Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 January 2017 – 31 March 2017

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Table of Contents Page

Markets in Financial Instruments Directive ("MiFID") 2

Markets in Financial Instruments Directive II ("MiFID II") 2

Capital Requirements Directive ("CRD IV") 10

European Markets Infrastructure Regulation ("EMIR") 12

Securities Financing Transactions Regulation ("SFTR") 19

Packaged Retail Insurance-based Investment Products ("PRIIPs") 21

European Securities and Markets Authority ("ESMA") 22

International Organisation of Securities Commissions 25

The Joint Committee (ESMA, EIOPA and EBA) 25

European Commission 27

Central Bank of Ireland 32

Anti-Money Laundering ("AML")/Counter-Terrorist Financing ("CTF") 42

Data Protection 47

INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

Markets in Financial Instruments Directive ("**MiFID**")

(i) ESMA publishes follow-up report to peer review on best execution under MiFID

On 11 January 2017, ESMA published a follow-up report to its peer review on best execution under the Markets in Financial Instruments Directive (2004/39/EC) ("**MiFID**").

ESMA initially published the peer review report in February 2015. It found that the level of implementation of best execution provisions and the level of convergence in the supervisory practices by national competent authorities ("**NCAs**") was relatively low. In particular, it found that 15 NCAs were not applying or partly applying criteria considered essential for ensuring effective best execution under MiFID. These NCAs were based in Bulgaria, Cyprus, Denmark, Estonia, Greece, Hungary, Liechtenstein, Lithuania, Latvia, Malta, Poland, Romania, Sweden, Slovenia and Slovakia.

In September 2016, ESMA launched follow-up work to assess whether these 15 NCAs had taken steps to address the deficiencies identified in the peer review report.

In the follow-up report, ESMA concludes that there have been improvements in the level of attention paid by the NCAs to the supervision of best execution requirements, although a number of deficiencies have not yet been addressed. The report contains a detailed assessment of the follow-up actions taken by each NCA.

The full report is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma42-1643088512-2962_follow-up_best_execution_peer_review_report.pdf

Markets in Financial Instruments Directive II ("**MiFID II**")

(i) ESMA publishes responses to consultation on MiFID II guidelines on suitability of management bodies of market operators and data reporting services providers

On 10 January 2017, ESMA published on its website the responses it received to its consultation paper on the guidelines on the suitability of the management bodies of market operators and data reporting services providers ("**DRSPs**") under MiFID II.

ESMA published the consultation paper in October 2016.

The responses can be found at the following link:
https://www.esma.europa.eu/press-news/consultations/guidelines-management-body-market-operators-and-data-reporting-services

(ii) ESMA issues opinion on impact of exclusion of fund managers from scope of MiFIR intervention powers

On 12 January 2017, ESMA published an opinion (ESMA50-1215332076-23) on the impact of the exclusion of fund management companies from the scope of MiFIR intervention powers.

Articles 40 and 42 of MiFIR give ESMA and NCAs power to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments or shares in UCITS and Alternative Investment Funds ("**AIFs**") by MiFID firms.

Fund management companies may be given permission under AIFMD or the UCITS IV Directive to carry out certain MiFID services and activities in relation to all MiFID financial instruments. Accordingly, if a restriction were applied to MiFID firms in relation to these activities, that restriction, unless allowed under national law, could not be applied to fund management companies carrying out those activities for the same reasons as for the marketing of UCITS and AIFs.

ESMA is concerned about the potential for regulatory arbitrage and believes that the EU institutions should address this issue. It believes that NCAs and ESMA should have power to apply restrictions to fund management companies.

The full opinion is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma50-1215332076-23_opinion_mifir_intervention_powers.pdf

(iii) ESMA publishes briefing on MiFID II technical data reporting requirements

On 13 January 2017, ESMA published a briefing paper (dated 12 January 2017) summarising technical data reporting requirements under MiFIR.

ESMA refers to the technical requirements and templates for data reporting, which it published in October 2016, and indicates the following dates for the start of data collection:

- By July 2017: ESMA plans to start the collection of instrument reference data (Article 4 of the Market Abuse Regulation (Regulation 596/2014) ("**MAR**") and Article 27 of MiFIR);
- By September 2017: ESMA plans to start the collection of data for transparency and double volume cap calculations (Article 22 of MiFIR); and
- By 3 January 2018: national competent authorities ("**NCAs**") plan to start the collection of transaction data (Article 26 of MiFIR).

The full briefing is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma00-6-265_note_on_mifid_reporting_0.pdf

(iv) ESMA publishes responses to ESMA consultation on MiFID II guidelines on product governance requirements

On 17 January 2017, ESMA published the responses it received to its consultation paper on product governance requirements under the MiFID II Directive (2014/65/EU).

Respondents included:

- Alternative Investment Management Association and Managed Funds Association;
- Association of Investment Companies;
- British Bankers' Association;
- European Association of Co-operative Banks;
- European Banking Federation;
- European Fund and Asset Management Association;
- European Savings and Retail Banking Group;
- International Capital Market Association;
- Investment Association;
- Securities and Markets Stakeholder Group; and
- Wealth Management Association.

ESMA published the consultation paper in October 2016. When it consulted on the guidelines, ESMA said that it would consider the feedback to the consultation during the first quarter of 2017 and expects to publish a final report in the first half of 2017. The guidelines will apply from 3 January 2018.

The responses can be found at the following link:

https://www.esma.europa.eu/press-news/consultations/draft-guidelines-mifid-ii-product-governance-requirements

(v) ESMA updates MiFID II Q&As on transparency and market structure

On 31 January 2017, ESMA updated two Q&A documents in relation to transparency and market structure requirements as per the MiFID II Directive and MiFIR.

The document relating to transparency has been updated with four additional questions in relation to the systematic internaliser ("**SI**") process as follows:

- The level at which the firm must perform the calculation where it is part of a group or operates EU branches;

- Which transactions should be exempted from, and included in, the calculation;

- At which level of asset class the calculation should be performed for derivatives, bonds and structured finance products; and

- How SIs in non-equity instruments can comply with some of their quoting obligations.

The document relating to market structure has been updated with three additional questions as follows:

- When a multinational trading facility ("**MTF**") operator can also be a member of its own MTF;

- The trading venues locating electronic systems on a third party data centre must comply with the co-location provisions; and

- How the reference to market makers should be understood under Article 2(1)(d) of MiFID II, where provision for the exemption from the obligation to be authorised as an investment firm.

The rationale of ESMA's Q&As is to provide common approaches and methods in the application of the MiFID II Directive and MiFIR from a supervisory perspective together with the related implementation requirements.

The updates on the transparency Q&As can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/mifid_ii_mifir_qa_on_transparency_topics.pdf

The updates on the market structures Q&As can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/mifid_ii_mifir_qa_on_market_structures_topics.pdf

(vi) ESMA updates MiFIR data reporting Q&As

On 2 February 2017, ESMA published an updated version of its Q&As on data reporting in relation to MiFIR. New Q&As have been added to the following:

- Section 3: date and time of the request of admission;

- Section 4: instrument identification code and underlying instrument code;

- Section 5: maturity date;

- Section 6: classification of financial instruments ("**CFI**") and financial instrument short name ("**FISN**");

- Section 7: request for admission to trading by issuer; and
- Section 8: base point spread of the index/benchmark of a floating rate bond.

The updated Q&As can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-56_qas_mifir_data_reporting.pdf

(vii) ESMA publishes draft ITS on position reporting under MiFID II

On 10 February 2017, ESMA published revised draft implementing technical standards ("**ITS**") on position reporting under the MiFID II Directive.

ESMA originally published the draft ITS in December 2015. Subsequently, ESMA has identified, in the course of the practical implementation of the regime, a number of technical amendments that it deems necessary for the correct functioning of the position reporting of commodity derivatives.

The changes are highlighted in the revised version of the ITS, which ESMA has sent to the European Commission for consideration.

The draft ITS can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-3_final_report_-_draft_its_4.pdf

(viii) ESMA publishes final report and Commission Delegated Regulation containing final draft RTS on package orders under MiFID II

On 28 February 2017, ESMA published a final report (ESMA70-872942901-21) on final draft regulatory technical standards ("**RTS**") on the treatment of package orders under Article 9(6) of the Markets in Financial Instruments Regulation (Regulation 600/2014) ("**MiFIR**"). Alongside the final report, ESMA published a draft Commission Delegated Regulation supplementing MiFIR with regard to package orders. The draft Delegated Regulation is based on ESMA's final draft RTS.

ESMA submitted the final report and final draft RTS to the European Commission on 27 February 2017. The European Commission has three months to decide whether to endorse the draft RTS.

ESMA's final report is available here:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-21_final_report_package_orders.pdf

(ix) ESMA publishes final report on RTS on scope of non-equity consolidated tape under MiFID II

On 31 March 2017, ESMA published its final report on revised draft RTS specifying the scope of the consolidated tape (CT) for non-equity financial instruments under Article 65(8)(c) of the MiFID II Directive.

The draft RTS have been submitted to the European Commission for endorsement. The European Commission has three months from date of submission, 31 March 2017, to decide whether it is going to endorse the draft RTS.

ESMA's final report is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-40_rts_net_final_report.pdf

(x) MiFID II delegated acts published in the Official Journal of the EU

On 31 March 2017, 28 Commission Delegated Regulations supplementing the MiFID II Directive and MiFIR were published in the Official Journal of the EU.

The Commission Delegated Regulations will enter into force 20 days after their publication in the Official Journal of the EU (that is, 20 April 2017) and, for the most part, will apply from 3 January 2018.

The Commission Delegated Regulations are:

1. Commission Delegated Regulation (EU) 2017/565 of April 25, 2016, supplementing MiFID II with regard to organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive;

2. Commission Delegated Regulation (EU) 2017/566 of May 18, 2016, supplementing MiFID II with regard to regulatory technical standards ("**RTS**") for the ratio of unexecuted orders to transactions in order to prevent disorderly trading conditions;

3. Commission Delegated Regulation (EU) 2017/567 of May 18, 2016, supplementing MiFIR with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions;

4. Commission Delegated Regulation (EU) 2017/568 of May 24, 2016, supplementing MiFID II with regard to RTS for the admission of financial instruments to trading on regulated markets;

5. Commission Delegated Regulation (EU) 2017/569 of May 24, 2016, supplementing MiFID II with regard to RTS for the suspension and removal of financial instruments from trading;

6. Commission Delegated Regulation (EU) 2017/570 of May 26, 2016, supplementing MiFID II on markets in financial instruments with regard to RTS for the determination of a material market in terms of liquidity in relation to notifications of a temporary halt in trading;

7. Commission Delegated Regulation (EU) 2017/571 of June 2, 2016, supplementing MiFID II with regard to RTS on the authorization, organizational requirements and the publication of transactions for data reporting services providers;

8. Commission Delegated Regulation (EU) 2017/572 of June 2, 2016, supplementing MiFIR with regard to RTS on the specification of the offering of pre- and post-trade data and the level of disaggregation of data;

9. Commission Delegated Regulation (EU) 2017/573 of June 6, 2016, supplementing MiFID II on markets in financial instruments with regard to RTS on requirements to ensure fair and nondiscriminatory co-location services and fee structures;

10. Commission Delegated Regulation (EU) 2017/574 of June 7, 2016, supplementing MiFID II with regard to RTS for the level of accuracy of business clocks;

11. Commission Delegated Regulation (EU) 2017/575 of June 8, 2016, supplementing MiFID II on markets in financial instruments with regard to RTS concerning the data to be published by execution venues on the quality of execution of transactions;

12. Commission Delegated Regulation (EU) 2017/576 of June 8, 2016, supplementing MiFID II with regard to RTS for the annual publication by investment firms of information on the identity of execution venues and on the quality of execution;

13. Commission Delegated Regulation (EU) 2017/577 of June 13, 2016, supplementing MiFIR on markets in financial instruments with regard to RTS on the volume cap mechanism and the provision of information for the purposes of transparency and other calculations;

14. Commission Delegated Regulation (EU) 2017/578 of June 13, 2016, supplementing MiFID II on markets in financial instruments with regard to RTS specifying the requirements on market making agreements and schemes;

15. Commission Delegated Regulation (EU) 2017/579 of June 13, 2016, supplementing MiFIR on markets in financial instruments with regard to RTS on the direct, substantial and foreseeable effect of derivative contracts within the Union and the prevention of the evasion of rules and obligations;

16. Commission Delegated Regulation (EU) 2017/580 of June 24, 2016, supplementing MiFIR with regard to RTS for the maintenance of relevant data relating to orders in financial instruments;

17. Commission Delegated Regulation (EU) 2017/581 of June 24, 2016, supplementing MiFIR with regard to RTS on clearing access in respect of trading venues and central counterparties;

18. Commission Delegated Regulation (EU) 2017/582 of June 29, 2016, supplementing MiFIR with regard to RTS specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing;

19. Commission Delegated Regulation (EU) 2017/583 of July 14, 2016, supplementing MiFIR on markets in financial instruments with regard to RTS on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives;

20. Commission Delegated Regulation (EU) 2017/584 of July 14, 2016, supplementing MiFID II with regard to RTS specifying organisational requirements of trading venues;

21. Commission Delegated Regulation (EU) 2017/585 of July 14, 2016, supplementing MiFIR with regard to RTS for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by ESMA and competent authorities;

22. Commission Delegated Regulation (EU) 2017/586 of July 14, 2016, supplementing MiFID II with regard to RTS for the exchange of information between competent authorities when cooperating in supervisory activities, on-the-spot verifications, and investigations;

23. Commission Delegated Regulation (EU) 2017/587 of July 14, 2016, supplementing MiFIR on markets in financial instruments with regard to RTS on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internalizer;

24. Commission Delegated Regulation (EU) 2017/588 of July 14, 2016, supplementing MiFID II with regard to RTS on the tick size regime for shares, depositary receipts, and exchange-traded funds;

25. Commission Delegated Regulation (EU) 2017/589 of July 19, 2016, supplementing MiFID II with regard to RTS specifying the organizational requirements of investment firms engaged in algorithmic trading;

26. Commission Delegated Regulation (EU) 2017/590 of July 28, 2016, supplementing MiFIR with regard to RTS for the reporting of transactions to competent authorities;

27. Commission Delegated Regulation (EU) 2017/591 of December 1, 2016, supplementing MiFID II with regard to RTS for the application of position limits to commodity derivatives; and

28. Commission Delegated Regulation (EU) 2017/592 of December 1, 2016, supplementing MiFID II with regard to RTS for the criteria to establish when an activity is considered to be ancillary to the main business.

Capital Requirements Directive ("CRD IV")

(i) Commission Delegated Regulation on RTS on data waiver permissions under CRR published in the Official Journal of the EU

On 14 January 2017, Commission Delegated Regulation (EU) 2017/72 supplementing the Capital Requirements Regulation (Regulation 575/2013) ("**CRR**") with regard to regulatory technical standards ("**RTS**") specifying conditions for data waiver permissions was published in the Official Journal of the EU.

The European Commission adopted the Delegated Regulation in September 2016. The Delegated Regulation came into force on 3 February 2017.

The Delegated Regulation can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0072&from=EN

(ii) SMSG publishes advice on Joint ESMA EBA guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders

On 3 February 2017, the Securities and Markets Stakeholders Group ("**SMSG**") published their advice issued to ESMA in relation to the new requirements which have been introduced by the CRD IV and MiFID II on the assessment of suitability of members of the management body by financial institutions and competition authorities.

The SMSG welcome the new requirements which will aid in the addressing of weaknesses in corporate governance at financial institutions. The SMSG note that the requirements will ensure that decisions taken by the Management Bodies of financial institutions are intended to be in the long-term interests of the institution, its shareholders and stakeholders, together with the financial sector and economy as a whole.

Together with the above, the SMSG has included answers to specific questions outlined in the consultation paper in the advice paper which is available at the below link:

https://www.esma.europa.eu/sites/default/files/library/smsg-advice_on_suitability_and_kfh.pdf

(iii) Commission Delegated Regulation on RTS on benchmarking portfolio assessment standards under CRD IV published in the Official Journal of the EU

On 3 February 2017, the Commission Delegated Regulation (EU) 2017/180 which relates to regulatory technical standards ("**RTS**") on benchmarking portfolio assessment standards and assessment sharing procedures under the CRD IV Directive (2013/36/EU) was published in the Official Journal of the EU.

The European Commission adopted the Commission Delegated Regulation in October 2016 and it took effect on 23 February 2017.

The Commission Delegated Regulation is available at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0180&from=EN

(iv) Commission Delegated Regulation on RTS on additional collateral outflows under CRR published in Official Journal of the EU

On 8 February 2017, Commission Delegated Regulation (EU) 2017/208 supplementing the CRR in relation to regulatory technical standards ("**RTS**") for additional liquidity outflows corresponding to collateral needs resulting from the impact of an adverse market scenario on an institution's derivatives transactions was published in the Official Journal of the EU.

The Commission Delegated Regulation was adopted by the European Commission in October 2016 and came into force on 28 February 2017.

The Delegated Regulation is available at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0208&from=EN

(v) EBA launches consultation on draft RTS under CRR on the specification of the nature, severity and duration of an economic downturn

On 1 March 2017, a consultation paper was published by EBA on draft regulatory standards ("**RTS**") under the CRR on the specification of the nature, severity and duration of an economic downturn.

The consultation closes to comments on 29 May 2017. Following its closure, the EBA will examine the responses it received and produce a final draft RTS that will be submitted to the European Commission for endorsement.

The full consultation paper can be found at the following link:

http://www.eba.europa.eu/documents/10180/1768419/Consultation+Paper+on+draft+RTS+on+the+specification+of+the+nature%2C%20severity+and+duration+of+an+economic+downturn+%28EBA-CP-2017-02%29.pdf

(vi) Commission Implementing Regulation laying down Implementing Technical Standards under CRD IV Directive published in Official Journal of the EU

On 17 March 2017, Commission Implementing Regulation (the "**Implementing Regulation**") (EU) 2017/461) laying down implementing technical standards ("**ITS**") with regard to common procedures, forms and templates for the consultation process between relevant competent authorities for proposed transactions of qualifying holdings in credit

institutions, as referred to in Article 24 of the CRD IV Directive (2013/36/EU), was published in the Official Journal of the EU.

Under Article 24 of the CRD IV Directive, relevant competent authorities must fully consult one another when carrying out the assessment relating to proposed transactions and increases of qualifying holdings in credit institutions.

The Implementing Regulation entered into force on 6 April 2017.

Provisions of the Acquisitions Directive (2007/44/EC) relating to proposed acquisitions and increases of qualifying holdings in credit institutions were incorporated into the CRD IV Directive.

The Implementing Regulation can be found at:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0461&from=EN

European Markets Infrastructure Regulation ("EMIR")

(i) EBA and ESMA report on interaction of CRR with EMIR

On 18 January 2017, EBA and ESMA published a report (the "**Report**") on the functioning of the Capital Requirements Regulation (Regulation 575/2013) ("**CRR**") with EMIR (the Regulation on OTC derivative transactions, central counterparties ("**CCPs**") and trade repositories (Regulation 648/2012).

In the Report, EBA and ESMA analyse requirements in CRR and EMIR that are potentially duplicative. In particular, the Report focuses on the duplicative requirement which applies to firms authorised as a credit institution and that operate as CCP's. The Report notes that, at present, only three EU credit institutions are also licensed as CCPs.

The Report makes certain recommendations including:

- The treatment of CRR capital requirements for exposures already covered by specific financial resources in compliance with EMIR should be clarified;

- CCPs holding a banking licence should be exempted from certain CRR requirements concerning credit risk, counterparty credit risk and market risk for exposures that are already covered by financial resources under EMIR. These entities should also be exempt from requirements in Articles 300 to 309 of the CRR concerning exposures to CCPs with which an interoperability arrangement has been established in compliance with EMIR; and

- Article 305 of the CRR, which regulates the treatment of clients' exposures to the clearing members, should be clarified to allow a consistent application of EMIR and CRR requirements related to clients' accounts and to improve the requirements around

the production of legal opinions, as well as to avoid unnecessary capital requirements for clients' exposures to CCPs.

The Report can be viewed at the following link:

http://www.eba.europa.eu/documents/10180/1720738/Report+on+the+interaction+with+EMIR+%28ESAS-2017-82+%29.pdf

(ii) Delegated and Implementing Regulations on technical standards on EMIR reporting requirement

On 21 January 2017, the following regulations relating to technical standards on data reporting under Article 9 of EMIR were published in the Official Journal of the EU:

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

  The European Commission adopted the Delegated Regulation, which relates to Article 9(5) of EMIR, on 19 October 2016.

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

The Delegated Regulation and the Implementing Regulation entered into force on 10 February 2017. They will apply from 1 November 2017, with the exception of Article 1(5) of the Implementing Regulation, which will apply from 10 February 2017.

The Delegated Regulation can be viewed at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0104&from=EN

The Implementing Regulation can be viewed at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0105&from=EN

(iii) ESMA consults on guidelines on transfer of data between trade repositories

On 30 January 2017, ESMA published a consultation paper in relation to guidelines (the "**Guidelines**") in respect of the transferring of data between trade repositories ("**TRs**") under EMIR.

The Guidelines as referred to, will relate to counterparties to derivatives and CCPs who are required to report derivatives under EMIR, together with TRs registered and recognised by ESMA. The Guidelines provide further information on the following:

- The reporting without duplication of derivatives by counterparties and CCPs as per Article 9(1) of EMIR;
- The transfer of derivatives data between TRs at the request of the counterparties to a derivative, or the entity reporting on their behalf, or in the situation as covered by Article 79(3) of EMIR;
- The recording of data of derivatives under Article 80(3) of EMIR.

The Guidelines establish high level principles that would need to be followed by TR participants, reporting entities, counterparties, CCP's and TR's.

The consultation closed on 31 March 2017 and ESMA is expected to publish final guidelines later in 2017.

ESMA's consultation paper can be viewed at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-708036281-17_cp_on_guidelines_on_tr_portability.pdf

(iv) Commission receives advices from ESMA in relation to EMIR review and sanctioning powers under EMIR and CRA Regulation

On 30 January 2017, ESMA published a letter dated 27 January 2017 sent to the European Commission to ask it to consider a number of issues relating to its supervisory and sanctioning powers under EMIR. This request is in the context of the ongoing review of EMIR launched in 2015 by the European Commission.

The letter may be viewed at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-708036281-19_letter_to_com_-_emir_review_and_sanctioning_powers.pdf

(v) 2017 EU-wide CCPs stress test launched by ESMA

On 1 February 2017, ESMA published its framework in relation to the stress testing which is to be carried out on CCPs over the course of 2017.

The framework outlines how the new stress test exercises will work and the manner in which the stress testing will be carried out. ESMA has made a number of changes to the 2017 framework in light of the stress testing which was carried out in 2016 whereby changes were identified.

CCPs currently carry out their own daily stress testing which focus on their individual environments; however ESMA's stress tests will serve to broaden the risk profile that is included in the tests as it will take into account the entire EU CCPs system. The ability of the CCPs to perform will be tested in line with a combination of multiple participant defaults and simultaneous market price shocks.

ESMA has submitted the data request to all EU CCPs and has issued instructions on how the CCPs are expected to calculate the data required which will be used in the stress testing process. ESMA envisages finalising the data analysis by the third quarter of 2017 and publishing the results stemming from the analysis in the fourth quarter of 2017.

This stress testing plan is beneficial as it will identify where the CCPs require attention in terms of any potential short comings but will also provide information on where and how CCPs are prepared in an event of market shock. If, following the stress testing, particular areas prove concerning, ESMA will provide recommendations on how to correct such issues.

Further information is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-708036281-51_public_framework_2017_ccp_stress_test_exercise.pdf

(vi) ESMA updates Q&A on EMIR implementation

On 2 February 2017, ESMA published an updated version of its Q&A on the implementation of EMIR.

The updated Q&A includes a new answer in relation to transition to the revised technical standards on reporting which will become applicable on 1 November 2017. The Q&A clarifies that the reporting entities are not obliged to update all the outstanding trades upon the application date of the revised technical standards and they are required to submit the reports related to the old outstanding trades when a reportable event takes place (e.g. when a trade is modified).

The purpose of the Q&A is to promote common supervisory approaches and practices in the application of EMIR.

The updated Q&A is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf

(vii) Limited reprieve from EMIR 1 March 2017 variation margin deadline

On 23 February 2017, the European Supervisory Authorities ("**ESAs**") issued a press release indicating its expectation that national EU regulators would show temporary forbearance in enforcing EMIR's variation margin provisions, on a case by case basis.

While this statement by the ESAs does not have the effect of amending the EMIR legislation, it would be expected to result in a temporary reprieve from enforcement action at a national level due to non-compliance with the variation margin rules. That is, assuming the relevant EU regulator considers this to be appropriate in light of the size of the exposure to the counterparty and the counterparty's default risk. The ESAs' statement also sets out that "participants must document the steps taken toward full compliance and put in place alternative arrangements to ensure that the risk of non-compliance is contained, such as using existing Credit Support Annexes to exchange variation margins." It would appear from this that counterparties who already have CSAs in place must take demonstrable steps to exchange variation margin under such CSAs from March 1 (even if not compliant with the EMIR requirements) whereas counterparties without such CSAs would not be expected to do so. It is not clear what "alternative arrangements" the ESAs expect counterparties without existing credit support documentation to put in place.

The statement goes on to say that "this approach does not entail a general forbearance, but a case-by-case assessment from the [national regulators] on the degree of compliance and progress" with the expectation that "the difficulties will be solved in the coming few months and that transactions concluded on or after 1 March 2017 remain subject to the obligation to exchange variation margin."

While this temporary reprieve will be welcomed by many, counterparties should take note of its limited and qualified nature.

Further information in relation to this is available at the following link:

https://www.eba.europa.eu/documents/10180/1762986/ESAs+Communication+on+Industry+Request+on+Forbearance+Variation+Margin+Implementation.pdf

(viii) Responses to ESMA consultation on draft RTS on data to be made publicly available by trade repositories under EMIR

On 23 February 2017, ESMA published a webpage detailing the responses it has received to its consultation paper on draft regulatory technical standards ("**RTS**") on data to be made publicly available by trade repositories ("**TRs**") under Article 81 of EMIR. ESMA published the consultation paper in December 2016.

Further information is available at the following webpage:

https://www.esma.europa.eu/press-news/consultations/consultation-draft-technical-standards-data-be-made-publicly-available-trs

(ix) Central Bank updates Q&A on EMIR in relation to variation margin rule

On 27 February 2017, the Central Bank updated its Q&A in relation to EMIR to include the following question and answer:

Question:
I cannot comply with the 1st March 2017 deadline for exchange of variation margin for reasons outside of my control. What should I do?

Answer:
It is a legal obligation to exchange variation margin from the 1st March 2017. However, it has been recognised by authorities across the EU and by IOSCO that there are operational challenges in meeting this deadline.

The Central Bank applies a risk-based approach to the supervision of the adequacy of processes adopted by entities. All counterparties are expected to make every effort to move into full compliance at the earliest possible date.

While the Central Bank does not expect market participants to unwind or avoid transactions that they would have otherwise entered into, it does expect to see evidence of robust planning to achieve compliance at the earliest possible time for all in-scope transactions entered into from 1 March 2017.

(x) European Commission adopts Delegated Regulation on list of exempted entities under EMIR

On 2 March 2017, the European Commission adopted a Delegated Regulation (the "**Delegated Regulation**") in relation to the list of exempted entities report.

The European Commission has concluded that central banks and public bodies charged with or intervening in the management of the public debt from Australia, Canada, Hong Kong, Mexico, Singapore and Switzerland should be exempted from the clearing and reporting requirements set out in EMIR. Article 1 of the Delegated Regulation therefore amends article 1(4)(c) of EMIR to add the central banks and public bodies of these jurisdictions to the list of exempted entities under EMIR.

The Delegated Regulation will enter into force twenty days after it has been published in the Official Journal of the EU.

The Delegated Regulation may be viewed at the following link:

http://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1324-F1-EN-MAIN-PART-1.PDF

(xi) ESMA signs MoUs with non-EU regulators under EMIR

On 20 March 2017, a press release was published by ESMA announcing a number of memoranda of understanding ("**MoUs**") that it had entered into under EMIR, which are as follows:

- Brazil (with the Banco Central de Brasil and the Comissao de Valores Mobiliarios);

- Japan (with the Ministry of Agriculture, Forestry and Fisheries and the Ministry of Economy, Trade and Industry;
- India (with the Reserve Bank of India);
- Dubai (with the Dubai Financial Services Authority for the Dubai International Financial Center); and
- United Arab Emirates (with the Securities and Commodities Authority).

These MoUs establish co-operation agreements, including the exchange of information for CCPs established and authorised or recognised in Brazil, Japan, India, the Dubai International Financial Centre or the United Arab Emirates and which have applied for EU recognition under EMIR.

The full press release can be found at the following link:

https://www.esma.europa.eu/press-news/esma-news/esma-cooperate-non-eu-regulators-ccps

(xii) ESMA updates list of recognised third-country CCPs

On 30 March 2017, ESMA updated its list of recognised CCPs based in third countries.

Under the EMIR regime, third country CCPs must be recognised by ESMA in order to operate in the European Union.

The CCPs which were recognised are as follows:

- Dubai Commodities Clearing Corporation;
- Clearing Corporation of India Ltd;
- Nasdaq Dubai Ltd;
- Japan Commodity Clearing House Co. Ltd;
- BM&FBovespa S.A., Brazil; and
- Nodal Clearing LLC, USA.

A full list of CCPs recognised to offer services and activities in the European Union may be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf

(xiii) Delegated Regulation further extending temporary clearing exception for PSAs under EMIR published in the Official Journal of the European Union

On 31 March 2017, Commission Delegated Regulation (EU) 2017/610 amending as regards the extension of the transitional periods related to pension scheme arrangements ("**PSAs**") was published in the Official Journal of the EU. The exemption for PSA's will run until August 2018.

The European Commission adopted the Delegated Regulation on 20 December 2016. The Council of the EU announced its decision not to object to the Delegated Regulation on 23 February 2017.

The Delegated Regulation entered into force on 1 April 2017.

The Delegated Regulation is available at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0610&from=EN

Securities Financing Transactions Regulation ("SFTR")

(i) Responses to ESMA consultation on supervision fees for trade repositories under SFTR and EMIR

On 14 February 2017, ESMA published a webpage containing the responses it has received to its consultation on draft technical advice to the European Commission in relation to fees for trade repositories under the Regulation on reporting and transparency of securities financing transactions ("**SFTR**"). Amendments to the fees under EMIR were also referred to in the webpage.

The consultation to which the responses relate was originally published by ESMA in December 2016.

The responses may be accessed at the following link:

https://www.esma.europa.eu/press-news/consultations/technical-advice-commission-fees-trs-under-sftr-and-certain-amendments-fees

(ii) ESMA publishes Report on Technical Standards under SFTR and Certain Amendments to EMIR

On 31 March 2017, ESMA issued a final report on the draft regulatory technical standards implementing SFTR, which aims to increase the transparency of securities financing transactions ("**SFTs**") (the "**Report**").

The SFTR will require both financial and non-financial market participants to report details of their SFTs to an approved EU trade repository ("**TRs**"). These details will include the

relevant terms of the repo, stock or margin loan, the composition of the collateral, whether the collateral is available for reuse or has been reused, the substitution of collateral at the end of the day and the haircuts applied.

The Report provides detailed provisions on:

- **SFT reporting** – including the use of ISO 20022 methodology for reporting, validation and access to data;

- **Data collection and availability** – the use of standardised identifies such as LEI, UTI and ISIN which should improve data quality and aggregation across TRs;

- **Defined access levels** for different public authorities;

- **Registration and extension of registration of TRs** – **detailed requirements on:**

    - verification of completeness and correctness of reports;
    - data availability and integrity ;
    - operational separation;
    - ancillary services;
    - outsourcing;
    - IT resources; and

- **Exchanges of data on sanctions between authorities.**

The reporting standards for SFTs has been built on ESMA's experience with EMIR and other EU-wide reporting regimes in order to align reporting standards to the maximum extent possible.

In addition to the SFTR, ESMA is proposing certain amendments to the existing standards implementing EMIR. These amendments are to ensure a level-playing field for market participants with regard to registration and access rules.

ESMA has sent the Report and the amended technical standards under EMIR to the European Commission, which has now three months to decide whether or not to endorse them.

The SFTR implementing measures are expected to enter into force by the end of 2017. Firms would have to start reporting their SFTs to TRs twelve months after the publication in the Official Journal of the European Union. The reporting obligation itself will be phased-in over nine months.

The Report is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-708036281-82_2017_sftr_final_report_and_cba.pdf

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

(i) Amended Delegated Regulation adopted by European Commission in respect of PRIIPS KID

On 8 March 2017, the European Commission adopted a Commission Delegated Regulation, including Annexes ("**PRIIPs RTS**"), supplementing the Regulation on key information documents ("**KIDs**") for packaged retail and insurance-based investment products ("**PRIIPs Regulation**").

The recently adopted PRIIPs RTS are a revised version of the respective delegated regulation adopted by the European Commission in June 2016 and aims to address the concerns expressed by the European Parliament in September 2016. Key amendments to the PRIIPs RTS are as follows:

- Clarification in relation to the treatment of multi-option products ("**MOPs**") which have UCITS or non-UCITS funds as underlying investment options, according to which a PRIIP manufacturer can use the key investor information document ("**KIID**") prepared in accordance with the UCITS Directive to comply with the PRIIPs KID disclosure requirements until 31 December 2019;

- The alignment of the comprehension alert with complex products under MiFID II; and

- An amendment to the performance scenarios where the option to provide a fourth scenario has been replaced by a mandatory requirement to add a stress scenario.

The European Parliament and the European Council have a period of three months to review the PRIIPs RTS. If no objections are raised, the PRIIPs RTS will become applicable twenty days following publication in the Official Journal of the EU. The PRIIPs RTS will apply from 1 January 2018. The European Supervisory Authorities ("**ESAs**") are expected to publish a Q&A to supplement the PRIIPs RTS later in 2017.

The amended PRIIPs RTS may be viewed at the following link:

http://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1473-F1-EN-MAIN-PART-1.PDF

European Securities and Markets Authority ("ESMA")

(i) ESMA launches new Q&A tool

ESMA's new webpage to support its new Q&A tool has been live since 9 February 2017. It is envisaged that the tool will provide a mechanism for ESMA to collect and address questions from stakeholders on a public forum.

Questions may be wide ranging, relating to the application of legislation under the remit of ESMA of any of the guidelines or opinions issued by ESMA.

The webpage contains an overview of all the Q&As developed by ESMA per legislative act and sets out instructions on submitting questions to ESMA. In addition to the above, ESMA has also published a separate guide in relation to the submission of questions best practice.

ESMA's new webpage is available at:

https://www.esma.europa.eu/questions-and-answers

(ii) ESMA supervisory convergence work programme for 2017

On 9 February 2017, ESMA published its 2017 supervisory convergence work programme ("**SCWP**").

The 2017 SCWP is ESMA's second consecutive annual work programme on supervisory convergence, in line with its 2016-2020 strategic orientation. The priority areas identified by ESMA for 2017 are:

- Ensuring the sound, efficient and consistent implementation of key new EU legislation by preparing for the MiFID II Directive (2014/65/EU) ("**MiFID II**") and the Markets in Financial Instruments Regulation (Regulation 600/2014) ("**MiFIR**") and applying the Market Abuse Regulation (Regulation 596/2014) ("**MAR**") including the finalisation of the underlying IT infrastructure;

- Improving data quality through focusing on the efforts of national competent authorities ("**NCAs**") to prepare for and enforce compliance with the various reporting requirements under EU legislation such as MiFID II and MiFIR, EMIR and AIFMD;

- Ensuring adequate investor protection in the context of cross-border provision of services; and

- Ensuring effective convergence in the supervision of EU central counterparties.

ESMA will monitor the implementation of the 2017 SCWP, and the priorities may be readjusted depending on developments during 2017. ESMA will also ensure more

systematic monitoring of compliance by NCAs with guidelines and peer review recommendations, and will provide remediation as required.

The SCWP is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma42-397158525-448_supervisory_convergence_work_programme_2017_0.pdf

(iii) ESMA final draft technical standards under Benchmarks Regulation

On 30 March 2017, ESMA published a final report containing the final draft regulatory technical standards ("**RTS**") and implementing technical standards ("**ITS**") required under the Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ((EU) 2016/1011) ("**Benchmarks Regulation**").

The report sets out policy decisions and the final text of 11 sets of RTS and ITS required under the Benchmarks Regulation. Such technical standards are referred to as follows:

- Procedures, characteristics and positioning of the oversight function (Article 5(5), Benchmarks Regulation);
- Appropriateness and verifiability of input data (Article 11(5), Benchmarks Regulation);
- Transparency of methodology (Article 13(3), Benchmarks Regulation);
- Specification of elements of the code of conduct of contributors (Article 15(6), Benchmarks Regulation);
- Governance and control requirements for supervised contributors (Article 16(5), Benchmarks Regulation);
- Compliance statements for significant and non-significant benchmarks (Articles 25(8) and 26(5), Benchmarks Regulation);
- Specification of qualitative criteria for significant benchmarks (Article 25(9), Benchmarks Regulation);
- Content of benchmark statements (Article 27(3), Benchmarks Regulation);
- Information to be provided in applications for authorisation and registration (Article 34(8), Benchmarks Regulation);
- Form and content for the application for recognition by third-country administrators (Article 32(9), Benchmarks Regulation); and

- Procedures and forms for exchange of information between competent authorities and ESMA (Article 47(3), Benchmarks Regulation).

The draft RTS and ITS have been submitted by ESMA to the European Commission who have three months to decide whether or not to endorse them. ESMA has previously consulted on the majority of these technical standards in September 2016.

The final report which contains the technical standards is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma70-145-48_-_final_report_ts_bmr.pdf

(iv) ESMA updates Q&A on CFDs and other speculative products

On 31 March 2017, ESMA published an updated version of its Q&A on the application of the Markets in Financial Instruments Directive (2004/39/EC) ("**MiFID**") to the marketing and sale of financial contracts for difference ("**CFDs**") and other speculative products (such as binary options and rolling spot forex) to retail clients.

The Q&A includes six new questions and answers in a new section 10, which provide clarity on the following:

- Passporting and the cross-border provision of services by investment firms offering CFDs and other speculative products to retail clients outside the home Member State without the establishment of a branch or tied agent;

- Assessment of the use of third parties by investment firms to acquire retail clients; and

- Examples of poor practice observed by national competent authorities regarding the use of third parties by investment firms offering CFDs and other speculative products to acquire retail clients on a cross-border basis.

Together with the updated Q&A, ESMA notes that it will also examine whether further work is required in light of the MiFID II requirements that will enter into force in 2018, such as noted in an accompanying press release issued by ESMA.

The updated Q&A is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/esma35-36-794_qa_on_cfds_and_other_speculative_products_mifid.pdf

ESMA's press release in relation to the potential further work required in light of MiFID II is available at the following link:

https://www.esma.europa.eu/press-news/esma-news/esma-publishes-updated-qa-cfds-and-other-speculative-products-2

International Organisation of Securities Commissions

(i) IOSCO final report on loan funds survey

On 20 February 2017, the International Organisation of Securities Commissions ("**IOSCO**") published its final report setting out its findings following a survey on loan funds.

In December 2015, IOSCO launched a questionnaire in order gather information from the members of its Committee on Investment Management on existing practices and experience in relation to loan funds in the area of investment funds. The report explains that there are loan originating funds and loan participating funds. These include open-ended funds and closed-ended funds, and are marketed to retail and professional investors.

Twenty-four jurisdictions participated in the survey. Based on the results of the survey, the report identifies the current position in each jurisdiction and explains how the markets have evolved. It also explains how regulators are addressing the risks associated with funds. These relate to:

- Liquidity risk;
- Credit risk;
- Systemic risks from excessive credit growth; and
- Regulatory arbitrage.

In conclusion, the report notes that no further work is currently required in relation to loan funds, although IOSCO will continue to supervise this segment of the fund industry and will potentially revisit it for further work dependent on market developments.

IOSCO's report can be viewed at the following link:

https://www.iosco.org/library/pubdocs/pdf/IOSCOPD555.pdf

The Joint Committee (ESMA, EIOPA and EBA)

(i) European Commission consults on operations of ESAs

On 21 March 2017, the European Commission published a consultation paper on the operations of the European Supervisory Authorities ("**ESAs**") (that is, ESMA, EIOPA and the EBA).

The consultation focuses on issues relating to the tasks and powers of the ESAs, grouped under the following headings:

- Optimising existing tasks and powers;

- Promotion of supervisory convergence;
- Consumer and investor protections;
- Working with third country supervisory authorities;
- Access and management of data between national competent authorities and ESAs;
- Powers in relation to reporting and improving reporting standards, in order to remove any overlaps or inconsistencies; and
- Financial reporting and enforcement of accounting standards.

In addition to the above, the European Commission is pursuing comments on the following topics:

Governance of the ESAs: The European Commission seeks views on the effectiveness of ESA's governance and, in particular, the current tasks and powers of their management boards.

Adapting the supervisory architecture to challenges in the market place: The European Commission is seeking views on the efficiency of the current sectoral model of the ESAs. In particular, it asks for comments on the merits of a "twin peaks" model, which would involve maximising synergies between the EBA and EIOPA and consolidating consumer protection powers in ESMA.

Funding of the ESAs: The European Commission is seeking views on whether the ESAs should be funded fully or partly by the industry.

The deadline for responses is 16 May 2017. The European Commission has indicated that further legislation may be recommended pending the outcome of the consultation.

The full consultation paper is available at the following link:

http://ec.europa.eu/info/sites/info/files/2017-esas-operations-consultation-document_en.pdf

European Commission

(i) Responses to European Commission fitness check consultation on EU consumer and marketing directives

On 17 January 2017, the European Commission announced that it has received responses following a consultation period in relation to its "Fitness Check" on EU consumer and marketing directives. Responses were received in the areas of consumer contract simplification, banning particular unfair contact terms and fines for business for non-compliance with consumer legislation which would be based on a percentage of the turn-over of each business, among others.

While differing in their response to the proposals for reform and to what are the major obstacles to the effective application of the EU consumer protection regime, respondents in all categories considered the issue of consumers being unfamiliar with their rights as being an area of concern in relation to the application of consumer protection rules.

The European Commission envisages publication of its final report on EU consumer and marketing law to take place in the second quarter of 2017 having taken into consideration the responses received following the consultation period.

Further information on this topic may be found at the following link:

http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=31689

(ii) European Commission CMU report on addressing national barriers to capital flows

On 27 February 2017, the European Commission published a report as part of its capital markets union ("**CMU**") initiative on addressing national barriers to capital flows (the "**Report**").

Key topics set out in the Report include the following:

- **Barriers to the cross-border distribution of investment funds:** Barriers identified include differences in the national criteria in relation to marketing of funds, administrative arrangements imposed on UCITS and alternative investment funds ("**AIFs**") together with regulatory fees for cross-border marketing.

  The European Commission has requested that Member States review their national criteria in relation to marketing and carry out changes in order to map the administrative arrangements, with the objective of eliminating unnecessary administrative burdens by 2019. The European Commission also calls on Member States to ensure that all fund notification-related fees are published in a comprehensive and user-friendly manner on a single website. The European Commission will examine later on in 2017 whether it is worthwhile developing a single public domain for fee-related information in the form of a comparative website or a central repository.

- **National approaches to crowdfunding:** It was noted that a disparity in terms of investor protection rules has resulted in many platforms declining to offer their services to non-residents and have made extensions to new markets possible only through new establishments. The European Commission has invited Member States to examine whether their national crowdfunding legislation provides an adequate level of protection to investors while permitting cross-border activity.

- **Residence requirements on managers of financial institutions:** The European Commission notes that some Member States require residence in their territories as a condition for appointment to certain positions in financial institutions. The European Commission has invited Member States to remove this residency requirement unless it is justified, suitable or proportionate and has suggested a deadline of the final quarter of 2017 for implementation of this step.

The Report includes proposed guidelines in relation to the actions which need to be taken in relation to national barriers to capital flows. The European Commission expects that this will be a living document and will be updated regularly to reflect additional actions to be taken before 2019 in respect of barriers that may need to be identified in the second stage.

The Report is available in full at the following link:

https://ec.europa.eu/info/file/99455/download_en?token=Ic00eual

(iii) European Commission assessment of EU equivalence decisions in financial services policy

On 27 February 2017, the European Commission published a draft staff working document that includes an assessment of EU equivalence decisions in financial services policy.

The staff working document includes the following:

- Provision of a factual analysis of third-country provisions in EU financial services legislation;

- A consideration of the current legislative framework and interactions with supervisory work in the EU and in conjunction with international counterparts;

- An explanation of the mechanism which culminates in a determination by the European Commission of the equivalence of third-country rules and supervisory systems; and

- Reference to the European Commission's experience with the equivalence framework.

The European Commission considers as “broadly satisfactory” its experience in relation to the use of equivalence as a tool to deal with cross-border regulatory issues. However, the European Commission notes that there are a number of areas which may require increased focus in relation to its continued use by the EU.

The European Commission notes that the existing equivalence criteria, which have been created for each act individually, are not as clear as is required in order to assess both the regulatory and supervisory framework to an equal degree. In addition to this, the criteria do not provide a clear answer as to what the role of the ESAs should be in such equivalence assessments.

The European Commission notes that monitoring should relate to relevant market developments together with legal requirements and supervision. For example, a substantial increase in the exposure of EU markets to an equivalent third country in a relevant sector would generally represent a need for a renewed assessment by the European Commission. The European Commission regards that the ESAs are well placed, in line with their mandate, to engage in specific monitoring tasks in relation to their area of activity.

In concluding, the European Commission notes that equivalence determinations are an important element of the regulatory framework in respect of financial services within the EU. They underpin the international activities of EU financial intermediaries and allow non-EU intermediaries to operate in the EU. In addition, they facilitate cross-border regulation and supervision. The careful risk calibration behind the approach also stimulates competition and efficiency in EU markets through proportionate equivalence assessments focussing on risks and proper enforcement arrangements.

The draft staff working paper is available at the following link:

https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf

(iv) European Commission publishes inception impact assessment on new prudential framework for investment firms

On 22 March 2017, the European Commission published an inception impact assessment on its review of the appropriate prudential treatment for investment firms.

The inception impact assessment is in relation to the European Commission's review of the prudential framework for investment firms, as required by Articles 293(2), 498(2), 508(2) and 508(3) of the CRR. The aim of the impact assessment is to, where necessary, introduce more appropriate prudential requirements in order to reflect the business models and capture the risks faced and posed by different types of investment firms.

The European Commission states that the bulk of any new rules will take the form of a Regulation. This will be accompanied by a Directive covering elements that need to take the form of a Directive for legal reasons, such as organisational and authorisation requirements and corporate governance.

The impact assessment indicates that the European Commission intends to adopt a legislative proposal in the fourth quarter of 2017.

The European Commission is seeking feedback on the impact assessment with the deadline for comments being 19 April 2017.

The impact assessment is available at the following link:

https://ec.europa.eu/info/law/better-regulation/initiative/16355/attachment/090166e5b12ea490

(v) European Commission action plan for consumer financial services

On 23 March 2017, the European Commission published its action plan for consumer financial services.

In creating the action plan the European Commission utilised its green paper on retail financial services and outlines the steps which can be taken to develop a genuine technology-enabled single marker for retail financial services, where consumers are exposed to the best value products while also being suitably protected.

Measures detailed in the action plan include:

- Make product switching easier;
- Improve the quality of financial services comparison websites;
- Develop a deeper single market for consumer credit;
- Examine consumer protection rules to assess whether they create unjustified barriers to cross-border business; and
- Assess which actions are required to support the development of FinTech and a technology driven single market for financial services.

The action plan forms part of the European Commission's work on building a capital markets union ("**CMU**").

Further information on the action plan is available at the following link:

http://europa.eu/rapid/press-release_IP-17-609_en.htm

(vi) European Commission conducts consultation on developing its policy approach to FinTech

On 23 March 2017, the European Commission published a consultation paper called "FinTech: a more competitive and innovative European financial sector". In order to further develop the European Commission's policy approach towards technological innovation in financial services ("**FinTech**") the consultation seeks stakeholders' views on:

- The impact of new technologies on the European financial services sector, both from the perspective of providers of financial services and consumers; and

- Whether the regulatory and supervisory framework fosters technological innovation in line with the European Commission's three core principles which are: technological neutrality; proportionality; and market integrity.

The consultation is structured along four broad policy objectives that reflect the main opportunities (as well as the relevant challenges) related to FinTech.

Section 1 of the consultation paper explores the benefits that FinTech can offer to consumers, investors and firms in terms of access to financial services and strengthening financial inclusion. The section also seeks feedback on the potential challenges and risks posed by financial innovations to consumer protection and stability of the financial sector.

Section 2 reviews how FinTech can improve services, reduce operational costs, increase efficiency and speed up innovation in the EU financial services industry by streamlining processes in the provision of services. It also looks at the challenges that these developments bring for financial stability and financial sector employment.

Section 3 describes the opportunities of FinTech in increasing the competitiveness of the single market, through lowering barriers to entry for newcomers, while preserving fair competition, a level playing field and incentives to innovate. This section also explores how regulators, supervisors and industry can best support innovation in the financial sector.

Section 4 assesses the impact of FinTech on the capacity to estimate and monitor risk in the financial sector via access to larger amounts of data than traditional channels have offered, while protecting individuals' need for privacy and control over their personal data.

It is hoped that the feedback will help the European Commission to gauge how FinTech can make the single market for financial services more competitive, inclusive and efficient. The goal is to create an enabling environment, where innovative FinTech products and solutions take off at a brisk pace all over the EU, while ensuring financial stability, financial integrity and safety for consumers, firms and investors.

Responses to the consultation are invited by 15 June 2017.

The Commission’s consultation paper can be accessed at:

http://ec.europa.eu/info/sites/info/files/2017-fintech-consultation-document_en_0.pdf

Central Bank of Ireland

(i) Central Bank Address to Irish Funds and the Central Bank's Independent Fund Directors Briefing

On 17 January 2017, the Central Bank published the address of acting Director of Securities and Markets Supervision, Grainne McEvoy, which was delivered on the 13 January 2017 and 16 January 2017. The address was in relation to the regulatory agenda, in particular, the priorities of the Central Bank relating to the Irish funds industry.

Some of the topics referred to in the address include the following:

- **Total Expense Ratios:** During 2016 the Central Bank undertook a review of the Total Expense Ratios ("**TERs**") of UCITS. The Central Bank's focus in the context of its review centered on the quality, comparability and presentation of fee disclosures pertaining to investment funds and, in particular, whether such disclosures are sufficient to allow investors to make informed investment decisions. The aim of this exercise was to build up a data-driven approach to understanding TERs and to identify funds that are outliers.

  The Central Bank is of the view that more can be done to provide investors with clear information on the fees and charges they can expect to pay.

- **Increased use of Data Driven Supervision:** in relation to investor fees the Central Bank has put in place a team of data analysts who will support frontline supervisors undertaking their work in this area:

  - **Data Quality:** Following analysis, the Central Bank has identified the issue of data quality as an area of increased focus for supervisors. It is envisaged that where issues are raised in relation to reporting quality the data providers will be subject to additional follow-up engagement from the Central Bank.

  - **Fee Disclosure:** The Central Bank has noted that the presentation of fees and expenses to investors can be complex and disjointed, with particular concern for less sophisticated investors. This may affect the investor's ability to fully understand the impact of the fees and expenses on their investment and as such the Central Bank notes that additional clarity and improved disclosure would be of aid to investors in making informed decisions.

  - **Identification of Outliers:** The review identified a number of funds which have been classed as outliers in terms of higher fees being charged in comparison to similar funds. As such, it is envisaged that Central Bank supervisory staff will engage with such funds.

It is likely that the Central Bank will consult further with industry on the issue of disclosure of fees and charges.

- **Themed Review of Fund Share Classes:** The Central Bank recently undertook a themed review of the use of share classes within Irish authorised investment funds. The objective of the review included gathering intelligence with regards to the population of share classes, to determine whether such classes were distributing or accumulating income, whether they were marketed to institutional or retail investors; or were engaging in hedging techniques at share class level. In light of this, the Central Bank has identified items which require follow-up action. An example of such follow-up action would include liaising with funds engaging in hedging activity where the objectives behind the hedging policy are ambiguous in order to foster transparency.

- **Supervisory Priorities – 2017:** In accordance with its Strategic Plan 2016/2018, it is the intention of the Central Bank to increase supervisory activities for entities deemed to be low impact under PRISM. In light of this, the Central Bank's supervisory staff are planning a comprehensive programme of activities which will affect the funds industry in 2017.

- **Depositary On-Site Inspections:** The Central Bank will continue its programme of work to include onsite, in-depth inspections of Irish depositaries. This work commenced last year when selected depositaries were subject to a review of their oversight and monitoring obligations of investment funds.

- **Full Risk Assessments:** In addition to the depositary inspections, supervisory staff will also be conducting full risk assessments on selected investment funds. While no decision has yet been taken on which funds will be subject to a full risk assessment, certain factors will increase the likelihood of a particular fund being selected, including for example (i) where investor complaints have been received, (ii) situations where other issues or additional market intelligence have been brought to the Central Bank's attention and (iii) other specific areas which the Central Bank has highlighted previously as areas of focus.

- **Automation of Authorisation Process:** One of the Central Bank's workstream for 2017 will be the automation of the authorisation process for investment funds. An important subset of funds applications, namely Qualifying Investor Alternative Investment Funds ("**QIAIFs**") are currently being processed using the new automatic system, Orion. Further to the introduction of Orion in December 2016 for QIAIFs, approximately 80% of investment fund applications are processed online.

  The Central Bank is also considering the introduction of application fees to assist in covering the costs of processing of fund applications. Such a system would be comparable to other European jurisdictions and would be beneficial as the costs would be borne directly by the applicant rather than imposing such costs on existing regulated entities, as is currently the case. The Central Bank has indicated that such fees would be approximately €3,000 for an umbrella fund application, €2,000 for each sub-fund application and €5,000 for a standalone fund. Such fees would be in addition to the annual regulatory levy payable by funds to the Central Bank. Industry has requested an

appropriate level of engagement and consultation prior to the Central Bank finalising its position on this matter.

- **Review of Regulatory Reporting:** As a priority in 2017, the Central Bank will conduct a review to evaluate the current system of regulatory reporting and consider options for streamlining and consolidating reporting requirements. In doing so, the Central Bank expects to improve the ease of which industry participants can submit regulatory information, together with improving the usability of data for regulatory authorities. Such objectives are unique to the Central Bank and as such could potentially become a leader in the area on a European and International level.

The text of the speech is available at the following link:

https://www.centralbank.ie/news/article/address-by-acting-director-of-securities-markets-supervision-grainne-mcevoy-at-irish-funds-breakfast-briefing-and-the-central-bank-s-independent-fund-directors-briefing

(ii) Central Bank responds to Irish Funds submission in relation to Submission and Validation of Investment Funds quarterly returns

On 30 January 2017, the Central Bank responded to Irish Funds in relation to their submission on Submission and Validation of Investment Funds quarterly returns whereby a number of issues were addressed. In the response the Central Bank:

- Committed to give six months' notice going forward where there are changes to the reporting form;

- Agreed to enhance liaison between it and industry in relation to ad-hoc data requests where possible. Such liaison would have the effect of avoiding data request deadlines from falling during a time of key reporting deadlines, thus allowing submissions to be more efficient;

- Agreed that when providing updates to validation rules by email such updates will also be published on the Central Bank's website.

The submission of Irish Funds dated 9 January 2017 can be located at the following link:

Irish Funds letter dated 9 January 2017

The response received from the Central Bank of Ireland dated 30 January 2017 is available at the following link:

Central Bank letter dated 30 January 2017

(iii) Policy statement on EBA's guidelines to sound remunerations policies published by the Central Bank

On 31 January 2017, the Central Bank released a statement affirming that as of 1 January 2017, the policies of the European Banking Authority ("**EBA**") apply to credit institutions, CRD IV investment firms and national competent authorities ("**NCAs**"). Such policies relate to the Guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU ("**CRD IV**") and disclosures under Article 450 of Regulation (EU) No. 575/2013 ("**CRR**"), collectively known as EBA's Remuneration Guidelines.

The EBA Remuneration Guidelines act in line with the remuneration requirements of CRD IV and refer to, among other things:

- Identifying those categories of staff whom the remuneration provisions apply to;
- The application of remuneration requirements in a group context; and
- The governance process for implementing sound remuneration policies.

The provisions of the CRD IV allow an organisation to apply the principle of 'proportionality', when establishing and applying a remuneration policy provided it is done so in a manner that is appropriate to the size, internal organisation and the nature, scope and complexity of the activities of the organisation.

Where the proportionality principle is being relied upon in relation to remuneration of identified persons, the Central Bank will, as part of the compliance assessment, assess the appropriateness of the reliance on the principle in line with, inter alia, the European Commission's thresholds in Article 94(3) of its proposal for amendments to CRD IV, which was published on 23 November 2016.

The Central Bank's statement may be viewed at the following link:

https://www.centralbank.ie/docs/default-source/publications/policy-statement-eba-remuneration-guidelines.pdf

(iv) Central Bank confirms departure of Cyril Roux, Deputy Governor (Financial Regulation)

On 28 February 2017, the Central Bank announced that Deputy Governor, Cyril Roux, will be leaving the Central Bank in April 2017 to pursue opportunities in the private sector.

(v) Central Bank clarification in respect of monitored email address

On 28 February 2017, the Central Bank provided clarification in relation to Part V of the Consultation Paper 86 ("**CP 86**") which addresses the requirement of funds and fund management companies to have in place a monitored email address. In order to allow

efficient and effective communication between the Central Bank and the fund and fund management companies.

Clarification in relation to the requirement to have such a monitored email address has been provided by the Central Bank as follows:

- Every fund and fund service provider will be required to designate an email address which will, in effect, replace the "registered office" of that entity in that all formal correspondence from the Central Bank will be sent to that email address from 1 July 2017;

- In the case of a fund which has appointed a management company, it can designate its own "fund-specific" email address if this is the preference of the board. Alternatively it can designate the email address of the management company to receive all of its Central Bank correspondence (assuming that the management company is agreeable to it doing so);

- A fund management company may provide one generic email address for all funds under its management or alternatively can designate a separate email address for each umbrella/stand-alone fund under management;

- There are no specific requirements imposed by the Central Bank in respect of the server which hosts the email address. Therefore in the case of a Self-Managed Investment Company ("**SMIC**"), the SMIC will not be prevented from using an email address which is hosted on the server of the investment manager provided that the board of directors are satisfied that the email address will be monitored daily and that there are appropriate procedures in place to ensure that the information sent by the Central Bank is passed along to the appropriate person(s) for action without delay;

- The email server should be checked to make sure that there is no firewall in place which would prevent the receipt of bulk emails issued by the Central Bank. In addition, while it is not envisaged that the Central Bank will be sending very large attachments, the email address should have adequate capacity to receive attachments;

- The Central Bank expects each fund and fund service provider to inform it of the chosen designated email address and, in order to facilitate this, the Central Bank will provide an email address to which the "designated email address" should be submitted in advance of 1 July 2017; and

- In the event that the designated email address changes, the Central Bank will consider this to be akin to a change of registered office and will need to be informed of any such change.

Further information in relation to CP86 may be found at the following link:

https://www.centralbank.ie/publication/consultation-papers/consultation-paper-detail/cp86-consultation-on-fund-management-company-effectiveness-delegate-oversight

(vi) Record breaking year for Irish funds revealed by new data

On 28 February 2017, Irish Funds issued a press release in reference to data released by the Central Bank which shows a growth in the value of Irish-domiciled funds.

According to the data, assets in Irish domiciled funds amounted to €2.1 trillion at the end of 2016. Such value is representative of a record level of net sales of Irish domiciled funds, with net sales for 2016 across all funds types valued at €139 billion. This is the highest figure to be recorded in the seven years in which data has been collected in relation to fund sales.

In the last five years, from 2011-2016, the net assets held in Irish funds has doubled.

In addition to the growth in funds which are domiciled in Ireland, non-domiciled funds which are administered in Ireland reached the value of €2 trillion. Combined, this brings the total value of assets under Irish administration to over €4 trillion.

Ireland has achieved the role of a leading destination for alternative investment funds, servicing more than 40% of hedge funds globally and more than 50% of European ETFs. It is also seen as a place that is capable of accommodating any fund type whether an ETF, MMF or alternative UCITS.

Further information is available at the following link:

http://www.irishfunds.ie/facts-figures/irish-domiciled-funds

(vii) New Central Bank Investment Firms Regulations

On 28 February 2017, the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 (the "**CBI IF Regulations**") were signed by the Central Bank Deputy Governor and were subsequently published in Iris Oifigiul on March 7, 2017. The new CBI IF Regulations apply to MiFID investment firms, to IIA investment business firms and to IIA fund administrators and follow on from a consultation paper CP97 which the Central Bank issued in early November 2015 and from a consultation paper CP100 which the Central Bank issued in December 2015.

As CP 97 explained, the Central Bank previously set down a variety of requirements for MiFID firms and for IIA firms in a number of different documents. The intention behind these new Regulations is to consolidate all of those requirements into a single document which can be updated to reflect changes which may be introduced in the future.

Part 1: Application and Scope

As noted above, the CBI IF Regulations apply to:

- MiFID investment firms (which are subject to the requirements in Part 2);

- IIA investment business firms who are not fund administrators (which are subject to the requirements of Parts 2 and 3); and

- Fund administrators (which are subject to the requirements of Parts 2 to 5).

Much of what appears within the CBI IF Regulations is not new, being taken from, for example, the former Chapter 5 of the AIF Rulebook [Fund Administrator Requirements] so there should be a high level of familiarity with the requirements already.

Part 2: General Supervisory Requirements

Part 2 applies to each category of entity. The requirements contained within Part 2 include:

- General Requirements

  Regulations 4, 5, 6 and 7 deal broadly with a firm's interactions with the Central Bank, requiring it to consult with the Central Bank in various instances such as when engaging in a new area of business or field of activity etc.

- Reporting Requirements

  A variety of reporting requirements are imposed by Regulation 8, with specific reference to the use of the Central Bank's Online Reporting System where the specific data items and reports required are set out in the Reporting Requirements Schedule (Parts 1-7 of the Schedule to the CBI IF Regulations).

Part 3: Additional Supervisory Requirements for IIA Investment Business Firms

Part 3 deals with a variety of additional supervisory requirements imposed on IIA investment business firms. The organisational requirements will not apply to MiFID firms given that the European Communities (Markets in Financial Instruments) Regulations 2007 as amended (the "MiFID Regulations") set down the organisational requirements of such firms in detail.

Part 4: Fund Administrator Requirements

Part 4 of the Regulations sets out requirements relating to fund administrators, including organisational requirements, outsourcing requirements, requirements relating to the check and release of the final NAV, management of outsourcing risks (there are numerous rules regarding outsourcing) and certain miscellaneous requirements.

Part 5: Own Funds and Capital Adequacy Requirements for Fund Administrators

Part 5 of the CBI IF Regulations deals with own funds and capital adequacy requirements of fund administrators. The financial controllers of fund administrators will need to pay great attention to these rules.

The CBI IF Regulations are available at the following link:

http://files.irishfunds.ie/1489420236-S.I.-No.-60-of-2017-Central-Bank-Supervision-and-Enforcement-Act-2013-Section-48-1-Investment-Firms-Regulations-2017.pdf

(viii) Central Bank issues recommendations in relation to Fund Administration Firms outsourcing activities

On 7 March 2017, the Central Bank issued a letter to all Fund Administration Firms in relation to outsourcing of administration activities. The Central Bank note that their existing outsourcing requirements are designed so that Fund Administration Firms maintain a consistent standard of oversight of Outsourcing Service Providers ("**OSPs**") and retain ultimate responsibility for outsourced activities.

During 2016, the Central Bank carried out a review of outsourcing arrangements focussing on the scale of outsourcing activities together with the oversight and governance arrangements in place in respect of such outsourced activities.

The Central Bank found that the extent of outsourcing among larger Irish Fund Administrators is extensive and is continuing to grow, with the Central Bank noting that levels of between 48% to 61% of fund administration activities were carried out by Full Time Equivalents ("**FTEs**") located in OSPs as at the end of 2015. The Central Bank has noted the following key observations:

- Firms under review outsourced on average to 10 locations;
- Firms under review outsourced primarily to other group entities; and
- Firms under review were subject to a concentration exposure to one or multiple outsourced locations, with these primarily related to two foreign jurisdictions.

The Central Bank is of the opinion that the level of outsourcing observed in its review is likely to be at or close to the outer limit of what is appropriate for the industry. As a result of this, the Central Bank is in the process of conducting a review of outsourcing across all financial sectors.

The Central Bank notes that outsourcing activities presents challenges for firms as they remain responsible under and are obliged to comply with the Outsourcing Requirements. Concern exists regarding the standards and/or arrangements in place in order to adequately oversee all outsourced activities. The Central Bank noted the following key observations in relation to governance and oversight of outsourced activities:

- Not all firms under review demonstrated that comprehensive outsourcing records are maintained;

- In general, OSPs are not regulated, or if they are regulated, are not regulated in the same way as Fund Administrators in Ireland; and

- The majority of firms under review have no tolerance levels set in respect of the amount of outsourcing permitted for a specific Fund Administration activity.

The Central Bank notes that outsourcing is a key area in relation to operational risk and is now integral to the business model of a significant number of Irish Fund Administrators. Therefore, it is important for firms to concentrate on having strong controls in place around the governance and oversight of all outsourcing arrangements.

Following completion of its review the Central Bank intends to issue recommendations to assist Fund Administrators who outsource certain of their activities.

The letter to industry can be viewed at the following link:

https://www.centralbank.ie/docs/default-source/Regulation/industry-market-sectors/funds-service-providers/fund-administrators/industry-letter---review-of-outsourcing-of-fund-administration-activities-7-march-2017.pdf

(ix) Central Bank publishes Q&A on Central Bank Investment Firms Regulations 2017

On 13 March 2017, the Central Bank published its Questions and Answers ("**Q&As**") paper on the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 (the "**CBI IF Regulations**").

The document sets out answers to queries which may arise in relation to the CBI IF Regulations. It is intended that the Central Bank will update any position on a query in the Q&A and this will be facilitated through its website. The Central Bank further reserves the right to alter its approach to any matter in the Q&A.

The Q&As focus on the following areas: general supervisory requirements for investment firms; outsourcing requirements for fund administrators; final net asset value ("**NAV**") calculation; and own funds and capital adequacy requirements for fund administrators.

The full Q&A document can be found at the following link:

https://www.centralbank.ie/docs/default-source/Regulation/industry-market-sectors/investment-firms/mifid-firms/regulatory-requirements-and-guidance/central-bank-investment-firms-regulations-qa.pdf?sfvrsn=2

(x) Central Bank publishes Consultation Paper on Methodology to Calculate Funding Levies

On 27 March 2017, the Central Bank published a consultation paper in relation to a proposed new methodology to calculating funding levies in respect of credit institutions, investment firms, fund service providers and EEA insurers ("**CP 108**"). The consultation paper proposes that the industry funding levy for banks be calculated according to the ECB methodology.

The Central Bank notes that the current regime for calculating fees can create inconsistencies in relation to the levy charged as the levy is based off impact categories which are assigned based on scores received following completion of the Central Bank's online reporting system. However, the use of impact categories to levy credit institutions, investment firms and fund service providers results in threshold effects whereby a movement between impact categories gives rise to a substantial increase or decrease in the levy.

The changes proposed in CP 108 remove the threshold effect by introducing continuous levying. The Central Bank note that for investment firms and fund service providers this would be achieved by calculating levies as a linear function of individual firms' impact scores; and for credit institutions, continuous levying would be achieved by using a modified ECB Methodology for levy calculations.

For EEA entities who passport into Ireland it is proposed that such entities will be subject to an industry funding levy which will be representative of the engagement of the Central Bank and the costs in respect of supervising such entities..

The Central Bank is seeking views on the proposed methodologies, with the deadline for responses being 28 April 2017.

The full consultation paper is available to view at the following link:

http://www.centralbank.ie/docs/default-source/publications/Consultation-Papers/cp108/cp-108-new-methodology-to-calculate-funding-levies.pdf?sfvrsn=4

(xi) Central Bank change of address

Effective from 3 April 2017, the Central Bank's postal address will change to either of the following:

Central Bank of Ireland New Wapping Street North Wall Quay Dublin 1	or	Central Bank of Ireland PO Box 559 Dublin 1

The Central Bank's existing telephone numbers and email addresses will remain in use.

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

(i) European Parliament votes to reject Delegated Regulation amending list of high-risk third countries under MLD4

On 19 January 2017, the European Parliament voted to reject Delegated Regulation which would have served to amend the European Commission's list of high-risk third counties under the Fourth Money Laundering Directive ((EU) 2015/849) ("**MLD4**"). The authority of the European Commission to vote and decide upon high risk third countries is contained in Article 9(2) of MLD4.

It should be noted that it is the view of the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") and the Committee on Civil Liberties, Justice and Home Affairs ("**LIBE**") that the proposed number of high-risk third countries is not sufficient and should be broadened to include countries which engage in tax crimes.

The press release detailing the decision is available at the following link:

http://www.europarl.europa.eu/pdfs/news/expert/infopress/20170113IPR58027/20170113IPR58027_en.pdf

(ii) Department of Finance published Information note in relation to Beneficial Ownership Regulations

On 31 January 2017, the Department of Finance published an Information Note in relation to the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (SI No. 560 of 2016) (the "**Beneficial Ownership Regulations**") as they relate to corporate and other legal entities incorporated in Ireland. Such regulations took effect in Ireland on 15 November 2016 as a result of MLD4.

The Beneficial Ownership Regulations stipulate that most Irish companies are required to take reasonable steps in order to hold adequate, accurate and current information in relation to the beneficial ownership of the company on an internal register. The Department of Finance note that there is currently progress on establishing a centralised register in relation to the beneficial ownership of companies in Ireland, however it is expected such register will not be publically available until later in the year.

The rationale behind the Beneficial Ownership Regulations is to ensure that there is a natural person who can be identified as the owner of the company; usually this is clear however in some cases the structure of the company may make it difficult to identify the beneficial owner(s) of the company. In such instances and where all options to identify the beneficial owner(s) have been exhausted, it is permitted that a senior member of management be added to the register.

The register of each company must comply with the Beneficial Ownership Regulations and contain specific information in respect of each beneficial owner/member of senior management:

- Name, date of birth, nationality and residential address;
- A statement of the nature and extent of the interest held by each beneficial owner;
- The date on which each natural person was entered into the Register;
- The date on which each natural person ceased to be a beneficial owner (if applicable).

It is important to note that failure by a relevant entity or company to comply with their obligations under the Beneficial Ownership Regulations risk committing an offence and is liable, on summary conviction, to a fine not exceeding €5,000. In addition to this, an individual who fails to comply with the Beneficial Ownership Regulations risks committing an offence which similarly to a company or relevant entity, may be liable on summary conviction to a fine of €5,000.

The Information Note issued by the Department is available at the following link:

http://www.finance.gov.ie/sites/default/files/Beneficial_Ownership_Information_Note_Jan_2017.pdf

(iii) European Data Protection Supervisor reacts to MLD5 proposals

On 2 February 2017, the European Data Protection Supervisor ("**EDPS**") published an opinion in relation to the proposed Fifth Money Laundering Directive ("**MLD5**").

For the purposes of the opinion, the EDPS takes into account the original MLD5 proposal of the European Commission of July 2016, together with the adapted text of the Council of the EU of December 2016. The EDPS examines MLD5 with a view to one's fundamental rights to privacy and data protection. In addition, the principles of necessity and proportionality in relation to the obtaining and usage of personal data are at the fore in the EDPS's examination of MLD5.

It is the opinion of EDPS that MLD5 takes a stricter approach to efficiently countering money laundering and terrorism financing in comparison to MLD4. The EDPS notes that MLD5 introduces policy purposes other than countering money laundering and terrorist financing such as specifically targeting tax evasion, the fight against financial crime and enhanced corporate transparency. The EDPS is concerned that the expansion of the purposes of data processing under MLD5 beyond that of AML/CTF brings with it a degree of uncertainty for data controllers in terms of justifying the purpose behind gathering such personal data.

The EDPS is of the opinion that the proposed amendments depart from the risk based approach adopted under MLD4.

In addition to above, the EDPS is further concerned in relation to the proposed broadening of access to beneficial ownership information by national competent authorities and the general public. Such broadening of access is intended to ensure and improve enforcement of tax obligations. The EDPS is of the opinion that, dependent on the roll out of such provisions, that a lack of proportionality may exist which would result in unnecessary risks for the individual rights to privacy and data protection.

In the opinion, EDPS advises that it was not consulted by the European Commission prior to the publishing of the MLD5 proposal, although its opinion was sought by the Council.

The opinion is available at the following link:

https://edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf

(iv) Central Bank publishes guidance note for completion of the Anti-Money Laundering, Countering the Financing of Terrorism and Financial Sanctions Risk Evaluation Questionnaire

On 9 February 2017, the Central Bank published a guidance note to assist those credit and financial institutions which are required to submit a Risk Evaluation Questionnaire ("**REQ**") to the Central Bank.

The Central Bank operates a risk-based system whereby institutions selected to complete the REQ must do so in the specified time period and to the format which is requested by the Central Bank.

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) requires institutions to have in place AML/CFT preventative measures, together with policies, procedures and processes to address such. The REQ acts as a mechanism to confirm such measures are in place and are of adequate nature.

The guidance note can be viewed at the following link:

https://www.centralbank.ie/docs/default-source/Regulation/anti-money-laundering-and-countering-the-financing-of-terrorism/guidance/req-guidance-final-pdf.pdf?sfvrsn=4

(v) Joint Committee of ESAs opinion on money laundering and terrorist financing risks

On 20 February 2017, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published an opinion, addressed to the European Commission, on the risks associated with money laundering and terrorist financing affecting the EU's financial sector (the "**Opinion**").

The objective of the Opinion is to provide information to the European Commission in relation to their risk assessment work, together with the ESA's work in respect of ensuring supervisory convergence and a level playing field in relation to anti-money laundering

("**AML**") and counter terrorism financing ("**CTF**"). The Opinion is also intended to assist Member State competent authorities in their application of the risk-based approach to AML and CTF supervision.

Key issues identified in the Opinion include firms' understanding of the money laundering and terrorist financing risk to which they are exposed and the importance of effective implementation, by firms, of customer due diligence policies and procedures. The Opinion also refers to the lack of timely access to intelligence that may aid in the identification and prevention of terrorist financing activities which can cause difficulties for firms, in addition to the differences in the manner in which competent authorities discharge their functions.

The ESAs state that the risks highlighted in the Opinion mean that more has to be done to ensure that the EU's AML and CFT defences are effective. Among other things, the ESAs highlight that:

- Law enforcement agencies should identify ways to work more closely with firms to facilitate the identification of such money laundering/terrorist financing risks;
- Competent authorities should collect AML/CFT supervisory data in a more consistent way to facilitate comparisons and track progress;
- The European Commission, the EU legislators and the ESAs should give further thought to identifying ways in which the ESAs and competent authorities can ensure that the EU's AML/CFT law and the ESAs' AML/CFT guidelines are implemented effectively and consistently in all Member States;
- The Opinion notes that several initiatives are already underway, which, in the short to medium term, will serve to address many of the risks identified. These include proposed amendments to the Fourth Money Laundering Directive ("**MLD5**").

The Opinion has been prepared under Article 6(5) of MLD4, which mandates the ESAs to issue a joint opinion on the risks of money laundering and terrorist financing affecting the EU's financial sector every two years.

The Opinion may be viewed at the following link:

https://www.eba.europa.eu/documents/10180/1749433/Consultation+Paper+on+RTS+on+CCP+to+strengthen+fight+against+financial+crime+%28JC-2017-08%29.pdf/85648168-2059-4b00-a6c8-5dbc321796f5

(vi) ECON and LIBE adopt report on MLD5

On 10 March 2017, the European Parliament published its report in relation to the proposed Fifth Money Laundering Directive ("**MLD5**"), which amends the Fourth Money Laundering Directive ((EU) 2015/849) ("**MLD4**") (the "**Report**"). The European Parliament issued a press release referring to the Report on 28 February 2017.

The press release noted that the Parliament's Economic and Monetary Affairs Committee ("**ECON**") and its Civil Liberties, Justice and Home Affairs Committee ("**LIBE**") have voted to adopt an amended version of their draft report on MLD5. The Report was passed by 89 votes to one with four abstentions. The Report contains a draft Parliament legislative resolution, together with opinions from the Committee on Development, the Committee on International Trade and the Committee on Legal Affairs.

According to the press release, ECON and LIBE also voted by 92 votes to one, with one abstention, in relation to entering into negotiations with the Council of the EU. The Parliament was originally scheduled to give approval in its March plenary session to start trialogue discussions with the Council and the European Commission, however this has been postponed to a future date yet to be confirmed.

The Report is available at the following link:

http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0056&format=PDF&language=EN

(vii) Central Bank AML/CTF briefing to Industry

On 14 March 2017 the Central Bank delivered an AML/CTF briefing to industry in relation to the Central Banks' Money Laundering and Terrorist Financing Risk Assessment and their AML/CTF Supervisory Engagement Model.

In relation to the Risk Assessment, the Central Bank notes that this is based on a sector by sector approach which takes into account categories of inherent risk, incorporating product/service, customer, geography and distribution channels. Together with this, categories of mitigants are taken into consideration, which incorporates quality of risk management and internal control functions and controls.

Such risk based approach assessment criteria result in Investment Firms (other than Asset Managers) and Fund Administrators/Funds being categorised as 'Medium High', with Life Assurance and Investment (Asset Managers) being categorised as 'Medium Low'.

The risk rating assigned impacts upon the AML/CTF Minimum Supervisory Engagement Model, whereby differing procedures exist dependent on the risk rating as outlined below:

Category	Inspection Cycle (Years)	AML/CTF review meetings (Years)	Risk Evaluation Questionnaires (Years)
Medium High ML/TF Risk	5	5	2
Medium Low ML/TF Risk	Spot check and Responsive	Spot check and responsive	3

Data Protection

(i) EU Article 29 Working Party adopts 2017 GDPR Action Plan

On 3 January 2017, the EU article 29 Working Party 29 ("**WP29**"), an independent advisory board specialising in data protection and privacy (originating from Data Protection Directive 95/46/EC), adopted their 2017 action plan in relation to the General Data Protection Regulations ("**GDPR**").

The GDPR comes into effect on 25 May 2018 and will replace the existing EU data protection framework, providing for additional and stronger data protection rights for individuals, and greatly increased obligations on organisations who collect and process personal data.

The 2017 action plan aims to build and advance upon the objectives of the 2016 plan, inclusive of issues such as the right to data portability and the incoming requirement of the position of Data Protection Officer within companies. Focus will also be given to the setting up of the European Data Protection Board ("**EDPB**") structure to preparing the mechanism for the establishment of the 'one stop shop' in relation to data protection and privacy issues within the European Union and the UK (post Brexit).

Going forward, new issues which WP29 intend to progress in 2017 include the creation of guidelines in relation to consent and filing, and transparency. In addition, the WP29 will be working on updating information in relation to data transfers to third countries and the procedures in relation to data breach notifications.

It is the intention of the WP29 to hold a Fablab in April 2017 whereby interested stakeholders may present their views and opinions to the Working Party. In conjunction with the Fablab, the Working Party intends to hold an interactive workshop whereby members of the international data protection community will be invited to converge, become involved and build relationships with their international counterparts.

The action plan is available at the following link:

https://www.huntonprivacyblog.com/wp-content/uploads/sites/18/2017/01/Pressrelease-Adoptionof2017GDPRActionPlan.pdf

(ii) The General Data Protection Regulation – Consultation on Key Concepts

On 16 March 2017, the office of the Data Protection Commissioner ("**DPC**") published an information note referring to the EU Article 29 Working Party's work in preparing guidance on the interpretation and application of key provisions of the GDPR and the DPC's assistance in the process.

To inform the process, the DPC initiated a consultation period seeking submissions from interested individuals and organisations on the following key concepts:

- Consent;
- Profiling;
- Personal data breach notifications; and
- Certification.

The DPC's consultation period ran up to 28 March 2017.

The submissions received will be supplied to the presidency team of the Article 29 Working Party for consideration in the preparation of guidance on the key concepts. However, The DPC will not be summarising or preparing a report of the submissions received.

The information note is available at the following link:

https://www.dataprotection.ie/docs/16-03-2017-GDPR-Call-for-consultation-on-consent-profiling-personal-data-breach-notifications-and-certification/1629.htm

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

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