Funds Quarterly Legal and Regulatory Update

Period covered:
1 April 2017 – 30 June 2017

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

Undertakings in Collective Investments and Transferrable Securities ("UCITS")

(i) ESMA publishes updates to the Q&A on application of UCITS Directive

On 6 April 2017, the European Securities and Markets Authority ("**ESMA**") published its updated Q&A on the application of the UCITS Directive (2009/65/EC), as revised by UCITS V (2014/91/EU) (together the "**UCITS Directive**"). One new Q&A was added concerning cross-border activities by UCITS management companies. It clarifies that a UCITS management company can notify cross-border activities without having to identify a specific UCITS.

On 24 May 2017, ESMA published a press release announcing it has further updated the UCITS Directive Q&A. One new Q&A was added concerning the use by a UCITS of the exemption for intragroup transactions under Article 4(2) of the Regulation on OTC derivative transactions, central counterparties and trade repositories (Regulation 648/2012) ("**EMIR**") if subject to the clearing obligation in Article 4(1) of EMIR.

The updated questions and answers document is available for download here.

(ii) ESMA publishes findings on thematic study on notification frameworks and the operation of home-host responsibilities under the UCITS Directive

On 7 April 2017, ESMA published the findings of its thematic study on notification frameworks and home-host responsibilities under the UCITS Directive and AIFMD (ESMA34-43-340). In the context of UCITS, ESMA's findings include:

- The extent to which the EU passports for the marketing and management of UCITS are used varies extensively across the Member States. Under the UCITS framework, UCITS management companies in 21 Member States carry out various kinds of cross-border management activities, including collective portfolio management. The extent of these activities is mostly consistent with the size of national fund markets and the share the respective Member State has in the single European fund market.

- Compared to cross-border management, the cross-border marketing of UCITS plays a significantly bigger role. Figures show that there is cross-border marketing activity in most Member States, with only a handful of Member States not reporting any outbound cross-border marketing activity. Again, a number of Member States have a larger share in cross-border marketing of UCITS, reflecting their central role in the single European financial market.

ESMA's full findings can be accessed here.

(iii) Section 167 of the Companies Act 2014 (Audit Committees) – Application to UCITS

Section 167 of the Companies Act 2014 ("**CA 2014**") imposes an obligation on "large private companies" (i.e. those companies exceeding the specified thresholds, or where the company has subsidiary undertakings, where the company and its subsidiaries exceed the specified thresholds) and public limited companies to establish an audit committee or, if they choose not to do so, explain in their annual report as to why they do not think it necessary to establish an audit committee.

Under the CA 2014, non-UCITS investment companies established under Part 24 of the Companies Act (such as retail AIF and QIAIFs) are exempt from the requirements under Section 167. UCITS investment companies and their wholly-owned subsidiaries are not exempt from these requirements.

On 16 June 2017, the Department of Jobs, Enterprise and Innovation ("**DEJI**") indicated in a letter to the Irish Funds ("**Irish Funds**") that it is intended to amend the CA 2014 to grant an exemption to UCITS investment companies but not their wholly-owned subsidiaries from the obligation to comply with Section 167. In the letter, the DEJI indicates that an amendment to this effect will be included in the forthcoming Companies (Statutory) Audits Bill.

Section 167 of CA14 may be viewed here.

(iv) Section 225 of the Companies Act 2014 (Directors' Compliance Statements) - Application to UCITS

Section 225 of CA 2014 imposes an obligation on "large private companies" (i.e. those exceeding the specified thresholds) and all public limited companies to prepare a directors' compliance statement which must be included in the company's annual report.

Under CA 2014, non-UCITS investment companies established under Part 24 of the Companies Act (such as retail AIF and QIAIFs) are exempt from the requirements under Section 225. UCITS investment companies and their wholly-owned subsidiaries are not exempt from these requirements.

On 16 June 2017, the DEJI indicated in a letter to the Irish Funds that there is no intention at present to amend CA 2014 to grant an exemption to UCITS investment companies or their wholly-owned subsidiaries from the requirements under Section 225.

Section 225 of CA14 may be accessed here.

(v) Central Bank publishes updated UCITS Q&A

On 15 May 2017, the Central Bank published a seventeenth edition of the UCITS Q&A. A new question ID 1076 related to the designated email for fund management companies was included.

On 28 June 2017, the Central Bank published the eighteenth edition of its UCITS Q&A. Two new Q&As (questions, ID 1077 and ID 1078) were added to provide clarity as regards the

treatment of existing share classes of a UCITS which are not in compliance with ESMA's opinion concerning 'Share classes of UCITS', dated 30 January 2017 (the **"ESMA Opinion**").

- Question ID 1077 has been added to clarify that where a share class of a UCITS approved by the Central Bank on or prior to 30 January 2017 does not comply entirely with the principles of the Opinion, that share class must be closed for investment by new investors on or before 30 July 2017, and for additional investment by existing investors on or before 30 July 2018.

- Question ID 1078 has been added to clarify that where a UCITS employs derivatives in order to engage in currency hedging at the level of a share class approved by the Central Bank on or prior to 30 January 2017, then if the UCITS intends to continue to offer that share class to investors, the UCITS must make any necessary amendments at the earliest opportunity. Any amendments to the documentation arising out of such process should be made at the time of the next update of the prospectus and/or supplement(s), if applicable in the case of sub-fund.

The latest version of the UCITS Q&A may be accessed here.

(vi) Central Bank issues revised "UCITS and AIF Share Classes" Guidance

On 28 June 2017, the Central Bank **issued** revised "UCITS and AIF Share Classes" Guidance in order to fully reflect the principles covered in the ESMA Opinion.

The revised UCITS and AIF Share Classes Guidance is available here.

Alternative Investment Fund Management Vehicle ("AIFMD")

(i) ESMA publishes updates to the Q&A on application of AIFMD

On 6 April 2017, ESMA published a press release announcing it has updated the Q&A in relation to the Alternative Investment Fund Managers Directive ("**AIFMD**"). One new Q&A was added concerning the cross-border marketing of EU AIFs by EU AIFMs under Article 32 of the AIFMD, clarifying that the AIF marketing passport may only be used for marketing to professional investors as defined in the AIFMD.

The press release may be accessed here.

On 24 May 2017, ESMA published a press release announcing it has further updated the Q&A in relation to the application of AIFMD. Three new Q&As were added concerning the following matters: (a) reporting to National Competent Authorities ("**NCAs**") on the breakdown between retail and professional investors; (b) notification of AIFMs on the AIFs to be managed, if domiciled in another Member State; and (c) use by an AIF of the exemption for intragroup transactions under Regulation (EU) 648/2012 ("**EMIR**"), if subject to the clearing obligation of Article 4(1) of EMIR.

The press release may be accessed here.

(ii) ESMA publishes findings on thematic study on notification frameworks and the operation of home-host responsibilities under AIFMD

On 7 April 2017, ESMA published the findings of its thematic study on notification frameworks and home-host responsibilities under the UCITS Directive and AIFMD. In the context of the AIFM passporting frameworks, ESMA's findings indicate that whilst cross-border management activities are only carried out relatively extensively in a small number of Member States, the use of the AIF marketing passport is more widespread. ESMA's findings further indicate, that AIF managers make use of the AIFMD passports to a much lesser extent and in fewer Member States, compared to the UCITS framework, reflecting the lower number of AIFs set up in Europe overall, the relatively short implementation period of AIFMD, as well as the late transposition of the AIFMD framework in a number of Member States, and the limitations around cross-border marketing by way of the passport to professional investors only.

ESMA's full findings can be accessed here.

(iii) Central Bank publishes twenty-fifth edition of the AIFMD Q&A

On 15 May 2017, the Central Bank published the twenty-fifth edition of its AIFMD Q&A. A new Q&A (question ID 1123) was added concerning the designated email address for fund management companies.

The updated Q&A may be accessed here.

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

(i) Political agreement reached on proposed Regulation amending EuVECA Regulation and EuSEF Regulation

On 30 May 2017, the European Commission published a press release announcing that it has reached agreement with the Council of the EU and the European Parliament on the proposed Regulation amending the European Venture Capital Funds Regulation (*Regulation 345/2013*) ("**EuVECA Regulation**") and the European Social Entrepreneurship Funds Regulation (*Regulation 346/2013*) ("**EuSEF Regulation**").

The press release states that the agreement reached:

- Extends the range of managers eligible to market and manage EuVECA and EuSEF funds to larger fund managers (that is, those with assets under management of more than EUR500 million);
- Extends the range of companies that can be invested in by EuVECA funds to "small mid-caps" and "small and medium-sized enterprises" listed on SME growth markets;
- Decreases costs by explicitly prohibiting fees imposed by competent authorities of host Member States where no supervisory activity is performed. It also simplifies the

registration process and determines the minimum capital necessary to become a manager.

The press release may be accessed here.

Once both the European Council and the Parliament have adopted it, the proposed Regulations will start to apply three months after its entry into force.

The European Parliament is due to consider the proposed Regulation during its plenary session to be held from 11 to 14 September 2017.

With respect to the European Council, the EU published an "I" item note (10573/17) from its General Secretariat to its Permanent Representatives Committee ("**COREPER**") on 27 June, 2017 whereby, inter alia, COREPER is invited to approve the final compromise text of the proposed Regulation. The European Council has also published a corrigendum to the addendum (10573/17 ADD1 COR1), which amends two articles of the final compromise text.

A copy of the "I" item note can be accessed here.

Money Market Funds Regulation ("MMF Regulation")

(i) European Parliament and the Council of the EU adopts MMF Regulation

On 16 May 2017, the Council of the EU published a press release announcing that it has adopted the Regulation on the MMF Regulation. The Council's adoption of the MMF Regulation follows the European Parliament's adoption of it in plenary on 5 April 2017.

A copy of the press release can be accessed here.

On 30 June 2017, the MMF Regulation was published in the Official Journal of the EU (the "**OJ**"), meaning it will formally enter into force on 20 July 2017. The Regulation will then apply as and from 21 July 2018, with the exception of Article 11(4), Article 15(7), Article 22 and Article 37(4) which apply from 20 July 2017.

The text of the MMF Regulation, as published in the OJ is available here.

(ii) ESMA publishes a consultation paper on the MMF Regulation

On 24 May 2017, ESMA published a consultation paper (ESMA34-49-82) on draft technical advice, implementing technical standards ("**ITS**") and guidelines under the MMF Regulation.

In the consultation paper, ESMA seeks views on its proposals for technical advice for the European Commission relating to:

- The liquidity and credit quality requirements applicable to assets received as part of a reverse repurchase agreement; and

- Internal credit quality assessments.

ESMA also seeks views on:

- Draft ITS on a reporting template containing all the information managers of money market funds ("**MMFs**") are required to send to the competent authority of the MMF; and

- Draft guidelines on common reference parameters for the scenarios to be included in the stress tests that managers of MMFs are required to conduct.

The deadline for responses to the consultation is 7 August 2017.

A copy of the consultation paper can be accessed here.

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

(i) Revised Delegated Regulation on RTS on KID on PRIIPs published in OJ of the EU

On 12 April 2017, a Commission Delegated Regulation (EU) 2017/653 (the "**Delegated Regulation**") supplementing the Regulation on key information documents ("**KIDs**") for packaged retail and insurance-based investment products ("**PRIIPs"**) (Regulation 1286/2014) was published in the OJ.

The Delegated Regulation lays down regulatory technical standards ("**RTS**") regarding the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide KIDs. The Delegated Regulation came into force on 2 May 2017 and it will apply from 1 January 2018. Article 14(2) will apply until 31 December 2019.

On 11 May 2017, a corrigendum to the text of Delegated Regulation was published in the OJ.

The Delegated Regulation can be accessed here.

The corrigendum can be found here.

Under Article 14(2), as a derogation from Article 14(1), PRIIP manufacturers may use a UCITS KID to provide specific information for the purposes of Articles 11 to 13 of the Delegated Regulation, where at least one of the underlying investment options referred to in Article 14(1) is a UCITS or non-UCITS fund referred to in Article 32 of the PRIIPs Regulation.

(ii) European Working Group develops templates for PRIIPs information exchange

On 30 June 2017, Insurance Europe published templates that seek to facilitate the exchange of information between insurers and asset managers that is required under the PRIIPs Regulation (1286/2014/EU) in relation to multi-option products ("**MOPs**").

These templates were developed by a European Working Group, of which Insurance Europe is a member. The Working Group comprises asset managers, insurers and their national associations.

In its press release, Insurance Europe stated that the templates provide a functional description of the set of data to be exchanged from asset managers and banks to insurers to help them fulfil their obligations under the PRIIPs Regulation.

The templates include:

- The European PRIIPs template ("**EPT**"): This template includes the minimum data necessary for insurers to produce a KID in accordance with the provisions of the PRIIPs Regulation. Asset managers will deliver the files for free.

- The "Comfort" EPT: This template includes more data and therefore its delivery depends on ad hoc bilateral agreements between insurers and asset managers.

Insurance Europe also noted that the use of these templates is not compulsory.

It its noteworthy that the European Fund and Asset Management Association ("**EFAMA**") also published these templates on 3 July 2017.

The press release and templates may be accessed here.

European Markets Infrastructure Regulation ("EMIR")

(i) ESMA publishes updates on Q&A on EMIR implementation

On 3 April 2017, ESMA announced that it has published an updated version of its Q&A (ESMA70-1861941480-52) on the implementation of EMIR. The Q&A has been updated following the publication of the revised RTS and ITS in the OJ on 21 January 2017. These RTS and ITS will become applicable on 1 November 2017.

ESMA also published a table of the updated validation rules for the reports submitted under the revised technical standards and these rules will become applicable from 1 November 2017.

The updated Q&A, press release and updated validation rules are all available here.

(ii) ESMA publishes responses to consultation on guidelines on transfer of data between trade repositories under EMIR

On 4 April 2017, ESMA published responses to its January 2017 consultation on guidelines on the transfer of data between trade repositories ("**TRs**") under EMIR (ESMA70-708036281-17).

ESMA explained in a related press release that the feedback received will be used to finalise the draft guidelines, with a view to publishing the final version by the third quarter of 2017.

The responses may be accessed here.

(iii) ESMA publishes opinion on portfolio margining for central counterparties ("CCPs") under EMIR

On 10 April 2017, ESMA published an opinion on portfolio margining requirements for CCPs under Article 27 of Commission Delegated Regulation (EU) 153/2013. The ESMA opinion provides clarification as to when two contracts can or cannot be considered as the same instrument for the purpose of portfolio margining. It also clarifies that CCPs have to limit the reduction in margin requirement when portfolio margining different instruments.

The opinion may be accessed here.

(iv) ESMA publishes MoU signed with New Zealand regulators under EMIR

On 18 April 2017, ESMA published a memorandum of understanding ("**MoU**") that it entered into with the Reserve Bank of New Zealand and the Financial Markets Authority of New Zealand under Article 25 of EMIR.

The MoU can be accessed here.

(v) ESMA final report: Technical advice to EC on fees for trade repositories under SFTR and EMIR

On 20 April 2017, ESMA published its final report (ESMA70-151-223) on technical advice to the European Commission about fees for TRs under the Regulation on reporting and transparency of securities financing transactions ("**SFTR**") and on certain amendments to the fees under EMIR.

The report may be accessed here.

(vi) Delegated Regulation delaying EMIR clearing obligation for counterparties with a limited activity volume published in the OJ

On 29 April 2017, the Commission Delegated Regulation (CDR) 2017/751 (the "**Delegated Regulation**") was published in the OJ.

The Delegated Regulation amends three EMIR Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives. As a result, the phase-in period for central clearing of OTC derivatives applicable to "category 3" counterparties (i.e. financial counterparties and AIFs qualifying as non-financial counterparties which do with a limited volume of derivative activity) has been delayed by two years.

The Delegated Regulation may be accessed here.

(vii) Draft Legislative Proposals to amend EMIR published by European Commission

On 4 May 2017, the European Commission published a proposed Regulation (COM (2017) 208) to amend EMIR. Rather than fundamental reform, the proposals make a number of targeted modifications to certain aspects of the current regime. The modifications proposed are designed to eliminate disproportionate costs and burdens and to simplify the rules. The areas targeted include:

- Reporting obligations for all counterparties;
- Quality of data reported to trade repositories;
- Clearing obligations threshold;
- Extension of exemption timeframes for Pension Scheme Arrangements;
- Risk-mitigation techniques for non-cleared OTC derivatives contracts; and
- Registration and supervision of, and access to data held in, trade repositories.

The proposed Regulation will be submitted by the European Commission to the Parliament and the Council for their consideration.

The proposed Regulation may be accessed here.

A number of the proposed amendments will have significant impact on market participants.

(viii) ESMA consults on guidelines on CCP conflicts of interest management under EMIR

On 1 June 2017, ESMA published a consultation paper (ESMA70-151-291) on guidelines relating to the management by CCPs of conflicts of interest. The consultation closes on 24 August 2017. ESMA will consider the feedback it receives to the consultation and expects to publish a final report on the guidelines by the end of 2017.

The consultation paper may be accessed here.

(ix) Delegated Regulation on list of exempted entities under EMIR published in OJ on 10 June 2017

On 10 June 2017, Commission Delegated Regulation (EU) 2017/979 setting out the list of entities exempted from the clearing and reporting requirements under EMIR, was published in the OJ. The Delegated Regulation entered into force on 30 June 2017.

The Delegated Regulation may be accessed here.

(x) Proposed Regulation amending the EMIR supervisory regime for central counterparties

On 13 June 2017, the European Commission published a proposed Regulation (COM (2017) 331 final) amending the EMIR supervisory regime for CCPs. In the related press release, the Commission indicates that the proposed Regulation seeks to overhaul the supervisory arrangements for CCPs established by EMIR. It complements the proposed amendments to EMIR, as well as the Commission proposal for CCP recovery and resolution.

The proposal introduces a more pan-European approach to the supervision of EU CCPs, to ensure further supervisory convergence and accelerate certain procedures. For non-EU CCPs, the proposal builds on the existing third-country provisions in EMIR and will make the process to recognise and supervise third-country CCPs more rigorous for those which are of key systemic importance for the EU. Amongst other changes, the proposal introduces a new "two tier" system for classifying third-country CCPs.

The proposal to amend EMIR will now be transferred to the European Parliament and to the Council for review and adoption. Both institutions will be able to propose additional amendments. The legislative process is expected to complete in late Q4 2018.

The proposed Regulation can be accessed here.

The related press release can be accessed here.

(xi) European Commission adopts amending Delegated Regulation on access to data and aggregation and comparison of data under EMIR

On 29 June 2017, the European Commission adopted a Delegated Regulation amending 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 (C(2017) 4408 final). ESMA published its final draft RTS on access to data and aggregation and comparison of data under EMIR in April 2016.

The next step will be for the Council of the EU and the European Parliament to consider the amending Delegated Regulation. If neither the Council nor the Parliament object to the amending Delegated Regulation, it will be published in the OJ. It will enter into force on the date following its publication in the OJ. It will apply from 1 November 2017.

The Delegated Regulation may be accessed here.

Benchmark Regulation

(i) ESMA publishes final report on draft RTS on cooperation arrangements with third countries under the Benchmarks Regulation

On 2 June 2017, ESMA published its final report (ESMA70-145-81) (dated 1 June 2017) on draft RTS on co-operation arrangements with third countries under the Regulation (EU) 2016/1011) ("**Benchmarks Regulation**").

The Benchmarks Regulation entered into force on 30 June 2016 and (with the exception of certain provisions) will apply from 1 January 2018.

ESMA has submitted the final draft RTS to the Commission. The European Commission has three months to decide whether to endorse the technical standards.

The full final report can be accessed here.

(ii) ESMA publishes a methodological framework developed to promote convergence in relation to the supervision of critical benchmarks under the Benchmark Regulation

On 2 June 2017, ESMA published a methodological framework (ESMA70-143-5) developed to promote convergence in relation to the supervision of critical benchmarks under the Benchmark Regulation.

The Benchmark Regulation provides that, under certain circumstances, an NCA can require supervised entities to contribute to a critical benchmark. The purpose of the recently published methodological framework is to assist NCAs in their selection of supervised entities to be compelled to contribute input data to critical benchmarks should its representativeness become at risk at some point in the future.

ESMA's methodological framework may be viewed here.

(iii) European Commission publishes a number of draft Delegated Regulations supplementing Benchmarks Regulation

On 22 June 2017, the European Commission published a number of Delegated Regulations which supplement the Benchmarks Regulation as follows:

- Draft Commission Delegated Regulation specifying the technical elements of the definitions of the Benchmarks Regulation;
- Draft Commission Delegated Regulation specifying the calculation of total values of references to benchmarks;
- Draft Commission Delegated Regulation specifying the application of qualitative criteria for critical benchmarks; and

- Draft Commission Delegated Regulation on the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks.

The Commission invites feedback on the draft Delegated Regulations by 20 July 2017. The draft Delegated Regulations are based on technical advice given by ESMA in November 2016.

Copies of the draft Delegated Regulations are available for download via the above links.

(iv) Commission Implementing Regulation establishing a list of critical benchmarks used in financial markets published in the OJ

On 29 June 2017, European Commission Implementing Regulation (EU) 2017/1147 was published in the OJ. This Implementing Regulation amends Implementing Regulation (EU) 2016/1368 establishing a list of critical benchmarks used in financial markets pursuant to the Benchmarks Regulation. Implementing Regulation (EU) 2016/1368 was published in August 2016.

It lists the euro interbank offered rate ("**EUIBOR**") and the euro overnight index average ("**EIONA**") as critical benchmarks. The Implementing Regulation entered into force on the day following its publication in the OJ (that is, 30 June 2017).

The Implementing Regulation may be accessed here.

The International Swaps and Derivatives Association ("ISDA")

(i) ISDA publishes speech on financial benchmarks

On 15 June 2017, the International Swaps and Derivatives Association ("**ISDA**") published a speech that was delivered by its Chief Executive, Mr. O'Malia, at an ISDA symposium on financial benchmarks. In his speech, Mr. O'Malia mentions the projects undertaken by ISDA to develop robust fallbacks to key IBOR rates as well as the efforts being made by a US public-private sector working group led by the Federal Reserve Bank of New York to develop alternative risk free rates. In addition, Mr. O' Malia indicates that ISDA is currently working with industry to prepare for compliance with the EU Benchmarks Regulation and possible amendments to the ISDA definitions/documents.

The speech is available for download here.

Credit Rating Agencies ("CRAs")

(i) ESMA conducts consultation on revisions to guidelines on CRA Regulation endorsement regime

On 4 April 2017, ESMA published a press release announcing it has issued a consultation paper on revisions to its guidelines on the application of the endorsement regime under the Credit Rating Agencies Regulation (Regulation 1060/2009) ("**CRA Regulation**").

The press release states that endorsement is a regime under the CRA Regulation, which allows credit ratings issued by a third-country CRA, and endorsed by an EU CRA, to be used for regulatory purposes in the EU. A credit rating that has been endorsed is considered to have been issued by the endorsing EU CRA. The endorsement regime is available for CRAs of systemic importance with global networks of affiliates.

The deadline for responses was 3 July 2017 and now ESMA will consider the feedback it received to the consultation with a view to finalising the updated guidelines and publish a final report in the fourth quarter of 2017. It is intended that the guidelines will enter into force on 1 June 2018.

The consultation paper can be accessed here.

The full press release can be found here.

European Securities and Markets Authority ("ESMA")

(i) ESMA response to European Commission consultation on operation of ESAs

On 30 May 2017, ESMA published its response (dated 29 May 2017) (ESMA03-173-194) to the European Commission's consultation on the operations of the European Supervisory Authorities ("**ESAs**") (that is, ESMA, EIOPA and the EBA). The European Commission published its consultation paper in March 2017.

As a general point, ESMA states that the current supervisory model combining centralised tasks within ESMA with most of the supervision carried out at national level should be continued, but with a clear view to addressing the risks and opportunities that arise with a more important role for cross-border financial markets in the context of capital markets union ("**CMU**") and Brexit.

The response discusses a number of issues, including:

- **Third countries.** ESMA should be the central point for technical third-country related issues. At an EU level, ESMA should have supervisory and enforcement powers over third-country entities such as credit rating agencies ("**CRAs**"), trade repositories ("**TRs**"), CCPs and benchmarks. Consideration should be given to ESMA having a similar role in respect of third-country trading venues.

- **Direct supervision.** ESMA suggests that it assumes direct supervision over critical benchmarks, data providers, and third-country entities referred to in the above bullet. It also believes that further consideration should be given to how CCPs are supervised in the EU. ESMA calls for power to impose higher fines on CRAs and TRs to support its enforcement credibility.

- **Supervisory convergence.** Particularly in the light of CMU, ESMA must have a strong role in ensuring consistent authorisation scrutiny and supervisory outcomes in the context of cross-border activities.

- **Access to data and reporting.** ESMA calls for more powers to ensure consistency in the level and quality of information provided to European regulators and the public.

- **Power to suspend rules.** ESMA suggests that it is given power to temporarily suspend the application of a particular rule for which it is responsible.

The response may be accessed here.

(ii) EBA response to EC consultation on operations of ESAs

On 31 May 2017, the European Banking Authority ("**EBA**") published its opinion (EBA/Op/2017/08) on the EC's consultation on the operations of the ESAs. The EBA's opinion includes a call for a stronger advisory role to the EC and the co-legislators

The opinion can be accessed here.

(iii) ESMA sets out general principles to support supervisory convergence in EU27 in context of UK withdrawing from EU

On 31 May 2017, ESMA published an Opinion (ESMA42-110-433), aimed at ensuring that the NCAs in the remaining 27 EU Member States as well as the NCAs of Norway, Lichtenstein and Iceland, take a consistent approach to the authorisation of UK entities looking to relocate into the EU following Brexit. The opinion covers all legislation referred to in the ESMA Regulation (Regulation 1095/2010), in particular, the AIFMD, the UCITS Directive, and the MiFID I and II Directives.

ESMA is concerned that competition between jurisdictions could lead to regulatory arbitrage. In this regard, the opinion recognises the risk that market participants may seek to minimise the transfer of the effective performance of those activities or functions in the EU27 (i.e. by relying on the outsourcing or delegation of certain activities or functions to UK-based entities, including affiliates). In that context, ESMA considers that its Opinion should be seen as a practical tool to achieve supervisory convergence, where the focus is on safeguarding investor protection, the orderly function of financial markets and financial stability.

The Opinion sets out the following nine principles:

- No automatic recognition of existing authorisations;

- Authorisations granted by EU 27 NCAs should be rigorous and efficient;

- NCAs should be able to verify the objective reasons for relocation;

- Special attention should be granted to avoid letter-box entities in the EU 27;

- Outsourcing and delegation to third countries is only possible under strict conditions;

- NCAs should ensure that substance requirements are met;

- NCAs should ensure sound governance of EU entities;

- NCAs must be in a position to effectively supervise and enforce EU Union law; and
- Coordination to ensure effective monitoring by ESMA.

The Opinion assumes that the UK will become a third country after it has withdrawn from the EU (i.e. a clean/ hard Brexit) and therefore the Opinion states that it is without prejudice to any specific arrangements that may be reached between the UK and the EU.

The Opinion can be accessed here.

A copy of Dillon Eustace's briefing paper on the opinion, entitled ESMA's Brexit Reminder can be accessed here.

(iv) European Commission feedback statement on operations of ESAs

On 21 June 2017, the European Commission published its feedback statement (dated 20 June 2017) on its consultation paper on the operations of the ESAs (as discussed above), which was published in March 2017.

A copy of the feedback statement can be accessed here.

European Commission

(i) European Commission impact assessment on reducing barriers to cross-border distribution of investment funds

On 22 June 2017, the European Commission published an inception impact assessment (Ares(2017)3132069) (dated 21 June 2017) entitled "reducing barriers to the cross-border distribution of investment funds".

The initiative forms part of the Commission's work on the Capital Markets Union and it aims to improve the functioning of the single market for EU investment funds by reducing national regulatory barriers to the cross-border distribution of funds. Identified policy areas for addressing the regulatory barriers relate to the following areas:

- harmonisation of national marketing requirements and practices;
- reduction in administrative requirements such as possible removal of the requirements to appoint local agents;
- increasing the transparency and improve the proportionality of regulatory fees;
- simplification of the process for updating notifications under the marketing passport; and
- clarification of the application of marketing rules for online distribution and taking steps to address other barriers, including national implementation of anti-money laundering rules and know-your-customer requirements.

It is noted in the inception impact assessment that the policy options that potentially develop the role of ESMA (i.e. in the area of regulatory fees and notification requirements may be alternatively covered in the upcoming initiative on the review of the ESAs).

Once the inception impact assessment has been published there is a window of four weeks in which feedback can be given. Therefore feedback may be received until 19 July 2017.

The inception impact assessment is available for download here.

(ii) European Commission publishes mid-term review of CMU action plan

On 8 June 2017, the European Commission published a communication on the mid-term review of the CMU action plan (COM(2017) 292). The purpose of the mid-term review is to set out further actions that complement the initiatives that the Commission set out in its original action plan for the CMU but which have not yet been completed.

The communication identifies a number of initiatives that the Commission intends on focusing on to strengthen the CMU action plan and these include, among other things:

- Strengthening ESMA's powers to promote the effectiveness of consistent supervision across the EU and beyond;
- Present a legislative proposal to review the prudential treatment of investment firms;
- As part of a comprehensive approach to enable FinTech, the Commission will assess the case for an EU licensing and passporting framework for FinTech activities;
- Launch an impact assessment with a view to considering a possible legislative proposal to facilitate the cross-border distribution and supervision of UCITS and alternative investment funds ("**AIFs**").

The Commission intends to establish the foundations of the CMU by 2019.

The communication may be accessed here.

Market Abuse Regulation ("MAR")

(i) ESMA opinion on accepted market practices on liquidity contracts under the Markets Abuse Regulation (Regulation 596/2014) ("MAR")

On 25 April 2017, ESMA published an opinion in relation to accepted market practices on liquidity contracts under MAR.

Under MAR, an exception is available to the general prohibition of market manipulation where a person establishes that the transaction, order or behaviour in question has been carried out for legitimate reasons and that it conforms with an accepted market practice

established in accordance with MAR. Before establishing an accepted market practice, a competent authority must notify ESMA and the other competent authorities of its intention to establish an accepted market practice. ESMA is then required to issue an opinion on the intended accepted market practice within two months of the receipt of the notification.

The opinion sets out agreed points that are expected to be used as a reference in the assessment of such accepted market practices.

The full opinion can be accessed here.

(ii) Corrigendum to Delegated Regulation on RTS on presentation of investment recommendations and disclosure of conflicts of interest under MAR

On 27 April 2017, a corrigendum to the text of the Delegated Regulation ((EU) 2016/958) (the "**Delegated Regulation**") was published in the OJ.

The Delegated Regulation supplements MAR with regard to RTS concerning the objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

In particular, the corrigendum makes a number of clarificatory amendments to Article 6(1) of the Delegated Regulation.

The Delegated Regulation came into force on 18 June 2016, and has applied since 3 July 2016.

The corrigendum may be accessed here.

(iii) ESMA announces launch of IT system for the collection of financial instrument reference data

On 30 May 2017, ESMA published a communication (ESMA70-145-103) announcing that its IT system for the collection of financial instrument reference data (that is, the "**Financial Instrument Reference Data System**" or "**FIRDS**") will become operational from 17 July 2017. From that date, market operators of regulated markets ("**RMs**") and investment firms and market operators operating multilateral trading facilities ("**MTFs**") will be able to transmit via FIRDS reference data concerning financial instruments for which a request for admission to trading was made, which were admitted to trading or were traded from 3 July 2016 onwards.

The communication may be accessed here.

(iv) ESMA updates MAR Q&A

On 30 May 2017, ESMA published an updated version of its Q&A on MAR. The updated Q&A include a new answers regarding: disclosure of inside information related to Pillar II requirements; and blanket cancellation of orders policy.

The updated version of the Q&A may be accessed here.

(v) ESMA issues technical standards concerning co-operation between competent authorities under MAR

On 1 June 2017, ESMA published its final report (ESMA70-145-100) on draft implementing technical standards concerning co-operation between NCAs under MAR.

The report sets out procedures and forms for NCAs to exchange information to help each other where necessary under MAR. The text of the draft technical standards is set out in Annex II to the report.

ESMA has submitted the final draft technical standards to the European Commission for endorsement. The Commission has three months to decide whether to endorse the draft technical standards.

The full final report may be accessed here.

Prospectus Directive

(i) New Prospectus Regulation

Regulation (EU) 2017/1129, the new Regulation on prospectuses for the issuing and offering of securities (the "**New Prospectus Regulation**"), was published in the OJ on 30 June 2017 and will enter into force on 20 July 2017. Most of its provisions will come into effect from 21 July 2019.

The New Prospectus Regulation was formally approved by the EU Council on 16 May 2017 and by the European Parliament on 5 April 2017. The New Prospectus Regulation is a key element of the European Commission's CMU initiative. It is intended to broaden the attractiveness of offering and listing securities across the EU, while maintaining a high degree of investor protection. The new regime simplifies the rules and streamlines related administrative procedures, and makes it cheaper and simpler for small businesses to access capital markets.

The New Prospectus Regulation is designed to repeal and replace the existing body of European prospectus law (namely, the Prospectus Directive (2003/71/EC) and the corresponding implementing measures, including the Prospectus Regulation (809/2004)).

The new regime will not apply retroactively; securities that comply with existing body of European prospectus law will be grandfathered before the New Prospectus Regulation enters into force.

As per the existing body of European Prospectus law, the New Prospectus Regulation will apply if securities are offered to the public or admitted to trading on a regulated market, in the EU, subject to certain exceptions.

Further, as per the existing body of European Prospectus law, the New Prospectus Regulation provides that it does not apply to "*units issued by collective investment schemes other than the closed-ended type*".

A number of the key changes made to the existing regime by the New Prospectus Regulation include:

- no prospectus will be required for capital raisings and crowdfunding projects up to €1 million;
- the threshold beyond which a prospectus is mandatory is increased from €5 million to €8 million in capital raised. Below that threshold, issuers can raise capital in accordance with rules set for local growth markets;
- the EU growth prospectus, a new type of prospectus, will be available for small – medium enterprises ("**SMEs**") and in certain circumstances, non-SMEs (small mid-caps) admitted to an SME growth market or small issuances by unlisted companies in certain circumstances with up to 499 employees;
- a new corporate bond prospectus, previously only for debt issued in denominations of at least €100 000, will be available for admission to wholesale debt markets;
- a frequent issuer regime will be available for frequent participants in capital markets, reducing approval times from ten working days to five;
- for secondary issuances, issuers already admitted to stock markets and SME growth markets will benefit from a lighter prospectus for follow-up issuances;
- prospectus summaries will be shorter and the language used clearer;
- paper prospectuses will no longer be required, unless a potential investor requests one; and
- a European online prospectus database will be operated free of charge by the European Securities and Markets Authority.

The New Prospectus Regulation will have direct effect without requiring implementation at the national level, unlike the previous Prospectus Directives. As regards the existing Irish prospectus legislation, it is anticipated that changes may be required to ensure consistency with the new regime.

The New Prospectus Regulation may be accessed here.

(ii) Deadline to update prospectus/supplement under SFTR approaches

The deadline for prospectus/supplement updates under the securities financing transaction regulation (EU) 2015/2365) ("**SFTR**") on reporting and transparency is 13 July 2017.

Central Bank of Ireland

(i) Central Bank Issues Discussion Paper on ETF

On 15 May 2017 the Central Bank issued a discussion paper on Exchange Traded Funds ("**ETFs**") which invite the views of stakeholders to inform its participation in a wider regulatory discussion on the future of ETFs and ETF regulation. The closing date for receipt of responses by the Central Bank is 11 August 2017. Dillon Eustace has prepared a client bulletin on the discussion paper.

The discussion paper may be accessed here.

The Dillon Eustace client bulletin can be found here.

(ii) Central Bank publishes Annual Performance Statement 2016/2017

The Central Bank has released its annual performance statement 2016/2017 which identifies key priorities of the various divisions of the Central Bank for 2017. Of particular relevance are the following:

- The Securities and Markets Supervision Directorate, which is responsible for oversight of investment funds, securities and markets, will engage in the following:
  - Performance of full risk assessments on investment funds for the first time;
  - Following on from the thematic review of fee structures carried out by the Central Bank in 2016, specific investment funds will now be contacted by the Central Bank in respect of their charging structures; and
  - Use of new analytical tools to identify market trends, monitor performance against such trends and identify outliers which may then be subject to further investigation and enforcement. Data will also be used to identify funds which are to be included in thematic reviews.
- The Asset Management Supervision Directorate, which is responsible for oversight of investment firms and fund service providers, has identified the implementation of MIFID II as its key area of focus for 2017. Outsourcing arrangements and protection of client assets will continue to be a priority during 2017. The Central Bank has also confirmed that it will continue to engage with fund service providers in relation to the implementation of the new IMR regime introduced last year.

Investment firms and fund service providers can also expect "intrusive supervisory engagement" from the Central Bank, in the form of full risk assessments, thematic reviews and focused reviews as well as regular series of desk-top review and meetings.

The annual performance statement can be found here.

(iii) Restructuring of the financial regulation functions of the Central Bank approved

On 30 May 2017, the restructuring of the Central Bank's Financial Regulation functions was approved. The restructure is designed to ensure the Central Bank is suitably equipped to meet its expanded regulatory mandate. Under the restructuring, the Central Bank's financial regulation functions will be organised under two pillars - Prudential Regulation and Financial Conduct.

The Prudential Regulation pillar will include the directorates for credit institutions; insurance; and asset management supervision. The Financial Conduct pillar will include the directorates for consumer protection; securities and markets supervision; and enforcement. The Policy and Risk Directorate will support both pillars but will be part of the Financial Conduct pillar for administrative purposes.The Central Banking pillar and the Operations pillar of the Central Bank will remain unchanged.

(iv) Central Bank publishes updated Q&A on Central Bank Investment Firms Regulations

On 28 June 2017, the Central Bank published the second edition of the Central Bank Investment Firms Regulations 2017 Questions and Answers.

The Q&A contain three amendments relating to outsourcing requirements for fund administrators as follows:

- Question ID 1005 has been added to clarify what the 'performance and quality standards' referred to in Regulation 21(1)(k) are;
- Question ID 1006 has been added to clarify the meaning 'key performance indicators' referred to in Regulation 21(1)(o)(i); and
- Question ID 1010 has been added to clarify when a fund administrator is required to notify existing clients who may be impacted by a proposed outsourcing arrangement.

The Q&A also contains four new questions comprising of the following:-

- Question ID 1022 has been added to clarify that the definition of 'administration services' relating to (i) the performance of valuation services (ii) fund accounting services and (iii) acting as a transfer agent or a registration agent for an investment fund;
- Question ID 1023 has been added to clarify when a fund administrator is required to carry out a stress test to assess the cost of their continuing to provide administration services under alternative arrangements if a disaster recovery scenario impacts either them or an outsourcing service provider;
- Question ID 1024 has been added to clarify that a fund administrator must notify the Central Bank immediately when they become away of any situation which may result in a change to an outsourced service which requires the service to be moved to a new location and/or a new outsourcing service provider; and

- Question ID 1025 has been added to clarify that, for the purposes of Regulation 19 which requires the check and release of each investment fund NAV to be completed and signed by a member of senior management of the fund administrator, a 'member of senior management' may include a senior staff member within the fund administrator.

The updated Q&A may be accessed here.

In addition to updated the Q&A, the Central Bank also updated its guidance entitled "Fund Administrator Outsourcing" (the "**Guidance**") on 28 June 2017 to reflect the best practices outlined in their recent Dear CEO letter (dated 7 March 2017) regarding the outsourcing of fund administration activities (the "**Letter**") following a themed review of the outsourcing of fund administration activities.

The updated Guidance which was originally published on 13 March 2017 supersedes the Letter.

The Guidance is available here.

Companies (Accounting) Act 2017

(i) Commencement of Companies (Accounting) Act 2017

The Companies (Accounting) Act 2017 (the "**2017 Act**") entered into force on 9 June 2017 and has amended certain provisions of the Companies Act 2014. The main aim of the 2017 Act is to transpose EU Directive 2013/34/EU (the "**Accounting Directive**") to bring Irish law into line with new EU accounting rules.

A number of changes to the existing regime have been made that affect funds and their management companies. The principal change is that UCITS, RIAIF and QIAIF fund structures will now be required to file its financial statements, directors' report and auditors' report with the Companies Registration Office (the "**CRO**") within 11 months of their financial year-end. As this is a public register, these documents will be publicly available once filed.

While it was initially thought that this rule change would take effect for financial periods beginning on or after 1 January 2016, the commencement order makes clear that this will apply in respect of financial periods beginning on or after 1 January 2017.

The 2017 Act has introduced a number of other changes of relevance to funds and their management companies. For further details, please contact your adviser at Dillon Eustace.

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

(i) Joint Committee of the ESAs publishes consultation paper on draft guidelines under revised Wire Transfer Regulation

On 5 April 2017, the Joint Committee of the ESAs published a consultation paper (the "**Consultation Paper**") on draft guidelines under the revised Wire Transfer Regulation

(*Regulation (EU) 2015/847*) ("**Revised WTR**"). The revised WTR will apply in Member States from 26 June 2017.

It is stated in the Consultation Paper that the draft guidelines build on the common understanding of the obligations imposed by EU Regulation 1781/2006 (the "**Original WTR**"). The draft guidelines widen the scope of the Original WTR and take the new legal framework and international anti-money laundering and counter-terrorist financing standards into account. The draft guidelines specify what payment service providers ("**PSPs**") should do to detect and prevent the abuse of fund transfers for terrorist financing and money laundering purposes.

The Consultation Paper can be accessed here.

(ii) Progress towards implementation of the 4th EU Anti-Money Laundering Directive in Ireland

Member States had until 26 June 2017 to implement the 4th EU Money Laundering Directive ("**MLD4**") which has the aim of strengthening laws in the EU to combat money laundering and terrorist financing.

Article 30(1) of MLD4 has already been implemented into Irish law by virtue of the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016. These Regulations, which came into operation on 15 November 2016, set out the requirements on corporates and other legal entities to obtain and hold adequate, accurate and current information on their beneficial ownership, including details of the beneficial interests held. A separate provision (Article 31) of MLD4 deals with the beneficial ownership of trusts, and has not yet been transposed into Irish law.

It is proposed that most of the remaining provisions of MLD4 will be implemented into Irish law by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill (the "**Bill**"). The general scheme of the Bill was published by Department of Justice and Equality in January 2017. In March 2017, the Irish Funds Industry AML working group led a review of the general scheme of the Bill and provided comment/feedback to the Department, a copy of which can be accessed here.

It is anticipated that the Bill will not be adopted in Ireland until the Fifth Money Laundering Directive ("**MLD5**") has been adopted by the European Parliament, which is expected to occur in Q4 2017.

MLD4 required each Member State 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 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 Q4 2017.

(iii) Joint Committee of ESAs publishes official translations of its guidelines on risk-based supervision under the Fourth Money Laundering Directive ((EU) 2015/849) ("MLD4")

On 7 April 2017, the Joint Committee of the ESAs published the 22 official EU language versions of its guidelines on risk-based supervision under Article 48(10) MLD4. The guidelines require NCAs to notify the ESAs as to whether they comply or intend to comply with the guidelines by 7 June 2017. If such a notification has not been received by this deadline, NCAs will be deemed to be non-compliant.

The final guidelines are available for download here.

(iv) Further rejection by European Parliament of the list of high-risk third countries proposed by the European Commission under MLD4

On 17 May 2017, the European Parliament published a press release announcing that it has objected to the list of high-risk third countries under MLD4 proposed by the European Commission on the grounds that it is inadequate.

The list is contained in the proposed Commission Delegated Regulation of 24 March 2017. The European Parliament had vetoed an earlier list drawn up by the Commission in January 2017.

The press release indicates that the MEPs indicated that the EU should have an independent, autonomous process for judging whether countries pose a threat of financial criminality rather than relying on the judgement of an external body.

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

(v) Wolfsberg Group guidance on PEPs

On 23 May 2017, the Wolfsberg Group published guidance on politically exposed persons ("**PEPs**"), together with a publication statement. The Wolfsberg Group is an association of thirteen global banks which aims to develop financial industry standards for AML, Know Your Customer ("**KYC**") and CTF policies.

The aim of the guidance is to assist financial institutions in handling the money laundering risks posed by PEPs. The guidance covers issues including:

- The definition of a PEP;
- The definitions of "close family members" and "close associates" of a PEP;
- The identification of a PEP and their close family members or close associates;
- Control by PEPs of organisations, state-owned entities and public sector bodies;
- Key components of the PEP risk management framework;

- Declassification of PEPs (that is, guidance on the time period that an individual should be regarded as a PEP after they have left the public function that gave rise to their initial categorisation); and

- PEP screening (that is the screening of customer names and associated details against PEP information during the customer relationship).

A copy of the guidance can be found here.

A copy of the publication statement can be found here.

(vi) ESAs consults on draft RTS in circumstances where a third country's law does not permit the application of group-wide AML and CTF policies and procedures under MLD4

On 31 May 2017, the Joint Committee of the ESAs published a consultation paper (JC 2017/25) on draft RTS on the measures credit institutions and financial institutions shall take to mitigate the risk of money laundering and terrorist financing where a third country's law does not permit the application of group-wide policies and procedures.

The Joint Committee held a public hearing on the draft RTS in London on 23 June 2017. Comments can be made on the draft RTS until 11 July 2017.

The Joint Committee will review the draft RTS in the light of responses received, and will then submit final draft RTS to the European Commission for endorsement.

The consultation paper may be accessed here.

(vii) Council of EU adopts its position on the proposed Directive on countering money laundering by criminal law

On 8 June 2017, the Council of the EU adopted its position on the proposed Directive on countering money laundering by criminal law (the "**proposed Eurocrime Directive**").

The aim of the proposed Eurocrime Directive is to ensure a harmonised and comprehensive criminalisation of money laundering offences across the EU, and also to ensure harmonisation in the level of sanctions for committing money laundering offences.

A copy of the general text of the proposed Eurocrime Directive can be found here.

The Council of the EU and the European Parliament will enter into negotiations on the final text as soon as the latter has decided on its position.

(viii) New system for the Financial Intelligence Unit of an Garda Síochána

On the 12 June 2017, an Garda Síochána's Financial Intelligence Unit ("**FIU's**") new system for reporting Suspicious Transaction Reports ("**STRs**") went live.

The new system is called goAML and is a secure online electronic reporting system which can be used by designated persons to submit STRs to the FIU. goAML is a global system developed by the UN and is already active in numerous other countries.

This new system replaced the previous paper method for reporting STRs to the FIU. However designated persons should be aware that they are still obliged to report STRs to the Irish Revenue Commissioners in addition to the FIU.

An Garda Síochána have published a goAML Entity Go-Live Pack which may be accessed here.

(ix) European Parliament to consider 5th EU Anti-Money Laundering Directive

On 12 June 2017, the European Parliament updated its procedure file for the proposed Fifth Money Laundering Directive ("**MLD5**"). The procedure file indicates that the Parliament will consider MLD5 at its 23 to 26 October 2017 plenary session. The European Commission published its MLD5 proposal in July 2016.

(x) ESA's publish draft RTS concerning the appointment and functions of a 'central contact point' under MLD4

On 26 June 2017, the ESA's published a final report on joint draft RTS on the criteria for determining the circumstances in which the appointment of a central contact point pursuant to Article 45(9) of MLD4 is appropriate and the functions of the central contact point.

The report may be accessed here.

(xi) European Commission publishes a supra-national assessment of the ML/TF risks in different sectors and financial products

On 26 June 2017, the European Commission published a report on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities (COM(2017)340 (the "**Supra-national Risk Assessment Report**" or "**SNRA**").

The SNRA assesses the money laundering and terrorist financing risks of different sectors and financial products and is the first report to do so at a supranational level within the EU. It analyses the risks in the financial and non-financial sector and identifies the areas most at risk to money laundering and terrorist financing. The SNRA also includes recommendations to Member States on how to address risks that have been identified.

The SNRA is available for download here.

(xii) ESAs publish AML / CFT guidelines

On 26 June 2017, the ESA's published final guidelines under MLD4 on; (i) the factors credit and financial institutions should consider when assessing the money laundering ("**ML**") and terrorist financing ("**TF**") risk associated with individual business relationships and occasional

transactions; and (ii) the extent of the simplified and enhanced customer due diligence which should be taken by firms in light of the ML / TF risk they have identified (the "**Guidelines**").

The Guidelines set out non-exhaustive factors and measures in relation to the following:

- What firms should consider when assessing the ML/TF risk associated with a business relationship or occasional transaction; and
- How firms can adjust the extent of their customer due diligence measures in a way that is commensurate to the ML/TF risk they have identified.

Competent authorities and firms should comply with these Guidelines by 26 June 2018.

A copy of the press release of the European Banking Authority can be accessed here.

The Guidelines may be accessed here.

(xiii) FATF publishes draft guidance on information sharing between financial institutions for consultation

On 29 June 2017, the Financial Action Task Force ("**FATF**") published draft guidance on information sharing between financial institutions for consultation (the "**Draft Guidance**").

According to the FATF, effective information-sharing is one of the cornerstones of a well-functioning AML/CFT framework. Constructive and timely exchange of information is a key requirement of the FATF standards and cuts across a number of FATF recommendations.

Accordingly, the intent of the Draft Guidance is to:

- Identify key challenges that inhibit sharing of information group-wide and between financial institutions not part of the same group;
- Articulate the FATF Standards on information-sharing regarding: a) group-wide AML/CFT programmes and within its context, sharing of information on suspicious transactions within the group, and how STR confidentiality and tipping-off provisions interact with such sharing; and b) between financial institutions not part of the same group;
- Highlight country examples of collaboration between data protection and privacy and AML/CFT authorities to serve mutually inclusive objectives;
- Provide country examples to facilitate sharing of information within group, between financial institutions not part of the same group; and of constructive engagement between the public and the private sectors; and
- Support the effective implementation of the AML/CFT regime, through sharing of information, both in the national and international context.

As set out in the Draft Guidance, the FATF advises that the guidance should be read in conjunction with a number of materials, including the FATF recommendations.

Before finalising the Guidance, the FATF has decided to consult with private sector stakeholders. Comments can be made on the Draft Guidance until 31 July 2017. As the FATF has not yet approved the Draft Guidance at this stage, the Guidance may be subject to further revisions and amendments.

The Draft Guidance is available for download here.

Data Protection

(i) Article 29 Working Party adopts Opinion on the Proposed Regulation for the ePrivacy Regulation

On 4 April 2017, the Article 29 Working Party (the "**Working Party**") adopted an Opinion (the "**Opinion**") on the Proposed Regulation for the ePrivacy Regulation (the "**Proposed Regulation**").

In the Opinion, the Working Party welcomed the proposal from the European Commission for an ePrivacy Regulation. It further welcomed the choice for a regulation as the regulatory instrument and expressed its support for the principled approach chosen in the Proposed Regulation of broad prohibitions and narrow exceptions, and the targeted application of the concept of consent.

The Working Party also welcomed the expansion of the scope of the Proposed Regulation to include Over-The-Top ("**OTT**") providers and notes that it is positive that the Proposed Regulation clearly covers content and associated metadata and recognises that metadata may reveal very sensitive data.

However, four points of grave concern were identified by the Working Party in the Opinion and these relate to the following issues:

- The tracking of the location of terminal equipment;
- The conditions under which the analysis of content and metadata is allowed;
- The default settings of terminal equipment and software; and
- Tracking walls.

The Working Party is of the opinion that the Proposed Regulation would lower the level of protection enjoyed under the General Data Protection Regulation ((2016/679/EU) ("**GDPR**") in relation to these areas. In this regard, the Working Party provides recommendations that would ensure that the Proposed Regulation will guarantee the same, or a higher level of protection appropriate to the sensitive character of communications data.

The Opinion also notes other points of concern which relate to, for example, the protection of terminal equipment and direct marketing and identifies issues which need clarification to introduce more legal certainty for all stakeholders involved.

The Opinion is available for download here.

(ii) Article 29 Working Party issues consultation on GDPR guidelines on DPIAs

On 4 April 2017, the Working Party issued guidelines on the Data Protection Impact Assessment ("**DPIA**") and determining whether processing is "likely to result in a high risk" for the purposes of the GDPR (the "**Guidelines**") for public consultation.

While the GDPR does not formally define the concept of a DPIA, the Guidelines note that it is a process designed to describe the processing, assess the necessity and proportionality of a processing and to help manage the risks to the rights and freedoms of natural persons resulting from the processing of personal data. While not mandatory for every processing operation, Article 35(1) of the GDPR provides that a DPIA is required when the processing is "*likely to result in a high risk to the rights and freedoms of natural persons*". Article 35 also sets out a non-exhaustive list of processing activities which require a DPIA.

The Guidelines aim to clarify the relevant provisions of the GDPR in order to help controllers to comply with the law and to provide legal certainty for controllers who are required to carry out a DPIA.

More specifically, the Guidelines discuss the following issues and provide recommendations on:

- What a DPIA addresses;
- The processing operations that are subject to a DPIA;
- How a DPIA should be carried out; and
- When the supervisory authority shall be consulted.

Annex 1 to the Guidelines sets out a list of links to examples of existing DPIA frameworks and Annex 2 outlines the criteria for an acceptable DPIA.

The Guidelines were open to public consultation until 23 May 2017. The Working Party will consider the comments received with a view to adopting a final version.

The Guidelines are available for download here.

(iii) Article 29 Data Protection Working Party adopts final Guidelines relating to GDPR

On 5 April 2017, the Working Party adopted final GDPR guidelines on the following:

- Data Protection Officers ("**DPOs**");

- The right to 'Data Portability'; and
- The Lead Supervisory Authority.

1. *Guidelines on DPO*

Under Article 37 of the GDPR, it is mandatory for certain controllers and processors to appoint a DPO. The GDPR sets out the conditions for the appointment of the DPO, his or her position and the tasks of the DPO.

The aim of these guidelines is to clarify the relevant provisions of the GDPR in order to help controllers and processors to comply with the law and also to assist DPOs in their role. More specifically, the Working Party provides guidance with regard to the criteria and terminology used in Article 37(1) of the GDPR including:

- Public authority or body;
- Core activities;
- Large scale; and
- Regular and systematic monitoring.

In addition, the guidelines provide best practice recommendations, building on the experience gained in some EU Member States. The annex to the guidelines also sets out a number of Q&A that organisations may have regarding these new requirements.

The Working Party will monitor the implementation of these guidelines and may update them with further details as appropriate.

The guidelines are available for download here.

2. Guidelines on the Right to Data Portability

Article 20 of the GDPR creates a new right to data portability which allows data subjects to receive the personal data that they have provided to a controller in a structured and machine-readable format and to transmit those data to another data controller.

The guidelines provide guidance on how to interpret and implement the right to data portability, clarifying the conditions under which the right applies taking into account the legal basis of the data processing and the fact that this right is limited to personal data provided by the data subject. It further provides concrete examples and criteria to explain the circumstances in which this right applies.

The guidelines also make a number of recommendations, one such recommendation being that industry stakeholders and trade associations work on a common set of interoperable standards and formats to deliver the requirements of the right to data portability.

The guidelines are available for download here.

3. Guidelines on Identifying Lead Supervisory Authority

The GDPR provides for the designation of a lead supervisory authority where cross-border processing is carried out. The lead supervisory authority will have primary responsibility for dealing with a cross-border data processing activity and will coordinate any investigation involving the 'concerned' supervisory authorities. The guidelines aim to provide guidance on identifying the lead supervisory authority and deals with other relevant issues such as the role of the supervisory authority 'concerned', local processing and companies not established within the EU.

The guidelines are available for download here.

(iv) EU – U.S. Joint Financial Regulatory Forum Issues Joint Statement

On 6 April 2017, EU and U.S. participants (the "**participants**") in the EU – U.S. Joint Financial Regulatory Forum ("**Forum**") published a joint statement. The participants met on 28 and 29 March 2017 in Brussels to allow the exchange of views on financial regulatory developments as part of their ongoing regulatory dialogue.

Among the matters discussed were the outlook for financial regulatory reforms and future priorities; cooperation in relevant global fora; and progress in implementing measures in their respective jurisdictions consistent with the G20 reform agenda.

In relation to data protection, the U.S. participants continued to raise issues in relation to the transfer of data for regulatory, supervisory and enforcement purposes and to data protection in light of the entry into application of the GDPR in May 2018.

In relation to insurance, participants provided updates on the progress of internal proceedings regarding the final legal text of the EU – U.S. bilateral agreement on prudential measures regarding insurance and reinsurance. EIOPA provided a presentation on insurance and reinsurance in a low interest rate environment.

The next Forum meeting will take place in Washington, D.C. in July 2017.

The full joint statement may be accessed here.

(v) Data Protection Commissioner publishes guidance on Access Rights and Responsibilities

On 7 April 2017, the Data Protection Commissioner (the "**DPC**") published a guide (the "**Guide**") on access rights and responsibilities which is aimed both at individuals and organisations. The aim of the Guide is to provide clarity around the rights and obligations that Access Requests cover and is designed to walk individuals through the process of making an access request and organisations through the process of responding to one.

The Guide follows a question and answer format and covers a number of areas including:

- Accessing personal data;
- Establishing if an organisation holds personal data about an individual;
- Applying for access to a copy of your personal data;
- Exemptions and restrictions to the Right of Access;
- Applying to have personal data corrected, deleted or restricted;
- Making a complaint to the data protection commissioner; and
- The effect the General Data Protection Regulations will have on Access Requests.

The Guide may be accessed here.

(vi) Data Protection Commissioner publishes Annual Report for 2016

On 11 April 2017, the DPC published its Annual Report for 2016 (the "**Report**"). The Report highlights the activities and achievements of the DPC and noted the volume of complaints being handled which reflects the growing awareness of, and concern for, data protection matters against individuals and organisations.

Some of the highlights of the Report include:

- The DPC dealt with 15,335 queries by email, 16,744 calls be telephone and 1,150 queries by post (up on 2015 figures);
- 1,479 complaints were investigated, with the largest single category of complaints continuing to be access requests (56%);
- 1,438 complaints were concluded in 2016, up from 1,015 in 2015;
- 26 'Right to be Forgotten' complaints were received, with 6 being upheld, 15 rejected and 5 currently still under investigation;
- The majority of complaints were amicably resolved; however a record number of formal decisions (59) were issued;
- 2,224 valid data-security breaches were recorded;
- Over 50 in-depth audits and inspections carried out, including of state agencies;
- 9 successful prosecutions for electronic marketing offences;

- Establishment of the new Multinationals and Technology team to lead on supervision of multinationals;
- Increased proactive engagement with other EU data protection authorities in preparing guidance on the General Data Protection Regulation;
- Over 100 face-to-face meetings were held with multinational companies;
- 2 successful prosecutions against private investigators for breaches in respect of access rights;
- 1,170 public and private sector consultation projects dealt with in 2016, up from 860 in 2015; and
- Commencement of intensive preparatory work in advance of GDPR.

The Annual Report may be accessed here.

(vii) General Scheme of Data Protection Bill 2017

On 12 May 2017, the Department of Justice and Equality published the General Scheme of the Data Protection Bill 2017 (the "**Data Protection Bill**").

The Data Protection Bill, amongst other things:

- Gives further effect to the GDPR including:
  - Providing for the imposition of fines on public authorities for breaches of data protection law where such authorities are acting in competition with private operators;
  - Specifying a digital age of consent for purposes of Article 8 GDPR;
  - Providing for a regulation making power to underpin the processing of sensitive data for reasons of substantial interest;
  - Providing for a more general basis for processing of personal data relating to criminal convictions and offences, subject to appropriate safeguards; and
  - Providing for a regulation making power to avail of the power to appoint a DPO if necessary and justified and where not already provided for in the GDPR.
- Transposes the Data Protection (Law Enforcement) Directive (2016/680/EU) into national law which concerns the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection, or prosecution of criminal offences, and on the free movement of such data; and

- Replaces the Data Protection Commissioner with a Data Protection Commission with the possibility of up to three Commissioners depending on future workload.

The Data Protection Bill is subject to pre-legislative scrutiny and is likely to change before it is enacted.

A press release by the Department of Justice and Equality on the Data Protection Bill may be accessed here.

The Data Protection Bill may be accessed here.

(viii) European Commission publishes Q&A on Data Protection Reform Package

On 24 May 2017, the European Commission published a set of questions and answers ("**Q&A**") on the data protection reform package which entered into force in May 2016 and will be applicable from May 2018. The package includes the GDPR and the Data Protection (Law Enforcement) Directive (2016/680/EU) for the police and criminal justice sector.

The Q&A's cover a number of issues including:

- The changes that will occur under the GDPR;
- The benefits for citizens and businesses;
- Specific protection for children;
- The benefits for SMEs;
- The penalties that will be incurred by a business for breaking the new data protection rules;
- How the GDPR protects personal data in the event of a cyberattack;
- The operation of the new rules in practice;
- The impact the Data Protection (Law Enforcement) Directive will have on enforcement operations; and
- The affect the Data Protection (Law Enforcement) Directive will have on citizens.

The Q&As may be accessed here.

(ix) Data Protection Commissioner launches information campaign on GDPR

On 25 May 2017, the DPC launched a GDPR focused website (www.GDPRandYou.ie) to assist businesses, in particular SMEs, with their preparations for the introduction of the GDPR. The new website will include guidance material on the GDPR. According to a study for the DPC conducted by Amárach Research, only 14% of Irish SMEs have begun

preparing for the introduction of the GDPR with one year to go. In a press release relating to the launch, Helen Dixon stated that "twelve months is not a long time and nobody can afford to delay".

The DPC GDPR website can be accessed here.

A related press release by the DPC may be accessed here.

(x) Data Protection Commissioner delivers speech at Data Summit Dublin 2017

On 15 June 2017, the DPC published a speech delivered by the Data Protection Commissioner, Helen Dixon, at the Data Summit Dublin 2017.

Ms Dixon covered a number of issues in her address including:

- Technology driving change – some downsides, some benefits;
- Binary arguments about technology being good or bad;
- Role of data protection authorities;
- Context in data protection analysis;
- Context for individual in making choices; and
- The GDPR.

Ms Dixon's full speech may be accessed here.

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