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FUNDS

Quarterly Legal and Regulatory Update

Period covered: 1 January 2021 – 31 March 2021

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1. APPROACHING DEADLINES

Approaching deadlines		
Q 2 2021	12 May	The ESA's consultation on the draft regulatory technical standards with regard to the content and presentation of taxonomy-related sustainability disclosures under the SFDR closes (see Section 8.2).
	26 June	The new prudential regime under the Investment Firms Directive and the Investment Firms Regulation imposing new initial capital requirements for all MiFID investment firms comes into effect.
	17 June	EBA's consultation on the proposed revised guidelines on risk-based supervision of credit and financial institutions' compliance with AML/CFT obligations ends (see Section 6.3).
	30 June	ESMA's consultation on proposed reforms to the Money Market Fund Regulation closes (see Section 9.1).
Q 3 2021	5 July	Existing UCITS funds and specific types of RIAIFs must comply with the CBI's Performance Fee Guidance in respect of accounting periods beginning on or after 5 July 2021 (see Section 2.9).
	31 July	All cloud outsourcing arrangements entered into, renewed, or amended on or after this date must comply with the new ESMA Guidelines on cloud outsourcing.
	2 August	The date on which the majority of the provisions of the Cross Border Distribution Directive and the Cross Border Distribution Regulation will apply (see Section 2.3).

2. UCITS & AIFMD

2.1 ESMA launches common supervisory action on costs and fees of UCITS

On 6 January 2021, the European Securities and Markets Authority (**ESMA**) launched its Common Supervisory Action (**CSA**) with national competent authorities (**NCAs**) on the supervision of costs and fees of UCITS across the EU. The CSA will also address the use of entities employing efficient portfolio management (**EPM**) techniques to assess whether they adhere to the requirements set out in the UCITS framework and ESMA Guidelines on ETFs and other UCITS issues.

As part of this CSA, the Central Bank of Ireland (**CBI**), along with other EU NCAs, issued both a qualitative and quantitative questionnaire to certain UCITS management companies in March 2021 with such UCITS management companies being required to complete these questionnaires by 31 March 2021.

The aim of the CSA is to assess the compliance of supervised entities with; (i) the relevant cost-related provisions in the UCITS framework, and (ii) the obligation of not charging investors with "undue costs". The CSA will be conducted with reference to the ESMA supervisory briefing on this topic, published on 4 June 2020, in which ESMA provided guidance to NCAs on the notion of "undue costs" which it noted had been interpreted differently across the EU. It also provided guidance on how to supervise UCITS management companies and AIFMs to ensure that end investors are not subject to any such "undue costs". The briefing indicated that "*In order to allow NCAs to appropriately supervise that investors are not charged with undue costs, NCAs are expected to require that management companies develop and periodically review a structured pricing process"* which addresses ten specific elements identified therein (paragraph 19). A copy of the ESMA supervisory briefing of 4 June 2020 can be accessed here.

The briefing paper also includes elements to be taken into account by NCAs for the purpose of their supervision of the duty to prevent undue costs being charged to investors.

An ESMA press release on the CSA can be accessed here.

Key Action Points	UCITS management companies which received the CSA questionnaires from the CBI were required to submit completed questionnaires to the CBI by 31 March 2021. However, because the supervisory briefing published by ESMA in June 2021 related not only to UCITS management companies but also to AIFMS, given the regulatory focus on costs, all UCITS management companies and AIFMs may want to consider a review of

	their existing pricing processes for funds under management taking into account the elements set down by ESMA in its supervisory briefing.

2.2 ESMA publishes final report on draft ITS under Cross Border Distribution Regulation

On 29 January 2021, ESMA published its final report on draft implementing technical standards (**ITS**) under the Regulation on cross-border distribution of funds ((EU) 2019/1156) (**Cross Border Distribution Regulation**)(**Report**).

The ITS address the publication of information by NCAs on their websites regarding the national rules governing marketing requirements for funds and the regulatory fees and charges levied by NCAs relating to fund managers' cross-border activities. It also addresses the information to be provided by NCAs to ESMA to enable ESMA, with effect from 2 February 2022, to publish and maintain a central database of UCITS and alternative investment funds (**AIFs**) marketed cross-border.

The ITS have been submitted to the European Commission for endorsement. Once adopted by the European Commission, the ITS will enter into force on the twentieth day following their publication in the Official Journal of the EU (**OJ**).

The majority of the provisions of the ITS, the Cross Border Distribution Regulation and the Directive with regard to cross-border distribution of collective investment undertakings ((EU) 2019/1160) (**Cross Border Distribution Directive**), are due to apply from 2 August 2021. Whilst Member States are required to transpose the Cross Border Distribution Directive into national law by this date, Ireland has not yet issued the draft implementing legislation to do so.

The Report can be accessed here.

2.3 Update - Cross Border Distribution Regulation and the Cross Border Distribution Directive due to apply from 2 August 2021

The Cross Border Distribution Regulation and the Cross Border Distribution Directive are due to apply from 2 August 2021. They contain new requirements applicable to UCITS Management Companies/AIFMs (**Management Companies**) in relation to the marketing and distribution of UCITS and AIFs. More generally, readers should be aware that these include:

- **Rules governing marketing communications**: the Cross Border Distribution Regulation sets down specific conditions that all marketing communications addressed to investors must comply with. These include an obligation to ensure that all information contained in marketing communications is fair, clear and not misleading. Marketing communications will also need to comply with ESMA's finalised guidelines on marketing communications under the Cross Border Distribution Regulation which are expected enter into force on 2 August 2021 (ESMA Marketing Guidelines which can be accessed here).

- **Introduction of pre-marketing requirements for AIFMs**: the Cross Border Distribution Directive introduces a new concept of "pre-marketing" for EU AIFMs (whereby an EU AIFM can test investor appetite for a particular investment idea or investment strategy) and sets down the conditions under which an EU AIFM can engage in pre-marketing.

- **De-Registration Requirements**: the Cross Border Distribution Directive introduces new rules which must be followed by Management Companies where a decision has been taken to discontinue the marketing of a fund in an EU jurisdiction. These include for example an obligation to make public the intention to terminate marketing arrangements in the relevant jurisdiction.

- **Facilities for retail investors**: under the new framework, AIFM which are marketing shares of an AIF to a retail investor must now provide local facilities to such investors, in line with the revised requirements which are also applicable to UCITS management companies.

Whilst Member States are required to transpose the Cross Border Distribution Directive into national law by 2 August, 2021, Ireland has not yet issued the draft implementing legislation to do so.

The text of the Cross Border Distribution Regulation can be accessed here.

The text of the Cross Border Distribution Directive can be accessed here.

Key Action Point	In advance of 2 August 2021 (being the date from which the relevant provisions are expected to apply, Management Companies should carry out a review of marketing materials to ensure that they meet the requirements set down in the new cross-border distribution framework. Where relevant, Management Companies may also wish to revise agreements with distributors / financial intermediaries to oblige them to ensure that any marketing communications issued by them relating to funds managed by such Management Companies comply with the Cross Border Distribution Regulation and the related ESMA Marketing Guidelines. Management Companies should also implement appropriate internal procedures to address pre-marketing requirements and potential implications for reverse solicitation (AIFMs only) and de-registration requirements.

2.4 CBI publishes final Guidance on Share Classes in Closed-Ended Funds

On 2 February 2021, the CBI published its finalised guidance on share class features of closed-ended QIAIFs (**Guidance**). The Guidance was issued following the publication of the CBI's Consultation Paper 132 on the Guidelines, in November 2020.

On the same date, the CBI published its feedback statement on the Guidance which provides the rationale for some of the positions taken by the CBI in the finalised text (**Feedback Statement**).

While this will be of relevance to closed-ended ILPs, the Guidance will also apply to closed-ended QIAIF established as ICAV, investment company, unit trusts and CCF.

The Guidance can be accessed here.

The Feedback Statement can be accessed here.

2.5 CBI publishes Guidance on Real Asset Depositaries

On 2 February 2021, the CBI published Guidance on Depositaries for AIFs under Regulation 22(3)(b) of the AIFM Regulations (**Depositaries of Assets other than Financial Instrument** or **DAoFI**) (**Guidance**). These types of depositaries are generally referred to as "Specialised Depositaries" or "Real Asset Depositaries". This follows the issue by the CBI of a Notice of Intention in November 2018, whereby the CBI had proposed a regulatory framework for entities applying to act as DAoFI under Regulation 22(3)(b) of the AIFM Regulations.

The Guidance sets out the requirements for authorisation as a DAoFI as follows:

- The eligible firm must be incorporated in Ireland and authorised as an investment firm pursuant to the Investment Intermediaries Act 1995, and must fulfil certain procedural and oversight standards to satisfy the CBI of its suitability;
- The firm must comply with certain AIF Rulebook requirements;
- The firm must meet certain capital requirements;
- The firm must hold a certain level of professional indemnity insurance cover;
- A DAoFI can only act as a depositary for certain AIFs, namely those which have no redemption rights exercisable for at least five years from the date of initial investment and which generally do not invest in financial instruments that can be held in custody.

Where the firm invests in financial instruments subject to custody obligations, the DAoFI must either appoint a sub-custodian or hold additional capital;

- Although the CBI does not propose to establish an exhaustive list of assets which would automatically be acceptable for a DAoFI to safe-keep, wine. A list of asset classes will be available in a CBI Q&A and will be updated from time to time;
- In all cases, a DAoFI must provide satisfactory evidence to the CBI of its capacity to safe-keep and provide ongoing monitoring of the assets for which it will provide services;
- A DAoFI may only be appointed to authorised AIFs which are Qualifying Alternative Investor AIFs; and
- The firm will be subject to certain investor disclosure obligations, such as the limited nature of the DAoFI's activities and the standard of liability applicable to its activities.

The DAoFI will complement the renewed Investment Limited Partnership fund product. Both are central to the further growth of Ireland as a domicile for private equity and real estate funds in particular, as well as other funds investing in illiquid or less liquid assets.

The Guidance can be accessed here.

2.6 ESMA publishes results of its common supervisory action on UCITS liquidity risk management and the CBI issues a letter on the importance of effective liquidity risk management to fund management companies

On 24 March 2021, ESMA published a statement outlining its findings from the CSA action conducted by it and each of the EU competent authorities on liquidity risk management (**LRM**) in UCITS management companies in 2020 (**Statement**).

While it found that in most cases UCITS management companies were complying with their regulatory obligations under the UCITS framework and have adopted "sufficiently sound" LRM processes, it has identified some shortcomings in the LRM arrangements of certain UCITS management companies.

In addition, on 10 March 2021, the CBI issued a letter to certain "fund management companies" (**Letter**) with corporate bond funds under management reminding them of the importance of effective LRM and ensuring compliance with relevant legislative and regulatory obligations for UCITS and AIFs. Whilst the Letter was addressed to that specific cohort of management companies, when publishing the Letter, the Central Bank noted that the findings outlined in the Letter more broadly are important and should be noted by all management companies.

Dillon Eustace has prepared a briefing entitled "Liquidity Management: The Regulatory Spotlight Remains" on the implications of the Statement and the Letter, which can be accessed here.

The Statement can be accessed here.

The Letter can be accessed here.

Key Action Point	All Irish management companies should conduct a review of their existing LRM frameworks in order to assess whether any changes are required to be made to address the matters outlined in the Letter, and in the case of UCITS management companies, in the ESMA Statement.

2.7 ESMA updates UCITS and AIFMD Q&As on performance fee guidelines

On 30 March 2021, ESMA updated each of its Questions and Answers documents on the application of the UCITS Directive (**ESMA UCITS Q&A**) and the AIFMD (**ESMA AIFMD Q&A**) to incorporate two new Q&As on its guidelines on performance fees in UCITS and certain types of AIFs (**Guidelines**).

These are incorporated as a new Section XI in the ESMA UCITS Q&A and as a new Section XV in the ESMA AIFMD Q&A. The UCITS Q&A and AIFMD Q&A each confirm that in ESMA's view, the Guidelines do not prevent a performance fee from being crystallised in the first years of a fund's existence. Under the Irish regime, the ESMA AIFMD Q&A will only relate to RIAIFS which charge performance fees. In addition, the new Q&As also deals with the application of certain requirements set out in the ESMA "Guidelines on performance fees in UCITS and certain types of AIFs" (**ESMA Guidelines**) which relate to a "performance reference period" of 5 years. This is not relevant to Irish UCITS or AIFs as the Irish model does not currently allow negative performance to be cleared after a period of 5 years.

The ESMA AIFMD Q&A also addresses the scope of the application of the Guidelines to European Long-Term Investment Funds (**ELTIFs**). The Q&A confirms that to the extent that an ELTIF is (i) marketed to retail investors, (ii) is not a closed-ended structure and (iii) is not a venture capital/private equity or real estate AIF, it must comply with the provisions of the ESMA guidelines.

The updated ESMA UCITS Q&A can be accessed here.

The updated ESMA AIFMD Q&A can be accessed here.

2.8 CBI updates Q&A on AIFMD

On 1 April 2021, the CBI published the thirty-eighth edition of its AIFMD – Questions and Answers" (**CBI AIFMD Q&A**). It contains new Q&As as follows:

- a new Q&A at ID 1141 which relates to raising capital from investors by way of a shareholder (unitholder) loan. The Q&A states that the CBI does not consider that such arrangements are in principle consistent with the objective of collective investment on behalf of an authorised AIF's members (investors). The Q&A further sets out the CBI's expectations in this regard. The CBI notes that it may revisit this matter during future public consultations.

- a new Q&A at ID 1142 which relates to whether or not an authorised AIF can enter into transactions with its investors. The Q&A states that the AIF Rulebook does not envisage that such transactions would take place, therefore the AIF Rulebook does not currently apply rules which relate to transactions with connected parties to transactions with investors. The CBI notes that it may revisit this matter during future public consultations.

The new Q&A at 1140 confirms the scope of the defined term "issuing body" in relation to the AIF Rulebook

This new Q&A also includes Q&As introduced as part of the thirty-seventh edition AIFMD Q&A (2 February 2021) which address the authorisation of DAoFI (ID 1136, ID 1137, ID 1138 and ID 1139)

The thirty-eighth edition CBI AIFMD Q&A can be accessed here.

2.9 CBI publishes final Guidance on performance fees of UCITS and certain types of retail investor AIFs

On 1 April 2021, the CBI published final Guidance on performance fees of UCITS and certain types of Retail Investor AIFs (**CBI Guidance**). The CBI Guidance incorporates, to the extent currently possible and practicable, the ESMA "Guidelines on performance fees in UCITS and certain types of AIFs" (**ESMA Guidelines**) into the CBI's regulatory framework.

The CBI Guidance applies to UCITS and to Retail Investor AIFs other than those Retail Investor AIFs that are closed-ended and open-ended Retail Investor AIFs that have been established as EuVECA, EuSEF or follow venture capital, private equity or real estate strategies.

The CBI Guidance applies at fund level. New classes within an existing in-scope fund with performance fees availing of the transition period shall continue to comply with the regulatory regime that applies to other classes within the fund.

Where the CBI Guidance is being applied in the context of a UCITS, responsibility for compliance with the CBI Guidance rests with the UCITS management company, or in the case of self-managed UCITS, the UCITS itself. Where the CBI Guidance is being applied in the context of a Retail Investor AIF, responsibility rests with the Retail Investor AIF.

The date of application for the CBI Guidance is as follows:

- for in-scope funds which are established or which amend or introduce a performance fee on or after 5 January 2021, the CBI Guidance applies from the date of establishment, amendment or introduction; and

- for in-scope funds with existing performance fees as at 5 January 2021, the CBI Guidance will apply from the beginning of the accounting period, which occurs six months after the Effective Date (5 July 2021). The CBI has explained in a footnote to the Guidance that for a fund with an accounting period ending on 31 December 2021, that fund must comply with the CBI Guidance for the financial period beginning on 1 January 2022 and that for a fund with an accounting period ending on 30 September 2021, the CBI Guidance must be complied with from 1 October 2021.

On the same day, the CBI also published its Feedback Statement on its Consultation Paper 134 on the Guidance (**Feedback Statement**). The Statement sets out the CBI's feedback to the one response received to its consultation. Retail AIFS marketing to Irish retail investors will also be required to comply with the Guidance.

The CBI Guidance can be accessed here.

The ESMA Guidelines can be accessed here.

The Feedback Statement can be accessed here.

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

3. EMIR & SFTR

3.1 European Commission adopts equivalency decision for US central counterparties

On 27 January 2021, the European Commission adopted an Implementing Decision determining that the United States Securities and Exchange Commission (**SEC**) regime for US central counterparties (**CCPs**) is equivalent to the legal and supervisory arrangements laid down in Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (**EMIR**)(**Decision**).

The equivalence decision applies to SEC-registered CCPs (**US CCPs**), i.e. those that clear securities and security-based derivative (or 'security-based swaps' in US terminology). US CCPs may now apply for recognition by ESMA. Once recognised by ESMA, US CCPs will be able to provide central clearing services in the EU.

In order to be allowed to offer services in the EU, US CCPs will have to have rules in place with respect to certain risk management requirements (i.e. liquidation periods and anti-procyclicality measures).

The Decision entered into force on 17 February 2021, 20 days following its publication in the OJ.

The text of the Decision can be accessed here.

3.2 ESMA updates EMIR Q&A

On 28 January 2021, ESMA updated its Questions & Answers (**Q&A**) on the implementation of EMIR, regarding reporting issues.

The new Q&As address the following topics:

- Trade Repository (**TR**) Q&A 3b on reporting of valuations has been updated to explain how to report the direction of derivatives in specific cases that are described.

- TR Q&A 57 on the procedure for terminating 'dead trades' by TRs clarifies the steps to be taken for the due termination of derivatives when the reporting counterparty ceases to exist. It also specifies how to deal with non-terminated reports of inactive (dissolved) counterparties to ensure that accurate information is provided to the authorities.

On 31 March 2021, ESMA made a further update to its Q&A regarding the exemption for intragroup transactions involving non-financial counterparties under EMIR.

- TR Q&A 51 has been amended to clarify issues regarding what actions should be taken by counterparties following the cessation of the reporting exemption, and the application of the reporting exemption for intra-group transactions where the parent undertaking is established in a third country.

The latest edition of the Q&A can be accessed here.

3.3 ESMA updates Q&A on Reporting Obligations under SFTR

On 29 January 2021, ESMA updated its 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 new Q&As address the following topics:

- reporting of events that were not duly reported on time (Question 6);

- updates to records of outstanding SFTs by the Trade Repositories based on reports made by the counterparties (Question 7); and

- operational aspects concerning the reporting by financial counterparties on behalf of small non-financial counterparties pursuant to the Article 4(3) of SFTR (Question 8).

On 23 March 2021, the Q&A was updated to include a new Question 9, addressing the reporting of SFTs where an external portfolio manager participates.

The Q&A can be accessed here.

3.4 Delegated Regulations under EMIR on risk management and clearing obligations published in the OJ

On 17 February 2021, the following Delegated Regulations under EMIR on risk management and clearing obligations were published in the OJ:

- Commission Delegated Regulation (EU) 2021/236 of 21 December 2020 amending technical standards laid down in Delegated Regulation (EU) 2016/2251 as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral (**Risk Management RTS**); and

- Commission Delegated Regulation (EU) 2021/237 of 21 December 2020 amending regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts (**Clearing RTS**).

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 Risk Management RTS and the Clearing RTS both entered into force on 18 February 2021, the day following their publication in the 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.

The Risk Management RTS can be accessed here.

The Clearing RTS can be accessed here.

3.5 European Commission consults on Delegated Regulation regarding FRANDT commercial terms under EMIR

On 10 March 2021, the European Commission published a draft Delegated Regulation supplementing EMIR by specifying the conditions under which the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent (**Delegated Regulation**).

EMIR Refit Regulation ((EU) 2019/834) (**EMIR Refit**) introduced an obligation on clearing members and clients providing clearing services, whether directly or indirectly, to provide those services under fair, reasonable, non-discriminatory and transparent (**FRANDT**) commercial terms. The requirement to apply FRANDT terms will apply from 18 June 2021.

The Delegated Regulation specifies the conditions under which the commercial terms for clearing services of clearing service providers are to be considered to be FRANDT based on the following:

- fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;

- factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;

- requirements that facilitate clearing services on a fair and non-discriminatory basis having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits; and

- risk control criteria for the clearing member or client related to the clearing services offered.

The Delegated Regulation, and its accompanying annex, can be accessed here. The European Commission is seeking feedback from stakeholders on the Delegated Regulation, the consultation period closed on 7 April 2021. The European Commission will take into account the responses when it finalises the Delegated Regulation.

3.6 ESAs publish Joint Q&As on Bilateral Margining

On 18 March 2021, the ESAs published a set of joint Q&As on exchange of collateral under EMIR (**Q&As**). The Q&As were developed based on their joint mandate under EMIR to define bilateral margin requirements.

The Q&As addresses the following topics:

- The scope of the partial exemption for intragroup transactions from the requirement related to the exchange of collateral for OTC derivatives contracts not cleared by a CCP;

- Which is the correct competent authority to decide on this exemption, where a counterparty is a financial counterparty and the other counterparty is a non-financial counterparty and they are established in different member states; and

- The scope of the covered bonds exemption.

The Q&As can be accessed here.

4. PRIIPs

4.1 ESAs submit draft RTS on amendments to the PRIIPS KID to the European Commission

On 3 February 2021, the European Supervisory Authorities (that is, the EBA, EIOPA and ESMA)(**ESAs**) submitted to the European Commission the draft final report on Regulatory Technical Standards (**RTS**) on amendments to the existing rules contained in Commission Delegated Regulation (EU) 2017/653 on key information documents (**KIDs**) for packaged retail and insurance-based investment products (**PRIIPS**) (**Final Report**). There are no content changes to the draft RTS as published in June 2020.

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

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

- AIF funds which currently produce a PRIIP KID will need to monitor these developments.

- UCITS funds which are marketed to retail investors are not currently required prepare a PRIIP KID under the PRIIPS Regulation. This exemption is due to expire on 31 December 2021. The European Commission is still considering whether to extend the current exemption beyond this date.

On 1 February 2021, the European Fund and Asset Management Association (**EFAMA**) published a statement calling for an extension to the UCITS exemption for at least a further 12 months (**Statement**). The Statement outlines the difficulties faced by UCITS managers if it was the case that they were expected to produce a PRIIPS KID from 1 January next year. In addition, the Statement highlights the need to revise the UCITS Directive to remove the obligation to publish a UCITS KIID to avoid a scenario whereby a UCITS must produce both a UCITS KIID and a PRIIPS KID.

The Final Report can be accessed here.

The EFAMA Statement can be accessed here.

5. CENTRAL BANK

5.1 CBI updates COVID-19 – Prudential Regulatory Flexibility Measures

On 2 February 2021, the CBI updated its webpage "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 webpage has been updated to remove the reference to Remittance Dates for Financial Statements of Investment Funds.

The webpage now includes a new section setting out expectations in respect of the European Single Electronic Format (**ESEF**) Regulation.

The webpage can be accessed here.

5.2 CBI publishes Securities Markets Risk Report

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

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

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

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

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

The Report can be accessed here.

5.3 CBI publishes consultation on enhancing its engagement with stakeholders

On 11 February 2021, the CBI published its Consultation Paper 136 on enhancing its engagement with stakeholders (**CP136**).

In CP136 the CBI acknowledges the importance of stakeholder engagement in its ability to identify opportunities to enhance the performance of the financial system and identify any risks that may be developing. CP136 notes that the CBI is committed to continuing to enhance its engagement and to extend its reach to relevant stakeholders with whom it does not currently engage.

In CP136 the CBI outlines four proposals that aim to build on existing engagement with relevant stakeholders and facilitate greater discussion of cross-sector, strategic issues that affect the CBI's oversight of the financial system. The four proposals are (i) enhanced engagement with civil society and with consumer representatives, (ii) industry engagement, (iii) financial system conference, and (iv) engagement with business representatives.

The closing date for responses to CP136 is 11 May 2021. Submissions may be sent by email to CP136@centralbank.ie

Please see the Dillon Eustace briefing paper entitled "Central Bank of Ireland issues consultation paper on enhancing engagement with stakeholders" for further information, which can be accessed here.

CP136 can be accessed here.

Key Action Point	Firms to consider whether or not they wish to make a submission prior to the close of the consultation on 11 May 2021.

5.4 CBI proposes new cross-industry guidance on outsourcing

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

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

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

The CBI is inviting stakeholders to submit feedback on the Guidance. The consultation period closes on 26 July 2021, and feedback may be submitted by email to outsourcingfeedback@centralbank.ie.

Please see the Dillon Eustace briefing paper entitled "Central Bank proposes new cross-industry guidance on outsourcing". The Dillon Eustace briefing paper can be accessed here.

CP138 can be accessed here, and the Guidance can be accessed here.

Key Action Point	Regulated firms in Ireland to consider whether or not they wish to make a submission prior to the close of the consultation on 26 July 2021.

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

6.1 EBA publishes revised Guidelines on AML/TF Risk Factors

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

Please see the previous Dillon Eustace briefing paper on this topic which can be accessed here.

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

The announcement published by the EBA can be accessed here.

The Revised Guidelines can be accessed here.

Key Action Point	Designated Bodies should consider and assess the implications of the Revised Guidelines and update their AML policies and procedures, where relevant, once the Revised Guidelines apply.

6.2 EBA issues opinion on the risks of ML and TF affecting the EU's financial sector

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

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

The Opinion also addresses ML/TF risks that have arisen in the context of the Covid-19 pandemic. The Opinion notes that the pandemic illustrates how new ML/TF risks can emerge unexpectedly, impacting firms' ability to ensure adequate AML/CFT compliance and NCAs'

ability to ensure the ongoing supervision of firms in the current context of restrictions on movement. The Opinion recommends that risks associated with Covid-19 require immediate attention and monitoring by NCAs.

The Opinion can be accessed here.

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

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

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

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

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

The Guidelines can be accessed here.

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

On 18 March 2021, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020 (**Act**) was signed into law. The purpose of the Act is to transpose the criminal justice elements of the Directive amending AMLD 4 on the prevention of the use of the financial system for the purposes of ML or TF ((EU) 2018/843)(**Fifth EU Anti-Money Laundering Directive** or **AMLD 5**) by amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 in line with AMLD 5.

The final text of the Act can be accessed here.

7. DATA PROTECTION

7.1 EDPB adopts joint opinions on new standard contractual clauses

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

- for transferring personal data to non-EU countries (**Third Country SCCs**); and

- between controllers and processors located in the EU (**Controller-Processor SCCs**).

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

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

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

The EDPB joint opinion on Third Country SCCs can be accessed here.

The EDPB joint opinion on Controller-Processor SCCs can be accessed here.

The EDPB Recommendations are available here.

7.2 EDPB adopts Guidelines on examples regarding data breach notification

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

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

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

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

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

The Guidelines can be accessed here.

7.3 Council agrees its position on new ePrivacy rules

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

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

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

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

The text of the Negotiating Mandate can be accessed here.

7.4 European Commission publishes draft adequacy decision for transfers of personal data to the UK

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

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

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

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

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

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

The Decision can be accessed here.

8. SUSTAINABLE GROWTH

8.1 Update on draft RTS on ESG disclosures

On 4 February 2021, the ESAs published the Final Report (**ESA Final Report**) on draft Regulatory Technical Standards on ESG Disclosures, dated 2 February 2021 (**Finalised Draft RTS**). The Finalised Draft RTS set down technical standards on disclosures required to be made by management companies under Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (**Sustainable Finance Disclosure Regulation** or **SFDR**).

Whilst the Finalised Draft RTS confirm that the detailed disclosure obligations set down thereunder will enter into force on 1 January 2022, many of the high-level disclosures under SFDR itself applied from 10 March 2021.

Under the Finalised Draft RTS, management companies which manage funds which fall within the scope of Article 8 (or "**light-green funds**") or Article 9 (or "**dark-green funds**") of the SFDR (together "**ESG Funds**") will be required to comply with detailed disclosure obligations which will impact the prospectus and periodic reports of the ESG Funds as well as the website of the relevant management companies, with the prospectus and periodic reports disclosures being required to follow a specific template set down in the Finalised Draft RTS.

In addition, the Finalised Draft RTS set down the requirements which management companies which are required or choose to report on the principal adverse impacts of their investment decisions on sustainability factors will be required to comply with.

The Finalised Draft RTS have been submitted to the European Commission for endorsement.

The ESA Final Report can be accessed here.

On 25 February 2021, the ESAs published a supervisory statement on the application of the SFDR and the Finalised Draft RTS (**Statement**). The Statement seeks to give guidance to NCAs in respect of their supervision of compliance by financial market participants with SFDR. It clarifies that firms are not expected to adhere to the Draft RTS before these come into force (expected to be from 1 January 2022). The ESA's do however recommend that NCAs to encourage in scope firms to use the interim period from 10 March 2021 to "prepare for the application of the RTS".

The Statement can be accessed here.

Key Action Points	The 10 March 2021 deadline for the compliance by each AIFM/UCITS ManCo/other Financial Market Participant with the majority of the SFDR obligations has now passed. However, those management companies which manage ESG Funds and/or which report on the principal adverse impacts of their investment decisions on sustainability factors should begin to implement internal processes and procedures in order to ensure that they will be in a position to comply with the disclosure obligations imposed under the Finalised Draft RTS when they enter into force on 1 January 2022.

8.2 ESAs issue consultation paper on taxonomy related sustainability disclosures

On 15 March 2021, the ESAs published a joint consultation paper on draft regulatory technical standards with regard to the content and presentation of taxonomy-related sustainability disclosures under the SFDR (**Draft RTS**).

The Draft RTS concern disclosures of financial products investing in economic activities that contribute to environmentally sustainable activities as defined by the Regulation on the establishment of a framework to facilitate sustainable investment ((EU) 2020/852) (**Taxonomy Regulation**) and will be of interest to those management companies which have ESG Funds under management which pursue an environmental objective or promote environmental characteristics. The Draft RTS also propose to create a single rulebook for sustainability disclosures under the SFDR and the Taxonomy Regulation to minimise duplication in the area and are expected to apply from 1 January 2022.

The ESAs are seeking the input of stakeholders on the Draft RTS, the consultation period is open until 12 May 2021.

The Draft RTS can be accessed here.

Key Action Point	Those Financial Market Participants who have ESG Funds under management which pursue an environmental objective or promote environmental characteristics may wish to monitor the progress of the Draft RTS and to respond to the consultation prior to the closing date of 12 May 2021.

9. MONEY MARKET FUND REGULATION (MMFR)

9.1 ESMA publishes consultation on legislative review of the MMFR

On 26 March 2021, ESMA issued a Consultation Report on the Regulation on money market funds ((EU) 2017/1131) (**Money Market Fund Regulation** or **MMFR**) (**Report**). The Report outlines proposed reforms of the MMFR which have been identified from the liquidity difficulties faced by many MMF during COVID-19, caused by "large redemptions from investors and a severe deterioration in the liquidity of money market instruments."

The proposed reforms are as follows:

- Reforms targeting the liability side of MMFs – such as decoupling regulatory thresholds from suspensions/gates to limit liquidity stress, and to require MMF managers to use liquidity management tools such as swing pricing;
- Reforms targeting the asset side of MMFs by e.g. reviewing requirements around liquidity buffers and their use;
- Reforms targeting both the liability and asset side of MMFs by reviewing the status of certain types of MMFs such as stable Net Asset Value (**NAV**) MMFs and Low Volatility Net Asset Value (**LVNAV**); and
- Reforms that are external to MMFs themselves by assessing whether the role of sponsor support should be modified. In addition, ESMA is also gathering feedback from stakeholders on other potential changes, particularly linked to ratings, disclosure and stress testing.

ESMA is seeking feedback from stakeholders on the Report, the consultation period is open until 30 June 2021. ESMA intends to publish its opinion on the review of the MMF Regulation in the second half of 2021. The European Commission is obliged to review the adequacy of the MMF Regulation from a prudential and economic point of view by July 2022.

The Report can be accessed here.

Key Action Point	Firms to consider whether or not they wish to make a submission prior to the close of the consultation on 30 June 2021.

10. BENCHMARKS REGULATION

10.1 Regulation amending the BMR to address benchmark cessation risks and exempt certain third-country FX benchmarks published in the OJ

On 12 February 2021, Regulation (EU) 2021/168 amending Regulation (EU) 2016/1011 (**Benchmarks Regulation** or **BMR**) as regards the exemption of certain third-country spot foreign exchange benchmarks and the designation of replacements for certain benchmarks in cessation and amending EMIR (**Amending Regulation**) was published in the OJ.

The purpose of the Amending Regulation is to 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 BMR is amended as follows:

- Under a new Chapter 4A 'statutory replacement mechanism', the European Commission has been granted the power to replace (i) benchmarks designated as "critical" under the BMR or (ii) a third country benchmark the cessation/wind-down of which could significantly disrupt the functioning of EU financial markets or pose a systemic risk to the EU's financial system;

- The transitional timeframe for the entry into application of the rules on third country benchmarks has been extended by two years until 31 December 2023 with the possibility of an extension by the European Commission by a maximum of two years until 31 December 2025. 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.

- The European Commission has been granted the power to exempt third country spot FX benchmarks from the scope of the Benchmarks Regulation (thus permitting them to continue to be used beyond 31 December 2023 without complying with the provisions of the Benchmarks Regulation) provided certain conditions have been met.

The Amending Regulation also amends Article 13a of EMIR to confirm that derivative contracts which are amended or novated solely in order to replace a reference benchmark/incorporate fallback provisions in relation to such a benchmark and which are not currently subject to clearing or margining requirements under EMIR will not become subject to new clearing or margining requirements as a result of such amendments/novation.

The Amending Regulation entered into force on 13 February 2021. The text of the Amending Regulation can be accessed here.

10.2 ESMA publishes consultation paper on draft guidelines on methodology to calculate a benchmark in exceptional circumstances

On 25 February 2021, ESMA published a consultation paper on draft guidelines on the methodology to be used in exceptional circumstances and amendment to the guidelines on non-significant benchmarks under the BMR (**Guidelines**).

The Guidelines aim at providing further guidance to market participants and competent authorities on the application of the requirements relating to the use of a methodology for calculating a benchmark in exceptional circumstances. A key decision for administrators, in response to the market conditions caused by Covid-19, was whether to apply the standard methodology or use an alternative methodology for a limited time frame. This led to a diversity of approaches and revealed several issues relating to the divergent application of some of the BMR's requirements, in particular with regard to the transparency of the methodology and the rationale behind the decision to suspend or adjust the rebalancing.

The Guidelines are split into two sections. The first set of guidelines deal with the key elements of the methodology and the material changes to the methodology applicable to critical and significant benchmarks, the oversight function of critical and significant benchmarks and the record keeping requirements for all benchmarks.

The second set of guidelines amends the existing guidelines for non-significant benchmarks with regard to the key elements of the methodology and the oversight function.

ESMA is seeking the input of stakeholders on the Guidelines, and the consultation period is open until 30 April 2021. ESMA intends to publish the finalised Guidelines in Q3 2021.

The Guidelines can be accessed here.

10.3 ESMA publishes updated statement on the impact of Brexit on the BMR

On 9 March 2021, ESMA published an updated statement on the consequences of Brexit for the ESMA register for benchmark administrators and third country benchmarks under the BMR (**Statement**).

In the absence of an equivalence decision by the European Commission, UK based administrators have until the 31 December 2023 (the end of the BMR transition period) to apply for recognition or endorsement in the EU, in order for the benchmarks provided by these UK based administrators to be included in the ESMA register again. Similarly, the BMR transition period also applies to UK recognised or endorsed third country benchmarks which have been deleted from the ESMA register following the end of the Brexit transition period.

The Statement can be accessed here.

11. IRISH INVESTMENT LIMITED PARTNERSHIPS

11.1 Update: Investment Limited Partnerships

On 2 February 2021, the CBI issued "Guidance on Closed-ended share Classes" which is of relevance for Irish Investment Limited Partnerships (**ILPs**). Please see Section 2.4 for further details.

Dillon Eustace has issued a briefing paper entitled "Key Features of the Irish Investment Limited Partnership" which can be accessed here.

In addition, Dillon Eustace published a series of additional briefing papers on Investment Limited Partnerships as follows:

- Limited Liability of Limited Partners in Investment Limited Partnerships, which can be accessed here;
- Umbrella Structure Investment Limited Partnerships, which can be accessed here;
- Marketing of Irish Investment Limited Partnerships, which can be accessed here;
- The Use of Side Letters in Investment Limited Partnerships, which can be accessed here;
- Fee Structuring in Investment Limited Partnerships, which can be accessed here;
- Taxation of Investment Limited Partnerships, which can be accessed here; and
- Advisory Committees in Investment Limited Partnerships, which can be accessed here.

If you have any questions in relation to the content of this update, to request copies of our most recent newsletters, briefings or articles, or if you wish to be included on our mailing list going forward, please contact any of the team members below.

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