the Minister has approved the acquisition. Under the Act, the Minister has wide-ranging powers, including the power to prohibit, or impose remedial measures, where a transaction may present risks to the security or public order of the State.

The new notification regime is expected to enter into force in Q2 2024.

For a detailed overview of the new FDI regime, see our briefing here.

[41] Regulation (EU) 2019/452 (here).

6.6 Expansion of Credit Union Services in Ireland

On 13 December 2023, the President of Ireland signed into law the Credit Union (Amendment) Act 2023 (here).

The Act amends the Credit Union Act 1997 to provide for an expansion of credit union services in Ireland, implementing the outcomes of the review of the domestic policy framework for credit unions, led by the Minister for Finance (see here).

Among related matters, the Act:

- provides for the establishment of "corporate credit unions" in Ireland;
- amends the requirements and qualifications for membership of a credit union;
- alters the scope of permitted investments by credit unions;
- provides for the setting of maximum interest rates, by the Minister for Finance, on loans offered by credit unions;
- allows a credit union to refer its members to another credit union, and to participate in the loans of other credit unions; and
- provides for changes to the governance arrangements of credit unions.

The expansion of services offered by credit unions in Ireland is particularly significant in the context of the reduction in size of Ireland's traditional retail banking sector, with prominent withdrawals from the Irish market, as well as several branch closures.

6.7 EMIR

CBI Enforcement Action

On 28 November 2023, the CBI announced that it had fined a UCITS investment fund €192,500 for breaching the reporting obligation under Article 9(1) of the European Market Infrastructure Regulation[42] ("**EMIR**"), following the fund's failure to report to a trade repository 200,640 derivative trades entered into in respect of one of its sub-funds. The fine was imposed pursuant to Ireland's European Union (European Markets Infrastructure) Regulations 2014[43], as amended, which were made for the purposes of giving full effect to EMIR.

Notably, the case marks the first enforcement action taken by the CBI under the Irish EMIR Regulations, and the fine is the first monetary penalty imposed by the CBI on an investment fund.

For more information, see our briefing here.

New EMIR Reporting Requirements

Changes made to EMIR by EMIR Refit[44] (see our briefings here and here) mandated the development of new technical standards regarding the information to be reported to trade repositories. The revised standards, which were published by the European Commission in October 2022 (here), come into operation on 29 April 2024. Given the serious consequences of failing to comply with EMIR reporting obligations (as demonstrated by the CBI's recent enforcement action, above), it is essential that in-scope entities are prepared for compliance or,

[42] Regulation (EU) 648/2012 (here).

[43] SI No 443 of 2014 (here).

[44] Regulation (EU) 2019/834 (here).

as applicable, monitoring compliance, with new EMIR reporting requirements once they take effect.

For more information, see our briefing here.

6.8 Reform of Capital Requirements Framework

On 7 December 2023, the Council of the EU published the following legislative texts, reflecting the outcome of its June 2023 political agreement with the European Parliament as regards the EU's implementation of the Basel III regulatory reforms:

- the proposal for a Directive ("**CRD VI**") amending the Capital Requirements Directive[45] as regards supervisory powers, sanctions, third-country branches, and ESG risks (proposal here); and

- the proposal for a Regulation ("**CRR III**") amending the Capital Requirements Regulation[46] as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk, and the output floor (proposal here).

The legislative texts reflect the co-legislators' agreement regarding:

- the so-called "output floor", limiting banks' variability of capital levels computed by using internal models, as well as the appropriate transitional arrangements to allow sufficient time for market players to adapt;

- reforms as regards credit risk, market risk and operational risk, making provision for additional proportionality in the rules, in particular for small and non-complex institutions;

- a harmonised "fit and proper" framework for assessing the suitability of members of the institutions' management bodies and key function holders;

- rules to safeguard supervisory independence, notably by providing for a minimum cooling-off period for staff and members of governance bodies of competent authorities before they can take up positions in supervised institutions, and a limit on the time in office for the members of the governance bodies;

- a transitional prudential regime for crypto assets and on amendments to enhance banks' management of ESG risk (see section 1.7 above); and

- harmonised minimum requirements applicable to branches of third-country banks and the supervision of their activities in the EU.

The EU's implementation of the Basel III regulatory reforms is lagging behind the timeline it initially agreed. However, it is expected that the new rules will become applicable in the EU from 1 January 2025.

The texts also include a number of non-Basel related proposals, including a new EU-wide requirement for third country credit institutions to establish a branch in a Member State.

For more information, see our briefing here.

[45] Directive 2013/36/EU (here).

[46] Regulation (EU) 575/2013 (here).

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