DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Funds

Quarterly Legal and Regulatory Update

Period covered: 1 October 2020 – 31 December 2020

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1. APPROACHING DEADLINES

Approaching deadlines		
Q1 2021	5 January 2021	ESMA guidelines on performance fees in UCITS and certain AIFs for new funds/existing funds which change performance fees take effect.
	Approx. 31 January 2021	Anticipated filing deadline for UCITS ManCos and AIFMs to file the annual ownership confirmation with the Central Bank of Ireland (**CBI**).
	Approx. 31 January 2021	Anticipated filing deadline for annual PCF Confirmation Return for UCITS ManCos and AIFMs with the CBI.
	19 February 2021	Deadline for updated KIIDs to be made available to investors and filed with the CBI. Updated KIIDs must also be translated (as necessary) and filed in any other host jurisdictions where the UCITS is registered to market its shares and uploaded on the UCITS' website.
	Approx. 28 February 2021	Anticipated filing deadline for annual PCF Confirmation Return for Investment Funds with the CBI.
	Approx. 28 February 2021	Anticipated filing deadline for of annual Fund Profile Return with the CBI.
	10 March 2021	Date for compliance with obligations under Regulation 2019/2088 (**SFDR**).
	15 March 2021	Scheduled date for the migration of Issuer CSD services for Irish Securities from Euroclear UK & Ireland to Euroclear Bank under Migration of Participating Securities Act 2019.
	31 March 2021	Management companies[1] must ensure that they have adopted a plan for compliance with Fund Management Companies Guidance (as defined in Section 2.3) by this date.
	31 March 2021	MMF managers must send their quarterly reports to national regulators by quarter end.

2. UCITS & AIFMD

2.1 CBI publishes updated UCITS Q&A and updated AIFMD Q&A to address notification requirements where a stress test reveals a material risk

On 9 October 2020, the CBI published the thirty-fifth edition of its "AIFMD – Questions and Answers" (**AIFMD Q&A**) and the thirtieth edition of its "UCITS – Questions and Answers" (**UCITS Q&A**).

The AIFMD Q&A and the UCITS Q&A have been updated to include an additional question and answer in relation to liquidity stress testing in Undertakings for the Collective Investment in Transferable Securities (**UCITS**) and Alternative Investment Funds (**AIFs**).

ESMA's Guidelines on liquidity stress testing in UCITS and AIFs (dated 16 July 2020) require managers (defined as UCITS management companies, authorised AIFMs, self-managed UCITS, internally managed AIFs and managers of money market funds) to notify national competent authorities (**NCAs**) of material risks exposed by a stress test and the actions taken to address these risks.

The new Q&As clarify that the notification to the CBI is a two-stage process.

- With regard to the initial notification, the CBI requires that it be immediately informed via an ONR IF Regulatory Report if a stress test performed reveals a material risk.

[1] UCITS management companies, authorised AIFMs, self-managed UCITS and internally managed Alternative Investment Funds.

- Where a stress test reveals a material risk, the manager is obliged to make a subsequent notification in the form of an extensive report with the results of the stress testing and a proposed action plan. Where necessary, the manager should take action to strengthen the robustness of the UCITS / AIF including actions that reinforce the liquidity or the quality of the assets of the UCITS / AIF. The manager shall again immediately inform the CBI via an ONR IF Regulatory report of the measures taken, to include the extensive report and the action plan.

The thirty-fifth edition AIFMD Q&A can be accessed here. The new Q&A is ID 1133.

The thirtieth edition UCITS Q&A can be accessed here. The new Q&A is ID 1098.

Key Action Points	Managers should ensure that their compliance processes are updated internally to ensure that the two step notification process is followed if a stress test reveals a material risk for a UCITS /AIF.

2.2 European Commission launches public consultation on the review of EU rules regarding European long-term investment funds

On 19 October 2020, the European Commission launched a public consultation on the review of the Regulation on European long-term investment funds (Regulation 2015/760) (**ELTIF Regulation**). The review seeks to analyse how well the ELTIF Regulation regime is working. Since its adoption, there has been a relatively low update of the regime, with only around 28 European long-term investment funds (**ELTIFs**) having been established.

In the consultation, the European Commission is seeking views on issues grouped under headings including:

- Scope of the ELTIF authorisation and process;
- Investment universe, eligible assets and qualifying portfolio undertakings;
- Borrowing of cash and leverage; and
- Rules on portfolio composition and diversification.

The consultation period will end on 19 January 2021. The consultation questionnaire can be accessed here.

2.3 CBI publishes findings on the adoption of the Fund Management Company Guidance and issues clarification in relation to location of designated persons

On 20 October 2020, the CBI issued a "Dear Chair" letter to industry outlining the findings of its review of the implementation by Irish fund management companies of the CBI's framework for effective governance, management and organisation (**CBI Letter**).

The CBI Letter followed a thematic review by the CBI of how Irish UCITS management companies, authorised Alternative Investment Fund Managers (**AIFMs**), self-managed UCITS/AIFs (**Management Companies**) have implemented the CBI's Fund Management Company Guidance (**Guidance**) and the related legislative requirements which underpin it.

The CBI expects each Management Company to critically assess its compliance with the Guidance and the legislative requirements underpinning it, taking into account the findings set out in the CBI Letter. The CBI asks that the CBI Letter be discussed and considered by the Management Company's Board and that the Management Company's assessment should be completed and an action plan discussed and approved by the Board by end of the first quarter of 2021.

In our recent client briefing on the CBI letter, which can be accessed here, we consider the comments made by the CBI in the areas of: (i) substance and resourcing; (ii) performance of managerial functions; (iii) delegate oversight; (iv) Director rotation, CEOs and diversity;

(iv) approval by Boards of additional funds and sub-funds; (v) role of the organisational effectiveness director; and (vi) the risk management framework.

Following the issue of the CBI Letter, the Irish Funds Industry Association wrote to the CBI (**IFIA Letter**) seeking clarification on a number of the comments made by the CBI in that letter. The CBI issued a response to the IFIA on 8 December 2020 (**CBI Response Letter**) whereby the CBI sought to clarify its requirements in respect of its requirements relating to effective supervision, substance and presence in Ireland. Some notable points include:

- **Substance/resourcing**: In the CBI Response Letter, the CBI confirms that the requirement for three full time employees (or equivalent) (**FTEs**) is a minimum requirement and is to be applied to all FMCs, including self-managed UCITS/AIFs. For larger firms, Designated Persons are expected to be full time roles.

- **Location of directors and designated persons**: In the CBI Response Letter, the CBI clarified that its earlier letter does not amend its effective supervision rule as set out in Regulation 104 of the CBI UCITS Regulations 2019 (i.e. requirements concerning the location of directors and designated persons). The CBI Response Letter clarifies that three separate but related matters need to be considered namely (i) effective supervision, (ii) substance, and (iii) presence in Ireland. In particular, the CBI noted that it was "difficult to see how a fund management company could be considered to be located in Ireland unless a clear and convincing preponderance of the firm's Designated Persons and management roles (including key roles) are performed within the jurisdiction".

The CBI Letter can be accessed here.

The IFIA Letter can be accessed by IFIA members on the website of the IFIA.

Key Action Points	Prior to 31 March 2021, Management Companies are required to: (i) assess their day to day operational, resourcing and governance arrangements; and (ii) ensure that the Board has approved and adopted a plan for identifying the necessary changes to ensure compliance with CBI requirements.

2.4 European Commission launches public consultation on review of AIFMD

On 22 October 2020, the European Commission launched a public consultation on its review of the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (**AIFMD**). The review seeks to examine how to strengthen the rules and complete the internal market for such investment funds.

The public consultation is seeking stakeholder feedback on a number of items, including:

- The authorisation/scope of the AIFM licence, its potential extension to smaller AIFMs and level playing field concerns in relation to the regulation of other intermediaries, e.g. UCITS managers, that provide similar services;

- How investor access may be improved. These questions address the differences between retail and professional investors, the adequacy of disclosure requirements and alleged ambiguities in the depositary regime;

- How to best achieve the equitable treatment of non-EU AIFs and how to secure a wider choice of AIFs for investors while ensuring EU AIFMs are not exposed to unfair competition or are otherwise disadvantaged. In particular, the consultation seeks views on delegation structures, for example whether the delegation rules are sufficiently clear to prevent the creation of letter-box entities in the EU;

- How to ensure National Competent Authorities (**NCAs**) and AIFMs have the tools necessary to effectively mitigate and deal with systemic risks;

- How the rules on investment in private companies may be improved;
- How the alternative investment sector can participate effectively in the areas of responsible investing; and
- Questions are posed regarding the question of a single licence for AIF and UCITS managers, harmonised metrics for leverage calculation and reporting on the use of liquidity management tools.

The consultation period will end on 29 January 2021. The consultation questionnaire can be accessed here.

Key Action Points	AIFMs and AIFs may wish to respond to the Consultation directly and/ or provide feedback through the Irish Funds Industry Association (**IFIA**).

2.5 ESMA consults on guidance for marketing communications on cross-border distribution of funds

On 9 November 2020, the European Securities and Markets Authority (**ESMA**) published a consultation paper on draft guidelines on marketing communications (**Guidelines**) under Article 4 of the Regulation on facilitating cross-border distribution of collective investment funds (Regulation 2019/1156) (**Regulation**).

The Regulation obliges AIFMs, EuVECA managers, EuSEF managers and UCITS management companies to ensure marketing communications sent to investors are prepared in line with the requirements set out in Article 4 of the Regulation. The purpose of the Guidelines is to specify the application of these requirements.

In particular, the Guidelines establish common principles on:

- How marketing communications should be identifiable as such;
- How the risks and rewards of purchasing shares in the relevant fund are disclosed (Section 5); and
- How to ensure that all information included in the marketing materials is fair, clear and not misleading (Section 6).

The closing date for receipt of comments on the draft Guidelines is 8 February 2021. ESMA expects to issue the final Guidelines by 2 August 2021, and the Guidelines will be applicable from the date of publication.

The Guidelines are available here.

The public consultation can be accessed here.

2.6 ESMA publishes reports on the use of sanctions under AIFMD and the UCITS Directive

On 12 November 2020, ESMA published:

- Its first annual report on the use by NCAs of sanctions under the AIFMD; and
- Its third annual report on the use of supervisory sanctions by NCAs under the Undertakings for Collective Investment in Transferrable Securities Directive (Directive 2009/65/EC) (**UCITS Directive**).

In both instances ESMA observed that the sanctioning powers are not equally used among NCAs and, except for certain NCAs, the number and amount of sanctions issued at national level seems relatively low. Ireland is mentioned in both reports as one of the Member

States where no measures were issued. In the reports, ESMA indicates "given the relevance of the topic in terms of investors' protection and orderly functioning of financial markets, ESMA expects NCAs to increase their focus on sanctions."

The AIFMD report can be accessed here. The accompanying press release can be accessed here.

The UCITS report can be accessed here. The accompanying press release can be accessed here.

In light of these reports, it is anticipated that the CBI will be under pressure to increase the number of sanctions issued under AIFMD and the UCITS Directive.

2.7 ESMA publishes report on liquidity risk in investment funds

On 13 November 2020, ESMA, published a report entitled "Recommendation of the European Systemic Risk Board (**ESRB**) on liquidity risk in investment funds" (**ESMA Report**).

This report follows the recommendation published by the ESRB to ESMA on 6 May 2020 requesting ESMA to assess the ability of corporate bond funds and real estate investment funds to react appropriately to potential future adverse shocks which could lead to a deterioration in financial market liquidity and valuation uncertainty.

The ESMA Report considers the five "priority areas" identified by ESMA to enhance the preparedness of the funds to potential future adverse shocks. While the ESMA Report focuses on corporate bond funds and real estate investment funds, the recommendations outlined will have broader application to all categories of investment funds, regardless of their asset class or investment strategy.

Irish management companies of corporate bond funds and real estate investment funds can expect increased scrutiny from the CBI in relation to the matters identified in the ESMA Report over the coming months

Please see the Dillon Eustace briefing paper entitled "ESMA's Report on ESRB Recommendations on Liquidity Risk in Investment Funds" which can be accessed here.

A copy of the ESMA Report can be accessed here.

Key Action Points	We suggest that it would be prudent for such management companies to conduct a review of their arrangements in light of the ESMA Report so that they are in a position to demonstrate their preparedness for potential future adverse shocks.

2.8 ESMA to focus upon costs and fees charged by fund managers

On 13 November 2020, ESMA announced that the following topics have been selected as the new Union Strategic Supervisory Priorities for NCAs:

(1) costs and performance for retail investment products; and

(2) market data quality.

In the context of (1), ESMA clarifies that it intends to focus upon the costs and fees charged by fund managers. ESMA states that investment firms and fund managers should have their clients' best interests at heart and ensure that costs and charges are reasonable and disclosed in a transparent and non-complex manner.

The ESMA press release announcing the selection is available here.

ESMA announced on 6 January, 2020 that it is launching a common supervisory action (**CSA**) with national competent authorities on the supervision of costs and fees of UCITS during 2021 in order to assess the compliance of UCITS management companies with (i) the relevant cost-related provisions in the UCITS framework and (ii) the obligation of not charging investors with undue costs.

ESMA has noted that the CSA will take into account its supervisory briefing on the supervision of costs which was published in June of last year. The CSA will also cover UCITS using efficient portfolio management (**EPM**) techniques to assess whether they adhere to the requirements set out in the UCITS framework and the ESMA Guidelines on ETFS and other UCITS issues.

ESMA has stated that the CSA will be conducted during 2021.

The CSA can be accessed here.

2.9 CBI issues Consultation Paper on Share Class Features of Closed Ended QIAIFs

On 23 November 2020, the CBI published Consultation Paper 132 on Guidance on share class features of closed-ended QIAIFs (**CP132**).

CP132 signals the CBI's intention to clarify, and in some cases adapt, its existing rules on the permissible features classes of interests / share class to reflect the typical features of closed-ended funds. These features will be available to closed-ended Qualifying Investor fund partnerships as well as all other available legal structures. CP132 addresses the following proposed amendments:

- Issue of interests/shares at a price other than net asset value;
- Excuse and exclude provisions;
- Stage Investing;
- Management / Carried Interest Classes.

The consultation period closed on 22 December 2020.

A copy of the consultation paper can be accessed here.

Please see the Dillon Eustace briefing paper entitled "Irish investment limited partnerships and closed-ended funds update". The Dillon Eustace briefing paper can be accessed here.

2.10 CBI publishes updated AIFMD Q&A to address the regulatory status of the general partner in an ILP

On 23 November 2020, the CBI published the thirty-sixth edition of its "AIFMD – Questions and Answers" to address the regulatory status of the general partner in an Irish Investment Limited Partnership. Please the Section entitled "Irish Investment Limited Partnerships".

2.11 CP134 - Consultation on new CBI performance fee guidance for UCITS and certain types of retail AIFs

On 3 December 2020, the CBI published Consultation Paper 134 on new Central Bank performance fee guidance for UCITS and certain types of retail AIFs (**CP134**).

Pursuant to CP134, the CBI is seeking stakeholder's views on the draft specific CBI Performance Fee Guidance (**CBI Guidance**) which it has formulated for UCITS and certain types of retail AIFs. The CBI has incorporated the ESMA "Guidelines on performance fees in UCITS and certain types of AIFs" (**ESMA Guidelines**) into this draft CBI Guidance. The draft CBI Guidance is included at Schedule A of CP134.

The ESMA Guidelines, addressed to competent authorities and fund managers, apply to UCITS and to certain types of retail AIFs. Retail AIFs that are closed-ended or open-ended, AIFs established as EuVECAs, venture capital AIFs, EuSEFs, private equity AIFs or real estate AIFs are excluded from the scope of the ESMA Guidelines.

The CBI has previously published existing requirements for performance fees, most recently reflected in the CBI's UCITS Regulations 2019[2] , the AIF Rulebook and the application form. Under the draft CBI Guidelines, the CBI is proposing a phased implementation of the ESMA Guidelines over time due to the need to carry out the consultation on amending the domestic framework, to reflect the transitional periods provided for under the ESMA Guidelines and to maintain a consistent approach for retail investor funds. The CBI is proposing that for:

- New UCITS or in-scope retail AIFs established: The CBI Guidance will apply from the date of establishment of those funds (i.e. immediately from 5 January 2021);
- Existing funds which change performance fee methodology/introduce performance fees after 5 January 2021: The CBI Guidance will apply to such existing UCITS and in-scope retail AIFs from the date of amendment or introduction of the performance fees; and
- Existing UCITS and in-scope retail AIFs with performance fees: The CBI Guidance will apply from the next accounting period, which occurs six months after 5 January 2021. Until that time, these funds must continue to comply with the current applicable requirements for performance fees.

The CBI notes that "*for a period of time the existing performance fee requirements as well as the performance fee regime established under the ESMA Guidelines will run in parallel. For the avoidance of doubt, in the event of any inconsistency between the ESMA Guidelines and the CBI UCITS Regulations 2019 or the AIF Rulebook, the statutory obligations of the CBI UCITS Regulations 2019 and the AIF Rulebook will prevail.*"

The consultation period will close on 15 January 2021. Thereafter, the CBI will consider the responses and finalise its CBI Guidance incorporating the ESMA Guidelines.

CP134, incorporating the CBI Guidance, can be accessed here.

The ESMA Guidelines can be accessed here.

Key Action Points	Irish Management Companies: (i) will need to identify in scope funds which are currently subject to a performance fee; (ii) review applicable performance fee model and methodology against the finalised CBI Guidance to determine what changes, if any, will need to be made to the model and methodology; and (iii) review existing prospectus, KIID and periodic report disclosures to identify any changes to be made for compliance with the CBI Guidance prior to the relevant application date.

2.12 ESMA publishes finalised Guidelines on Leverage Risk under AIFMD

On 17 December 2020, ESMA published finalised guidelines on leverage risk under AIFMD, in accordance with Article 25 of AIFMD (**Guidelines**).

Under Article 25 of AIFMD, competent authorities in each Member State are required to gather certain information from AIFMs to identify the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets or risks to the long-term growth of the economy. Article 25(3) of AIFMD provides competent authorities with the power to impose limits on the level of leverage that individual AIFM are entitled to employ where it considers this necessary to ensure the stability or integrity of the

[2] S.I. No. 230/2019 – Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2019

financial system. The purpose of the imposition of such leverage limits is to limit the extent to which leverage contributes to the build up of systemic risk in the financial system or the risks of disorderly markets.

In April 2018, the ESRB published a set of recommendations to address liquidity and leverage risk in investment funds. One of the recommendations was for ESMA to provide guidance on:

- The framework to assess the extent to which the use of leverage within the AIF sector contributes to the build-up of systemic risk in the financial system (i.e. the risk assessment to be used to identify build-up of systemic risk arising from leverage); and
- The design, calibration and implementation of macro-prudential leverage limits.

The purpose of the Guidelines is to ensure that EU member states adopt a consistent approach when assessing whether the condition for imposing leverage-related measures (such as the imposition of leverage limits under Article 25 of AIFMD) are met. The Guidelines apply to NCAs.

The assessment of leverage-related systemic risk, which must be conducted by EU competent authorities in accordance with the provisions of the Guidelines, should be used to select any AIFs for which it is appropriate to set a leverage limit.

The Guidelines (which are set out in Annex III of the attached report) are divided into three sections.

- V.1 sets down the guidelines to be followed by competent authorities when conducting the assessment of leverage-related systemic risk.
- V.2 sets down the guidelines to be followed by competent authorities when deciding whether or not to impose leverage limits on an AIFM.
- V.3 comprises of the relevant annexes referenced in the Guidelines.

Leverage limits should be based on the leverage measures set out in the AIFMD (being the gross method as set out in Article 7 of the AIFMD Delegated Regulation and the commitment method as set out in Article 8 of the AIFMD Delegated Regulation). It should be noted that the Guidelines are not limited to only those AIFs with substantial leverage.

NCAs will have two months from the date of translation into official EU languages to confirm if they comply or intend to comply with the Guidelines. The Guidelines will apply from the end of this two-month period.

A copy of the Guidelines can be accessed here.

3. EMIR & SFTR

3.1 ESMA postpones application of updated EMIR validation rules

On 26 October 2020, ESMA announced it has postponed the applicability date of the updated Regulation on OTC derivatives, central counterparties and trade repositories (Regulation 648/2012) (**EMIR**) validation rules from 1 February 2021 to 8 March 2021.The postponement is due to technical issues related to their implementation in light of the UK's withdrawal from the EU.

An ESMA Press Release confirming the delay can be accessed here.

The updated EMIR validation rules can be accessed here.

3.2 Reporting obligations under SFTR

On 5 November 2020, ESMA published its first Questions & Answers on data reporting (**Q&A**) under the Regulation on reporting and transparency of securities financing transactions (Regulation 2015/2365) (**Securities Financing Transactions Regulation** or **SFTR**).

The Q&A addresses the following topics:

- Frequency of reports;
- Reporting of settlement fails;
- Reporting of repos initially collateralised on a transaction basis and subsequently on a net exposure basis;
- Reporting of trading venue for cleared and non-cleared SFTs; and
- Reporting of zero collateral for margin lending.

The Q&A can be accessed here.

3.3 ESMA publishes updated statement on issues affecting EMIR and SFTR reporting

On 10 November 2020, ESMA published an updated statement on issues affecting EMIR and the SFTR in respect of reporting after the end of the UK's transition period on 31 December 2020.

The statement updates the previously published statement, from 1 February 2019, which was issued in preparation for a no-deal Brexit scenario. The updated statement provides certain clarifications relating to issues affecting reporting, recordkeeping, reconciliation, data access, portability and aggregation of derivatives under Article 9 EMIR and of security financing transactions reported under Article 4 SFTR, after the end of the transition period.

On expiry of the Transition Period, UK trade repositories will no longer appear on this ESMA register and as a result cannot be used to fulfil trade reporting obligations under EMIR or SFTR.

The statement can be accessed here.

On 4 January 2021, ESMA withdrew its registrations of the four UK based TRs. As a result the UK TRs cannot be used to fulfil trade reporting obligations under EMIR or SFTR respectively.

Key Action Points	For Irish Funds and their management companies, please note that all in-scope derivative transactions and/or securities financing transactions must now be reported to a trade repository registered with ESMA.

3.4 ESMA publishes report on post trade risk reduction services

On 10 November 2020, ESMA published a report on post trade risk reduction services (**PTRR**) with regard to the clearing obligation under EMIR (**Report**).

The Report takes into account feedback received from stakeholders during a public consultation held earlier in the year. Under EMIR, ESMA was mandated to prepare a report for the European Commission on whether any trades that directly result from PTTR services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1) EMIR.

In the Report, ESMA acknowledges that the benefits of allowing certain PTRR transactions to be exempted from the clearing obligation would reduce risk in the market, allow for legacy trades to be compressed, increase participation in PTRR services of counterparties less interested to participate today (due to complex structures) and overall reduce complexity in the market by using simpler trades for rebalancing.

ESMA is of the view that, in the absence of compelling evidence or reasoning to the contrary, those positive effects outweigh, inter alia, the increased operational burden on market participants and regulators and the increase in gross risk in the non-cleared netting sets (in case of portfolio rebalancing).

ESMA concludes that any such exemption should be limited and subject to certain requirements in order to reduce any risk of circumvention of the clearing obligation.

The Report can be accessed here.

3.5 ESMA publishes final report on RTS and ITS under EMIR Refit Regulation

On 17 December 2020, ESMA published its final report on draft RTS and implementing technical standards (**ITS**) on reporting, data quality, data access and registration of Trade Repositories (**TRs**) under Regulation (EU) 2019/834 amending EMIR (**EMIR Refit Regulation**) (**Report**).

The Report addresses data reporting to TRs, procedures to reconcile and validate the data, access by the relevant authorities to data and registration of the TRs. The following technical standards are included in the Annexes to the Report:

- Draft RTS on details of the reports to be reported to TRs under EMIR;
- Draft ITS on standards, formats, frequency and methods and arrangements for reporting to TRs under EMIR;
- RTS on registration and extension of registration of TRs under EMIR;
- ITS on registration and extension of registration of TRs under EMIR;
- RTS on procedures for ensuring data quality; and
- RTS on operational standards for aggregation and comparison of data and on terms and conditions for granting access to data.

Steven Maijoor, ESMA Chair, noted that the Report is "*an important milestone toward ensuring the full alignment of EU derivatives reporting with globally agreed recommendations, and in establishing the highest standards for data quality worldwide*."

The draft technical standards have been submitted to the European Commission for endorsement. ESMA envisages that there will be an 18-month implementation period following the entry into force of the technical standards.

The Report can be accessed here.

3.6 ESMA publishes updated EMIR Q&As

On 21 December 2020, ESMA published an updated version of its Q&As on the implementation of EMIR. The amendments to the Q&As comprise:

- Part I (OTC derivatives) has been updated to clarify post 31 December 2020 the status of legacy derivative transactions executed on UK markets.

- Part IV and V have been amended to clarify the reporting technique for derivatives executed on a third country venue and cleared on the same day.

A copy of the Q&AS can be accessed here.

3.7 ESMA publishes updated guidelines on reporting under SFTR

On 21 December 2020, ESMA published a corrected version of its Guidelines on reporting under Articles 4 and 12 SFTR (**Guidelines**).

The Guidelines, first published 6 January 2020, provide clarification regarding the compliance with the technical standards under the SFTR and ensure the consistent implementation of the SFTR rules.

The corrections are shown in the Guidelines in tracked changes.

The Guidelines can be accessed here.

3.8 European Commission adopts Delegated Regulations under EMIR on risk management and clearing obligations

On 21 December 2020, the European Commission adopted two Delegated Regulations under EMIR:

- Commission Delegated Regulation amending regulatory technical standards laid down in Delegated Regulation (EU) 2016/2251 (**Risk Management RTS**) as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral, which can be accessed here; and

- Commission Delegated Regulation amending regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 (**Clearing RTS**) as regards the date at which the clearing obligation takes effect for certain types of contracts, which can be accessed here.

The Delegated Regulations provide a window of time within which counterparties may novate legacy OTC derivative contracts from a UK to an EU counterparty without triggering the EMIR bilateral margining requirements and the EMIR clearing obligations under certain conditions. The measures set out in the Delegated Regulations in respect of Brexit-related novations are time limited and will expire 12 months from their entry into force. Separately, the Delegated Regulations also address an extension to the temporary exemption from certain EMIR obligations for intragroup transactions and equity options.

The Delegated Regulations will now be considered by the Council of the EU and the European Parliament. If they do not formulate any objections, the Delegated Regulations will enter into force on the day following their publication in the Official Journal of the EU (**OJ**).

Please see the Dillon Eustace briefing paper entitled "EMIR Update: Extension of relief on Brexit-related novations" for further information, which can be accessed here.

Key Action Point	Counterparties should commence the negotiation of the novation of their legacy OTC transactions if they wish to avail of the relief from the EMIR margining and clearing requirements as provided for in the Delegated Regulations.

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

4.1 CBI publishes sixth issue of Anti-Money Laundering Bulletin focusing on transaction monitoring

On 2 October 2020, the CBI published the sixth issue of its Anti-Money Laundering Bulletin focusing on transaction monitoring (**Bulletin**).

The Bulletin highlights the importance of transaction monitoring, which the CBI states will continue to be a key focus area in its ongoing supervision of compliance by designated persons with anti-AML and CFT requirements. The Bulletin sets out the CBI's findings following supervisory engagements across multiple credit and financial institutions and sets out the CBI's expectations with regard to the application of transaction monitoring controls.

Please see the Dillon Eustace briefing paper entitled "Central Bank issues AML Bulletin on Transaction Monitoring" which provides a detailed summary of the Bulletin. The Dillon Eustace briefing paper can be accessed here.

A copy of the sixth edition of the Bulletin can be accessed here.

4.2 CBI updates FAQ on the Beneficial Ownership Register

On 11 December 2020, the CBI updated its webpage entitled "FAQ regarding the Beneficial Ownership Register" (**FAQ**).

In respect of the definition of a beneficial owner of a unit trust, the FAQ has been updated to provide further clarity as regards the concept of the natural person exercising "control" in the second limb of the definition appearing in Regulation 4 of the European Union (Modifications of Statutory Instrument No. 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020. The FAQ now state that such a person may be a person in the trustee or management company. The previous version of the FAQ referred to such a person in the trustee but did not mention the management company.

The FAQ can be accessed here.

4.3 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020 (**Bill**) was passed by Dáil Éireann on 17 December 2020 and is currently before Seanad Éireann, Second Stage. The purpose of the Bill is to transpose the criminal justice elements of Directive (EU) 2015/849 (**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 Bill seeks to:

- improve the safeguards for financial transactions to and from high-risk third countries;
- bring a number of new 'designated persons' under the existing legislation (notably certain letting agents, virtual currency providers and custodian wallet providers);
- improve the transparency of beneficial ownership of legal entities. Where a designated person is entering a business relationship with another entity, the designated person must take steps to obtain the relevant information from the appropriate register of beneficial ownership prior to commencing the business relationship;
- provide for a new defence in relation to 'tipping off' where the designated person can prove that the entity to whom the information was disclosed was a specified financial institution, which is connected to the designated person or part of the same group structure;
- enhance existing customer due diligence (**CDD**) requirements;

- set new limits on the use of anonymous pre-paid cards. A person supplying such an instrument will now be required to conduct CDD when the value of the requested card is €150 or higher;

- broaden the definition of a politically exposed person (**PEP**) to include 'any individual performing a prescribed function';

- provide for Ministerial guidance which will clarify domestic 'prominent public functions' that will give rise to a person being designated as a PEP; and

- make a number of technical amendments to other provisions of Acts already in force.

The Bill's progress can be tracked here.

5. DATA PROTECTION

5.1 EDPB adopts Guidelines on Data Protection by Design and Default

On 20 October 2020, the European Data Protection Board (**EDPB**) adopted the final version of its Guidelines on Data Protection by Design & Default (**Guidelines**).

The Guidelines address the obligation upon controllers, irrespective of size and complexity of processing, to effectively implement the data protection principles and data subjects' rights and freedoms by design and default, as set out in Article 25 of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data (**General Data Protection Regulation** or **GDPR**).

The Guidelines offer general guidance on the obligation upon controllers, which requires the implementation of appropriate measures and necessary safeguards that provide effective implementation of the data protection principles. In addition, controllers should be able to demonstrate that the implemented measures are effective.

The Guidelines also contain guidance on how to effectively implement the data protection principles in Article 5 GDPR, listing key design and default elements as well as practical cases for illustration.

The Guidelines can be accessed here.

5.2 EDPB adopts Recommendations on 'supplementary measures' relating to third country transfers

On 10 November 2020, the EDPB adopted two sets of Recommendations. The Recommendations contain a roadmap of the steps data exporters must take to find out whether they need to put in place supplementary measures to be able to transfer data outside the EEA in accordance with EU law, and help them identify those measures that could be effective. The Recommendations comprise:

- Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data; and

- Recommendations 02/2020 on the European Essential Guarantees for surveillance measures.

Recommendations 01/2020 were adopted with the aim of assisting controllers and processors acting as data exporters comply with their duty to identify and implement appropriate "supplementary measures" and promote the consistent application of the GDPR across the EEA, particularly in light of the CJEU's recent "Schrems II" ruling (*Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems*).

Recommendations 02/2020 provide data exporters with guidance to determine whether the legal framework governing public authorities' access to data for surveillance purposes in third countries can be regarded as a justifiable interference with the rights to privacy and the protection of personal data, and therefore as not impinging on the commitments of the Article 46 GDPR transfer tool the data exporter and importer rely on.

Recommendations 01/2020 can be accessed here. Recommendations 01/2020 were subject to a public consultation, which closed on 21 December 2020.

Recommendations 02/2020 can be accessed here.

5.3 European Commission publishes new draft Standard Contractual Clauses

On 12 November 2020, the European Commission published two new draft sets of standard contractual clauses (**SCC**):

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

The Third Country SCCs will replace the existing SCCs in place. The purpose of the Third Country SCCs is to ensure that the level of protection of personal data ensured by the GDPR, when transferred to a third country, is not undermined. The Third Country SCCs have been updated to bring them in line with the requirements set out in the GDPR and the CJEU's recent "Schrems II" ruling (*Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrem*s).

Controllers and processors will have twelve months to implement the new Third Country SCCs from the date they come into force.

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. These SCCs are not mandatory and are intended to provide guidance. Parties may choose to rely on the Controller-Processor SCCs or negotiate an individual contract containing the compulsory elements laid out in Article 28(3) and (4) GDPR.

The consultation period ended on 10 December 2020. The European Commission has requested a joint opinion from EDPB and the European Data Protection Supervisor (**EDPS**) on the implementing acts of both sets of SCCs. The SCCs are expected to be formally adopted by the European Commission in early 2021.

The draft Third Country SCC, and its accompanying implementing decision, can be accessed here.

The draft Controller-Processor SCC, and its accompanying implementing decision, can be accessed here.

5.4 EDPB issues statement on the ePrivacy Regulation and the future role of Supervisory Authorities and the EDPB

On 19 November 2020, the EDPB issued a statement on the ePrivacy Regulation and the future role of Supervisory Authorities and the EDPB (**Statement**).

The Statement addresses the proposed Regulation concerning the respect for private life and the protection of personal data in electronic communications (**ePrivacy Regulation**) which is intended to replace Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (**ePrivacy Directive**).

In the Statement, the EDPB emphasises that the future ePrivacy Regulation must not lower the level of protection offered by the current ePrivacy Directive, noting that it should complement the GDPR by providing additional guarantees for confidentiality for all types of electronic communication.

The EDPB expresses concern regarding discussions in the Council concerning the enforcement of the future ePrivacy Regulation which could lead to fragmentation of supervision, procedural complexity and a lack of legal certainty. The EDPB notes that many provisions of the future ePrivacy Regulation relate to the processing of personal data, and states that oversight should be entrusted to the same national authorities which are responsible for the enforcement of the GDPR.

The EDPB concludes by inviting the Member States to support a more effective ePrivacy Regulation, as initially proposed by the European Commission.

The Statement can be accessed here.

5.5 Transfers of Personal Data to Third Countries or International Organisations

On 9 December 2020, the Data Protection Commission updated its webpage entitled "Transfers of Personal Data to Third Countries or International Organisations" (**Webpage**).

The Webpage addresses, amongst other items, Article 46 - Transfers subject to appropriate safeguards, taking into account the CJEU's recent "Schrems II" ruling (*Case C-311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems*) and recent publications by the EDPB.

The Webpage can be accessed here.

5.6 Post Brexit - transfers of personal data from the EEA to the UK

Under the EU-UK Trade and Cooperation Agreement (**Agreement**) concluded on 24 December 2020, a "grace period" during which the transfers of personal data from EEA Member States to the UK will not be considered a "third country" transfer under the GDPR was agreed. The Agreement provides that the specified period will last for no longer than six months from 31 December 2020.

This means that during the specified period, personal data can continue to flow from the EEA to the UK without any additional safeguards, such as SCCs being required. This is subject to an important caveat: if, during this period, the UK amends the data protection laws it has in place on 31 December 2020, or exercises certain powers under the Data Protection Act 2018 or the UK GDPR without the agreement of the EU Partnership Council, the specified period shall automatically end.

Please see the Dillon Eustace briefing paper entitled "Brexit: Welcome reprieve for data transfers from the EEA to the UK" which can be accessed here.

Key Action Points	The Irish Data Protection Commission has noted that the European Commission intends to adopt an adequacy decision within the specified period. However, if this is not forthcoming, Irish Funds and their management companies which transfer personal data to the UK will need to put in place alternative transfer mechanisms to safeguard against any interruption to the free flow of EU to UK personal data when the specified period expires, currently expected to occur on 30 June 2021.

6. SUSTAINABLE GROWTH

6.1 European Commission publishes FAQ on the Commission Platform on Sustainable Finance

On 1 October 2020, the European Commission published a frequently asked questions document (**FAQ**) in relation to the setting-up and work of the Commission Platform on Sustainable Finance (**Platform**).

The Platform is an advisory body that will advise the European Commission on the development of technical screening criteria for the EU taxonomy and policy development, among other things, as required by the Taxonomy Regulation.

The FAQ addresses, amongst other items, the general role of the Platform, how members are appointed and where the work of the Platform may be followed.

The FAQ can be accessed here.

6.2 SFDR Update – Delay of entry into force of delegated measures

On 29 October 2020, the European Commission published a letter addressed to the ESAs on the application of Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (**Sustainable Finance Disclosure Regulation** or **SFDR**) and related RTS (**Letter**).

The original timeframe for application required the joint development by the European Insurance and Occupational Pensions Authority (**EIOPA**), ESMA and the European Banking Authority (**EBA**) of most of the draft RTS by 30 December 2020 and the application of the SFDR's provisions from 10 March 2021.

The Letter notes that the draft RTS will enter into force at "a later stage", without confirming what that date will be. Further in the Letter, the European Commission acknowledges that "in terms of substance, the application of the Regulation is not conditional on the formal adoption", confirming that all application dates specified by the SFDR, with effect from 2021, will be maintained. Financial market participants and financial advisers subject to the SFDR will be required to comply with high level and principle-based requirements of the SFDR from this time.

As a result, there is now a staggered timeframe for complying with the obligations under the SFDR. Certain of the obligations of the SFDR apply to "Financial Market Participants" as defined therein (which includes AIFMs and UCITS ManCos), whilst other obligations apply to the "Financial Products" which are defined to include the AIF or the UCITS.

The staggered timeframe for compliance by AIFMs and UCITS ManCos in respect of their fund products is as outlined below:

(i) Article 3 and Article 6 disclosure obligations (which relate to integration of sustainability risks into the investment decision-making process on the management company's website and in the prospectus of the fund respectively) remain unchanged and apply in full from 10 March 2021;

(ii) Article 5 disclosure obligations (relating to the remuneration policy) remain unchanged and applies in full from 10 March 2021;

(iii) Article 4 disclosure obligations relating to principal adverse impact reporting will apply from 10 March 2021;

(iv) Article 8 and Article 9 disclosure obligations (which relate only to ESG Funds and which must be incorporated in the prospectus of the relevant ESG Funds) will apply from 10 March 2021;

(v) Article 10 disclosures (which relate only to ESG Funds and which must be provided on the website of the management company) apply from 10 March 2021;

(vi) Article 11 disclosure obligations (which relate only to ESG Funds and which must be incorporated in the annual reports of the relevant ESG Funds) apply from 1 January 2022.

This means that for those disclosures set out at (iii), (iv) and (v) above, the website of the manager (in the case of Article 4 and Article 10) and prospectus of each ESG fund (in the case of Article 8 and Article 9) will need to be updated to provide "high level principals-

based" disclosures by 10 March 2021. They will then need to be revised to meet the additional disclosure obligations set down in the Draft RTS whenever these measures are finalised and enter into force.

The Letter can be accessed here.

Key Action Points	Each AIFM / UCITS ManCo / other Financial Market Participant will need to review their existing website disclosures, together with the pre-contractual documents of their Financial Products (i.e. the Prospectuses in the case of UCITS / AIFs) to determine the additional disclosures required to be made prior to 10 March 2021 to reflect the high level principles of the SFDR. Please see below concerning the new fast track process introduced by the CBI to facilitate a timely approval process for the changes to Prospectuses.

6.3 ESMA publishes consultation paper on disclosure obligations under Article 8 of the Taxonomy Regulation

On 5 November 2020, ESMA published a consultation paper (**Consultation Paper**) containing ESMA's draft advice to the European Commission on Article 8 of the Regulation on the establishment of a framework to facilitate sustainable investment (Regulation (EU) 2020/852) (**Taxonomy Regulation**).

The Taxonomy Regulation imposes additional requirements on large public interest entities (including credit institutions and insurance companies) which are subject to requirements under Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (**Non-Financial Reporting Directive** or **NFRD**). Under Article 8 of the Taxonomy Regulation, such entities must make certain public disclosures on how and to what extent its activities are associated with economic activities that qualify as environmentally sustainable under the Taxonomy Regulation.

Article 8(4) of the Taxonomy Regulation requires the European Commission to adopt, by 1 June 2021, a delegated act specifying the content and presentation of the key performance indicators (**KPIs**) that non-financial undertakings and asset managers are required to disclose. On 15 September 2020, ESMA received a call for advice from the European Commission, requesting input on certain aspects of the delegated act. The Consultation Paper presents a draft version of ESMA's advice (i.e. level two measures) to the European Commission.

As noted by ESMA in the Consultation Paper, very few asset managers are expected to fall into scope of the NFRD outright. This because such entities typically do not comprise "public-interest entities" (i.e. listed companies) with an average of 500 employees or more during the financial year and therefore do not fall within scope of the NFRD.

The consultation period closed on 4 December 2020. ESMA will deliver its final advice to the European Commission by 28 February 2021.

The Consultation Paper is available here.

6.4 European Commission consults on Delegated Regulation on climate change mitigation and adaptation under Taxonomy Regulation

On 20 November 2020, the European Commission published for consultation the text of Commission Delegated Regulation supplementing the Taxonomy Regulation relating to climate change mitigation and adaptation. The Taxonomy Regulation was published in the OJ on 22 June 2020 and entered into force 20 days later.

The purpose of the Delegated Regulation is to establish the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives. The consultation closed on 18 December 2020. The Taxonomy Regulation requires the Delegated Regulation to be adopted before 31 December 2020.

The next steps are for the Delegated Regulation to be adopted by the European Commission. Thereafter, it will be subject to a four month objection period by the European Parliament and the Council, which can be extended by two months at their request.

The text of the Commission Delegated Regulation can be accessed here.

6.5 Three Delegated Regulations supplementing BMR on sustainable finance issues published in OJ

On 3 December 2020, three delegated regulations supplementing the Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (Regulation (EU) 2016/1011) (**Benchmarks Regulation** or **BMR**) (**Q&A**) in relation to sustainable finance issues were published in the OJ:

- Delegated Regulation (EU) 2020/1816 supplementing the BMR as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published, which can be accessed here**;**
- Delegated Regulation (EU) 2020/1817 supplementing the BMR as regards the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology, which can be accessed here; and
- Delegated Regulation (EU) 2020/1818 supplementing the BMR as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, which can be accessed here.

The three delegated regulations entered into force on 23 December 2020, i.e. twenty days following their publication in the OJ.

6.6 CBI confirms introduction of fast-track filing process for updates in respect of SFDR

On 17 December 2020, the CBI confirmed to Irish Funds that, further to its intention to put in place a fast-track process to deal with the volume of prospectus and supplement updates due to be filed under the SFDR by 10 March 2021, the CBI will establish a dedicated email address for the receipt of such updates and will issue an acknowledgement of same.

The CBI has clarified that the prospectus/supplement updates which can avail of this fast-track process must be limited to compliance with the SFRD level 1 text. Such updates will not be subject to post authorisation review by the CBI under this process however the CBI will require each filing to be accompanied by a "self-certification letter".

Key Action Point	Filings under the fast-track process may be made by funds from 11 January 2021 to SFDR@centralbank.ie. The CBI is encouraging firms to make submissions ahead of the 10 March deadline in order to avoid a bottleneck.

7. MONEY MARKET FUND REGULATION (MMFR)

7.1 ESMA updates instructions for reporting under the MMFR

On 4 December 2020, ESMA updated its Reporting Instructions, Validations and Schemas under the Regulation on money market funds (Regulation (EU) 2017/1131) (**MMFR**). An earlier update had been issued by ESMA on 2 October 2020.

The proposed changes are not related to the published XML schemas. The changes only provide clarifications on existing validation rules in order to fix inconsistencies or ease the understanding of the rules. It also extends the Classification of Financial Instruments (**CFI**) codes for eligible assets.

The latest versions of the Reporting Instructions, Validations and Schemas can be accessed here.

7.2 ESMA final report on Stress Testing Scenario Guidelines under the MMFR

On 16 December 2020, ESMA published its final report containing revised guidelines on stress test scenarios under the MMFR (**Guidelines**). The annex to the report contains the updated guidelines and calibration of scenarios for 2020.

ESMA notes that the new 2020 parameters set out in the updated Guidelines must be used for the purpose of the first reporting period following the start of the application of the updated guidelines (i.e. 2 months after the publication of their translation.

A copy of the Guidelines can be accessed here.

8. BREXIT

8.1 Brexit: Implications of Expiry of Transition Period for Funds and Management Companies

In a statement published on 21 December 2020, ESMA has urged all market participants to ensure that they have taken "all necessary actions in due time to remain operational and compliant with EU law on 1 January 2021".

Please see our Dillon Eustace briefing paper entitled "Brexit: Implications of Expiry of Transition Period for Funds and Management Companies" which can be accessed here.

Key Action Points	Irish funds and their management companies should consider the various implications of the expiry of the Brexit transition period as set out in the DE briefing paper.

9. MiFID/ MiFIR REVISION

9.1 ESMA issues updates in relation to assessment of third-country venues under MiFID II and MiFIR

On 27 October 2020, ESMA updated the list of third-country venues in respect of:

- ESMA's Opinion determining third-country trading venues for the purpose of transparency under the second Markets in Financial Instruments Directive (2014/65/EU) (**MiFID II**) and the Regulation on markets in financial instruments (Regulation (EU) No 600/2014) (**MiFIR**); and

- ESMA's Opinion determining third-country trading venues for the purpose of position limits under MiFID II.

The purpose of the update is to add the UK to the Annex of each Opinion, following a positive assessment by ESMA of UK venues against the criteria of each Opinion.

As a result, from 1 January 2021:

- EU investment firms will not be required to make transactions public in the EU via an approved publication arrangement (**APA**) if they are executed on one of the UK trading venues on the transparency list; and

- Commodity derivative contracts traded on UK trading venues on the position limits list will not be considered as economically equivalent over-the-counter (**EEOTC**) contracts for the EU position limit regime.

The Annex to each Opinion can be accessed here.

In addition, ESMA has updated its Guidance on the Annex to its Opinion determining third-country trading venues for the purpose of transparency under MiFIR. The update concerns the identification of bonds and US treasuries (on 27 October 2020), and the treatment of venues without a market identifier code (**MIC**) (on 6 November 2020), which can be accessed here.

On 9 November 2020, ESMA published a decision of the Board of Supervisors, dated 5 November 2020, on delegation to the ESMA Chair of the assessment regarding third country trading venues for the purpose of transparency under MiFIR (**Decision**).

The Decision takes into account the amendments reflected in the updated ESMA Opinion related to post-trade transparency, dated 28 May 2020.

The Decision delegates to the Chair of ESMA the task to assess whether a third-country venue meets the criteria to be considered a third-country entity as a trading venue for the purposes of the post-trade transparency requirements pursuant to Article 20 and Article 21 MiFIR. The Board of Supervisors retains the powers to perform controversial assessments.

The Decision specifies the criteria to be used by the Chair when making the assessment, and outlines the conditions under which delegation may be made.

The Decision repeals and replaces ESMA's decision on the assessment dated 26 September 2018.

A copy of the Decision is available here.

9.2 EFAMA publishes response to ESMA consultation on data and transaction reporting obligations under MiFIR

On 20 November 2020, EFAMA published its reply to ESMA's consultation paper on MiFIR review report on the obligations to report transactions and reference data (**Response**).

In the Response, EFAMA express disagreement with the extension of the scope of the reporting requirements imposed by Article 26 MiFIR to UCITS' and AIFs' management companies. EFAMA argue that this would be a breach of the principle of proportionality because:

- it would apply to non-core activities of UCITS and AIFS and would only identify only a few (if any) market activities to report;
- ESMA does not demonstrate the existence of market abuses detected;
- ESMA and NCAs can already associate the transactions with the decision makers in most cases (notably through the reporting provided by trading venues under Article 26(5) MiFIR;
- Contrary to ESMA's view, introducing MiFIR reporting for UCITS management companies and AIFM would not create a level playing field. Market participants have the free choice to operate either as investment firm or in consideration of the requirements for UCITS' or AIFs' management companies. Licenses and requirements are different and market participants can switch licenses at any time but each model has specificities; and
- extending the scope of Article 26 MiFIR would create disadvantages in comparison to UK UCITS Management Companies when applying for portfolio management mandates outside the 27 EU Member States.

The Response notes that should ESMA impose additional reporting to UCITS' and AIFs' management companies, this burden should be minimised. EFAMA suggests the introduction of two new reporting fields as a way to deliver ESMA's required information albeit with a lower reporting burden.

ESMA intends to submit its final review report, in respect of its consultation, to the European Commission in the first quarter of 2021.

The Response can be accessed here.

10. BENCHMARKS REGULATION

10.1 ESMA updates Q&A on BMR to address transitional provisions relating to critical benchmarks

On 6 November 2020, ESMA updated its Questions and Answers on the BMR (**Q&A**). The Q&A was last updated in December 2019.

The new question and answer, at section 9.4, addresses how long a critical benchmark can be used by supervised entities in the EU in circumstances where the provider has not been granted authorisation.

The Q&A can be accessed here.

10.2 Update on proposed Regulation amending the BMR to address benchmark cessation risks and exempt certain third-country FX benchmarks

On 9 December 2020, the Council of the EU published the final compromise text of the proposed Regulation amending the BMR regarding the exemption of certain third country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation (**Proposed Regulation**).

The draft text of the Proposed Regulation was first published by the European Commission on 24 July 2020. The European Parliament and the Council had reached political agreement on the Proposed Regulation on 30 November 2020.

The agreed amendments empower the European Commission to designate a replacement benchmark that covers all references to a widely used reference rate that is phased out, such as the London Interbank Offered Rate (**LIBOR**), when this is necessary to avoid disruption of the financial markets in the EU.

The European Commission will be granted power to replace:

- "critical" benchmarks, which influence financial instruments and contracts with an average value of at least €500 billion and could thus affect the stability of financial markets across Europe;
- benchmarks with no, or very few, appropriate substitutes whose cessation would have a significant and adverse impact on market stability;
- third country benchmarks whose cessation would significantly disrupt the functioning of financial markets or pose a systemic risk for the financial system in the Union.

In its statement welcoming the political agreement, the European Commission noted *"regarding other '-IBOR' rates, it is still in market participants' best interests to actively prepare for the transition to alternative reference rates, as this offers them the greatest degree of control over the fate of contracts if a reference rate ceases to be published."*

In addition, the European Parliament and the Council agreed to postpone the entry into application of the rules on third country benchmarks until 31 December 2023 with the possibility of an extension by the European Commission by a maximum of two years until 31 December 2025, however such an extension must be "duly motivated." This means that EU market participants will continue to be able to use benchmarks administered in a country outside the EU until at least the end of 2023.

This postponement will be welcomed by trade associations such as the EBF, EFAMA, and ISDA who, alongside other representatives, wrote to the European Commission on 20 November 2020 requesting that the transition period be extended to the end of 2025 (**Trade Association Letter**). The Trade Association Letter noted concerns such as the lack of ability for EU supervised entities to rely on non-EU benchmarks qualifying under the existing third country regimes and the accompanying competitive disadvantage as reasons for the request for an extension period. In particular, the Trade Association Letter noted an extension was needed to allow time for a comprehensive review of the regime and to allow the European Commission to identify other third countries which may be able to benefit from an equivalence decision.

The European Parliament and the Council intend to adopt the amendments without further discussion as soon as possible. Once approved, the Proposed Regulation will apply immediately after publication in the OJ.

The final text of the Proposed Regulation can be accessed here, and the accompanying press release can be accessed here.

The European Parliament press release announcing the key elements of the political agreement can be accessed here.

The Trade Association Letter is available here.

10.3 ESMA publishes consultation report on procedural rules for penalties imposed on Benchmark Administrators

On 23 December 2020, ESMA published a consultation report on procedural rules for penalties imposed on benchmark administrators under the BMR (**Report**).

The purpose of the consultation is to seek stakeholder input on ESMA's proposals relating to penalties imposed on benchmark administrators under its direct supervision.

The Report can be accessed here. The consultation response form can be accessed here. The closing date for receipt of feedback is 23 January 2021. ESMA expects to publish a final report and submit its advice to the European Commission in Q1 2021.

11. LIBOR CESSATION

11.1 FSB publishes global transition roadmap for LIBOR

On 16 October 2020, the Financial Stability Board (**FSB**) published a Global Transition Roadmap for LIBOR (**Roadmap**).

The FSB published the Roadmap in response to the risks posed to global financial stability by the continued reliance of global financial markets on LIBOR. The LIBOR benchmarks are not guaranteed to continue to be available after the end of 2021. The purpose of the Roadmap is to inform stakeholders with exposure to LIBOR benchmarks to some of the steps they should be taking now and until the end of 2021 to mitigate these risks. The Roadmap sets out prudent steps for financial and non-financial sector firms to take so that an orderly transition may be ensured.

The Roadmap sets out what a firm should already have in place, what a firm should have in place by the effective date of the ISDA Fallbacks Protocol (January 25 2021), and what firms should have in place by end 2020, mid-2021 and end-2021. The Roadmap intends to supplement existing timelines from industry groups and regulators.

The Roadmap recommends that regulated financial institutions have an open and constructive LIBOR transition dialogue with their regulators, both home state and host state, throughout the transition period. The Roadmap further recommends that other firms with exposure to LIBOR benchmarks should also monitor developments.

The Roadmap is available here.

11.2 ISDA publishes IBOR Fallbacks Supplement and IBOR Fallbacks Protocol

On 23 October 2020, International Swaps and Derivatives Association (**ISDA**) published the IBOR Fallbacks Supplement (**Supplement**) and IBOR Fallbacks Protocol (**Protocol**).

The Supplement will amend the 2006 ISDA Definitions for interest rate derivatives to incorporate robust fallbacks for derivatives linked to certain interbank offered rates (**IBORs**). The Protocol will enable market participants to incorporate the revisions into their legacy non-cleared derivatives trades with other counterparties that choose to adhere to the Protocol. The Protocol applies to certain ISDA and non-ISDA agreements. The Protocol will come into effect on January 25 2021 and will remain open for adherence after this date.

The purpose of the implementation of fallbacks for derivatives is to migrate the systemic risk of a key IBOR becoming unavailable while market participants continue to have exposure to that rate. The fallbacks for a particular currency will apply following a permanent cessation of the IBOR in that currency.

As readers will be aware, the Financial Conduct Authority in the UK (**FCA**) had previously advised market participants that they could not rely on LIBOR being published after the end of 2021 and so should implement transition plans to ensure that all exposure to LIBOR was eliminated before that date.

However, in December 2020, the administrator of the LIBOR benchmarks has issued a consultation on potential cessation of LIBOR benchmarks. In it, it proposed that LIBOR benchmarks denominated in GBP, EUR, CHF and JPY in all tenors, as well as the 1 month/2 month USD LIBOR settings would cease to be published after 31 December 2021. However, it has proposed that the remaining USD LIBOR (including overnight and 1, 3, 6 and 12 month rates) would continue to be calculated until June 2023 which would allow most legacy USD LIBOR contracts to mature before the relevant LIBOR rate ceases to be calculated. This consultation closes on 25 January 2021.

The Supplement can be accessed here.

The Protocol can be accessed here.

ISDA has published an FAQ document addressing the fall-back Protocol/Supplement which can be accessed here.

ISDA has published a User Guide to IBOR Fallbacks and Risk-free Rates which can be accessed here.

ISDA has published a webpage which will serve as the central repository for information from ISDA relating to financial benchmark reform and the transition from LIBOR. The webpage can be accessed here.

Key Action Points	UCITS management companies and AIFMs should monitor developments, bearing in mind that the FCA has confirmed that it encourages market participants which are party to legacy LIBOR contracts to continue work to convert these contracts or adopt robust fallbacks, noting that this is "the only way for parties to have certainty and control over their contractual terms when LIBOR ceases or is no longer representative

12. IRISH INVESTMENT LIMITED PARTNERSHIPS

12.1 Ireland's Investment Partnership Act signed into law

The Investment Limited Partnership (Amendment) Act 2020 (**2020 Act**) was signed into law by the President of Ireland on 23 December 2020. The purpose of the 2020 Act is to amend The Investment Limited Partnerships Act 1994, which governs the establishment and operation of regulated investment limited partnerships (**ILP**) in Ireland.

The 2020 Act looks to modernise the law governing ILP so as to make the ILP the vehicle of choice for implementing private equity, venture capital, private debt and real assets investment strategies in Europe. As well as modernising the ILP in line with other types of Irish investment fund vehicles, the amendments to the existing ILP regime are intended to incorporate "best in class" features for this type of vehicle.

Please see the Dillon Eustace briefing entitled "Ireland's Investment Partnership Act signed into law" which can be accessed here.

12.2 CBI publishes updated AIFMD Q&A to address the regulatory status of the general partner in an ILP

On 23 November 2020, the CBI published the thirty-sixth edition of its "AIFMD – Questions and Answers" (**AIFMD Q&A**), reflecting the provisions of the new Investment Limited Partnership (Amendment) Act 2020.

The AIFMD Q&A incorporates two new questions and answers at ID1134 and ID 1135 in relation to the regulatory status of the general partner in an ILP. The AIFMD Q&A confirms that the general partner will not need to be regulated as an AIF management company but notes that it will still be subject to the CBI fitness and probity requirements and that directors or partners of a general partner will still constitute PCF functions.

The AIFMD Q&A can be accessed here.

13. FITNESS & PROBITY

13.1 New CBI Pre-Approval Control Functions to take effect that impact Asset Management Industry

On 9 October 2020, the CBI published the Central Bank Reform Act 2010 (Sections 20 & 22) (Amendment) Regulations 2020 (**Amending Regulations**) which expand the Pre-Approval Controlled Functions (**PCFs**) regime by (i) introducing three new PCF roles (PCF 49, PCF 50 and PCF 51); and (ii) splitting the current PCF-39 Designated Person role into six PCF roles aligned to specific managerial functions (i.e. PCF-39A to PCF-39F).

Please see the Dillon Eustace briefing paper entitled "New Central Bank Pre-Approval Control Functions to take effect that impact the Asset Management industry" for details on the changes introduced. The Dillon Eustace Briefing Paper can be accessed here.

The CBI has published an FAQ in respect of the introduction of the new and revised PCFs, which can be accessed here.

The updated list of CBI PCF roles can be accessed here.

The Amending Regulations can be accessed here.

Key Action Points	PCF-39: Where a person discharging the relevant PCF-39 function changes after 5 October 2020, he/she will need to obtain the CBI's prior approval before performing this role by completing the CBI's individual questionnaire. PCF-49, PCF-50 or PCF-51: If the individual discharging the relevant PCF-49, PCF-50 or PCF-51 role changes after 5 October 2020, the prior approval of the CBI will be required by completing and submitting an individual questionnaire.

13.2 CBI issues second "Dear CEO" letter on Fitness and Probity

On 17 November 2020, the CBI issued a second "Dear CEO" on fitness and probity, following thematic on-site inspections which it conducted on a sample of firms in the insurance and banking sectors (**Letter**). The CBI's first "Dear CEO" letter on the topic was issued in April 2019.

The CBI has highlighted that it expects all firms to take appropriate action to deal with the issues addressed in the Letter, and that the Letter should be read in conjunction with its prior "Dear CEO" letter, the Fitness and Probity Standards and associated fitness and probity guidance.

Please see the Dillon Eustace briefing paper entitled "CBI issues second "Dear CEO" letter on fitness and probity", which looks at some of the CBI's key findings. This briefing paper can be accessed here.

The Letter can be accessed here.

Key Action Points	Please see the additional Dillon Eustace briefing paper entitled "Fitness and Probity - Action points for Irish funds and their management companies" for details of suggested action points. This briefing paper can be accessed here.

14. MISCELLANEOUS

14.1 ESMA publishes 2021 Work Programme

On 2 October 2020, ESMA published its work programme for 2021 (**Programme**). The Programme sets out ESMA's priorities and areas of focus for the next 12 months, in support of its mission to enhance investor protection and promote stable and orderly financial markets.

ESMA's activities for 2021 will focus on:

- **Supervisory convergence**: ESMA will prioritise building an EU common risk-based and outcome-focused supervisory culture. Areas of focus include EMIR, ESG reporting and ESG data reporting, fund liquidity risk/ liquidity management tools and retail investment product costs and charges.

- **Risk assessment**: ESMA will focus on integrating financial innovation and ESG into their risk analysis. ESMA will also focus on data for risk-based supervision to support policy and convergence work. ESMA will continue to monitor the impact on the markets of the Covid-19 pandemic and of Brexit, intervening when necessary in support of investor protection, orderly markets and financial stability.

- **Single rulebook**: ESMA will continue to engage in a programme of regular post-implementation reviews of laws and technical standards. More particularly, ESMA will seek to contribute to the legislative reviews of MiFID and AIFMD, assess whether changes

to the rulebook are needed to develop the Capital Markets Union and will review technical standards under EMIR where necessary.

- **Direct supervision**: under its direct supervision activity, ESMA will focus on third country central counterparty supervision under the EMIR Refit Regulation. Furthermore, ESMA will prepare for new supervisory mandates regarding Benchmarks and Data Service Providers, as well as continuing direct supervision in the areas of Credit Rating Agencies, Trade Repositories and Securitisation Repositories.

The Programme can be accessed here.

14.2 ESAs publish work programme for 2021

On 6 October 2020, the ESAs, namely the EBA, EIOPA and ESMA, published its work programme for 2021 (**Programme**) which identifies the following areas of focus for the Joint Committee in 2021. These include:

- Cross-sectoral Risk Reports: The publication of bi-annual cross-sectoral Risk Reports, which will be of particular importance in 2021 in light of the economic and financial implications of the COVID-19 pandemic;
- Brexit: The Joint Committee will serve continue to serve as a forum to discuss and coordinate any cross-sectoral issues arising from Brexit impacting investor protection, EU market integrity and financial stability in this respect;
- Consumer protection;
- Sustainable finance: The Joint Committee will develop and deliver a number of draft technical standards under the SFDR;
- Financial innovation: The Joint Committee will place a special emphasis on monitoring and analysing technological innovations, as well as developments regarding cybersecurity and outsourcing to third party providers; and
- PRIIPS: The Joint Committee will provide guidance on the application of the PRIIPs rules.

The Programme can be accessed here.

14.3 EFAMA updates cyber-security standards for investment management companies

On 28 October 2020, EFAMA published a document updating the "International Investment Funds Association (**IIFA**) Cybersecurity Program Basics" (**Standards**), first published in October 2019.

The Standards set out the key cyber-prevention standards for investment management companies. The aim of the Standards is to provide the global asset management industry with commonly shared principles that firms can apply, with the aim of minimising the likelihood of cyber incidents.

The update addresses best practice considerations in the context of the Covid-19 pandemic, such as business continuity planning and work from home considerations.

The update can be accessed here.

The Standards can be accessed here.

14.4 Supervisory flexibility - Securities Markets, Investment Management, Investment Firms and Fund Service Providers

On 10 November 2020, the CBI updated the section of its website entitled "COVID-19 – Prudential Regulatory Flexibility Measures". The section sets out the regulatory flexibility that will be applied by the CBI in certain areas for Securities Markets, Investment Management, Investment Firms and Fund Service Providers.

The following key points are of relevance for funds, fund management companies, administrators and depositaries (**Fund Service Providers**):

- Filing of financial statements relating to UCITS and AIF funds: in April of this year, the CBI announced some flexibility on the filing deadlines applicable to financial statements of UCITS and AIF funds where the fund was not in a position to meet the relevant deadlines. However, the CBI has clarified that the ability to avail of an extension period is only available in respect of those financial statements which cover a period ending before 1 April 2020/1 May 2020.

- Fund Service Provider on-site visits to outsourcing service providers / delegates: The CBI has set out its expectations as regards due diligence arrangements and periodic on-site visits to outsourcing service providers and delegates.

- Risk Mitigation Programmes (**RMPs**): The CBI has indicated that it expects firms to meet specific RMP submission dates.

- Pillar Two Guidance/ Pillar Three: The CBI has indicated that it expects MiFID investment firms subject to CRR/CRD IV to hold capital in accordance with any Pillar 2 Guidance. It also expects MiFID investment firms subject to CRR/CRD IV should assess the need for additional Pillar 3 disclosures.

The website page can be accessed here.

14.5 CBI consults on Client Asset Requirements

On 3 December 2020, the CBI published the paper 'Consultation on enhancements to the Central Bank Client Asset Requirements, as contained in the Central Bank Investment Firms Regulations' (**CP133**).

The CBI has carried out an assessment of the Irish client asset landscape and, based on this assessment, is now proposing to make amendments to the Client Asset Requirements (**CAR**), as is set out in Part 6 of the Investment Firms Regulations (S.I. No 604 of 2017) (**Investment Firms Regulations**)

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Please see the Dillon Eustace briefing paper entitled "Central Bank consults on Client Asset Requirements", which addresses the proposed changes, can be accessed here.

Any stakeholders wishing to submit a response have until 10 March 2021.

CP133 can be accessed here.

14.6 ESMA publishes guidelines on outsourcing to cloud service providers

On 18 December 2020, ESMA published its final report on guidelines on outsourcing to cloud service providers (**CSPs**) (**Guidelines**).

The purpose of the Guidelines is to help firms identify, address and monitor the risks that may arise from their cloud outsourcing arrangements and to support a convergent approach to the supervision of cloud outsourcing arrangements across competent authorities in the EU. The Guidelines provide guidance to firms on:

- The risk assessment and due diligence that they should undertake on their CSPs;
- The governance, organisational and control frameworks that they should put in place to monitor the performance of their CSPs and how to exit their cloud outsourcing arrangements without undue disruption to their business;
- The contractual elements that their cloud outsourcing agreement should include; and
- The information to be notified to competent authorities.

In addition, the Guidelines provide guidance to competent authorities on the supervision of cloud outsourcing arrangements, with a view to fostering a convergent approach in the EU.

The Guidelines will be translated in the official EU languages and published on ESMA's website. The publication of the translations will trigger a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the Guidelines.

The Guidelines are available 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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