BIPAR Update

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European Federation of Insurance Intermediaries

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1. Anti-money laundering – EBA consults on its proposals for a central AML/CFT database

The European Banking Authority (EBA) has launched a public consultation on draft Regulatory Technical Standards (RTS) on a central database on anti-money laundering and countering the financing of terrorism (AML/CFT) in the EU. The AML/CFT central database aims to serve as an early warning tool to enable various competent authorities to act before the ML/TF risks crystalise and help them plan their on-site inspections and perform off-site monitoring. EBA will use this database, in particular to inform its view of ML/TF risk affecting the EU's financial sector including emerging risks, to inform its AML/CFT policy, to perform aggregated analysis.

The draft RTS proposed in the EBA Consultation Paper specify:
- *the definition and the materiality of weaknesses that will trigger the competent authorities' obligation of reporting;*
- *the corresponding situations where a weakness may occur (including during prudential supervision);*
- *the type of information collected and provided to EBA - for an insurance intermediary, the volume of premiums intermediated;*
- *and how such information will be communicated to the EBA.*

The draft RTS also sets out how EBA will analyse and disseminate the information contained in the AML/CFT central database (information sharing cross-border and with EIOPA and ESMA). Moreover, the draft RTS set out the rules on the effectiveness of the database, the confidentiality of the data contained in the database, as well as on how the database will interact with other notifications that competent authorities are required to provide to EBA. With regard to data protection, the draft RTS specify in particular that EBA, ESMA, EIOPA and the competent authorities shall determine their respective responsibilities as joint controllers of personal data by means of an arrangement between them.

Background

The revised EBA Regulation (ESAs review) that came into effect in January 2020 requires EBA to supervise all obliged entities under the AML rules, including life insurance undertaking and intermediaries. The revised EBA Regulation requires EBA to establish and keep up to date a central database with information on AML/CFT weaknesses that competent authorities (CAs) across the EU have identified in respect of individual financial institutions. The database will also contain information on the measures competent authorities have taken to rectify those material AML/CFT weaknesses. Information from this database will be used by individual competent authorities and EBA with the aim of making the fight against ML/TF in the EU more targeted and effective in the future.

The deadline for the submission of comments to EBA is 17 June 2021. ***Please let us know whether you have any comments regarding this EBA draft RTS for an AML central database.***

In parallel, EBA is seeking the view of the European Data Protection Supervisor (EDPS) on these draft RTS, which will be taken into consideration when the final report is developed. EBA has performed a Data Protection Impact Assessment (DPIA) which analyses the risks arising from the processing of personal data and establishes the controls that will be put in place by EBA to mitigate the risks identified (e.g. personal data not to be shared automatically, only relevant data, 10-year retention period). The summary of this draft DPIA can be found ***here****.*

EBA has launched a ***public consultation*** *on changes to its Guidelines on Risk-Based Supervision of credit and financial institutions' compliance with anti-money laundering and countering the financing of terrorism (AML/CFT) obligations. The proposed changes aim to address the key obstacles to effective AML/CFT supervision that EBA has identified. The deadline for this consultation is 17 June 2021.* ***Please let us know whether you have any comments regarding these Guidelines (see also the BIPAR update sent on 19 March 2021****).*

2. Motor Insurance – EU Court of Justice on the insurance obligation - Meaning of vehicle

The Court of Justice of the EU (C-383/19) held on 29 April 2021 that the conclusion of **a contract of insurance against civil liability in respect of the use of a motor vehicle is compulsory where the vehicle concerned is registered in a Member State, as long as that vehicle has not been officially withdrawn from use in accordance with the applicable national rules.**

According to the facts of the case, the forfeiture of a vehicle registered in Poland was ordered to the name of the district which became the owner of the vehicle. The assessment of the vehicle at issue established that it was impossible to start the vehicle, that it was in a poor technical state and that it constituted scrap metal. Given that technical state, the district decided to have the vehicle destroyed. Between the date of the final forfeiture decision and until the publication of the order of enforceability, the vehicle was kept in a guarded car park. The guarantee fund informed the district that it had failed to fulfil its obligation to take out a contract of insurance against civil liability in respect of the use of that vehicle during that period.

The District Court of Ostrów Wielkopolski, Poland (referring court) raised to the EUCJ the issue of the possibility of excluding the obligation to conclude a contract of insurance against civil liability in respect of the use of motor vehicles where the vehicle concerned is immobilised on private land, has become the property of a local government authority by virtue of a final decision of a court, is not capable of being driven and is to be destroyed as a result of its owner's decision. **This is, in essence, a question about the scope of the insurance obligation laid down in the first paragraph of Article 3 of the Motor Insurance Directive (MID 2009/103).**

The EUCJ found that Article 3 of MID provides that each Member State is, subject to Article 5, to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. Article 5 of MID provides that a Member State may derogate from Article 3 for certain natural or legal persons, public or private, or, for certain types of vehicle or certain vehicles having a special plate. However, it appears that Poland has not exercised that option in respect of vehicles acquired by local government authorities by virtue of a judicial decision.

The EUCJ recalled that the **definition of "vehicle" is unconnected with the use which is made or may be made of the vehicle in question and independent of the intention of the owner of the vehicle or of another person actually to use it** (*Juliana case*, C-80/17). The Court also clarified that the judgments in the ***Vnuk* case (C-162/13) and *Rodrigues de Andrade* case (C-514/16)** whereby only situations of use of a vehicle as a means of transport fall within the concept of "use of vehicles", within the meaning of Article 3 of MID, **were in relation to the obligation of the insurer under a contract of insurance against civil liability to pay** for the damage or injuries caused by the use of that vehicle. These judgments do not in any way mean that the determination of whether there is an obligation to take out such insurance should be dependent on whether or not the vehicle at issue is actually being used as a means of transport at a given time.

The Court concluded that a vehicle which is registered and therefore has not been officially withdrawn from use, and which is capable of being driven, corresponds to the concept of "vehicle" and, consequently, does not cease to be subject to the insurance obligation. The same must apply, in principle, to a vehicle registered in a Member State which is on private land and which is to be destroyed in accordance with the choice of its owner, even where that vehicle is not, at a given time, capable of being driven because of its technical state.

3. Non-financial reporting – Commission's draft rules for certain undertakings to disclose their taxonomy-aligned activities (Article 8)

The European Commission has published its draft Delegated Act to the Taxonomy Regulation to specify the content, methodology and presentation of the information concerning the environmentally sustainable economic activities of companies that are subject to the scope of the Non-Financial Reporting Directive (NFRD). The draft Delegated Act specifies the disclosure obligations under Article 8 of the Taxonomy Regulation.

Article 8 of the Taxonomy Regulation, which entered into force on 12 July 2020 and will start to apply by the 1 January 2022, requires companies falling within the scope of the existing NFRD – AND the additional companies brought under the scope of the recently proposed Corporate Sustainability Reporting Directive (CSRD), if approved by the co-legislators – to report on the extent to which their activities are taxonomy-aligned. The CSRD proposal extents the scope of NFRD to all large companies (including non-listed large companies) and all size companies listed on regulated markets (except listed micro-enterprises). Other SME undertakings may comply with this disclosure obligation on a voluntary basis (*for more details about the proposal for a CSRD, please see the BIPAR Update of 30 April 2021*).

More precisely, **the Taxonomy Regulation (Article 8) requires that financial and non-financial undertakings under the NFRD (and CSRD) scope to report how and to what extent their activities qualify as environmentally sustainable**. In particular, non-financial undertakings will have to disclose the share of their turnover, capital, and operational expenditure resulting from environmentally sustainable economic activities (key performance indicators – KPIs). Financial undertakings will have to disclose to what extent they finance, or invest, in environmentally sustainable economic activities.

This disclosure aims to help investors and the public to understand the companies' trajectory towards sustainability through the annual publication of their KPIs associated with environmentally sustainable economic activities and to prevent greenwashing. Financial and non-financial undertakings can use the information disclosed to design credible green financial products and meet their own obligations under the Sustainable Finance Disclosure Regulation (SFDR).

Draft Article 8 KPIs in brief

According to this draft Taxonomy Delegated Act, turnover, capital expenditure and operating expenditure are irrelevant for assessing the environmental sustainability of financial activities, including lending, investment and insurance. Specific KPIs are required for financial undertakings.

The **KPIs for insurance and reinsurance undertakings** that are subject to the NFRD/CSRD disclosure obligations should capture their underwriting activities and investment policy that are part of their business model. One key performance indicator should relate to the investment policy of such insurance and reinsurance undertakings for the funds collected from their underwriting activities and should show the share of Taxonomy-aligned assets in their overall assets. A second indicator should relate to the underwriting activities themselves and show what proportion of the overall non-life underwriting activities is composed of non-life underwriting activities related to taxonomy-aligned activities (gross premiums written non-life (re)insurance revenue).

Asset managers should disclose the proportion of investments they made in Taxonomy-aligned economic activities in the value of all investments managed by them resulting from both their collective and individual portfolio management activities.

Investment firms that are subject to the NFRD/CSRD disclosure obligations should cover in their KPIs both their dealing on own account and their dealing on behalf of clients. The disclosure of the key performance indicator for dealing on own account should reflect which proportion of the total assets is composed of Taxonomy-aligned assets. That indicator should focus on the investment firms' investments, including debt securities and equity instruments in investee companies. The key performance indicator for the environmental sustainability of investment firms' services and activities on behalf of all their clients should be based on the revenue in the form of fees, commissions and other monetary benefits that investment firms generate from their investment services and activities provided to their clients.

The exposures to undertakings not subject to an obligation to publish non-financial information pursuant to NFRD/CSRD shall be excluded from the numerator of KPIs of financial undertakings, unless they provide such information voluntarily.

Background

In view of the preparation of the Delegated Act, the Commission had addressed a call for advice to the European Supervisory Authorities (ESAs) on 15 September 2020 It invited ESAs to investigate the content and presentation of relevant KPIs and determine which methodology should be used by different financial undertakings under their remit to disclose their degree of Taxonomy-alignment under Article 8 of the Taxonomy Regulation. For more details on the EIOA, ESMA and EBA Advice in relation to Article 8 of Taxonomy, please see the BIPAR Update of 19 March 2021.

The Commission launched a public consultation on the draft Delegated Act of the Taxonomy Regulation - Article 8 and the deadline is 2 June 2021. The final version of the Delegated Regulation is currently planned for adoption by the end of June 2021. According to the provisions of the draft Delegated Act, it is expected to start to apply from 1 January 2023. From 1 January 2022, financial undertakings shall disclose, not the detailed KPIs, but the share of their exposures to Taxonomy non-eligible and Taxonomy-eligible economic activities in their total assets.

4. EIOPA Chair and ESMA Executive Director confirmed by European Parliament Plenary

On 18 May 2021, the European Parliament Plenary voted in favour of the appointment of:

- Mrs **Petra Hielkema** (current Director of Insurance Supervision at the Dutch Central Bank) as **Chairperson** of the European Insurance and Occupational Pensions Authority (**EIOPA**). The members of the Parliament ECON committee had held an exchange of views with her and had voted in favour of her appointment on 10 May 2021. This was now confirmed by the European Parliament Plenary with 643 votes in favour, 6 against, and 47 abstentions.
- Mrs **Natasha Cazenave** as **Executive Director** of the European Securities and Markets Authority (**ESMA**). The members of the Parliament ECON committee had held an exchange of views with her and had voted in favour of her appointment on 22 April. This was now confirmed by the European Parliament Plenary with 635 votes in favour, 17 against and 44 abstentions.

The Council now has to officially confirm their appointment (but this is a formality as the Council had already agreed on their candidacies).

For the position of ESMA Chair, no decision has yet been taken. The process is believed to be "blocked" in Council. As a reminder, the ESMA Board of Supervisors shortlisted the following candidates in alphabetical order of their surname:

- Maria-Luis Albuquerque, former Minister of Finance, Portugal
- Carmine Di Noia, Commissioner of Commissione Nazionale per le Società e la Borsa (CONSOB), Italy and
- Verena Ross, current Executive Director of ESMA