



Funds

Quarterly Legal and Regulatory Update

Period covered: 1 January 2023 – 31 March 2023

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1. APPROACHING DEADLINES ¹

Approaching deadlines		
Q2 2023	28 April 2023	ESMA consultation on Consultation on Review of Methodology included in Guidelines on Stress Testing Scenarios under the MMFR closes. See Section 6.2 below for further details
	30 April 2023	Deadline for in-scope Irish management companies managing ETF funds to submit responses to the Central Bank of Ireland's (Central Bank) questionnaire on the role of authorised participants and market makers. See Section 7.1 below for further details.
	3 May 2023	The European Commission consultation on proposed extensions to the EU Taxonomy Framework closes. For further information, please refer to our recent briefing .
	9 May 2023	ESMA consultation on amendments to EMIR position calculation guidelines closes. See Section 10.6 below for further details.
	13 June 2023	The Central Bank's consultation on its Individual Accountability Framework closes. See Section 3.1 below for further information.
	30 June 2023	Fund management companies which (i) are obliged due to their size; or (ii) which have chosen to report on the principal adverse impacts of investment decisions on sustainability factors must publish their first full PAI statement on their website on or before this date.
Q3 2023	4 July 2023	The ESA consultation on proposed amendments to SFDR Level 2 Measures closes. For further information, please refer to our recent briefing .
	30 September 2023	All Irish UCITS management companies and AIFMs must, where appropriate, put in place a plan to address any gaps identified from a gap analysis carried out against the findings and expectations of the Central Bank on costs and fees. See Section 2.1 below for further information
Q4 2023	3 October 2023	ESMA revised guidelines on MiFID II suitability requirements begin to apply. ESMA revised guidelines on MiFID II product governance requirements expected to apply from the same date. See Section 4.3 below for further information
	1 December 2023	Irish fund management companies must be in a position to evidence actions/plans taken to address the Central Bank's Cross-Industry Guidance on Operational Resilience by this date at the latest. The relevant guidance is available here .

¹ Funds falling within the scope of Article 8 or Article 9 of the SFDR must file updated pre-contractual annexes contained in Commission Delegated Regulation 2023/363 which contain additional disclosure obligations relating to exposure to Taxonomy-aligned fossil gas and nuclear energy economic activities with the Central Bank "as soon as possible and at the earliest opportunity". Please refer to Section 4.1 below for further details.

2. UCITS & AIFMD

2.1 Central Bank publishes Dear Chair Letter on Undue Costs

On 24 March 2023, the Central Bank published a Dear Chair letter in which it:

- (i) highlights the main findings of the inspection carried out by the Central Bank on costs and fees charged to UCITS as part of the ESMA common supervisory action to assess UCITS management companies' compliance with relevant cost-related provisions contained in the UCITS framework (**CSA**);
- (ii) sets out the Central Bank's expectations and identifies the key actions to be taken by all firms to mitigate these issues; and
- (iii) requires both UCITS management companies and AIFMs to conduct a gap analysis against the findings and expectations outlined in the letter and where appropriate, put a plan in place by the end of Q3 2023 to address any gaps identified.

The letter confirms that while the scope of the CSA did not include a review of AIFMs, it expects AIFMs to consider the findings and actions of this review with respect to cost and fees charged to AIFs.

For more information on the key findings of the Dear Chair letter, please see a Dillon Eustace briefing [here](#)

The Dear Chair letter can be accessed [here](#).

Key Action Points

Fund management companies should carry out a gap analysis between their existing costs/pricing processes and the supervisory expectations outlined by the Central Bank in its Dear Chair letter and, where appropriate, put a plan in place by the end of Quarter 3 2023 to address any gaps identified.

2.2 ESMA publishes updated Q&A on the application of the UCITS Directive

On 3 February 2023, ESMA updated its Q&As on the application of the UCITS Directive.

A newly added Q&A addresses the issuer concentration rules set down in Article 52 of the UCITS Directive which requires a UCITS not to invest more than 20% of its assets in deposits made with the same "body".

ESMA confirms that reference to "body" in this context should be interpreted as meaning "credit institution" as mentioned in Article 50(1)(f) of the UCITS Directive.

The Q&A on the Application of the UCITS Directive can be accessed [here](#).

2.3 ESMA Q&A on AIFMD

On 10 March 2023, ESMA published an updated Q&A on AIFMD, in which ESMA considered what constitutes a "substantive direct or indirect holding" for the purposes of determining whether an AIFM meets the threshold applicable to registered AIFMs (sometimes referred to as "sub-threshold AIFMs") under Article 3(2) of the AIFMD.

ESMA confirms that the "substantive direct or indirect holding" refers to situations where the AIFM manages the portfolios of AIFs through its direct or indirect holding in a company and notes that this "covers, for instance, situations whereby the AIFM de facto has the power to impose decisions on the AIF portfolio composition, its asset allocation or its risk management. Article 3(2)(a) AIFMD does not set a quantitative threshold. The notion of "substantive direct or indirect holding" shall be assessed on a case-by-case basis by AIFMs supervisors".

The updated Q&A can be accessed [here](#).

2.4 Triologue Negotiations on AIFMD and UCITS reforms begin

On 8 March 2023, the first triologue meeting between the European Commission, the Council of the EU and the European Parliament on proposed AIFMD and UCITS reforms was held, during which each institution outlined their positions on the proposed amendments to existing delegation rules and liquidity management rules and the introduction of a pan-European loan origination regime amongst others.

The second political triologue meeting is scheduled to be held on 19 April 2023 with the Swedish Presidency of the Council of the EU indicating that it aims to reach agreement by June 2023 when its term ends.

For an overview of some of the key issues to be monitored by Irish fund management companies and their funds during the triologue negotiations, please refer to our briefing on the topic which is available [here](#).

2.5 Central Bank publishes revised Q&A on UCITS

On 24 March 2023, the Central Bank published a revised Q&A on UCITS as well as updated web-based guidance on the filing of PRIIPS KID with the Central Bank.

Please see section below entitled "[PRIIPS](#)" for further details.

2.6 ESMA publishes revised AIFMD Reporting IT Technical Guidance

On 6 January 2023, ESMA published Revision 5 of its AIFMD Reporting IT Technical Guidance.

The new IT technical guidance Revision 5 introduces new validation rules making more fields mandatory or with stricter rules to improve data quality.

Revision 4 of the Guidance will continue to apply until November 2023 when Revision 5 will become applicable. The exact date on which Revision 5 will become applicable will be published in due course.

Revision 5 can be downloaded [here](#).

3. CENTRAL BANK OF IRELAND

3.1 Central Bank (Individual Accountability Framework) Act 2023 and Central Bank Consultation Paper on the Individual Accountability Framework (CP 153)

On 9 March 2023, the Central Bank (Individual Accountability Framework) Act 2023 (**Act**) was signed into law.

The Act was introduced to promote accountability within the financial services sector and is intended to make individuals in key positions individually responsible for their actions within the scope of their roles. This includes senior management, directors and other decision makers with an impact on the firm's overall performance, with the ultimate goal being an improvement in integrity and stability.

The Act comprises four pillars:

- Introduction of New Business and Individual Conduct Standards: The Act introduces new conduct standards for both firms and individuals working for such firms. All firms regulated by the Central Bank will be required to comply with business conduct rules, including obligations such as acting honestly and with due skill, care and diligence. All individuals performing controlled functions (**CFs**) in a regulated firm will be required to comply with common conduct standards. Senior executives will also have to comply with additional conduct standards related to running the part of the business for which they are responsible;

- Senior Executive Accountability Regime (**SEAR**): This will require in-scope firms to set out clearly and fully where responsibility and decision-making lie within the firm's senior management;
- Enhancements to the current Fitness & Probity (**F&P**) Regime: This will include clarifying firms' obligations to proactively certify that individuals carrying out CF functions are fit and proper; and
- Amendments to the Administrative Sanctions Procedure (**ASP**): A key change will be the Central Bank's ability to take enforcement action under the ASP directly against individuals for breaches of their obligations rather than only for their participation in breaches committed by a firm.

On 13 March 2023, the Central Bank published its Consultation Paper 153 (**CP153**) containing draft regulations and guidance which set out how it proposes to implement the new Individual Accountability Framework (**IAF**) following the signing into law of the Act on 9 March 2023.

CP153 contains draft implementing regulations including (i) SEAR Regulations, (ii) Fitness and Probity Certification Regulations and (iii) Holding Companies Regulations.

CP153 also includes draft Guidance proposed by the Central Bank which seeks to provide further clarity in terms of its expectations for the implementation of SEAR, the conduct standards applicable to CF functions, PCFs and those who may exercise significant influence on the conduct of the firm's affairs and certain aspects of the enhancements to the F&P regime.

The Central Bank has proposed the following implementation timeline:

- Conduct standards applicable to individuals working in regulated firms: 31 December 2023.
- F&P Regime - certification (and inclusion of Holding Companies requirements): 31 December 2023.
- SEAR Regulations – obligations on prescribing responsibilities of different roles and requirements on firms to clearly set out allocation of those responsibilities and decision-making are set to apply to in-scope firms: 1 July 2024.

The Central Bank has also confirmed that the business standards which will apply to all regulated firms under the Act are being reviewed as part of the current review of the Central Bank's Consumer Protection Code and accordingly has not yet provided a proposed timeline for implementation of those business standards in CP153.

Interested stakeholders are invited to submit their feedback on CP153 to the Central Bank by the deadline of 13 June 2023 via email to IAFconsultation@centralbank.ie.

A copy of the Act can be found [here](#).

CP153 can be accessed [here](#).

Further information on the contents of CP153 is contained in our briefing which is accessible [here](#).

You can also view a webinar hosted by Dillon Eustace on CP153 [here](#).

Key Action Points

All fund management companies and corporate funds should review the proposals put forward by the Central Bank in CP 153 regarding implementation of its IAF framework and likely implications for existing governance arrangements and, if deemed appropriate, respond to CP 153 no later than 13 June 2023.

3.2 New Client Asset Requirements to enter into force on 1 July 2023

On 27 January 2023, the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2023 (**Revised Investment Firms Regulations**) were published in the Irish Statute Book. The Revised Investment Firms Regulations revoke

and replace the Central Bank (Supervision and Enforcement) Act 2013 Section 48(1) (Investment Firms) Regulations 2017 and amend the client asset requirements (**CAR**) which are set out in Part 6 of the Revised Investment Firms Regulations.

In February 2023, the Central Bank published a draft Addendum to its June 2022 Guidance Note on the Central Bank Client Asset Requirements (the **Addendum**). The Addendum includes draft guidance in respect of the transfer of client assets as part of a transfer of business. Both documents are expected to be published in final form shortly.

In October 2022, the Central Bank published a revised Monthly Client Asset Report (**MCAR**) template in order to strengthen the MCAR as a supervisory tool and reflect the revisions to the CAR. The Central Bank has published the revised MCAR and accompanying guidance on its website, available [here](#), to provide in-scope firms with the opportunity to prepare for the revised MCAR reporting. The Central Bank will advise investment firms of the date from which to start using the revised MCAR in due course.

A number of key changes have been made to the existing CAR requirements, including in the areas of segregation, reconciliation, calculation, client disclosure and consent, prime brokerage services, risk management and reporting. Steps should be taken by in-scope firms to begin preparations to ensure they will be able to fully comply with the revised CAR.

The client assets rules apply to UCITS management companies/AIFMs with extended MiFID 'top-up' permissions in respect of those 'top-up' activities which hold client assets.

Under the Revised Investment Firms Regulations, in-scope management companies will have until 1 July 2023 to comply with the revised CAR requirements.

The Revised Investment Firms Regulations can be accessed [here](#).

The draft Guidance Note can be accessed [here](#), and the accompanying Addendum can be accessed [here](#).

Key Action Points

Fund Management Companies with extended MiFID "top-up permissions" which hold client assets should ensure that internal arrangements for holding client assets are updated to comply with the Revised Investment Firms Regulations and related guidance by 1 July 2023.

3.3 Central Bank Securities Markets Risk Outlook Report 2023

On 2 March 2023, the Central Bank published its third Securities Markets Risk Outlook Report (**Report**), in which it identified the key risks and areas of supervisory focus in 2023. The Report also sets down the Central Bank's expectations of what financial service providers and market participants should do to effectively identify, mitigate and manage these risks in the context of their particular business activities.

Some of the key risks and areas of focus identified which will be relevant to fund management companies and the funds that they manage include:

- Delegation and Outsourcing;
- Sustainable Investing;
- External Risk Environment;
- Market Conduct Risk Management;
- Market Integrity;
- Cyber Security;
- Data Quality; and
- Digital Innovation.

For more information on the risks and areas of focus identifies by the Report, as well as the suggested actions which should be taken by fund management companies, please see a Dillon Eustace briefing [here](#).

The Report can be accessed [here](#).

Key Action Points

Fund Management Companies should consider all of the suggested actions identified by the Central Bank in the Report and, where necessary, take appropriate steps to ensure that internal arrangements are such that they meet the supervisory expectations of the Central Bank as outlined in the Report.

3.4 Dear CEO Letter - Central Bank's key regulation and supervision priorities for 2023

On 16 February 2023, the Central Bank published a Dear CEO letter which was sent to all regulated firms on key regulatory and supervisory priorities for the coming year, against what they deem to be a persisting challenging financial backdrop. The Central Bank has reiterated its outcomes focused approach to regulation and supervision, which remains fundamentally a risk-based approach.

Key regulatory and supervisory priorities for the Central Bank include:

- The provision of a clear, open and transparent authorisation process.
- The assessment and management risks to the financial and operational resilience of firms.
- Consulting and engaging on regulatory developments under the Consumer Protection Framework and Individual Accountability Framework.
- Consultation on the Central Bank's approach to innovation that will include an exploration of new ways of engagement with innovators and their products.
- Ongoing focus on integrity within the financial system including the prevention of market abuse, and supervision of compliance with anti-money laundering and countering the financing of terrorism (AML/CFT) obligations and enforcing financial sanctions.
- Ensuring implementation of the EU's Anti-Money Laundering Action Plan including the establishment of a single supervisory authority (the Anti-Money Laundering Authority).
- Implementation of new EU regulations, including digital operational resilience (DORA) and markets in crypto assets (MiCA).

The Dear CEO letter can be accessed [here](#).

A related Central Bank press release can be accessed [here](#)

3.5 Updated Fitness & Probity process for Individual Questionnaires

In March 2023, the Central Bank updated its Fitness and Probity (F&P) Individual Questionnaire (IQ) which must be submitted by any person wishing to be approved by the Central Bank to perform a pre-approved controlled function. It also published draft guidance on a new process for the submission of IQs via the Central Bank Portal.

For more information on the changes to the IQ application process, please see a Dillon Eustace briefing [here](#).

A PDF version of the updated IQ can be accessed [here](#).

The Central Bank's draft guidance on the submission of the IQ can be accessed [here](#), and a presentation on the new F&P application process can be accessed [here](#).

3.6 Central Bank Information Note on Liability Driven Funds

On 29 March 2023, the Central Bank published an Information Note on liability driven investment funds (“LDI Funds”) in which it noted the statement published by the Bank of England’s Financial Policy Committee on the same day.

It notes that following the significant UK sovereign bond (gilts) market turmoil in late September 2022, it sent a letter in November 2022 to all LDI Funds which set out the minimum safeguards required to maintain their operational and financial resilience. It also confirms that it will continue to work with UK, EU and international bodies and that while this work is ongoing, it expects the minimum yield buffer of 300-400 basis points to be observed by LDI Funds denominated in GBP.

The Central Bank’s Information Note can be accessed [here](#).

The Central Bank’s letter of 30 November 2022 can be accessed [here](#).

3.7 Central Bank removes COVID-19-related flexibility for regulated firms

During COVID-19, the Central Bank allowed for certain flexibility in how regulated firms complied with their regulatory obligations, including the suspension of certain due diligence requirements and periodic on-site visits to outsourcing providers and delegates by fund service providers.

On 28 February 2023, the Central Bank confirmed that it no longer considers such flexibility to be required and, as a result, all regulated firms should resume to comply with their regulatory requirements in the normal manner.

Further information can be accessed [here](#).

3.8 Central Bank announces changes to the Central Bank Portal

In a message sent to all Portal administrators in March 2023, the Central Bank confirmed that in H2 2023, the existing ONR login will be permanently disabled and that all users should link their Portal and ONR accounts by the end of June 2023 to ensure that they retain the same permissions and access for the Portal that they currently hold for the ONR system. Further guidance on how to link both accounts is available [here](#).

Key Action Points

All regulated firms should ensure that users of the Central Bank’s ONR system link their Portal and ONR accounts by end of June 2023.

4. SUSTAINABLE FINANCE

4.1 Publication of revised SFDR Level 2 Measures and Central Bank Process Clarification Document

On 17 February 2023, Commission Delegated Regulation (EU) 2023 363 (**Revised SFDR Level 2 Measures**) amending the existing SFDR Level 2 Measures² was published in the Official Journal, entering into force on 20 February 2023.

The Revised SFDR Level 2 Measures incorporate updated pre-contractual annexes and periodic report annexes which must be used by funds falling within the scope of Article 8 or Article 9 of the SFDR which incorporate additional questions regarding exposure of the relevant fund to EU taxonomy-aligned fossil gas and nuclear energy economic activities. They also make some other additional changes to the existing SFDR Level 2 Measures.

² Commission Delegated Regulation (EU) 2922 1288

On 20 February 2023, the Central Bank published a process clarification document which outlines its filing requirements for in-scope Article 8 and Article 9 funds in light of the publication of the Revised SFDR Level 2 Measures, in which it noted that revised pre-contractual annexes should be submitted to the Central Bank “as soon as possible and at the earliest available opportunity”, noting that the fast-track filing process will be “time limited”.

The Revised Level 2 SFDR Measures are available [here](#).

A Dillon Eustace briefing on the process clarification can be accessed [here](#).

The Central Bank’s process clarification is available [here](#).

Key Action Points

Fund Management Companies which manage in-scope Article 8 funds and/or Article 9 funds should ensure that updated pre-contractual annexes are prepared, approved (by both the board of directors of the fund management company and the board of directors of the relevant fund, where applicable) and filed with the Central Bank as soon as possible and at the earliest available opportunity.

4.2 Provisional agreement reached on EU Green Bond Framework

On 28 February 2023, the European Parliament and the Council of the EU announced that provisional agreement had been reached on the EU Green Bond Framework. This provisional agreement follows on from the European Commission’s proposal for an EU Green Bond Framework published on 6 July 2021. The key objective of the framework is to create a high-quality voluntary standard for bonds financing sustainable investment.

The agreed text still needs to be formally confirmed by the European Parliament and the Council of the EU and adopted by both institutions before it is considered final. The framework will apply 12 months after its entry into force.

For more information on the provisional agreement and the changes made to the Commission’s proposal, please see a Dillon Eustace briefing [here](#).

A press release on the provisional agreement can be accessed [here](#).

4.3 ESMA Final Report on MiFID II Product Governance

On 27 March 2023, ESMA published its final report containing the revised guidelines on MiFID II product governance requirements (**Revised Guidelines**).

The Revised Guidelines address the new sustainability related provisions introduced under the revisions made to the MiFID II Delegated Directive³ (EU) 2017/593. In particular, they require in-scope product manufacturers to specify any sustainability-related objectives the product is compatible with when identifying the target market. Other amendments to the existing guidelines include guidance on identifying a target market per cluster of products instead of per individual product and updated guidance on the periodic review of products, including the application of the proportionality principle.

ESMA has noted in the guidelines that the application date of the revised guidelines should reasonably align with the application date of the ESMA guidelines on suitability. We can therefore expect the revised guidelines to apply from October 2023.

A copy of the final report can be accessed [here](#).

³ Commission Delegated Directive (EU) 2017/593

5. PRIIPs

5.1 Updated CBI UCITS Q&A and CBI web-based guidance on PRIIPS filing requirements

On 24 March 2023, the Central Bank published revised web-based guidance on the filing of PRIIPS KID.

The revised guidance re-confirms that UCITS authorised before 1 January 2023 are not required to file a PRIIPS KID with the Central Bank at this time and that it is not possible to file a new PRIIPS KID for any funds authorised before 1 January 2023 via the Central Bank Portal at this time.

The revised web-based guidance clarifies that for any UCITS which was authorised on or after 1 January 2023 which has filed a PRIIPS KID with the Central Bank, any amended PRIIPS KID should be submitted through the Portal using the “UCITS KIID Update” Request Changes as a temporary measure.

The Central Bank also published a revised UCITS Q&A in which it amended certain existing Q&A concerning PRIIPS filing requirements. It also confirms that where a UCITS markets share classes only to professional investors, the UCITS can file a UCITS KIID to the Central Bank for those purposes. It also confirmed that the PRIIPS KID of any foreign domiciled UCITS registered to market in Ireland that intends to market to retail investors must be filed with the UCITS home regulator for onward submission to the Central Bank.

The updated web-based guidance can be accessed [here](#).

The revised Central Bank’s UCITS Q&A can be accessed [here](#).

5.2 Corrigendum to PRIIPS Level 2 Measures published in Official Journal

On 16 March 2023, a corrigendum to the PRIIPs Level 2 Measures⁴ was published in the Official Journal which corrects one of the rules applicable to the calculation of the summary risk indicator detailed in Annex II thereto.

A copy of the corrigendum is available [here](#).

Key Action Points

PRIIPs manufacturers should ensure that systems used to calculate the summary risk indicator are updated as appropriate in line with the revised rules set down in the corrigendum.

6. MONEY MARKET FUNDS

6.1 Guidelines on stress test scenarios under the MMF Regulation

On 27 January 2023, ESMA published its Guidelines (**ESMA Guidelines**) on Stress Testing under the Money Market Funds Regulation (**MMFR**), which contain updated guidance on the types of stress testing scenarios to be included in the stress tests conducted by MMFs or their managers under Article 28 of the MMFR and their calibration, in all EU official languages including the English language version.

The ESMA Guidelines apply from 27 March 2023.

On 24 March 2023, the Central Bank published a Notice of Intention in which it confirmed that it expects full compliance with the ESMA Guidelines from 27 March 2023.

The ESMA Guidelines can be accessed [here](#).

The Notice of Intention can be accessed [here](#).

⁴ Commission Delegated Regulation (EU) 2021/7653 as amended by Commission Delegated Regulation (EU) 2021/2268

6.2 ESMA Consultation on Review of Methodology included in Guidelines on Stress Testing Scenarios under the MMFR

On 31 January 2023, ESMA published a consultation paper on a review of the methodology included in the ESMA guidelines on stress test scenarios under the MMFR (**ESMA Guidelines**). In that consultation, ESMA has proposed amending the ESMA Guidelines to update the methodology used to measure the impact of the stress scenarios whose results must be reported by MMFs or their managers under Article 38 of the MMFR.

The consultation closes on 28 April 2023, with ESMA intending to publish finalised revised guidelines in Q4 2023.

The Consultation Paper can be accessed [here](#).

Key Action Points

Fund management companies which manage money market funds may want to consider, if deemed appropriate, responding to the ESMA consultation by 28 April 2023.

6.3 ESMA EU MMFR Report

On 8 February 2023, ESMA published its inaugural report on MMF (**Report**) within the EU entitled “EU MMF Market 2023” which provides a comprehensive overview of the MMF market based on information provided by managers to national Competent Authorities and ESMA.

The Report provides an overview of the structure of the EU MMF sector, an analysis of MMF activities and trends and the holder structure of European MMFs, as well as an overview of the reporting framework applicable to MMF.

The Report can be accessed [here](#).

7. EXCHANGE TRADED FUNDS

7.1 Central Bank ETF themed review on the role of the Authorised Participant and Market Makers

The Central Bank has commenced its anticipated ETF themed review which is focused upon the role of Authorised Participants (APs) and Market Makers (**MMs**). The Central Bank has initiated this review with a qualitative questionnaire which it issued to a number of ETF managers. This qualitative questionnaire includes questions around the details of the APs and MMs as well as seeking information regarding the initial and ongoing due diligence policies and procedures which are utilised in respect to the appointment and ongoing monitoring of APs/MMs. The Central Bank has indicated that it requires responses (from those ETF managers who received its qualitative questionnaire) to be submitted to it by 30 April 2023. It is anticipated that the Central Bank will also issue a second (quantitative) questionnaire to ETF managers before the end of April. We understand that this second questionnaire may be sent to a wider group of ETF managers than those who received the first questionnaire. The Central Bank is also likely to have follow-up on site meetings with a number of ETF managers once it has reviewed the responses to its questionnaires. We would anticipate that after it is has completed its ETF themed review, the Central Bank would be likely to issue a Dear Chair letter to the industry outlining its key findings and highlighting matters which ETF managers should ensure are adequately addressed within their operational procedures and structures.

Key Action Points

Management Companies of Irish ETF funds which have received the Central Bank’s questionnaire should provide a completed questionnaire to the Central Bank no later than 30 April 2023.

8. CROSS-BORDER DISTRIBUTION FRAMEWORK

8.1 Central Bank of Ireland publishes updated national provisions governing marketing requirements for UCITS and AIFs

On 27 February 2023, the Central Bank updated its national provisions governing marketing requirements for UCITS and AIFs.

The revised website guidance provides updated information on the format and content of marketing material and the Central Bank's approach to verification of marketing communications.

The updated provisions applicable to the marketing of UCITS in Ireland can be accessed [here](#).

The updated provisions applicable to the marketing of AIFs in Ireland can be accessed [here](#).

9. ELTIF

9.1 Amending ELTIF Regulation published in the Official Journal

On 7 March 2023, the Council of the EU adopted the amending regulation to the European Long Term Investment Fund (ELTIF) Regulation (**Amending ELTIF Regulation**), marking the final step in the legislative process.

The revisions to the existing ELTIF framework are intended to redesign the regulatory framework and make ELTIFs a more attractive option for asset managers who want to offer long-term investment opportunities, such as infrastructure projects, to institutional and private investors across the EU.

The legislation was signed into law on 15 March 2023 and was published in the Official Journal of the EU on 20 March 2023. It entered into force on 9 April 2023. The updated regime will apply from 10 January 2024.

A Dillon Eustace briefing containing more information on the Amending ELTIF Regulation is available [here](#).

The Amending ELTIF Regulation can be accessed [here](#)

10. EMIR & SFTR

10.1 Extension of the Intragroup exemptions from clearing and collateral exchange requirements

On 13 February 2023, two Commission Delegated Regulations were published in the Official Journal confirming the extension of the temporary intragroup exemptions from clearing and margining from 30 June 2022 until 30 June 2025.

The intragroup exemptions (from clearing or collateral exchange requirements) apply to OTC derivative contracts that are concluded between counterparties which are part of the same group and where one counterparty is established in a third country for transactions with third country entities.

The two Commission Delegated Regulations comprise:

- Commission Delegated Regulation (EU) 2023/314 of 25 October 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) 2016/2251 as regards the date of application of certain risk management procedures for the exchange of collateral. A copy is available [here](#)

- Commission Delegated Regulation (EU) 2023/315 of 25 October 2022 amending the regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) No 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts. A copy is available [here](#)

10.2 ISDA, AIMA, EFAMA and FIA publish a joint statement on EMIR 3.0 Proposals

On 2 February 2023, ISDA, AIMA, EFAMA and FIA published a joint statement in response to certain of the European Commission's (EC) proposed amendments to Regulation (EU) No 648/2012 (EMIR) to make derivatives clearing in the EU more attractive, known as EMIR 3.0.

One of the most noteworthy elements of EMIR 3.0 is the proposal to require EU market participants to clear a proportion of their transactions in certain derivatives at active accounts at clearing counterparties (CCPs) in the EEA (Active Account Requirement), thereby moving a significant proportion of euro derivatives trading to EEA CCPs. The proposal seeks to counter risks to the EU financial stability which the European Commission believes arise from the concentration of clearing in some third-country CCPs, notably in a stress scenario.

The classes of derivatives which are proposed to fall in scope initially, subject to regulatory technical standards, are those set out below:

- (i) interest rate derivatives denominated in Euro or in Polish Zloty,
- (ii) credit default swaps denominated in Euro, and
- (iii) short-term interest rate derivatives denominated in Euro.

The list of classes can be increased on foot of additional regulatory technical standards following an assessment by ESMA on the basis of whether a class of derivatives poses a threat to financial stability/is of substantial systemic importance.

The proportion of activity for each class of derivative for which an active account must be used has not yet been specified and this will be determined by regulatory technical standards to be prepared by ESMA. It is also proposed that clearing members and clients that clear through a non-EU CCP will need to provide certain annual reporting to their relevant competent authority. This will also be determined by future regulatory technical standards.

In the Statement, ISDA, AIMA, EFAMA and the FIA state that:

"The EC has taken some important steps towards strengthening the competitive position of Europe's growing derivatives markets in the EMIR 3.0 proposal.... However, the EC has proposed that firms subject to the EU clearing obligation should have an active account at an EU CCP, while giving the European Securities and Markets Authority the power to define the portion of certain euro- and Polish zloty-denominated contracts that should be cleared through those accounts via secondary regulation. Changes to capital rules would reinforce this, making it less commercially viable for EU market participants to clear through CCPs based outside the EU. We remain convinced that these measures, as proposed, would be harmful to EU capital markets. They would make EU firms less competitive and would have a negative impact on the derivatives market, EU clearing members and their clients, EU investors and savers, and the Capital Markets Union. For EU firms, this would not only hinder their ability to provide best execution to clients, but would also be costly to implement".

Currently, the equivalence of U.K. CCPs (ICE Clear Europe, LCH and LME) is set to expire on 25 June 2025. If implemented, the proposals will result in the movement of a significant portion of trading from ICE Clear Europe, LCH and LME to EU CCPs.

A copy of the joint statement is available [here](#).

A copy of a Dillon Eustace briefing paper containing further details can be accessed [here](#).

10.3 EMIR 3.0 – Proposed amendments to counterparty risk limits for UCITS and Money Market Funds

EMIR 3.0 proposes amendments to the Money Market Funds Regulation (Regulation (EU) 2017/1131 as amended) to eliminate counterparty risk limits for all derivative transactions that are centrally cleared by a CCP that is authorised or recognised under EMIR. This applies to the counterparty risk limits set out in Article 17(4) and 17(6)(c) of the Money Markets Fund Regulation.

In a related measure, a separate proposed directive amending the UCITS Directive also seeks eliminate counterparty risk limits for all OTC derivative transactions from counterparty risk limits under Article 52 of the UCITS Directive. This measure aims to establish a level playing-field between exchange traded and OTC derivatives and to better reflect the risk reducing nature of CCPs in derivative transactions

In both instances such an exclusion will only apply where the derivative transaction is centrally cleared by a CCP that is authorised or recognised under EMIR.

A copy of the EMIR 3.0 proposal can be accessed [here](#).

A copy of the proposed amending Directive can be accessed [here](#).

10.4 ESRB publishes letters on EMIR 3.0

On 21 March 2023, the European Systemic Risk Board (**ESRB**) published a Letter to the Members of the European Parliament on the EMIR 3.0 proposal. On the same date, the ERSB also published a Letter to the Council Working Party on the same proposal.

A copy of the Letter to the Members of the European Parliament on EMIR 3.0 can be found [here](#).

A copy of the Letter to the Council Working Party on EMIR 3.0 can be found [here](#).

10.5 ESMA updates Q&As on EMIR implementation: March 2023

On 31 March 2023, ESMA published an updated version to their Q&As on the implementation of EMIR. The update includes a new question under Article 9 EMIR on the inclusion of derivatives in the Trade State Report (**TSR**) and the following two amendments to existing questions under Article 9 EMIR:

- Reporting to trade repositories (**TRs**). ESMA clarifies that when a broker is a counterparty to a derivative, it should not report this both in the “broker” and “counterparty” fields. Instead the broker should report the derivative and identify itself as a counterparty.
- Exchange traded derivatives (**ETDs**): ESMA Clarifies which parties are obligated to report ETD contracts.

The updated version of the Q&A can be found [here](#).

10.6 ESMA issues Consultation Paper on the amendments to EMIR position calculation guidelines

On 28 March 2023, ESMA published a consultation paper on amendments to their guidelines regarding position calculation under EMIR (**Guidelines**). The Guidelines seek to ensure positions in derivatives calculated by trade repositories are calculated in a harmonised and consistent manner, including the time of calculations, the scope of data to be used and the calculation methodologies.

Section 4 details in table form the proposed amendments to the Guidelines and Annex III contains a consolidated version of the Guidelines as amended.

The consultation paper can be found [here](#), with ESMA inviting all relevant stakeholders who wish to respond to do so online by the 9 May 2023.

10.7 ESMA updates Q&As on data reporting under SFTR: March 2023

On 23 March 2023, ESMA published an update to their Q&As on reporting requirements under Regulation (EU) 2015/2365 (the **SFTR**) regarding transparency of securities financing transactions.

The new Question 15 added by ESMA under Article 4 SFTR relates to reporting of the jurisdiction of the issuer.

The updated Q&A document can be accessed [here](#).

11. ANTI-MONEY LAUNDERING (AML) AND COUNTERING THE FINANCING OF TERRORISM (CFT)

11.1 Guidelines on the Definition of 'prominent public functions': Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

On 27 January 2023, the Department of Justice issued guidelines under Section 37(12) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) (**Guidelines**). The Guidelines provide clarification on those functions in Ireland that shall be considered to be “prominent public functions” for the purposes of identifying domestic “Politically Exposed Persons”.

For the purpose of the Guidelines, a “prominent public function” within the State is considered an office or other employment in a public body (not including courts) in respect of which the remuneration is not less than the lowest remuneration in relation to the position of Deputy Secretary General in the Civil Service. The Guidelines set out specific examples of those falling within the scope of “prominent public function”.

The Guidelines can be found [here](#).

11.2 European Banking Authority Updated Single Rulebook Q&A - Directive 2015/849/EU (AMLD)

During the period 1 January 2023 to 31 March 2023, the European Banking Authority (**EBA**) updated its Single Rulebook Q&As publication for Directive 2015/849/EU (the **5th Anti-Money Laundering Directive**). The Q&As in respect of the following articles have been updated:

- Article 11 – Payment Information Service Providers (PISP) obligations to conduct customer due diligence;
- Article 29 - Clarification of the relationship between EBA's Guidelines on outsourcing arrangements and Section 4 of the Directive (EU) 2015/849; and
- Article 45 - Establishment and appointment of a Central Counterparty Clearing House (**CCP**).

The full Q&A document, including changes, can be found [here](#).

12. DATA PROTECTION

12.1 EDPB adopts its decision on EU-US Data Privacy Framework

On 28 February 2023, the European Data Protection Board (**EDPB**) adopted its opinion (**Opinion**) on the proposed EU-US Data Privacy Framework having regard to the level of protection afforded in the United States of America on the basis of the examination of the draft decision prepared by the European Commission.

On 13 December 2022, the European Commission published its draft adequacy decision under which it provided a detailed assessment of the US legal framework for state surveillance, intended to replace the previous US Privacy Shield previously invalidated by the CJEU in the Schrems II case. The European Commission's draft decision concludes that the framework ensures an adequate level of protection for personal data transferred from the EU to US companies.

In the Opinion, the EDPB expresses the opinion that the U.S. Executive Order 14086 has led to significant improvements in the level of protection for personal data compared to the US Privacy Shield. However, despite noting "substantial improvements" in contrast to the previous legal framework, the EDPB raises a number of concerns relating to "certain rights of data subjects, onward transfers, the scope of exemptions, temporary bulk collection of data and the practical functioning of the redress mechanism" which it suggests should be addressed and clarified by the European Commission "in order to solidify the grounds for the draft adequacy decision".

On 14 February 2023, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs published a [draft motion](#) for a resolution rejecting the proposed framework on 14 February 2023 in which it urges the European Commission not to adopt the draft adequacy decision in relation to the US and calls for the introduction of meaningful reforms.

Before the European Commission can proceed with adopting the finalised adequacy decision, it is still subject to approval from a committee composed of representatives of the EU Member States, along with the European Parliament who have a right of scrutiny over such adequacy decisions.

For further information please see [here](#).

12.2 Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers under Chapter V of the GDPR

On 14 February 2023, the EDPB adopted revised guidelines on the interplay between Article 3 and Chapter V of the GDPR. The original guidelines were published on 18 November 2021.

The revised guidelines were issued in February 2023 following a public consultation. The original guidelines include various examples of data flows to third countries. The updated guidelines include additional examples to provide a better understanding, including providing further guidance on when personal data could be deemed to be "made available" to a third country controller, joint controller or processor. In the new guidelines, the EDPB states that:

"Some examples of how personal data could be "made available" are by creating an account, granting access rights to an existing account, "confirming"/"accepting" an effective request for remote access, embedding a hard drive or submitting a password to a file. It should be kept in mind that remote access from a third country (even if it takes place only by means of displaying personal data on a screen, for example in support situations, troubleshooting or for administration purposes) and/or storage in a cloud situated outside the EEA offered by a service provider, is also considered to be a transfer provided that the three criteria outlined [above] are met".

In addition, the revised guidelines provide further guidance relating to (i) the transfers of data by a processor in the EEA (as exporter) back to its controller in a third country and (ii) the transfers of data by a processor in the EEA (as exporter to a sub-processor in a third country).

A copy of the original guidelines can be accessed [here](#).

A copy of the revised guidelines can be accessed [here](#).

13. CONFLICT IN UKRAINE

13.1 Adoption of tenth package of sanctions against Russia by the European Union on 25 February 2023

In reaction to Russia's continued military aggression against Ukraine, the European Union adopted additional economic sanctions against Russia which have been introduced through a suite of additional packages adopted by the Council of the European Union announced on 25 February 2023. This package included, amongst others, the following measures:

- (i) a new reporting obligation for individuals and legal entities to provide their competent authority and the European Commission with information on the assets and reserves of the Central Bank of Russia which they hold or control or to which they are a counterparty. The Central Bank subsequently confirmed that in-scope entities must make the relevant filings within two weeks of 27 April 2023 (i.e. by 11 May 2023) and must be updated every three months thereafter;
- (ii) additional reporting obligations on frozen assets (including for dealings before listing) and assets which should be frozen, with in-scope individuals and legal entities being required to report this information to their national competent authority and the European Commission within two weeks of acquiring this information; and
- (iii) an extension to the list of those individuals and entities subject to restrictive measures;

For a complete overview of the additional measures introduced on 25 February 2023, please see the related press release which is available [here](#).

The Central Bank's webpage on sanctions reporting is accessible [here](#).

A consolidated version of the European Commission's frequently asked questions on the range of measures introduced in response to Russia's continued military aggression against Ukraine is available [here](#).

Key Action Points

If applicable, fund management companies should ensure that additional information required to be provided to the Central Bank and the European Commission is submitted to both organisations within applicable timeframes.

13.2 Central Bank reminds regulated firms of obligations to ensure compliance with financial sanctions

In its Securities Markets Risk Outlook Report for 2023 published on 2 March 2023, the Central Bank has reminded firms that they must remain in compliance with financial sanctions at all times with respect to any impacted asset or investor.

It expects all financial service providers to have appropriate systems and controls in place to identify relevant sanctioned instruments and individuals to ensure that they are compliant with their obligations in relation to financial sanctions.

A copy of the report is available [here](#).

Key Action Points

All fund management companies should ensure that they have appropriate financial sanctions systems and controls in place which meet the supervisory expectations of the Central Bank as outlined in its Securities Risk Outlook Report

14. MISCELLANEOUS

14.1 ESMA publishes updated Q&A on Securitisation Regulation

On 17 February 2023, the ESAs published an updated Q&A on the EU Securitisation Regulation, including a Q&A applicable to “institutional investors” which will include UCITS management companies/AIFMs investing in securitisations on behalf of managed funds.

ESMA confirms that any such institutional investor (other than the originator, sponsor or original lender) holding a securitisation position is not subject to any reporting obligations under the Securitisation Regulation. It also restates the existing obligation imposed on institutional investors to comply with the due-diligence requirements set out in Article 5 of the Securitisation Regulation as applicable prior to and whilst holding a securitisation position.

A copy of the updated Q&A can be accessed [here](#).

14.2 Council of EU agrees negotiating mandate on distance financial services contracts

On 2 March 2023, the Council of the EU announced via a press release that it has agreed on a general approach (or negotiating mandate) regarding a proposed Directive on financial services contracts concluded at a distance (**Proposed Directive**). The Proposed Directive will amend the rules concerning financial services contracts concluded at a distance, repealing the existing **Distance Marketing Directive** and inserting its provisions into the **Consumer Rights Directive** once finalised.

The European Commission first adopted its legislative proposal for the distance financial service contracts Directive in May 2022. The general approach adopted by the Council provides the Council Presidency with a mandate for negotiations with the European Parliament.

The Council have published an accompanying note from the Permanent Representatives Committee enumerating the general purpose and aim of the Proposed Directive, namely:

- to ensure a streamlined and future-proof framework for financial services concluded at a distance,
- to provide better protection for consumers in the digital environment,
- to reduce unnecessary burden and provide a level playing field for financial service providers, to encourage the cross-border provision of such services.

A copy of the Council’s press release can be found [here](#).

The Council’s note can be accessed [here](#).

The Commission’s proposal for the Directive can be accessed [here](#).

14.3 ESMA and FCA agree new Memorandum of Understanding relating to UK benchmark administrators

On 25 January 2023, ESMA and the UK’s FCA agreed a new Memorandum of Understanding (MoU) regarding cooperation and the exchange of information with respect to benchmark administrators based in the UK who seek recognition or are recognised in the EU. The new MoU with the UK FCA enables ESMA to start recognising benchmark administrators in the UK under the Benchmarks Regulation third country regime.

A copy of the MoU is accessible [here](#).

14.4 ESMA letter regarding concerns with changes to the insider list regime under the Market Abuse Regulations

On 10 March 2023, ESMA published a letter addressed to the European Parliament and Council in relation to the changes to the insider list regime in Regulation 596/2014/EU (**the Markets Abuse Regulation, MAR**) proposed by the European Commission on 7 December 2022.

In the letter, ESMA outlines its concerns over the proposal by the European Commission to amend Article 18 of MAR to provide that insider lists need only be comprised of persons with regular access to inside information, or “permanent insiders”, and not those who may access such information on an ad hoc basis. ESMA sets out that it believes that this proposal may have two significant detrimental effects:

- The first concern is in relation to the ability of National Competent Authorities to adequately enforce against market abuse. As the new insider lists will not cover those persons working for the issuer who have irregular access to inside information, ESMA is concerned that this will limit the ability of NCAs to quickly identify non-permanent insiders. Moreover, ESMA is concerned that NCAs will not be able to use the list to assess which permanent insider accessed each piece of inside information and when.
- The second concern is the significant detrimental effect on issuers. Firms currently use insider lists to manage inside information. ESMA is concerned that under the new proposal, insiders will not be aware if they are in possession of insider information. ESMA note that this unawareness could increase the risk of unintended insider dealing, in addition to weakening the issuers’ control of the flow of inside information.

The letter can be found [here](#).

The proposed amendments discussed can be found [here](#).

If you have any questions in relation to the content of this update, to request copies of our most recent newsletters, briefings or articles, or if you wish to be included on our mailing list going forward, please contact any of the team members below or your usual contact in the Dillon Eustace Asset Management and Investment Funds team

Donnacha O'Connor

E-mail: donnacha.oconnor@dilloneustace.ie

Tel : + 353 1 673 1729

Brian Dillon

E-mail: brian.dillon@dilloneustace.ie

Tel : + 353 1 673 1713

Etain de Valera

E-mail: etain.devalera@dilloneustace.ie

Tel : + 353 1 673 1739

Derbhil O'Riordan

E-mail: derbhil.oriordan@dilloneustace.ie

Tel : + 353 1 673 1755

Brian Kelliher

E-mail: brian.kelliher@dilloneustace.ie

Tel : + 353 1 673 1721

Brian Higgins

E-mail: brian.higgins@dilloneustace.ie

Tel : + 353 1 673 1891

Cillian Bredin

E-mail: cillian.bredin@dilloneustace.ie

Tel : + 353 1 673 1889

David Walsh

E-mail: david.walsh@dilloneustace.ie

Tel : + 00 1 646 770 6080

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