Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 January – 31 March 2019

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INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

MiFID II - European Developments

(i) ESMA updates Q&A on Transparency Topics

During the period 1 January 2019 to 31 March 2019, the European Securities and Markets Authority ("**ESMA**") published an updated version of its questions and answers publication "on MiFID II and MiFIR transparency topics" ("**Q&As on Transparency Topics**"). The updated questions are listed below:

- **Question ID: Part 3 Equity transparency – Question 3** (as updated on 4 January 2019) which asks what parameters should be applied until the transparency parameters are published by ESMA or the relevant non-delegating National Competent Authority ("**NCA**");

- **Question ID: Part 3 Equity transparency – Question 4** (as updated on 4 January 2019) relates to how a request for market data ("**RFMD**") should be reported under certain circumstances;

- **Question ID: Part 4 Non-equity transparency - Question 15** (as updated on 4 January 2019) asks what would be the applicable thresholds, where large-in-scale and size-specific-to-the-instrument thresholds in the case of pre-trade and post-trade transparency for bonds are not published by ESMA or the relevant non-delegating NCA;

- **Question ID: Part 7 The systematic internaliser regime – Question 1** (as modified on 30 January 2019) asks when will ESMA publish information about the total number and the volume of transactions executed in the European Union ("**EU**") and asks when do investment firms have to perform the assessment whether they should be considered as systematic internalisers ("**SIs**") for the first time as well as for subsequent periods; and

- **Question ID: Part 8 Data reporting services providers – Question 4** (as updated on 1 February 2019) asks how should Approved Publication Arrangements ("**APAs**") report trading activity volume to competent authorities for the purpose of the transparency calculations.

A copy of the updated Q&As on Transparency Topics can be accessed here.

(ii) ESMA updates Q&A on Commodity Derivatives

During the period 1 January 2019 to 31 March 2019, ESMA published updated version of its questions and answers publication "on MiFID II and MiFIR commodity derivatives topics" ("**Q&As on Commodity Derivatives**"). The updates made to the Q&As on Commodity Derivatives are as follows:

- **Question ID: Part 7 Other issues – Question 1** (as updated on 4 January 2019) asks how should the field "Price Multiplier" (field 25 of Table 3 of the Annex of the Commission Delegated Regulation (EU) 2017/585 ("**RTS 23**")) be populated for electricity derivative contracts;

- **Question ID: Part 3 Ancillary activity – Question 6** (as modified on 27 March 2019) modifies the answer provided in response to the question asking when should a firm who wishes to make use of the ancillary exemption, notify its respective competent authority; and

- **Question ID: Part 3 Ancillary activity – Question 14** (as updated on 27 March 2019) this question seeks to bring clarity to the scope of the ancillary activity test on a third-country firm dealing on an EU trading venue in derivatives or allowances.

A copy of the updated Q&A on Commodity Derivatives can be accessed here.

(iii) SMSG published End of Term Report 2018

On 3 January 2019, ESMA's Securities and Markets Stakeholder Group ("**SMSG**") published its 'End of Term Report 2018' (the "**Report**") which covers the period from 1 July 2016 to 31 December 2018. By way of background, SMSG was first established in April 2011 under ESMA's founding Regulation (Regulation (EU) No 1095/2010) to help facilitate consultation with stakeholders in all areas relevant to ESMA's tasks. The Report covers the following five areas:

1. **The role of SMSG** - This section deals with the legislative mandate establishing SMSG and the developments of ESMAs work and the advisory role of SMSG;

2. **The composition of SMSG -** This section deals with the membership composition of SMSG and its steering committee;

3. **How SMSG works -** This section deals with SMSG's working methods, rules of procedure, meetings and its secretariat and administrative support, its relationship with ESMA and its co-operation with other stakeholders and the impact of its papers, consultations and advices;

4. **The lessons SMSG has drawn from its work -** This section deals with SMSGs self-assessment and key messages; and

5. **An overview of the papers adopted by SMSG in this mandate period -** This section deals with SMSG's activity with advice papers, statements, letters and its permanent working groups on MiFID II/Markets in Financial Instruments Regulation (600/2014) ("**MiFIR**") implementation.

The Report concludes with a number of considerations for the future tasks of ESMA and the co-operation of stakeholder groups established to provide advice to the European Supervisory Authorities ("**ESAs**").

A copy of the Report can be accessed here.

(iv) Draft Commission Delegated Regulations on sustainable finance published

On 4 January 2019, the European Commission published draft Delegated Regulations designed to ensure investment firms and insurance distributors take environmental, social and governance issues into account when advising customers. These are listed below:

- Commission Delegated Regulation amending Delegated Regulation (EU) 2017/565 as regards the integration of environmental, social and governance considerations and preferences into investment advice and portfolio management. This draft Delegated Regulation can be accessed here; and

- Commission Delegated Regulation amending Regulation (EU) 2017/2359 as regards the integration of environmental, social and governance considerations and preferences into the investment advice for insurance-based investment products. This draft Delegated Regulation can be accessed here.

  (together the "**Delegated Regulations**").

The Delegated Regulations arise from Articles 24(13) and 25(8) of the MiFID II Directive (2014/65/EU) (the "**MiFID II Directive**") and Article 30(6) of the Insurance Distribution Directive (2016/97/EU) ("**IDD**"), respectively.

The European Commission can only officially adopt the Delegated Regulations once the new disclosure provisions for sustainable investments and sustainability risks have been agreed at EU level. The publication of the Delegated Regulations should enable firms to start preparing to take environmental, social and governance considerations and preferences into account.

Once adopted by the European Commission, the Delegated Regulations will enter into force twenty days after publication in the Official Journal of the EU, unless the European Parliament or the Council of the EU objects.

A copy of the press release relating to the publication of the Delegated Regulations can be accessed here.

(v) European Commission published draft Delegated Regulation extending MiFID II trade transparency exemption to People's Bank of China

On 10 January 2019, the European Commission published a draft Delegated Regulation amending the Commission Delegated Regulation (EU) 2017/1799 as regards to the exemption of the People's Bank of China from the pre- and post-trade transparency requirements under MiFIR (the "**Delegated Regulation**") together with an Annex.

Under Article 1(9) of MiFIR the European Commission can adopt delegated acts to exempt certain third-country central banks from MiFID II pre- and post-trade transparency requirements. The Delegated Regulation adds the People's Bank of China to the list of exempted institutions.

The Delegated Regulation can be accessed here and the Annex here.

(vi) ESMA publishes latest Double Volume Cap Data

ESMA published the updates of the latest set of data regarding the double volume cap ("**DVC**") under the MiFID II Directive in the first quarter of 2019, specifically on the 9 January, 15 February and 7 March.

The MiFID II Directive introduced the DVC to limit the amount of dark trading in equities allowed under the reference price waiver and the negotiated transaction waiver. The DVC mechanism is set out in Article 5 of MiFIR with the aim of limiting the trading under the reference price waiver (Article 4(1)(a) of MiFIR) and the negotiated transaction waiver for liquid instruments (Article 4(1)(b)(i) of MiFIR) in an equity instrument.

The data files published by ESMA provide the information needed for the implementation of the DVC mechanism. This includes the identifiers of the instruments and trading venues associated with a suspension of the relevant waivers, and the period in which the DVC will be applicable.

In the updates published on the 9 January, 15 February and 7 March, ESMA amended the suspension files relating to the DVC data which it had originally published on 7 August 2018. The suspension file, which is required under MiFIR, contains a list of International Securities Identification Numbers ("**ISIN**"), which are suspended from trading. Furthermore, as of 7 March, there was a total of 342 instruments suspended.

The data files and the suspension files can be found here.

(vii) EFAMA's Response to ESMA's Call for Evidence on Periodic Auctions for Equity Instruments

On 21 January 2019, the European Fund and Asset Management Association ("**EFAMA**") published a reply to ESMA's call for evidence on periodic auctions for equity instruments (the "**Response**").

The call for evidence was prompted by concerns raised by stakeholders that a new type of periodic trading system for equity instruments consisting of auctions of a very short duration during the trading day ("**frequent batch auctions**") is being used to circumvent the suspension of trading under the DVC. The operation of these systems similarly raises questions as to their compatibility with the MiFID II Directive.

EFAMA in the Response set out their support to all of the initiatives that can help achieving fair and liquid markets, which EFAMA consider as an important element for the protection of end-investors. As with the implementation of MiFID II, this new regime has opened the market for new liquidity providers.

EFAMA believe that a variety of types of execution, e.g. trading venues, periodic auctions and SI's organisation should best serve the interests of the industry to maintain flexibility in innovation and different options when trading, and are of the opinion that a well-calibrated periodic auctions regime can be further developed in a way that could:

- Support liquidity in the markets, facilitate regulated funds and asset managers needs to execute orders including large orders;
- Minimize trading costs for the benefit of the retail investors; and
- Ensure best in class execution;

A copy of the Response can be accessed here.

(viii) ESMA updates MiFID II transitional transparency calculations for electricity derivatives

On 22 January 2019, ESMA published an updated version of its Frequently Asked Questions ("**FAQs**") on MiFID II Transitional Transparency Calculations ("**TTC**") required under the MiFID II Directive and MiFIR.

The aim of the FAQs is set out a list of frequently asked questions and their corresponding answers regarding the TTC for all equity and non-equity instruments in accordance with the Commission Delegated Regulation (2017/587/EU) ("**RTS 1**"), the Commission Delegated Regulation (2017/567/EU), the Commission Delegated Regulation (2017/583/EU) ("**RTS 2**") and the Commission Delegated Regulation (2017/588/EU) ("**RTS 11**").

The update to the FAQs relate to the TTC for commodity derivatives and only affects electricity derivatives.

A copy of the FAQs can be accessed here.

(ix) ESMA publishes opinions on position limits under MiFID II

On 23 January 2019, ESMA published six opinions on position limits regarding certain commodity derivatives under the MiFID II Directive and MiFIR.

Most recently on 20 March 2019, ESMA published a further seven opinions on proposed limits and in respect of all publications ESMA agreed with the proposed position limits regarding the commodity derivatives, noting that the limits were consistent with the objectives established under the MiFID II rules and the accompanying methodology developed for setting those limits.

The MiFID II Directive provides for all commodity derivatives traded on trading venues and economically equivalent over-the-counter ("**OTC**") contracts to be subject to position limits. ESMA publishes a list of liquid commodity derivatives currently identified by the relevant NCAs in order to further assist market participants with the implementation of the MiFID II position limit framework.

The relevant six opinions can be accessed here and most recent opinions, seven in total, can be accessed here.

(x) ESMA Renews Intervention Measures which restrict the sale of CFDs

On 23 January 2019, ESMA adopted a decision under Article 40 of MiFIR to restrict the marketing, distribution or sale of contracts for differences ("**CFDs**") to retail clients (the "**Decision**"). The Decision renews and amends ESMA Decision (EU) 2018/796 on the same terms as the previous renewal decision, ESMA Decision (EU) 2018/1636.

Under MiFIR, ESMA can introduce temporary prohibitions or restrictions concerning certain financial instruments, financial activities or practices to address consumer protection measures in the EU.

The Decision was published in the Official Journal of the EU on 31 January 2019 and will apply from 1 February 2019 for a period of 3 months.

A copy of the Decision can be accessed here.

(xi) ESMA updates action plan for the Systematic Internaliser Regime Calculations for Equity, Equity-like instruments and Bonds

On 30 January 2019, ESMA published an update of its action plan for the SI calculations for equity, equity-like instruments and bonds under the MiFID II Directive and MiFIR.

ESMA has stated that it was required to amend its action plan as data completeness for various non-equity asset classes has not yet reached adequate levels and ESMA provided that it had considered it premature to publish the SI calculations for non-equity instruments other than bonds until at the latest 2020. ESMA has provided that it will focus on further

improving the quality and completeness of those asset classes to ensure the publication of the SI-calculations takes place as soon as possible.

Under Article 4(1)(20) of the MiFID II Directive, firms dealing on own account when executing client orders OTC on an organised, frequent systematic and substantial basis are subject to the rules applicable to a SI.

The Commission Delegated Regulation (EU) No 2017/565 specifies thresholds determining what constitutes frequent, systematic and substantial OTC trading. A firm must assess whether it is a SI in a specific instrument (such as equity and equity-like instruments or bonds) or for a class of instruments (derivatives, securitised derivatives and emission allowances) on a quarterly basis based on data provided relating to the previous six months.

For each specific instrument or class, a firm must compare the trading it undertakes on its own account to the total volume and number of transactions executed in the EU. If the firm exceeds the relevant thresholds it will be deemed to be an SI. ESMA has computed the total volume and number of transactions executed in the EU to help market participants carry out the test.

A copy of the relevant press release can be accessed here.

(xii) ESMA updates Q&A on Market Structures Topics

On 1 February 2019, ESMA published an updated version of its questions and answers publication "On MiFID II and MiFIR market structures topics" (the "**Q&As on Market Structures Topics**"). The following update to the Q&As on Market Structures Topics was made:

- **Question ID: Part 3 Direct Electronic Access ("DEA") and algorithmic trading – Question 30** (as updated on 1 February 2019) which relates to tests to identify high frequency trading techniques, described in Article 19 of Commission Delegated Regulation (EU) 2017/565.

A copy of the updated Q&As on Market Structures Topics can be accessed here.

(xiii) ESMA updates Q&A on MiFIR Data Reporting

On 4 February 2019, ESMA published an updated version of its questions and answers publication "On MiFIR Data Reporting" (the "**Q&As on MiFIR Data Reporting**"). The updates to the Q&As on MiFIR Data Reporting are as follows:

- **Question ID: Part 2 Legal Entity Identifier ("LEI") of the issuer – Question 5** (as updated on 4 February 2019) asks how should operators of trading venue(s) and SI(s) populate field 5 (issuer or operator of the trading venue identifier) where the issuer of the instrument has a branch that has a LEI;

- **Question ID: Part 5 Maturity Date, expiry date and termination date – Question 2** (as updated on 4 February 2019) asks how should Field 15 (maturity date) of Table 3 of the Annex to the Commission Delegated Regulation (2017/585/EU) ("**RTS 23**") and the Commission Delegated (2016/909/EU) ("**MAR RTS**") and the Commission Implementing Regulation (2016/378/EU) ("**MAR ITS**") be populated in case of trading in bonds after their originally intended mature date;

- **Question ID: Part 5 Maturity Date, expiry date and termination date – Question 3** (as updated on 4 February 2019) asks how should field 15 (maturity date) and field 24 (expiry date) of Table 3 of the Annex to RTS 23 and the related MAR RTS and MAR ITS be populated, if these dates are non-trading dates, example a weekend or a bank holiday;

- **Question ID: Part 5 Maturity Date, expiry date and termination date – Question 4** (as updated on 4 February 2019) asks when should an instrument be terminated in the Financial Instruments Reference Database System ("**FIRDS**"); and

- **Question ID: Part 17 Complex trades – Question 1 (c)** (as updated on 4 February 2019) asks how the Trading Venue Transaction Identification Code ("**TVTIC**") (field 3 of Commission Delegated Regulation (EU) 2017/590 ("**RTS 22**")) should be populated in transaction reports of a complex trade.

A copy of the updated Q&As on MiFIR Data Reporting can be accessed here.

(xiv) The European Commission adopts proposal for a Council of EU decision on incorporating MiFIR and the MiFID II Directive into EEA Agreement

On 4 February 2019, the European Commission published a Council of the EU decision on the position to be adopted, on behalf of the EU, within the European Economic Area ("**EEA**") Joint Committee, concerning an amendment to Annex IX (Financial Services) to the EEA Agreement it had adopted on 31 January 2019 (the "**Decision**").

The Decision incorporates MiFIR and the MiFID II Directive into the EEA Agreement.

The Annex to the Decision sets out the text of the draft EEA Joint Committee decision, extending the existing EU policy under MiFIR and the MiFID II Directive to the EEA European Free Trade Association ("**EFTA**") states (i.e. Norway, Iceland and Liechtenstein). Since the proposed adaptations to the EEA Agreement that are set out in the Annex go beyond technical adaptations, the EU position must be established by the Council of the EU.

The Decision was made and entered into force on 4 March 2019, a copy of the Decision can be accessed here and the Annex can be found here.

(xv) Council of the EU publishes presidency compromise text of proposed Directive amending the MiFID II and the Solvency II Directives

On 4 February 2019, the Council of the EU published the presidency compromise text of the proposed Directive amending the MiFID II Directive and the Solvency II Directive (2009/138/EC) (the "**Proposed Directive**"). The Proposed Directive aims to strengthen and further integrate the current EU supervisory framework by doing the following:

- **Better co-ordination of supervision** – the Proposed Directive aims to strengthen macro-prudential supervision across the EU, to strengthen the existing powers of the ESAs in order to foster greater supervisory convergence and to increase the role of European Insurance and Occupational Pensions Authority ("**EIOPA**") in co-ordinating the authorisation of (re)insurance companies' internal risk measurement models.

- **Extension of the direct supervisory powers of ESMA** – the Proposed Directive aims to extend the direct supervisory powers of ESMA, focussing on those areas where direct supervision can remove cross-border barriers and promote further market integration.

- **Enhancing the focus on environmental, social and governance factors and FinTech** – the Proposed Directive will require the ESAs to take account of environmental, social and governance factors, as well as issues related to FinTech, when performing tasks within their respective mandates.

- **The transfer of certain supervisory powers from NCAs to the ESAs** – the Proposed Directive seeks to transfer the power to authorise and supervise data reporting service providers to ESMA. The Proposed Directive also seeks to assign EIOPA with a greater role in contributing to supervisory convergence in the applications for the use of internal risk measurement models, changes with respect to information sharing regarding such model applications, and the possibility for EIOPA to issue opinions in that connection and to assist in the settlement of disputes between supervisory authorities.

The Council's presidency compromise text can be accessed here.

(xvi) ESMA sets out use of UK data in ESMA databases under a no-deal Brexit

On 5 February 2019, ESMA published a statement on the use of UK data in ESMA databases and the performance of MiFID II calculations under a no-deal Brexit (the "**Statement**"), whereby the UK's Financial Conduct Authority ("**FCA**") will cease sending data to ESMA and will no longer have access to ESMA's IT applications and databases.

It was provided that under a no-deal Brexit, no new UK related data will be received and processed by ESMA nor published on the ESMA website. The Statement aims to inform stakeholders on the approach it will take on all ESMA IT applications and databases.

A copy of the Statement can be accessed here.

(xvii) ESMA publish supervisory briefing on the supervision of non-EU branches of EU firms

On 6 February 2019, ESMA published a MiFID II supervisory briefing on the supervision of non-EU branches of EU firms providing investment services and activities (the "**Supervisory Briefing**").

The Supervisory Briefing is aimed at NCAs of Member States and also gives market participants indications of the EU compliant implementation of the MiFID II provisions and of the recommendations expressed in ESMA's opinion to support supervisory convergence where an EU investment firm establishes a branch in a third country jurisdiction. The Supervisory Briefing covers the following topics:

- Supervisory expectations in relation to the authorisation of investment firms.
- Ongoing activities of non-EU branches, including reporting and collection of information.
- Supervisory activity and co-operation with non-EU competent authorities.

A copy of the Supervisory Briefing can be accessed here.

(xviii) European Commission adopts Delegated Regulation amending MiFID II tick size regime

On 13 February 2019, the European Commission adopted RTS 11 as regards the possibility to adjust the average daily number of transactions for a share, where the trading venue with the highest turnover of that share is located outside the EU (the "**Delegated Regulation**").

By way of background, Article 49(3) of the MiFID II Directive requires that ESMA develop draft Regulatory Technical Standards ("**RTS**") to further specify the tick sizes or tick size regimes for shares, depositary receipts, certain exchange traded funds, certificates and similar financial instruments.

ESMA submitted a draft RTS to the European Commission in December 2018, which proposed amendments to RTS 11 in order to ensure that the tick sizes that apply to third-country instruments are adequate and appropriately calibrated.

The draft RTS further specified provisions relating to the calculation of the tick size for financial instruments traded or admitted to trading on an EU trading venue and a third-country trading venue in cases where the most liquid trading venue by turnover is the trading venue located outside the EU.

On 13 March 2019, the European Parliament published a provisional version of its decision to raise no objections to the Delegated Regulation (the "**Decision**"). In the Decision, the European Parliament provided that:

- The Delegated Regulation contains important amendments to preserve the competitiveness of EU trading venues offering trading in shares that are admitted to trading or are traded in the EU and a third country concurrently, and where the trading venue with the highest turnover in those shares is located outside the EU; and

- It recognises the importance of a swift adoption of the Delegated Regulation to ensure the preparedness of the EU in the event of a no deal Brexit.

On 20 March 2019, the Delegated Regulation was published in the Official Journal of the EU. The Delegated Regulation will now enter into force on the twentieth day after this publication and will be directly applicable in all Member States.

A copy of the Decision can be accessed here and the Delegated Regulation here.

(xix) ESMA makes new Bond Liquidity data available

On 15 February 2019, ESMA published updated liquidity assessment data on its data register in respect of bonds which are subject to pre-trade and post trade requirements under the MiFID II Directive and MiFIR. The first communication was published on 27 September 2018.

ESMA's liquidity assessment for bonds is based on a quarterly assessment of quantitative liquidity criteria, which include the daily average trading activity (trades and notional amount) and percentage of days traded per quarter. ESMA is set to update its bond market liquidity assessments quarterly.

The transparency requirements for bonds deemed liquid will apply from 16 February 2019 until the 15 May 2019.

The list of bonds assessed for liquidity are available through the register system which can be found here.

(xx) ESMA publishes annual transparency calculations for equity and equity-like instruments published for 2019/2020

On 6 March 2019, ESMA published the results of the annual transparency calculations for equity and equity-like instruments.

By way of background, ESMA's annual transparency calculations are based on the data provided to the Financial Instruments Transparency System ("**FITRS**") by trading venues and arranged publication arrangements for the calendar year 2018.

There are currently 1,344 liquid shares and 389 liquid equity-like instruments other than shares, subject to MiFID II/MiFIR transparency requirements, with the calculations being applicable from 1 April 2019, until then the TTC continue to apply.

ESMA have stated that due to late data submissions by some reporting entities and adaptations necessary in case of a no-deal Brexit, that it will likely have to update the results after 29 March 2019. On this point, ESMA has provided that it intends to make the public aware of any updates in advance.

The transparency requirements based on the results of the annual transparency calculations published from 1 March for equity and equity-like instruments will apply from 1 April 2019 until 31 March 2020.

A copy of the results of the annual transparency calculations for equity and equity-like instruments can be accessed here.

(xxi) European Commission welcomes political agreement on new rules to further improve access to capital markets for smaller businesses

On 6 March 2019, the European Commission issued a press release welcoming the political agreement reached by the European Parliament and Member States on new rules that will further help small and medium-sized enterprises ("**SMEs**") to finance their growth, innovate and create jobs.

The new rules seen as a key element of the Capital Markets Union ("**CMU**") agenda will seek to ensure that smaller businesses in the EU will have access to diversified sources of financing at each stage of their development.

The revised rules propose to make it cheaper and simpler for SMEs to access public markets through the so-called '*SME Growth Markets*', a new category of trading venue dedicated to small issuers. It was provided that listing on the stock exchange can provide the following positive outcomes for a SME: a reduced dependence on bank funding, a broader investor base, easier access to additional equity capital and debt finance, and a higher public profile and brand recognition.

The proposal provides for targeted amendments to two key pieces of financial services legislation, namely:

- **The Market Abuse Regulation** ("**MAR**") – it is provided that the amendments to the rules on market abuse aim to cut red tape for small businesses while safeguarding market integrity and investor protection and creates a common set of rules on liquidity contracts for SME Growth Markets in all Member States while giving NCAs sufficient flexibility to tailor market practices to local conditions which will ensure minimum liquidity and reduce volatility of SME shares; and

- **The Prospectus Regulation** - the proposed changes will allow issuers in SME Growth Markets to produce a lighter prospectus when transferring to a regulated market which can lead to significant cost-saving for growing SMEs.

A copy of the press release can be accessed here and a copy of the draft Commission Delegated Regulation amending Commission Delegated Regulation (EU) 2017/565 as regards certain registration conditions to promote the use of SME growth markets can be accessed here.

(xxii) ESMA includes MIFID II/MiFIR in its Interactive Single Rulebook

On 14 March 2019, ESMA updated its Interactive Single Rulebook, an online tool allowing a comprehensive overview of and an easy access to all level 2 and level 3 measures adopted in relation to a level 1 text.

ESMA's Interactive Single Rulebook aims to facilitate the consistent application of the EU rulebook in the securities markets area and the online tool provides an interactive version of level 1 texts under ESMA's remit.

The Interactive Single Rulebook can be accessed here.

(xxiii) ESMA publishes results of MiFID II annual calculations of LIS and SSTI thresholds for bonds for 2019/2020

On 18 March 2019, ESMA published the results of the annual transparency calculations of the large in scale ("**LIS**") and size specific to the instruments ("**SSTI**") thresholds for bonds.

By way of background, the Commission Delegated Regulation (EU) 2017/583 ("**RTS 2**") on transparency requirements for non-equity instruments requires competent authorities to publish information on the size of LIS compared to the standard market size and the SSTI which pre-trade transparency requirements can be waived and the publication of post-trade transparency information can be deferred.

The task of performing the calculations has been delegated to ESMA on behalf of the EEA competent authorities.

ESMA has provided that the transparency requirements based on the results of the annual calculations of the LIS and SSTI thresholds for bonds shall apply from 1 June 2019 until 31 May 2020 and from 1 June 2020, the results of the next annual calculations of the LIS and SSTI thresholds for bonds, to be published by 30 April 2020, will become applicable.

A copy of the annual transparency calculations for non-equity instruments register can be accessed here.

(xxiv) ESMA's application of the trading obligation for shares following a no-deal Brexit

On 19 March 2019, ESMA published a public statement entitled "Impact of Brexit on the trading obligation for shares (Article 23 of MiFIR)" (the "**Statement**"). The Statement deals with the possible impact on the MiFIR trading obligation, for shares of the UK, in respect of planned exit of the UK from the EU on 29 March 2019, without a withdrawal agreement, and without an equivalence decision for the UK by the European Commission.

By way of background, Article 23 of MiFIR requires investment firms to conclude transactions in shares admitted to trading on a regulated market ("**RM**") or traded on an EU trading venue on RMs, multilateral trading facilities, SIs or third-country trading venues assessed as equivalent by the European Commission. This requirement is, however, not deemed applicable to transactions in shares that are traded in the EU on a non-systematic, ad hoc, irregular and infrequent basis.

In order to provide certainty for market participants, ESMA has sought to clarify, as is provided for in the Statement, the concept of "non-systematic, ad hoc, irregular and infrequent" for shares admitted to trading or traded on EU as well as UK markets, on a no-deal Brexit and without an equivalence decision for the UK.

The Statement had been published in a response to requests from market participants for additional clarity and certainty on the application of the trading obligation for shares in the absence of an equivalence decision by the European Commission.

ESMA has highlighted in the Statement that the guidance provided should only be applied in case of a no-deal Brexit occurring on 29 March 2019 and should the timing and conditions of Brexit change, ESMA may adjust its approach and inform the public of any changes as soon as possible.

A copy of the Statement can be accessed here.

(xxv) Delegated Regulation under MiFIR relating to systematic internalisers' quote obligations published in the Official Journal of the EU

On 20 March 2019, the Delegated Regulation (EU) 2019/442 amending and correcting Delegated Regulation (EU) 2017/587 to specify the requirement for prices to reflect prevailing market conditions and to update and correct certain provisions (the "**Delegated Regulation**") was published in the Official Journal of the EU.

The Delegated Regulation entered into force on 9 April 2019 and can be accessed here.

(xxvi) ESMA publishes guidelines compliance table in respect of its guidelines on transaction reporting, order record keeping and clock synchronization under MiFID II

On 21 March 2019, ESMA published a guidelines compliance table (the "**Table**") which indicates the countries that comply or have expressed the intention to comply with the ESMA guidelines on transaction reporting, order record keeping and clock synchronization under MiFID II (the "**Guidelines**").

As per the Table, the Central Bank of Ireland complies with the Guidelines. A copy of the Table can be accessed here and a copy of the Guidelines can be accessed here.

(xxvii) ESMA adds new venues to register of derivatives to be traded under MiFIR

On 21 March 2019, ESMA updated the public register of those derivative contracts that are subject to the trading obligation under MiFIR. The update follows the authorisation of additional entities where the classes of derivatives subject to the trading obligation are available for trading.

The register provides clarity to market participants on the application of the trading obligation under MiFIR and in particular on:

- The classes of derivatives subject to the trading obligation;
- The trading venues on which those derivatives can be traded; and
- The dates on which the obligation takes effect per category of counterparties.

A copy of the public register can be accessed here.

(xxviii) Notice of ESMA's Product Intervention Renewal Decision in relation to binary options

On 27 March 2019, ESMA Decision (EU) 2019/509 (the "**Binary Options Decision**"), a renewal decision, was published in the Official Journal of the EU, which ESMA had adopted on 22 March 2019.

By way of background, ESMA under MiFIR can introduce temporary prohibitions or restrictions concerning certain financial instruments, financial activities or practices to address consumer protection measures in the EU.

The Binary Options Decision renews the ESMA Decision (EU) 2018/795 on the same terms as the previous renewal decision, ESMA Decision (EU) 2018/2064 which prohibits the marketing, distribution or sale of binary options to retail clients. The Binary Options Decision applies from 2 April 2019 until 1 July 2019.

A copy of the Binary Options Decision can be accessed here.

(xxix) ESMA updates Q&A on Investor Protection and Intermediaries Topics

During the period 1 January 2019 to 31 March 2019, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR investor protection and intermediaries topics" ("**Q&As on Investor Protection and Intermediaries Topics**"). The updates to the Q&As on Investor Protection and Intermediaries Topics are as follows:

- **Question ID: Part 1 Best execution – Question 20** (as updated on 28 March 2019) which asks what is the scope of the Commission Delegated Regulation (2017/575/EU) ("**RTS 27**") reporting requirements for market makers and other liquidity providers;

- **Question ID: Part 2 Suitability and appropriateness – Question 3** (as modified on 28 March 2019) the relevant answer provided was modified. The question asks can the suitability report be made available to the client on the firm's website, with the client receiving a notification regarding the availability of this document;

- **Question ID: Part 2 Suitability and appropriateness – Question 10** (as updated on 28 March 2019) which asks are investment firms allowed to use a tick-the-box approach and/or generic statements in a suitability report;

- **Question ID: Part 9 Information on costs and charges – Question 7** (as modified on 28 March 2019) the relevant answer provided was modified. The relevant question asks how should investment firms use the product's costs as presented in the PRIIPs KID;

- **Question ID: Part 9 Information on costs and charges – Question 22** (as updated on 28 March 2019) which relates to the MiFID II ex-ante disclosure of information on and costs and charges requirement;

- **Question ID: Part 9 Information on costs and charges – Question 23** (as updated on 28 March 2019) which asks in what circumstances and under which conditions could a firm meet its obligation for ex-ante disclosure by informing its clients of the relevant costs and charges just once, or on a regular basis, but not before each transaction;

- **Question ID: Part 9 Information on costs and charges – Question 24** (as updated on 28 March 2019) which asks how should the ex-ante costs and charges disclosure requirements be applied to the service of portfolio management;

- **Question ID: Part 9 Information on costs and charges – Question 25** (as updated on 28 March 2019) which asks what terminology should firms use in costs and charges disclosure material;

- **Question ID: Part 9 Information on costs and charges – Question 26** (as updated on 28 March 2019) which asks which taxes should be included in the ex-ante and ex-post costs and charges disclosure;

- **Question ID: Part 13 Provision of investment services and activities by third country firms – Question 4** (as updated on 28 March 2019) which relates to the MiFID II third-country firm reverse solicitation exemption;

- **Question ID: Part 15 Other issues – Question 3** (as updated on 28 March 2019) which relates to the requirement to provide information to a client in a durable medium and asks whether the provision of the information to the client through the firm's website, in a certain fashion would suffice; and

- **Question ID: Part 16 Product governance – Question 1** (as updated on 28 March 2019) which asks which considerations should manufacturers and distributors take into account when specifying the target market category "type of client to whom the product is targeted" for Contingent Convertible-Bond-Funds.

A copy of the updated Q&As on Investor Protection and Intermediaries Topics can be accessed here.

(xxx) Council of the EU adopts position on a proposal to seek to amend the MiFID II Directive in respect of crowdfunding service providers

On 29 March 2019, the Council of the EU published that it has adopted its position on the proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments (the "**Proposal**") at its first reading.

The Proposal seeks to exclude crowdfunding service providers from the MiFID II Directive and provides that the creation of a draft EU Regulation will provide for uniform, proportionate and directly applicable requirements for the authorisation and supervision of crowdfunding service providers.

The Council of the EU now calls on the European Commission to refer the matter to the European Parliament again if it replaces, substantially amends or intends to substantially amend its Proposal.

A copy of the Proposal can be accessed here.

Capital Requirements Directive IV / V / CRR / CRR II

(i) EBA releases a revised version of the Single Rulebook Q&As – CRR

During the period 1 January 2019 to 31 March 2019, the European Banking Authority ("**EBA**") updated its Single Rulebook Q&As – Regulation (EU) No. 575/2013 (the "**CRR Regulation**") (the "**CRR Q&As**"). We have set out below the updates made to the CRR Q&As in the last quarter:

Topic - Supervisory Reporting

- **Question ID: 2014 1203 and Question ID: 2014 1169** (as updated on 11 January 2019): this question relate to Template F 16.01 specifically interest income and expenses by instrument and counterparty sector;

- **Question ID: 2018 3842** (as updated on 11 January 2019): this question relates to validation rules v5228_m,v5229_m,v_5231_m,v5235_m and asks to confirm whether these validations take into account the expected credit loss calculated for other demand deposits and cash balances at central banks;

- **Question ID: 2018 3792** (as updated on 11 January 2019): this question relates to validation rules on template F 18.00, comparing with F 04.04.1 and F 01.01;

- **Question ID: 2018 3963** (as updated on 11 January 2019): this question asks should the validation rule v6063_m in v2.7.0.1 include equity instruments of other non-trading non-derivative financial assets and non-trading non-derivative financial assets measured at cost-based-method;

- **Question ID: 2017 3591** (as updated on 11 January 2019): this question asks if validation v2776_m for IFRS 9 (taxonomy 2.7) is correct;

- **Question ID: 2018 3793** (as updated on 11 January 2019): this question relates to the clarification of "Other collateralized loans" on template F 05.01;

- **Question ID: 2018 3897** (as updated on 11 January 2019): this question asks if validation rule v2818 has an error, as it has caused a blocking error for an institution;

- **Question ID: 2018 4064** (as updated on 11 January 2019): this question relates to the inconsistency in validation rule eba_v4721_m;

- **Question ID: 2018 3887** (as updated on 22 February 2019): this question relates to the reactivation of validation rule v0191_m as of v2.7;

- **Question ID: 2018 3912** (as updated on 22 February 2019): this question relates to the treatment of off-balance sheet exposures measured at reporting date at fair value through P&L in templates F 18.00 and F 19.00;

- **Question ID: 2018 3947** (as updated on 22 February 2019): this question relates to the new risk weights for exposures to central governments or central banks not applicable in DPM 2.7 for C 07.00;

- **Question ID: 2018 3970** (as updated 15 March 2019): this question relates to the validation rule Finrep (DPM 2.7) F 18;

- **Question ID: 2018 4005** (as updated 15 March 2019): this questions relates to the clarifying impact of the new securitisation framework on template C 14.00;

- **Question ID: 2018 4066** (as updated 15 March 2019): this question relates to the COREP template C 05.01-validation rule v0269;

- **Question ID: 2018 3991** (as updated 15 March 2019): this question relates to the FINREP validation rule v5116_m;

- **Question ID: 2018 3794** (as updated 15 March 2019): this question relates to the presentation of cash flows related to non performing exposures in the templated (C66.01.a);

- **Question ID: 2018 4009** (as updated 15 March 2019): this question relates to the validation rules ad published by EBA DPM 2.7.0; and

- **Question ID: 2018 4146** (as updated 15 March 2019): this question relates to the COREP Template C 25.00 Validation rule v0641_m.

Topic - Own Funds

- **Question ID: 2018 3823** and **Question ID: 2018 3821** (as updated on 18 January 2019): these questions both relate to inclusion of interim profits in CET1; and

- **Question ID: 2018 4269** (as updated on 22 March 2019): this question relates to the clarification on the risk weight applied to deferred tax assets that do not rely on future profitability.

Topic - Credit Risk

- **Question ID: 2014 1297** (as updated on 11 January 2019): this question relates to material exposure in connection with term "days past-due" in the definition of non-performing exposure;

- **Question ID: 2017 3426** (as updated on 18 January 2019): this question relates to the offset of Additional Value Adjustments ("**AVA**") against Expected Loss ("**EL**") under Article 159 of CRR;

- **Question ID: 2017 3517** (as updated on 1 March 2019): this question relates to exposures to regional governments, local authorities or public sector entities which are treated as exposures to central governments under Articles 115 and 116 of the CRR;

- **Question ID: 2017 3765** (as updated on 1 March 2019): this question asks how should exposures to unrated institutions be treated under Article 121 of the CRR; and

- **Question ID: 2017 3753** (as updated on 1 March 2019): this question asks what would be the applicable risk weight according to Article 119(2) of the CRR, to an exposure in the scope of Article 114(6)(a) of the CRR.

Topic - Securitisation and Covered Bonds

- **Question ID: 2017 3141** (as updated on 11 January 2019): this question relates to the recognition of specific credit risk adjustments on securitised defaulted exposures under Article 266(1) of the CRR;

- **Question ID: 2018 4274** (as updated on 18 January 2019): this question relates to mapping of SEC-ERBA credit quality steps;

- **Question ID: 2018 3806** (as updated on 22 March 2019): this question relates to the scope of application of the term "securitisation" and the risk retention in Article 405 of the CRR; and

- **Question ID: 2018 4262** (as updated on 22 March 2019): this question relates to the supervisory formula method – calculation of parameters.

Topic – Leverage Ratio

- **Question ID: 2017 3756** (as updated on 22 March 2019): this question relates to the application of margin period of risk scalars for cleared transactions.

Topic - Liquidity Risk

- **Question ID: 2018 4148** (as updated on 18 January 2019): this question relates to the treatment of government bonds of a third country as Level 1 assets when the credit quality step 1 is assigned according to Article 114(7) of the CRR;

- **Question ID: 2018 3726** (as updated on 18 January 2019): this question relates to the treatment of Value Added Tax ("**VAT**") accounts opened for collection and payment of VAT;

- **Question ID: 2018 3730** (as updated on 8 February 2019): this question relates to on demand secured lending of level 1 assets; and

- **Question ID: 2016 2585** (as updated on 8 February 2019): this question relates to reporting of assets sold short as an additional outflow for Liquidity Cover Ratio under the Delegated Regulation (EU) 2015/61.

Topic - Transparency and Pillar 3

- **Question ID: 2018 3836** (as updated on 15 February 2019): this question relates to template 2 EU LI2 EBA/GL/2016/11 (i.e. main sources of differences between regulatory exposure amounts and carrying values in financial statements).

Topic – Accounting and Auditing

- **Question ID: 2018 3995** (as updated on 15 February 2019): this question seeks clarification relating to the validation rule v3995_u.

Topic – Leverage ratio

- **Question ID: 2018 3756** (as updated on 22 March 2019): this question relates to the margin period of risk scalars for cleared transactions.

A copy of the CRR Q&A can be accessed here.

(ii) EBA final guidelines on exposures associated with high risk under CRR

On 17 January 2019, the EBA published a final report (EBA/GL/2019/01) on guidelines on the specification of types of exposures to be associated with high risk under the CRR (the "**Final Report**"). The Final Report consist of two sections:

- **First Section** – Aims to clarify the notions of investments in venture capital firms and private equity as referred to in Article 128(2) of the CRR; and

- **Second Section** – sets out the types of exposures that should be considered as high risk (and under which circumstances) by way of application of Article 128(3) CRR.

By way of background, Article 128(3) of the CRR gives a mandate to the EBA for drafting guidelines that specify which types of exposures, other than those mentioned in Article 128(2) of the CRR, are associated with particularly high risk.

The EBA have provided that the guidelines set out will assist with ensuring a harmonised and consistent application of Articles 128(2) and (3) of the CRR until any revision of the provisions has to be applied by institutions under Basel III. The guidelines contained in the Final Report will apply from 1 July 2019.

A copy of the Final Report can be accessed here.

(iii) European Union (Capital Requirements) (Amendment) Regulations 2019

On 3 February 2019, the European Union (Capital Requirements) (Amendment) Regulations 2019 (S.I. No. 29 of 2018) (the "**Regulations**") came into effect.

The Regulations amend Regulation 3 of the European Union (Capital Requirements) (No.2) Regulations 2014 (S.I. No. 159 of 2014). The Regulations set out that the Central Bank is the national designated authority in charge of the application of Article 458 of the CRR.

By way of background, under Article 458 of the CRR, the Central Bank can implement national macroprudential measures whenever changes in the intensity of macroprudential or systemic risk in the financial system are identified and which have the potential for serious negative consequences on the financial system and the real economy.

The amendments set out in the Regulations specify what powers the Central Bank can use in order to introduce measures under Article 458, which include the power to make reciprocation decisions.

A copy of the Regulations can be accessed here.

(iv) The European Commission adopts proposal for a Council of EU decision on incorporating CRR and CRD IV into EEA Agreement

On 25 March 2019, the European Commission published a Council of the EU decision on the position to be adopted, on behalf of the EU, within the EEA Joint Committee, concerning an amendment to Annex IX (Financial Services) to the EEA Agreement it had adopted on 19 March 2019 (the "**Decision**").

The Decision incorporates the CRR and CRD IV into the EEA Agreement which was adopted and entered into force on 19 March 2019 with a copy of the Decision being accessible here.

(v) Commission Implementing Regulation on benchmark portfolios, reporting templates and reporting instructions under CRD IV Directive

On 29 March 2019, the Commission Implementing Regulation (EU) 2019/439 (the "**Regulation**") amending Implementing Regulation (EU) 2016/2070 as regards benchmark portfolios, reporting templates and reporting instructions under the CRD IV Directive (2013/36/EU) (the "**CRD IV**") was published in the Official Journal of the EU.

The Regulation, which was adopted by the European Commission on 15 February 2019, reflects the amendments proposed by the EBA, specifying the information that firms must report to the EBA and competent authorities to enable the assessments of internal approaches for calculating own funds requirements in accordance with Article 78 of the CRD IV. The Regulation will enter into force on 18 April 2019 and a copy of the Regulation can be accessed here.

(vi) Commission Implementing Decision (2019/536/EU) amending the Commission Implementing Decision (2014/908/EU) published

On 29 March 2019, the Commission Implementing Decision (2019/536/EU) (the "**Decision**") was published by the European Commission.

The Decision will amend the Commission Implementing Decision (2014/908/EU) (the "**Original Decision**"), which sets out the relevant list of third countries and territories whose supervisory and regulatory requirements are considered equivalent to the EU's regime for the treatment of exposures in accordance with CRR.

Annexes I, IV, and V to the Original Decision has been replaced by the text set out in the respective Annexed I, II, and III to the Decision.

The key change set out in the Decision, is the addition of Argentina to the list of equivalent third countries and territories that are considered to have an equivalent supervisory and regulatory regime to the EU in accordance with the CRR.

The Decision will enter into force on the twentieth day following its publication in the Official Journal of the EU and a copy of the Decision can be accessed here.

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

(i) ESAs publish final report concerning amendments to the PRIIPs KID

On 8 February 2019, the Joint Committee of the ESAs published its final report (the "**Final Report**") concerning the proposed amendments to Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 on key information documents ("**KID**") for packaged retail and insurance-based investment products ("**PRIIPs**") (the "**Delegated Regulation**"). The Final Report summarises the responses received to the Joint Committee's consultation paper dated 8 November 2018 and sets out the intended next steps regarding the work to review the Delegated Regulation this year.

The Report notes that the overall feedback provided to the consultation paper indicated that stakeholders did not support the proposed targeted amendments to the PRIIPs Delegated Regulation, prior to a more comprehensive review of Regulation (EU) 1286/2014 (the "**PRIIPs Regulation**"). The proposed targeted amendments included:

- Proposals to change the approach for performance scenarios and a description of several other options that were identified;
- Potential amendments on a limited number of other specific issues based on the information gathered by the ESAs since the implementation of the KID; and

- Possible changes in view of the forthcoming expiry of the exemption in Article 32 of the PRIIPs Regulation and the possible use of the PRIIPS KID by UCITS and relevant non-UCITS funds from 31 December 2019.

The Final Report states that in light of the overall feedback on the consultation paper and in light of the implications of a possible decision by the European Co-legislators to defer application of the KID by UCITS and certain non-UCITS funds until 31 December 2021, the ESAs have decided not to propose substantive amendments to the PRIIPs Delegated Regulation at this time. Instead, the ESAs indicate that they have begun work to provide input to a review of the Delegated Regulation during 2019.

The Final Report sets out how the ESAs plan to conduct this work and discusses the next steps that the ESAs intend to take.

The Final Report can be accessed here

(ii) ESAs publish a Joint Supervisory Statement in relation to the presentation of performance scenarios in PRIIPs KIDs

On 8 February 2019, the Joint Committee of the ESAs issued a joint supervisory statement, included as an annex to the Final Report of the same date (see above) in relation to the presentation of performance scenarios in PRIIPs KIDs. The Joint Supervisory Statement recommends that PRIIP manufacturers take the following actions in relation to the presentation of performance scenarios:

- To include a statement in the KID warning the retail investor of the limitations of the figures shown and to highlight that market developments in the future cannot be accurately predicted (specific wording is suggested);

- In respect of the other relevant information provided to the retail investor in relation to the PRIIP at the pre-contractual or post-contractual stage, to include additional explanations or to put the performance scenario figures in the KID in additional context;

- To ensure that any steps taken are proportionate and provide information that is complementary to the existing information within the KID. Any additions to the KID should be limited to what is considered essential to ensure that the presentation of performance scenarios is fair, accurate, clear and not misleading.

The Joint Supervisory Statement can be accessed here.

(iii) Proposals to align the expiry date of the PRIIPs derogation with the expiry date of the UCITS exemption

In February 2019, the Council of the EU reached a political agreement with the European Parliament on the proposed Regulation and Directive on the cross-border distribution of collective investment funds. Amongst other matters, this Regulation amends the PRIIPs Regulation to:

- Delay the Commission's mandatory review of the PRIIPS Regulation from 31 December 2018 to 31 December 2019; and
- Prolong the time period for which UCITS (and relevant non-UCITS funds) are exempted from preparing a PRIIPs KID from 31 December 2019 (as reflected in Article 32 of the PRIIPs Regulation) to 31 December 2021.

In light of these developments, the Joint Committee of the ESAs published a letter sent to the European Commission on 8 March 2019.

The letter highlighted the need to align the date in Article 18 of the Delegated Regulation (EU) 2017/653 (the "**PRIIPs Delegated Regulation**"), with the expiry date of the temporary exemption of UCITS from the PRIIPs Regulation. Draft RTS were appended to the letter to align the dates in both measures. The Joint Committee requested that the date of the exemption in Article 18 of the PRIIPS Delegated Regulation be amended to 31 December 2021 for consistency with the amendment to the PRIIPS Regulation as soon as possible.

The letter can be accessed here and the draft RTS can be accessed here.

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

(i) ESMA updates list of third-country CCPs recognised to offer services and activities in the European Union

During the period 1 January 2019 to 31 March 2019, ESMA updated its list of third-country CCPs recognised to offer services and activities in the European Union. The European Markets Infrastructure Regulation (EU) 648/2012 ("**EMIR**") requires third-country CCPs to be recognised by ESMA in order to operate in the European Union.

A copy of the updated list can be accessed here.

(ii) ESMA updates list of CCPs that have applied for recognition under Article 25 of EMIR published

During the period 1 January 2019 to 31 March 2019, ESMA updated its list of the CCPs established in countries outside of the European Economic Area that have applied for recognition under Article 25 of EMIR. The list is provided for information purposes only and ESMA has emphasised that it is not exhaustive.

A copy of the list is available here.

(iii) European Commission adopts Delegated Regulation amending the list of exempted entities under EMIR to include UK central bank and public bodies

On 30 January 2019, the European Commission adopted a Delegated Regulation exempting the Bank of England ("**BoE**") and associated applicable bodies from the clearing and reporting requirements under EMIR.

EMIR currently exempts members of the European System of Central Banks ("**ESCB**"), other Member States' bodies performing similar functions and other EU public bodies charged with or intervening in the management of public debt from certain requirements. However, after Brexit these exemptions will no longer apply to the BoE and other UK institutions involved in managing public debt. The Delegated Regulation extends the exemptions to UK institutions even though the UK will be a third country after Brexit.

The recital to the Delegated Regulation makes reference to the fact that the UK has provided assurances to the European Commission that it will, with effect as of when European Union law ceases to apply in the UK, exempt from the application of its domestic law equivalent to EMIR the members of the ESCB and other Member States' bodies performing similar functions and other EU bodies charged with or intervening in the management of public debt, in a manner comparable to the way in which the Commission has done so.

The Delegated Regulation can be accessed here.

(iv) ESMA publish statement addressing challenges of the proposed EMIR Refit implementation

On 31 January 2019, ESMA published a statement concerning certain implementation issues arising in the context of the proposed Regulation to amend EMIR (the "**EMIR Refit**"). The ESMA Statement addresses issues around the clearing and trading obligations for small financial counterparties and the backloading requirement for reporting entities, ahead of upcoming deadlines, which would represent challenges for such entities in the context of the ongoing EMIR Refit negotiations. The ESMA Statement acknowledges:

- The challenges that certain small financial counterparties would face to prepare for the 21 June 2019 deadline to start CCP clearing and trading on trading venues some of their OTC derivative contracts; and

- The challenges that reporting counterparties would face regarding the backloading requirement by 12 February 2019. (The requirements for reporting entities to report derivatives that were outstanding on or after 16 August 2012 and terminated before the EMIR reporting start date, 12 February 2014 is the process commonly referred to as "backloading").

ESMA had previously recommended that the backloading requirement should be waived due to its concern about the particularly high number of reconciliation failures concerning the derivatives subject to backloading and therefore the limited usefulness of such data. The Refit negotiations have not been finalised (therefore create timing gaps for affected entities) but include proposals to; (i) remove the backloading requirement from Article 9 of EMIR and to create a small financial counterparties category (whose derivative positions are below certain clearing thresholds); and (ii) exempt the new category of counterparties from the clearing obligation.

In respect of the clearing obligation, ESMA noted its expectation that competent authorities will not prioritise their supervisory actions towards financial counterparties whose positions are expected to be below the clearing thresholds when the EMIR Refit enters into force, and will generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

In respect of the backloading obligation, ESMA noted its expectation that competent authorities will apply their risk-based supervisory powers in their day-to-day enforcement of EMIR in a proportionate manner. This may include not prioritising counterparties' reporting of backloaded transactions in their day-to-day supervision and enforcement of EMIR.

The statement can be accessed here.

(v) ESMA updates Q&As on the implementation of EMIR

On 4 February 2019, ESMA published an updated version of its questions and answers on the implementation of EMIR ("**Q&As on EMIR Implementation**"). The updates to the Q&As on EMIR Implementation relate to the following:

- **Question 34 on trade repositories:** This Q&A clarifies how counterparties should report derivative contracts with no specified maturity date under EMIR;
- **Question 38 on trade repositories:** This Q&A clarifies how trades which are terminated before the reporting deadline should be reported; and
- **Question 50 on trade repositories:** This is a newly inserted Q&A which provides information on the approach to be taken by counterparties in respect of the reporting field titled "Confirmation Means".

The updated Q&As on EMIR Implementation can be accessed here.

(vi) Central Bank issues Statement to address upcoming EMIR Refit implementation issues

On 4 February 2019, the Central Bank issued a statement which welcomed ESMA's statement of 31 January 2019 (see above) addressing EMIR Refit implementation issues. The ESMA Statement addresses issues around the clearing and trading obligations for small financial counterparties and the backloading requirement for reporting entities, ahead of upcoming deadline.

The Central Bank's statement confirms that, in accordance with the recommendation from ESMA and pending the entry into force of EMIR Refit, the Central Bank will apply its risk-based supervisory powers in the day-to-day enforcement of applicable legislation (i.e. EMIR's reporting obligation, clearing obligation and MiFIR's trading obligation) in a proportionate manner.

The Central Bank's Statement can be accessed here.

(vii) Preliminary trilogue agreement reached on the EMIR Refit Regulation

On 5 February 2019, the Council of the EU published a press release announcing that it had reached a preliminary agreement with the European Parliament on the proposal for a Regulation to amend EMIR (the "**EMIR Refit Regulation**"). The press release provides details of a number of key aspects of the text agreed by the co-legislators, which includes the following:

- The agreed text introduces a new category of "small financial counterparties" which will be exempted from the obligation to clear their transactions through a central counterparty, in order to increase the efficiency of the regulatory framework;
- The temporary exemption from the clearing obligation of pension scheme arrangements will be extended by another two years;
- The obligation to report historic data ("**backloading**") as well as intragroup transactions involving non-financial counterparties will be removed; and
- The agreed text introduces an obligation on clearing brokers to provide services on fair, reasonable, non-discriminatory and transparent commercial terms by ensuring transparency on fees as well as unbiased and rational contractual arrangements.

The press release can be accessed here.

On 1 March 2019, the Council of the EU published an "I" item note, in which it invited COREPER to approve the final compromise text. The note is accompanied by an addendum which sets out the final compromise text in full.

The "I" item note can be accessed here and the addendum can be found here.

(viii) Central Bank publishes its expectations on EMIR trade reporting

On 20 February 2019, the Central Bank published a letter which sets out its expectations on trade reporting under EMIR. The purpose of the letter is to enable the Central Bank to provide feedback to counterparties to derivatives trading so that they can take appropriate action to ensure complete, accurate and timely reporting.

The Central Bank noted that the quality of data reported to trade repositories is improving, but that a number of significant issues remain. The letter identifies recurring issues and provides recommendations in respect of a number of aspects of EMIR reporting.

The Central Bank's letter can be accessed here.

(ix) ESMA publishes guidance on the clearing obligation under the EMIR Refit Regulation

On 28 March 2019, ESMA published a statement on the clearing obligation for financial counterparties ("**FCs**") and non-financial counterparties ("**NFCs**") under the EMIR Refit Regulation. The statement provides guidance on when FCs and NFCs need to determine whether they are subject to the clearing obligation under the new regime, and equally when they need to notify ESMA and their relevant competent authority that they are subject to the clearing obligation.

ESMA explains that, under the new regime, the determination of whether FCs and NFCs are subject to the clearing obligation will depend on whether their positions exceed the clearing thresholds. FCs and NFCs can choose whether or not to conduct the calculation. However, when they choose not to, or where the result of that calculation exceeds the clearing thresholds, then these FCs or NFCs are required to immediately notify ESMA and the relevant competent authority, and they will also become subject to the clearing obligation for the OTC derivative contracts entered into, or novated, from four months following that notification.

ESMA's guidance also identifies the following differences between the two regimes with regard to the scope of application of the clearing obligation and with regard to the calculation of the positions:

- **Scope**: when NFCs conduct the calculation, they are only subject to the clearing obligation for the OTC derivative contracts pertaining to those asset classes in respect of which the calculation result exceeds the clearing thresholds; and

- **Calculation**: NFCs only need to include the OTC derivative contracts that are not objectively measurable as reducing risks, whereas FCs must include all OTC derivative contracts they enter into or novate.

ESMA notes that, as the new regime will apply as soon as the Refit Regulation enters into force, FCs and NFCs taking positions in OTC derivative contracts and choosing to calculate their aggregate month-end average position for the previous 12 months would need to determine the results of that calculation on the day the Refit text enters into force. FCs and

NFCs are therefore expected to collect all the necessary data and information for the calculation in the meantime

Where FCs and NFCs taking positions in OTC derivative contracts do not calculate their aggregate month-end average position for the previous 12 months, or where the result of that calculation exceeds any of the clearing thresholds, they will be required to immediately notify ESMA and their relevant competent authority on the day the Refit Regulation text enters into force.

ESMA's statement can be accessed here.

Securitisation Regulation

(i) ESMA publishes final report outlining draft technical standards on supervisory cooperation under the Securitisation Regulation

On 8 January 2019, ESMA published its final report (the "**Final Report**") setting out draft RTS on cooperation, exchange of information and notification between the ESAs under Regulation (EU) 2017/2402 (the "**Securitisation Regulation**")

The Final Report contains ESMA's proposed draft RTS which seeks to clarify the conditions under which NCAs and the ESAs can exchange information and assist each other in the supervision of the entities involved in securitisation transactions. The draft RTS outline the general cooperation obligations for the competent authorities and the ESAs, the information to be exchanged and the common notifications procedures in the event of infringements of the Securitisation Regulation.

ESMA's Final Report can be accessed here and a related press release is available here.

(ii) European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 is published

In January 2019, the European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 [S.I. No. 656 of 2018] (the "**Irish Securitisation Regulations**") were published in Ireland. The Irish Securitisation Regulations are intended to give further effect to the Securitisation Regulation in Irish law and came into operation on 1 January 2019, the same date that the Securitisation Regulation became directly effective across the European Union. The Irish Securitisation Regulations:

- Designate the Central Bank as the Irish competent authority for the purposes of the Securitisation Regulation, save in respect of compliance by institutions for occupation retirement provision ("**IORPs**") with the due diligence requirements of the Securitisation Regulation;

- Require originators, sponsors or securitisation special purpose entities to notify the Central Bank within 15 working days of the issue of the securities of a securitisation;

- Provide the Central Bank with a number of powers, including powers necessary to monitor compliance with the Securitisation Regulation;

- Provide the Central Bank with the power to issue specific directions to persons to take specific action or refrain from taking a specific action where it deems it necessary to prevent that person from contravening/continuing to contravene The Irish Securitisation Regulations or the Securitisation Regulation and to ensure the integrity of, and enhance investor confidence in, the financial markets;

- Set down the sanctions which may be imposed by the Central Bank on regulated financial service providers for any negligent or intentional contravention of the Irish Securitisation Regulations or the Securitisation Regulation. These sanctions include pecuniary sanctions of up to €5 million or up to 10% of the latest annual turnover of the relevant entity.

The Regulations can be accessed here.

(iii) ESMA publishes opinion and Q&A on disclosure requirements under the Securitisation Regulation

On 31 January 2019, ESMA published an opinion containing a revised set of draft RTS and Implementing Technical Standards ("**ITS**") under the Securitisation Regulation (the "**Opinion**"). The Opinion is in response to a letter from the European Commission dated 30 November 2018, which requested a number of amendments to the disclosure requirements published in ESMA's Final Report on 22 August 2018. The main revisions provided for in the Opinion include the following:

- ESMA has substantially expanded the ability for reporting entities to use the 'No Data' options in the respective disclosure templates, particularly in respect of the templates for asset-backed commercial paper ("**ABCP**") securitisation; and

- ESMA has adjusted the content of certain fields in the templates and has clarified the templates to be used to provide any inside information as well as significant events affecting securitisation.

In addition, ESMA published a set of questions and answers on the Securitisation Regulation Q&As on the same date, which have the objective of providing guidance to market participants seeking further context that may be helpful for their future expectations of how to comply with the RTS and ITS outlined in the Opinion. ESMA has stressed that these Q&As are being provided in advance of the possible adoption of the disclosure RTS and ITS by the European Commission and may be subject to possible changes as a result.

ESMA's Opinion can be accessed here and the Q&As are available here. A related press release can be found here.

(iv) ICMA publish guide to due diligence requirements for investing in a securitisation position

On 31 January 2019, the International Capital Market Association's ("**ICMA**") Asset Management and Investors Council published a guide to due diligence requirements for investing in a securitisation position (the "**Guide**"). The Guide aims to explain the due diligence requirements in respect of the Securitisation Regulation to investors and to provide potential investors with practical guidance as to what information should be obtained and where this information can be obtained from.

The Guide can be accessed here.

(v) Transparency requirements of the Securitisation Regulation to be incorporated into Eurosystem collateral framework

On 22 March 2019, the European Central Bank ("**ECB**") published a press release which announced that the loan-level data reporting requirements of the Securitisation Regulation are to be incorporated into the Eurosystem's collateral framework, with the objective of promoting efficiency and standardisation in the securitisation market.

The disclosure requirements of the Securitisation Regulation will be reflected in the eligibility requirements for the acceptance of asset-backed securities ("**ABSs**") as collateral in the Eurosystem's liquidity-providing operations.

The press release can be accessed here.

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

(i) European Commission adopts Delegated Regulation amending the list of exempted entities under the SFTR to include UK central bank and public bodies

On 30 January 2019, the European Commission adopted a Delegated Regulation exempting the BoE and associated applicable bodies from the reporting obligations and the reuse transparency requirements under Regulation (EU) 2015/23651 on securities financing transactions (the "**SFTR**").

The recital to the Delegated Regulation makes reference to the fact that the UK has provided assurances to the European Commission that it will, with effect as of when European Union law ceases to apply in the UK, grant to the members of the ESCB and other Member States' bodies performing similar functions and other EU bodies charged with or intervening in the management of public debt, an exemption comparable to the one provided under the Delegated Regulation.

The Delegated Regulation can be accessed here.

(ii) Publication of Delegated Regulations relating to trade repositories under the SFTR

On 22 March 2019, the following two Delegated Regulations relating to trade repositories under the SFTR were published in the Official Journal of the European Union (the "**OJ**"):

- Commission Delegated Regulation (EU) 2019/361 amending Delegated Regulation (EU) 151/2013 with regard to access to the data held in trade repositories. The Delegated Regulation aims to establish adequate levels of access to trade repository data for the authorities added to this list. The Delegated Regulation can be accessed here; and

- Commission Delegated Regulation (EU) 2019/362 amending Delegated Regulation (EU) 151/2013 as regards RTS specifying the details of the application for registration as a trade repository. The Delegated Regulation aims to strengthen the framework for the registration of trade repositories and to ensure consistency with similar provisions developed under the SFTR. The Delegated Regulation can be accessed here.

The Delegated Regulations will enter into force on the twentieth day following their publication in the OJ.

(iii) Publication of multiple Delegated and Implementing Regulations relating to the SFTR

On 22 March 2019, the following Delegated and Implementing Regulations relating to the SFTR were published in the Official Journal of the European Union:

- Delegated Regulation (EU) 2019/356 supplementing the SFTR with regard to RTS specifying the details of securities financing transactions ("**SFTs**") to be reported to trade repositories, which can be accessed here;

- Delegated Regulation (EU) 2019/357 supplementing the SFTR with regard to RTS on access to details of SFTs held in trade repositories, which can be accessed here;

- Delegated Regulation (EU) 2019/358 supplementing the SFTR with regard to RTS on the collection, verification, aggregation, comparison and publication of data on SFTs by trade repositories, which can be accessed here;

- Delegated Regulation (EU) 2019/359 supplementing SFTR with regard to RTS specifying the details of the application for registration and extension of registration as a trade repository, which can be accessed here;

- Delegated Regulation (EU) 2019/360 supplementing the SFTR with regard to fees charged by ESMA to trade repositories, which can be accessed here;

- Implementing Regulation (EU) 2019/363 laying down ITS with regard to the format and frequency of reports on the details of SFTs to trade repositories in accordance with the

SFTR and amending Implementing Regulation (EU) 1247/2012 with regard to the use of reporting codes in the reporting of derivative contracts, which can be accessed here;

- Implementing Regulation (EU) 2019/364 laying down ITS with regard to the format of applications for registration and extension of registration of trade repositories in accordance with the SFTR, which can be accessed here; and

- Implementing Regulation (EU) 2019/365 laying down ITS with regard to the procedures and forms for exchange of information on sanctions, measures and investigations in accordance with the SFTR, which can be accessed here.

Each Regulation entered into force on 11 April 2019.

Central Securities Depositories Regulation ("**CSDR**")

(i) ESMA publishes list of competent authorities for CSDs under Article 11 of CSDR

On 24 January 2019, ESMA published a list of the competent authorities for Central Securities Depositories ("**CSDs**") under Article 11 of CSDR. Article 11 of CSDR obliges each Member State to designate the competent authority responsible for carrying out the duties under CSDR for the authorisation and supervision of CSDs established in its territory and to inform ESMA thereof.

The list details the relevant competent authority/ies in each Member State, the roles of each competent authority and the authority responsible for cooperation with other Member States' competent authorities and with ESMA and the EBA.

The list can be accessed here.

(ii) The European Central Securities Depositaries Association consults on CSDR settlement fail penalties framework

On 29 January 2019, the European Central Securities Depositaries Association ("**ECSDA**") published an updated version of its draft CSDR Penalties Framework (the "**Framework**").

The objective of the Framework is to create a harmonised set of rules for the creation and operation of settlement discipline cash penalties mechanisms by all European CSDs subject to the CSDR or equivalent provisions. The first draft framework was published for consultation in July 2018, and the updated draft reflects comments received during the public consultation.

The Framework can be accessed here.

(iii) ESMA publishes updated Q&As on CSDR

On 30 January 2019, ESMA updated its Q&As regarding the implementation of CSDR. ESMA has added to its existing Q&A on the calculation of cash penalties in the section relating to settlement discipline. This Q&A now confirms that the net amounts of cash penalties referred to in Article 17 of the RTS on Settlement Discipline should be calculated per settlement currency and should not be converted into Euros.

ESMA has also included an additional Q&A in the settlement discipline section on the scope of the cash penalty mechanism provided for under Article 7(2) of the CSDR. This Q&A provides that cash penalties should not be applied in certain specified situations where settlement cannot be performed for reasons that are independent from the involved participants.

ESMA's updated Q&As on CSDR can be found here.

(iv) EEA Joint Committee adopts Decision incorporating CSDR into the EEA Agreement

On 28 February 2019, Decision No. 18/2019 of the EEA Joint Committee amending Annex IX (Financial services) to the EEA Agreement was published in the Official Journal of the OJ (the "**Decision**").

The Decision entered into force on 9 February 2019 and amends Annex IX to the EEA Agreement in order to incorporate the CSDR into the EEA Agreement. Decision No. 18/2019 of the EEA Joint Committee can be accessed here.

(v) ESMA announces that it will recognise UK CSD in the event of a no-deal Brexit

On 1 March 2019, ESMA published a press release in which it announced that it would recognise Euroclear UK and Ireland limited as a third country CSD for the purposes of the CSDR in the event of a no-deal Brexit.

ESMA considers that the conditions for recognition under Article 25 of CSDR are met by the UK CSD and adopted the decision in order to allow the UK CSD to serve Irish securities and to avoid any negative impact on the Irish securities market.

ESMA's press release can be accessed here.

Benchmarks Regulation

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

During the period 1 January to 31 March 2019, ESMA published an updated version of the "Q&As – on the Benchmarks Regulation". The update can be summarised as follows:

- **Question 4.5: Scope of application of the Commission Delegated Regulations adopted under the Benchmarks Regulation** – The Q&A clarified that that the scope of application of the Commission Delegated Regulations adopted under the Benchmarks Regulation is identical to the scope of the corresponding requirement specified in the Benchmarks Regulation, including the transitional provisions of Article 51 of the Benchmarks Regulation.

The Q&A document can be accessed here.

(ii) European Parliament adopts first reading position on proposed Regulation amending the Benchmarks Regulation on carbon benchmarks

On 26 March 2019, the European Parliament published a legislative resolution announcing that it had adopted a position on first reading in respect of the proposed Regulation amending Regulation (EU) 2016/1011 (the "**Benchmarks Regulation**") on carbon benchmarks (the "**Proposed Regulation**").

The Proposed Regulation will amend the Benchmarks Regulation in order to provide a reliable tool to pursue low-carbon investment strategies by establishing a new category, comprising two types of financial benchmarks:

- A low-carbon benchmark, where the underlying assets are selected so that the resulting benchmark portfolio has less carbon emissions in comparison with assets that comprise a standard capital-weighted benchmark; and

- A positive carbon impact benchmark, where the underlying assets are selected on the basis that their carbon emissions savings exceed the asset's carbon footprint.

The Proposed Regulation will also impose an obligation for all benchmarks administrators to provide an explanation of how environmental, social and governance factors are reflected in their investment strategy, to explain the rationale behind the parameters of their methodology and to explain how the benchmark contributes to environmental objectives. In addition, it proposes to extend the transition regime for critical and third-country benchmarks until the end of 2021.

The Parliament instructed the President to forward its position to the Council, the Commission and the national parliaments.

The legislative resolution can be accessed here.

(iii) Central Bank publishes Key Facts Document in relation to Benchmark Administrator applications

On 29 March 2019, the Central Bank published a Key Facts Document ("**KFD**") in respect of Benchmark Administrator applications. The KFD provides entities who are seeking to act as Benchmark Administrators and provide benchmarks in the EU with guidance concerning the information which the Central Bank will seek prior to any formal application being made.

The KFD requires Benchmarks Administrators to submit information to the Central Bank concerning the background of the applicant firm, the reason why the applicant firm has selected Ireland to become authorised or registered as a Benchmark Administrator and an overview of the business model/strategy of the applicant firm.

The KFD can be accessed here.

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

(i) ESMA publishes updated list of market makers and authorised primary dealers who are using the exemption under the Short Selling Regulation

During the period 1 January 2019 to 31 March 2019, ESMA published an updated list of market makers and authorised primary dealers who are using the exemption under Regulation (EU) 236/2012 (the "**Short Selling Regulation**").

According to Article 17(13) of the Short Selling Regulation, ESMA shall publish and keep up to date on its website a list of market makers and authorised primary dealers who are using the exemption under the Short Selling Regulation.

The data provided in this list have been compiled from notifications of Member States' competent authorities to ESMA under Article 17(12) of the Short Selling Regulation.

The list is available here.

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

(i) ESMA adopts implementing rules on data protection

On 16 January 2019, ESMA published a decision (the "**Decision**") which adopted implementing rules relating to Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (the "**Regulation**"). The Decision lays down the general rules for the implementation of the Regulation as regards ESMA.

The Decision can be accessed here.

(ii) EDPB publishes findings of Second Annual Joint Review of the EU – U.S. Privacy Shield

On 22 January 2019, the European Data Protection Board ("**EDPB**") published a report which outlined its findings in respect of its second annual joint review of the EU – U.S. Privacy Shield (the "**Report**"). The EDPB's review involved an assessment of both the commercial aspects of the EU – U.S. Privacy Shield adequacy decision (the "**Privacy Shield**") and on the government access to personal data transferred from the EU for the purposes of Law Enforcement and National Security, including the legal remedies available to EU citizens. The main findings of the Report include the following:

- The EDPB welcomed actions undertaken by the U.S. authorities and the Commission to adapt the initial certification process and to start ex officio oversights and enforcements actions in order to implement the Privacy Shield;
- The EDPB highlighted the need for further attention to be paid to the Privacy Shield requirements concerning onward transfers, HR Data and processors and the recertification process. The EDPB also noted that a lack of oversight and supervision of compliance with the principles of the Privacy Shield remains a concern;
- The EDPB encouraged the Privacy and Civil Liberties Oversight Board ("**PCLOB**") to issue further reports, noting that the collection and access of personal data for national security purposes still remains an important issue for the EDPB, especially with regards to massive and indiscriminate access; and
- The EDPB noted that it is still awaiting the appointment of a permanent independent Ombudsperson and the exact powers of the Ombudsperson need to be clarified through the declassification of internal procedures concerning the interactions between the Ombudsperson and the other elements of the intelligence community or oversight bodies.

The Report can be accessed here.

(iii) EDPB publishes updated Guidelines on certification and identifying certification criteria in accordance with Articles 42 and 43 of GDPR

On 23 January 2019, the EDPB published an updated version of Guidelines 1/2018 on certification and identifying certification criteria in accordance with Articles 42 and 43 of GDPR (the "**Guidelines**"). The objective of the Guidelines is to identify overarching criteria that may be relevant to all types of certification mechanisms issued in accordance with Articles 42 and 43 of the GDPR. The Guidelines:

- Explore the rationale for certification as an accountability tool;
- Explain the key concepts of the certification provisions in Articles 42 and 43; and
- Explain the scope of what can be certified under Articles 42 and 43 and the purpose of certification.

The updated Guidelines provide for further clarification concerning the European Data Protection Seal, the application for approval of criteria pursuant to Article 42(5) and 70(1)(o) and the role of accreditation.

On 15 February 2019, the EDPB also published Annex 2 to the Guidelines for public consultation purposes. Annex 2 provides guidance for review and assessment of certification criteria pursuant to Article 42(5). It identifies a minimum list of topics that a data protection supervisory authority and the EDPB will consider and apply for the purpose of approval of certification criteria of a certification mechanism.

The deadline for receipt of comments was 29 March 2019 and a copy of the updated Guidelines can be accessed here and Annex 2 is available here.

(iv) Commission Decision (EU) 2019/165 laying down internal rules concerning the provision of information to data subjects and the restriction of certain of their data protection rights by the Commission in the context of administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings

On 4 February 2019, Commission Decision (EU) 2019/165 laying down internal rules concerning the provision of information to data subjects and the restriction of certain of their data protection rights by the Commission in the context of administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings (the "**Decision**") was published in the Official Journal of the European Union.

The Decision lays down the rules to be followed by the Commission in respect of the processing of data in accordance with Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies (the "**Regulation**") when conducting administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings. Article 2 of the Decision outlines the

circumstances where the Commission may restrict the application of certain articles of the Regulation and the rights and obligations imposed thereunder.

The Decision also imposes a number of obligations on the Commission with regard to the processing of data.

The Decision can be accessed here.

(v) Data Protection Commission publishes guidance on transfers of personal data from Ireland to the UK in the event of a "No Deal" Brexit

On 8 February 2019, the Data Protection Commission ("**DPC**") published guidance on transfers of personal data from Ireland to the UK in the event of a "No Deal" Brexit (the "**Guidance**"). The Guidance begins by setting out a non-exhaustive list of examples of ways in which a company might be transferring data to a UK-based company. It then discusses the extra measures that companies will need to put in place to legally transfer this data in the event of a "No Deal" Brexit, discussing the specific safeguards which Irish companies which intend to transfer personal data to the UK will need to put in place to protect the data in the context of its transfer and subsequent processing.

In particular, the Guidance recommends the use of Standard Contractual Clauses ("**SCCs**"), whereby both parties to the contract give contractually binding commitments to protect personal data in the context of its transfer from the EU to the Third Country and the data subject is given certain specific rights under the SCCs, even though he or she is not party to the relevant contract. The DPC notes that these SCCs can be adopted by putting in place a stand-alone or new contract between the Irish-based controller and the UK-based recipient, or can be incorporated into existing contracts between Irish-based controllers and UK-based processors.

The Guidance provides for a sample set of SCCs which can be used by Irish data controllers who are transferring personal data to a UK-based service provider, where the service provider is acting as a data processor.

The DPC's Guidance can be accessed here.

(vi) Commission Decision (EU) 2019/236 laying down internal rules concerning the provision of information to data subjects and the restriction of certain of their rights in the context of the processing of personal data by the European Commission for the purposes of internal security of the Union institutions

On 8 February 2019, Commission Decision (EU) 2019/236 of 7 February 2019 (the "**Decision**") was published in the Official Journal of the European Union. The Decision outlines the circumstances in which the Commission may restrict the application of certain provisions of Regulation (EU) 2018/1725 when the Commission is exercising its security and investigatory function.

Regulation (EU) 2018/1725 lays down the data protection obligations for EU institutions, bodies, offices and agencies and imposes similar obligations on EU institutions and bodies to those imposed under GDPR.

The Decision can be accessed here.

(vii) Information note on data transfers under the GDPR in the event of a no-deal Brexit

On 12 February 2019, the EDPB issued an information note to commercial and public organisations on data transfers under GDPR in the event of a no-deal Brexit (the "**Information Note**").

Part 1 of the Information Note sets out details of the five steps which organisations should take to prepare for a no-deal Brexit when transferring data to the United Kingdom.

Part II of the Information Note sets out details on the basis for data transfers from the EEA to the UK (i.e. the available data transfer instruments) which comprise:

- Standard or ad hoc Data Protection Clauses;
- Binding Corporate Rules ("**BCRs**");
- Codes of Conduct and Certification Mechanisms;
- Derogations; and
- Instruments exclusively available to public authorities or bodies.

Part III of the Information Note relates to data transfers from the UK to EEA Members.

A copy of the Information Note can be accessed here.

(viii) DPC publishes Annual Report for the period 25 May - 31 December 2018

On 28 February 2019, the Commissioner for Data Protection, Helen Dixon, published the first annual report (the "**2018 Annual Report**") of the DPC covering the period 25 May to 31 December 2018, detailing the work of the Irish data protection authority following the introduction of GDPR on 25 May 2018. Highlights of the 2018 Annual Report include:

- 2,864 complaints were received for the period 25 May to 31 December 2018 with a total, 4,113 complaints were received in the 2018 a 56% increase on the total number of complaints received in 2017;
- 3,542 valid data security breaches were notified with a total of 4,740 valid data security breaches being notified in 2018 demonstrating a 70% increase on the total number of valid data security breaches recorded in 2017;

- 136 cross-border processing complaints were received through the new One-Stop-Shop mechanism that were lodged by individuals with other European Union data protection authorities;

- 900 Data Protection Officer notifications were received by the DPC; and

- 15 statutory investigations were opened in relation to the compliance of certain technology companies with GDPR;

- 32 new complaints were investigated under the E-Privacy Regulations in various forms of electronic direct marketing. A number of these investigations concluded with successful District Court prosecutions;

- The first public consultation on the processing of children's personal data and the rights of children as data subjects under the GDPR was launched on 19 December 2018;

- The DPC commenced a significant project to develop a new five-year DPC regulatory strategy which will include extensive external consultation during 2019; and

- Staffing numbers in the DPC increased from 85 at the end of 2017 to 110 at the end of 2018.

A copy of the 2018 Annual Report can be accessed here.

(ix) Data Sharing and Governance Act 2019

On 4 March 2019, the Data Sharing and Governance Act 2019 was signed into Irish law. The Act has the objectives of:

- Regulating the sharing of information, which includes personal data, between public bodies which occurs extensively at present;

- Regulating the management of information by public bodies;

- Establishing a base of registries;

- Collecting public service information;

- Establishing a data governance board; and

- Providing for related matters.

The Act can be accessed here.

(x) Data Protection Commission publishes results of GPEN 2018 'Sweep'

On 5 March 2019, the DPC published the results of the Global Privacy Enforcement Network's ("**GPEN**") 'Sweep'. The GPEN's Sweep is an annual intelligence gathering operation that examines organisations' self-reporting of their implementation of the core concepts of accountability for compliance with data protection laws. The DPC noted the following trends from the Sweep carried out in Ireland:

- 86% of organisations have a contact for their DPO listed on their website. All have privacy policies which are easily accessible from the homepage;
- Most organisations reported that they have policies and procedures in place to respond to requests and complaints from individuals;
- 75% of organisations reported that they have adequate data breach policies in place;
- All organisations reported that they provide some form of data protection training for staff. However, only 38% of those organisations provided evidence of training programmes for all staff, including new entrants and refresher training;
- In most cases, organisations reported that they undertake some data protection monitoring/ self-assessment, but not to a sufficiently high level. 3 of the 29 respondents scored 'poor' in this section, while 13 reached 'satisfactory';
- One third of organisations failed to provide evidence of documented processes to assess risks associated with new products and technology. However, most organisations appear to be aware of the need for this and many reported that they are in the process of documenting appropriate procedures; and
- 30% of organisations failed to demonstrate that they had an adequate inventory of personal data while almost half failed to maintain a record of data flows.

(xi) EDPB published and adopted Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR

On 12 March 2019, the EDPB published and adopted 'Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities' (the "**Opinion**").

The Opinion arose from the Belgian DPA requesting that the EDPB examine and issue an opinion on the interplay between the ePrivacy Directive and GDPR, regarding:

- The competence, tasks and powers of data protection authorities;
- Whether the cooperation and consistency mechanisms can or should be applied; and

- Which processing can be governed by provisions of both the ePrivacy Directive and the GDPR.

A copy of the Opinion can be accessed here.

(xii) EDPB publish and adopted Statement 3/2019 on an ePrivacy regulation

On 13 March 2019, the EDPB published and adopted 'Statement 3/2019 on an ePrivacy regulation' (the "**Statement**"), whereby the EDPB calls on European Union legislators to increase their efforts towards the adoption of an ePrivacy Regulation.

The EDPB continue further in the Statement that the ePrivacy Regulation must not lower the level of protection offered by the current ePrivacy Directive 2002/58/EC, must complement the GDPR and provide additional strong guarantees for all types of electronic communications. It must also not hinder the development of new technologies and services and ensure a level playing field and legal certainty for market operators.

The Statement can be accessed here.

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

(i) FATF publishes new consolidated assessment ratings

For the period 1 January 2019 to 31 March 2019, the Financial Action Task Force ("**FATF**") updated the consolidated assessment ratings which provide a summary of (1) the technical compliance; and (2) the effectiveness of the compliance, of the assessed parties against the 2012 FATF Recommendations on combating money laundering and the financing of terrorism & proliferation. FATF also released new mutual evaluations for the same period.

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

(ii) The General Scheme of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019

On 7 January 2019, the Department of Justice published the General Scheme of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019 (the "**Bill**"). The Bill will transpose many of the provisions of Directive (EU) 2018/843 (the "**Fifth Money Laundering Directive**" or "**MLD5**") into Irish law, amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the **CJA 2010**) in the process. Some of the key amendments which the Bill proposes to introduce include the following:

- The extension of the definition of "designated persons" in the CJA 2010;

- The imposition of additional customer due diligence ("**CDD**") requirements on designated persons prior to establishing a business relationship where the customer is a body corporate or a trust required to register its beneficial ownership information;

- The broadening of the measures that must be taken where senior managing officials are identified as beneficial owners;

- The inclusion of additional information to be obtained by a designated person where enhanced due diligence is required;

- The amendment of the defence for "tipping off" in section 51 of the CJA 2010; and

- The inclusion of additional categories of high risk investors in Schedule 4 of the CJA 2010.

The General Scheme of the Bill can be accessed here.

(iii) ESAs publish multilateral agreement on the exchange of information between the ECB and AML/CFT competent authorities

On 15 January 2019, the Joint Committee of the ESAs published a multilateral agreement on the practical modalities for exchange of information between the ECB and NCAs responsible for supervising compliance of credit and financial institutions with anti-money laundering and countering the financing of terrorism obligations under Directive (EU) 2015/849 (the "**Fourth Money Laundering Directive**" or "**MLD4**"). The agreement establishes a framework for exchanging information.

The agreement can be accessed here and a related press release is available here.

(iv) Wolfsberg Group publish guidance on use of sanctions screening by financial institutions

On 21 January 2019, the Wolfsberg Group published guidance on how Financial Institutions ("**FIs**") should carry out sanctions screening.

Sanctions screening is a control used within FIs to detect, prevent and disrupt financial crime and manage sanctions risk. This is done by comparing data sourced from an FI's operations, customer and transactional records, against lists of names and other indicators of sanctioned parties or locations. These lists are derived from regulatory sources and are often supplied by specialist external providers with the FIs augmenting these with lists of sanctions-relevant terms, names or phrases, which have been identified through their own operations, research or intelligence.

The guidance concludes that FIs should seek to adopt a risk-based approach to sanctions screening and consider all aspects of a comprehensive sanctions screening control framework. It states that:

- FIs must have a robust Financial Crime Compliance ("**FCC**") programme for sanctions screening;
- FIs approach should recognise that sanctions screening has its limitations and for it to be fully effective it should be deployed alongside a broader set of non-screening controls;
- FIs should document their approach to screening by linking it to their risk appetite statements;
- The accuracy and completeness of the FI's own data is central to an effective and efficient sanctions screening process;
- Technology remains a key enabler in the effectiveness of identifying financial crime risk through screening;
- FIs must have a robust governance and oversight mechanisms to ensure transparency of risk decisions to key stakeholders and risk owners; and
- FIs should ensure that those involved in the end-to-end risk event management are trained, supervised and that the appropriate levels of quality control are in place to ensure compliance with requirements;

A copy of the guidance can be accessed here.

(v) European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019

On 29 January 2019, the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019 came into effect (the "**Regulations**"). The Regulations transpose into Irish law certain paragraphs of Article 31 of MLD4 requiring obligations to be imposed on trustees of trusts to identify beneficial owners.

The Regulations require the trustee (or manager in the case of a collective investment scheme) to establish a beneficial ownership register (the "**Register**") which must contain details of all beneficial owners of the trust as well as information on the date on which each beneficial owner was entered on the register and, where applicable, the date on which any such person ceased to be a beneficial owner of the trust. The Register must be kept up-to-date and reflect any change in beneficial ownership as and when that change occurs. The Register must be made available to the Revenue Commissioners, Central Bank, Department of Finance and other competent authorities on request.

The Regulations also require the trustee to keep records of steps taken to identify the beneficial owner(s) of the relevant trust and retain those records for at least 5 years after the date on which the final distribution is made under the trust. Where the trustee of a trust engages with other "designated persons", it must inform that entity that it is acting in the capacity of a trustee. It must also provide that designated person with details of the beneficial

owner(s) of the trust on request and, where relevant, notify that designated person of any change to the beneficial ownership of the trust.

The Regulations can be accessed here and for further information, please refer to a related Dillon Eustace article, which can be found here.

(vi) The European Commission adopts Delegated Regulation containing RTS on measures to mitigate money laundering and terrorist financing risk under MLD4

On 31 January 2019, the European Commission adopted a Delegated Regulation supplementing MLD4 with RTS specifying the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries.

The RTS specify how credit and financial institutions should manage money laundering and terrorist financing risk as required by Article 8 of MLD4, where a third country's law prevents the implementation in their branches or majority-owned subsidiaries of group-wide policies and procedures on AML and CFT. This may occur, for example, when the sharing of customer-specific information within the group conflicts with local data protection or banking secrecy requirements.

The Council of the European Union and the European Parliament will now consider the Delegated Regulation and if neither objects, it will enter into force twenty days after it is published in the Official Journal of the European Union and will apply three months after it has entered into force.

A copy of the Delegated Regulation can be accessed here.

(vii) EBF, AFME and IIF publish joint response to ESAs consultation on AML Colleges Guidelines

On 8 February 2019, the European Banking Federation ("**EBF**"), the Association for Financial Markets in Europe ("**AFME**") and the Institute of International Finance ("**IIF**") published a joint response to the ESAs' draft guidelines on the cooperation and information exchange for the purposes of MLD4 between competent authorities supervising credit and financial institutions (the "**AML Colleges Guidelines**").

In the response the organisations encourage the ESAs, where possible, to maximise the use of existing structures as efficiently as possible. The organisations note that setting up supervisory colleges has potential to add another layer of complexity for firms and duplicating existing procedures should be avoided in order to ensure seamless cooperation and information exchange between competent authorities. The response advocates a holistic view on the importance of enhancing cooperation between all sectors, which will assist in the reduction of criminal abuse of the financial system.

The organisations' response can be accessed here and a related press release is available here.

(viii) Political agreement reached on proposed Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences

On 12 February 2019, the European Commission published a press release which announced that it had reached a political agreement with the European Parliament and the Council of the European Union on the proposed Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences (the "**Proposed Directive**"). The Proposed Directive has the following primary objectives:

- **To allow timely access to financial information:** Law enforcement authorities and Asset Recovery Offices will have direct access to bank account information contained in national centralised bank account registries or data retrieval systems. Europol will also be able to access this information indirectly;

- **To improve cooperation:** The new rules enhance cooperation between national authorities, Europol and the Financial Intelligence Units; and

- **To safeguard data protection:** Law enforcement will have access to limited information only on the identity of the bank account holder and in specific cases of serious crime or terrorism, ensuring that the rights and freedoms of individuals are fully protected, in particular the right to the protection of personal data.

The Directive will now need to be formally adopted by the European Parliament and the Council.

The European Commission's press release can be accessed here.

(ix) Council of the EU objects to European Commission's Delegated Regulation identifying high-risk third countries with strategic deficiencies in their anti-money laundering and counter-terrorist financing frameworks

On 13 February 2019, the European Commission adopted a Delegated Regulation supplementing MLD4 by identifying high-risk third countries with strategic deficiencies (the "**Delegated Regulation**").

The list of high-risk third countries (as provided for in an annex to the Delegated Regulation) was produced by the European Commission using new methodology set out under MLD5.The Commission concluded that 23 countries had strategic deficiencies in their anti-money laundering or counter terrorist financing regimes.

The Delegated Regulation can be accessed here. The list of high-risk third countries was provided in the annex to the Delegated Regulation and can be found here. A related press release is available here.

On 7 March 2019, the Council of the EU published a press release which announced that it had objected to the European Commission's Delegated Regulation. The Council justified its decision on the grounds that it could not support the proposal as it was not established in a transparent and resilient process that actively incentivised affected countries to take decisive action while also respecting their right to be heard.

The Commission will now have to propose a new draft list of high-risk third countries that will address member states' concerns.

The Council's press release can be accessed here.

On 14 March 2019, the European Parliament published a resolution which stressed the urgency for the adoption of an EU blacklist identifying high-risk third countries with strategic deficiencies. The Parliament expressed its regret at the Council's decision to object to the Delegated Regulation and called on the European Commission to take into account all of the concerns expressed and to come up with a new delegated act as soon as possible.

The Parliament's resolution can be accessed here.

(x) FATF updates methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems

In February 2019, FATF published its updated methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems.

The document sets out how FATF will determine whether a country is sufficiently compliant with the 2012 FATF Standards and whether its AML/CFT system is working effectively. It provides an overview of the assessment methodology and how it will be used in evaluations and sets out the criteria for assessing technical compliance with each of the FATF Recommendations. It also outlines the outcomes, indicators, data and other factors used to assess the effectiveness of the FATF Recommendations.

FATF's updated methodology can be accessed here.

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

(i) ESMA publishes guidelines compliance tables in respect of its guidelines under MAR

On 4 February 2019, ESMA published the following guidelines compliance tables under Markets Abuse Regulation (Regulation 596/2014) ("**MAR**"):

- Guidelines compliance table in respect of ESMA's MAR guidelines on delay in the disclosure of inside information, which can be accessed here;
- Guidelines compliance table in respect of ESMA's MAR guidelines on information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives, which can be accessed here;
- Guidelines compliance table in respect of ESMA's MAR guidelines for persons receiving market soundings, which can be accessed here.

Each national competent authority is obliged to inform ESMA whether they comply or intend to comply with the above guidelines and this information is detailed in the respective compliance tables. The Central Bank has confirmed that it complies with all of the above guidelines.

(ii) ESMA publishes list of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons

On 13 February 2019, ESMA published a list of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons.

In accordance with Article 19(9) of MAR, competent authorities that raise the threshold to €20,000 must inform ESMA and provide a justification for adopting the higher threshold prior to its application, referring to specific market conditions.

Denmark, France, Italy and Spain are the four countries for whom notifications and justifications were received from national competent authorities regarding the increase of the threshold.

ESMA's list can be found here.

(iii) ESMA updates Q&As on the implementation of MAR

On 29 March 2019, ESMA published a Q&As document on the implementation of MAR. The updated Q&As include new questions and answers on:

- The disclosure of inside information by collective investment undertakings;
- The meaning of parent and related undertakings; and
- When emission allowances market participants ("**EAMPs**") are under an obligation to disclose inside information concerning emission allowances where that inside information relates to installations of group undertakings.

ESMA's updated Q&As can be accessed here. For a more detailed analysis of the Q&As on the implementation of MAR, please refer to an article on the subject on the Dillon Eustace website, which can be accessed here.

Transparency Directive

(i) ESMA updates Q&As on the Transparency Directive

On 31 January 2019, ESMA published an updated version of its Q&As on the Transparency Directive.

The updated Q&As include a new Question 26 which applies in the event that the UK withdraws from the EU with no withdrawal agreement in place. Question 26 addresses the question of how issuers who have chosen the UK as their home member state should choose a new home member state.

The updated Q&As can be accessed here.

(ii) ESMA publishes guidelines compliance table in respect of its guidelines on the enforcement of financial information

On 21 March 2019, ESMA published a guidelines compliance table in respect of its guidelines on the enforcement of financial information (the "**Guidelines**").

Each national competent authority is obliged to inform ESMA whether they comply or intend to comply with the Guidelines and this information is detailed in the compliance table. The Irish Accounting and Auditing Supervisory Authority has confirmed that it complies with the Guidelines.

The guidelines compliance table can be accessed here.

Prospectus Regulation

(i) ESMA publishes updated Q&As on Prospectuses

On 31 January 2019, ESMA published the Twenty-Ninth Edition of the updated version of its Q&As on Directive 2003/71/EC (the "**Prospectus Directive**"). The updates apply in the event that the UK withdraws from the EU with no withdrawal agreement in place;

- **Q&A 103**: This question considers how issuers who have chosen the UK as their home member state should choose a new home member state; and
- **Q&A 104:** This question clarifies the status within the European Union / EEA EFTA of prospectuses approved by the United Kingdom's Financial Conduct Authority ("**FCA**") while the United Kingdom was a Member State.

A copy of the press release can be accessed here and a copy of the Q&A can be accessed here.

(ii) ESMA publishes list of thresholds below which an EU prospectus is not required

On 8 February 2019, ESMA published a list of the thresholds below which an offer of securities to the public does not need a prospectus in EU Member States. The document provides the following information:

- A short description of the national thresholds below which no prospectus is required;
- A summary of any national rules which apply to offers below that threshold; and
- Hyperlinks to the relevant national legislation and rules.

The document can be accessed here and a related press release from ESMA is available here.

(iii) Draft Commission Delegated Regulation supplementing the Prospectus Regulation with regard to RTS on key financial information

On 14 March 2019, the European Commission published a draft text of its Delegated Regulation supplementing Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") with regard to RTS on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal (the "**Draft Delegated Regulation**"). The Draft Delegated Regulation:

- Sets out a brief set of key financial information taking into account the various categories of issuers and types of securities that can be accommodated within the seven-page limit of the prospectus summary;

- Specifies requirements relating to the publication of prospectuses by (i) carrying forward existing Level 2 provisions which have not already been incorporated in the Prospectus Regulation or become obsolete and (ii) removing the ban on hyperlinks in prospectuses;

- Sets out a list of data that will allow ESMA to (i) provide a centralised storage mechanism of prospectuses allowing access free to charge and appropriate search facilities for the public and (ii) draw up the annual report containing statistics on prospectuses and an analysis of trends that will facilitate the future evaluation of prospectus rules;

- Strengthens the protection of investors about advertisements and allows competent authorities to supervise the advertising activity and cooperate in a more efficient way;

- Specifies situations that require the publication of a supplement to the prospectus by adapting recent RTSs addressing the same issue to the new prospectus regime and adding measures to cover the new elements set out in the Prospectus Regulation; and

- Specifies the technical arrangements to expand ESMA's IT system to cover the whole set of documents that will be passported through the notification portal.

The Draft Delegated Regulation can be accessed here. The annexes to the Draft Delegated Regulation, which set down the key financial information for various entities in the summary of a prospectus, can be accessed here.

(iv) Draft Commission Delegated Regulation supplementing the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus

On 14 March 2019, the European Commission published a draft text of its Delegated Regulation supplementing the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**Draft Delegated Regulation**"). The Draft Regulation details:

- The minimum information to be included in the registration documents and in the securities notes and additional information to be included in prospectuses;

- The format of a prospectus and a base prospectus, the categories of information to be included in the base prospectus and the requirements of a prospectus summary;

- The key information which must be contained in the specific summary for the EU Growth prospectus, the required contents of the EU Growth registration document and of the EU Growth securities note and the format of the EU Growth prospectus;

- The criteria for the scrutiny of the completeness of information contained in the prospectus and for the scrutiny of comprehensibility and consistency of the information; and

- The proportionate approach to be taken in the scrutiny of draft prospectuses and the review of the universal registration document, the requirements for submission of draft prospectuses for approval and the steps that must be taken where there are changes to a draft prospectus during the approval procedure.

The Draft Regulation can be accessed here.

(v) ESMA publishes Q&As in respect of the Prospectus Regulation

On 27 March 2019, ESMA published a Q&Aa document in respect of the Prospectus Regulation. The Q&As provide clarification on the following issues in respect of the Prospectus Regulation:

- The scope of the grandfathering of prospectuses approved under the national laws of Member States implementing Directive 2003/71/EC (Prospectus Directive);

- The applicability of the current level 3 guidance concerning the Prospectus Directive after the entry into application of the Prospectus Regulation; and

- The process of updating the information included in registration documents and universal registration documents.

The Q&As can be accessed here.

(vi) ESMA publishes final guidelines on risk factors under the Prospectus Regulation

On 29 March 2019, ESMA published its final report setting out its guidelines on risk factors under the Prospectus Regulation (the "**Guidelines**"). The Guidelines aim to encourage appropriate, focused and more streamlined disclosure of risk factors, in an easily analysable, concise and comprehensible form.

The Guidelines note that risk factors should be limited to those risks which are material and specific to the issuer and its securities and which are corroborated by the content of the prospectus. ESMA's Guidelines are divided into the following groups:

- **Guidelines on Specificity** - Before approving the prospectus, the competent authority should ensure that specificity of the risk factor is clear from the disclosure;

- **Guidelines on Materiality** - Before approving the prospectus, the competent authority should ensure that materiality of the risk factor is clear from the disclosure;

- **Guidelines on Corroboration of the materiality and specificity** - Before approving the prospectus, the competent authority should ensure that the materiality and specificity of the risk factor is corroborated by the overall picture presented by the prospectus;

- **Guidelines on Presentation of risk factors across categories** - The presentation of risk factors across categories (depending on their nature) should aid investors in navigating the risk factors section. Before approving the prospectus, the competent authority should ensure that risks factors are presented across categories based on their nature;

- **Guidelines on Focused/concise risk factors** - Before approving the prospectus, the competent authority should ensure that the disclosure of each risk factor is presented in a concise form; and

- **Guidelines on Risk factors in the summary** - Where a summary has been included in the prospectus, before approving the prospectus the competent authority should ensure consistency in disclosure presentation.

Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities to which the Guidelines apply must notify ESMA whether they comply, do not comply or intend to comply with the Guidelines.

The final report can be accessed here.

(vii) ESMA publishes final report on technical advice on minimum information content for prospectus exemption

On 29 March 2019, ESMA published its final report setting out its technical advice on the minimum information required for a document that is made available to the public under the prospectus exemption.

In accordance with the Prospectus Regulation, issuers may offer/admit securities connected with a takeover, merger or division without publishing a prospectus, provided that an alternative document is made available to investors which describes the transaction and its impact on the issuer, described as an "Exempted Document" by ESMA.

ESMA intends that its technical advice will ensure a harmonised approach in all jurisdictions with regard to the information provided to investors when takeovers, mergers and divisions are connected with public offers of securities or admissions to trading on regulated markets. This will also bring transparency to the market regarding the information that needs to be disclosed in the context of public offers/admissions to trading connected with takeovers, divisions or mergers, in particular when these transactions have a cross-border element. In this case, only a single document, complying with the requirements, would need to be published.

Annex IV to the report sets out ESMA's technical advice regarding the minimum information content for the Exempted Document.

The technical advice will now be delivered to the European Commission and will form the basis for delegated acts related to the Prospectus Regulation.

ESMA's final report can be accessed here.

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

(i) IOSCO publishes statement on disclosure of ESG matters by issuers

On 18 January 2019, IOSCO published a statement in which it outlined the importance for issuers of considering the inclusion of Environmental, Social and Governance ("**ESG**") matters when disclosing information material to investors' decisions (the "**Statement**").

The Statement seeks to emphasise that ESG matters, although often characterised as non-financial, can have material short-term and long-term impact on the business operations of the issuers as well as on risks and returns for investors and their investment and voting decisions. The Statement encourages issuers to adopt the following measures:

- Issuers should consider the materiality of ESG matters to their business and should assess risks and opportunities in light of their business strategy and risk assessment methodology;
- Issuers should disclose the impact or potential impact of ESG matters on their financial performance and value creation, where they are considered to be material;
- Issuers should give insight into the governance and oversight of ESG-related material risks when disclosing material information to investors. The information provided should be balanced and should consider and reflect both risks and opportunities presented by material ESG matters;
- Information disclosed outside of securities filings following a voluntary disclosure framework may also be required to be disclosed under security filings if it is material; and
- Issuers should clearly disclose the framework(s) that they have used (if any) in preparing and disclosing material ESG information.

IOSCO's Statement can be accessed here.

(ii) IOSCO publishes consultation report on sustainable finance in emerging markets and the role of securities regulators

On 1 February 2019, IOSCO published a consultation report titled 'Sustainable finance in emerging markets and the role of securities regulators' (the "**Consultation Report**"). The Consultation Report examines the issues and challenges that affect the development of sustainable finance in capital markets, focusing on sustainable assets in emerging markets and measures to facilitate market development in this area.

It also proposes 11 recommendations that regulators should consider when issuing regulations or guidance regarding sustainable instruments and additional disclosure requirements of ESG-specific risks.

The closing date for responses by stakeholders to the Consultation Report was 1 April 2019.

The Consultation Report can be accessed in full here.

(iii) EFAMA publishes response to IOSCO's consultation report on leverage

On 4 February 2019, EFAMA published a response to IOSCO's November 2018 consultation report on a proposed framework to help assess leverage used by investment funds (the "**Consultation Report**").

The framework proposed comprises a two-step process with the objective of achieving a consistent assessment of global leverage, as part of an effort to address risks that may arise from certain asset management activities. The first step involves using the measures of leverage identified and developed with a view to identifying and analysing funds that may pose a risk to financial stability. The focus of the second step is on risk-based analysis on the subset of funds identified in step 1.

In its response, EFAMA highlighted its support for the assessment of the robustness of the existing regulatory frameworks that monitor the use of leverage in investment funds and enhance consistency at the global level via common measures. In respect of the measures proposed for step 1, EFAMA expressed its firm support for measures foreseen in the European regulatory framework, i.e. the gross method and the commitment approach. EFAMA also welcomed the proposed risk-based analyses involved in step 2 and agreed with the discretion provided to regulators to determine which funds to analyse and which analyses to perform in this context.

However, while EFAMA welcomed the 2-step approach, it also stressed the need for appropriate and proportionate measures to be included in each step and noted that these efforts should build upon existing reporting templates, such as those under AIMFD Annex IV. EFAMA is convinced that the majority of investment funds employing leverage in Europe do not pose financial stability risks and that this needs to be taken into account for the development of appropriate and proportionate measures of leverage for financial stability purposes. In addition, EFAMA highlighted the need to ensure improved data sharing among regulators in order to enhance their leverage measurement both at the EU and the global scale.

The closing date for responses to the Consultation Paper was 1 February 2019 and EFAMA's response can be accessed here.

(iv) IOSCO and CPMI publish update on the status of level 1 assessments for the implementation of principles for financial market infrastructures

On 14 March 2019, IOSCO and the Committee on Payments and Market Infrastructures ("**CPMI**") jointly published an updated Level 1 Assessment Online Tracker on the monitoring of the implementation of the principles for financial market infrastructures ("**PFMI**").

The PFMI are international standards for payment, clearing and settlement systems, and trade repositories. They are designed to ensure that the infrastructure supporting global financial markets is robust and well placed to withstand financial shocks.

The online tracker highlights the progress of various jurisdictions in implementing the international standards for payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories. The assessment demonstrates that further progress has been made among some participating jurisdictions that had not completely adopted the implementation measures at the time of the fifth update to the Level 1 assessment report, which was published in July 2018.

In total, 23 of the 28 jurisdictions that participate in the implementation monitoring programme have adopted measures for all financial market infrastructure types.

The updated Level 1 Assessment Online Tracker can be accessed here.

European Fund and Asset Management Association ("**EFAMA**")

(i) EFAMA submits its responses to ESMA's consultations on integrating sustainability risks and factors in the UCITS Directive, AIFMD and MiFID II

On 19 February 2019, EFAMA submitted its response to ESMA's consultations on integrating sustainability risks and factors in the UCITS Directive, AIFMD and MiFID II.

In its response, EFAMA welcomes ESMA's high-level-principles-based approach, which acknowledges the principle of necessary proportionality based on a firms' investment strategy and underlying assets of each investment product but stresses the importance of ensuring a consistent application of this high-level approach among other current consultation processes.

Looking at the consultation timeframe, EFAMA said the 12-month window suggested by the European Commission to implement the changes would be too narrow to implement such changes effectively, as regulatory amendments would need to be incorporated into national laws of each Member State first.

A copy of EFAMAs response can be accessed here.

(ii) EFAMA issues statement in relation to the New Regime for Investment Firms

On 12 March 2019, EFAMA issued a statement (the "**Statement**") welcoming the intention of the EU policy makers to conclude as soon as possible the trilogue negotiations concerning the new prudential regime for investment firms, relating to the proposed IFR and IFD.

In the Statement, EFAMA provided that having the new prudential regime in place prior to the end of the European Parliament's mandate is important given the recent agreement reached in respect to the CRD/CRR which currently covers part of the investment firms in Europe.

The Statement stated that an expedited agreement on the IFR and IFD will spare investment firms the burden of legal uncertainty and that it is important for EU policy makers to keep in mind the need for compatibility between a number of rules foreseen in the proposed regime and the current one.

EFAMA have set out that it will analyse the on-going discussions and agreements in order to assess whether the proposed regime will address appropriately and efficiently the multitude of very different business models that it will apply to.

A copy of the Statement can be accessed here.

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

(i) ISDA outlines clearing risk management best practices for CCPs

On 24 January 2019, ISDA published a paper which outlines clearing risk management best practices for CCPs (the "**Paper**"). The objective of the Paper is to provide guidance to ensure that CCPs have risk controls and margin requirements that adapt to concentration, liquidity, member credit quality and wrong-way risk in a member's portfolio, effective and transparent default management processes and robust membership criteria and greater assurances of continued adherence to them. The Paper recommends that CCPs adopt the following practices:

- The alignment of CCP Risk Management to Underlying Risk: The Paper recommends that CCPs link risk management to actual risk and do not base it solely on a given product being an OTC or exchange-traded derivative;

- CCPs should ensure that they have robust membership requirements in place: In particular, the Paper recommends that members should have sufficient operational capacity and back-up sources of liquidity in place to settle trades in a timely fashion, the ability to independently risk manage their own and their clients' positions and the financial resources to pay extra margin, assessments for additional guarantee fund contributions and other payments to support their positions in periods of market stress and to participate in the default management process;

- Products cleared by a CCP should be sufficiently standardised and liquid and prices need to be observable on a regular basis;

- CCPs need to ensure that there are sufficient participants in an auction, as mutualisation of risk in a CCP works best if that risk is mutualised across many members;

- Best practices for margin calculations should be implemented by CCPs across all products, based on applicable risk factors and not limited to trading venue;

- Controls and limits that protect against erroneous trades and build-up of concentrated positions should be implemented at the exchange level;

- CCPs should ensure enhanced transparency on margin models and stress testing frameworks in general and clearing participants should have enough information from the CCP to replicate the CCP's risk management and stress testing models, enabling them to conduct meaningful due diligence on the CCP;

- Default fund and financial safeguard coverage and default management should be aligned with best practices; and

- Governance: The parties underwriting the counterparty risk of a CCP need to be part of the governance of the CCP, especially in the area of risk management. Clearing members should receive sufficient information so they can scrutinise the risk management framework in detail.

The Paper can be accessed here.

(ii) ISDA publishes Disclosure Annex for Commodity Derivative Transactions

On 11 February 2019, ISDA published its disclosure annex for commodity derivative transactions (the "**Annex**").

The Annex refers to transactions in which the underliers are physical commodities, contracts for the future delivery of physical commodities, physical events (such as weather, transportation or emissions), rights or indexes relating to physical commodities, contracts for the future delivery of physical commodities or physical events or an index of commodity indexes.

The Annex can be accessed here.

(iii) ISDA publish updated 2019 LEI Factsheet

On 15 February 2019, ISDA published an updated Legal Entity Identifier ("**LEI**") factsheet to the joint ISDA and Global Financial Markets Association ("**GFMA**") publication from July 2017.

A copy of the updated 2019 factsheet can be accessed here.

(iv) ISDA publishes proposed amendments to the 2014 ISDA Credit Derivative Definitions relating to narrowly tailored credit events

On 7 March 2019, ISDA published its proposals to amend the 2014 ISDA Credit Derivative Definitions relating to narrowly tailored credit events. The ISDA proposal, which was agreed by a working group of buy and sell-side market participants, aims to take away the incentive for these arrangements by requiring a failure to pay credit event to result from or in a deterioration in creditworthiness. The proposals follow a statement from the ISDA board last year which noted that narrowly tailored credit events could impact the efficiency, reliability and fairness of the credit default swaps market.

The proposals intend to update the ISDA Credit Derivatives Physical Settlement Matrix so that "Credit Deterioration Requirement" is specified as applicable for all Corporate and Financial Transaction Types.

The closing date for feedback on the proposals was 27 March 2019. A copy of ISDA's proposed amendments can be accessed here and a related press release is available here.

Financial Stability Board ("**FSB**")

(i) FSB work programme for 2019

On 12 February 2019, the Financial Stability Board ("**FSB**") published its work programme for 2019. The work programme details the FSB's planned work and an indicative timetable of main publications for 2019 which reflects the FSB's continued pivot from policy design to the implementation and evaluation of the effects of reforms and, in particular, vigilant monitoring to identify and address new and emerging risks to financial stability. The main areas of the FSB's work during 2019 are set to relate to the following:

- **Addressing new and emerging vulnerabilities in the financial system -** the FSB will continue to identify and assess emerging risks through regular discussion by its members of macro-financial developments and it will also continue to assess the impact of evolving market structures and of technological innovation on global financial stability, which includes the resilience of financial markets in stress, the implications of the growth of non-bank financial intermediation and operational issues such as cyber risks.

- **Finalising and operationalising post-crisis reforms –** the FSB have provided that the policy development for addressing "too big to fail" for banks is largely completed and now its focus has turned to the technical and operational issues that arise in resolution as well as issues relating to systemic risk in the insurance sector and financial market infrastructures.

- **Implementation of G20 reforms -** in collaboration with standard setting bodies, the FSB will continue work on monitoring through regular progress reports and peer reviews. This includes monitoring the implementation of Basel III, effective resolution

regimes for financial institutions, OTC derivatives market reforms and the implementation of the FSB principles and standards for sound compensation practices.

- **Evaluating effects of the reforms** - the FSB will improve its programme to evaluate the effects of post-crisis reforms by assessing whether reforms are operating as intended in an efficient manner and to identify and deliver adjustments where appropriate, without compromising on the agreed level of resilience.

A copy of the work programme can be accessed here.

(ii) FSB publish report on FinTech and market structure in financial services: Market developments and potential financial stability implications

On 14 February 2019, the FSB published a report entitled "FinTech and market structure in financial services: Market developments and potential financial stability implications" (the "**Report**") which assesses FinTech market developments in the financial system and the potential implications for financial stability.

The Report considers three different FinTech related developments that are altering, or have the potential to alter, the current structure of the financial system and as a result may have implications for financial stability:

1. New providers of bank-like services competing or co-operating with established financial services providers;

2. The provision of financial services by large technology companies; and

3. Reliance on third-party providers for cloud services.

Some key considerations from the FSB's analysis of the link between technological innovation and market structure include the following:

- The relationship between incumbent financial institutions and FinTech firms appears to be largely complementary and co-operative in nature;

- The competitive impact of BigTech (i.e. large and established technology companies) may be greater than that of FinTech firms; and

- Reliance by financial institutions on third-party data service providers for core operations is estimated to be low at present and warrants ongoing attention from authorities.

The FSB have provided that as FinTech firms, BigTech firms and third-party services continue to develop it will be important to monitor the developments and their financial stability implications.

A copy of the Report can be accessed here.

European Commission

(i) Proposed New Regulatory Framework for Investment Firms

On 7 January 2019, it was announced via a press release by the Council of the EU (the "**Council**") that it's Permanent Representatives Committee ("**COREPER**") had endorsed its position on a package of measures, composed of the proposed Investment Firms Regulation ("**IFR**") and the proposed Investment Firms Directive ("**IFD**"), which will set out a new regulatory framework for investment firms designed to make "the rules applicable to investment firms more proportionate and more appropriate to the level of risk which they take".

The IFR and the IFD will, for most existing investment firms, replace the existing prudential requirements for investment firms set out in the CRR Regulation and the CRD IV Directive (2013/36/EU) ("**CRD IV Directive**") and will also amend the MiFID II Directive and MiFIR. The Council has published notes setting out the Council Presidency's compromise proposals on the IFR and the IFD, which are set out below:

- A note (5021/19) setting out the Presidency compromise proposal on the IFR; and
- A note (5022/19) setting out the Presidency compromise proposal on the IFD.

Investment firms and credit institutions in the EEA are currently subject to similar prudential rules set out in the CRD IV Directive and the CRR which include capital, liquidity and risk management requirements.

The European Commission, which has proposed the new framework, holds the view that the provisions contained in the CRD IV Directive and CRR do not take sufficient account of the business models and risks of investment firms. This point is reiterated by the Council which has indicated that the risks faced and posed by most investment firms are substantially different to the risks faced and posed by credit institutions and that such differences should be clearly reflected in the prudential framework.

Under the proposed new framework, many investment firms would no longer be subject to rules that were originally designed for credit institutions. However, the largest and most systemic investment firms would remain subject to the existing prudential framework under the CRD IV Directive and the CRR. Under the proposed new framework, investment firms will be divided into three classes:

- **Class 1** – covers the largest and systemically relevant investment firms which engage in "bank-like" activities and services, which would include proprietary trading or underwriting of financial instruments. Such firms whose consolidated assets exceed EUR 15 billion would automatically be subject to the CRD IV Directive and CRR;

- **Class 2** – covers a category of investment firms that are not categorised as systemic. Such firms would be subject to a tailored prudential regime under the proposed new framework; and

- **Class 3** – covers non-systemically relevant investment firms that do not fall into Class 2 and are defined as "small and non-interconnected investment firms".

In summary the largest firms (Class 1) would be subject to the full banking prudential regime and would be supervised as credit institutions, whereas smaller firms which are not considered systemic (Classes 2 & 3) would face a new tailored regime with bespoke and lighter prudential requirements.

The new proposed framework also seeks to strengthen the equivalence regime, as is set out in MIFID II Directive and MIFIR, which would apply to third country investment firms. The text contained in the IFR and the IFD sets out in greater detail the requirements providing such firms access to the single market. Furthermore, the proposed requirements also seek to grant additional powers to the European Commission in order to monitor foreign financial firms which operate in the EEA.

For instance, where the proposed activities to be performed by third country firms are likely to categorised as systemic, the proposed new framework will allow the European Commission to apply certain specific operational conditions to an equivalence decision to ensure that ESMA and the NCAs have the necessary tools to prevent regulatory arbitrage and to monitor the activities of third country firms.

The agreement reached on 7 January 2019, will require the approval of the European Parliament before being finalised. The Council and the European Parliament will now begin trialogue negotiations. It is intended that the new regime would start to apply 18 months after the IFR and the IFD are finalised and formally adopted.

Please find a copy of the press release published by the Council here, a copy of the note (5021/19) setting out the Presidency compromise proposal on the IFR can be accessed here and a copy of the note (5022/19) setting out the Presidency compromise proposal on the IFD can be accessed here.

On 26 February 2019, the Council and the European Parliament published a press release announcing that they have reached a political agreement on the proposed IFR and the proposed IFD.

Furthermore, on 19 March 2019, the Council published an 'I' item note with accompanying addenda setting out the final compromise texts of the proposed IFR and the proposed IFD. The European Parliament has indicated that it plans to consider the proposed IFR and the proposed IFD at its plenary session of 15 to 18 April 2019.

A copy of the February press release from the Council can be accessed here, the respective press release from the European Parliament can be accessed here and a copy of the 'I' item note can be accessed here.

(ii) European Commission provides update on progress on building the Capital Markets Union

On 15 March 2019, the European Commission published a Communication providing an update on progress on building the CMU. The Communication provides an overview of the status of the various legislative and non-legislative measures that form the building blocks of the CMU at the time of its publication.

In particular, the Communication highlights that, out of the thirteen CMU legislative proposals, three have been adopted, whilst agreement has been reached on a further seven. The three proposals awaiting agreement at the date of the Communication related to crowdfunding, third-party effects of assignment of claims and the review of the ESAs, including reinforced anti-money laundering rules. The three proposals which had been adopted were Regulation (EU) 2017/2402 (the "**Securitisation Regulation**"), Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") and Regulation (EU) 2017/1991 amending: (i) Regulation (EU) 345/2013 (the "**European Venture Capital Funds Regulation**") and (ii) Regulation (EU) 346/2013 (the "**European Social Entrepreneurship Funds Regulation**").

The Communication also provides a status update on legislative proposals relating to sustainable finance, noting that the proposals on disclosure and low-carbon and positive carbon benchmarks have reached political agreement, whilst agreement remained outstanding in the case of the taxonomy proposal.

The European Commission's Communication can be accessed here, with a related set out Q&As and a factsheet published by the Commission can be accessed here.

Council of the European Union

(i) Political Agreement reached on EU Framework for Covered Bonds

On 27 February 2019, the Council of the European Union published a press release announcing that a political agreement had been reached by the European Parliament and Member States on the EU framework for covered bonds.

The proposed framework seeks to set minimum harmonisation requirements that all covered bonds across Europe will be required to meet. The objective of the framework is to increase security for investors and to open up new opportunities, particularly where markets are less developed. The proposed framework:

- Provides a common definition of covered bonds;
- Defines the structural features of the instrument;

- Defines the tasks and responsibilities for the supervision of covered bonds;
- Sets out the rules allowing the use of the 'European Covered Bonds' label; and
- Strengthens the conditions for granting preferential prudential treatment to covered bonds under the Capital Requirements Regulation.

The Council of the European Union's press release can be accessed here.

On 19 March 2019, the Council of the EU published an "I" item note, together with accompanying addenda setting out the final compromise texts of the proposed Regulation and Directive regarding covered bonds. In the note, the Council invited COREPER to approve both final compromise texts.

The "I" item note can be accessed here, the final compromise text of the proposed Regulation is available here and the final compromise text of the proposed Directive can be found here.

(ii) Council of EU invites COREPER to approve final compromise text of proposed Regulation amending the EMIR supervisory regime for EU and third-country CCPs

On 18 March 2019, the Council of the EU published the following "I" item notes:

- An "I" item note on the proposed Regulation amending the EMIR supervisory regime for EU and third-country CCPs (the "**Proposed Regulation**"), together with an addendum setting out the final compromise text; and
- An "I" item note on the proposed Decision amending Article 22 of the Statute of the ESCB and of the ECB (the "**Proposed Decision**"), together with an addendum setting out the final compromise text.

In the "I" item notes, the Council invited COREPER to approve the final compromise texts of both the Proposed Regulation and the Proposed Decision and to confirm that the Presidency can indicate to the European Parliament that, should the European Parliament adopt its position at first reading, the Council would approve the European Parliament's position.

The Proposed Regulation aims to establish a CCP supervisory committee within ESMA and to strengthen the existing system for recognising and supervising third country clearing houses. In particular, it intends to introduce a "two tier" system differentiating between non-systemically important CCPs and systemically important CCPs, whereby Tier 2 CCPs would be subjected to stricter recognition and authorisation rules within the EU.

The Proposed Decision intended to amend Article 22 of the Statute of the ESCB and of the ECB in order to provide the ECB with new powers regarding clearing systems for financial instruments, which are located in third countries and are systemically important or likely to become systemically important to the financial stability of the Union or of one or more of its Member States.

The "I" item note in respect of the Proposed Regulation can be accessed here and the final compromise text of the Proposed Regulation is available here.

(iii) Council of the EU publishes final compromise text of the proposed Regulation on disclosures relating to sustainable investments and sustainability risks

On 22 March 2019, the Council of the European Union published the final compromise text of the proposed Regulation on disclosures relating to sustainable investments and sustainability risks (the "**proposed Regulation**"). This follows the announcement by the Council of the EU on 7 March 2019 that it had reached political agreement with the European Parliament on the proposed Regulation.

The proposed Regulation seeks to introduce a harmonised EU approach to the integration of sustainability risks and opportunities into the procedures of institutional investors. It will require such institutional investors to disclose:

- The procedures they have in place to integrate environmental and social risks into their investment and advisory process;
- The extent to which those risks might have an impact on the profitability of the investment; and
- Where institutional investors claim to be pursuing a "green" investment strategy, information on how this strategy is implemented and the sustainability or climate impact of their products and portfolios.

In a related "I" item note, the Council called on the Permanent Representatives Committee to approve the text of the proposed Regulation with a view to reaching an agreement at first reading with the European Parliament.

The final compromise text can be accessed here and the "I" item note is available here.

(iv) Council of EU invites COREPER to approve final compromise texts on the reform of the European System of Financial Supervision

On 29 March 2019, the Council of the European Union published an "I" item note in which it invited COREPER to approve the final compromise texts of the European Commission's proposed legislative reforms to the European System of Financial Supervision (the "**Proposed Regulation**"). The Proposed Regulation aims to put in place an improved supervisory framework for European financial institutions through the introduction of the following measures:

- By altering the existing system for supervisory convergence in order to make the process more efficient, coherent and transparent. The Proposed Regulation builds on existing tools, such as peer reviews, guidelines and Q&As while introducing new ones, for example the establishment of coordination groups at EU level;

- By reviewing the ESAs' governance structure. The Proposed Regulation maintains the principle that decisions have to be taken by the Board of Supervisors and ensures a key role for the national competent authorities within the ESAs governance structure;

- By reviewing the powers of each of the three ESAs. The Proposed Regulation intends to give ESMA direct supervision powers over third country critical benchmark administrators, as well as in respect to data reporting service providers; and

- By strengthening the role and powers of the EBA as regards anti-money laundering supervision. In particular, the EBA is given the tasks of collecting information from national competent authorities, enhancing the quality of supervision through the development of common standards, performing risk assessments and facilitating cooperation with non-EU countries on cross-border cases.

The 'I' item note can be accessed here and the final compromise text in respect of the Proposed Regulation is available here.

ESMA

(i) ESMA publish advice and annex to European Union institutions on ICOs and cryptoassets

On 9 January 2019, ESMA published advice and an annex on initial coin offerings ("**ICOs**") and cryptoassets. The advice is addressed to the European Commission, the European Parliament and the Council of the European Union. ESMA clarifies the European Union rules applicable to cryptoassets that qualify as financial instruments under MiFID II Directive and sets out its position on gaps and issues in the current regulatory framework.

ESMA has a number of concerns with the existing framework regarding cryptoassets, about the risks to investor protection and market integrity with the most significant risks identified as being fraud, cyberattack, money laundering and market manipulation. ESMA has identified gaps and issues that fall into two categories:

- **Cryptoassets that qualify as financial instruments -** existing rules were not designed with cryptoassets in mind with areas that require potential interpretation or reconsideration of specific requirements to allow for an effective application of existing regulations; and

- **Cryptoassets that do not qualify as financial instruments** - the absence of applicable financial regulation leaves investors exposed to risk with ESMA believing that AML requirements should apply to all cryptoassets and activities with appropriate risk disclosures in place so consumers can be made aware of the potential risks before committing funds to cryptoassets.

Considering the novelty of cryptoassets and the evolving business models, ESMA expects that some follow-up work will be needed, as the market develops and will continue actively

monitoring market developments around cryptoassets and will continue to engage with global regulators, as international cooperation is required to address this global phenomenon.

A copy of the advice can be accessed here, with a copy of the annex accessible here.

(ii) ESMA publish first annual statistical report on the cost and performance of retail investment products

On 10 January 2019, ESMA published its first annual statistical report on the performance and costs of retail investment products (the "**Report**"). The Report covers UCITS and AIFs sold to retail investors and Structured Retail Products ("**SRPs**") and highlights in particular the significant impact of costs on the final returns that retail investors make on their investments. The findings include the following:

- Cost impact varies widely, depending on the choice of product, asset class, fund type;
- Management fees and other on-going costs constitute over 80% of investors' costs, while entry and exit fees have less of an impact;
- For UCITS funds, the various charges applied reduce their gross returns by one quarter on average;
- Retail investors pay on average twice as much as institutional clients; and
- In terms of overall returns, passive equity funds consistently outperform active equity funds.

The Report finds a significant variation in costs and gross performance across Member States. The Report further highlights the lack of available and usable cost and performance data, especially for retail AIFs and SRPs, which is a significant issue from an investor protection perspective.

A copy of the Report can be accessed here.

(iii) ESMA's 2019 Regulatory Work Programme

On 4 February 2019, ESMA published its 2019 regulatory work programme, which provides an overview of ESMA's Single Rulebook work and lists all the technical standards and technical advice that ESMA has been mandated to draft by the relevant legislation. The regulatory work programme covers various areas, such as:

- EMIR (the Regulation on OTC derivative transactions, CCPs and trade repositories);
- MiFID II Directive;
- MiFIR;

- The Securitisation Regulation; and
- The SFTR.

The regulatory work programme has three annexes:

- Annex I lists the mandates for technical standards and technical advice that are contained within legislative proposals, once the legislation has been adopted ESMA will begin work on those mandates;
- Annex II gives the full references for the legislation currently in force that is referred to in the regulatory work programme; and
- Annex III gives the full references for the legislative proposals that have not yet been adopted.

A copy of the regulatory work programme can be accessed here.

(iv) ESMA publishes its 2019 supervisory convergence work programme

On 6 February 2019, ESMA published its 2019 supervisory convergence work programme, which sets out ESMA's work streams to promote sound, efficient and consistent supervision across the European Union. For 2019, the following priorities for supervisory convergence were identified:

- Ensure supervisory convergence in the context of the United Kingdom's decision to withdraw from the European Union;
- Ensuring data is high-quality data and is consistent by developing and further clarifying reporting methodologies and providing guidance;
- Ensuring consistency in the application of MiFID II and MiFIR and to reach a common understanding on supervisory challenges;
- Safeguard the free movement of services in the European Union through investor protection in cross-border services; and
- Promote supervisory convergence in financial innovation.

2019's priorities build upon those of 2018 by reflecting the progress achieved and highlighting new areas for attention and take into account various factors, including the market environment, legislative and regulatory developments and NCAs' supervisory priorities.

ESMA notes that it will closely monitor and update priorities depending on possible changes in the European Union environment in 2019 and may readjust the supervisory convergence work programme.

A copy of the press release and the supervisory convergence work programme can be accessed here.

(v) ESMA publish its 2019 risk assessment work programme

On 7 February 2019, ESMA published its 2019 risk assessment work programme, which provides an overview of the analytical, research, data and statistical activities that ESMA will carry out in 2019. ESMA's 2019 risk assessment agenda is focused on further developing its data sources and analytical exploitation, such as:

- Continue to collect market data under its AIFMD, MiFID and EMIR mandates and finalising the framework for processing, managing and analysing the data in close co-operation with NCA's;
- Further enhance its capacities on risk monitoring by generating market statistics, risk indicators and metrics based on new data;
- Continue in-depth analysis around key topics on market and fund liquidity, fund leverage and the impact of innovation in market infrastructures and investment advice; and
- Continue its impact assessment activities, complementing the regulatory work programme and improve stress testing work to facilitate more sophisticated future European Union-wide tests on CCPs as well developing its approach to investment fund stress testing.

ESMA is preparing for any changes to its analytical and statistical framework that may need to be made when the United Kingdom leaves the European Union.

A copy of the press release and the risk assessment work programme can be accessed here.

(vi) ESMA to renew prohibition on binary options for retail clients

On 18 February 2019, ESMA published a press release in which it announced that it had agreed to renew the prohibition of the marketing, distribution or sale of binary options to retail clients, which has been in effect since 2 July 2018 (the "**Press Release**").

The prohibition will be extended for a further three months starting from 2 April 2019, as ESMA continues to have investor protection concerns relating to the offering of such options to retail clients. Accordingly, the exclusion of the following types of binary options will continue in effect:

- A binary option for which the lower of the two predetermined fixed amounts is at least equal to the total payment made by a retail client for the binary option, including any commissions, transaction fees and other related costs; and

- A binary option that meets cumulatively the following three conditions:

  (a) The term from issuance to maturity is at least ninety calendar days;

  (b) A prospectus has been drawn up and approved in accordance with the Prospectus Directive (2003/71/EC) and is available to the public; and

  (c) The binary option does not expose the provider to market risk throughout the term of the binary option and the provider or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed commissions, transaction fees or other related charges.

The Press Release announcing the renewal of the prohibition on binary options for retail clients can be accessed here.

(vii) ESMA publish 2019 work programme for CRAs, TRs and third-country CCPs and CSDs

On 19 February 2019, ESMA published its 2018 annual report and 2019 work programme relating to the supervision of CRAs, Trade Repositories ("**TRs**") and the monitoring of third-country CCPs and CSDs. ESMA has identified its supervisory priorities for 2019:

- TR data quality and access by authorities;

- TR business continuity planning, IT process and system reliability and information security function;

- CRA portfolio risk and quality of the rating process;

- CRA cybersecurity;

- Recognition of United Kingdom CCPs in a no-deal Brexit scenario; and

- Assessment of pending applications for recognition as third country CCPs and third country CSDs and risk monitoring.

A copy of the 2018 annual report and 2019 work programme can be accessed here.

European Banking Authority ("**EBA**")

(i) EBA publishes final report on guidelines on outsourcing arrangements

On 25 February 2019, the EBA published its final report (the "**Final Report**") on its guidelines on outsourcing arrangements (the "**Guidelines**"). The Guidelines replace and supersede the Committee of European Banking Supervisors guidelines on outsourcing issued in 2006 (the "**CEBS Guidelines**"). The CEBS Guidelines related solely to credit institutions, whilst the Guidelines have a broader ambit and will apply to all financial institutions that are within the scope of the EBA's mandate, including credit institutions, investment firms and payment institutions.

The Guidelines specify the internal governance arrangements, including sound risk management, which should be implemented by institutions, payment institutions and electronic money institutions when outsourcing. They also detail how outsourcing arrangements should be reviewed and monitored by competent authorities.

The Guidelines explain that each financial institution's management body remains responsible for that institution and all of its activities at all times. The Guidelines further stress that financial institutions which outsource to service providers located in third countries must take particular care to ensure compliance with EU legislation and regulatory requirements.

The EBA notes that the Guidelines have been reviewed in order to provide better differentiation between the requirements for the outsourcing of critical and important functions, to which a stricter framework applies, and for other, non-material, outsourcing. The Guidelines have also been restructured to mirror the approach under Directive 2014/65/EU7 ("**MiFID II**"), which clearly defines outsourcing and critical and important functions and sets out the requirements for institutions when outsourcing these functions.

The Guidelines will enter into force on 30 September 2019 and the CEBS Guidelines will be repealed with effect from the same date.

The Final Report can be accessed here.

Central Bank of Ireland

(i) Central Bank Act 1942 (Section 32D) (Additional and Supplementary Supervisory Levies - Regulated Entities) Regulations 2019 [S.I. No. 17 of 2019]

On 29 January 2019, the Central Bank Act 1942 (Section 32D) (Additional and Supplementary Supervisory Levies - Regulated Entities) Regulations 2019 [S.I. No. 17 of 2019] were signed into law (the "**Regulations**"). The additional supervisory levy is a once off fee that is to be payable by fund service providers, MiFID firms, investment funds and sub-funds following authorisation / approval by the Central Bank.

In addition, a regulated entity may be liable to pay a separate additional supervisory supplementary levy ("**ASSL**") in addition to the additional supervisory levy. The ASSL will be payable for the purposes of providing the Bank with sufficient funds to enable it to consider matters of particular complexity in relation to an authorisation, or extension of existing authorisation or of a significant expansion in activities of a regulated entity.

The Regulations can be accessed here and for further information on the Additional Supervisory Levy is provided on the Central Bank's website and can be found here.

(ii) Central Bank publishes Guidance Notes on the registration form for SPEs

On 11 February 2019, the Central Bank published its guidance notes on the registration form for Financial Vehicle Corporation ("**FVC**") or Special Purpose Vehicle ("**SPV**"), considered to be Special Purpose Entities ("**SPEs**") (the "**Guidance**").

The Guidance outlines the process for registering SPEs with the Central Bank. The Guidance includes dedicated sections dealing with registration, activity information, interlinkages, administration, sign off and submission of the form.

The Guidance can be accessed in full here.

(iii) Central Bank approves investment via China Bond Connect

On 21 March 2019, the Central Bank published a letter in response to a submission from the Irish Funds Industry in which it approved investment via the China Bond Connect (the "**Letter**").

The Letter notes that, if an Irish authorised UCITS or AIF proposes to acquire Chinese bonds through the Bond Connect infrastructure, the depositary of the UCITS or AIF, or an entity within its custodial network, must ensure that it retains control over the bonds at all times. The depositary must review and keep under review the Bond Connect infrastructure arrangements to ensure that its legal obligations can continue to be met.

The Letter can be accessed here and for further information on the approval of the China Bond Connect initiative, please refer to a related article on the Dillon Eustace website, which is available here.

(iv) The Central Bank issued two new Editions of the Investment Firms Questions & Answers

During the period 1 January 2019 to 31 March 2019, the Central Bank released two editions of its Investment Firms Questions & Answers ("**Q&As**"). Which were the Sixth and Seventh Editions of the Q&As. Details and amendments made by the recent editions are set out below:

- **The Sixth Edition** – This edition was published on 16 January 2019. The addition made related to the insertion of question 'ID 1031'. This question asked if the International Organisation of Securities Commission's ("**IOSCO**") Multilateral Memorandum of Understanding was a co-operation arrangement which satisfies the requirement set out in Regulation 5(5)(b) of the MiFID II Regulations. The answer provided was in the affirmative. A copy of the Sixth Edition of the Q&As can be accessed here; and

- **The Seventh Edition** – This edition was published on 4 March 2019. The following two questions were inserted questions 'ID 1041' and 'ID 1042', both of which related to tied agents under the MiFID II Regulations. The newly inserted questions clarify that only EEA MiFID firms can appoint tied agents and that tied agents must be persons established in the EEA. Questions 'ID 1026' and 'ID 1027' have been removed as they are no longer relevant. A copy of the Seventh Edition of the Q&As can be accessed here.

Brexit

(i) The Minister for Justice and Equality announces Government support for Legal Services Sector Brexit Initiative

On 4 January 2019, the Minister for Justice and Equality, Charlie Flanagan TD, issued a press release announcing that the Government has agreed to support the joint initiative of the Bar of Ireland, the Law Society and the wider legal community in promoting Ireland as a leading centre globally for international legal services. The initiative is also being supported by IDA Ireland and will now form a component of the Government's Brexit strategy.

Measures being proposed to further develop the courts and legal systems in support of this initiative will be considered as an integral part of the Government's continuing programme of courts, judicial, legislative and legal services reform that the Minister for Justice and Equality is leading in conjunction with the Courts Service and the judiciary.

An implementation group will now be established to progress the initiative with the participation of all key stakeholders including Government Departments and IDA Ireland.

A copy of the press release can be found here.

(ii) ISDA publishes updated Brexit FAQs

On 22 January 2019, ISDA published an updated Brexit related FAQ document which provides for a general assessment of the various possible outcomes of the UK's exit negotiations and the consequences of those outcomes for the derivatives market. The FAQs include information on the following issues:

- Contractual points under ISDA documentation;
- Choice of law, jurisdiction and recognition of judgments;
- The impact of Brexit on the ability of financial services firms established in the UK to enter into OTC derivatives with counterparties established in the EU and on the ability for EU firms without a UK branch to continue to be able to carry out derivatives business in the UK post-Brexit;
- Financial collateral and settlement finality;
- Additional provisions which counterparties will need to include in their ISDA Master Agreements to address requirements under the BRRD when facing an EU counterparty post-Brexit;
- The process for transferring derivative transactions from an entity established in the UK to an entity established in the EU; and
- The impact of Brexit on use of an index which is considered to be a benchmark for the purposes of the European Benchmark Regulation.

A copy of ISDA's updated FAQ document can be found here.

(iii) Delegated Regulations exempting Bank of England from MiFID II, EMIR, MAR and SFTR after Brexit published in the Official Journal of the European Union

On 30 January 2019, the European Commission adopted four Delegated Regulations that exempt the BoE and public bodies charged with or intervening in the management of the public debt in the United Kingdom from specified requirements under MiFIR, MAR, the Regulation on EMIR and the Regulation on reporting and SFTR. The four Delegated Regulations comprise:

- Commission Delegated Regulation (EU) 2019/462 amending Commission Delegated Regulation (EU) 2017/1799 as regards the exemption of the BoE from the pre- and post-trade transparency requirements in MiFIR, can be accessed here;
- Commission Delegated Regulation (EU) 2019/461 amending Delegated Regulation (EU) 2016/522 as regards the exemption of the BoE and the United Kingdom Debt Management Office from the scope of MAR, can be accessed here;

- Commission Delegated Regulation (EU) 2019/460 amending EMIR with regard to the list of exempted entities, can be accessed here; and

- Commission Delegated Regulation (EU) 2019/463 amending the SFTR with regard to the list of exempted entities, can be accessed here.

The Council of the European Union and the European Parliament did not to object to the Delegated Regulations at a meeting on 7 and 8 March 2019. On 22 March 2019, the four Delegated Regulations were published in the Official Journal of the European Union and will apply on the day that EMIR, MAR, MiFIR and the SFTR cease to apply to and in the United Kingdom.

(iv) ESMA and European Union securities regulators agree no-deal Brexit MoUs with the FCA

On 1 February 2019, ESMA and European securities regulators have agreed Memoranda of Understanding ("**MoUs**") with the FCA. These form part of the preparations should the United Kingdom leave the European Union without a withdrawal agreement and will only take effect in the event of a no-deal Brexit scenario. The MoUs are:

- Between ESMA and the FCA concerning the exchange of information in relation to the supervision of CRAs and TRs; and

- A multilateral MoU ("**MMoU**") with the European Union and EEA NCAs and the FCA covering supervisory cooperation, enforcement and information exchange.

On 1 February 2019, EFAMA issued a statement welcoming the announcement with a view to have a framework for supervisory cooperation in place between ESMA, the EU 27 NCAs and the FCA, in the event of a Brexit.

A copy of ESMAs press release can be found here and EFAMAs statement can be accessed here.

(v) ESMA publishes statement concerning the reporting and handling of derivative data in case of "no-deal Brexit"

On 1 February 2019, ESMA published a statement on issues affecting reporting, recordkeeping, reconciliation, data access, portability and aggregation of derivatives under Article 9 of EMIR in the case of UK withdrawal from the EU without a transitional agreement. The guidance provided in the statement includes the following:

- **Reporting:** The statement notes that there will be a decoupling between the data reported by the EU counterparty and the UK counterparty post-Brexit and the EMIR reporting obligation will no longer apply to UK counterparties. UK counterparties are not expected to report any derivative concluded from 29 March 2019 onwards to an EU TR, or to report amendments to any derivative concluded prior to 29 March 2019;

- **Reconciliation:** The statement provides that, following 29 March 2019, the derivatives where at least one of the counterparties is an UK-based entity, should not be reconciled and should also be excluded from the inter-TR reconciliation process;

- **Counterparty recordkeeping:** The statement provides that EU27 counterparties and CCPs shall comply with the recordkeeping obligation under Article 9(2) of EMIR. UK counterparties shall comply with the recordkeeping obligation under EMIR until the date of a no-deal Brexit and subsequently with those established under UK law;

- **Data access:** The statement recommends that TRs that have affiliate UK-based TRs should strive to ensure on a continuous basis and without duplication direct and immediate access to EMIR data. Following 29 March 2019, access by UK authorities to EMIR data reported pre- and post-Brexit will be linked to an equivalence decision by the European Commission under Article 75 or Article 76a of EMIR. The statement notes that, if these options are not in place as of 29 March 2019, there will be a temporary cut in UK authorities' access to EMIR data;

- **Portability of data:** The statement requires UK-based TRs to ensure the transfer of the full dataset to any EU trade repository before the 29 March 2019. UK-based TRs, whose registration is to be withdrawn in accordance with EMIR, are requested to provide ESMA with the relevant wind-down plan including the transfer of data. ESMA notes that, should UK counterparties require porting of data to a UK TR, this should be done only with regards to the data reported by those counterparties;

- **Aggregations:** The statement provides that EU TRs should continue to include the derivatives that were reported in the reference period in aggregations relating to data reported during that period.

ESMA's statement can be accessed here.

It should be noted that, while the statement itself refers to 29 March 2019 as the date of the withdrawal of the UK from the EU, ESMA has since clarified that, in relation to previously published measures and actions issued on the basis of a no-deal Brexit scenario on 29 March 2019, reference to the date of 29 March 2019 in these statements should now be read as 12 April 2019.

This statement can be accessed here.

(vi) ESMA announces recognition of United Kingdom CCPs in the event of a no-deal Brexit

On 4 February 2019, ESMA published a press release announcing that it and the BoE have reached agreement on MoUs on the recognition of United Kingdom CCPs and United Kingdom CSDs in the event of a no-deal Brexit.

On 18 February 2019, ESMA published a press release announcing that it will recognise three CCPs established in the United Kingdom in the event of a no-deal Brexit:

- LCH Ltd;
- ICE Clear Europe Ltd; and
- LME Clear Ltd.

The three CCPs will be recognised to provide services in the European Union as they all meet the recognition conditions under Article 25 of EMIR. ESMA states that it has adopted recognition decisions to limit the risk of disruption in central clearing and to avoid any negative impact on the financial stability of the European Union.

A copy of the press releases can be found here and here.

(vii) Notice of Intention in relation to the location requirement for directors and designated persons of Irish Fund Management Companies in the event of a "no-deal Brexit"

On 4 February 2019, the Central Bank published a "Notice of Intention in relation to the location requirement for directors and designated persons of Irish Fund Management Companies" (the "**Notice of Intention**").

The location requirement for directors and designated persons of Irish Fund Management Companies requires that a minimum number of directors of designated persons be resident in the EEA. In the event that the UK withdraws from the EU with no withdrawal agreement in place (i.e. a "no-deal" Brexit), the Central Bank will not immediately adopt a position which would treat the UK as a third country for the purposes of this requirement and will not require UK-based directors and designated persons to be replaced by EEA based equivalents.

The Central Bank will subsequently determine whether the UK continues to satisfy the Effective Supervision Requirement and will publish a notice on its website to this effect at a later stage.

The Central Bank's Notice of Intention can be accessed here.

(viii) Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019

On 20 February 2019, the 'Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019' (the "**Bill**") was presented to Dáil Éireann.

The Bill, an omnibus bill is composed of 15 parts and 91 sections which has been developed by nine ministers and is a contingency plan in the event that the United Kingdom's exit from the European Union results in a 'no deal' scenario. If a managed withdrawal arrangement is brokered between the European Union and the United Kingdom in advance of 11pm on 29 March 2019, then the Bill will not become operational.

More than half of the Bill's provisions seek to address matters of taxation and set out a number of amendments to the primary Income Tax, Capital Tax, Corporation Tax and Stamp Duty acts. These amendments seek to ensure continuity in relation to current access to certain taxation measures such as reliefs and allowances.

Amongst other measures, the Bill proposes to make amendments necessary to support the implementation of the European Commission's equivalence decision under the Central Securities Depositories ("**CSD**") Regulation and to extend the protections contained in the Settlement Finality Directive to Irish participants of United Kingdom systems for temporary period. In relation to insurance and reinsurance, there are provisions in the Bill to ensure contract continuity for existing insurance policies.

A temporary run-off regime will enable insurance undertakings and intermediaries to service existing contracts for three years from the date of withdrawal of the United Kingdom.

On 13 March 2019, the Bill was passed by both Houses of the Oireachtas and signed into law by the President on 17 March 2019.

A copy of the Act can be accessed here.

(ix) Industry Letter on Brexit – equivalence of UK derivatives trading venues under EMIR and MiFIR

On 28 February 2019, Futures Industry Association ("**FIA**") along with nine other trade bodies (**ISDA**, the Alternative Investment Management Association ("**AIMA**"), the Association for Financial Markets in Europe ("**AFME**"), Associazione Intermediari Mercati Finanziari – ASSOSIM, the European Banking Federation ("**EBF**"), the European Federation of Energy Traders ("**EFET**"), ICI Global, the Investment Association and the Securities Industry and Financial Markets Association's Asset Management Group ("**SIFMA**") (together the "**Associations**") published an 'Industry Letter on Brexit – equivalence of UK derivatives trading venues under EMIR and MiFIR' (the "**Industry Letter**") to the European Commission Vice-President Valdis Dombrovskis on the equivalence of United Kingdom derivatives trading venues under EMIR and MiFIR.

The Associations welcome the European Commission's adoption of the temporary equivalence decisions with respect to United Kingdom's CCPs and central securities depositories and the measures to facilitate novations of derivatives transactions from the United Kingdom to the European Union 27 counterparties.

However, the Associations are still concerned about the disruptive impact on the European Union 27 market participants and European derivatives markets if the European Commission does not take urgent action with respect to the recognition of United Kingdom's derivatives trading venues under EMIR and MiFIR in a no-deal scenario. The Associations have noted their concerns in the Industry Letter, as the following:

- In the absence of a European Commission equivalence decision under EMIR with respect to the United Kingdom's regulated markets, United Kingdom's exchange-traded derivatives will be considered OTC derivatives under EMIR in the event of a no-deal Brexit. This would result in an adverse impact on non-financial counterparties ("**NFCs**") currently under the EMIR clearing threshold and financial counterparties ("**FCs**") with smaller positions in OTC derivatives;

- In the absence of a European Commission equivalence decision under MiFIR with respect to United Kingdom's multilateral trading facilities and organised trading facilities, European Union 27 FCs and NFCs would cease to be able to execute transactions in OTC derivatives in the event of a no-deal Brexit, subject to the trading obligation under MiFIR on those venues. This would result in European Union 27 firms not being able to access these United Kingdom's venues to service their clients or risk manage their own positions, and transactions between European Union 27 and United Kingdom's counterparties may be subject to conflicting requirements.

- There should be no obstacle to the European Commission making an equivalence determination with respect to United Kingdom's trading venues under EMIR and MiFIR. Under the European Union (Withdrawal) Act 2018, the regulatory requirements currently applicable to United Kingdom's trading venues will continue to apply in the event of a no-deal Brexit, with necessary modifications to reflect the United Kingdom's status outside the European Union; and

- The Associations urge the European Commission to prepare the necessary implementing acts with a view to them taking effect at or very shortly after the United Kingdom leaves the European Union without a deal and if necessary consider a temporary or limited equivalence decision.

A copy if the Industry Letter can be accessed here.

(x) ESMA announces recognition of UK CSD in event of no-deal Brexit

On 1 March 2019, ESMA released a press statement announcing that, in the event of a no-deal Brexit, the CSD established in the UK (Euroclear UK and Ireland Limited) will be recognised as a third country CSD to provide its services in the EU. The recognition decision would take effect on the date following the UK's withdrawal from the EU, under a "no-deal" scenario.

A copy of the press release can be accessed here.

(xi) ESMA sets out its approach to the application of some key MiFID II / MiFIR and Benchmark Regulation provisions under a no-deal Brexit

On 7 March 2019, ESMA published a statement on its approach to the application of some key MiFID II, MiFIR and Benchmark Regulation provisions should the United Kingdom leave the European Union under a "no-deal" Brexit. The statement sets out details on MiFID II and Benchmark Regulation aspects under a "no-deal" Brexit, such as:

- **The MiFID II "C(6) carve-out"** - the impact of derivative contracts based on electricity or natural gas produced, traded or delivered in the UK no longer being eligible for the carve-out as they will not fall within the "wholesale energy product" definition;

- **Trading obligation for derivatives** - ESMA recognises that the large majority of trading in derivatives subject to the trading obligation is concluded on UK trading venues. However, ESMA understands that most UK trading venues that offer trading in derivatives subject to the trading obligation are in the process of establishing new trading venues in the EU27 and plan to offer the same product portfolio in the EU27 as they are currently offering in the UK.

  In addition, there are already trading venues in the EU27 offering trading in derivatives subject to the trading obligation. As a result, ESMA does not have any evidence that market participants will not be able to continue meeting their obligations under the trading obligation for derivatives in the case of a no-deal Brexit and in the absence of an equivalence decision by the European Commission covering United Kingdom trading venues.However, ESMA will continue to closely monitor how liquidity develops post-Brexit;

- **ESMA opinions on post-trade transparency and position limits** - ESMA has not yet assessed any United Kingdom's trading venue against the criteria set out in its two opinions from 2017 on third-country trading venues in the context of MiFID II/MiFIR, but will do so on the request of EU 27 market participants with the need for assessment arising as trading venues established in the United Kingdom will be considered to be third country trading venues post-Brexit;

- **Post-trade transparency for OTC transactions between European Union investment firms and United Kingdom counterparties** - the obligations under Article 20 and 21 of MiFIR for investment firms established in the United Kingdom post-Brexit will no longer be European Union investment firms but fall within the category of counterparties established in a third country;

- **ESMA register of administrators and third-country benchmarks** - UK administrators included in the ESMA register will be deleted under the Benchmarks Regulation and the application of the BMR transitional period defined in Article 51 of the Benchmarks Regulation.

If the timing and conditions of Brexit change, ESMA may adjust its approach and will announce any such changes as soon as possible.

A copy of the statement can be accessed here.

(xii) FCA and PRA extend notification window for temporary permissions regime to 11 April 2019

On 25 March 2019, the FCA updated its webpage on the temporary permissions regime ("**TPR**") to announce an extension to the notification window for firms and funds wishing to enter into the TPR until the end of 11 April 2019. The extension to the original 28 March 2019 deadline for firms and funds who wish to enter the TPR regime comes in light of the European Council and United Kingdom Government's agreement to a short extension of the Article 50 process.

On 26 March 2019, the Prudential Regulation Authority ("**PRA**") also updated its webpage on the TPR to make a similar announcement. The FCA updated its TPR webpage with supplementary directions to provide guidance on how a firm can withdraw its notification and the PRA published an equivalent supplementary direction on withdrawals of notifications before exit day.

The updated FCA webpage is available here.

(xiii) European Commission adopts Delegated Regulations under EMIR in preparation for no-deal Brexit

On 28 March 2019, the following Commission Delegated Regulations under EMIR were adopted by the European Commission, in preparation for the possibility of a no-deal Brexit:

- Commission Delegated Regulation amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 supplementing EMIR as regards the date at which the clearing obligation takes effect for certain types of contracts. The Delegated Regulation amends each of the aforementioned Delegated Regulations to allow contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State. The Delegated Regulation can be accessed here; and

- Commission Delegated Regulation amending Delegated Regulation (EU) 2016/2251 supplementing EMIR as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a central counterparty. The Delegated Regulation modifies Article 35 of Delegated Regulation (EU) 2016/2251, allowing contracts with a counterparty established in the United Kingdom currently subject to risk-management procedures established prior to the relevant dates of application of that Regulation to be novated for a fixed period of 12

months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State. The Delegated Regulation can be accessed here.

The European Parliament and the Council of the European Union will now consider the new Delegated Regulations. Both Delegated Regulations will only enter into force in the event of a no-deal Brexit or if a decision is taken to extend the two year period referred to in Article 50(3) of the Treaty on European Union beyond 31 December 2019.

(xiv) Central Bank issues updated Brexit FAQ for consumers

During the period 1 January 2019 to 31 March 2019, the Central Bank issued updated Brexit related FAQ document providing general information to consumers on the potential implications of Brexit. The Central Bank's FAQ for consumers discusses a variety of topics including:

- The Central Bank's work in preparation for Brexit;
- The impact of Brexit on financial services firms providing services to Irish customers;
- The Central Bank's proposed approach to issues concerning Irish consumers who have insurance policies with UK insurers or brokers;
- The effects of Brexit on Irish banks; and
- The effects of Brexit on the Irish economy.

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

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

During the period 1 January 2019 to 31 March 2019, the Central Bank issued an updated Brexit related FAQ document providing general information to financial services firms considering relocating their operations from the UK to Ireland. The Central Bank's FAQ for financial services firms addresses a number of topics including:

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

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

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

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

(xvi) ESMA updates on its preparations for a possible no-deal Brexit scenario on 12 April

On 28 March 2019, ESMA published a statement to highlight that the previously published measures and actions issued on the basis of a no-deal Brexit scenario for the 29 March 2019, should be updated and that these statements should now be read as 12 April 2019.

A copy of the statement can be accessed here.

Dillon Eustace
31 March 2019

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