Funds Quarterly Legal and Regulatory Update

Period covered:
1 April 2019 - 30 June 2019

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

Undertakings in Collective Investments and Transferable Securities ("**UCITS**")

(i) ESMA publishes first annual report on use of UCITS supervisory sanctions

On 4 April 2019, the European Securities and Markets Authority ("**ESMA**") published its first annual report on sanctions imposed by national competent authorities ("**NCAs**") under the UCITS Directive (2009/65/EC) as amended ("**UCITS Directive**").

Under the UCITS Directive, NCAs can impose sanctions for infringements of its provisions.

The report contains an overview of the applicable legal framework and information on the penalties and measures imposed by NCAs in accordance with Article 99e of the UCITS Directive. It covers the periods between 1 January 2016 and 31 December 2016, and 1 January 2017 and 31 December 2017.

ESMA deems that the data on sanctions imposed during 2016 and 2017 does not allow it to observe clear trends or tendencies in the imposition of sanctions, or to produce detailed statistics based on it.

The annual report can be accessed here.

(ii) Amendments to Article 54 of the UCITS Directive under the proposed Regulation of Sovereign bond-backed securities

On 16 April 2019, the European Parliament adopted the proposed regulation (the "**Proposed Regulation**") on sovereign bond-backed securities ("**SBBS**").

The Proposed Regulation amends the UCITS Directive Article 54 by extending the existing derogation which permits a UCITS to invest up to 100% of its assets in transferable securities or money market instruments issued or guaranteed by a Member State to include reference to SBBS.

The aim of the Proposed Regulation is to enhance the liquidity of SBBS and to make them appealing to a large number of investors. In addition to the amendment to the UCITS Directive, the Proposed Regulation incorporates requirements for the:

i. the composition, maturity and structure of SBBSs;

ii. notification, transparency, information and use of the designation SBBS; and

iii. product oversight by ESMA

On 7 May 2019, the European Commission amended the proposal of the European Parliament but they did not amend the proposed changes to the UCITS Directive. The

European Parliament may now forward on this position as amended or make amendments of their own.

The Proposed Regulation can be accessed here.

(iii) Amendment to Article 52(4) of the UCITS Directive under the proposed Directive on covered bonds

On 18 April 2019, the European Parliament adopted the proposed directive on the issue of covered bonds and covered bond public supervision (the "**Proposed Directive**"). The Proposed Directive aims to establish minimum common standards of harmonization based on existing national frameworks. It will cover key aspects such as cover pool composition, regulatory supervision and disclosure reporting requirements.

Article 52(4) of the UCITS Directive provides for investment by UCITS of up to 25% of assets in bonds issued by EU credit institutions subject by law to special public supervision designed to protect bondholders. The Proposed Directive amends the UCITS Directive Article 52(4) to instead refer to covered bonds as defined under the Proposed Directive.

The Proposed Directive can be accessed here.

(iv) Central Bank publishes revised Central Bank UCITS Regulations

On 27 May 2019, the Central Bank of Ireland published the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2019, S.I. No. 230 of 2019 (the "**Revised Central Bank UCITS Regulations**"). The Revised Central Bank UCITS Regulations consolidates amendments made by two previous amending regulations. The Revised Central Bank UCITS Regulations sets down the domestic rules governing the operation of Irish domiciled UCITS and UCITS management companies and imposes certain obligations on Irish domiciled depositaries.

The Revised Central Bank UCITS Regulations introduces the following changes:

- **Performance Fees**: The Central Bank has incorporated its previous web-based guidance on performance fees into the Revised Central Bank UCITS Regulations. The Revised Central Bank UCITS Regulations now provide statutory provisions which mandate that performance fees payable to management companies or investment managers may only be paid on outperformance of a benchmark or if a new high net asset value ("**NAV**") is achieved over the life of the UCITS. While the remainder of the rules relating to performance fees must be complied with immediately, the Central Bank has allowed UCITS management companies with existing UCITS investment funds a transitional period until 27 January 2021 to adjust their methodologies to comply with the annual crystallisation requirement;

- **UCITS Share Classes**: The Revised UCITS Central Bank Regulations reaffirm the text of the ESMA Opinion on UCITS Share Classes to allow UCITS to hedge 95% of the portion of the NAV of the share class which is to be hedged against currency risk;

- **European Union Money Market Funds**: The Central Bank has incorporated a number of amendments arising from the implementation of Regulation (EU) 2017/1131 (the "**Money Market Fund Regulation**"), including the disapplication of certain provisions to Irish domiciled money market funds in order to remove any overlap with the Money Market Fund Regulation;

- **Cash held as ancillary liquidity**: The Revised Central Bank UCITS Regulations provide that UCITS must now aggregate deposits and cash held as ancillary liquidity when applying the limits on exposure to any one credit institution. This reflects the practice that cash held on deposit with credit institutions is not typically distinguished between cash held for investment purposes and cash held for liquidity management purposes; and

- **Reporting requirements applicable to UCITS management companies and depositaries**: The Revised Central Bank UCITS Regulations require UCITS management companies and depositaries to file a second set of accounts with the Central Bank which covers the full 12 months of the financial year within one month after year end instead of two months. The rationale for the shortened filing period is to enable supervisors to obtain information in a "timely manner" so that they can take any necessary supervisory action arising from their review of the accounts filed. The Revised Central Bank UCITS Regulations also codifies the ability of a structured UCITS to be subject to a management fee which is calculated based on the initial offer price rather than being based on the NAV of the relevant class and the requirement introduced under CP 86 that all UCITS maintain an email address for correspondence with the Central Bank which is monitored daily.

The Revised Central Bank UCITS Regulation can be accessed here.

(v) ESMA updates Q&As on the application of the UCITS Directive

On 4 June 2019, the European Securities and Markets Authority ("**ESMA**") published an updated questions and answers document ("**Q&As**") on the application of EU Directive 2009/65/EC, as amended (the "**UCITS Directive**").

The purpose of the Q&As is to promote common supervisory approaches and practices in the application of the UCITS Directive and its implementing measures. The updated Q&As provide the following clarifications in section X in respect of depositaries:

- **Q&A 2**: The distinction between depositary tasks and supporting tasks in the context of delegation;

- **Q&A 3**: The ability of third party delegates of the depositary to transfer assets belonging to the relevant fund;

- **Q&A 4**: The allocation of depositary functions where the depositary is a branch and the head office is established in another Member State;

- **Q&A 5**: Which competent authority is responsible for supervising the activities of the branch relating to depositary functions; and

- **Q&A 6**: Confirmation that legal entities within the same group of a depositary should be considered "third parties" for the purposes of the depositary delegation rules.

The updated Q&As can be accessed here.

(vi) Central Bank publishes twenty-sixth edition of the UCITS Q&As

On 6 June 2019, the Central Bank published the twenty-sixth edition of its "UCITS – Questions and Answers" (the "**UCITS Q&As**"). The UCITS Q&A has been updated to allow for the amendments of certain Q&As made as a result of the introduction of the Revised Central Bank UCITS Regulations. The Central Bank has deleted any Q&A that is no longer relevant after the Revised Central Bank UCITS Regulations.

The Central Bank added a new Q&A ID 1090 in relation to performance fees being permitted on an individual investor basis. This Q&A clarifies that performance fees can only be charged on an individual investor level or at a share class/fund level.

The Central Bank also added a new Q&A ID 1091 with regard to whether a UCITS can crystallise and pay a performance fee upon the redemption of its shares/units by an investor. This Q&A clarifies that a UCITS is permitted to crystallise and pay a performance upon the redemption of shares/units by an investor.

The updated Central Bank UCITS Q&As can be accessed here.

(vii) Central Bank publishes feedback statement on CP 119 on amendments to the Central Bank UCITS Regulations

On 6 June 2019, the Central Bank published its feedback statement to Consultation Paper 119 on amendments to (and consolidation of) the Central Bank UCITS Regulations ("**CP 119**").

The feedback statement on CP119 can be accessed here.

Alternative Investment Fund Management Directive ("**AIFMD**")

(i) ESMA updates Q&As on the application of the AIFMD

On 4 June 2019, the European Securities and Markets Authority ("**ESMA**") published an updated questions and answers document ("**Q&As**") on the application of Directive 2011/61/EU as amended (the "**AIFMD**").

The updated Q&As provide the following clarifications in section VI in respect of depositaries:

- **Q&A 10**: The distinction between depositary tasks and supporting tasks in the context of delegation;
- **Q&A 11**: The ability of third party delegates of the depositary to transfer assets belonging to the relevant fund;
- **Q&A 12**: The allocation of depositary functions where the depositary is a branch and the head office is established in another Member State;
- **Q&A 13**: Which competent authority is responsible for supervising the activities of the branch relating to depositary functions; and
- **Q&A 14**: Confirmation that legal entities within the same group of a depositary should be considered "third parties" for the purposes of the depositary delegation rules.

The updated Q&As can be accessed here.

Proposed Regulation and Directive on cross-border distribution of collective investment funds

(i) The European Parliament and Council of the European Union adopt proposed Regulation and Directive on reforms to cross-border distribution of investment funds

On 14 June 2019, the Council of the European Union voted to adopt the European Commission's initiatives to improve the efficiency of cross-border distribution of collective investment schemes. The changes consisting of a Regulation and a Directive, are designed to increase transparency, remove overly complex and burdensome requirements and harmonise diverging national rules.

The Regulation and the Directive will take effect 20 days after their publication in the Official Journal of the European Union. Member States are required to implement the Directive 24 months after it enters into force. The majority of the Regulation will come into effect immediately apart from the following which will not apply until 24 months after coming into force:

1. UCITS managers will no longer be obliged to maintain a physical presence in the host Member State in which a UCITS is registered to market;

2. the introduction of disclosure requirements for UCITS and AIF marketing communications.

3. the codification of a European Union framework for AIFMs marketing AIFs to retail investors;

4. the ability for UCITS managers and AIFMs, who wish to discontinue marketing in a Member State, to withdraw notifications made to that Member State;

5. the ability for AIFMs to undertake "pre-marketing" of established or not yet established AIFs

The proposed reforms include:

- Directive amending the UCITS Directive and AIFMD with regard to the cross-border distribution of collective investment funds (the "**Directive**"); and

- Regulation on facilitating cross-border distribution of collective investment funds (the "**Regulation**").

The main changes concern:

- **Harmonised rules relating to local facilities and agents** - One of the most costly obligations under the UCITS Directive is the requirement to provide local facilities and appoint a local Paying or Facilities Agent. The Directive recognises that such facilities are rarely used by investors with the preferred method of interaction in a more direct way. Consequently, the Directive replaces the requirement for local facilities so that the requirements are harmonised and may be provided electronically or by means of other distance communications with investors. Similar provisions are introduced for AIFMs marketing AIFs to retail investors;

- **Harmonised Rules relating to changes to information to be notified to host regulators** - In the event of a change to information notified to a Member State or a change regarding share classes to be marketed, the Directive provides that written notice must be given to each of the national competent authority of the home Member State of the UCITS and the competent authority of the host Member State at least one month before implementing that change. If the competent authority of the home Member State is of the view that as a result of the change the UCITS would no longer comply with the UCITS Directive, it must then notify the UCITS within 15 working days that it is not to implement the change. Otherwise the national competent authority of the home member state must inform the host regulator without delay. Importantly where a change is implemented subsequent to a notification by the competent authority of the home Member State that the UCITS is not to implement that change and pursuant to that change the UCITS no longer complies with the UCITS Directive, the competent

authority of the home Member State of the UCITS is required to take all due measures including, where necessary, the express prohibition of marketing of the UCITS and shall notify accordingly the competent authorities of the host Member States without undue delay. Similar changes are made to the AIFMD in respect of the approval or rejection of planned changes for AIFs;

- **Harmonised process for notification of discontinuation of marketing -** The current practice for notification of discontinuation of marketing differs between Member States. The Directive provides for a more harmonised approach in order to create more economic and legal certainty for managers in a host member state. The UCITS will be required to fulfil certain conditions prior to deregistration. Notifications of discontinuation of marketing shall, under the Directive, be made to the home competent authority which will, no later than 15 days from the date of receipt, transmit the request to the host competent authority and to ESMA and inform the UCITS. The UCITS may not be marketed thereafter, although the obligations to provide information to investors who remain will continue. Similar provisions are introduced for AIFMs discontinuing marketing of AIFs, other than closed-ended AIFs and European long-term investment funds;

- **Pre-marketing** - AIFMs which engage in pre-marketing must notify their home competent authority in writing within two weeks of engaging in pre-marketing, specifying the Member States, time periods in which the pre-marketing took place, a brief description of the strategies presented and, where relevant, a list of the AIFs which were the subject of pre-marketing. The home competent authority shall promptly inform the competent authorities of the Member States in which the pre-marketing took place;

- **Reverse Solicitation** - Fund managers will no longer be able to rely on reverse solicitation if they have carried out pre-marketing in relation to the AIF in question within the previous 18 months;

- **Fees** - National regulators will be permitted to charge fees which must be proportionate to the regulatory tasks carried out and subject to a transparent process. Details of such fees will be maintained on a centralized ESMA database;

- **Marketing Materials** - UCITS and AIFs will be required to comply with harmonised requirements for their marketing materials with ESMA required to issue implementing technical standards to the Commission within eighteen months of the entry into force of the Regulation;

- **Database** - ESMA will be required to publish and maintain on its website a database listing all AIFMs, ManCos, AIFs and UCITS which those AIFMs and ManCos are managing and marketing as well as the Member States in which those funds are marketed; and

- **UCITS KID** - The Recitals in the Regulation pave the way for legislative measures to amend the Regulation on key information documents for packaged retail and insurance based investment products (Regulation (EU) No 1286/2014) (the "**PRIIPS**

Regulation"). Recitals 13 & 14 provide: (i) that the time period for the review by the European Commission of the UCITS exemption from the requirement to produce a PRIIPs KID should be extended by 12 months (i.e. until December 2019); and (ii) that the transitional period for the UCITS exemption should be extended by 24 months (i.e. December 2020).

The Directive can be accessed here and the Regulation can be accessed here.

Packaged Retail Insurance-based Investment Products ("**PRIIPs**")

(i) Joint Committee of ESAs updates Q&As on PRIIPs KID

On 4 April 2019, the Joint Committee of the European Supervisory Authorities (the "**ESAs**") published an updated version of its Q&As on the key information document ("**KID**") requirements for packaged retail insurance-based investment products ("**PRIIPs**").

The updated Q&As include new Q&As in the following sections of the document:

- **General topics**: this contains a new Q&A on what aspects should be considered by the manufacturer when determining the recommended holding period ("**RHP**") of a PRIIP; and

- **Multi-option products** ("**MOPs**"): this contains a new Q&A on the form and name that "specific information on each underlying investment option" should take.

The updated version of the Q&As can be accessed here.

(ii) ESAs publish letter concerning PRIIPs KID Level 2 Review

On 23 May 2019, the ESAs published a letter sent to the European Commission (the "**Letter**") on their proposed options for presenting information on performance scenarios to be tested during the upcoming consumer testing exercise under Level 2 Review of Regulation (EU) No 1286/2014 (the "**PRIIPs KID Regulation**").

The ESAs believe there is merit in testing options involving only illustrative scenarios as such illustrative scenarios may provide more meaningful information for structured products. The ESAs believe that it is very challenging to define a revised methodology that adequately fits structured products without risking inappropriate results.

Further the ESAs believe that it would prove useful to gather evidence on how this type of approach is understood by consumers in view of its current use (in similar forms) for structured UCITS.

The Letter can be accessed here.

(iii) Commission publishes letter to the ESAs providing guidance on the treatment of bonds under the PRIIPs Regulation

On 28 May 2019, the European Commission published a letter (dated 14 May 2019 but signed on 13 May 2019) (the "**Letter**"), sent to the ESAs, providing guidance on the treatment of bonds under the European Union Regulation on Key Information Documents for packaged retail insurance-based products ((EU) No 1286/2014) (the "**PRIIPs Regulation**"). The Letter is a response to a letter dated 19 July 2018 from the ESAs.

The European Commission noted that only the Court of Justice of the European Union can provide binding interpretations of European Union law. However, the European Commission made comments to provide guidance for assessing whether a particular bond is a packaged retail investment product ("**PRIP**").

The Letter can be accessed here.

European Markets Infrastructure Regulation ("**EMIR**")

(i) Delegated Regulation amending RTS on clearing obligation under EMIR published in Official Journal

On 29 April 2019, Delegated Regulation 2019/667 (the "**amending Delegated Regulation**") was published in the Official Journal of the European Union. The amending Delegated Regulation amends three Commission Delegated Regulations to extend the dates of deferred application of the clearing obligation for certain over-the-counter ("**OTC**") derivatives contracts.

European Commission Delegated Regulations 2015/2205, 2016/1178 and 2016/592, which supplement EMIR, have been amended. They contain regulatory technical standards ("**RTS**") with temporary exemptions from the clearing obligation for certain intragroup transactions where one of the counterparties is in a third country. The provisions provide for a deferred date of application of the clearing obligation of up to three years for these transactions, in the absence of a relevant equivalence decision in respect of the third country.

The amending Delegated Regulation amends the three Delegated Regulations to extend the temporary exemptions until 21 December 2020.

The amending Delegated Regulation entered into force on 30 April 2019.

The amending Delegated Regulation can be accessed here.

(ii) Commission Implementing Decision published on supervision of derivative transactions in Japan

On 2 May 2019 Commission Implementing Decision (EU) 2019/684 of 25 April 2019 (the "**Decision**") was published in the Official Journal of the European Union. The Decision is a recognition of the legal, supervisory and enforcement arrangements of Japan for derivatives transactions supervised by the Japan Financial Services Agency as equivalent to the valuation, dispute resolution and margin requirements of Article 11 of EMIR.

The Decision entered into force on 22 May 2019.

The Decision can be accessed here.

(iii) ISDA publishes paper concerning compliance with initial margin regulatory requirements following BCBS/IOSCO Guidance Statement

On 13 May 2019, ISDA published a paper concerning compliance with initial margin regulatory requirements (the "**Paper**") following the Basel Committee on Banking Supervision ("**BCBS**") and the International Organization of Securities Commissions ("**IOSCO**") Guidance Statement.

The Paper aims at clarifying what steps should be taken if an aggregate average notional amount ("**AANA**") is above the relevant phase-in amount but one or more of my relationships does not exceed the initial margin ("**IM**") exchange threshold.

On March 5, 2019, the BCBS and IOSCO published a statement highlighting that where a counterparty relationship is in scope of the initial margin requirements but the amount of IM to be exchanged falls below the €50 IM exchange threshold specified in the BCBS/IOSCO WGMR margin framework, the documentation, custodial or operational requirements will not apply to that relationship.

The Paper sets out that the first step is to identify in-scope entities for regulatory IM requirements, then determine if there must be self-disclosure to counterparties and finally assess whether they are under the threshold as explained in the BCBS/IOSCO guidance statement.

All counterparties (including Irish UCITS/AIFS) will become subject to the IM requirements under EMIR or equivalent international standards either: (i) as of 1 September 2019 ("**Phase IV**" counterparties) or; (ii) as of 1 September 2020 ("**Phase V**" counterparties) depending on their AANA amount.

The Paper can be accessed here.

(iv) ISDA announces voluntary disclosure exercise for Phase 5 IM counterparties

On 23 May 2019, ISDA announced that they would facilitate a voluntary early disclosure exercise for parties which expect they may exceed the Phase V IM threshold in one or more jurisdictions. The aim of this exercise to aid the industry in preparation for the IM requirements under Phase V that are due to come into force on 1 September 2020. ISDA noted that they are welcoming participation from potential Phase V firms as well as new or updated disclosures from Phase IV firms.

The press release can be accessed here.

(v) EMIR Refit Regulation enters into force

On 28 May 2019, Regulation (EU) 2019/834 (the "**EMIR Refit Regulation**") was published in the Official Journal of the European Union. The EMIR Refit Regulation aims to simplify the rules for OTC derivatives and make them more proportionate, with a view to reducing regulatory costs and burdens on market participants. The EMIR Refit Regulation entered into force on 17 June 2019.

The EMIR Refit Regulation makes a number of key changes for AIFs and UCITS including:

- **Financial counterparty** ("**FC**"): The EMIR Refit Regulation will broaden the definition of FC to capture all AIFs which are established in the European Union, as well as AIFs which are managed by AIFMs authorised or registered in accordance with AIFMD. This is a change to the position currently under EMIR, as EMIR only captures AIFs which are managed by AIFMs authorised or registered in accordance with AIFMD as FCs. UCITS and UCITS management companies remain captured as FCs under both EMIR and the EMIR Refit. AIFs which are securitisation special purpose entities, and AIFs/ UCITS which are established solely for employee share purchase plans, will be specifically excluded from the definition of an FC under the EMIR Refit Regulation;

- **Small financial counterparty** ("**SFC**"): The EMIR Refit Regulation introduces a new sub-category of FC which will be exempt from the EMIR clearing obligations termed an SFC. An FC will be deemed to be an SFC if its OTC derivative positions do not exceed any of the EMIR clearing thresholds. An SFC will remain subject to EMIR's risk mitigation requirements, including margin exchange requirements;

- **Determination of clearing threshold – FCs**: The EMIR Refit Regulation provides that an FC has the option to perform a calculation: (i) on the date of its entry into force (i.e. 17 June 2019); and (ii) on a date every 12 months thereafter to determine whether its aggregate month-end average position at group level (for the previous 12 months) exceeds the clearing thresholds. An FC that exceeds the clearing threshold for at least one asset class or does not calculate its positions, will become subject to a clearing obligation for all asset classes. Whilst the calculations are normally performed at group level, the EMIR Refit specifically provides that for UCITS and AIFs, these calculations are performed at the fund level;

- **Determination of clearing threshold - non-financial counterparties** ("**NFCs**"): The EMIR Refit Regulation replaces the 30 day rolling average determination of positions, as set out under EMIR, with an annual determination. The EMIR Refit Regulation provides that an NFC has the option to perform a calculation: (i) on the date of its entry into force (i.e. 17 June 2019); and (ii) on a date every 12 months thereafter to determine whether its aggregate month-end average position at group level (for the previous 12 months) exceeds the clearing thresholds. If the calculation is performed and none of the clearing thresholds are exceeded, the NFC will be deemed to be an NFC- and will be exempt from the EMIR clearing obligations. In addition, under the EMIR Refit Regulation, an NFC will only be required to clear those OTC derivative contracts which relate to the particular asset class for which the clearing threshold is exceeded;

- **Notifications to Central Bank and ESMA**: All FCs or NFCs which do not calculate their aggregate month-end average position for the previous 12 months, or where the result of that calculation exceeds any of the clearing thresholds, whether previously subject to the clearing obligation or not, are required to immediately notify ESMA and their relevant competent authority on the date of its entry into force (i.e. 17 June 2019). Such an entity has four months from making that notification to implement the clearing arrangements, as applicable (i.e. by 18 October 2019); and

- **Removal of the frontloading requirements**: The EMIR Refit Regulation removes the clearing frontloading obligation. The frontloading obligation is the obligation to clear OTC derivative contracts entered into, or novated, before the clearing obligation for those classes of derivatives takes effect.

The EMIR Refit Regulation can be accessed here.

(vi) ESMA updates EMIR Q&As

On 28 May 2019, ESMA updated its questions and answers ("**Q&As**") on EMIR. The updated Q&As provide clarifications arising from the introduction of the EMIR Refit Regulation and amends an existing Q&A on novation. The update to the Q&As on EMIR relate to the following:

- **Question 2 on OTC**: This Q&A clarifies the procedure for FCs and NFCs to notify that they exceed/cease to exceed the clearing thresholds;

- **Question 4 on OTC**: This Q&A clarifies whether a counterparty is responsible for assessing whether its counterparty is above or below the clearing thresholds;

- **Question 20 on OTC**: This Q&A clarifies that for the purpose of applying the clearing obligation, all types of novations of derivative contracts are covered;

- **Question 25 on OTC**: This is a new Q&A which clarifies the start date for counterparties who are in Category 3 and 4 under Article 2 of Commission Delegated Regulation (EU) 2015/2205;

- **Question 36 on Trade Repositories**: This Q&A clarifies how counterparties should report OTC derivatives novations; and

- **Question 42 on Trade Repositories**: This Q&A clarifies how the field should be populated for (c1) transactions executed on a regulated market and (c2) cleared trades.

On 14 June 2019, ESMA updated its Q&As to provide further clarity on data reporting as introduced by the EMIR Refit Regulation. The update to the Q&As on EMIR relate to the following:

- **Question 3 on OTC**: This Q&A clarifies the process for calculating of positions for clearing thresholds; and

- **Question 51 on Trade Repositories**: This is a new Q&A which clarifies the reporting obligations under Article 9(1) of EMIR. The Q&A identifies which notifications are necessary to apply an intragroup exemption from reporting

The updated Q&As can be accessed here.

(vii) ISDA issues letter to U.S. Regulators on IM requirements

On 3 June 2019, ISDA published a letter to the Commodity Futures Trading Commission ("**CFTC**") and other US regulatory bodies (the "**Letter**"). In the Letter, ISDA indicates its support for the call made by the CFTC on 29 April 2019 for US regulators to issue guidance clarifying that a US regulated entity need not have in place systems and documentation to exchange initial margin on uncleared swaps with a given counterparty if its calculated bilateral initial margin amount with that counterparty is less than $50 million.

The Letter can be accessed here.

(viii) ESMA publishes letter to European Commission concerning the EMIR Refit Regulation

On 7 June 2019, ESMA published a letter to the European Commission concerning the hedging exemption in the calculation of the clearing threshold for non-financial groups under the EMIR Refit Regulation (the "**Letter**").

ESMA are concerned that FCs and NFCs will face different obligations when calculating the month-end average positions in non-financial groups. FCs will need to take into account all OTC contracts entered into by that FC or entered into by other entities within the group to which that FC belongs while NFCs will only have to take account those that are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity, namely hedging, of the NFC or of that group.

ESMA understands that the purpose of the hedging exemption is to avoid impediments for NFCs to appropriately mitigate their commercial risks. However ESMA notes that this could have some unintended consequences on nonfinancial groups' behavior. For this reason

ESMA has asked if the European Commission could clarify what is the correct interpretation of the applicable provision for FCs with NFCs in their group.

The Letter can be accessed here.

(ix) ISDA publishes paper on the implementation of margin requirements and market fragmentation across jurisdictions

On 17 June 2019, ISDA published a paper on the implementation of margin requirements and market fragmentation for non-cleared derivatives (the "**Paper**"). The Paper aims at highlighting the main areas of difference in the implementation of margin requirements for non-cleared derivatives across jurisdictions. ISDA notes that while most jurisdictions have implemented standards in line with the BCBS/IOSCO phase in schedule, differences continue to exist. The Paper makes recommendations on how to resolve these differences.

The Paper can be accessed here.

Securitisation Regulation

(i) ESMA updates Securitisation Regulation Q&A

On 27 May 2019, ESMA published an updated set of questions and answers ("**Q&As**") on Regulation 2017/2402 (the "**Securitisation Regulation**").

The updated Q&As has amended a number of Q&As and introduced new ones in advance of the possible adoption of the disclosure regulatory technical standards ("**RTS**") and implementing technical standards ("**ITS**") by the European Commission and may be subject to possible changes as a result.

The updated Q&A can be accessed here.

European Venture Capital Funds ("**EuVECA**") Regulation and European Social Entrepreneurship Funds ("**EuSEF**") Regulation

(i) Delegated Regulation supplementing EuSEF Regulation published in Official Journal

On 22 May 2019, Commission Delegated Regulation (EU) 2019/819 (the "**Delegated Regulation**") supplementing the European Social Entrepreneurship Funds Regulation (EU) 346/2013 (the "**EuSEF Regulation**") with regard to conflicts of interest, social impact measurement and information to investors was published in the Official Journal of the European Union.

The Delegated Regulation sets out:

- The types of conflicts of interest for the purposes of Article 9(2) of the EuSEF Regulation;

- Disclosure of conflict of interests;
- Conflicts of interest policy requirements;
- Information on positive social impact;
- Description of the investment strategy and objectives;
- Information on methodologies used to measure social impact;
- Management of the consequences of conflicts of interest;
- Strategies for exercising voting rights to prevent conflicts of interest;
- Information about support services;
- Procedures and measures to prevent, manage and monitor conflicts of interest;
- Procedures to assess positive social impact; and
- Description of non-qualifying assets.

The Delegated Regulation came into force on 11 June 2019 (that is, 20 days after publication in the Official Journal of the European Union). It applies from 11 December 2019.

The Delegated Regulation can be accessed here.

(ii) Delegated Regulation supplementing EuVECA Regulation and published in the Official Journal

On 22 May 2019, Commission Delegated Regulation (EU) 2019/820 (the "**Delegated Regulation**") supplementing the European Venture Capital Funds Regulation (EU) 345/2013 (the "**EuVECA Regulation**") with regard to conflicts of interest was published in the Official Journal of the European Union.

The Delegated Regulation sets out:

- Disclosures of conflict of interests;
- Strategies for exercising voting rights to prevent conflicts of interest;
- Procedures and measures to monitor, prevent and manage conflicts of interest;
- Management of consequences of conflicts of interest;
- The types of conflict of interest for the purposes of Article 9(2) of the EuVECA Regulation; and

- Conflicts of interest policy requirements;

The Delegated Regulation came into force on 11 June 2019 (that is, 20 days after publication in the Official Journal of the European Union). It applies from 11 December 2019.

The Delegated Regulation can be accessed here.

The Securities Financing Transactions Regulation ("**SFTR**")

(i) Commission Implementing Regulation for reporting obligations under SFTR comes into effect

On 11 April 2019, the Commission Implementing Regulation (EU) 2019/365 of 13 December 2018 laying down implementing technical standards ("**ITS**") with regard to the procedures and forms for exchange of information on sanctions, measures and investigations (the "**Implementing Regulation**"), entered into force. The Implementing Regulation provides welcome certainty around the dates on which the reporting obligations that arise under Article 4 of Regulation (EU) 2015/2365 ("**SFTR**") will begin to apply to various categories of counterparties to securities financing transactions ("**SFT**").

The below sets out the date on which counterparties must begin to report SFT to a trade repository:

- UCITS funds, AIF funds, AIFM and UCITS Management Companies - 11 October 2020;
- Credit Institutions - 11 April 2020;
- Investment Firms - 11 April 2020;
- Insurance and reinsurance entities - 11 October 2020; and
- Central Counterparties and Central Securities Depositary - 11 July 2020.

It is worth noting that the reporting obligations (and applicable timeframes) shall also apply to third country entities that would require authorisation or registration if they were established in the European Union.

The SFTR also confirms that in the case of externally managed UCITS and externally managed AIFs, the reporting obligations are imposed on the UCITS Management Company and the AIFM respectively. It also confirms that the reporting obligation may be delegated.

The Implementing Regulation can be accessed here.

(ii) ESMA opens public consultation on reporting obligations under SFTR

On 27 May 2019, ESMA opened a public consultation on draft guidelines on how to report SFT. This consultation paper seeks stakeholders' opinions on any future developments of ESMA guidelines on reporting under SFTR. These guidelines will complement the SFTR technical standards and ensure the consistent implementation of the recently introduced Commission Implementing Regulation (EU) 2019/365.

The guidelines include general principles that apply to SFT reporting, including where the reports should be sent and how the reports should be constructed.

The deadline for feedback is 29 July 2019. ESMA is due to consider the feedback it receives in the third quarter of this year and publish a final report in the fourth quarter on the guidelines on reporting under SFTR.

The public consultation can be accessed here.

Benchmarks Regulation

(i) ESMA updates its Q&As on the Benchmarks Regulation

On 23 May 2019, ESMA published an updated version of the "Q&As – on the Benchmarks Regulation". The update can be summarised as follows:

- **Question 7.4**: This addresses the relevant time to determine the Member State of reference in an application for recognition of a third country administrator;
- **Question 7.5**: This addresses the information on which NCAs may rely upon in an external audit report of compliance to International Organization of Securities Commissions ("**IOSCO**") principles for financial benchmarks; and
- **Question 8.5**: This addresses the type of information that should be included in the field "contact info" of ESMA's register of benchmark administrators.

The Q&As can be accessed here.

Global Legal Entity Identifier System ("**GLEIS**")

(i) Legal Entity Identifier Regulatory Oversight Committee report on fund relationships in GLEIS

On 20 May 2019, the Legal Entity Identifier Regulatory Oversight Committee ("**LEI ROC**") published its report on the policy on fund relationships in the global legal entity identifier system (the "**Report**").

The Report requests the Global LEI Foundation ("**GLEIF**") to replace the current optional reporting of a single "fund family" relationship with either fund management entity relationships, umbrella structures and master-feeder relationships.

The update aims to ensure that the implementation of relationship data is consistent throughout the GLEIS, and provide a means to facilitate a standardised collection of fund relationship information at the global level. Collection of these relationships in the GLEIS will be optional, except if the relationship is mandated to be reported and for relationships between an umbrella structure and a sub-fund or compartment.

Annex 1 to the Report contains guidelines for the registration of investment funds in the GLEIS.

The LEI is a 20-character reference code to uniquely identify legally distinct entities that engage in financial transactions. Each LEI is associated with reference data, including the name and legal address of the entity. LEIs are issued and managed by a network of independent operators federated by the GLEIF, applying the rules of the GLEIS under oversight of LEI ROC.

The Policy can be accessed here.

Shareholder's Rights Directive ("**SRD II**")

(i) Shareholders Rights Directive II

The second Shareholders Rights Directive (Directive (EU) 2017/828) ("**SRD II**") extends the scope of SRD I (Directive 2007/36/EC) to impose certain obligations on asset managers (which include MiFID firms providing portfolio management services to investors, AIFMs, UCITS management companies and UCITS SMIC) ("**Asset Managers**") when they invest in "EEA listed companies". In order to constitute an "EEA listed company" within the meaning of SRD II, the company must have a registered office in an EEA member state and its shares must be admitted to trading on a regulated market situated or operating within an EEA member state.

Asset Managers will also be required to make certain public disclosures outlining how they engage with investee companies.

SRD II has not yet been transposed into Irish law.

The SRD II can be accessed here.

European Fund and Asset Management Association (“**EFAMA**”)

(i) EFAMA submits its responses to ESMA’s consultations paper on the guidelines on liquidity stress testing in UCITS and AIFs

On 2 April 2019, EFAMA issued a response (dated 22 March 2019) to ESMA’s consultations paper on the guidelines on liquidity stress testing in UCITS and AIFs.

In its response, EFAMA acknowledged that the regulatory setup of requiring stress testing has consistently proven efficient and robust, including during challenging market events, such as the euro crisis and post-Brexit referendum. However they note that it cannot be used as a standalone tool to be relied upon as a way of predicting future liquidity crises and must be used in conjunction with other determinants.

EFAMA also voiced their concern that part of the guidelines and in particular the explanatory statements are taking a more prescriptive approach which is not appropriate. With regards the scope of the guidelines, EFAMA agreed with covering both AIFs and UCITS but believe money market funds (“**MMFs**”) should be exempted as they are already covered by a specific regulatory framework.

A copy of EFAMAs response can be accessed here.

(ii) EFAMA publishes comments on ESMA’s consultation paper on draft RTS under the ELTIF Regulation

On 25 June 2019, EFAMA published comments on ESMA’s consultation paper on draft RTS under Article 25 of Regulation (EU) 2015/760 (the “**European Long-Term Investment Funds Regulation**” or the “**ELTIF Regulation**”). EFAMA is of the view that the current methodology prescribed to calculate PRIIPs (arrival price) transaction cost is not effective for ELTIFs that are invested in illiquid assets. EFAMA believes ESMA should align the adoption of the RTS on the ELTIF cost disclosures with the conclusion of the currently ongoing PRIIPs review. This would ensure parties do not have to implement rules that would be revised shortly afterwards.

The comments can be accessed here.

European Commission

(i) European Commission seeks consultation on Distance Marketing Directive

On 9 April 2019, the European Commission announced a consultation relating to its evaluation of Directive 2002/65/EC, namely the Distance Marketing of Financial Services Directive (“**DMD**”).

The European Commission explains that, since the DMD came into force, the retail financial sector has become increasingly digital, with new products and actors available on the market, and new sales channels being used.

The aim of the consultation is to ensure that all relevant stakeholders have the opportunity to express their views on the relevance, effectiveness, pertinence and coherence of the DMD to assess whether it is still fit for purpose.

Responses to the consultation can be made by completing an online questionnaire, which is linked to from the consultation webpage. Comments can be made on the consultation until 2 July 2019. The Commission expects to publish the conclusions of the evaluation exercise by the end of 2019.

The new webpage can be accessed here.

European Parliament

(i) European Parliament adopts proposals on ESFS reforms

On 16 April 2019, the European Parliament published its adopted texts on the proposed reforms to the European System of Financial Supervision ("**ESFS**") comprising:

- The proposed Omnibus Regulation relating to the powers, governance and funding of the ESAs, the adopted text can be accessed here;
- The proposed Regulation amending the European Systemic Risk Board ("**ESRB**") Regulation (1092/2010), the adopted text can be accessed here; and
- The proposed Omnibus Directive amending the MiFID II Directive (2014/65/EU) and the Solvency II Directive (2009/138/EC), the adopted text can be accessed here.

The Parliament announced its adoption of these texts earlier on 16 April 2019.

The reforms intend to give additional powers and responsibilities to the ESAs and the ESRB through amendments to two Directives and nine Regulations. In particular, the amended proposal for the Omnibus Regulation contains:

- Amendments to the ESAs Regulations (that is, the EBA Regulation, the EIOPA Regulation and the ESMA Regulation) that are intended to enhance the role and powers of the three ESAs; and
- Amendments to various pieces of sectoral financial legislation giving additional powers to ESMA, such as direct supervisory powers over prospectuses, harmonised collective investment funds (that is, EuVECAs, EuSEFs and ELTIFs), data reporting services providers and benchmarks.

The next step is for the Council of the European Union to adopt the proposals.

A copy of the press release from the European Parliament can be accessed here.

ESMA, EBA and ESAs

(i) ESMA issues revised Q&A on Investor Protection under MiFID relating to funds which invest predominantly in Co-Co Bonds

On 28 March 2019, ESMA issued revised Q&A on Investor Protection under MiFID relating to funds which invest predominantly in Co-Co Bonds. ESMA has set out considerations that manufacturers and distributors should take into account when specifying the target market category:

- **Q&A 1**: In ESMA's view, CoCo-Bond Funds are generally not compatible with the retail market. ESMA believes that the investor protection concerns raised by CoCo-Bonds do also largely apply to funds which predominantly invest in CoCo-Bonds or use benchmarks which are predominantly composed of CoCo-Bonds. Therefore, ESMA expects manufacturers and distributors of CoCo-Bond-Funds to carefully scrutinize such products in the respective product approval process and assess the target market proportionally to the features and risks of the product. Manufacturers and distributors should therefore consider excluding retail investors from the positive target market or including retail clients in the negative target market. For CoCo-Bond-Funds already in the market, ESMA would expect manufacturers and distributors to take the abovementioned considerations into account in the next cycle of the product review process, at thef latest.

The Q&A can be accessed here.

(ii) ESMA publishes speech on current priorities

On 13 May 2019, ESMA published a speech, given by Evert van Walsum, Head of the Investors and Issuers Department, on its current priorities. The points of note include:

- The European Supervisory Authorities ("**ESAs**") are commencing work on the mandated technical standards on disclosures relating to sustainable investments and sustainability risks;

- ESMA is currently working on some common principles that could help harmonise the way European Union regulators approach performance fees and the way they allow asset managers to structure them while creating funds; and

- ESMA has begun work on a broad review of the PRIIPs Delegated Regulation ((EU) 2017/653). It expects to consult publicly in the third quarter of 2019. The review will include proposals to review the performance scenarios section of the PRIIPs key information document ("**KID**") and will also cover cost-related issues, such as the presentation and calculation of costs.

A copy of the speech can be accessed here.

Market Abuse Regulation ("**MAR**")

(i) SMSG issue advice to ESMA for peer review into the collection and use of suspicious transaction and order reports under the MAR

On 1 April 2019, the Securities and Markets Stakeholders Group ("**SMSG**") issued advice to ESMA for the peer review into the collection and use of suspicious transaction and order reports under Regulation (EU) No 596/2014, namely the Market Abuse Regulation ("**MAR**") as a source of information in the context of market abuse investigations. The SMSG confirms their support of the review regarding the collection and use of suspicious transaction and order reports ("**STORs**") under the MAR and believes STORs are key in mitigating market abuse and uphold market integrity.

The advice can be accessed here.

(ii) European Parliament adopts a proposed Regulation to amend MAR

On 18 April 2019, the European Parliament adopted, with amendments, the European Commission's proposed regulation to amend the Market Abuse Regulation in relation to the promotion of the use of Small to Medium Enterprise ("**SME**") growth markets (the "**Proposed Regulation**"). These amendments:

- Clarify that the obligation to establish insider lists rests with both issuers and persons acting on their behalf or on their account;
- Give Member States the option to require SME growth market issuers to provide more extensive insider lists of all persons with access to information; and
- Allow all issuers to have two business days from receipt of a notification to make the information in that notice public from a person discharging managerial responsibilities ("**PDMR**"), or person closely associated with a PDMR ("**PCA**").

The European Parliament's position will now be forwarded to the Council of the European Union.

The Proposed Regulation can be accessed here.

(iii) ESMA publishes formal request letter of the European Commission on technical advice for report under Article 38 of MAR

On 14 May 2019, ESMA published a letter (dated 20 March 2019) (the "**Letter**") setting out the European Commission's formal request to ESMA for technical advice on the report under Article 38 of the Market Abuse Regulation.

Under Article 38 of MAR, the European Commission is required to submit a report to the European Parliament and the Council of the European Union on both the application of MAR

and the level of thresholds, with a view to assessing whether that level is appropriate or should be adjusted.

The European Commission has requested that ESMA provides its advice by no later than 31 December 2019.

The Letter can be accessed here.

Transparency Directive

(i) Commission Delegated Regulation on the specification of a single electronic reporting format published in Official Journal

On 29 May 2019, Commission Delegated Regulation (EU) 2018/815 (the "**Delegated Regulation**") supplementing Directive 2004/109/EC (the "**Transparency Directive**") with regard to regulatory technical standards on the specification of a single electronic reporting format was published in the Official Journal of the European Union.

The Delegated Regulation enters into force on 18 June 2019 and will apply to annual financial reports containing financial statements for financial years beginning on or after 1 January 2020.

The Delegated Regulation can be accessed here.

Prospectus Regulation

(i) ESMA publishes updated Q&As on Prospectuses

On 8 April 2019, ESMA published the thirtieth Edition of the updated version of its Q&As on Directive 2003/71/EC (the "**Prospectus Directive**"). The Q&As have been modified to remove references to 29 March 2019 as being the date on which the UK leaves the European Union. The question therefore applies if the UK leaves the European Union without a withdrawal agreement regardless of the actual date.

- **Q&A 103**: This question considers how issuers who have chosen the UK as their home member state should choose a new home member state; and

- **Q&A 104**: This question clarifies the status within the European Union / EEA EFTA of prospectuses approved by the United Kingdom's Financial Conduct Authority ("**FCA**") while the United Kingdom was a Member State.

The Q&As can be accessed here.

(ii) European Parliament adopts a proposed regulation to amend Prospectus Regulation

On 18 April 2019, the European Parliament adopted, with amendments, the European Commission's proposed regulation to amend the Prospectus Regulation in relation to the

promotion of the use of Small to Medium Enterprise ("**SME**") growth markets (the "**Proposed Regulation**"). These amendments

- Introduce a requirement to draft a prospectus for a non-listed issuer which seeks admission to trading following an exchange offer, merger or division removing an unintended consequence of the existing exemptions;

- Extend the simplified prospectus regime to an issuer whose securities have been offered to the public and admitted to trading on an SME growth market continuously for at least two years with full compliance and which seeks admission to a regulated market of securities fungible with previously issued securities; and

- Add a new category to those who may opt to draw up an European Union growth prospectus of issuers (other than SMEs) offering shares to the public at the same time as seeking the admission of those shares to an SME growth market.

The European Parliament's position will now be forwarded to the Council of the European Union under the ordinary legislative procedure.

The Proposed Regulation can be accessed here.

(iii) Commission Delegated Regulations supplementing the Prospectus Regulation published in the Official Journal

On 21 June 2019, Commission Delegated Regulation (EU) 2019/979 and Commission Delegated Regulation (EU) 2019/980 (the "**Delegated Regulations**") were published in the Official Journal of the European Union. The Delegated Regulations supplement the Prospectus Regulation and were both adopted by the European Commission on 14 March 2019.

Commission Delegated Regulation (EU) 2019/979 deals with the regulatory technical standards on key information in the summary of prospectuses while Commission Delegated Regulation (EU) 2019/980 deals with the content, approval, format and scrutiny of prospectuses. The Delegated Regulations will enter into force on 11 July 2019 and apply from 21 July 2019.

Commission Delegated Regulation (EU) 2019/979 can be accessed here and Commission Delegated Regulation (EU) 2019/980 can be accessed here.

Central Bank of Ireland

(i) Central Bank issues letter to Regulated Financial Service Providers regarding their obligations under the Fitness and Probity Regime

On 8 April 2019, the Central Bank issued a "Dear CEO" letter (the "**Letter**") to all Regulated Financial Service Providers (the "**Firms**") regarding their obligations under the Central Bank's Fitness and Probity Regime. The focus of the Letter is to remind Firms of the significant obligations placed on them under the Central Bank's Fitness and Probity Regime and to highlight some of the main areas of compliance which the Central Bank have found to be deficient.

The Central Bank highlights in its Letter the shortcomings with regard to Firms ensuring that they do not allow persons to perform controlled function roles ("CF" roles) unless they are "satisfied on reasonable grounds" that the person complies with Fitness and Probity Standards.

The Central Bank notes that (i) Firms are required to conduct due diligence on an on-going basis to ensure employees performing CF roles comply with the Standards and (ii) where Firms have taken steps to address any fitness and probity concerns they have about an individual, that they should report those concerns to the Central Bank.

The Central Bank also observed that there were individuals acting in senior roles known as pre-approved controlled functions ("**PCFs**") without the Firm having first sought the Central Bank's approval. The Central Bank operates a "gatekeeper" regime under the Central Bank Reform Act 2010 which allows the Central Bank to assess if individuals being appointed to PCF roles are fit and proper.

The Letter reminds Firms that when a PCF applicant is completing their individual questionnaire they are to be candid, truthful and provide a full, fair and accurate response to all questions. Where applicants are uncertain of how to respond or uncertain as to the level of detail that are expected to provide, they should endeavour to provide as much information as possible noting that it is for the Central Bank to determine whether a fact is material to a PCF application. Separately, the Central Bank noted that individuals applying for PCF roles in low and medium impact Firms, may, at the discretion of the Central Bank, be subject to interview in order for the Central Bank to assess their suitability for the role.

The Central Bank lists a number of recommended steps that Firms should take which focus on Firms being aware of the quality and integrity of those in PCF/CF roles.

The Letter can be accessed here.

(ii) Speech of Mr. Michael Hodson, Director of Asset Management and Investment Banking, Central Bank of Ireland on 14 May 2019

On 14 May 2019, Mr. Michael Hodson, Director of Asset Management and Investment Banking of the Central Bank of Ireland gave a speech concerning reflections on Brexit, insights on supervision and enhancing diversity. The following points may be of particular interest to UCITS/AIFs and their delegates:

- **CP86**: Mr.Hodson noted that the Central Bank is currently considering the framework for the thematic review. Mr.Hodson confirmed that the Central Bank will issue a questionnaire to fund management companies and self-managed investment companies and based on responses, will carry out desk based reviews and onsite inspections for certain firms;

- **Benchmark Regulation**: The Central Bank has published a key facts document ("**KFD**") for those who seek to be authorised or registered as a benchmark administrator under Regulation (EU) 2016/1011 (the "**Benchmark Regulation**") which should be completed before any formal application is made. Application forms are due to be available by the end of the summer and formal applications will then be accepted. The application process will involve a face to face meeting with the Central Bank, followed by a KFD and once the Central Bank is satisfied with the information provided to it, it will then accept applications. The KFD can be accessed here; and

- **Outsourcing**: Mr.Hodson confirmed that outsourcing remains a focus of the Central Bank who will continue to monitor outsourcing arrangements put in place by regulated firms.

A transcript of Michael Hodson's speech can be accessed here.

(iii) Speech of Mr. Michael Hodson, Director of Asset Management and Investment Banking, Central Bank of Ireland on 11 June 2019

On 11 June 2019, Mr. Michael Hodson, Director of Asset Management and Investment Banking of the Central Bank of Ireland gave a speech concerning reflections on Brexit, supervisory developments and corporate governance. The following points may be of particular interest to UCITS/AIFs and their delegates:

- **Brexit**: Mr.Hodson noted that the migration of assets or clients to Irish authorised entities should be dealt with now (including any necessary repapering of agreements) to eliminate unnecessary and material operational and execution risks in the event of a hard Brexit. Mr.Hodson also emphasised the need for affected firms to engage with the migration from Crest to Euroclear Bank (which must be completed by March 2021) and the implications of a hard Brexit for European Union firms obliged to comply with share trading obligations under Article 23 of MiFIR;

- **Performance Fee**: Mr.Hodson indicated that the Central Bank intends to consult on a new framework for treatment, correction and compensation of errors for investment

funds. Mr.Hodson confirmed that the thematic review of UCITS performance fees have concluded but transparency and fees in the investment fund sector remain a supervisory priority; and

- **Corporate Governance**: Mr.Hodson highlighted an industry letter on the topic of corporate governance will be issued by the Central Bank in the coming months.

A transcript of Michael Hodson's speech can be accessed here.

(iv) Central Bank uses its product intervention powers for first time to ban sales of binary options to retail investors and restrict the sale of CFDs

On 12 June 2019, the Central Bank of Ireland announced measures to ban the sale of binary options to retail investors and restrict the sale of contracts for difference ("**CFDs**").

This marks the first time that the Central Bank has used its product intervention powers, introduced in 2018, which allow the Central Bank to restrict or prohibit the sale of certain types of products. The Central Bank had issued a warning to investors on CFDs and binary options in March 2018.

The Central Bank's product intervention powers were introduced in Article 42 of the Markets in Financial Instruments Regulation ("**MiFIR**") (Regulation (EU) No 600/2014) which came into effect on 3 January 2018. These powers allow the Central Bank to prohibit or restrict the marketing, distribution or sale of a financial instrument, structured deposit or a type of financial activity or practice.

The Central Bank must be satisfied on reasonable grounds that the financial instrument, structured deposit, financial activity or practice gives rise to significant investor protection concerns, poses a threat to the orderly functioning and integrity of financial markets or has a detrimental effect on the price formation mechanism in the underlying market. The measure must be proportionate and not have a discriminatory effect on services or activities provided from another European Union Member State.

The product intervention measures will prohibit the marketing, distribution or sale of binary options to retail investors. In respect of CFDs, the relevant measure will restrict the distribution, marketing or sale of CFDs in respect of retail investors. The restrictions will: (i) require that retail investors cannot lose more money than they put into their CFD account; (ii) prohibit the use of incentives by a CFD provider; (iii) place limits on leverage; (iv) introduce a margin close requirement; and (v) impose a standardised risk warning.

ESMA has imposed temporary product intervention measures in relation to binary options and CFDs since 2018. These ESMA measures have been issued on a rolling three months basis, with the current ESMA temporary measures due to expire on 2 July 2019 for binary options and 1 August 2019 for CFDs. The Central Bank's measures will enter into force on these dates.

On 18 June 2019 ESMA issued a press release concerning the Central Bank's measures. ESMA found the measures to be justified and proportionate. The Central Bank has carried out

these measures at the same as a number of other Member States and ESMA has approved all other Member State measures as they closely mirror the previous ESMA temporary measures.

The measures for binary options can be accessed here, the measures for CFDs can be accessed here and ESMA's press release can be accessed here.

(v) Government announce individual accountability framework legislation to be drafted

On 18 June 2019, the Government announced that new legislation is to be drafted so that the Central Bank's proposals for an Individual Accountability Framework can be introduced. These proposals will be included in the Central Bank (Amendment) Bill 2019.

According to the Government, the Heads of Bill of this new legislation will provide for the following:

- Senior Executive Accountability Regime which will place obligations on firms and their senior management to set out where responsibility for decision-making lies. If the Government adopts the Central Bank's proposals as set out in its report on "Behaviour and Culture of the Irish Retail Banks" (the "**Report**"), regulated entities will be required to prepare "Statements of Responsibilities" for each senior staff member falling within the regime's scope and to produce a "Responsibility Map" documenting key management and government arrangements;

- Conduct Standards for firms and individuals which will be imposed on regulated entities and on their staff and be enforceable if they are breached;

- Enhanced Fitness and Probity Regime which, if the Central Bank's proposals as per the Report are adopted, will result in regulated firms being required to annually certify that all individuals who are performing controlled functions are fit and proper;

- Breaking the "participation link" which currently requires the Central Bank to show that an individual "participated" in a breach by a regulated entity in order to pursue an individual under its Administrative Sanctions Procedure, so that individuals can be subject to the process without any requirement to link their behaviour back to some wrong-doing by the regulated firm; and

- Technical amendments to improve existing legislation and clarify certain statutory processes.

(vi) Central Bank publishes report on protected disclosures

On 28 June 2019, the Central Bank published its report on protected disclosures (the "**Report**"). The Report provides details of whistleblowing to the Central Bank in a 12 month period. The Central Bank is required to publish an annual report relating to the number of protected disclosures made to the Central Bank in the preceding year in addition to detailing the action taken in response to the disclosures made. The Central Bank received 150

protected disclosures between 1 July 2018 and 30 June 2019. There was an assessment of each disclosure and action was taken where appropriate.

The Report can be accessed here.

Euronext (formerly the Irish Stock Exchange ("**ISE**"))

(i) Euronext registered as a European Union benchmark Administrator

On 17 April 2019, Euronext announced that four of its market operators have been registered by ESMA as Benchmark Administrators under the new European Union Benchmark Regulation (Regulation (EU) 2016/1011). These newly registered market operators include:

- AFM in the Netherlands;
- AMF in France;
- CMVM in Portugal; and
- FSMA in Belgium.

An application for the authorisation of Euronext Dublin as a Benchmark Administrator is expected to be made later this year.

The press release can be accessed here.

(ii) Euronext Dublin publishes a code of listing requirements and procedures for investment funds

On 28 May 2019, Euronext Dublin published a code of listing requirements and procedures for investment funds (the "**Code**"). The Code will apply to any Fund or Sub-Fund which is proposing to apply or is listed to trade on the regulated market of Euronext Dublin.

The Code can be accessed here.

Anti-Money Laundering ("**AML**") / Counter-Terrorist Financing ("**CTF**")

(i) FATF publishes new consolidated assessment ratings

For the period 1 April 2019 to 30 June 2019, the Financial Action Task Force ("**FATF**") updated the consolidated assessment ratings which provide a summary of:

(1) the technical compliance; and

(2) the effectiveness of the compliance, of the assessed parties against the 2012 FATF Recommendations on combating money laundering and the financing of terrorism & proliferation. FATF also released new mutual evaluations for the same period.

The updated consolidated rating table can be accessed here and the full set of reports for each country can be accessed here.

(ii) EBA centralises information on administrative sanctions or measures under MLD4

The European Banking Authority ("**EBA**") has updated its website to provide links to national competent authorities' ("**NCAs**") websites. On the NCAs website users will be able to access information on sanctions and administrative measures NCAs have imposed for breaches of AML and CTF obligations under Directive (EU) 2015/849 (the "**Fourth Money Laundering Directive**" or "**MLD4**").

The EBA website with the links to NCAs websites can be accessed here.

(iii) Council of the European Union adopts Directive to fight non-cash payment fraud and is published in Official Journal

On 9 April 2019, the Council of the European Union formally adopted the directive on combating fraud and counterfeiting of non-cash means of payment (Directive (EU) 2017/0226) (the "**Directive**"). The Directive updates the existing rules to ensure that a clear, robust and technology-neutral legal framework is in place.

The Directive encompasses traditional non-cash payments such as bank cards or cheques and also new ways of making payment which have appeared over recent years, such as electronic wallets, mobile payments and virtual currencies.

On 10 May 2019, the Directive was published in the Official Journal of the European Union. Member states will have two years from the publication in the Official Journal of the European Union to implement the new provisions.

The Directive can be accessed here and the Council of the European Union press release can be found here.

(iv) FATF Ministers give FATF an open-ended Mandate

On 12 April 2019, the FATF adopted an open-ended mandate. The FATF members agreed to greater ministerial engagement and support for the FATF through regular and more frequent ministerial-level meetings, and by extending the term of the FATF Presidency, and by agreeing to a new funding model for the organization.

The FATF's new mandate recognises the need for the FATF to continue to lead global action to counter the threats of the abuse of the financial system by criminals and terrorists, and strengthens its capacity to respond to these threats.

The FATF mandate can be accessed here.

(v) European Parliament increases oversight powers of EBA and ESMA

On 16 April 2019, the European Parliament adopted the amended proposal for a Regulation which aims at preventing and combating money laundering and terrorist financing (the "**Proposed Regulation**"). The most notable changes include:

- **Helping consumers and sustainable finance** – ESMA has been entrusted with direct supervisory power in specific financial sectors, such as markets in financial instruments or benchmarks. ESMA will also coordinate national actions in the areas of Financial Technologies and promote sustainable finance, including when conducting European Union-wide stress tests to identify which activities could have a negative effect on the environment; and

- **New powers to improve fight against money laundering** - The Proposed Regulation strengthens the European Banking Authority's ("**EBA**") mandate, tasking it with preventing the financial system from being used for money-laundering and terrorist financing. Specifically, the EBA will now have the power to adopt measures to prevent and counter money laundering and terrorist financing. National authorities will be obliged to provide the EBA with information necessary to identify weaknesses in the European Union financial system regarding money laundering.

European Union ministers will now have to formally confirm the Proposed Regulation before the reforms enter into force.

The press release for the new rules can be found here and the Proposed Regulation can be accessed here.

(vi) European Parliament and Council of European Union adopt texts on Directive laying down rules facilitating the use of financial and other information for the prevention of crime

On 17 April 2019, the European Parliament adopted the texts for a Proposed Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences (the "**Proposed Directive**").

The Proposed Directive aims at allowing law enforcement authorities to quickly access crucial financial information for criminal investigations and improving cooperation between national authorities, Europol and the Financial Intelligence Units ("**FIUs**").

On 7 June 2019, the European Commission adopted the proposal. On this date Italy and Germany also released statements on the Proposed Directive. While they both broadly supported the purpose of the Proposed Directive, Italy had stressed the need for greater flexibility for its implementation while Germany had some issues with the legitimacy of national bodies accessing data as currently drafted.

On 14 June 2019 the Council of the European Union adopted the texts of the Proposed Directive. The Proposed Directive will enter into force 20 days after being published in the Official Journal of the European Union.

The Proposed Directive can be accessed here.

(vii) Commission Delegated Regulation with AML requirements applying to financial institutions with branches or subsidiaries in certain non-European Union countries published in Official Journal

On 14 May 2019 Commission Delegated Regulation (EU) 2019/758 (the "**Delegated Regulation**") was published in the Official Journal of the European Union. The Delegated Regulation supplements MLD4. The Delegated Regulation sets out the regulatory technical standards ("**RTS**") which are required to be taken where the local law of a third country does not permit the implementation of group-wide AML/CTF policies and procedures.

The Delegated Regulation imposes general obligations on every credit or financial institution that has an established branch or subsidiary in a third country. These obligations include:

- assessing AML/CTF risk, record it and keep it up-to-date;
- reflecting that risk assessment in its group-wide AML/CTF policies and procedures;
- obtaining senior management approval at group level for the risk assessment and updated policies and procedures; and
- providing targeted, effective AML/CTF training to relevant staff in the third country.

The Delegated Regulation also requires credit or financial institutions that have an established branch or subsidiary in a third country to inform the national competent authority when there is a restriction or prohibition, consider whether customer consent is appropriate to overcome the restriction and where necessary to take additional measures.

The Delegated Regulation sets out a number of additional measures which a credit or financial institution that has an established branch or subsidiary in a third country could take. These measures include:

- restricting the nature and type of financial products provided by the branch/subsidiary;
- ensuring other entities in the same group do not rely on customer due diligence carried out by the branch/subsidiary;
- carrying out enhanced reviews, including onsite checks and independent audits;
- ensuring approval from group senior management is sought for higher risk transactions;
- ensuring the branch/subsidiary determines the source and destination of funds;

- ensuring the branch/subsidiary carries out enhanced ongoing AML/CTF monitoring;

- ensuring the branch/subsidiary shares underlying suspicious transaction report information with the group including the facts and documents giving rise to the suspicion;

- carrying out enhanced ongoing monitoring of any customer of the branch/subsidiary or the customer's beneficial owner who has been the subject of suspicious transaction reports made by other group entities;

- ensuring the branch/subsidiary has effective systems and controls are in place for identifying and reporting suspicious transactions; and

- ensuring the branch/subsidiary keeps customer risk profiles and due diligence information up to date and secure as long as legally possible.

Where additional measures under the Delegated Regulation are required to be taken then the extent of such measures needs to be determined upon a risk-sensitive basis and the group needs to be able to demonstrate to its competent authority that the extent of the measures is appropriate. If the AML/CTF risk cannot be effectively managed by applying the additional measures then some or all of the operations of the branch or subsidiary are required to be closed down.

It should be noted that most third countries' legal systems will not prevent groups from implementing group-wide AML/CTF policies and procedures, in which case the additional measures set out in the Delegated Regulation will not be required. However, unless or until the ESAs produce a list of relevant third countries, then it will be up to each individual group to make its own determination.

The Delegated Regulation will apply from 3 September 2019.

The Delegated Regulation can be accessed here.

(viii) Central Bank publishes Guidance for Completion of the Schedule 2 Anti-Money Laundering Registration Form

On 20 May 2019, the Central Bank of Ireland published Guidance for the Completion of the Schedule 2 Anti-Money Laundering Registration Form (the "**Guidance**"). The purpose of the Guidance is to provide information to firms who are required to register with the Central Bank as a Schedule 2 firm.

The Guidance sets out:

- When the obligation to register as a Schedule 2 firm arises;

- Exemptions from Obligation to Register;

- How to register as a Schedule 2 firm; and

- Guidance on completing the registration form.

The Guidance also provides completion notes setting out any definitions that may be involved in the process.

The Guidance can be accessed here.

(ix) European Commission publishes report on the Regulation concerning the information accompanying the transfers of funds

On 19 June 2019, the European Commission published a report (the "**Report**") on the application of Chapter IV of Regulation (EU) 2015/847 on information accompanying transfers of funds (the "**Regulation**"). Chapter IV of the Regulation requires Member States to set up a regime of administrative sanctions and measures applicable to breaches of the Regulation allowing the transfer of funds to be more transparent. The European Commission is required to prepare this Report under Article 22(2) of the Regulation as the Member States have notified these sanctions and measures to the ESAs.

The Report details the state of play of the implementation by Member States of Chapter IV of the Regulation with particular focus on important horizontal implementation issues which the European Commission believes to be common to several Member States. The Report also provides a brief overview of the sanctioning activities of different national supervisory authorities.

The Report can be accessed here.

(x) FATF notes jurisdictions with AML/CTF deficiencies at third plenary meeting

On 21 June 2019, the FATF held its third plenary meeting. The FATF identified jurisdictions that they believe have AML/CTF deficiencies. The FATF notes the particular deficiencies of each jurisdiction and the strategic improvements that they must make to meet the necessary standards. The jurisdictions with deficiencies include the Bahamas, Cambodia and Pakistan among others.

The press release can be accessed here.

(xi) CRO announces that Central Register of Beneficial Ownership will be delayed

On 24 June 2019, the Companies Registration Office announced that the opening of the central register of beneficial ownership of companies (the "**RBO**") has been postponed temporarily. The RBO was due to accept filings commencing on 22 June 2019 which aimed at setting out details of the beneficial ownership of companies in Ireland. Companies are required to submit information in relation to their beneficial owners to the RBO before 22 November 2019.

The press release can be accessed [here](#).

(xii) FATF publishes reports to G20 on current and future focus of work

On 27 June 2019, the FATF published its report to the G20 for the G20 leaders' summit in Osaka, Japan (the "**Report**"). The Report provides an overview of FATF current and future AML/CTF work. The Report notes that the FATF has is focusing on the following:

- Strengthening the institutional basis, governance and capacity of the FATF;
- The FATF's Work Programme on Virtual Assets;
- Countering the financing of terrorism;
- Countering the Financing of Proliferation of Weapons of Mass Destruction;
- Improving Transparency and the Availability of Beneficial Ownership Information;
- Financial Technologies, Regulatory Technologies: Digital Identity; and
- De-risking by Banks.

The Report can be accessed [here](#).

Anti-Corruption Legislation & Law Reform

(i) European Parliament adopts proposed Directive to protect whistleblowers reporting on breaches of European Union Law

On 16 April 2019, the European Parliament formally adopted a proposed Directive on the protection of persons reporting on breaches of European Union law (the "**Proposed Directive**").

The proposal is part of a package of measures adopted by the European Commission on 23 April 2018. The package also includes: a 'Communication on strengthening whistleblower protection at European Union level' and two staff working documents setting out the European Commission's Impact Assessment on the proposal and an Executive Summary of the Impact Assessment.

It is expected that the Council of the European Union will formally adopt the proposed Directive at one of its next meetings, after which it will be published in the Official Journal of the European Union.

The Proposed Directive can be accessed [here](#).

Data Protection / General Data Protection Regulation ("**GDPR**") / Cyber Security

(i) Joint Committee of ESAs provide advice on risk management requirements and cyber resilience to European Commission

On 10 April 2019, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published two advices to the European Commission on the need for legislative improvements on information and communication technology ("**ICT**") risk-management requirements in the European Union financial sector and on the costs and benefits of a coherent cyber-resilience testing framework for significant market participants and infrastructures.

The advice regarding risk management requirements can be accessed here and the advice regarding cyber-resilience can be accessed here.

(ii) EDPB seeks public consultation on processing of personal data under GDPR

On 12 April 2019, the European Data Protection Board ("**EDPB**") announced that they are seeking public consultation on guidelines of Article 6(1)(b) of the General Data Protection Regulation, namely Regulation (EU) 2016/679 ("**GDPR**"). This article concerns the processing of personal data in the context of contracts for online services, irrespective of how the services are financed.

The guidelines will outline the elements of lawful processing under Article 6(1)(b) GDPR and consider the concept of 'necessity' for the performance of a contract and whether a requested service can be provided without the specific processing taking place.

The public consultation finished on 24 May 2019.

The guidelines for public consultation can be found here and the press release can be found here.

(iii) DPC examines right of rectification concerning diacritical marks

On 30 April 2019, the Data Protection Commissioner ("**DPC**") issued a note examining the right to rectification in the context of diacritical marks. The right of rectification allows individuals to have inaccurate personal data rectified, or completed if it is incomplete. In particular, this note examined the case of recording of names of individuals that contain diacritical marks (for example, fadas in the Irish language).

The DPC determined that there must be a balancing of the purpose for processing with the data subject's fundamental rights. It should be noted that this guidance is not binding and the DPC emphasized that any complaint would be judged on its individual merits.

The note can be accessed here.

(iv) European Commission publishes guidance on the interaction of free flow of non-personal data with the European Union data protection rules

On 29 May 2019, the European Commission published guidance on the interaction of free flow of non-personal data with the European Union data protection rules. The Regulation on the free flow of non-personal data (Regulation (EU) 2018/1807) (the "**Regulation**") has come into effect in Member States. This guidance aims to help users, in particular small and medium-sized enterprises (**SMEs**), understand the interaction between this new regulation and the GDPR.

The Regulation prevents European Union Member States from putting laws in place that unjustifiably force data to be held solely inside national territory. The guidance gives examples on how the regulation and the GDPR should be applied when a business is processing datasets composed of both personal and non-personal data.

The press release can be accessed here.

(v) EPDS summary opinion on the negotiating mandate of an EU-US agreement on cross-border access to electronic evidence published in Official Journal

On 3 June 2019, a summary of the opinion of the European Data Protection Supervisor ("**EDPS**") on the negotiating mandate of a European Union-United States agreement on cross-border access to electronic evidence (the "**Opinion**") was published in the Official Journal of the European Union. The Opinion arises as a result of the European Commission recently issuing a recommendation for a Council Decision authorising the opening of negotiations to conclude an international agreement with the United States on cross-border access to electronic evidence.

The Opinion aims at solving the issue of access to content and non-content data held by service providers in the European Union and the United States. The EDPS made the following conclusions:

- The EDPS supports the efforts to identify innovative approaches to obtain cross-border access to electronic evidence quickly and effectively;

- The EDPS agrees that the envisaged agreement should be conditional on strong protection mechanisms for fundamental rights;

- The EDPS believes that further safeguards are needed to ensure that the final agreement meets the proportionality condition. The involvement of judicial authorities designated by the United States is recommended to review compliance of the orders with fundamental rights and raise grounds for refusal; and

- The EDPS also lists more specific recommendations including the definition and types of data covered by the envisaged agreement and the categories of data subjects concerned.

The Opinion of the EDPS can be accessed here.

(vi) EDPB holds eleventh plenary session

On 5 June 2019, the EDPB issued a press release detailing its eleventh plenary session held on 4 June 2019. During this session the following was discussed:

- **Guidelines on Codes of Conduct**: The EDPB adopted a final version of the Guidelines on Codes of Conduct. The aim of these guidelines is to provide interpretative assistance and practical guidance when applying Articles 40 and 41 GDPR which deal with the issuing and monitoring of codes of conduct. The EDPB intends for the guidelines to help clarify the rules and procedures involved in the submission, approval and publication of codes of conduct at both national and European Union level;

- **Annex to the Guidelines on Certification**: The EDPB adopted a final version of annex 2 to the Guidelines on Certification which gives extra detail to certain sections in the guidelines such as the obligation to keep records of the processing activities. The primary aim of these guidelines is to identify overarching criteria which may be relevant to all types of certification mechanisms issued in accordance with Articles. 42 and 43 GDPR which deal with certification and the relevant bodies. The annex contains a non-exhaustive list of criteria used to determine certification; and

- **Annex to the Guidelines on Accreditation**: The EDPB adopted a final version of the annex to the Guidelines on Accreditation. The aim of these guidelines is to assist Member States, supervisory authorities and national accreditation bodies to establish a harmonised and consistent baseline for the accreditation of certification bodies that issue certification in accordance with Article 43 GDPR. The annex provides guidance on the additional requirements for the accreditation of certification bodies to be established by the supervisory authorities.

The press release can be accessed here.

(vii) DPC provides guidance on the transfer of personal data to third countries or international organisations

On 24 June 2019, the Data Protection Commission issued a note providing guidance on the transfer of personal data to third countries or international organisations (the "**Note**"). The Note focuses on providing summary guidance on the provisions of Chapter V of the GDPR which deals with the transfer of personal data to third countries or international organisations.

The Note provides guidance on:

- Transfers on the basis of an adequacy decision;

- The types of agreements that will satisfy transfers subject to appropriate safeguards; and

- Derogations for specific situations.

The Note can be accessed here.

(viii) DPC provides guidance on data processing contracts

On 24 June 2019, the Data Protection Commission issued a note (the "**Note**") providing guidance on contracts governing the processing of personal data when a data processor is engaged to process personal data on the instruction of a data controller (a "**Data Processing Contract**").

The Note provides guidance on:

- The context of the obligation on controllers and processors to enter into a data processing contract under the GDPR;
- When data controllers and data processors need to enter into a data processing contract; and
- The minimum provisions which should be included in a data processing contract.

The Note can be accessed here.

The International Swaps and Derivatives Association ("**ISDA**")

(i) ISDA publishes Master Regulatory Disclosure Letter

On 7 June 2019, ISDA published a Master Regulatory Disclosure Letter (the "**Letter**"). The Letter consolidates content previously published by ISDA and inserts new questions. The Letter enables counterparties to notify each other of their status for clearing and other regulatory requirements under EMIR (as amended by EMIR Refit). The Letter is used as a method of communicating classification status between counterparties and is used to determine what regulatory requirements are applicable.

The Letter can be accessed here.

Brexit

(i) ISDA publishes letter to UK HM Treasury on the impact of Brexit on EEA derivatives trading venues under EMIR and MiFIR

On 9 April 2019, ISDA published a letter to the HM Treasury in the United Kingdom on behalf of a number of groups including the Alternative Investment Management Association ("**AIMA**") concerning the recognition of EEA derivatives trading venues under EMIR and MiFIR as they apply in the United Kingdom after Brexit (the "**Letter**").

The Letter details their concern of the potential impact on United Kingdom market participants and European derivatives markets if HM Treasury does not take urgent action

with respect to the recognition of EEA derivatives trading venues under EMIR and MiFIR as they apply in the United Kingdom in a 'no-deal' scenario.

The Letter also outlines the potential negative implications if the Financial Conduct Authority ("**FCA**") does not grant transitional relief using its proposed temporary transitional powers.

The Letter can be accessed here.

(ii) FCA extends notification window for temporary permissions regime to 30 October 2019

On 28 May 2019, the Financial Conduct Authority ("**FCA**") updated its webpage on the temporary permissions regime ("**TPR**") to announce an extension to the notification window for firms and funds wishing to enter into the TPR until the end of 30 October 2019. The extension to the previous deadlines for firms and funds who wish to enter the TPR regime comes in light of the European Council and United Kingdom Government's agreement to an extension of the Article 50 process.

Any fund managers that, as a result of this extension, wish to update their notification should email recognisedcis@fca.org.uk by the end of 16th October 2019 at the latest confirming this and including their FRN.

Further information on the TPR and how to register is provided on the updated FCA website which can be accessed here.

While the FCA will acknowledge the request to update a notification, it will not be possible to submit a revised notification until after 16th October 2019 at which stage the FCA will advise what steps should be taken.

Fund managers should continue to follow the current process via their home member state regulator for registering new funds.

The FCA has also updated the guide to making notifications of an intention to use the TPR which can be accessed here.

(iii) Central Bank issues updated Brexit FAQ for consumers

During the period 1 April 2019 to 30 June 2019, the Central Bank issued an updated Brexit related FAQ document providing general information to consumers on the potential implications of Brexit. The Central Bank's FAQ for consumers discusses a variety of topics including:

- The Central Bank's work in preparation for Brexit;
- The impact of Brexit on financial services firms providing services to Irish customers;

- The Central Bank's proposed approach to issues concerning Irish consumers who have insurance policies with UK insurers or brokers;
- The effects of Brexit on Irish banks; and
- The effects of Brexit on the Irish economy.

A copy of the Central Bank's updated FAQ for consumers can be found here.

(iv) Central Bank issues updated Brexit FAQ for financial services firms

During the period 1 April 2019 to 30 June 2019, the Central Bank issued an updated Brexit related FAQ document providing general information to financial services firms considering relocating their operations from the UK to Ireland. The Central Bank's FAQ for financial services firms addresses a number of topics including:

- The Central Bank's approach to authorisation, its timelines and requirements;
- The impact of Brexit on existing Irish authorised firms;
- The Central Bank's proposed approach to issues concerning a firm's substance in Ireland; and
- The Central Bank's approach to outsourcing to the UK firms.

It also deals with other questions such as whether Ireland has a similar regime to the UK's Senior Managers Regime and Certification Regimes. In addition, the document addresses the Central Bank's views on centralised risk management in the UK or elsewhere and whether a firm's key employees can hold more than one position before the entity goes live.

The FAQ provides links to the Central Bank's relevant web-site application documentation as well as explanatory material on the authorisation processes for the different regulatory regimes.

A copy of the Central Bank's updated FAQ for financial services firms can be found here.

Irish Collective Asset-management Vehicle ("**ICAV**")

(i) Minister for Finance updates "relevant jurisdictions" relating to the migration of investment companies and ICAVS in and out of Ireland

On 15 May 2019, the Minister for Finance made regulations to prescribe new countries as "relevant jurisdictions" for the purposes of allowing foreign investment companies migrate into Ireland and continue as an investment company or ICAV under Irish law. These regulations also allow Irish investment companies and ICAVs migrate to such jurisdictions and to continue under the laws of those jurisdictions.

The jurisdictions covered are the BVI, Cayman Islands, Jersey, Bermuda and Guernsey. It should be noted that the BVI, Jersey and Cayman Islands were already prescribed as “relevant jurisdictions” for the purposes of the ICAV Act.

The regulations amending the Companies Act 2014 can be accessed here and here and the regulations amending the ICAV Act can be accessed here and here.

Sustainable Finance

(i) Council of the European Union announces amendments to proposed regulation for a taxonomy framework to facilitate sustainable investment

On 4 April 2019, the Council of the European Union announced that it had made a significant number of amendments to the proposed regulation for a framework to facilitate sustainable investment (the “**Proposed Regulation**”) as adopted by the European Parliament on 28 March 2019.

The Proposed Regulation seeks to establish a European Union-wide taxonomy with the objective of providing businesses and investors with uniform language to determine what degree economic activities can be considered environmentally-sustainable. The amendments change the focus of the Proposed Regulation from mostly focusing on preventing carbon exposures to putting in safeguards for other environmental objectives, such as biodiversity and energy efficiency.

On 24 June 2019, the Council of the European Union published a progress report on the Proposed Regulation. The Council of the European Union is continuing to work towards a final text as there is still some debate over what economic activities should be captured.

The Proposed Regulation can be accessed here and the progress report can be accessed here.

(ii) The European Parliament adopts proposed Regulation on disclosures relating to sustainable investments and sustainability risks

On 18 April 2019, the European Parliament published the provisional edition of the proposed regulation on disclosures relating to sustainable investments and sustainability risks (the “**Proposed Regulation**”).

The Proposed Regulation aims to integrate environmental, social and governance (“**ESG**”) considerations when taking decisions on investments in order to make investments more sustainable. Under the Proposed Regulation, UCITS, AIFMs, EuSEF managers and EuVECA managers that receive a mandate from their clients or beneficiaries to take investment decisions on their behalf would integrate ESG into their internal processes and inform their clients in this respect.

The Council of the European Union is due to consider the Proposed Regulation, if not objected then the Regulation will enter into force twenty days after it is published in the Official Journal of the European Union.

The provisional edition of the text can be accessed here.

(iii) ESMA publishes final report on integrating sustainability risks and factors in the UCITS Directive and AIFMD

On 3 May 2019, ESMA published its final report on technical advice to the European Commission on integrating sustainability risks and factors into the UCITS Directive (Directive 2009/65/EC as amended) and AIFMD (Directive 2011/65/EC as amended). ESMA consulted on the draft technical advice it published in December 2018 and the final report includes a number of general comments arising from the consultations and ESMA's response.

The final report has been published in response to the European Commission requesting technical advice from ESMA in relation to its sustainable finance legislative proposals.

ESMA's view is that the integration of sustainability risks within the UCITS Directive and the AIFMD should follow a principles-based approach similar to that already followed for other relevant risks. ESMA found through a public consultation that a majority of respondents agreed with their view and they pointed to the fact that there are several ongoing legislative procedures relating to Sustainable Finance and noted that prescriptive requirements in relation to sustainability risks at this stage may result in potential regulatory inconsistencies and legal uncertainty.

The proposals put forward by ESMA intend to impose obligations on AIFMS and UCITS managers to incorporate sustainability risks (being the risk of fluctuation in the value of positions in the value of positions in a fund's portfolio due to ESG factors) in their due diligence processes and to assess and manage the sustainability risks stemming from their investments.

The final report proposes changes to the AIFMD and UCITS framework in the following areas:

- General organisational requirements;
- Resources;
- Senior management responsibilities;
- Conflicts of interest;
- Due diligence requirements; and
- Risk Management.

ESMA will now co-operate with the European Commission with a view to transforming the technical advice into formal delegated acts.

The press release can be accessed here.

(iv) ESMA establishes new co-ordination network on sustainability

On 23 May 2019, ESMA published a press release announcing it has established a new co-ordination network on sustainability ("**CNS**").

The CNS aims to:

- Co-ordinate with national competent authorities' ("**NCAs**") to work on sustainability; and
- Be responsible for the development of policy in this area, with a strategic view on issues related to integrating sustainability considerations into financial regulation.

In the press release, ESMA noted that the European Union envisages a shift towards a more sustainable financial system in the medium and long term. ESMA and the European Union securities regulators must therefore make sustainable finance an integral part of their supervisory and enforcement activities. For this reason, ESMA's work on sustainable finance supports the European Commission's sustainability action plan in the areas of investment services and investment funds.

The press release can be accessed here.

Irish Property Funds

(i) Potential Tax Changes for Irish Property Funds

On 21 May 2019, the Taoiseach Leo Varadkar commented that Irish property funds may face further tax changes later this year. The Taoiseach confirmed that Finance Minister Paschal Donohoe is to carry out a review of their tax treatment in advance of the budget in October. The Taoiseach noted that the tax incentives involved with such funds were brought in to achieve a particular purpose and they should be removed when they are no longer necessary. The announcement that the tax treatment of Irish funds will be reviewed again is likely to be of interest to managers, investors and the Irish real estate sector.

Irish Investment Limited Partnerships (Amendment) Bill 2019

(i) Investment Limited Partnerships (Amendment) Bill 2019

On 18 June 2019, the Investment Limited Partnerships (Amendment) Bill 2019 (the "**Bill**") completed Dáil Éireann, First Stage (whereby the Bill is initiated or presented to the House). The Bill is to amend the Investment Limited Partnerships Act, 1994, which governs the establishment and operation of regulated investment limited partnerships in Ireland.

The Bill, when enacted, is expected to provide for general updates and enhancements to the existing partnership legislation, to make certain technical amendments to the Irish Collective Asset-management Vehicles Act, 2015 and to provide for related matters.

The Bill's progress can be tracked through a number of stages in both Houses of the Irish Parliament here.

Dillon Eustace
30 June 2019

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