Funds Quarterly Legal and Regulatory Update

Period covered:
1 October 2017 – 31 December 2017

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Table of Contents

Undertakings in Collective Investments and Transferable Securities ("**UCITS**").....2

Alternative Investment Fund Management Directive ("**AIFMD**").....2

European Venture Capital Funds ("**EuVECA**") & European Social Entrepreneurship Funds ("**EuSEF**").....3

International Organisation of Securities Commissions ("**IOSCO**") 4

Packaged Retail Insurance-based Investment Products ("**PRIIPs**").....5

European Markets Infrastructure Regulation ("**EMIR**") 6

Central Clearing Counterparties & Clearing 11

Benchmarks Regulation.....12

European Long-Term Investment Funds ("**ELTIF Regulation**") 14

Securities Financing Transactions Regulation.....15

Money Markets Funds Regulation ("**MMF Regulation**") 15

2018 Work Programmes of ESMA, European Commission, EBA and ESAs.....16

Central Bank of Ireland 19

Capital Markets Union ("**CMU**").....23

Market Abuse Regulation ("**MAR**").....23

Prospectus Regulation.....24

Anti-Money Laundering ("**AML**") / Counter-Terrorist Financing ("**CTF**").....25

Data Protection / GDPR.....30

Companies (Statutory Audits) Bill 2017 36

Short Selling Regulation ("**SSR**") 36

International Swaps and Derivatives Association ("**ISDA**") 37

Mediation Act 2017 37

FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

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

(i) Central Bank issues revised UCITS Q&As

During the period 1 October 2017 to 31 December 2017, the Central Bank published the Twentieth and the Twenty-First Edition of the Central Bank UCITS Question & Answers ("**Q&A**").The updates to the Q&As comprise:

- Q&A ID 1085 confirms that any Irish fund which is managed by a non-Irish fund management company must now create a designated email address which should be monitored for regulatory correspondence. The Q&A also confirms that an individual email address can be set up for each Irish fund or alternatively a single email address for all Irish UCITS managed by the non-Irish fund management company can be used. The deadline for submitting details of the relevant email address was10 November 2017 and should be submitted via CP86email@centralbank.ie; and

- Q&A ID 1015 concerns the regulatory considerations around Irish authorised UCITS acquiring Chinese shares through the Shanghai-Hong Kong stock Connect and Shenzhen-Hong Kong Stock Connect.

  A copy of the Twenty-First Edition Q&A can be found here.

(ii) ESMA updates Q&A on application of UCITS Directive

On 5 October 2017, the European Securities and Markets Authority ("**ESMA**") published an updated Questions & Answers document ("**Q&A**") on the application of Directive 2009/65/EC, as amended (the "**UCITS Directive**"). The updates comprise:

- Q&A No 2: This concerns the reporting of data items in Section A of the Annex of Regulation (EU) 2015/2365 on reporting and transparency of securities financing transactions ("**SFTR**") in the annual and half-yearly reports of a UCITS.

A copy of the revised Q&A can be found here.

An accompanying press release can be found here.

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

(i) Central Bank issues revised AIFMD Q&A

During the period 1 October 2017 to 31 December 2017, the Central Bank published the Twenty-Sixth Edition and the Twenty-Seventh Edition of the Central Bank UCITS Question & Answers ("**Q&A**") on the application of Directive 2011/61/EU ("**AIFMD Directive**"). The updates to the Q&As comprise:

- Q&A ID 1124 confirms that an Irish authorised AIF managed by a non-Irish fund management company must maintain a designated email address for regulatory correspondence in respect of Irish authorised AIFs. This email address should be monitored for regulatory correspondence. It confirms that individual email addresses can be set up for each Irish authorised AIF or a single email address for all Irish authorised AIFs under management by the non-Irish fund management company. The deadline for submitting details of the relevant email address was 10 November 2017 and should be submitted via CP86email@centralbank.ie; and

- Q&A ID 1094 concerns the regulatory considerations around Irish authorised AIF seeking to acquire Chinese shares through the Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect.

A copy of the Twenty-Seventh Edition Q&A can be found here.

(ii) ESMA updates Q&A on application of AIFMD Directive

On 5 October 2017, ESMA published an updated Questions and Answers on the application of the AIFMD ("**Q&A**"). The updates comprise:

- Section I (Remuneration) Question 6: This concerns the remuneration-related disclosure requirements under Article 22(2)(e) of the AIFMD;

- Section I (Remuneration) Question 7: This concerns the inclusion of the information prescribed by Article 22(2)(e) and (f) of the AIFMD in the annual reports; and

- Section XIII (Impact of SFTR) Question 2: This concerns the reporting of data items in Section A of the Annex of Regulation (EU) 2015/2365 on reporting and transparency of securities financing transactions ("**SFTR**") in the annual reports of the AIF.

A copy of the updates Q&A can be found here.

An accompanying press release can be found here.

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

(i) Regulation amending EuVECA and EuSEF Regulations published in the Official Journal

Regulation (EU) 2017/1991 amending: (i) the European Venture Capital Funds Regulation (Regulation 345/2013) (the "**EuVECA** Regulation") and (ii) the European Social Entrepreneurship Funds Regulation (Regulation 346/2013) (the "**EuSEF Regulation**") (the "**Amending Regulation**") was published on 10 November 2017 in the Official Journal of the European Union (the "**OJ**").

Amongst other changes, the Amending Regulation amends the existing EuVECA Regulation and the EuSEF Regulation by:

- Opening up the use of the EuVECA and EuSEF to all managers authorised under the AIFMD Directive.This means that larger managers with assets under management of more than EUR 500 million will also be able to set up and manage EuVECA and EuSEF funds;

- Setting up a publicly accessible central database on EuVECA/EuSEF funds and all qualified managers managed by ESMA;

- Extending the class of EuVECA eligible assets to allow investment in small mid-caps (i.e. unlisted undertakings that employ up to 499 employees) and small and medium-sized enterprises" listed on an SME growth market;

- Decreasing costs by explicitly prohibiting fees imposed by competent authorities of host Member States where no supervisory activity is performed; and

- Simplifying the registration process and setting the minimum capital necessary to become a manager.

The Amending Regulation applies from 1 March 2018.

A copy of the Amending Regulation can be found here.

International Organisation of Securities Commissions ("**IOSCO**")

(i) IOSCO publishes final report on good practices for termination of investment funds

On 23 November 2017, the International Organization of Securities Commissions ("**IOSCO**") published its final report setting out good practices for the termination of investment funds.

The report sets out 14 good practices which apply to voluntary terminations (i.e. those terminations which occur because an investment fund is either no longer economically viable or cannot meet its intended objectives even though it is still solvent) as opposed to involuntary terminations. The report explains that it is expected that local national legislation will address involuntary terminations.

The report indicates that the good practices set out therein do not override national or regional legal or regulatory requirements and/or insolvency regimes. Moreover, the report indicates that whilst relevant in some cases, the good practices prescribed in this document may not be applicable to involuntary terminations.

A copy of the final report can be found here.

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

(i) Insurance Europe and EFAMA publish a revised template for PRIIPs information exchange

Regulation (EU) No 1286/2014 of the European Parliament and of the Council (the "**PRIIPs Regulation"**) takes effect from 1 January 2018.

The objective of the PRIIPs Regulation is to improve the transparency of certain products manufactured by the financial services industry which are offered to retail investors. In brief, the PRIIPs Regulation introduces an obligation on the manufacturers of packaged retail and insurance-based investment products ("**PRIIPs**") to produce a key information document ("**KID**") for retail investors so that they can understand and compare the key features and risks of a PRIIP.

On 6 October 2017, Insurance Europe and the European Fund and Asset Management Association ("**EFAMA**") published a press release announcing that they have updated their PRIIPs information exchange templates:

- **The European PRIIPs template** ("**EPT**")

The template has been amended by two optional parts (82 to 101). The first addition is relevant only for funds or structured products offered in the German market and the second part amends the EPT for data fields related to structured products that were not addressed in the first version of the template.

- **The "Comfort" EPT ("CEPT**")

The content of this template has not changed, but it now provides two possible methods for the VaR-equivalent volatility ("**VEV**") calculation for regular premiums.

The templates seek to facilitate the exchange of information between insurers and asset managers, which is a requirement under the PRIIPs Regulation for multi-option products.

A copy of the templates can be found here.

(ii) ESAs publish updated Q&As on PRIIPs KID

On 20 November 2017, the ESAs published an updated version of its questions and answers document on the KID requirements for PRIIPs under Commission Delegated Regulation (EU) 2017/653 (the "**PRIIPS Delegated Regulation**") (the "**Q&As**").

The PRIIPS Delegated Regulation supplements the PRIIPs Regulation by laying down the regulatory technical standards with regard to the presentation, content, review and revision of such a KID and the conditions for fulfilling the requirement to provide such a KID.

The updated Q&As comprise:

- General Topics: Q&A 2 concerns the requirement for a KID when an investment product is listed on a regulated market and Q&A 3 concerns the definitions of the terms "biometric risk premium" and "insurance premium";

- Market risk assessment (Annex II, Part 1): Q&A 8 concerns the correction for risk neutrality and Q&A 13 concerns the treatment of credit-linked notes;

- Market risk assessment (Annex II, Part 1): Q&A 8 concerns the correction for risk neutrality;

- Performance Scenarios (Annex IV): Q&A 3 concerns the number of trading periods and Q&A 4 concerns the application of the term "rolling";

- Derivatives: Q&A 4 concerns alterations of the prescribed wording in the KID template for OTC derivatives;

- Multi-option products: Q&A 1 concerns the presentation of information on the underlying options; and Q&A 2 concerns presentation of information on costs.

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

(iii) EIOPA publishes a Q&A on the comprehension alert in KID for insurance-based investment products

On 21 December 2017, EIOPA published a Q&A (dated 19 December 2017) on the comprehension alert in the KID for insurance-based investment products ("**IBIPs**").

A copy of the Q&A can be found here.

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

(i) ESMA publishes updated version of EMIR Q&As

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on Regulation (EU) No 648/2012 of the European Parliament and of the European Council on OTC derivatives, central counterparties and trade repositories ("**EMIR**"). The updated version of the Q&A contains updates on:

- Question 1 of Part I concerning the definition of "OTC derivatives";

- Question 18b of Part I concerning the segregation level for indirect clearing accounts;

- Question 22 of Part II concerning the ongoing monitoring of collateral requirements for central counterparties ("CCPs");

- Question 3a of Part III concerning the reporting of collateral to trade repositories;

- Question 24 of Part III concerning buy/sell indicators for swaps;
- Question 34 of Part III concerning contracts with no maturity date;
- Question 24 of Part III concerning reporting to TRs: Buy/Sell indicator for swaps;
- Question 40 of Part III concerning LEI changes due to mergers and acquisitions/ up-date of identification code to LEI; and
- Question 44 of Part III concerning transition to new EMIR technical standards on reporting.

A copy of the updated EMIR Q&A can be found here.

(ii) ESMA updates its list of recognised CCPs based in third countries

On 9 October 2017, ESMA updated its list of recognised CCPs based in third countries. EMIR requires that third-country CCPs are to be recognised by ESMA in order to operate in the European Union.

A copy of the updated list can be found here.

A copy of the press release can be found here.

(iii) European Commission Implementing Decision on the equivalence of arrangements of US CFTC regime for purposes of Article 11 of EMIR published in the OJ

On 14 October 2017, the European Commission Implementing Decision ((EU) 2017/1857) on the equivalence of the legal, supervisory and enforcement arrangements of the US for derivative transactions supervised by the Commodity Futures and Trading Commission ("**CFTC**") for the purposes of Article 11 of EMIR was published in the OJ.

The Commission Implementing Decision entered into force on 3 November 2017.

A copy of the Commission Implementing Decision can be found here.

(iv) Revised RTS and ITS on EMIR trade reporting commence 1 November 2017

The following revised European Commission Regulations concerning the technical standards on data reporting under Article 9 of EMIR commenced application as and from 1 November 2017:

- Commission Delegated Regulation (EU) 2017/104 amending Commission Delegated Regulation (EU) No 148/2013 supplementing EMIR with regard to regulatory technical standard ("**RTS**") on the minimum details of the data to be reported to trade repositories (the "**Revised RTS on trade reporting**"); and

- Commission Implementing Regulation EU) 2017/105 amending Implementing Regulation (EU) No 1247/2012 supplementing EMIR with regard to implementing technical standards with regard to the format and frequency of trade reports to trade repositories ("**ITS**") (the "**Revised ITS on trade reporting**").

The revised RTS and ITS on trade reporting are based on previous ESMA consultation papers and contain a number of amendments to the trade reporting to be carried out. The revised RTS and ITS were published in the OJ on 21 January 2017.

The Revised RTS on trade reporting can be found here.

The Revised ITS on trade reporting can be found here.

(v) Updated EMIR validation rules commence 1 November 2017

The updated EMIR validation rules, as published by ESMA on 3 October 2017, commenced application on 1 November 2017. The validation rules were updated by EMSA to accompany the Revised RTS on trade reporting and the Revised ITS on trade reporting (see above).

The updated EMIR validation rules can be accessed here.

(vi) Commission Delegated Regulation revising the RTS on access to data and aggregation and comparison of data under EMIR commences 1 November 2017

Commission Delegated Regulation (EU) 2017/1800 was adopted by the European Commission on 29 June 2017. The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 151/2013 with regard to RTS specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing data under EMIR.

Commission Delegated Regulation (EU) 2017/1800 was published in the OJ on 7 October 2017 and commenced application on 1 November 2017. It revises the existing RTS by further specifying the operational standards required to aggregate and compare data across trade repositories.

A copy of the Commission Delegated Regulation (EU) 2017/1800 can be found here.

(vii) Commission Delegated Regulations on indirect clearing arrangements under EMIR and MiFIR published in the OJ

The following Delegated Regulations were published in the OJ on 21 November 2017:

- Commission Delegated Regulation (EU) 2017/2154 which supplements MiFIR with regard to RTS on indirect clearing arrangements; and

- Commission Delegated Regulation (EU) 2017/2155 which amends Commission Delegated Regulation (EU) 149/2013 with regard to RTS on indirect clearing arrangements.

The Commission Delegated Regulations entered into force on 11 December 2017 and will apply from 3 January 2018.

A copy of Commission Delegated Regulation (EU) 2017/2154 can be found here.

A copy of Commission Delegated Regulation (EU) 2017/2155 can be found here.

(viii) ESAs release joint statement regarding variation margin exchange for physically-settled FX forwards

On 24 November 2017, the ESAs released a statement regarding variation margin exchange for physically-settled FX forwards under EMIR.

The ESAs announced that they were reviewing the Commission Delegated Regulation (EU) 2016/2251 (the "**Margin RTS**") and developing draft amendments to "align the treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions".

The ESAs reiterated their commitment to apply the international standards and to "require the exchange of variation margin for physically-settled FX forwards in a risk based and proportionate manner".

In particular, the ESA's indicated that "this would most likely imply that the scope should cover transactions between institutions (i.e. credit institutions and investment firms)" but suggested that certain transactions with end-users (i.e. institution to non-institution, which would include investment funds) could be brought outside scope.

In light of the difficulties certain end-users are facing, the ESAs referred to their expectation that EU national competent authorities should "*generally apply their risk based supervisory powers in their day to day enforcement of applicable legislation in a proportionate manner.*"

A copy of the ESA's joint statement can be found here.

(ix) Update on the EMIR reform proposal

On 4 May 2017, the European Commission published its proposal to amend EMIR. The proposal seeks to introduce a number of specific changes to EMIR seeking to simplify the applicable rules and eliminating burdens. The reforms included:

- Proposed changes to the counterparty classification under EMIR (such as including all alternative investment funds within the scope of the classification of financial counterparties);

- Proposed changes to the scope of reporting activities (such as reducing the reporting burden for non-financial counterparties who contract OTCs with financial counterparties by requiring the financial counterparties to report the trades on behalf of both parties);

- Proposed changes to the clearing obligation (such as reducing the clearing thresholds for small financial counterparties FCs and extending the exemption from clearing obligations for pension scheme arrangements); and

- Enabling clearing obligations to be temporarily suspended by the European Commission for up to 12 months in certain circumstances.

A copy of the European Commission's initial proposal can be found here.

On 17 October 2017, the European Central Bank ("**ECB**") published an opinion (dated 11 October 2017) on the proposed EMIR reform proposals.

A copy of the ECB's opinion can be found here.

On 16 November 2017, the Council of the European Union published a second Council compromise proposal on the proposed EMIR reform proposal, while on 28 November 2017, it published its third Council compromise proposal on the proposed EMIR reform proposal.

A copy of the compromise proposal for 28 November 2017 can be found here.

(x) ESAs publish final draft RTS amending margin requirements for physically-settled foreign exchange ("FX") forwards

On 18 December 2017, the ESAs published a final report containing the text of their proposed amendments to the Margin RTS. The revisions to the Margin RTS exempt certain counterparties, including investment funds, from the variation margin requirement in respect of physically-settled FX forwards.

The draft RTS aims to align the treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions. The next step is for the draft amendments to the Margin RTS to be considered by the EU Commission.

A copy of the final report can be found here.

(xi) Central Bank issues statement on the variation margin requirements for physically-settled FX forwards

The Central Bank issued a statement on 19 December 2017 in response to the ESAs joint statement on 24 November 2017 in respect of the requirement under the Margin RTS to exchange variation margin for physically-settled FX forwards from 3 January 2018.

This follows similar statements recently issued by, inter alia, the Financial Conduct Authority ("**FCA**") in the UK on 7 December 2017 and the Federal Financial Supervisory Authority ("**BaFin**") in Germany on 12 December 2017 in support of the ESAs joint statement.

The Central Bank's statement provides the following:

- It welcomed the ESAs joint statement;
- It noted that the ESAs are undertaking a review of the relevant requirements and will propose some targeted amendments which are likely to continue to require the exchange of variation margin for physically-settled FX forwards in a risk-based and proportionate manner but to limit the scope to transactions between institutions (credit institutions and investment firms); and
- It confirmed that, in accordance with the recommendation from the ESAs and pending the outcome from their review, it will apply its risk-based supervisory powers in the day-to-day enforcement of applicable legislation in a proportionate manner.

Although not expressly stated, it may be inferred from the Central Bank's statement that investment funds do not need to comply with the relevant requirement to exchange variation margin for physically-settled FX forwards as and from 3 January, 2018.

For further information on EMIR, please refer to previous briefings issued by Dillon Eustace including the briefing entitled "Proposal for EMIR Reform – targeted changes with important consequences for AIFs, AIFMs and UCITS Management Companies'' can be found here.

A copy of the Central Banks statement can be found here.

Central Clearing Counterparties & Clearing

(i) European Commission publishes opinion backing increased regulatory powers for the ECB regarding CCPs

The European Commission has published an opinion dated 3 October 2017 supporting a recommendation of the ECB of 23 June 2017 in which the ECB recommended that the ECB should have a greater role in regulating clearing systems for financial instruments, including CCPs.

An annex to the European Commission's opinion contains the Commission's proposed amendments to the ECB's suggested amendments to the text of Article 22 of the Statute of the European System of Central Banks and of the ECB (the "**Statute**").

A copy of the European Commission's opinion can be found here, the annex to the opinion can be found here and a copy of the ECB recommendation can be found here.

(ii) ECB publishes an opinion on the proposed Commission Regulation to amend EMIR and the ESMA Regulation

On 4 October 2017, the ECB published an opinion on the proposed Commission Regulation amending EMIR and Regulation (EU) 1095/ 2010 (the "**ESMA Regulation**") as regards the procedures and authorities involved for authorisation of the central clearing parties ("**CCPs**") and the recognition of third-country CCPs.

The European Commission published the proposed Commission Regulation on 13 June 2017.

A copy of the ECB opinion can be found here.

A copy of the proposed Regulation can be found here.

(iii) European Commission publishes consolidated version of its modified legislative proposal to amend EMIR and the ESMA Regulation

On 13 October 2017, European Commission published a consolidated version of its modified legislative proposal to amend EMIR and the ESMA Regulation as regards the procedures and authorities involved for authorisation of CCPs and the recognition of third-country CCPs.

This version of the proposal consolidates the European Commission's original version of the proposed Regulation with the amendments made in the European Commission's subsequent version.

The proposal was open to feedback prior to 8 December 2017.

A copy of the modified legislative proposal can be found here

Benchmarks Regulation

(i) European Commission adopts a Commission Delegated Regulation to assess the impact of cessation of, or changes to, existing benchmarks

On 3 October 2017, the European Commission adopted a Commission Delegated Regulation on conditions to assess the impact of cessation of or changes to existing benchmarks under Regulation (EU) 2016/ 1011 (the "**Benchmarks Regulation**").

The Commission Delegated Regulation sets out in detail the conditions upon which a national competent authority may determine that the cessation or changing of an existing benchmark could result in a force majeure event, or could frustrate or otherwise breach the terms of a financial contract or financial instrument, or the rules of an investment fund, referencing an existing benchmark.

On 10 November 2017, the Council of the European Union did not object to the Commission Delegated Regulation, however it is awaiting committee decision.

A copy of the Commission Delegated Regulation can be found here.

The progress of the Delegated Regulation can be viewed here.

(ii) ESMA updates its webpage concerning the register under the Benchmark Regulations

On 13 October 2017, ESMA updated its webpage on benchmarks regarding the publication of the register of administrators and third country benchmarks in accordance with Article 36 of the Benchmarks Regulation.

ESMA will publish this list of administrators and third country benchmarks as of from 1 January 2018. The final register will be available in the third quarter of 2018.

The webpage can be accessed from here.

(iii) Commission Implementing Regulation establishing list of critical benchmarks under the Benchmarks Regulation published in the OJ

Commission Implementing Regulation (EU) 2017/2446 of 19 December 2017 was published in the OJ on 28 December 2017. This Commission Implementing Regulation amends Implementing Regulation (EU) 2016/1368 establishing a list of critical benchmarks used in financial markets pursuant to the Benchmarks Regulation.

A copy of the Commission Implementing Regulation can be found here.

(iv) ESMA publishes updated Q&As on the Benchmarks Regulation

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on the Benchmarks Regulation. The updates comprise:

- Q&A 4.1: The application of the Benchmarks Regulation to EU and third country central banks;
- Q&A 4.2: The exemption relating to single reference price;
- Q&A 4.3: The scope of the Benchmarks Regulation regarding the application of the Benchmarks Regulation outside the EU;
- Q&A 5.1:The definition of "family of benchmarks";
- Q&A 5.2: The definition of "use of a benchmark";

- Q&A 6.1: Authorisation and registration on the applicability of the requirements of the Benchmarks Regulation;
- Q&A 6.3: Transitional provisions that are applicable to third country benchmarks;
- Q&A 6.1: Authorisation and registration on the applicability of the requirements of the Benchmarks Regulation; and
- Q&A 7.1: Requirements for users of benchmarks, written plans for cessation or material changes of a benchmark.

A copy of the December Q&As can be found here.

European Long-Term Investment Funds ("**ELTIF Regulation**")

(i) European Commission adopts Delegated Regulation on RTS under the ELTIF Regulation

On 4 December 2017, the European Commission adopted a Commission Delegated Regulation supplementing Regulation (EU) 2015/760 on European Long-Term Investment Funds ("**ELTIF Regulation**") with respect to RTS which specifies:

- The criteria to determine when the use of financial derivative instruments is solely for hedging purposes under Article 9(3) of the ELTIF Regulation;
- The circumstances in which the life of an ELTIF is considered sufficient in length to cover the life-cycle of each of the individual assets of the ELTIF under Article 18(7) of the ELTIF Regulation;
- The conditions and risk for an assessment of the market for potential buyers and valuation of the assets to be divested under Article 21(3) of the ELTIF Regulation;
- Definitions, calculation methodologies and presentation formats of costs to the capital of the ELTIF under Article 25(3) of the ELTIF Regulation; and
- The characteristics of the facilities available to retail investors under Article 26(2) of the ELTIF Regulation.

The Council of the European Union and the European Parliament will review the Commission Delegated Regulation. If neither of them object, the Commission Delegated will enter into force twenty days after it is published in the OJ.

A copy of the Commission Delegated Regulation can be found here.

Securities Financing Transactions Regulation

(i) European Commission publishes a report under the Securities Financing Transactions Regulation

On 19 October 2017, the European Commission published a report to the European Parliament and Council of the European Union under Regulation (EU) 2015/2365 (the "**Securities Financing Transactions Regulation**") ("**SFTR**") on reporting and transparency.

Article 29(3) of the SFTR requires that the European Commission produces a report on the progress of international regulatory efforts to mitigate the risks related with securities financing transactions ("**SFTs**"), which includes the Financial Stability Board's ("**FSB**") recommendations for cuts on non-centrally cleared SFTs and the appropriateness of those recommendations for the European Union market.

The Commission concludes that the FSB's recommendations on SFTs have been addressed in the European Union through the adoption of the SFTR and the specific provisions in financial services legislation and guidelines. The Commission indicates that on this basis there appears to be no need for further regulatory action at this stage, however, it will continue to monitor developments in the SFT markets.

A copy of the report can be found here.

Money Markets Funds Regulation ("**MMF Regulation**")

(i) ESMA publishes final report on its technical advice ITS and guidelines under the MMF Regulation

Following on from its consultation in May 2017, ESMA has published its final report (dated 13 November 2017) (the "**Final Report**") on: (i) its technical advice (ii) draft ITS and (iii) guidelines, pertaining to Regulation (EU) 2017/1131 on money market funds (the "**MMF Regulation**").

- Technical advice: In its technical advice, ESMA provides further guidance on: (i) liquidity and credit quality requirements applicable to assets received under a reverse repurchase agreement; (ii) criteria for validation of the credit quality assessment methodologies; (iii) criteria for quantifying the credit risk of an issuer; (iv) qualitative indicators on the issuer of an instrument; and (v) assessment of aspects of an issuer of an instrument.

- Draft ITS: The Final Report also incorporates draft ITS which establish a reporting template to be used by money market fund managers when reporting information to the competent authorities on a quarterly basis. In respect of the reporting template, ESMA indicated that it has sought legal advice from the European Commission as to whether or not information on the "destruction" of shares must be included in the quarterly reporting. The Final Report confirms that first quarterly reports will need to be submitted to national regulators in October/November of 2019 (rather than July 2018). It also

confirms that there will be no requirement to retroactively provide historical data for any period prior to the starting date of the reporting.

- Guidelines: The Final Report also incorporates ESMA guidelines on stress test scenarios (the "**Guidelines**") which are addressed to both national regulators and money market funds and their managers. The Guidelines establish common reference parameters which must be observed when conducting the stress testing required under the MMF Regulation. The Guidelines will apply from the transposition dates applicable to new and existing money market funds set down in the MMF Regulation.

Please see the Dillon Eustace publication entitled "ESMA's Final Report on the Money Market Fund Regulation" for further details, which can be found here.

A copy of the final report can be found here.

2018 Work Programmes of ESMA, European Commission, EBA and ESAs

(i) ESMA's work programme for 2018

On 5 October 2017, ESMA published its work programme for 2018. This sets out ESMA's priorities and areas of focus for 2018 which include:

- Increasing the level of supervisory convergence in EU legislation concerning corporate finance matters (including the areas of prospectus legislation, transparency and takeover bids);

- Increasing supervisory convergence in the area of enforcement accounting standards and increase co-operation between accounting and auditing enforcers;

- Identifying areas of non-convergence in respect of investment funds legislation (such as the UCITS Directive, AIFMD, PRIIPs and the MMF Regulation), undertaking a peer review on the ESMA guidelines on ETFs and other UCITS issues and providing further guidance to promote supervisory convergence;

- Providing guidance to promote the consistent application of the MiFID II Directive and MiFIR (including peer reviews on MiFID topics related to investor protection and intermediaries) and to promote the consistent application of the SFTR;

- Ensuring the quality, integration, usability and transparency of the data collected by ESMA relating to MiFID II, alternative investment funds, trade repositories, credit rating agencies and securities financing transactions; and

- Increasing supervision of credit rating agencies and trade repositories, issuing advice on third country equivalence and other guidance on the application of the Benchmarks Regulation via opinions, Q&A and guidelines.

A copy of the work programme for 2018 can be found here.

A copy of the accompanying press release can be found here.

(ii) EBA's work programme for 2018

On 5 October 2017, the European Banking Authority ("**EBA**") published its work programme for 2018. This sets out the EBA's priorities and areas of focus for 2018 which include:

- Contributing to the developments relating to the CRD IV Directive (2013/36/EU) ("**CRD IV**") and the Capital Requirements Regulation (Regulation 575/2013) ("**CRR**"), and the Bank Recovery and Resolution Directive (Directive 2014/59/EU) ("**BRRD**"):
- Implementing data infrastructure and data analysis to enhance the EBA's role as a data hub for banks in the EU to collect, process and disseminate high-quality data for a wide range of stakeholders;
- Monitoring and evaluating the impact of Brexit to protect the public interest;
- Evaluating and contributing to FinTech regulation;
- Fostering appropriate policy developments while monitoring the consistent application of the Single Rulebook and its impact on institutions; and
- Contributing to the Council of the EU's action plan to tackle non-performing loans ("**NPLs**") in the EU.

A copy of the work programme for 2018 can be found here.

A copy of the accompanying press release can be found here.

(iii) European Commission's work programme for 2018

On 24 October 2017, the European Commission published a communication outlining its work programme for 2018. It presents a focused list of 26 key initiatives across the Commission's ten political priorities, 15 intended withdrawals or modifications of pending proposals and 66 priority pending proposals.

The communication is accompanied by a Q&A document and by the following annexes:

- Annex I which contains key initiatives to be presented in the year ahead;
- Annex II which contains REFIT initiatives;
- Annex III which lists the priority pending legislative files;
- Annex IV which contains a list of intended withdrawals of pending proposals; and

- Annex V which contains a list of existing legislation which the European Commission intends to repeal.

A copy of the communication can be found here.

A copy of the Q&A can be found here.

A copy of the Annexes can be found here.

(iv) ESMA publishes updated Q&As on its guidelines on alternative performance measures

On 30 October 2017, ESMA published updated Q&As on its guidelines on alternative performance measures ("**APMs**").

The ESMA guidelines apply to APMs disclosed in regulated information by issuers in the EU with securities traded on regulated markets and prospectuses.

The guidelines will apply to APMs disclosed in annual and interim financial reports. They will also apply to other regulated information published by an entity, for example, management reports disclosed to the market under the Transparency Directive (Directive 2004/109/EC), and disclosures under Market Abuse Regulation (Regulation 596/2014) ("**MAR**").

The updated Q&As include six new questions and answers:

- Question 12: Definition of APMs;
- Question 13: Scope of the APM Guidelines;
- Question 14: Application of the scope exemption;
- Question 15: Definition and basis of calculation;
- Question 16: Reconciliation;
- Question 17: Application of the Fair review principle to APMs;

A copy of the press release can be found here.

A copy of the Q&As can be found here.

(v) ESAs' 2018 work programme

On 15 November 2017, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published its 2018 work programme. In the 2018 work programme, the ESAs states that in 2018 it will continue to:

- Prioritise and focus on consumer protection issues. In this regard, ESAs will continue to support the implementation of the PRIIPs Regulation, analyse and assess the adequacy of cross-border supervision of financial services and assess whether firms have implemented the complaints-handling guidelines;

- Monitor the evolution of the market with a view to identify the relevant FinTech and digitalisation issues that need addressing;

- Focus on cross-sectoral risk analysis and assessment;

- Focus on new and emerging anti-money laundering and counter-terrorist financing risks and to continue with its review and development of guidelines and technical standards to ensure consistency in the EU as regards these risks;

- Focus on effective supplementary supervision of financial entities;

- Serve as an important body for addressing other cross-sectoral matters, such issues as Brexit, European Commission proposals to enhance the operation of the ESAs, the revised EMIR proposals and work on long-term performance of retail investment products.

A copy of the ESAs 2018 work programme can be found here.

Central Bank of Ireland

(i) Central Bank publishes feedback statement to Consultation Paper 108 (New methodology to calculate funding levies)

On 27 March 2017, the Central Bank published Consultation Paper 108 entitled "New Methodology to Calculate Funding Levies: Credit Institutions, Investment Firms, Fund Service Providers and EEA Insurers" ("**CP 108**"). In CP 108, the Central Bank proposed to revise the way the current industry funding levy is calculated for credit institutions, investment firms, fund services providers and EEA insurers.

On 2 October 2017, the Central Bank published a feedback statement in response to CP 108 (the "**Feedback Statement**"). The Feedback Statement clarifies the changes which will be introduced which can be summarised as follows:

- **Credit institutions:** The Central Bank will proceed with the adapted ECB methodology for the calculation of the industry funding levies as outlined in CP 108. However, institutions that were admitted to the ELG scheme will continue to pay 100% of their levy contribution;

- **Irish Investment firms and fund service providers**: The proposed new levy methodology will be applied once the MiFID II implementation is complete and to facilitate changes to PRISM impact scores which will first apply from 3 January 2018;

- **EEA insurance companies**: In respect of EEA insurers, the Central Bank intends to proceed with the changes to levies based on three categories as highlighted in the consultation whereby:
  - Category 1: Large non-life and life insurers, to be levied at half the rate of medium high insurers;
  - Category 2: Non-life insurers not belonging to category 1 having written motor insurance in Ireland in 2016, to be levied at half the rate of medium low insurers;
  - Category 3: Insurers not belonging to category 1 or 2, to be levied as before; and
- **EEA Investment Firms and Fund Service Providers**: The Central Bank intends proceed with introducing a fixed levy equal to the flat levy component of Irish investment firms and Irish fund service providers.

A copy of the Feedback Statement on CP 108 can be found here.

(ii) Central Bank speech – CP 86 and Fund Management Companies Guidance

On 19 October 2017, the Director of Asset Management Supervision of the Central Bank, Michael Hodson, delivered a speech on the role of the board of fund management companies in achieving compliance with CP 86 and the Central Bank's Fund Management Companies Guidance.

Mr. Hodson's speech focused on the following areas:

- The Central Bank's work to enhance fund management company effectiveness under the new "organisational effectiveness" role;
- The role of the board of directors in light of the many changes on the horizon, such as Brexit, the MMF Regulation and MiFID II;
- The European Regulatory landscape in the context of the United Kingdom's decision to leave the European Union;
- The application process to enable management companies to provide ancillary services, such as portfolio management services under MiFID II; and
- The Central Bank's 2018 supervisory priorities, which include the supervision of firms in light of Brexit and MiFID II and also the safeguarding of investor money in the context of the revised Investor Money Regulations.

A copy of the full speech can be found here.

(iii) Central Bank publishes industry letter on the Contingency Planning for Investment Funds on Brexit

On 6 November 2017, the Central Bank published a letter in relation to Brexit contingency planning for the investment funds industry.

In this letter addressed to self-managed investment companies ("**SMICs**") and to management companies of externally managed funds ("**ManCos**"), the Central Bank indicated that these entities should be conducting an analysis on the potential impact of Brexit on asset management and distribution.

The Central Bank referred the SMICs and ManCos to the recently published ESMA opinions dealing with MiFID investment firms, investment fund managers and self-managed funds and secondary markets trading venues.

The Central Bank indicated that the analysis to be carried out by the Board of each SMIC and ManCos should include an analysis to determine the extent to which Brexit will affect fund investors, their day-to-day fund operations and delivery of investment strategies.

Based on the analysis carried out, the Central Bank requires Boards to develop contingency plans for all Brexit scenarios and associated risks including communication with investors where appropriate. Contingency plans for each potential outcome including key dates for decisions and actions should be discussed and documented at Board meetings. Further details are set out in the letter as regards considerations which the Boards must be mindful of when carrying out such an analysis in respect of each particular fund.

In December 2017, the Central Bank issued a further industry letter on the contingency planning for Investment Funds on Brexit, requesting firms to provide a response to the certain questions prior to 19 January 2018:

A copy of the November 2017 letter can be found here.

(iv) Central Bank speech - regulatory priorities for 2018

On 30 November 2017, the Director of Policy and Risk of the Central Bank, Gerry Cross, delivered a speech to the Institute of Bankers in Ireland. His speech focused on broad topics such as:

- Brexit;
- MiFID II implementation;
- IFRS 9;
- IT & Cyber Risk;
- Outsourcing;

- Fintech; and
- Conduct, behaviour and culture of a firm.

A copy of the full speech can be found here

(v) Central Bank introduces additional supervisory levy

With effect from 1 December 2017, the Central Bank has introduced a new "authorisation" levy which will be imposed on every Irish domiciled investment fund that is authorised, and every sub-fund which is approved, by the Central Bank. This levy will be known as an "additional supervisory levy" and is distinct from the annual industry funding levy to which all Irish domiciled funds are already subject.

The rate of this once-off levy imposed by the Central Bank will depend on whether the relevant fund is being established as a new umbrella fund or a stand-alone fund or whether it is a new sub-fund within an existing umbrella fund. By way of example, a new umbrella fund will be subject to a levy of €3,000 with an additional €2,000 being imposed in respect of each sub-fund created within that umbrella fund. Any sub-funds which are approved by the Central Bank after the umbrella fund has been authorised will be subject to a levy of €2,000 per sub-fund, subject to a maximum fee cap.

The levy will be payable by the relevant fund within 28 days of the issue of the levy notice by the Central Bank. An appeals process may be invoked by any fund within 21 days following the due date of the levy notice where that fund believes that the levy has been incorrectly assessed.

Full details of the applicable rates, together with further information relating to the levy is available from the Central Bank's webpage, accessible here.

(vi) Central Bank announces review of connected party transactions questionnaire

On 13 December 2017, the Central Bank announced that it is conducting a review in relation to "connected party" transactions for investment funds. As part of this review, the Central Bank issued a questionnaire to a large number of AIFs and UCITS.

The purpose of the review is to ascertain how Irish authorised funds are complying with their obligations concerning "connected party" transactions, with specific details being requested for material connected party transactions as set out in the "connected parties questionnaire" file.

The specific focus of the questionnaire is on investment transactions with connected parties as opposed to fee payments for the performance of contracted services to the fund. Investment transactions are considered to be transactions with the fund that result in the transfer of assets or liabilities irrespective of whether or not a price is charged.

The Central Bank also wishes to seek some detail in relation to stock lending arrangements and the provision of loans by beneficial investors, from a connected party's viewpoint.

A copy of the Questionnaire can be accessed here.

Capital Markets Union ("**CMU**")

(i) European Commission publishes its request to the ESAs to report on cost and past performance of main categories of retail investment, insurance and pension products

On 17 October 2017, the European Commission published its request (dated 13 October 2017) to the ESAs to issue recurrent reports on the cost and past performance of the main categories of retail investment, insurance and pension products.

The request is one of the actions announced in the European Commission's communication on the mid-term review of the CMU which was published in June 2017.

It is envisaged that the reporting should be based on data and information originating from disclosures and reporting already required under EU law or national legislation.

A copy of the request can be found here.

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

(i) ESMA publishes updated Q&As on the Market Abuse Regulation

During the period 1 October 2017 to 31 December 2017**,** ESMA published updated versions of its questions and answers ("**Q&As**") on the Markets Abuse Regulation (Regulation 596/2014) ("**MAR**"). The updates comprise:

- Question 7.8 (trading during closed periods and prohibition of insider dealing);
- Question 7.9 (types of transactions by person discharging managerial responsibilities ("**PDMRs**") prohibited during closed periods); and
- Question 11.1 (calculations relating to emissions, allowances and emission allowances market participants ("**EAMPs**")).

A copy of the Q&AS can be found here.

Prospectus Regulation

(i) ESMA publishes updated Q&As on Prospectuses

On 20 October 2017 ESMA published an updated versions of its questions and answers on prospectuses ("**Q&A on Prospectuses**"). The changes arise from the implementation of the Prospectus Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") on 20 July 2017.

The updates comprise:

- Question 27 (concerning convertible or exchangeable securities);
- Question 29 (concerning the conversion or exchange of non-transferable securities and exemption from publishing a prospectus);
- Question 31 (concerning the exemption for admission to trading);
- Question 32 (concerning exemptions from the obligation to publish a prospectus in Article 1(5) of the Prospectus Regulation as stand-alone exemptions); and
- Question 44 (concerning the obligation to publish a prospectus for admission of securities to trading on a regulated market).

A copy of the Q&A on prospectuses can be found here.

(ii) ESMA publishes consultation paper on draft RTS for the Prospectus Regulation

On 15 December 2017, ESMA published a consultation paper on proposed draft RTS under the Prospectus Regulation. The RTS sets out a number of requirements concerning the following areas:

- The key financial information that should appear in the summary of the prospectus;
- Data and machine readability information that provides the public with free of charge access, storage and search functions and for submitting data to ESMA;
- Advertisements relating to public offers or admission to trading;
- Situations which require the publication of a supplement to a prospectus; and
- Publication of a prospectus.

The consultation is open for comments until 9 March 2018.

A copy of the consultation paper can be found here.

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

(i) European Commission adopts Delegated Regulation amending the Commission's list of high-risk third countries under the Fourth Money Laundering Directive ("MLD4")

On 27 October 2017, the European Commission adopted a Delegated Regulation amending the Commission's list of high-risk third countries under the Fourth Money Laundering Directive ((EU) 2015/849) ("**MLD4**") to include Ethiopia.

The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing MLD4 by identifying high-risk third countries.

On 23 November 2017, the initial period for examining the delegated act was extended by one month, at the European Parliament's request and is awaiting a committee decision.

A copy of the Delegated Regulation can be found here.

The progress of the Delegated Regulation can be viewed here.

(ii) Outcomes of the Joint Plenary of FATF/GAFILAT

In November 2017, FATF and the Financial Action Task Force of Latin America ("**GAFILAT**"), held the first joint plenary meeting in Buenos Aires.

According to FATF's press release of 3 November 2017, the main issues dealt with at the plenary meeting were:

- Combatting terrorist financing, including the adoption of a report on the financing of recruitment for terrorist purposes;
- Information sharing and the adoption of revisions to Recommendations 18 and 21 on information sharing;
- Adoption of a supplement to the 2013 FATF Guidance on AML/CFT measures and financial inclusion;
- The mutual evaluation reports of Mexico and Portugal;
- The follow up report for the mutual evaluation of Austria;
- AML/CFT improvements in Uganda;
- Brazil's progress in addressing the deficiencies identified in its mutual evaluation reports since the June 2017 FATF report;
- Approval of a statement about the proliferation financing risk emanating from the Democratic People's Republic of Korea, which stresses the global obligations and the

importance of a robust application of the FATF standards and relevant UN Security Council Resolutions;

- Revisions to methodology;
- Strengthening of FATF's institutional basis, governance and capacity;
- Outcomes of the meeting of the Forum of FATF Heads of Financial Intelligence Units ("**FIUs**");
- Publication of a statement by FATF expressing its strong support for responsible financial innovation in line with FATF Standards and an exploration of the opportunities that new financial and regulatory technologies present for improving the effective implementation of AML/CFT measures;
- FATF/GAFILAT Outreach Prosecutorial Services and Criminal Justice Systems;
- GAFILAT Private Sector engagement;
- Training activities of the FATF Training and Research Institute in Busan, Korea; and
- Considering jurisdictions with strategic AML/CFT deficiencies or which a call for action applies, including an update on Iran's engagement with FATF and an update on AML/CFT improvements in Uganda.

A copy of the press release can be found here.

(iii) ESAs publish a final report on draft RTS on strengthening group-wide management of money laundering and terrorist financing risk under MLD4

On 6 December 2017, the ESAs published a final report on draft RTS on strengthening group-wide management of money laundering and terrorist financing risks under MLD4.

The final report on the draft RTS indicates that additional policies and procedures will be required to be taken by credit and financial institutions to manage money laundering and terrorist financing risks ("**ML/TF Risk**") where one or more branches or majority-owned subsidiaries are located in third countries whose laws do not permit some or all parts of a group's AML and CTF policies and procedures to be implemented in full by such branches/ subsidiaries.

The final report on draft RTS indicates that such additional policies and procedures should be risk-based. However in order to ensure a consistent EU wide approach, the RTS sets out the specific minimum actions which such credit and financial institutions should be required to take in those situations.

The report also indicates that if the relevant competent authority believes that the additional measures taken by a credit institution or financial institution are insufficient to manage that

risk, the competent authority should be able to direct the credit institution or financial institution to take specific measures to ensure the credit institution's or financial institution's compliance with its AML/CFT obligations.

The final draft RTS will be sent to the European Commission for its review and approval.

A copy of the final draft RTS can be found here.

(iv) Central Bank publishes the third edition of the Anti-Money Laundering Bulletin

In December 2017, the Central Bank published the third edition of the Anti-Money Laundering Bulletin with the purpose of providing guidance on customer due diligence ("**CDD**") in relation to the discontinuation of a business relationship where: (i) a firm is unable to identify and verify its customers, or (ii) where there is insufficient documentation or information on file to verify a customer.

The Central Bank states that in such circumstances a "firm must not allow the situation to perpetuate". It states that it expects that firms will have remediation plans in place in order to obtain the outstanding documentation and/or information.

In the bulletin, the Central Bank indicates that it has identified compliance deficiencies in the past which have arisen as a result of a firm acquiring a book of business and thereafter it is unable to verify the identity of these customers, and does not hold sufficient documentation or information to verify these customers. In such cases, the Central Bank indicates that the anti-money laundering function within the firm acquiring /transferring such a book of business should be involved in the due diligence process in order to assess the magnitude of any compliance deficiencies. This involvement will allow firms to commence a remediation exercise should the acquisition/transfer proceed.

The bulletin sets out certain steps to be considered by firms when conducting customer due diligence ("**CDD**") in respect of new customers. The list is stated not to be exhaustive. The steps to be taken by a firm include:

- Implementation of policies and procedures which specify the defined timeframe in which CDD must be completed (if CDD is completed during the establishment of the business relationship). This is to minimize the risk that a firm should be unable to contact the customer or return the funds to the original source, should there be a requirement to discontinue the business relationship;

- Obtaining customer consent as part of the on-boarding process in order to deal with the requirement to discontinue the customer relationship should the need arise; and

- Implementation of processes that allow firms to return funds directly to the source from which they came. Firms should exercise caution when considering the means of doing this, so as not to appear to convert or legitimise such funds.

The bulletin also sets out steps to be considered by firms when conducting CDD measures in respect of existing customers. These include:

- Review of all customer records to ascertain the extent of any deficiencies in CDD;
- Creation of a comprehensive plan to address any failure of customers to provide the required CDD documentation and/or address circumstances in which there is insufficient information in respect of the customer for the firm to demonstrate that the CDD requirements are met. In circumstances where it will take a longer period of time to fully implement remediation plans, firms should consider prioritising remediating customers that would represent a higher risk of ML/TF before remediating other areas;
- Exploration of all options to source CDD, to include other types of identification documents and information which may be acceptable given the ML/TF risk profile of the customer. In cases where customers appear to be non-contactable, firms should employ all available methods that could be utilised in order to locate such customers, for example engaging with the customer's intermediary;
- Where CDD is not forthcoming from customers with whom the firm has been able to successfully correspond, firms must ensure that there are documented policies and procedures in place that outline the action required to discontinue the business relationship;
- In circumstances where there remains a cohort of customers for whom it has not been possible to obtain CDD despite all efforts to contact those customers, firms should design and document policies and procedures to be applied in order to ensure that the associated ML/TF risks are appropriately managed. This may include for example applying measures whereby these accounts are clearly identified as 'discontinued', ring fenced from normal accounts and flagged accordingly, subject to additional and more robust measures to be applied should the customer re-present;
- Consider whether there is any cause for suspicion in circumstances where CDD is not forthcoming and ensure suspicious transaction reporting obligations are fulfilled.

A copy of the third edition of the Anti-Money Laundering Bulletin can be found here.

(v) European Commission adopts a further Delegated Regulation which further amends the Commission's list of high-risk third countries under MLD4

On 13 December 2017, the European Commission adopted a further Commission Delegated Regulation amending the Commission's list of high-risk third countries. The Commission Delegated Regulation adds Sri Lanka, Trinidad, Tobago and Tunisia to the Commission's list of high-risk third countries.

The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing MLD4 by identifying high-risk third countries.

The Council of the European Union and the European Parliament will review the Commission Delegated Regulation and if neither of them objects, it will be published in OJ.

A copy of the Commission Delegated Regulation can be found here.

(vi) Political agreement reached on MLD5

On 15 December 2017, the European Commission published a press release confirming that the Council of the European Union and the European Parliament have reached a political agreement on the proposed MLD5. This was followed by similar press releases of the European Parliament and by, the Council of the European Union.

MLD5 sets out a series of measures to better counter the financing of terrorism and to ensure increased transparency of financial transactions. In particular MLD5 aims to:

- Increase transparency on who really owns companies and trusts by establishing beneficial ownership registers;
- Prevent risks associated with the use of virtual currencies for terrorist financing and limiting the use of pre-paid cards;
- Improve the safeguards for financial transactions to and from high-risk third countries; and
- Enhance the access of Financial Intelligence Units to information, including centralised bank account registers.

A copy of the European Commission's press release and the accompanying factsheet can be found here.

(vii) MLD4 – Update as regards to Central Register for beneficial ownership in Ireland

Under MLD4 each Member State is required to establish a central register of beneficial ownership of corporate and other legal entities, including trusts, by 26 June 2017. As a result of the ongoing discussions concerning the MLD5 proposals, the Department of Finance has indicated that it is envisaged that the central register of beneficial ownership is now expected to be launched in Quarter 1, 2018.

Data Protection / GDPR

(i) Article 29 Data Protection Working Party adopts draft Guidelines on personal data breach reporting

On 3 October 2017, the Article 29 Working Party (the "**Working Party**") adopted guidelines on personal data breach reporting (the "**Draft Breach Reporting Guidelines**").

The Working Party is a collective of EU data privacy supervisory authorities (**"DPAs"**), including the Irish Data Protection Commissioner ("**DPC**").

The Draft Breach Reporting Guidelines seek to provide clarity on data controller's and processor's notification obligations under the General Data Protection Regulation (Regulation (EU) 2016/679) ("**GDPR**").

The Draft Breach Reporting Guidelines will be a useful tool for data controllers in light of the GDPR's mandatory reporting requirements for all personal data breaches (save for those that are unlikely to result in a risk to the rights and freedoms of individuals) and in light of the potential ramifications for failing to report a breach.

In particular the Draft Breach Reporting Guidelines address the:

- Definition of a personal data breach;
- Timelines for reporting breaches to the Supervisory Authority and the data subject;
- Information that needs to be provided;
- Meaning of "risk," and
- Role of the Data Protection Officer ("**DPO**") in the context of breach notification reporting.

In addition, the Working Party has provided a flowchart illustrating the notification requirements along with the provision of practical examples of personal data breaches and who to notify.

Organisations are advised to develop an incident response plan in advance of the implementation of the GDPR, including processes to detect and promptly contain data breaches and to assess the risk to individuals arising from potential breaches.

The deadline for comments on the Draft Breach Reporting Guidelines passed on 28 November 2017. The Working Party are considering the comments received with a view to adopting a final version.

The Draft Breach Reporting Guidelines are available here.

(ii) Article 29 Data Protection Working Party adopts draft Guidelines on application and setting of administrative fines

On 3 October 2017, the Working Party adopted the draft guidelines on the application and setting of the administrative fines under the GDPR (the "**Draft Administrative Fines Guidelines**"). The Draft Administrative Fines Guidelines are intended for use by supervisory authorities to ensure improved application and enforcement of the GDPR and to encourage its consistent and harmonised interpretation and application.

Administrative fines are a powerful part of the 'enforcement toolbox' of the supervisory authorities under the GDPR.

Under the GDPR, the scope and nature of administrative fines which can imposed has increased exponentially and may be up to €20 million or 4% of total worldwide annual turnover, whichever is greater.

The Draft Administrative Fines Guidelines state that supervisory authorities must assess each case individually to identify the most "effective, proportionate and dissuasive" corrective measure (or combination of measures) having regard to a number of assessment criteria (both aggravating and mitigating). These criteria include:

- The nature, gravity and duration of the infringement (including number, purpose of processing and level of damage suffered);
- The intentional or negligent character of the infringement;
- Any action taken by the controller or processor to mitigate the damage suffered by data subjects;
- The degree of responsibility of the controller or processor;
- Any relevant previous infringements by the controller or processor;
- The degree of cooperation with the supervisory authority;
- The categories of the personal data affected by the infringement;
- The manner in which the infringement became known to the supervisory authority;
- Whether, and if so to what extent, the controller or processor notified the infringement;
- Adherence to approved codes of conduct pursuant; and
- Any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

Dillon Eustace has published an article on Administrative Sanctions under the GDPR which is available here.

The Draft Administrative Fines Guidelines are available for download here.

(iii) Article 29 Data Protection Working Party adopts Guidelines on automated individual decision making and profiling

On 17 October 2017, the Working Party adopted guidelines on automated individual decision making and profiling for the purpose of GDPR (the "**Draft Automated Decision Making Guidance**"). The Guidelines aim to clarify the GDPR's provisions that address the risks arising from profiling and automated decision-making and cover the following areas:

- Definitions of profiling and automated decision-making and the GDPR approach to these in general;
- Specific provisions on automated decision-making;
- General provisions on profiling and automated decision-making;
- Children and profiling; and
- Data protection impact assessments.

The deadline for comments on the Draft Automated Decision Making Guidance passed on 28 November 2017.

The Draft Automated Decision Making Guidance is available here.

(iv) Article 29 Data Protection Working Party November plenary meeting

On 28 and 29 November 2017, the Working Party held its November plenary meeting (the "**Plenary**") to examine certain critical matters with regards to the implementation of the GDPR and the Privacy Shield and to adopt certain key documents. In addition, discussions were held at the Plenary on:

- The preparation of guidelines on 'certification' and on 'derogations for transfers' under the GDPR, which are expected to be proposed for adoption at the February plenary;
- The organisation and structure of the European Data Protection Board ("**EDPB"**);
- The Working Party's mandate to work on the development of a position relating to territorial scope of the GDPR; and
- The Working Party's mandate to develop a new opinion on the proposal for an ePrivacy regulation and a statement on encryption.

Regarding the financial matters issues, discussions were held at the Plenary on the Working Party's continued active collaboration with ESMA on the establishment of a framework for the exchange of information between European and non-European financial supervisory authorities and the implementation of revised Payment Services Directive (Directive EU 2015/2366) ("**PSD2**") and its compatibility with the GDPR.

The public agenda for the Plenary is available here.

The press release issued following the Plenary is available here.

(v) Article 29 Data Protection Working Party adopts Guidelines on US Privacy Shield

On 28 November 2017, the Working Party adopted a report on the EU-US Privacy Shield adequacy decision (the "**Privacy Shield**") after the first Joint Annual Review which took place in September 2017 in Washington DC (the "**Privacy Shield Report**").

The Privacy Shield Report acknowledges the progress of the Privacy Shield in comparison to the now invalid Safe Harbour Decision and the efforts made by US authorities and the European Commission to implement the Privacy Shield.

In the Privacy Shield Report, the Working Party identifies a number of significant concerns and it advises that such concerns need to be addressed by both the European Commission and the US authorities by setting up an action plan immediately in order to demonstrate that these concerns will be addressed.

The Working Party's concerns relate to:

- Lack of guidance and information;
- HR Data;
- Lack of oversight and supervision of compliance with the Principles;
- Application of the Privacy Shield to processors established in the US;
- Automated-decision making/Profiling; and
- Self-Certification Process and Cooperation between U.S. authorities in the Privacy Shield mechanism.

The Privacy Shield Report states that if these concerns are not adequately addressed the Working Party will take appropriate action, including the possibility of challenging the Privacy Shield adequacy decision before the national courts (who would refer the case to the European Court of Justice ("**CJEU**") for a ruling.

The Privacy Shield Report is available here.

The Working Party press release announcing the publication of the Privacy Shield Report is available here.

(vi) Article 29 Data Protection Working Party adopts Guidelines on transparency

Following on from the Plenary, the Working Party published guidelines on the obligation of transparency under the GDPR in relation to the processing of personal data (the "**Transparency Guidelines**"). The transparency principle under the GDPR applies to three central areas:

- Provision of information related to fair processing to individuals;
- Communication with individuals in relation to their rights under the GDPR; and
- Facilitating the exercise by individuals of their data protection rights.

The Transparency Guidelines are vital for data controllers and data processors as they provide practical guidance and interpretive assistance on the principle of transparency, which has not defined within the GDPR.

Comments on the Transparency Guidelines can be submitted to the Working Party before the public consultation closes on 23 January 2018.

The Transparency Guidelines are available here.

(vii) Article 29 Data Protection Working Party adopts a working document on adequacy referential

On 28 November 2017, the Working Party adopted a working document on adequacy referential (the "**Adequacy Referential Working Document**") which is a means of ensuring an adequate level of protection during the transfer of personal data outside of the European Union.

The aim of the Adequacy Referential Working Document is to update the previously published working document on transfers of personal data to third countries ("**WP 12**") as a result of the replacement of the EU Data Protection Directive by the GDPR with effect from 25 May 2018.

The Adequacy Referential Working Document is focused solely on adequacy decisions and it seeks to provide guidance primarily to the European Commission on the core data protection principles that have to be present in a third country legal framework or an international organisation in order to ensure essential equivalence with the European Union framework.

While the principles set out in the Adequacy Referential Working Document are not addressed directly to data controllers or data processors, third countries and international organisations seeking to obtain adequacy may use the working document as a guide.

Comments on the the Adequacy Referential Working Document can be submitted to the Working Party before the public consultation closes on 17 January 2018.

The Adequacy Referential Working Document is available here.

(viii) Article 29 Data Protection Working Party adopts Guidelines on consent

On 28 November 2017, the Working Party adopted its Guidelines on consent under the GDPR (the "**Consent Guidelines**").

In order for a data subject to give lawful consent to the processing of their personal data under the GDPR, a data controller must ensure that the consent meets all of the enhanced requirements as set out in the GDPR. To assist with this, the Working Party has published the Consent Guidelines, which provide a thorough analysis of the notion of consent under the GDPR and provides guidance on what constitutes a valid consent.

The Consent Guidelines should be read in conjunction with existing Working Party Opinions on consent, including Opinion 15/2011, where consistent with the GDPR.

Comments on the Guidelines on Consent can be submitted to the Working Party before the public consultation closes on 23 January 2018.

The Consent Guidelines are available here.

(ix) Article 29 Data Protection Working Party adopts working documents setting up tables with the elements and principles to be found in binding corporate rules for controllers and for processors

On 29 November 2017, the Working Party adopted two working documents setting up tables with the elements and principles to be found in binding corporate rules for controllers and for processors (the "**BCR Working Documents**").

The aim of the BCR Working Documents is to amend the working document 153 (which was adopted in 2008 for controller transfers ("**BCR-C**")) and the working document 195 (which was adopted in 2012 for processor transfers ("**BCR-P**")) setting up a table with the elements and principles to be found in binding corporate rules in order to reflect the requirements referring to BCRs now expressly set out in the GDPR.

BCR-Cs and BCR-Ps allow a corporate group or a group of enterprises engaged in a joint economic activity to transfer personal data from organisations established in the European Union to organisations within the same group established outside the European Union.

BCR-Cs are suitable for framing transfers of personal data from controllers established in the European Union to other controllers or to processors (established outside the European Union) within the same group, whereas BCR-Ps apply to data received from a controller (established in the European Union) which is not a member of the group and then processed by the concerned group members as processors and/or sub-processors.

The aim of the BCR Working Documents is to:

- Clarify the necessary content of BCR-Cs and BCR-Ps;
- Provide a distinction on what must be included in the BCRs and what must be presented to the competent Supervisory Authority in the BCRs application; and
- Provide explanations/comments on each of the requirements.

Comments on the BCR Working Documents can be submitted to the Working Party before the public consultation closes on 17 January 2018.

The BCR-C Working Document is available here.

The BCR-P Working Document is available here.

Companies (Statutory Audits) Bill 2017

(i) Companies (Statutory Audits) Bill 2017

The Companies (Statutory Audits) Bill 2017 (the "**Bill**") was published in the Oireachtas on 6 November 2017. It is anticipated that the Bill will be enacted in Spring 2018.

The Bill contains numerous proposed amendments to the Companies Act 2014. In the context of corporate collective investment schemes, the two main points to note are as follows:

- The Bill excludes UCITS and AIFs from the requirement under Section 167 of the Companies Act 2014 for an audit committee for public interest entities (section 51 of the Bill which incorporate a new Part 27 in to the Companies Act 2014); and
- The Bill excludes UCITS from the provisions of the shareholders rights' directive set out in sections 1099 to 1110 of the Companies Act 2014 (see section 74 of the Bill).

A copy of the Bill can be found here.

Short Selling Regulation ("**SSR**")

(i) ESMA publishes a final report containing technical advice on the evaluation of certain elements of the SSR

On 21 December 2017, ESMA published a final report containing technical advice to the European Commission on the evaluation of certain elements of Regulation 236/2012 the ("**Short Selling Regulation** or "**SSR**").

The final report follows ESMA's consultation on the SSR in July 2017.

ESMA was asked to provide technical advice on issues arising in respect of the following three main areas: (i) exemption for market making activities; (ii) short-term bans on short-selling; and (iii) transparency of net short positions. Annex II contains the resultant technical advice provided to the European Commission on these issues.

A copy of the final report can be found here.

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

(i) ISDA documentation post Brexit

In October 2017, the International Swaps and Derivatives Association ("**ISDA**") wrote to members asking for feedback on whether to add the option of being governed by Irish or French law to the current choice of English or New York law for derivatives documentation. ISDA has decided to explore this option in order to meet the needs of counterparties wanting to have their contracts governed by the laws of an EU member state.

ISDA also released a Brexit FAQ in September 2017. A copy of the Brexit opinion can be found here.

Mediation Act 2017

(i) The Mediation Act 2017

On 2 October 2017, the Mediation Act 2017 (the "**Act**") was signed into law and is expected to come into force in the coming weeks. The Act applies to all litigation disputes apart from arbitration and certain disputes under tax and customs legislation.

The Act encourages the use of mediation which may achieve a better outcome for parties while also reducing legal costs and therefore improving access to justice and easing the strain on the court system.

The Act is expected to increase the number of mediations which means that parties will need professional or expert advice, including financial expertise, at an earlier stage in the dispute process. This will ensure that parties are in a position to fully consider the financial and taxation ramifications of any settlement proposal. The Act also introduces an obligation on solicitors and barristers to advise their clients to consider using mediation as a means of resolving disputes.

A copy of the Act can be found here.

Dillon Eustace
31 December 2017

CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 667 0022
Fax: +353 1 667 0042

Cayman Islands

Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022
Fax: +1 345 945 0042

New York

245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501
E-mail: enquiries@dilloneustace.ie
Website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the Regulatory and Compliance team members below.

Andrew Bates
E-mail: andrew.bates@dilloneustace.ie
Tel : + 353 1 673 1704
Fax: + 353 1 667 0042

Breeda Cunningham
E-mail: breeda.cunningham@dilloneustace.ie
Tel : + 353 1 673 1846
Fax: + 353 1 667 0042

Karen Jennings
E-mail:karen.jennings@dilloneustace.ie
Tel : + 353 1 667 0022
Fax: + 353 1 667 0042

This Funds Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 31 December 2017, and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace.

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO