# Funds Quarterly Legal and Regulatory Update

**Period covered: 1 October 2021 – 31 December 2021**

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### APPROACHING DEADLINES

- **UCITS & AIFMD**
- **EMIR & SFTR**
- **CROSS-BORDER DISTRIBUTION FRAMEWORK**

### PRIIPS

- **OPERATIONAL RESILIENCE**
- **CENTRAL BANK**

### DATA PROTECTION

- **SUSTAINABLE GROWTH**
- **MONEY MARKET FUNDS**

### MISCELLANEOUS
1. APPROACHING DEADLINES

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<td>Q1 2022</td>
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<td>31 January 2022 (Approx.)</td>
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<td>31 January 2022</td>
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<td>1 February 2022</td>
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2. UCITS & AIFMD

2.1 Central Bank updates Q&As on application of AIFMD

On 1 October 2021, the Central Bank of Ireland (Central Bank) published the 42nd edition of its publication entitled “AIFMD Questions and Answers” (Q&As) on the application of Directive 2011/61/EU (Alternative Investment Fund Managers Directive or AIFMD). The new Q&As clarify the current position for qualifying investor alternative investment funds (QIAIFs) intending to invest more than 50% of net assets and for retail investor alternative investment funds (RIAIFs) intending to invest more than 30% of net assets in a UK domiciled fund (including UK UCITS).

The Central Bank has confirmed that it is currently considering whether an Irish QIAIF can invest more than 50% of net assets in a UK domiciled fund and notes that for the period while it is under consideration, it will not treat UK alternative investment funds (AIFs), which will include UK undertakings for collective investment in transferable securities (UCITS), as “ineligible” for such purposes. It does, however, confirm that UK AIFs must be “treated in the manner of a category 2 investment fund” as detailed in the Central Bank’s AIF Rulebook during this period.
In addition, the Central Bank has confirmed that it is considering whether an Irish RIAIF can invest more than 30% of net assets in a UK domiciled fund. Equivalent to the position adopted for QIAIFs, during this period RIAIFs must treat such a fund as a “category 2 investment fund” for the purposes of the requirements set down in the Central Bank’s AIF Rulebook.

A copy of the revised AIFMD Q&A can be accessed here.

A copy of the Central Bank’s AIF Rulebook can be accessed here.

On 29 October 2021, the Central Bank published the 43rd edition of its publication entitled “AIFMD Questions and Answers” on the application of AIFMD. The new Q&As update the Central Bank’s list of the types of non-financial instrument asset classes which may be safe-kept by a depositaries of assets other than financial instruments (DAoFI). This list of permissible non-financial asset classes has been updated to now include aircrafts.

A copy of the revised AIFMD Q&A can be accessed here.

On 20 December 2021, the Central Bank published the 44th edition of its publication entitled “AIFMD Questions and Answers” on the application of AIFMD. The new Q&As set down the Central Bank’s expectations in respect of any arrangement involving a non-discretionary investment advisor which provides services to an Irish QIAIF.

The Central Bank notes that in the case of private equity QIAIFs or other QIAIFs which invest in illiquid assets, such a non-discretionary investment advisor may provide a range of services to the alternative investment fund manager (AIFM) in respect of such QIAIFs not typically provided for in other investment strategies. In such circumstances, the Central Bank expects the prospectus of the QIAIF to incorporate appropriate disclosures on the fees paid to the investment advisor and the services being provided by the non-discretionary investment advisor to provide context for the fees which that entity receives out of the assets of the QIAIF.

The Central Bank confirms that it expects any such non-discretionary investment advisor to only perform a role that is advisory in nature. It also expects that the AIFM of the QIAIF should be able to demonstrate this to be the case when requested by the Central Bank.

The news Q&As additionally confirm that existing multi-manager RIAIFs have until 1 January 2023 to adapt their performance fee methodologies to ensure that no performance fee is payable to an investment manager in respect of the portion of the portfolio managed by that investment manager in respect of which there has been outperformance in circumstances where there is a global underperformance of the relevant fund.

All multi-manager RIAIFs established after 20 December 2021 must comply with this requirement from date of authorisation/approval by the Central Bank.

A copy of the revised AIFMD Q&A can be accessed here.

2.2 Central Bank updates Q&As on application of UCITS Directive

On 1 October 2021, the Central Bank published the 34th edition of its publication entitled “UCITS Questions and Answers”, in which the Central Bank clarifies the following:

- A UCITS or RIAIF marketing its units to retail investors in Ireland will be considered to comply with Schedule 6(11) of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2019 (Central Bank UCITS Regulations) and Chapter 9.36 of the revised Consumer Protection Code 2012 where the relevant marketing communication contains the statement that “past performance does not predict future returns”, being the statement required to be included in marketing communications under Paragraph 47 of the European Securities and Markets Authority (ESMA) Guidelines;
In complying with the requirement set down in Regulation 54(3) of the Central Bank UCITS Regulations, it is possible to use a shorter disclaimer as described in Paragraph 8 of the ESMA Guidelines, provided that it is only used in the specific instances set down in that paragraph.

A copy of the revised UCITS Q&A can be accessed here.

On 29 October 2021, the Central Bank published the 35th edition of its publication entitled “UCITS Questions and Answers”. The Central Bank explains that, with effect from the date of publication, a UCITS with a financial year end of 31 December 2021 which is implementing changes to its performance fee methodology to comply with the ESMA Guidelines on performance fees in UCITS and certain types of AIFs (ESMA Performance Fee Guidelines) may elect to make either:

- Two key investor information document (KIID) filings, one to reflect changes to the UCITS arising from implementation of ESMA’s Performance Fee Guidelines and one to meet KIID filing obligations arising under Article 23 of Commission Regulation 583/2010 (Commission Regulation); or

- A single filing to meet KIID filing obligations arising under Article 23 of the Commission Regulation by 22 February 2022.

The Central Bank also notes that a UCITS which elects for the option outlined under (ii) must nevertheless ensure that prospective investors are provided with sufficient information in relation to changes to the UCITS arising from the implementation of ESMA’s Performance Fee Guidelines in order to help them to reach an informed investment decision.

A copy of the revised UCITS Q&A can be accessed here.

On 20 December 2021, the Central Bank published the 36th edition of its publication entitled “UCITS Questions and Answers”. Within which it addresses the payment of performance fees in multi-manager UCITS in the case of (i) existing UCITS and (ii) UCITS established after 20 December 2021.

The Central Bank has confirmed that existing multi-manager UCITS which have a performance fee structure under which an individual investment manager can receive a performance fee based on the performance of the part of the portfolio managed by it, regardless of the performance of the UCITS as a whole, will have until 1 January 2023 to adapt their performance fee methodologies to align with Section XI, Question 5 of the ESMA Q&A on the UCITS Directive (ESMA Q&A), which provides as follows:

“Based on paragraph 37 of the guidelines, performance fees:

- should be paid only where positive performance has been accrued during the performance reference period; and

- could be paid in case the fund has overperformed the reference benchmark but had a negative performance.

The above also applies in case of delegation by the authorised management company to different delegated portfolio managers. Therefore, in case of a global underperformance of the fund, performance fees should not be paid to those delegated portfolio managers who have overperformed.”

The Central Bank has also made changes to its fund application forms and checklists and has provided that all multi-manager UCITS established after 20 December 2021 must comply with the ESMA Q&A immediately.

The Central Bank has noted that it will update its existing UCITS Regulations to reflect this position in due course.

A copy of the revised UCITS Q&A can be accessed here.
A copy of ESMA’s Q&A can be accessed here.

2.3 Publication of the European Union (Covered Bonds) Regulations 2021

On 3 November 2021, the European Union (Covered Bonds) Regulation 2021 (Irish Covered Bonds Regulation) was signed into law. The Irish Covered Bonds Regulation gives effect to Directive (EU) 2019/2162 (Covered Bonds Directive) into Irish law and it enters into force on 8 July 2022.

The Covered Bonds Directive creates a uniform framework setting down specific structural features which must be satisfied by bonds issued by EU credit institutions which are to be classified as “covered bonds” under the UCITS framework.

Covered bonds issued before 8 July 2022 are not affected by the new framework. From 8 July 2022, UCITS will only be able to avail of the higher investment restrictions applicable to covered bonds where they are satisfied that the relevant bonds meet the specific criteria as set down in the Covered Bonds Directive.

For a detailed analysis of the Covered Bond Directive and its impact on UCITS, please refer to our in-depth client briefing on the topic.

A copy of the Irish Covered Bonds Regulation can be accessed here.

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<th>Key Action Points</th>
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<td>Managers of Irish domiciled UCITS should ensure that internal investment processes are updated in advance of 8 July 2022 to ensure that any covered bond issued after that date and acquired by the UCITS meets the specific criteria set down in the Covered Bonds Directive in order to be able to avail of the higher investment limits applicable to covered bonds as set down in the Irish UCITS Regulations.</td>
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2.4 Central Bank issues consultation paper on Irish domiciled property funds

On 25 November 2021, the Central Bank published its 145th consultation paper entitled “Macroprudential Measures for the Property Fund Sector” (Consultation Paper) in which it outlined proposals to impose certain leverage limits on Irish domiciled funds which invest over 50% directly or indirectly in Irish property assets (In-Scope Funds).

The Consultation Paper proposes that In-Scope Funds should comply with additional guidance to limit liquidity mismatch. The Central Bank explains in the Consultation Paper that it believes that the proposed measures are necessary in order to increase the resilience of such funds to ensure that they can absorb rather than amplify any future adverse shocks in the Irish commercial real estate (CRE) market.

The Central Bank propose that existing In-Scope Funds will have 3 years from the date on which any finalised guidance comes into force within which to comply with new leverage limits. The consultation process runs until 18 February 2022.

For an in-depth analysis of the Consultation Paper and possible implications for In-Scope Funds, please refer to our recent client briefing on the topic.

A copy of the Consultation Paper can be accessed here.

2.5 European Commission publishes proposal to amend UCITS and AIFMD Frameworks

On 25 November 2021, the European Commission published its legislative proposal for a Directive amending both the UCITS and AIFMD frameworks (Proposal) following a public consultation launched by it late last year.
In the Proposal, the European Commission proposes to permit third country arrangements to continue, subject to such arrangements complying with minimum substance requirements and enhanced supervision of such third country delegation arrangements by national competent authorities (NCAs) and ESMA. Aside from new delegation requirements, the Proposals also include:

- New rules governing the use of liquidity management tools;
- New harmonised regime for AIFMs managing loan-originating AIFs;
- Changes to the depositary regime including; (i) a proposal to allow an AIF to appoint a depositary located in a different EU Member State to it; and (ii) to provide that central securities depositories (CSDs) providing custody services are deemed delegates of the depositary;
- Enhanced supervisory reporting regime/reporting to investors;
- Proposals in relation to permitted ancillary activities; and
- Proposals prohibiting the marketing within the EU of Non-EU AIFS which are located in “black-list” countries.

For a detailed analysis of the Proposal and its potential impacts for UCITS management companies and AIFMs and their funds, please refer to our in-depth client briefing on the topic.

A copy of the Proposal can be accessed here.

2.6 ESMA updates Q&As on application of UCITS Directive

On 26 November 2021, ESMA published a revised version of its Q&As on the application of Directive 2009/65/EC (as amended) (UCITS Directive) to include a new Q&A on whether: (i) fee rebate arrangements put in place by UCITS management companies (each a UCITS Management Company) with individual investors; or (ii) fees paid from the UCITS Management Company's own resources under side letters entered into with institutional investors fall within the inducements restrictions under Article 29 of the Commission Directive 2010/43/EU.

In its response, ESMA notes that Article 29 lays down strict conditions for fees or commissions paid or received to/from a third party in relation to the activity of investment management and administration in a UCITS. It also states that as management fee discount arrangements entail payments to certain investors based on the fees charged by the UCITS Management Company to remunerate investment management and/or administration activities, these arrangements should be analysed as payments for the activity of the investment management and administration of the UCITS.

Accordingly, it is of the view that inducement rules must be satisfied in these scenarios. It notes that UCITS Management Companies should be able to demonstrate that: (i) any such arrangements “enhance the quality of the relevant service” for the UCITS to the benefit of all investors; and (ii) all investors pay their fair share in the functioning of the UCITS (taking into account the management fee discount) and the UCITS cost structure. Those arrangements should not have a negative impact on other investors. In the case of Irish UCITS Management Companies, such documented justifications must be capable of being provided to the Central Bank upon request.

A copy of the revised UCITS Q&A can be accessed here.

On 17 December 2021, ESMA published a revised version of its Q&As on the application of the UCITS Directive to include two new Q&A on issuer concentration.
It its response, ESMA confirmed that under Article 54(1) of the UCITS Directive a UCITS cannot invest up to 100% of their assets in transferable securities or money markets instruments that are not issued nor guaranteed by a Member State, one or more of its local authorities, a third country or a public international body to which one or more Member States belong. ESMA also noted that Article 54(1) of the UCITS Directive "unambiguously provides that if a UCITS holds more than six issues in transferable securities and money market instruments issued or guaranteed by a Member State, one or more of its local authorities, a third country or a public international body to which one or more Member States belong, all the issues should respect the 30% limit (i.e. even if the UCITS holds more than 6 issues)".

In the same edition of its Q&A on UCITS, ESMA considered whether, in the case of a UCITS which has a hedged share class in a different currency, unrealised foreign exchange (FX) profits and losses should be counted towards the net asset value (NAV) of the hedged share class and accordingly be taken into account when calculating the counterparty risk limit of Article 52(1) of the UCITS Directive. In its response, ESMA noted that FX forwards are over the counter (OTC) instruments, meaning when UCITS invest in this type of instrument for currency hedging purposes in a share class, they should comply with the counterparty risk limits in Article 52(1) in respect to the NAV of the share class as provided for in Paragraph 26a of ESMA’s Opinion on Share Classes of UCITS. Therefore, FX profits and losses should be counted towards the NAV of the hedged share class of the UCITS and taken into account when calculating the counterparty risk limits of Article 52(1) in respect to the NAV of the hedged share class.

A copy of the revised UCITS Q&A can be accessed here.

A copy of ESMA’s Opinion on Share Classes of UCITS can be accessed here.

2.7 ESMA updates Q&As on application of AIFMD

On 17 December 2021, ESMA published a revised version of its Q&As on the application of AIFMD to include a new Q&A on whether managers of undertakings which invest in crypto-assets are subject to AIFMD.

In its response, ESMA notes that it will be necessary in each case to assess whether the relevant undertaking meets the definition of an “AIF” set down in the AIFMD, taking into account ESMA’s guidelines on key concepts of the AIFMD (Guidelines). It notes that AIFs can, subject to any applicable requirements imposed at national level, invest in both traditional and alternative asset classes as long as the AIFM can ensure compliance with the AIFMD.

It also reminds AIFMs and investors of the high risks involved in investments in crypto assets as previously articulated in a statement from the European Supervisory Authorities (ESAs) on February 2018.

A copy of the revised AIFMD Q&A can be accessed here.

A copy of the Guidelines can be accessed here.

A copy of the ESAs warning statement can be accessed here.

3. EMIR & SFTR

3.1 EBA consults on draft RTS on initial margin model validation under EMIR

On 4 November 2021, the European Banking Authority (EBA) published a consultation paper on its draft regulatory technical standards (RTS) on Initial Margin Model Validation (IMMV) under Regulation (EU) No 648/2012 (European Market Infrastructure Regulation or EMIR) (Consultation Paper). The Consultation Paper sets out the supervisory procedures for initial and ongoing validation of initial margin models.

The deadline for responses is 4 February 2022.
For a detailed analysis of the EMIR IMMV and its effect on Irish UCITS / AIFs, please refer to our in-depth client briefing on the topic.

A copy of the Consultation Paper can be accessed here.

3.2 ESMA final report on RTS clearing and derivative trading obligations under EMIR and MiFIR in light of benchmark transition

On 18 November 2021, ESMA published a final report on draft RTS on the clearing obligations (CO) and derivative trading obligations (DTO) in view of the benchmark transition to risk free rates under Article 5(2) of EMIR and Article 32 of Regulation (EU) No 600/2014 (Markets in Financial Instruments Regulation or MiFIR), following public consultation in July 2021.

ESMA's proposed amendments to the draft RTS aim to ensure a smooth benchmark transition while maintaining an effective scope for the CO and DTO, in line with the G20 objectives. In particular, it is proposed that the scope of the CO and DTO be amended to accompany the benchmark transition for OTC derivatives away from Euro Overnight Index Average (EONIA) and the London Inter-Bank Offered Rate (LIBOR) to introduce Risk-Free Rates, which include the Euro Short-Term Rate (€STR) and Secured Overnight Financing Rate (SOFR).

ESMA submitted draft RTS, set out in Annex II of the final report, to the European Commission. Following their endorsement, they will then be subject to non-objection by the European Parliament and the Council of the EU.

A copy of the final report can be accessed here.

3.3 ESMA updates Q&As on EMIR implementation

On 19 November 2021, ESMA published a revised version of its Q&As on the implementation of EMIR to include new Q&As concerning the calculation of the clearing threshold and the definition of “hedging”, as set out below:

The two new revised Q&As confirm as follows:

- Where a financial counterparty calculates its positions to determine clearing thresholds under Article 4(a)(3) EMIR, it should include the OTC derivative contracts that are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity entered into by the non-financial counterparties (NFCs) that are part of the same group in the calculation, as Article 4(a)(3) does not provide for a hedging exemption.

- NFCs whose core activity is to buy, sell or own financial instruments can benefit from the hedging exemption set out in Article 10(3) EMIR when using OTC derivative contracts to hedge certain risks as it applies to all NFCs, irrespective of what their core activity is.

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

4. CROSS-BORDER DISTRIBUTION FRAMEWORK

4.1 Central Bank publishes Notice of Intention relating to ESMA Guidelines on Marketing Communications

On 1 October 2021, the Central Bank published a Notice of Intention in which it provides that it requires all Irish authorised UCITS management companies and AIFMs (which will include self-managed UCITS and internally managed AIFs) to comply with the ESMA Guidelines on Marketing Communications under the Regulation on Cross-Border Distribution of Funds (Guidelines) from 2 February 2022.

As explained in the Notice of Intention, the objective of the Guidelines is to establish common principles on the identification of marketing communications, the description of risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent
manner, and the fair, clear and not-misleading character of marketing communications, taking into account on-line aspects of such marketing communications.

A copy of the Notice of Intention can be accessed here.

A copy of the Guidelines can be accessed here.

| Key Action Points | Management companies should ensure that all marketing communications published in respect of UCITS and AIF funds under management comply with the Guidelines from 2 February 2022 onwards. |

4.2 ESMA publishes revised UCITS Q&A relating to advance notice requirement for marketing of new share class requirements of UCITS notified for cross-border marketing

On 17 December 2021, ESMA published a revised version of its Q&As on the application of the UCITS Directive to include a new Q&A on advance notice for the marketing of new share classes of UCITS notified for cross-border marketing.

In its response, ESMA confirmed that if a UCITS intends to market a new share class in a Member State where it has already been notified for marketing, the UCITS should give written notice to the competent authorities of both the UCITS home and host Member State, at least one month before the marketing of the new share class starts.

A copy of the revised UCITS Q&A can be accessed here.

| Key Action Points | Management companies should note that they are required to give written notice to the competent authorities of both the UCITS home and host Member State, at least one month before the marketing of the new share class starts. |

5. PRIIPs

5.1 ESAs call for advice on PRIIPs Regulation

On 21 October 2021, the Joint Committee of the ESAs published a call for evidence to assist it in providing advice to the European Commission in relation to the European Commission's review of Regulation (EU) 1286/2014 (PRIIPS Regulation).

The Commission published a call for advice to the joint committee in August 2021 and requests that the joint committee deliver its advice to the Commission Services by 30 April 2022. The joint committee explains in its call for evidence that the ESAs believe that changes to the PRIIPs Regulation are needed in areas beyond those addressed in the Commission's mandate. Therefore, it is requesting feedback on a range of additional issues, including:

- General survey on the use of the key information document (KID), complexity and readability of the KID and the operation of the comprehension alert;
- Use of digital media; and
- Scope of the PRIIPs Regulation and differentiation between different types of PRIIPs.

The call for evidence closed on 16 December 2021 and can be accessed here.
5.2 EBA updates Q&As on the PRIIPS KID

On 17 December 2021, the ESAs published a revised version of their Q&A on the packaged retail and insurance-based investment products (PRIIPS) KID (the ESA Q&As).

The ESA Q&As includes a new Q&A which confirms that where an AIF invests in linear products but where the leverage changes throughout time, that AIF should be categorised as a Category 2 PRIIP for the purposes of determining the market risk assessment to be carried out. The ESAs have also included a new Q&A on what should be shown as the “Total Costs” in Table 1 of the costs-related disclosures required to be included in the PRIIP and confirms that this figure should be shown in monetary terms and consider all of the costs indicated in the list of costs and the calculation methodologies in Annex VI, Part 1 of Commission Delegated Regulation 2017/653. The Q&A also confirms that the methodology “reduction in yield” described in Part 2 of Annex VI should only be used to calculate the summary costs indicators in percentage terms.

The ESA Q&As also includes a new Q&A to address how the obligation to review the KID should apply to the different holding periods disclosed in the moderate performance scenarios disclosed in the KID. Unrelated to funds, four new Q&As on the costs associated with subscription products for PRIIPS have also been included.

A copy of the updated ESA Q&A can be accessed here.

5.3 PRIIPS KID Update


Under the Amending PRIIPS Regulation, the exemption currently afforded to UCITS from being required to prepare a PRIIPS KID, which had previously been extended to expire on 30 June 2022, has been further extended until 31 December 2022. This means that UCITS which are marketed to retail investors in the EEA will be required to prepare a PRIIPS KID from 1 January 2023.

In a related development, Directive (EU) 2021/2261 (Amending Directive) which amends the UCITS Directive, was signed into law on 15 December 2021. Under the Amending Directive, the obligation to produce a UCITS KIID under the UCITS Directive will be deemed satisfied where the UCITS provides a PRIIPS KID which complies with the PRIIPS Regulation. This is to avoid a scenario where a UCITS is required to produce both a UCITS KIID and a PRIIPS KID.

The Amending Directive requires Member States to transpose the Amending Directive into local law by 30 June 2022 and to apply these measures from 1 January 2023.

On 20 December 2021, Commission Delegated Regulation 2021/2268, which amends the existing RTS published under the PRIIPS Regulation contained in Commission Delegated Regulation (EU) 2017/653 (Amending PRIIPS Level 2 Measures) was published in the OJ.

The Amending PRIIPS Level 2 Measures make significant changes to the existing rules governing the methodology and presentation of performance scenarios, the presentation of costs, the methodology for the calculation of summary cost indicators and the methodology required to calculate transaction costs, as well as introducing new disclosure obligations for in-scope UCITS and AIFs.

The Amending PRIIPS Level 2 Measures apply from 1 July 2022 meaning that any PRIIPS KID currently published in respect of AIFs which are marketed to EEA retail investors will need to be updated by that date to comply with the revised disclosure obligations.

As noted above, UCITS funds which are marketed to EEA retail investors will be required to publish a PRIIPS KID from 1 January 2023 which will need to comply in full with the Amending PRIIPS Level 2 Measures.
Please refer to our in-depth client briefing which considers the implications of the above for Irish UCITS funds and the PRIIPS KID disclosure requirements.

A copy of the Amending PRIIPS Regulation can be accessed here.

A copy of the Amending Directive can be accessed here.

A copy of the Amending PRIIPS Level 2 Measures can be accessed here.

### 6. OPERATIONAL RESILIENCE

#### 6.1 CP140 - Consultation on Cross Industry Guidance on Operational Resilience

On 1 December 2021, the Central Bank published its Cross Industry Guidance on Operational Resilience (OR) (Guidance) as part of its Feedback Statement on Consultation Paper 140.

The Guidance applies to all regulated fund service providers (RFSPs) and consists of 15 industry guidelines built around core principles and three pillars of OR, being: (a) Identify and Prepare; (b) Respond and Adapt; and (c) Recover and Learn.

The purpose of the Guidance is to:

- Communicate to the boards (Boards) and senior management of RFSPs, the Central Bank’s expectations with respect to the design and management of OR;
- Emphasise Board and senior management responsibilities when considering OR as part of their risk management and investment decisions; and
- Require that Boards and senior management take appropriate action to ensure that their OR frameworks are well designed, operating effectively and sufficiently robust. This should ensure that the risks to the RFSP’s operational continuity do not transmit into the financial markets and that the interests of the customers and market participants are safeguarded during business disruptions.

RFSPs should be able to demonstrate that they have applied the Guidance within an appropriate time frame, which will depend on a range of factors, including nature, scale, and complexity of a RFSP’s business and the RFSP’s overall impact on customers and the wider economy.

The Central Bank expects RFSPs to be actively and promptly addressing OR vulnerabilities and to be in a position to evidence actions/plans to apply the Guidance at the latest within two years of its being issued.

For a detailed analysis of the Central Bank’s Feedback Statement on Consultation Paper 140 on Cross Industry Guidance on Operational Resilience, please refer to our in-depth client briefing on the topic.
A copy of the Guidance can be accessed here.

A copy of the Feedback Statement can be accessed here.

6.2 European Parliament publishes text of adopted ECON report on proposed Regulation on digital operational resilience and proposed Directive supporting EU Digital Finance Strategy

On 7 December 2021, the European Parliament published the text of the report adopted by its Economic and Monetary Affairs Committee (ECON) on the proposed Regulation on digital operational resilience for the financial sector (DORA). According to the Parliament’s procedure file, the report has now been tabled for the Parliament to consider in plenary.

This follows the adoption by the EU Council on 24 November 2021 of its position on two proposals that are part of the EU’s digital finance package: the ‘Regulation on Markets in Crypto Assets’ (MiCA) and DORA. This agreed position now forms the EU Council’s negotiating mandate for trilogue negotiations with the European Parliament.


DORA aims to consolidate and upgrade information communications technology (ICT) risk requirements throughout the financial sector to ensure that all participants of the financial system are subject to a common set of standards to mitigate ICT risks for their operations and have the necessary safeguards in place to mitigate cyber-attacks and other risks.

A copy of the European Parliament text of the report can be accessed here.

A copy of DORA can be accessed here.

A copy of the DORA Directive can be accessed here.

A copy of MiCA can be accessed here.

7. CENTRAL BANK

7.1 Funding Strategy and Guide to the 2021 Industry Funding Regulations

On 15 October 2021, the Central Bank published its Funding Strategy and Guide to the 2021 Industry Funding Regulations with the objective of providing guidance in relation to the calculation of industry-wide annual levies which have been set to recover the Central Bank’s Financial Regulation costs in 2020.

A copy of the Funding Strategy and Guide can be accessed here.

7.2 Central Bank publishes Dear Chair Letter on Climate Risk

On 3 November 2021, the Central Bank issued a ‘Dear CEO letter’ (Letter) to regulated financial service providers outlining its supervisory expectations in five key areas as they seek to comply with statutory and regulatory obligations on climate and broader environmental, social and governance (ESG) issues. It noted that it will be focused on ensuring compliance with climate and wider ESG related statutory and regulatory obligations and on effective risk management. The five key areas identified by the Central Bank in the Letter are governance, risk management framework, scenario analysis, strategy and business model risk, and disclosures.
The Central Bank notes, in its Letter, that its supervisory expectations do not replace or override any legal, regulatory, or supervisory requirements applicable to the relevant firm and that these expectations are not binding on firms.

The Letter does not set down a timeframe within which action must be taken to address the supervisory expectations of the Central Bank.

A copy of the Letter can be accessed here.

### Key Action Points

Fund management companies should consider how they will address these supervisory expectations in their organisational and risk management framework and be in a position to demonstrate to the Central Bank, if required, how same have been satisfied.

#### 7.3 Central Bank issues a ‘Dear CEO letter’ on MiFID II Suitability Requirements

On 1 December 2021, the Central Bank issued a ‘Dear CEO letter’ (Letter) on MiFID II Suitability Requirements. In the Letter, the Central Bank outlines the findings of a review of MiFID authorised investment firms and credit institutions providing investment services to assess compliance with the suitability requirements under MiFID II (Review). The Review was conducted as part of a Common Supervisory Action (CSA) coordinated by ESMA in performing their supervisory activities throughout the EU/EEA. The findings incorporate the Central Bank’s own supervisory analysis findings, and engagement with other NCAs. The findings were included in ESMA’s public statement published on 21 July 2021.

The Review identified several instances where further action is required by investment firms, including:

- Firms need to adopt a client-focused approach: The review found a failure by investment firms to establish a risk-based and client-focused approach to suitability that prioritises positive outcomes for clients and puts the necessary safeguards, procedures, and controls in place to ensure clients’ best interests are protected;

- Firms must improve their assessment of clients’ knowledge and experience, financial situation, and investment objectives: The review found that it was not evident how investment firms considered all relevant information in their assessment, particularly relating to clients’ financial situation and their capacity to withstand losses;

- Suitability Reports need to be sufficiently detailed and personalised: The review found that suitability reports relied on automated templates and standardised wording that provides little value to clients, while information on client’s financial situation was occasionally missing or limited; and

- Controls on ‘Exception’ Processes need to be stricter: The review found issue with the quality of oversight of the ‘exception’ process whereby a client insists on proceeding with the transaction on their own initiative and against the advice of the investment firm. In such an event, the client should be clearly informed of the potential risks involved by proceeding and firms must be able to demonstrate that the transaction was initiated by the client.

In the Letter, the Central Bank indicates that all Irish authorised MiFID firms and credit institutions who provide portfolio management and advisory services to retail clients (each a Relevant Firm) must conduct a review of their individual sales practices and suitability arrangements. This review must include details of actions taken to address ESMA’s findings and the Letter. This review must be completed, and an action plan discussed and approved, by the board of each Firm by the end of Q1 2022.

A copy of the Letter can be accessed here.

A copy of ESMA’s findings of the CSA on MiFID II suitability requirements can be accessed here.

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1 ESMA’s Public Statement entitled “ESMA presents the results of the 2020 Common Supervisory Action (CSA) on MiFID II suitability requirement” (ESMA35-43-2748)
Each Relevant Firm must, prior to the end of Q1 2022, (i) complete a thorough documented review of their individual sales practices and suitability arrangements; and (ii) ensure that an action plan is discussed and approved by the board of each such Firm to address ESMA’s findings and the “Dear CEO Letter.”

7.4 Central Bank publishes finalised Cross-Industry Guidance on Outsourcing

On 17 December 2021, the Central Bank published its finalised Cross-Industry Guidance on Outsourcing (Guidance) together with a Feedback Statement providing the rationale for some of the approaches taken by it in finalising the Guidance (Feedback Statement), following its consultation on the topic of outsourcing earlier this year.

The Guidance, which applies from 17 December 2021, is intended to assist regulated firms in developing their outsourcing risk management framework to effectively identify, monitor and manage their outsourcing risks.

It sets down the Central Bank’s supervisory expectations on key matters relating to outsourcing arrangements which include (i) governance and the role of the Board and senior management, (ii) the application of the Guidance to intragroup arrangements, (iii) the need to have a documented outsourcing strategy and outsourcing policy, (iv) conducting outsourcing risk assessments and due diligence on outsourced service providers (OSP), (v) provisions which should be included in contractual arrangements with certain OSPs and (vi) business continuity and disaster recovery arrangements.

For a detailed analysis of the Central Bank Cross-Industry Guidance on Outsourcing and the implications of the Guidance on Irish fund management companies, please refer to our in-depth client briefing for fund management companies on the topic.

For a detailed analysis of the Central Bank Cross-Industry Guidance on Outsourcing and the implications of the Guidance on Irish depositaries and fund administrators, please refer to our separate client briefing on the topic.

A copy of the Guidance can be accessed here.

A copy of the Feedback Statement can be accessed here.

Management companies and other fund service providers should assess their existing arrangements against the Central Bank’s Guidance on Outsourcing to identify what changes will need to be made in order to comply with the Guidance, the key stakeholders involved and the time frame within which necessary steps will be taken.

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

8.1 EBA Revised Guidelines on money laundering and terrorist financing risk factors enter into force

On 7 October 2021, the EBA’s Revised Guidelines on AML and CFT risk factors (Revised Guidelines) entered into force, following its translation into all official EU languages.

The Revised Guidelines strengthen the requirements on individual and business wide risk assessments, as well as customer due diligence (CDD) measures, including new guidance on the identification of beneficial owners, the use of innovative solutions to identify and verify customers’ identities, and how financial institutions should comply with legal provisions on enhanced CDD related to high-risk third countries.

The Revised Guidelines are addressed to both financial institutions and supervisory authorities.

A copy of the Revised Guidelines can be accessed here.
8.2 EBA publishes draft guidelines on use of Remote Customer Onboarding Solutions under MLD4


The Draft Guidelines set out a common understanding by NCAs of the steps financial service providers should take to ensure safe and effective remote customer onboarding practices in line with applicable AML and CFT legislation and the EU's data protection framework.

Once adopted, the Draft Guidelines will apply to all financial service providers that are within the scope of MLD4.

The EBA has invited comments from stakeholders on the Draft Guidelines, the closing date for responses is 10 March 2022. The EBA will finalise the Draft Guidelines following the consultation period.

A copy of the Draft Guidelines can be accessed here.

8.3 EBA publishes final report on RTS setting up an AML/CFT central database

On 20 December 2021, the EBA published a final report on its draft RTS on a central database on AML/CFT in the EU (Draft RTS).

The EBA has a mandate to establish and keep up to date a central AML/CFT database. The central AML/CFT database will contain information on material AML/CFT weaknesses in financial sector operators that NCAs have identified. It will also contain information on the measures NCAs have taken in response to those material weaknesses.

The Draft RTS specify when weaknesses are material, the type of information NCAs have to report, how information will be collected and how the EBA will analyse and disseminate the information contained in the database. They also set out the rules necessary to ensure confidentiality, the protection of personal data and the effectiveness of the database.

The EBA will submit the Draft RTS to the European Commission for approval. Once approved, the Draft RTS will be directly applicable in all Member States.

A copy of the Draft RTS can be accessed here.

9. DATA PROTECTION

9.1 GDPR adequacy decisions in respect of the UK published in the OJ

On 11 October 2021, the two European Commission adequacy decisions for transfers of personal data to the UK, adopted in June 2021, were published in the OJ.

The Decisions conclude, following assessment by the Commission, that the UK ensures an essentially equivalent level of protection to that guaranteed under Regulation (EU) 2016/679 (General Data Protection Regulation or GDPR) and Directive (EU) 2016/680 (Law Enforcement Directive). Personal data can now flow freely from the European Union to the UK.

Both adequacy decisions contain a ‘sunset clause’ which limits the duration of adequacy to four years. After four years, it will be possible to renew the adequacy finding if the level of protection in the UK continues to be adequate.

A copy of the adequacy decision concerning GDPR can be accessed here.

A copy of the adequacy decision concerning the Law Enforcement Directive can be accessed here.
9.2 EDPB adopts Guidelines on restrictions of data subject rights under Article 23 GDPR following public consultation

On 13 October 2021, the European Data Protection Board (EDPB) adopted a final version of the Guidelines 10/2020 on Restrictions under Article 23 of the GDPR (Guidelines), following public consultation.

Article 23 of the GDPR permits Member States to restrict data subject rights on the grounds of necessity and proportionality. The Guidelines provide a thorough analysis of the criteria that apply to restrictions, the assessments that need to be observed, how data subjects can exercise their rights after the restrictions are lifted, and the consequences of infringements of Article 23 GDPR.

The Guidelines make it clear that restrictions of data subject’s rights must observe the requirements stated in Article 23 GDPR and that Member States issuing the legislative measures setting those restrictions, and the controllers applying them, should be aware of the exceptional nature of the restrictions.

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

10. SUSTAINABLE GROWTH

10.1 ESAs final report and draft RTS on content and presentation of taxonomy-related sustainability disclosures under SFDR

On 22 October 2021, the ESAs published their final report containing draft RTS which concern the content and presentation of disclosures which will apply to investment funds falling within the scope of the detailed taxonomy-related disclosure obligations set down in Regulation (EU) 2020/852 (Taxonomy Regulation). This follows the joint consultation paper on taxonomy-related disclosures published in March 2021.

The draft RTS must now be considered by the European Commission which must decide whether to endorse them within 3 months of their publication date being 22 January 2022. If endorsed, the draft RTS will be amalgamated with the finalised draft RTS under the Sustainable Finance Disclosure Regulation (EU) 2019/2088 (SFDR).

While high-level disclosures set down in the Taxonomy Regulation apply from 1 January 2022, the Draft RTS are expected to apply from 1 July 2022, to coincide with the expected application date of the SFDR RTS.

For a detailed analysis of the ESAs final report on draft RTS under the Taxonomy Regulation, please refer to our in-depth client briefing on the topic.

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

10.2 Central Bank announces fast-track process for Taxonomy and SFDR L2 related updates

On 15 November 2021, the Central Bank issued a Notice confirming its intention to establish a fast-track filing process while also clarifying filing requirements for pre-contractual document updates required under the Taxonomy Regulation and the SFDR Level 2 Measures.

The fast-track process is only available in respect of funds which are already approved by the Central Bank and the filing must follow the prescribed format set out in its communication. Documents should be dated as of date of submission to the Central Bank.

The “Level 1” Taxonomy Regulation requirements apply from 1 January 2022 and will require updates to pre-contractual documentation for UCITS and AIFs. “Level 2” SFDR disclosure requirements, which include taxonomy-related disclosures, (SFDR Level 2 Measures) were at the time of the issue of the Notice anticipated to take effect from 1 July 2022. However, the SFDR Level 2 Measures have since been delayed until 1 January 2023. Please see Section 10.4 for further details.
For a detailed analysis of the Central Bank’s Notice on the fast-track filing process for pre-contractual document updates required under the Taxonomy Regulation and the SFDR Level 2 Measures, please refer to our in-depth client briefing on the topic.

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

### 10.3 European Commission publishes ESAP Proposal

On 26 November 2021, the European Commission published a legislative proposal relating to the creation of a European Single Access Point (ESAP) which is intended to provide public and free access to EU-level financial and sustainability-related information (which is required to be reported under existing EU legislation/comprises of additional categories of information voluntarily reported by stakeholders) from one single access point.

The European Commission has proposed that information must be made available in a data-extractable format, enabling comparability, under open terms of use. It is hoped that this will assist investors in making better-informed investment decisions and allow for a better assessment of sustainability-related risks and impacts of companies and financial market participants.

ESMA is mandated under the proposal to establish the ESAP by 31 December 2024 with the “start date” for filing information on ESAP dependent on the legislative framework under which the relevant institution is regulated.

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

### 10.4 Delay of entry into force of the SFDR Level 2 Measures

On 29 November 2021, the European Commission issued a letter, dated 25 November 2021, to the European Parliament and European Council (Commission Letter) confirming that SFDR Level 2 Measures, which includes the Taxonomy-related disclosures applicable to in-scope financial products, will now apply from 1 January 2023.

The Commission Letter provides that those fund management companies which are required, or voluntarily choose to, report on the principal adverse impacts (PAI) of their investment decisions on sustainability factors under Article 4 of the SFDR, will be required to comply with the detailed disclosure obligations imposed under the SFDR Level 2 Measures by 30 June 2023 in respect of a reference period running from 1 January 2022 to 31 December 2022.

It remains to be seen if the Central Bank will proceed with its fast-track process in respect of SFDR filings in light of the delay of entry into force of the relevant disclosure obligations until 1 January 2023.

For a detailed analysis of the implications of this Delay of SFDR Level 2 Measures, please refer to our in-depth client briefing on the topic.

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

### 10.5 Publication of the Climate Delegated Act under Article 10 and 11 of the Taxonomy Regulation

On 9 December 2021, Commission Delegated Regulation (EU) 2021/2139 (Climate Change TSC Delegated Regulation) was published in the OJ, following significant political discussions by EU Member States, and applied from 1 January 2022.

The Climate Change TSC Delegated Regulation, which was adopted by the European Commission on 4 June 2021, sets down the technical screening criteria (TSC) which must be used by fund management companies whose funds fall within the scope of Article 5 or Article 6 of the Taxonomy Regulation in order to determine (i) whether an economic activity is “contributing substantially” to climate change mitigation or climate change adaptation and (ii) whether that economic activity does any significant harm to any of the other environmental objectives set down in Article 9 of the Taxonomy Regulation.
The TSC for climate change mitigation are set out in Annex I to the Climate Change TSC Delegated Regulation while the TSC for climate change adaptation are set out in Annex II thereto.

A copy of the Climate Change TSC Delegated Regulation can be accessed here.

10.6 Publication of Commission Delegated Regulation issued under Article 8 of the Taxonomy Regulation

On 10 December 2021, Commission Delegated Regulation 2121/2178, which supplements Article 8 of the Taxonomy Regulation, (Delegated Regulation) was published in the OJ.

The Delegated Regulation specifies the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2014/95/EU (Non-Financial Reporting Directive or NFDR) concerning environmentally sustainable economic activities. It additionally sets down content and presentation of the information to be disclosed by all undertakings (whether financial undertakings or non-financial undertakings), as well as giving the methodology to comply with that disclosure. The information which must be disclosed is specified for the various types of undertakings in the annexes to the Article 8 Commission Delegated Regulation.

The Article 8 Commission Delegated Regulation had been adopted by the European Commission on 6 July 2021 and applies from 1 January 2022.

The European Commission also published an FAQ document on 21 December 2021 which provides non-binding implementation guidance on disclosures to be made by entities falling within the scope of Article 8 of the Taxonomy Regulation.

A copy of the Delegated Regulation can be accessed here.

A copy of the FAQ document can be accessed here.

11. MONEY MARKET FUNDS

11.1 Money Market Fund Reporting Obligations

On 17 November 2021, the Central Bank published Volume 9 of the Money Market Fund Regulation (MMFR) Reporting Guidance which outlines the reporting requirements for Fund Management Companies for Irish Authorised Money Market Investment Funds.

The new volume provides clarity for Section 4.3.5, relating to Daily Money Market Fund (MMF) Reports. The Central Bank states that the C-Code for an Institution making a filing and the C-Code for the Umbrella/Standalone Fund are one in the same. Hence, only the Umbrella/Standalone Fund C-Code is included in the file name for the Daily MMF Report.

A copy of the MMFR Reporting Guidance can be accessed here.

12. MISCELLANEOUS

12.1 ESMA statement on making investment recommendations on social media

On 28 October 2021, ESMA issued a public statement on investment recommendations made on social media. The statement was published following a rise in investments recommendations being made on social media platforms and a growing concern regarding potential risks to retail investors.

The statement defines an investment recommendation, details the process of publication on social media platforms and explains the consequences of potential breaches of Regulation (EU) No 596/2014 (Market Abuse Regulation or MAR).
MAR consists of various requirements relating to investment recommendations and provides that persons disseminating investment recommendations must disclose their interests and must take reasonable care to ensure that such information is objectively presented. As such, ESMA considers that investment recommendations made on social media must be produced and disseminated in an objective and transparent way so that investors can distinguish facts from opinions prior to making an investment decision and can easily identify the source of the information and any conflicts of interest of those making recommendations.

In addition, Delegated Regulation (EU) 2016/958 provides for further disclosure requirements where an expert publishes investment recommendations, including the provision of a summary of their basis of valuation and an indication of the location where detailed information about the valuations or methodology are easily accessible.

ESMA notes that where rules relating to investment recommendations are not adhered to, there may be fines or further supervisory actions, which in cases of dissemination of false or misleading information could include the referral to public prosecutors for market manipulation.

A copy of the public statement can be accessed here.
A copy of the Market Abuse Regulation can be accessed here.
A copy of the Delegated Regulation can be accessed here.

12.2 A Guide to Selling Regulated Investment Funds in Asia


In this publication the various requirements are set out for marketing a regulated Irish fund in Australia, Hong Kong, Japan, Korea, Malaysia, China, Singapore, Thailand, and Taiwan whether as a public offering or on a private placement basis. The Guide considers various component factors to be dealt with when considering the offering of an Irish domiciled fund in the above jurisdictions.

For a detailed analysis of the primary factors to be considered where selling regulated investment funds in Asia, please refer to our in-depth client briefing on the topic.

12.3 ESMA updates MiFID II Q&As on investor protection and intermediaries

On 19 November 2021, ESMA published an updated version of its Q&As on investor protection and intermediaries under MiFID II and MiFIR.

The updated version contains a new Q&A in the Product Governance section which confirms that the mere presence of a make-whole clause is not sufficient for a bond to be exempted from the MiFID II product governance requirements. It confirms that bonds with a make-whole clause and no other embedded derivative which are marketed to retail and/or professional clients are exempt from such requirements whilst bonds with a make-whole clause and with one or more embedded derivative which are marketed to retail and/or professional clients are subject to MiFID II product governance requirements.

A copy of the updated version of ESMA’s Q&As can be accessed here.

12.4 Legislative proposal amending the ELTIF Regulation

On 25 November 2021, the European Commission adopted legislative proposal under which it proposes amending Regulation (EU) 2015/760 (European Long-Term Investment Funds Regulation or ELTIF Regulation).
As the results of the ELTIF Regulation to date have been disappointing, with only 57 ELTIFs registered across 4 Member States, the Commission’s aim for the legislative proposal is to improve the attractiveness and effectiveness of the ELTIF framework for investment managers and investors, which should result in an uptake of ELTIFs across the EU.

In order to improve the attractiveness and effectiveness of the ELTIF framework, the legislative proposal intends to:

- Extend the scope of eligible assets and investments;
- Allow more flexible fund rules which allow fund managers to design appropriate investment strategies and portfolio compositions;
- Reduce the barriers of entry which prevent retail investors from accessing ELTIFs while maintaining appropriate levels of investor protection; and
- Introduce an additional liquidity window mechanism to provide for the possibility of an early exit by investors from an ELTIF investment subject to certain conditions.

The Council of the European Union and the European Parliament will now consider the legislative proposal and agree on the final text.

A copy of the legislative proposal can be accessed here.

12.5 Extension to the interim period of Companies (Miscellaneous Provisions) (Covid-19) Act 2020


The COVID-19 Act amends the Companies Act 2014 on a temporary basis in order to allow companies to withstand the challenges posed by the COVID-19 pandemic and includes specific provisions relating to the holding of general meetings and meetings of creditors via electronic means as well as measures relating to the execution of instruments during the interim period.

A copy of the COVID-19 Act can be accessed here.

A copy of the S.I. extending the “interim period” can be accessed here.

12.6 ESMA publishes Guidelines on Settlement Fails Reporting under Article 7 CSDR


The Guidelines apply from the date of entry into force of the RTS on Settlement Discipline. The Central Bank is obliged, within two months, to notify ESMA whether they intend to comply with the Guidelines. CSDs are not required to report whether they comply with the Guidelines.

CSDR entered into force in 2014 with an objective of improving securities settlements in the European Union. One of the cornerstones of the CSDR is the introduction of an obligation on CSDs to impose cash penalties on participants to their securities settlement systems that cause settlement fails. Another of the key measures of the new settlement discipline regime established under the CSDR is the introduction of new mandatory buy-in rules. However, the European Commission announced in November 2021 that the application of these new rules has been delayed and will not apply from 1 February 2022.
The new cash penalties regime, which is intended to serve as an effective deterrent for participants that cause settlement fails and to incentivize those in the settlement chain to settle trades in a timely manner, enters into force from 1 February 2022. The CSDR defines a settlement fail as “the non-occurrence of settlement, or partial settlement of a securities transaction on the intended settlement date, due to a lack of securities or cash and regardless of the underlying cause”.

The CSDR itself is supplemented by a number of RTS which include Commission Delegated Regulation 2017/389 as well as the RTS on Settlement Discipline.

For a detailed analysis of the new settlement cash penalties regime, please refer to our in-depth client briefing on the topic.

A copy of the Guidelines can be accessed here.

A copy of the RTS on Settlement Discipline can be accessed here.

12.7 ESMA updates Q&As on application of CSDR

On 17 December 2021, ESMA published an updated version of its Q&A on the implementation of the CSDR. The update includes one new Q&A and the revision of another Q&A, both of which relate to settlement discipline.

The newly added Q&A addresses the settlement fails which should be taken into account when calculating a participant’s rate of settlement efficiency in accordance with Article 39(2) of the related RTS on Settlement Discipline. The amended Q&A relates to settlement instructions sent by central counterparties.

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

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