



Funds

Quarterly Legal and Regulatory Update

Period covered: 1 January 2022 – 31 March 2022

TABLE OF CONTENTS

<u>APPROACHING DEADLINES</u>	<u>UCITS & AIFMD</u>	<u>EMIR & SFTR</u>	<u>CROSS-BORDER DISTRIBUTION FRAMEWORK</u>
<u>PRIIPS</u>	<u>CENTRAL BANK</u>	<u>AML & CFT</u>	<u>DATA PROTECTION</u>
<u>SUSTAINABLE GROWTH</u>	<u>MONEY MARKET FUNDS</u>	<u>MARKET ABUSE</u>	<u>MISCELLANEOUS</u>

1. APPROACHING DEADLINES

Approaching deadlines		
Q2 2022	3 June 2022	Following the introduction of changes to the PCF regime, confirmations regarding redesignation of impacted in-situ PCF roles will need to be made by funds and fund management companies to the Central Bank by 3 June 2022. (See Section 6.3).
	6 June 2022	Fund management companies, as users of ESG rating services, may want to provide feedback to the European Commission's Call for Evidence or Targeted Consultation by 6 June 2022. (See Section 9.1).
Q3 2022	8 July 2022	Deadline for managers of Irish domiciled UCITS to ensure internal investment processes are updated as per the specific criteria set down in the Covered Bonds Directive. (See Section 2.3 of the previous Quarterly Legal and Regulatory Update for the period 1 October 2021 – 31 December 2021).
	1 August 2022	Sustainability related provisions under UCITS and AIFMD Delegated Acts apply.
	2 August 2022	In-scope MiFID Firms will be required to collect information from their clients regarding their sustainability preferences and to consider them as part of the clients' suitability assessment. (See Section 12.1).

2. UCITS & AIFMD

2.1 ESMA announces common supervisory action on valuation of UCITS and open-ended AIFs

On 20 January 2022, the European Securities and Markets Authority (**ESMA**) published a press release confirming that it has launched a common supervisory action (**CSA**) with national competent authorities (**NCA**s) on fund valuations, which will be conducted throughout 2022. The press release notes as follows:

- The CSA will be focused on valuation of undertakings for collective investment in transferable securities (**UCITS**) and open-ended alternative investment funds (**AIFs**);
- While it intends to assess compliance of UCITS management companies and alternative investment fund managers (**AIFMs**) (collectively **Management Companies**) with valuation related provisions set down in the Directive 2009/65/EC (**UCITS Directive**) and Directive 2011/61/EU (**Alternative Investment Fund Managers Directive** or **AIFMD**) frameworks generally, the CSA will focus in particular on the valuation of less liquid assets; and
- Consequently, the CSA will focus on those management companies of UCITS and open-ended AIFs which invest in less liquid assets. ESMA notes that this includes unlisted equities, unrated bonds, corporate debt, real estate, high yield bonds, emerging markets, listed equities that are not actively traded, bank loans.

We understand that the CSA will be issued to certain Management Companies selected by the Central Bank of Ireland (**Central Bank**) shortly.

For a detailed analysis of ESMA's CSA and its impact on UCITS and AIFs, please refer to our in-depth [client briefing](#) on the topic.

A copy of ESMA's press release can be accessed [here](#).

2.2 ESMA and NCAs identify scope for improvement in funds' liquidity stress testing

On 30 March 2022, ESMA published a press release reporting on the findings of a supervisory engagement with investment funds it has carried out in conjunction with NCAs.

The exercise focused on liquidity risk in corporate debt and real estate funds. The results indicate that the funds included in the scope of the exercise do not pose any substantial risk for financial stability. However, the press release notes that there is “room for improvement and continuing monitoring, especially on the liquidity stress testing and valuation of less liquid assets.”

ESMA notes that it will now facilitate discussions on these topics among NCAs on the application of its liquidity stress testing guidelines published in July 2020. As noted above, ESMA is also conducting a CSA on the valuation of less liquid assets in UCITS and open-ended AIFs (see [Section 2.1](#)).

A copy of the ESMA press release is available [here](#).

A copy of the ESMA guidelines on liquidity stress testing in UCITS and AIFs is available [here](#).

3. EMIR & SFTR

3.1 ESMA consultation on the review of clearing thresholds under EMIR

On 19 January 2022, the European Fund and Asset Management Association (**EFAMA**) published a response to ESMA's consultation on the review of clearing thresholds under Regulation (EU) 648/2012 as amended (**European Market Infrastructure Regulation** or **EMIR**).

In its reply, EFAMA highlights two areas where the benefit of changes in thresholds and methodologies would outweigh implementation costs, being the following:

- UK exchange traded derivatives (**ETDs**): EFAMA recommend the removal of the need for an equivalence decision under Article 2 of EMIR, but failing that, EFAMA support a solution with a temporary grandfathering of UK ETDs; and
- Foreign exchange (**FX**) derivatives contracts: EFAMA support excluding physically settled FX forwards and swaps from the clearing thresholds calculation, based on the same rationale under which they are excluded from variation margin requirements.

A copy of EFAMA's response can be accessed [here](#).

3.2 ESMA updates Q&As on data reporting under SFTR

On 28 January 2022, ESMA published updated Questions and Answers on reporting requirements under the Regulation (EU) 2015/2365 (**Securities Financing Transactions Regulation** or **SFTR**) (**SFTR Data Reporting Q&As**).

ESMA has amended Question 2 on reporting and transparency of securities financing transactions to accommodate for settlement fails.

A copy of the SFTR Data Reporting Q&As can be accessed [here](#).

3.3 European Commission adopts amendments to RTS clearing and derivative trading obligations under EMIR and MiFIR in light of benchmark transition

On 8 February 2022, the European Commission adopted a Delegated Regulation amending the Regulatory Technical Standards (RTS) laid down in Delegated Regulation (EU) 2015/2205 supplementing EMIR to reflect the LIBOR transition (the **EMIR Delegated Regulation**).

The EMIR Delegated Regulation follows the ESMA final report on draft RTS on the clearing obligations (CO) and derivative trading obligations (DTO) in view of the benchmark transition to risk free rates under Article 5(2) of EMIR, which was published on 18 November 2021.

The EMIR Delegated Regulation will amend the RTS to remove from the CO those classes of derivatives that reference the Euro Overnight Index Average (EONIA), Pound Sterling (GBP) London Interbank Offered Rate (LIBOR) or Japanese Yen (JPY) LIBOR. It will also bring within the CO classes of over the counter (OTC) interest rate derivatives referencing the Euro Short-Term Rate (ESTR), Secured Overnight Financing Rate (SOFR), Secured Overnight Index Average (SONIA) or Tokyo Overnight Average (TONA) that certain central counterparties (CCPs) have been authorised to clear.

On 8 February 2022, the European Commission also adopted a second Delegated Regulation amending the RTS laid down in Delegated Regulation (EU) 2017/2417 supplementing Regulation (EU) 600/2014 (Markets in Financial Instruments Regulation or MiFIR) (the **MiFIR Delegated Regulation**). The MiFIR Delegated Regulation provides for the removal from the derivatives trading obligation (DTO) of derivatives referencing both GBP and US Dollar (USD) LIBOR. Subject to the DTO are interest rate swaps (IRS) with 3M or 6M tenors denominated in EUR, USD and GBP and Index Credit Default Swaps (Index CDS).

Both Delegated Regulations will be subject to scrutiny from the Council of the EU and the European Parliament. If neither object, they will enter into force the day after their publication in the Official Journal of the European Union (OJ).

A copy of the EMIR Delegated Regulation can be accessed [here](#).

A copy of the MiFIR Delegated Regulation can be accessed [here](#).

3.4 European Commission consults on review of EU CCP framework

On 8 February 2022, the European Commission published a targeted consultation paper on a review of the EU central clearing framework to improve the attractiveness of EU CCPs in order to reduce the EU's overreliance on systemic third country CCPs (**Consultation Paper**).

The paper seeks stakeholders' views on a range of topics, including:

- Clarifying the interaction between EMIR and other relevant legislation such as Directive 2014/65/EU (MiFID II) and the UCITS Directive;
- Introducing measures to incentivise EU counterparties to reduce excessive exposures to Tier 2 third country CCPs;
- Introducing a monitoring process to measure the progress of EU counterparties towards reducing their exposures to Tier 2 CCPs;
- Measures aimed at EU CCPs, such as ways to support them in expanding their range of clearing services and improving the current setup of payment and settlement arrangements available to them in the EU;

- Strengthening the supervisory framework for EU CCPs and giving EU-level supervision a stronger role, to better address risks involved in increased cross-border clearing activity, simplify, and accelerate procedures, remove legal uncertainties, and facilitate co-ordination with third country supervisory authorities;
- Widening the scope of clearing members and clients accessing CCPs to include entities such as pension scheme arrangements, private entities that do not access CCPs directly and public authorities; and
- Widening the scope of the products offered for clearing or required to be cleared to include products such as equity derivatives, repurchase and foreign exchange derivatives.

The Consultation Paper follows a statement from the European Commission, published on 10 November 2021, announcing the Commission's proposal for central clearing (**Statement**).

Alongside the Consultation Paper, the Commission published a call for evidence for an impact assessment (**Call for Evidence**), within which the European Commission indicates that it plans to adopt legislative proposals in Q3 2022.

The closing date for responses was 22 March 2022.

A copy of the Consultation Paper can be accessed [here](#).

A copy of the Statement can be accessed [here](#).

A copy of the Call for Evidence can be accessed [here](#).

3.5 Commission Implementing Decision extending temporary equivalence of UK regulatory framework for CCPs

On 25 March 2022, ESMA published a statement announcing its decision to extend the application of recognition decisions and tiering determination decisions for three CCPs established in the UK until 30 June 2025 (the **Statement**).

This aligns with the Commission Implementing Decision (EU) 2022/174 (**Implementing Decision**) approving the extension of equivalency in respect of the UK's legal and regulatory supervision of UK CCPs until 30 June 2025. The Implementing Decision was adopted by the European Commission on 8 February 2022. The European Commission noted in the Implementing Decision that some transactions cleared in UK CCPs simply cannot be cleared elsewhere at this point in time.

The extension of the temporary equivalence to 30 June 2025 is intended as a sufficiently lengthy provision of time to allow the European Commission to revise the EU supervisory system for CCPs and to encourage the development of the clearing capacity of EU CCPs. UK CCPs can, therefore, be continued to be used by EU counterparties (such as Irish UCITS / AIFs) until the expiry of this extended temporary equivalence period.

The Implementing Decision entered into force on 10 February 2022 and will apply from 1 July 2022.

A copy of the Statement can be accessed [here](#).

A copy of the Implementing Decision can be accessed [here](#).

3.6 ESMA update on third country CCP recognition decisions

On 30 March 2022, ESMA published a number of memoranda of understanding (**MoUs**) following publication, on 25 March 2022, of a series of updates on the recognition of central counterparties established in third countries (**TC-CCPs**) under EMIR as amended (the **Statement**), resulting from its completion of tiering and review of the recognition decisions of 25 TC-CCPs on 22 March 2022.

Included within the number of MoUs published by ESMA is the MoU Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Certain Clearing Agencies Established in the United States (the **US MoU**). Within the US MoU, ESMA and the Securities and Exchange Commission (**SEC**) affirm their willingness to cooperate and exchange information to proportionately fulfil their respective supervisory and regulatory responsibilities.

On 23 March 2022, ESMA published a list of TC-CCPs recognised to offer service and activities in the European Union (the **List**). The List details that ESMA has recognised National Securities Clearing Corporation (**NSCC**), which is authorised and supervised by the US SEC, as a Tier 1 CCP following Commission Implementing Decision (EU) 2021/85 on the equivalence of US CCPs entering into force.

ESMA has concluded revised MoUs with relevant third country authorities as a pre-requisite of the recognition process.

ESMA is still waiting for additional clarifications, including from the European Commission on relevant equivalence decisions, to finalise the review of recognition process.

A copy of the Statement can be accessed [here](#).

A copy of the US MoU can be accessed [here](#).

A copy of the List can be accessed [here](#).

4. CROSS-BORDER DISTRIBUTION FRAMEWORK

4.1 ESMA publishes letter to European Commission on reverse solicitation by asset managers

On 3 January 2022, ESMA published a letter, dated 17 December 2021, to the European Commission relating to the European Commission's report on reverse solicitation (the **Letter**) under Regulation (EU) 2019/1156 (**Cross Border Distribution Regulation**).

Under Article 18(2) of the Cross Border Distribution Regulation, the European Commission is required to submit a report to the European Parliament and the European Council on reverse solicitation, outlining the extent to which reverse solicitation is used, its geographical distribution and its impact on the passporting regime. This report must be prepared on the basis of consultation with competent authorities, ESMA and other relevant stakeholders.

ESMA conducted a survey amongst NCAs towards the end of 2021 on the use of reverse solicitation by asset managers and the impact on passporting activities. The Letter outlines ESMA's findings, which include the following:

- Almost all NCAs could not provide an estimate of the share of reverse solicitation as compared to marketing and, therefore, it is not possible to draw any conclusion on the use of reverse solicitation within those Member States. The inability of NCAs to provide an accurate estimate of the share of reverse solicitation stems from the fact that under EU law asset managers are not required to report to their NCAs on the level of subscriptions coming from reverse solicitation; and
- "Several" NCAs believe that reverse solicitation is used in practice to circumvent the rules of third countries and EU passport regimes. They also believe that it creates an uneven playing field between EU asset managers and non-EU asset managers which are operating in the EU using reverse solicitation, however this cannot be confirmed by any tangible data from the NCAs.

The Letter outlines some of ESMA's suggestions on how to fill this information gap and the drawbacks of each approach. It has also suggested that if there was a willingness to address this on a more permanent basis, the European Commission could consider introducing a new reporting requirement allowing information to be collected on reverse solicitation across the EU.

A copy of the Letter can be accessed [here](#).

4.2 Central Bank updates webpage regarding marketing requirements for an AIF being marketed in Ireland to Retail Investors

On 4 March 2022, the Central Bank revised its 'publication of national provisions governing marketing requirements for AIFs' webpage to include a list of information and documentation to be submitted to the Central Bank in a situation where an AIF is located in another jurisdiction and proposes to market its units in Ireland to retail investors.

The Central Bank webpage can be accessed [here](#).

4.3 ESMA publishes document containing summaries of national rules governing marketing requirements

On 28 March 2022, ESMA published an updated document containing the hyperlinks to, and summaries of, national rules governing marketing requirements, which were provided by the competent authorities in the EEA and European Free Trade Association (EFTA).

ESMA is required under the Cross Border Distribution Regulation to publish on its website the hyperlinks to the websites of competent authorities where they publish complete and up-to-date information on the applicable national laws, regulations and administrative provisions governing marketing requirements of AIFs and UCITS, as well as the summaries thereof. They are also required to provide hyperlinks to the websites of competent authorities which contain a complete and up-to-date list of the fees and charges they levy for carrying on their duties in relation to the cross-border activities of fund managers.

A copy of the document can be accessed [here](#).

5. PRIIPs

5.1 Proposed Extension to Application Date of PRIIPs Revised Level 2 Measures

On 17 March 2022, the European Commission adopted a Delegated Regulation (the **Delegated Regulation**) which proposes to delay the application of Delegated Regulation (EU) 2021/2268 containing revised Level 2 measures issued under Regulation (EU) No 1286/2014 (**PRIIPs Regulation**) (**Revised Level 2 Measures**) until 1 January 2023.

The Revised Level 2 Measures amend the Original Level 2 Measures to revise some of the existing requirements relating to the presentation and content of the KID.

If implemented in its current form, the Delegated Regulation will mean that all UCITS, qualifying investor alternative investment funds (**QIAIFs**) and retail investor alternative investment funds (**RIAIFs**) which fall within the scope of the PRIIPs Regulation, as a result of making their shares available to EEA retail investors, will be required to prepare and publish a PRIIPs KID which complies with the Revised Level 2 Measures from the same date, being 1 January 2023.

The Delegated Regulation also amends the Original Level 2 Measures to extend the transitional arrangement for manufacturers of PRIIPs that offer investment funds as either the only underlying investment options or alongside other investment options so that such manufacturers will not be required to prepare a PRIIPs KID until 1 January 2023.

The Delegated Regulation must now be scrutinised by the European Parliament and the Council. If neither object, it will enter into force 20 days after its publication in the OJ.

A copy of the Delegated Regulation can be accessed [here](#).

A copy of the Revised Level 2 Measures can be accessed [here](#).

A copy of the Original Level 2 Measures can be accessed [here](#).

Key Action Points

In-scope UCITS, RIAIFS and QIAIFS should now be implementing appropriate project plans to ensure that they are in a position to publish a PRIIPS KID in accordance with the Revised Level 2 Measures from 1 January 2023.

6. CENTRAL BANK

6.1 Central Bank publishes Securities Markets Risk Outlook Report 2022

On 8 February 2022, the Central Bank published its second Securities Markets Risk Outlook Report (**Report**) in which it identifies the key conduct risks it has identified as facing securities markets in 2022 which include misconduct risk, sustainable finance, governance, conflicts of interest, financial innovation, data, cyber security and market dynamics. The Report also sets down the Central Bank's expectations of what financial service providers and market participants should do to effectively identify, mitigate, and manage these conduct risks as well as detailing the supervisory priorities of the Central Bank for the year ahead.

For a detailed analysis of the Report and its implications for fund management companies, please refer to our in-depth [client briefing](#) on the topic.

A copy of the Central Bank's Securities Markets Risk Outlook Report 2022 can be accessed [here](#).

Key Action Points

Irish fund management companies should review the Report and, where necessary, initiate action to ensure that the conduct risks identified by the Central Bank are being managed in a manner consistent with its expectations.

6.2 Central Bank Director General sets out 2022 financial regulation priorities

On 11 March 2022, the Central Bank published a press release setting out its financial regulation priorities for 2022 (the **Press Release**).

Within the Press Release, the Central Bank indicated that in the area of governance, it will continue to work with the Department of Finance on the introduction of the Individual Accountability Framework (**IAF**). At European level, significant areas of focus will include the development of a macro-prudential framework for funds, progressing the AIFMD review, seeking to further the advancement of capital markets union, and helping shape the overhaul of European anti-money laundering (**AML**) structures.

Similarly, the Central Bank provides that it will continue to step up work on climate change to ensure that the financial system can support the transition to a carbon neutral economy and is suitably resilient to the risks.

A copy of the Press Release can be accessed [here](#).

6.3 Central Bank updates list of Pre-Approval Controlled Functions

Further to its Notice of Intention informing industry of its intention to make certain changes to the Pre-Approval Controlled Functions (**PCF**) under the PCF regime published in September 2021, the Central Bank has now published the Central Bank Reform Act 2010 (Sections 20 and 22) (Amendment) Regulations 2022 (**Amending Regulations**) together with a Feedback Statement.

Changes introduced following publication of the Amending Regulations include:

- Separation of the PCF-2 role into two roles, namely PCF-2A for the role of non-executive director and PCF-2B for the newly specified role of independent non-executive director (INED);
- Removal of PCF-15 (Head of Compliance with responsibility for Anti-Money Laundering and Counter Terrorist Financing Legislation) and introduction of PCF-52 (Head of Anti-Money Laundering and Counter Terrorist Financing Compliance);

- Expansion of the PCF-16 (Branch Manager of branches in other EEA countries) role to include branch managers of regulated firms in non-EEA countries; and
- Removal of PCF-31 (Head of Investment). Individuals that hold the role of PCF-31 will be automatically re-designated as PCF-30 (Chief Investment Officer).

For a detailed analysis of the Central Bank's updates to the PCF regime, please refer to our separate [client briefing](#) on the topic.

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

The Central Bank's Feedback Statement can be accessed [here](#).

The Central Bank's Notice of Intention can be accessed [here](#).

Key Action Points

Irish funds and fund management companies should assess the Central Bank's updates to the PCF regime and consider their impact. Any appointments to the newly introduced roles made after 5 April 2022 will proceed through the usual application process. Confirmations regarding redesignation of impacted in-situ PCF roles will need to be made by funds and fund management companies to the Central Bank by 3 June 2022.

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

7.1 European Commission adopts new Delegated Regulation adding Cayman Island to the list of high-risk third countries under MLD4 (AML Blacklist)

On 21 February 2022, Commission Delegated Regulation (EU) 2022/229 that amends the list of high-risk third countries with strategic AML and counter-terrorist financing (CTF) deficiencies produced under Article 9(2) of Directive (EU) 2015/849 (as amended) (the **Fourth Money Laundering Directive** or **MLD4**) (the **Delegated Regulation**) was published in the OJ, following adoption by the European Commission on 7 January 2022.

The Delegated Regulation proposes to amend Delegated Regulation (EU) 2016/1675 by adding nine countries, including the Cayman Islands, that have been identified as having strategic AML and CFT deficiencies to the table in the Annex. The Delegated Regulation will also remove countries that no longer present strategic AML and CFT deficiencies, such as the Bahamas and Iraq, from the table in the Annex. The AML blacklist is highly aligned with, but not identical to, FATF's Ongoing Monitoring (or 'Grey') List.

Certain implications arise as a result of such blacklisting, including;

- Where a customer is established or resident in a jurisdiction on the AML blacklist, any entity which is subject to the EU's AML laws must apply enhanced DD for that customer and put in place ongoing monitoring processes.
- Under Article 4 of Regulation (EU) 2017/2402 (as amended) (the **Securitisation Regulation**), securitisation special purpose entities (SSPEs) cannot be established in any third country which appears on the European Commission's "blacklist" published under MLD4. As a result, asset managers should ensure that appropriate due diligence arrangements are in place to ensure EU investors do not invest in securitisations which are issued by an SSPE established in the Cayman Islands after 13 March 2022.

The Delegated Regulation entered into force on 13 March 2022.

A copy of the Delegated Regulation can be accessed [here](#).

Key Action Points

UCITS management companies and AIFMS should ensure that appropriate due diligence arrangements are in place to ensure that funds under management do not invest in securitisations which are issued by an SSPE established in the Cayman Islands after 13 March 2022.

7.2 EBA launches AML and CFT central database

On 31 January 2022, the European Banking Authority (**EBA**) published a press release announcing the launch of the European Reporting System for material CFT/AML weaknesses (**EuReCA**) following the publication of a final report on draft RTS on EuReCA (**draft RTS**) in December 2021.

EuReCA is an AML and CFT central database which will contain information on material weaknesses in individual financial institutions within the EU as identified by competent authorities as well as information on the measures imposed on financial institutions to rectify material weaknesses. EuReCA will also include internal audit findings identified during on-site inspections by prudential authorities.

The EBA will use information from EuReCA to inform its view of AML and CFT risks affecting the EU financial sector and will also share information from EuReCA with competent authorities, including if specific AML and CFT risks or trends emerge.

EuReCA will not commence the process of collecting personal data until the approval of the draft RTS by the European Commission.

A copy of the press release can be accessed [here](#).

A copy of the draft RTS can be accessed [here](#).

7.3 ECB opinions on proposed Regulations and Directive implementing part of AML and CTF action plan

On 17 February 2022, the Council of the EU published two opinions of the European Central Bank (**ECB**) on legislative proposals that form part of the larger package of measures implementing the European Commission's AML and CFT action plan:

- Opinion on a proposal for a Regulation establishing the Authority for AML and CTF (**AMLAR**); and
- Opinion on a proposal for a Directive and Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (**MLD6** and **AML Regulation**).

The ECB welcomes the legislative proposals, however, recommends several amendments within their drafting proposals contained within each respective opinion document.

A copy of the opinion on AMLAR can be accessed [here](#).

A copy of the opinion on MLD6 and AML Regulation can be accessed [here](#).

8. DATA PROTECTION

8.1 EDPB adopts Guidelines on Right of Access and letter on cookie consent

On 28 January 2022, the European Data Protection Board (**EDPB**) published draft regulatory guidelines (the **Guidelines**) on the right of data subjects to have access to their personal data under Regulation (EU) 2016/679 (**General Data Protection Regulation** or **GDPR**), following adoption of the Guidelines on 19 January 2022, during its January plenary session.

The Guidelines aim to analyse the various aspects of the right to access to provide more precise guidance on the information the controller has to provide to the data subject, the format of the access request, the main modalities for providing access, and the notion of manifestly unfounded or excessive requests.

The deadline for public consultation responses was 11 March 2022.

In addition, the EDPB adopted a letter in reply to letters calling for a consistent interpretation of cookie consent (the **Letter**). Within the Letter, the EDPB notes its commitment to ensuring a harmonised application of data protection rules throughout the EEA. In this respect, the EDPB has recently set up a taskforce on cookie banners to coordinate the response to complaints concerning cookie banners. Furthermore, the EDPB has updated the Guidelines on consent in order to ensure a harmonised approach on the conditionality of consent and on the unambiguous indication of wishes.

A copy of the Guidelines can be accessed [here](#).

9. SUSTAINABLE GROWTH

9.1 ESG Rating Providers in the EU

On 3 February 2022, ESMA published a call for evidence on the market characteristics for ESG rating providers in the EU (**ESMA's Call for Evidence**) in order to understand the size, structure, resourcing, revenues and product offerings of the different ESG rating providers operating in the EU. ESMA also sought the views and experiences of the users of the ESG rating providers as well as those entities covered by ESG rating providers.

Subsequent to this, the European Commission itself issued a call for evidence on ESG ratings and sustainability risks in credit ratings on 4 April 2022 (**Commission's Call for Evidence**) as part of its consideration of legislative or non-legislative action to strengthen the reliability and comparability of ESG ratings as well as possible targeted revisions to the legal framework relating to CRAs on incorporation of ESG risks into their creditworthiness assessments. On the same date, the European Commission also launched a targeted consultation on the functioning of the ESG ratings market in the EU and consideration of ESG factors in credit ratings (**Targeted Consultation**).

The European Commission has indicated that following the completion of an impact assessment in 2022, there may be a legislative or non-legislative proposal put forward by it by Q1 2023.

A copy of the ESMA's Call for Evidence can be accessed [here](#).

A copy of the Commission's Call for Evidence can be accessed [here](#).

A copy of the Targeted Consultation can be accessed [here](#).

Key Action Points

Fund management companies, as users of ESG rating services, may want to provide feedback to the European Commission's Call for Evidence or Targeted Consultation by 6 June 2022.

9.2 ESMA publishes its Sustainable Finance Roadmap for 2022-2024

On 11 February 2022, ESMA published its sustainable finance roadmap for 2022 to 2024 (the **Roadmap**). The Roadmap sets out ESMA's priority areas of focus and serves as a practical tool to ensure that there is coordinated implementation of ESMA's broad sustainable finance mandate from 2022 to 2024. ESMA has noted that the Roadmap is intended to be a living document and, therefore, is subject to regular re-assessment by ESMA itself and NCAs to ensure its continued relevance.

The three priority areas identified by ESMA in the Roadmap are as follows:

- Tackling greenwashing and promoting transparency;
- Building the capacities of both ESMA and the NCAs in sustainable finance; and
- Monitoring, assessing and analysing ESG markets and risks.

These priority areas will focus on the sectors of investment management; investment services, issuers' disclosure and governance, benchmarks, ratings (credit ratings and ESG ratings), trading and post-trading, and financial innovation.

The Annex to the Roadmap sets out a detailed list of actions and deliverables together with indicative timelines.

A copy of the Roadmap can be accessed [here](#).

9.3 EU Platform on Sustainable Finance publishes report on Social Taxonomy

Under the Taxonomy Regulation, the European Commission is required to deliver a report on the possible extension of the Taxonomy to including other sustainability objectives, such as social objectives.

On 28 February 2022, the EU Platform on Sustainable Finance (**PSF**) published a report entitled "Final Report on Social Taxonomy" (the **Report**) in response to a request for advice from the European Commission.

In the Report, the PSF proposes a structure for a social taxonomy within the present EU legislative environment on sustainable finance and sustainable governance which comprises of the existing and proposed initiatives on the EU Taxonomy, the proposed corporate sustainability reporting directive, Regulation (EU) 2019/2088 (**Sustainable Finance Disclosure Regulation** or **SFDR**) and the European Commission's sustainable corporate governance initiative.

In particular, in order to align with the existing EU Taxonomy framework, the structure for a social taxonomy proposed by the PSF involves the following:

- The development of social objectives;
- Defining different types of substantial contribution;
- The creation of "do no significant harm" criteria; and
- Minimum safeguards with a recommendation that the technical screening criteria (**TSC**) for a social taxonomy being set out in delegated acts.

The social objectives identified by the PSF comprise (i) decent work, (ii) adequate living standards and wellbeing for end-users, and (iii) inclusive and sustainable communities and societies, each of which will need to be supplemented by different sub-objectives which spell out different aspects of the three social objectives.

The Report will now be considered by the European Commission.

A copy of the Report can be accessed [here](#)

9.4 European Commission approves draft Taxonomy Complementary Delegated Act on gas and nuclear activities

On 9 March 2022, the European Commission formally adopted the EU Taxonomy Climate Complementary Delegated Act (the **Climate Complementary Taxonomy Act**) following the publication of that legislation on 2 February 2022 which permits certain economic activities involved in nuclear energy and natural gas to be classified as "transitional activities".

The purpose of the Climate Complementary Taxonomy Act is to set down TSC which must be met in order for an economic activity involving gas or nuclear energy to be classified as environmentally sustainable, including:

- It contributes to the transition to climate neutrality;
- For an economic activity involving nuclear energy, it fulfils nuclear and environmental safety requirements; and
- For an economic activity involving natural gas, it contributes to the transition from coal to renewables.

In its press release announcing the publication of the Climate Complementary Taxonomy Act in February 2022, the European Commission noted that the TSC for the specific gas and nuclear activities are “in line with EU climate and environmental objectives” and will “help to accelerate the shift from solid or liquid fossil fuels, including coal, towards a climate-neutral future, mostly based on renewable energy sources”.

The inclusion of gas and nuclear activities as economic activities covered by Regulation (EU) 2020/852 (**Taxonomy Regulation**) is controversial and several EU Member States have objected to the extension of the EU taxonomy to include economic activities involving nuclear energy and natural gas.

It also follows the publication of a response to the draft legislation by the PSF (**Platform Response**), dated 21 January 2022, in which it was noted that the economic activities covered by the draft legislation were not in line with the Taxonomy Regulation and that most members of the platform were of the view that it created a serious risk of undermining the sustainable Taxonomy framework.

The Climate Complementary Taxonomy Act also amends Commission Delegated Regulation (EU) 2021/2178 supplementing Article 8 of the Taxonomy Regulation to require large listed non-financial and financial companies to disclose the proportion of their activities linked to natural gas and nuclear energy.

It will now be subject to scrutiny from the European Parliament and the Council of Europe. If no objection is raised, the Climate Complementary Taxonomy Act will enter into force 20 days after its publication and will apply from 1 January 2023.

For a detailed analysis of the European Commission's plans to include gas and nuclear energy within the EU Taxonomy framework, please refer to our separate [client briefing](#) on the topic.

A copy of the Climate Complementary Taxonomy Act, and its accompanying Annexes, can be accessed [here](#).

A copy of the European Commission press release can be accessed [here](#).

A copy of the Platform Response can be accessed [here](#).

Key Action Points

Fund management companies may want to begin to consider whether any of the economic activities of issuers in which they are invested could be considered taxonomy-aligned based on the TSC set down in the Climate Complementary Taxonomy Act, bearing in mind that it is currently being scrutinised by the European Parliament and the Council of Europe and does not yet have the force of law.

9.5 ESAs publish Revised Supervisory Statement on the Application of the SFDR

On 25 March 2022, the European Supervisory Authorities (**ESAs**) published a joint updated supervisory statement on the application of the SFDR in light of the postponement of the entry into force of the related Level 2 Measures, to be published under the SFDR, until 1 January 2023 (the **Statement**).

The ESAs indicate that until the finalised Level 2 measures, to be published under the SFDR, enter into force on 1 January 2023 (the **Interim Period**), the draft Level 2 measures can be used as a reference for the purposes of applying the disclosure obligations set down

under the SFDR itself, noting, however, that the draft Level 2 measures may be subject to further change and that financial market participants should be encouraged by NCAs to use the Interim Period to prepare for the application of these measures.

The ESAs also clarify that they expect disclosures made by financial products falling within the scope of Article 5 or Article 6 of the Taxonomy Regulation during the Interim Period, to specifically include a percentage figure of the extent to which the investments underlying the financial product are taxonomy-aligned.

Separately, the Statement confirms that estimates should not be used to calculate the taxonomy-alignment of in-scope financial products but notes that where information is not readily available from public disclosures by investee companies, financial market participants may rely on equivalent information on taxonomy alignment obtained directly from the investee companies or from third party providers.

For a detailed analysis of the ESA joint updated supervisory statement on the application of the SFDR, please refer to our separate [client briefing](#) on the topic.

A copy of the Statement can be accessed [here](#).

Key Action Points

Fund management companies should now assess the possible implications of the Statement on their existing ESG frameworks and SFDR/Taxonomy related disclosures being made by funds under management.

9.6 EU Platform on Sustainable Finance publishes report on environmental transition taxonomy with traffic light system

On 29 March 2022, the PSF published its report entitled “The Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition” (**Final Report**) in response to the European Commission’s request for advice under the Taxonomy Regulation.

In recognition of the fact that the current Taxonomy framework leaves a wide variety of economic activities non-classified which could be mistakenly interpreted as “not green” and consequently struggle to obtain required investment to support environmental transition, the PSF has proposed extending the Taxonomy framework beyond “green activities” to classify activities using a traffic light system as follows:

- Red: Unsustainable performance requiring an urgent transition to avoid significant harm. These activities could qualify for taxonomy-recognised investment as part of a transition plan to avoid their current significantly harmful performance and move to intermediate performance levels;
- Amber: Intermediate performance activities that could qualify for taxonomy-recognised investment as part of an intermediate or amber transition plan under which they continue to improve to stay out of significantly harmful performance;
- Green: Substantial contribution activities already included in the green Taxonomy under the Climate Complementary Taxonomy Act or to be included in future delegated acts; and
- Low Environmental Impact: Activities that do not have a significant environmental impact and should not be regarded as red, amber or green.

The European Commission will now analyse the advice from the PSF as set out in the Final Report.

A copy of the Final Report can be accessed [here](#).

9.7 EU Platform on Sustainable Finance reports on technical screening criteria for remaining environmental objectives of EU Taxonomy

Under the framework established under the Taxonomy Regulation, the European Commission is required to establish TSC for each of the environmental objectives identified in Article 9 of the Taxonomy Regulation. While the TSC for the first two environmental objectives of climate change mitigation and climate change adaptation have already been set down in Commission Delegated Regulation (EU) 2021/2139, which entered into force on 1 January 2022; the European Commission must, in the form of a separate Commission Delegated Regulation, set down TSC to be used to determine whether an economic activity contributes to one of the four remaining environmental objectives, being:

- Sustainable use and protection of water and marine resources;
- Transition to a circular economy;
- Pollution prevention and control; and
- Protection and restoration of biodiversity and ecosystems.

In a report published on 30 March 2022, the PSF sets down its recommendations relating to the TSC for the four remaining environmental objectives as well as providing recommendations to review the “Do No Significant Harm” criteria already set down in the Commission Delegated Regulation (EU) 2021/2139 to improve consistency and usability of the Taxonomy as well as other recommendations to improve the design of the Taxonomy and the Taxonomy criteria.

This report will now be considered by the European Commission when finalising the delegated acts containing the TSC for the four remaining environmental objectives with the delegated acts scheduled to apply from 1 January 2023.

A copy of the report can be accessed [here](#).

10. MONEY MARKET FUNDS

10.1 ESRB & ESMA publish recommendations on the Money Market Fund Reform

Under Article 46 of Regulation (EU) 2017/1131 (**Money Market Funds Regulation** or **MMFR**), the European Commission (**EC**) is required to review the adequacy of the MMFR by 21 July 2022. As part of this review, the EC must have regard to any recommendations made by ESMA and the ESRB on the reform of the MMFR.

ESRB recommendations on the reform of money market funds

On 25 January 2022 the ESRB published a policy recommendation aimed at increasing the resilience of money market funds (**MMFs**) (**ESRB Recommendations**). The ESRB Recommendations contain policy reforms which are intended to address systemic risk and provide recommendations to the European Commission on revisions to the MMFR which include:

- Reducing threshold effects by (i) requiring all low-volatility net asset value (**LVNAV**) MMFs to have a fluctuating net asset value (**NAV**) and (ii) removing regulatory thresholds set down in Article 34(1)(a) and (b) of the MMFR;
- Reducing liquidity transformation by incorporating new liquidity requirements for VNAV MMF and LVNAV MMF composed of daily maturing assets, weekly maturing assets and public debt assets and permitting individual MMF managers to take actions leading them to hold fewer weekly maturing assets and fewer public debt assets than required in certain circumstances;
- Imposing the cost of redemptions and subscriptions on redeeming and subscribing investors by requiring managers of MMF to incorporate at least one liquidity management tool into the MMF’s constitutional document; and

- Enhancing the monitoring and stress-testing frameworks.

The European Commission has been requested to submit a communication on the actions undertaken in response to the ESRB Recommendations by 31 December 2023.

Along with the policy recommendation, the ESRB also published a report on the economic rationale underlying the recommendations, as well as providing an impact assessment of its main proposals.

A copy of the ESRB Recommendations can be accessed [here](#).

A copy of the ESRB report on the recommendations can be accessed [here](#).

ESMA recommendations on MMFR reform

On 14 February 2022, ESMA published its opinion on the review of the MMFR (**ESMA Opinion**). The publication of the ESMA Opinion follows its consultation on required reforms in March 2021 and takes into account the ESRB Recommendations as well as the final report on policy proposals published by the FSB in October 2021¹.

The ESMA Opinion puts forward proposed reforms of the MMFR in its opinion which include the following:

- (i) A decoupling of regulatory thresholds from the activation of suspensions/gates to limit liquidity stress for LVNAV funds and constant net asset value (**CNAV**) funds;
- (ii) Removing the possibility to use amortised costs for LVNAVs;
- (iii) Imposing an obligation on the MMF to have at least one liquidity management tool available to them and activation of these liquidity management tools by the manager of the MMF;
- (iv) Amendments of the Daily liquidity asset ratios (**DLAs**)/Weekly liquidity asset ratios (**WLAs**) applicable to variable net asset value (**VNAV**) and LVNAV MMFs as well as amending the pool of eligible assets (including public debt assets) which can be used to satisfy the liquidity ratios;
- (v) Inclusion/reinforcement of the possibility to temporarily use liquidity buffers in times of stress;

Complementary/crisis preparedness reforms aimed at enhancing the MMF resilience as a whole proposed in the ESMA Opinion include:

- (vi) Enhancement of MMF reporting requirements;
- (vii) Enhancement of the MMF stress testing framework;
- (viii) Clarifications around the requirements applicable to external (sponsor) support; and
- (ix) New disclosure requirements on ratings of MMFs.

Following receipt of the ESRB Recommendations and ESMA's Final Report, the European Commission will now review the adequacy of the MMFR.

¹ <https://www.fsb.org/wp-content/uploads/P111021-2.pdf>

For a detailed analysis of ESMA's Final Report on its opinion on the review of the MMFR, please refer to our separate [client briefing](#) on the topic

A copy of the Final Report can be accessed [here](#).

A copy of the Guidelines can be accessed [here](#).

Key Action Points

Managers of MMFs should monitor any proposed reforms of the MMFR announced by the European Commission following its review which must be conducted by 21 July 2022.

11. MARKET ABUSE

11.1 ESMA publishes Final Report on Review of MAR Guidelines

On 5 January 2022, ESMA published a final report on amendments to its guidelines on delay in the disclosure of inside information and interactions with prudential supervision under Regulation (EU) 596/2014 (**Market Abuse Regulation** or **MAR**) (the **Final Report**).

The Final Report, which follows a consultation process in July 2021, amends the existing 2016 MAR guidelines on the delay in the disclosure of inside information by adding to the existing list of legitimate interests which may be prejudiced if inside information is disclosed immediately to: (i) include redemptions, reductions and repurchases of own funds, pending regulatory authorisation; and (ii) the draft Supervisory Review and Evaluation Process decisions or preliminary information related thereto.

The Final Report also clarifies that Pillar 2 Capital Requirements are highly likely to meet the definition of inside information under MAR and that Pillar 2 Capital Guidance may be inside information under MAR whenever assessed as price sensitive, providing examples of situations in which Pillar 2 Capital Guidance is expected to be price sensitive.

The Final Report notes that the revisions to the existing MAR guidelines introduced via the Final Report will apply after the translation procedure and the regular comply or explain procedure have been carried out.

A copy of the Final Report can be accessed [here](#).

12. MISCELLANEOUS

12.1 ESMA issues consultation on Guidelines on certain aspects of MiFID II Suitability Requirements

Under existing MiFID II requirements, EU investment firms which provide the services of investment advice (whether independent or not) or portfolio management to their clients (**In-Scope MiFID Firms**)² must carry out a suitability assessment on their clients, taking into account the client's knowledge and experience, financial situation and investment objectives. From 2 August 2022, In Scope MiFID Firms will be required to collect information from their clients regarding their sustainability preferences and to consider them as part of the clients' suitability assessment.

On 27 January 2022, ESMA published a consultation paper on draft guidelines on certain aspects of the suitability requirements under MiFID II (**Consultation Paper**), updating the current guidelines on suitability under MiFID II, dated 28 May 2018. The Consultation Paper sets down ESMA's proposed revisions to the existing guidelines to provide guidance on the incorporation of sustainability preferences into the suitability assessment process as well as taking into account the results of the 2020 CSA carried out by NCAs on the application of the MiFID II suitability requirements amongst other changes.

² This will include UCITS management companies and AIFMs which have an extended licence to provide investment advice or individual portfolio management to clients.

The consultation process closes on 27 April 2022. ESMA will consider the feedback and publish a final report in Q3 2022.

A copy of the Consultation Paper can be accessed [here](#).

Key Action Points

From 2 August 2022, In-Scope MiFID Firms will be required to collect information from their clients regarding their sustainability preferences and to consider them as part of the clients' suitability assessment.

12.2 ESMA updates Q&As on application of the Benchmarks Regulation

On 28 January 2022, ESMA published an updated version of its Questions and Answers on the Benchmarks Regulation (**BMR**) (**BMR Q&As**).

Under Article 28(2) of the BMR, supervised entities (which will include in-scope UCITS management companies and AIFMs) are required to produce and maintain "robust written plans setting out the actions that they would take in the event that a benchmark materially changes or ceases to be provided".

In the revised BMR Q&As published in January, ESMA confirms that temporary disruptions to the provision of a benchmark do not require supervised entities to initiate their written plans prepared in accordance with Article 28(2) of the BMR on the basis that a temporary disruption to the provision of a benchmark does not constitute by itself a cessation of the benchmark.

A copy of the BMR Q&As can be accessed [here](#).

12.3 EU Sanctions against Russia / Belarus

In reaction to Russia's military aggression against Ukraine, the European Union has adopted a suite of economic sanctions against Russia and Belarus which have been introduced through four packages on 23 February 2022, 25 February 2022, 28 February 2022, 2 March 2022, 9 March 2022, 15 March 2022, 24 March 2022 and 8 April 2022 (the **Sanctions**) which require Irish fund management companies and investment funds to implement appropriate procedures to ensure that they are in a position to comply with the Sanctions at all times.

The Central Bank has also written to Irish fund service providers outlining its expectations as regards valuation, liquidity, and fund suspensions in the current environment as well as reminding fund management companies of the need to be "open and forthcoming" to the Central Bank with issues materially affecting funds under management.

The Central Bank's webpage providing further information on the Sanctions can be accessed [here](#)

The European Commission's webpage relating to the Sanctions can be accessed [here](#).

The Central Bank's letter to fund service providers dated 7 March 2022 can be accessed [here](#).

12.4 Investment Firms Directive Implementing Regulation published in the OJ

On 8 March 2022, Commission Implementing Regulation (EU) 2022/389 (**Implementing Regulation**) was published in the OJ.

The Implementing Regulation sets down implementing technical standards (**ITS**) on the format, structure, content lists and annual publication date of the information which must be disclosed by NCAs under Directive (EU) 2019/2034 (**Investment Firms Directive** or **IFD**).

The Implementing Regulation entered into force on 28 March 2022.

A copy of the Implementing Regulation can be accessed [here](#).

12.5 European Commission publishes proposal for the revision of the Central Securities Depositories Regulation

On 16 March 2022, the European Commission published a proposal to amend Regulation (EU) No 909/2014 (as amended) (the **Central Securities Depositories Regulation** or **CSDR**) in order to “make securities settlement in the EU safer and more efficient, improving the attractiveness of the EU’s capital markets and ultimately contributing to the financing of our economies” (the **Proposal**).

Most notably for fund management companies, the European Commission has proposed that mandatory buy-in requirements under the CSDR would only apply if and when the cash penalties regime alone, which has applied since 1 February 2022, does not improve settlement fails in the EU. The mandatory buy-in requirements introduced under the CSDR were intended to enter into force on 1 February 2022, however, they were delayed by the European Commission in November 2021 following extensive lobbying from the industry and ESMA.

Along with the Proposal in relation to mandatory buy-in requirements, the European Commission has also proposed to simplify the passporting regime, improve the conditions under which central securities depositories (**CSDs**) can access banking-type ancillary services and, with respect to the activities of third country CSDs, end the grandfathering clause set down in the CSDR and introduce a notification requirement so as to ensure that ESMA and national supervisors have better information about the activities of third country CSDs in the EU.

The Proposal must now be considered by the European Parliament and the Council with the changes entering into force once the proposed amendments have been approved by the co-legislators.

A copy of the Proposal can be accessed [here](#).

12.6 Whistleblowing Legislation to enhance the protection afforded to whistle-blowers

On 23 March 2022, the Irish Government published an updated version of the Protected Disclosures (Amendment) Bill 2022 (**Bill**) incorporating agreed amendments following governmental debate at Committee Stage. The Bill has now progressed to its Report Stage. The updated version of the Bill contains provision for the review of the operation of the Act within five years of the date on which it is passed.

The Bill proposes to transpose Directive (EU) 2019/1937 (the **Whistleblowing Directive**) into national law, building on an already comprehensive national whistleblower protection legal framework as provided by the Protected Disclosures Act 2014 (the **Act**). The Bill will amend the Act to give effect to the Whistleblowing Directive and to broaden the provisions of the protected disclosures regime.

Key provisions under the Bill include:

- The introduction of an obligation on organisations with over 50 employees to establish internal reporting channels and procedures for their workers to make protected disclosures. Notably, organisations with between 50 and 249 employees are afforded a temporary derogation from this requirement which expires on 17 December 2023;
- Amending the definition of “relevant wrongdoing” under the Act to include a ‘breach’ defined as “an act or omission that is unlawful” and falls within the scope of a range of specified EU acts and to exclude from the definition any matters concerning interpersonal grievances or matters which solely concern the reporting person;
- Extending the protective scope of the Act to include volunteers, shareholders, trainees, board members and job applicants within the definition of “worker” along with a provision to protect those who make anonymous disclosures and whose identity subsequently becomes known and is penalised for having made the disclosure;

- The reversal of the burden of proof in claims for penalisation for making a protected disclosure, placing the onus of proof on the employer to prove that an alleged act of penalisation was based on duly justified grounds; and
- Introducing new offences including the attempt or act of hindering a worker in making a report, failing to establish and maintain an internal reporting channel, and penalising, threatening to penalise, or causing/permitting another to penalise or threaten penalisation. Similarly, the Bill proposes to extend the compensatory caps to provide for limited compensation for workers not in remuneration.

While the Bill is currently progressing through the stages of the Dáil and has not been finalised, the Republic of Ireland, along with many other EU Member States, has missed the December 2021 deadline for transposition of the Whistleblowing Directive. As such, the Bill is expected to be transposed over the coming months, requiring employers to take action to ensure compliance with the changes to the Act as introduced by the Bill.

A copy of the updated version of the Bill can be accessed [here](#).

A copy of the Bill can be accessed [here](#).

A copy of the Whistleblowing Directive 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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