



Breakfast Briefing 31st January 2018

Legal and Regulatory Priorities 2018

GDPR

Funds and Service Providers

Some key issues.

Etain de Valera

Countdown to GDPR

From May 2018

- ❑ Overhaul of the existing data protection regime relating to the protection of the personal data of individuals.
- ❑ GDPR - Regulation (EU) 2016/679 : Directly effective.
- ❑ Further domestic legislation Data Protection Act 2018 (Heads of Bill published April 2017).
- ❑ Introduces more onerous obligations on data controllers and data processors and affords greater rights to data subjects
- ❑ Why is it relevant to Funds and their Service Providers?

Key Data Protection Key Concepts – Funds and Processing

- ▣ Processing of personal data intrinsic part of day to day operations of funds and their service providers;
- ▣ What is processing? Very widely defined – any action relating to collection, storage or use of information which identifies a natural person.
 - Names, email addresses, date of birth
- ▣ What is a data controller?
 - Determines purpose and means of processing i.e. what, when and how?
- ▣ What is a data processor?
 - Processes on behalf of the data controller

Key Data Protection Key Concepts – Funds and Processing

- ▣ What personal data will be processed in respect of day to day operations?
 - ▣ “*investor data*”: investors in a fund and directors/beneficial owners of such investors.
 - ▣ “*business to business*” personal data – Fund to service provider - directors, secretary and designated persons of a Fund.
 - ▣ “*business to business*” personal data – Service Provider to Fund - employees of service providers to the Fund (e.g. personal data of employees of the investment manager, administrator, depositary etc.).

Key Data Protection Concepts: Funds

- ▣ **Q: Is the Fund a data controller or data processor of investor data?**
- ▣ A: Data controller as it:
 - ▣ “*determines the purposes and means of processing*” of the information received from investors.
 - ▣ is the entity which requires this information in order to (i) perform its contract with the investor and (ii) in order to comply with its own legal obligations under AML/CTF etc.
 - ▣ is the entity which issues the share application form under which the relevant data is collected and decides the basis for collecting the information.

Key Data Protection Concepts: Funds

- ▣ **Q: Is the Fund a data controller or data processor of business to business data (such as directors details, details of employees of service providers etc)?**

- ▣ **A:** Typically in context of fund operations, Fund likely to be data controller of business to be business data e.g. will require an authorised signatory list from the investment manager and will determine that same should be shared with the depositary in order for the fund to comply with its obligations to provide instructions under the terms of the depositary agreement.

BUT

Each relationship needs to be looked at separately – depends on who is determining why the information is required and what it is to be used for.

Key Data Protection Concepts: Funds Service Providers

- ▣ The Fund will need to consider whether its appointed service providers are its data processors (i.e. processing data on its behalf) or whether they are data controllers in their own right.
- ▣ A Fund service provider may not automatically be a data processor for a fund.
- ▣ Is it using it for its own purposes?
- ▣ The ICO Guidance on data controllers and data processors provides useful guidance on this point:
 - degree of control service provider might have in respect of personal data;
 - decision making capabilities in respect of why and how of processing? i.e. why is it being collected, for what purpose and how it is held;
 - significant decision making.

Key Data Protection Concepts: Relationships with Fund Service Providers – Some Examples

Service Provider	Type of Data	Use of Data	Data Processor/Data Controller?
Administrator	Investor Data	collecting and holding as part of share application process and AML compliance on behalf of the Fund	Data Processor
Administrator	B2B Data	uses information to satisfy its own AML requirements	Data Controller
Investment Manager	Investor Data	holds information to facilitate ongoing investor relationship management in respect of the fund	Data Processor
Investment Manager	B2B Data	uses to facilitate direct marketing of other funds on its own behalf	Data Controller
Depository **	B2B Data	uses data relating to individuals in the investment manager/administrator to perform obligations under the agreement	– Data Processor/Data Controller ** ** Divergent views in the market

Data Controller/Data Processor Contractual Arrangements

- ▣ Agreements between Fund and Service Providers should address role of each entity in respect of relevant personal data;
- ▣ Where a data processing agreement must comply with Article 28 (3) requirements;
- ▣ Where dual use i.e. as controller/processor will need to address issues as to liability and indemnity;
- ▣ If a processor goes beyond the scope of the contract with the controller and then determines the “purpose and means” of processing, it will be treated as a data controller in respect of that processing: Article 28(10).
- ▣ Agreements will need to reflect reality of operations.

Is the processing of data lawful?

- ▣ Personal data can only be processed where it is “lawful” to do so.
- ▣ Fund as data controller must justify that the processing of personal data is lawful on one of the following grounds:
 - ▣ Consent of data subject given for one or more specific purposes; or
 - ▣ The processing of personal data is necessary for any of the following:
 - performance of contract to which data subject is party;
 - the data controller to comply with its legal obligations;
 - the protection of the public interest or vital interests of the data subject or any other person; or
 - the “legitimate interests” of the data controller or a third party;
 - Special categories of data – additional protection (PEP screening).

Is the processing of data lawful?

- ▣ Preferred basis likely to be that necessary for performance of a contract with the data subject or to comply with legal obligations e.g. fund needs to hold shareholder data to perform the investment contract and comply with its AML obligations
- ▣ Relying on consent could be problematic – must comply with certain conditions and is capable of being withdrawn. What happens if you don't get consent?
- ▣ Legitimate interests of the data controller could also be problematic.
 - data subject's right to object
 - “balancing test” against interests of data subject
- ▣ What may be legitimate interests?
 - direct marketing?

GDPR – Compliance steps for Funds and their Service Providers

1. **Data Inventory** – Review of personal data gathered by the Fund or any data processor acting on its behalf, classification of data (investor data/business to business data), identification of data processors and how and where such data is held.
2. **Review basis for processing** e.g. consent, legitimate interests, necessary for contract performance etc.
3. **Contractual review** – review and revision of agreements with data processors to ensure Article 28(3) is complied with? Address where service provider might also be data controller.
4. **Transfer of data outside of the EEA** – is it lawful?
5. **Consider appointment of DPO/Data Protection Impact Assessment.**

Questions & Answers

Any questions?



Contact

33 Sir John Rogerson's Quay, Dublin 2, Ireland

Telephone +353 1 66 700 22

Fax +353 1 66 700 42

E-Mail: enquiries@dilloneustace.ie

Website: www.dilloneustace.com

Dublin Cayman Islands New York Tokyo



Breakfast Briefing 31st January 2018

Legal and Regulatory Priorities 2018

CP86

Fund Management Companies Guidance

Countdown to July 2018

Emmet Quish

Introduction and Background

- Requirements applicable to FMCs by virtue of their authorisation as a:
 - UCITS Man Co,
 - UCITS SMIC,
 - AIFM,
 - Internally Managed AIF.
 - From consultation process beginning in 2014 to effective implementation in July 2018 – home strait now!
 - Most FMC boards should have work well under way at this stage.
-

New Rules for 1 July 2018

- ▣ FMCs authorised by the Central Bank before 1 November 2015, must comply with the new rules introduced by the CBI by **1 July 2018**.
 - ▣ The 4 new core rules relate to:
 - (i) streamlining of managerial functions to 6 managerial functions
 - (ii) the organisational effectiveness role
 - (iii) the 'retrievability of records' rule and
 - (iv) the 'location' rule
 - ▣ The guidance on (i) delegate oversight and (ii) directors time commitments is already in force.
 - ▣ All FMC must now have monitored email address.
-

Aims and objectives of finalised guidance

Aim



Enhance effectiveness of FMC and their boards of directors = improving investor protection

Focus



- Ensuring substantive control by FMC over delegates;
- Streamlining of management functions;
- Ensuring FMC operate efficiently;
- Increasing effective supervision by the Central Bank through:
 1. Location rule and
 2. Record Retention requirements

Actions to be taken now....

- ▣ Gap Analysis – Should already be underway:
 - review and revision of existing documentation;
 - identify gaps, prepare relevant documents; and
 - have same approved by the Board.

 - ▣ Business plan (no review), policies (risk mgmt, OE policy, recordkeeping), material contracts, engagement letters with directors & designated persons.

 - ▣ The Central Bank has advised that compliance with the new rules “*will not be something that can be rushed through at the last minute*” .
-

Managerial Functions: 1 July 2018

- ▣ Streamlining of managerial functions to **6** functions –
 - Fund Risk Management, Operational Risk Management, Investment Management, Regulatory Compliance, Distribution, Capital and Financial Management.
- ▣ Guidance sets out the expectations of the CBI as regards role of Designated Persons (“**DP**”).
- ▣ A DP must be identified for each managerial function - Same DP cannot perform investment management function & fund risk management or operational risk management.
- ▣ DP is the “link” between the board of the FMC and its delegates.
- ▣ The DP should be “available on a day-to-day basis” - responsible for monitoring and overseeing the managerial function on a day to day basis.

Managerial Functions: 1 July 2018

- ▣ Reporting from delegates to DP should not be on “exceptions only” basis.
 - A summary of relevant information for each investment fund under management is required instead.
 - ▣ A director can be named as DP for any one managerial function.
 - ▣ Obligation on DP to act in best interests of investors at all times.
 - ▣ DP must have experience & expertise in managerial functions and be sufficiently senior so can challenge/interrogate delegates.
 - ▣ Separate letter of appointment for DP & Directors.
-

Managerial Functions: 1 July 2018

- ▣ Each regulatory obligation imposed on an FMC must be allocated to a specific managerial function – mapping exercise.
 - ▣ The DP must ensure that the FMC is complying with the regulatory obligations attributed to its managerial function(s).
 - ▣ See Annex I and Annex II of finalised guidance for suggested mapping.
 - ▣ However, all other legislation will also need to be considered.
 - **PRIIPs**
 - **EMIR**
 - **Market Abuse Rules**
-

Organisational Effectiveness: 1 July 2018

Purpose



Someone is constantly monitoring how well FMC is organised and resourced

- ▣ Must be discharged by an independent director
 - ▣ Relevant Director can only discharge OE Role
 - ▣ OE policy - frequency of reporting, support from DP
- ▣ Responsible for raising any organisational issues with the Board to improve effectiveness e.g.
 - (i) Are there adequate *internal resources* being allocated?
 - (ii) What *conflicts of interests* are arising?
 - (iii) Review of *composition* of the Board and effectiveness evaluations?
 - (iv) How is *supervision of delegates* working?

Effective Supervision: Location Rule & Records

- ▣ The Central Bank has introduced (i) a “location rule” and (ii) a “retrievability of records” rule as a means of increasing its effective supervision of FMC.
- ▣ Concept of “Supervisability”:

“the capacity to carry out the CBI’s engagement model without undue restraint and the ability to react in a crisis”

Effective Supervision: The 'Location Rule': July 2018

- ▣ Low Impact PRISM Rating: 2 Irish resident directors, 50% of directors resident in EEA and 50% of managerial functions performed by at least 2 DP in the EEA.
 - All investment funds are low impact.

- ▣ Medium High/Medium Low PRISM Rating: 3 Irish Resident directors/2 Irish resident directors and 1 Irish Resident DP; 50% of directors resident in EEA and 50% of managerial functions performed by at least 2 DP in EEA.
 - AIFM/UCITS ManCo may fall into either category depending on size and scale.

Effective Supervision: The 'Location Rule': July 2018

▣ Rationale for the Location Rule:

- Ability of the CBI to influence FMC on an ongoing and day to day basis;
- The more aware the FMC is of the presence of the CBI, the more concerned it is likely to be of the consequences of falling below the expected standards of the CBI;
- The CBI believes that a FMC which has at least 50% of its directors within the EEA and 50% of its management functions being discharged by DP within the EEA will be more cognisant of the “*ongoing supervisory presence and impact of the Central Bank*”.

Effective Supervision: BREXIT

- How will the CBI treat UK resident directors/designated persons post Brexit?
- Central Bank will take into account the “supervisibility” factors set out in its feedback statement when considering UK resident directors/DP post-Brexit.
- These factors include, but are not limited to:
 - (i) physical proximity; (ii) demographic; (iii) cultural and historical ties; (iv) ease of travel; (v) commonalities of legal system; (vi) legal and regulatory environment; and (vii) ease of carrying out investigations/on-site inspections.
- It would appear that UK resident directors/DP would be considered as permitting effective supervision.
- Brexit contingency planning.
- CBI UCITS Regulations – *“or such other country as the Bank may determine..”*.

Effective Supervision: Retrievability of Records: July 2018

- ▣ Effective supervision of the FMC will depend on whether or not the FMC can produce records upon request by the CBI
- ▣ Records must be immediately retrievable in or from the State:
 - If requested by CBI **before 1pm**, must be provided to CBI on same day;
 - If requested by CBI **after 1pm**, must be provided to CBI before 12pm on next business day.
- ▣ FMC need to consider how they are going to store their records.
 - Need to ensure that records are immediately retrievable?
 - If relying on third parties to store records, need to revisit contractual arrangements.

Effective Supervision: Retrievability of Records: July 2018

- ▣ Record Management Policy
 - must be reviewed by board of FMC annually; and
 - must be audited (either by internal audit function or externally) on a yearly basis.

 - ▣ Emphasis on document management and record retention including:
 - Delegated service provider contracts
 - Board minutes
 - Policies and Procedures
 - Letters of Engagement
-

Effective Supervision: Dedicated Email Address

- ▣ Each FMC must now have a dedicated email address to facilitate effective communication by and to the CBI.
- ▣ Expectation that the email address will be monitored daily.
- ▣ CBI communication with the FMC will increasingly be channelled through the e-mail address e.g. recent connected party questionnaire.

Risk Management – Already in force

- ▣ Adoption of a risk management framework which:
 - (i) identifies and measures applicable risks;
 - (ii) identifies risk mitigants to manage these risks;
 - (iii) monitors these risks;
 - (iv) incorporates a risk appetite statement; and
 - (v) incorporates a risk register and risk incident log.

 - ▣ Consider whether existing risk reporting from delegates/depositories is adequate – any gaps in existing framework should be addressed

 - ▣ Investment Risk

 - ▣ Operational Risk
-

Action to be taken now...Directors' Time Commitments

- ▣ Must have sufficient time to fully discharge directorships duties.
 - ▣ **20** directorships with **2,000** plus hours per year constitutes a risk indicator which will attract additional supervisory focus from the CBI.
 - ▣ 20 directorships - Irish authorised Funds & ManCos only.
 - ▣ The following should be taken into account when assessing Director's time commitment and availability:
 - the number of sub-funds and their complexity;
 - Membership of board committees;
 - Separate time commitment for DP role and directorship role.
-

General principles to bear in mind....

- ▣ Contravention of any of the 4 new rules will constitute a “prescribed contravention” of the relevant legislation and may lead to the CBI invoking the administrative sanctions regime.
 - ▣ Compliance by the FMC with the rules and guidance must be demonstrable through appropriate record-keeping and minutes.
 - ▣ Proper documentation of policies and procedures is critical.
 - ▣ Policies should reflect actual practice.
 - ▣ Clock is ticking!
-

Questions & Answers

Any questions?



Contact

33 Sir John Rogerson's Quay, Dublin 2, Ireland
Telephone +353 1 66 700 22

Website: www.dilloneustace.com
Email: enquiries@dilloneustace.ie

Dublin Cayman Islands Tokyo New York



Breakfast Briefing 31st January 2018

MIFID II AND FUND MANAGEMENT

**Common issues and how they are being dealt
with**

Donnacha O'Connor

Topics

- ▣ Research payments - non-EU delegate investment managers;
- ▣ Product governance: out of scope manufacturers;
- ▣ Recording of telephone calls and electronic communication.

Research Payments

- ▣ Recap on permitted research payment arrangements:
 - The Investment Firm pays out of its own resources; or
 - RPA controlled by the Investment Firm funded by the client by way of a specific research charge.

- ▣ Non-EU investment managers and Non-EU research providers.

- ▣ SEC temporary no-action letters October 2017:
 - US brokers can receive direct payments (or payments through an RPA)
 - Different payment arrangements for research by US investment advisers permitted

- ▣ European Commission Q&As October 2017:
 - Execution and research payments to non-EU brokers can be combined in a single payment;
 - The payment attributable to research must be identifiable;
 - The amounts spent on research with a particular third country broker must be identifiable;
 - Must be a clear audit trail of payments made to research providers;
 - Separate charge for research must be identifiable but not necessary by specific invoice.

- ▣ Problem solved?

Product Governance

▣ Recap:

- MiFID II product governance rules apply to firms who:
- (i) manufacturer; and/or (ii) distribute financial instruments; or (iii) who sell or advise on structured deposits
- A “Manufacturer” is a firm that manufactures an investment product, where manufacturing includes the creation, development, issuance or design of that product, including when advising corporate issuers on the launch of a new product.
- A “Distributor” is a firm that offers, recommends or sells an investment product and service to a client.

▣ Out of scope manufacturers:

- UCITS, AIFs, AIFMs and UCITS management companies (other than when providing individual account services).

▣ The Problem:

- Extensive obligations on distributors who must obtain adequate and reliable information from manufacturer.

▣ Common solution:

- Out of scope manufacturers generally agreeing contractually to provide data / information through the EMT and reasonable assistance to the distributor.

Recording

- ▣ Recap:
 - ▣ What must be recorded and by whom?
 - ▣ What content?
 - ▣ What is the regulatory purpose of the rule?
 - ▣ Written policy must be put in place.

- ▣ Back office lines?

- ▣ If outsourced, is this subject to MIFID II outsourcing rules?

Questions & Answers

Any questions?



Contact

33 Sir John Rogerson's Quay, Dublin 2, Ireland

Telephone +353 1 66 700 22

Fax +353 1 66 700 42

E-Mail: enquiries@dilloneustace.ie

Website: www.dilloneustace.com

Dublin Cayman Islands New York Tokyo