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Funds
Quarterly Legal and Regulatory Update

Period covered: 1 October 2022 – 31 December 2022

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1. APPROACHING DEADLINES

Approaching deadlines		
Q1 2023	1 January 2023	Funds falling within the scope of Article 8 or Article 9 of the SFDR must incorporate and publish an "ESG" annex into their prospectus/fund supplements which satisfy the relevant regulatory technical standards published under the SFDR.
	1 January 2023	The annual reports of any funds falling within the scope of Article 8 or Article 9 of the SFDR published on or after 1 January 2023 must incorporate an "ESG" annex into their annual report which satisfies the relevant regulatory technical standards published under the SFDR.
	1 January 2023	All UCITS funds which are made available to EEA retail clients must prepare and publish a PRIIPS Key Information Document from this date.
	1 January 2023	All UCITS management companies, AIFMS and Irish corporate UCITS and AIF funds must review and update their whistleblowing policies and internal reporting channels and procedures in line with the Protected Disclosures (Amendment) Act from this date.
	16 January 2023	Closing date for responding to the ESA's Call for Evidence on Greenwashing.
	31 January 2023	Deadline for all Irish UCITS management companies and AIFMs to file annual confirmation of ownership with the Central Bank.
	20 February 2023	Closing date for responding to the ESMA consultation on guidelines on funds' names using ESG or sustainability-related terms.
	21 February 2023	All UCITS which continue to prepare a UCITS KIID must file updated KIIDs which contain updated performance data for the period ended 31 December 2022 and which incorporate any other required revisions with the Central Bank no later than 21 February 2023.
	23 February 2023	Closing date for responding to the Central Bank's Consultation Paper No 152 on Own Funds Requirements for UCITS management companies and AIFMS authorised to perform discretionary portfolio management.
	28 February 2023	Deadline for filing the fund profile return for all Irish authorised sub-funds with the Central Bank via its ONR portal.
	28 February 2023	Deadline for filing the annual PCF confirmation for both Irish authorised UCITS management companies/AIFMS and Irish authorised investment funds with the Central Bank
	[TBC] end- February 2023	Fund management companies with a PRISM Impact Rating of Medium Low or above (or its equivalent) to submit their completed outsourcing register, with the reference date of 31 December 2022, to the Central Bank via the Online Reporting System (ONR).

2. UCITS and AIFMD

2.1 Central Bank publishes Consultation Paper 152 on Own Fund Requirements for Irish UCITS Management Companies and AIFMs authorised to provide discretionary portfolio management

Under existing rules, Irish UCITS management companies and AIFMs which are authorised to provide discretionary portfolio management services and additional non-core services (**Management Companies with Extended IPM Permissions**) must comply with the own funds requirements set down in the Irish UCITS Regulations and Irish AIFM Regulations respectively as well as those set down in Regulation 18(2) of the European Communities (Capital Adequacy of Investment Firms) Regulation 2006 (**2006 Regulations**).

Under the Central Bank of Ireland's (**Central Bank**) proposals, all Management Companies with Extended IPM Permissions will be subject to bespoke own fund requirements, under which any firm which does not meet conditions to be a "small and non-interconnected firm" will be required to apply the higher of:

(i) the own funds requirements set down in the Irish UCITS Regulations or Irish AIFM Regulations as applicable; or

(ii) a Risk to Client K-factor own fund requirement (modelled on the Risk to Client K-factor applicable to MiFID investment firms under the Investment Firms Regulation.

Any firm which meets the conditions to be a "small and non-interconnected firm" will be subject to the own funds requirements set down in the Irish UCITS Regulations or the Irish AIFM Regulations as applicable and would no longer be required to calculate the own funds requirement under the 2006 Regulations.

The closing date for responding to the Consultation Paper is 23 February 2023.

A copy of the Consultation Paper is available here**.**

Key Action Points	Fund Management Companies with Extended IPM Permissions should consider the proposals for own fund requirements put forward by the Central Bank in its Consultation Paper and, if deemed appropriate, respond to the Consultation Paper no later than 23 February 2023.

2.2 Central Bank UCITS Q&A- 37th Edition

On 21 December 2022, the Central Bank published the 37th Edition of its UCITS Q&A.

This edition of the Q&A features three new Q&As (ID 1107, 1108 and 1109) which address the Central Bank's requirements for UCITS funds which produce a PRIIPs Key Information Document (**PRIIPs KID)** from 1 January 2023 to file such PRIIPs KID with the Central Bank.

It confirms that where an existing UCITS produces a PRIIPs KID, there is no requirement to file the PRIIPs KID with the Central Bank on 1 January 2023. The first reporting/submission of these PRIIPs KIDs to the Central Bank is expected to take place in 2024. Periodic updates to such PRIIPs KIDs will only be required to be filed with the Central Bank after the first reporting exercise.

It also sets down the filing obligations relating to new UCITS seeking authorisation or approval from the Central Bank which are producing a PRIIPS KID.

Further information relating to PRIIPS KID is available below under "PRIIPS".

The 37th edition of the Central Bank's UCITS Q&A is available here.

2.3 Central Bank AIFMD Q&A- 45th and 46th Editions

On 5 October 2022, the Central Bank published the 45th edition of its Q&A on AIFMD. This edition incorporates two new Q&As, ID 1154 and 1155.

ID 1154 confirms that for the purposes of the investment limit calculation of a QIAIF which invests more than 50% of "net assets" in another investment fund as detailed in the Central Bank's AIF Rulebook, the reference to "net assets" can be understood to refer to

committed capital for any QIAIF which remains closed for redemptions during the capital commitment period. The Central Bank also confirms that this calculation methodology can only be applied for six months following the completion of the capital commitment period.

Similarly, ID 1155 confirms that for the purpose of calculating leverage for a loan-origination QIAIF, reference to "net assets" in the Central Bank's AIF Rulebook can be understood to committed capital for any QIAIF which remains closed for redemptions during the capital commitment period. Again, the Central Bank also confirms that this calculation methodology can only be applied for six months following the completion of the capital commitment period.

On 21 December 2022, the Central Bank published the 46th Edition of its AIFMD Q&A. This edition revises Q&A ID 1126, which considers if AIFs which fall within the scope of the PRIIPs Regulation are required to file KIDs with the Central Bank.

The Q&A sets out the Central Bank's requirement that Retail Investor AIFs which produce PRIIPs KIDs shall file these on an ex-post basis. This will include periodic updates to existing KIDs. The first annual reporting of such KIDs will take place in January 2024. The Q&A also confirms that Qualified Investor AIFs which produce PRIIPS KID are not required to file them with the Central Bank.

The 45th Edition of the Central Bank's AIFMD Q&A is available here.

The 46th Edition of the Central Bank's AIFMD Q&A is available here.

2.4 ESMA Questions and Answers on the Application of AIFMD

On 16 December 2022, ESMA updated its Q&A on the Application of AIFMD to clarify whether managers of special purpose acquisition companies ("**SPACs**") are subject to the AIFMD.

ESMA confirms that, due to the complex structure of SPAC transactions, each one will have to be assessed on a case-by-case basis to determine whether the SPAC is an "AIF" or a "holding company" within the meaning of AIFMD in order to conclude whether the manager of such SPAC does in fact fall within the scope of the AIFMD.

The ESMA Q&A on the application of AIFMD is available here.

2.5 UCITS Management Companies Regulatory Reporting Requirements

The Central Bank has published a table providing a summary of the regulatory reporting requirements applicable to UCITS Management Companies, in which it provides guidance notes/comments for each return under the following headings:

- Financial Reporting
- Capital Reporting
- Other Scheduled ONR Returns
- Ad-Hoc Returns

The Central Bank's AIFM Reporting Requirements table is available here.

2.6 AIFM Regulatory Reporting Requirements

The Central Bank has published a table providing a summary of the regulatory reporting requirements applicable to AIF Managers, in which it provides guidance notes/comments for each return under the following headings:

- Financial Reporting
- Capital Reporting
- Other Scheduled ONR Returns
- Ad-Hoc Returns

The Central Bank's AIFM Reporting Requirements table is available here.

3. SUSTAINABLE FINANCE

3.1 Publication of ESA Q&A on SFDR

On 17 November 2022, the ESAs published a Questions and Answers on the SFDR Delegated Regulation (**Q&A**).

In the Q&A, the ESAs provide additional guidance which will be of relevance to fund management companies, including advices on the following matters:

- PAI disclosures to be made by financial market participants falling within the scope of Article 4(1) of the SFDR;
- Calculation of "current value of all investments" under the PAI and Taxonomy frameworks;
- Disclosures to be made by financial products falling within the scope of Article 8 or Article 9 of the SFDR; and
- Taxonomy-aligned investment disclosures and calculation of Taxonomy alignment.

For a more detailed analysis of the guidance provided by the ESAs in the Q&A and possible implications for fund management companies, please refer to our recent briefing which is available here.

A copy of the Q&A is available here.

Key Action Points	Where relevant, fund management companies should review the Q&A and assess implications for existing and future product-level and entity level disclosures.

3.2 ESMA Consultation on Funds' Names using ESG or Sustainability-Related Terms

On 18 November 2022, ESMA published a consultation paper containing draft guidelines on funds names which contain the term "ESG" or other sustainability-related terms (**Consultation Paper**).

Under the proposals put forward by ESMA in the Consultation Paper, funds which include ESG or other sustainability-related terms in their names will be required to comply with certain quantitative thresholds, including the following:

(i) Any fund which contains the term "ESG" or other ESG-related terms (including for example "climate change" or "biodiversity"), must use a minimum proportion of 80% of its investments to meet the environmental or social characteristics promoted by the fund or the sustainable investment objective of the relevant fund in accordance with the binding elements of the investment strategy;

(ii) Any fund which contains the term "sustainable" or any derivative of that word must allocate within the 80% bucket referred to in (i) above, at least 50% of minimum proportion of sustainable investments within the meaning of the SFDR.

ESMA also proposes that any fund which contains an ESG or sustainability-related term in its name must also comply with the exclusion criteria applicable to Paris-aligned benchmarks in respect of all investments in the fund.

A copy of the Consultation Paper is available here.

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Key Action Points	Where relevant fund management companies should review the ESMA Consultation Paper to assess any potential implications for the portfolio construction of funds which use ESG or sustainability-related terms in their names and consider providing feedback to ESMA on same on or before the deadline of 20 February 2023.

3.3 Publication of the Central Bank's "Sustainable Finance and the Asset Management Sector" Briefing

On 14 November 2022, the Central Bank published an information note entitled "Sustainable Finance and the Asset Management Sector: Disclosures, Investment Processes and Risk Management" (**Information Note**).

In the Information Note, the Central Bank outlined its findings from a review of disclosures it carried out in early 2022 made by Irish domiciled funds under level 1 of the SFDR and the Taxonomy Regulation together with suggested actions to be taken by fund management companies where required in order to align with supervisory expectations.

The Information Note also identifies other key areas of interest for the Central Bank going forward, which include the following:

(i) Adaption of risk management frameworks, including action taken in respect of management of sustainability risk as required under the SFDR as well as management of climate risk and other ESG issues as set down by the Central Bank in its cross-sectoral letter to industry in November 2021;

(ii) Supervisory engagement on Article 8 funds with a low proportion of portfolio promoting environmental/social characteristics and those funds which have re-classified under the SFDR and the rationale provided to the Central Bank in respect of such re-classification;

(iii) Consistency of sustainability-related information provided in fund documentation and marketing materials;

(iv) Fees and costs incurred by Article 8 fund and Article 9 funds;

(v) Securities lending entered into by Article 8 and Article 9 funds; and

(vi) The role of fund service providers in SFDR compliance, such as the role of the depositary.

For a more detailed analysis of the Information Note and possible implications for Irish fund management companies, please refer to our recent briefing which is available here.

A copy of the Information Note is available here.

Key Action Points	Irish fund management companies should review the Information Note and identify any actions which may need to be considered in order to align with the Central Bank's supervisory expectations as outlined therein.

3.4 European Commission adopts Commission Delegated Regulation amending existing SFDR Level 2 Regulations to incorporate additional disclosure obligations relating to exposure to investments in Taxonomy-aligned gas and nuclear economic activities.

On 31 October 2022, the European Commission adopted amending SFDR Level 2 Regulations (which include revised pre-contractual and periodic reporting annexes) **(Draft Amending SFDR Level 2 Regulations)** which will require fund management companies with funds falling within the scope of the Taxonomy Regulation to use such updated pre-contractual and periodic reporting annexes in order to provide information on investments in taxonomy-aligned fossil gas and nuclear economic activities. In particular, disclosures must make clear the proportion that such investments represent within all investments, and in environmentally sustainable economic activities.

The European Parliament and the Council of Europe have 3 months from date of receipt from the European Commission to scrutinise the amending SFDR Level 2 Regulations (i.e. until 31 January 2023) which provide that they should take effect on the third day following their formal publication in the Official Journal of the European Union.

A copy of the amending SFDR Level 2 Regulations is available here and a copy of the annexes thereto is available here.

Key Action Points	Management companies with funds falling within the scope of the Taxonomy Regulation should consider the disclosure obligations introduced under the Draft Amending SFDR Level 2 Regulations, monitor developments relating to the Draft Amending SFDR Level 2 Regulations and adapt their SFDR project implementation plans as necessary.

3.5 ESA Call for Evidence on Greenwashing

The ESAs also published a Call for Evidence on potential greenwashing practices in the whole EU financial sector on 15 November 2022 (**Call for Evidence**).

In the Call for Evidence, the ESAs seek input from stakeholders across the EU financial sector on examples of potential greenwashing practices at both entity and product level, any available data to help the ESAs gain a concrete sense of the scale of greenwashing and identify areas of high greenwashing risks and views from stakeholders on how to understand greenwashing and what the main drivers of greenwashing might be.

The responses received from stakeholders will inform an interim progress report which the ESAs must each provide to the European Commission by May 2023 and a final report which must be provided to the European Commission by May 2024 detailing greenwashing risks and occurrences in the EU financial sectors and on the supervisory action taken and challenges faced to address those risks.

Reponses to the Call for Evidence must be submitted by 16 January 2023.

A copy of the Call for Evidence is available here.

3.6 EU Corporate Sustainability Reporting Directive is published in the Official Journal

On 16 December 2022, the EU Corporate Sustainability Reporting Directive (**CSRD**) was published in the Official Journal of the European Union.

The CSRD amends both the scope and the reporting obligations imposed under the existing Non-Financial Reporting Directive (NFRD) so that all EU large companies, all EU listed companies1 and certain non-EU companies meeting specific thresholds will be required to incorporate sustainability-related information relating to environmental matters, social and human rights and governance factors in the

[1] Irish corporate funds which are listed on an EU regulated market do not fall within the scope of the CSRD.

non-financial statement included in their annual financial statements, using specific mandatory reporting templates prepared by the European Financial Reporting Advisory Group.

The CSRD will be phased in as follows for financial years starting on or after:

- 1 January 2024 for companies already subject to the NFRD;
- 1 January 2025 for companies that are not presently subject to the NFRD; and
- 1 January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance undertakings.

A copy of the CSRD is available here.

3.7 European Commission publishes draft notice on the interpretation and implementation of certain legal provisions of the EU Taxonomy Climate Delegated Act

On 19 December 2022, the European Commission issued a draft notice on the interpretation and implementation of certain legal provisions of the EU Taxonomy Climate Delegated Act which sets down the technical screening criteria required to be used to assess whether an activity contributes substantially to the environmental objectives of (i) climate change mitigation or (ii) climate change adaptation and does no significant harm to any of the other environmental objectives (**Notice**).

The Notice is intended to facilitate the effective application of the EU Taxonomy Climate Delegated Act and to provide technical clarifications responding to FAQs on the technical screening criteria set out therein.

The Notice is divided into the following three sections:

- Horizontal questions on process, updates and further development;
- Sector-specific questions on technical screening criteria; and
- Questions on recurring DNSH ("do no significant harm") criteria.

The Notice has been approved in principle by the European Commission and its formal adoption will take place at a later date as soon as the language versions are available.

A copy of the Notice is available here.

Key Action Points	Management companies which use the EU Taxonomy framework should have regard to the guidance provided by the European Commission in the Notice when assessing the extent to which economic activities invested in by funds under management contribute to the environmental objectives of climate change adaptation and climate change mitigation.

3.8 European Commission publishes notices on the interpretation and implementation of the Disclosures Delegated Act under Article 8 of the Taxonomy Regulation

During the period under review, the European Commission published two separate notices on the interpretation and implementation of the Disclosures Delegated Act2 which applies to those entities which fall within the scope of Article 8 of the Taxonomy Regulation. While

[2] Regulation (EU) 2021/2178

investment funds (as "financial products") do not fall within the scope of Article 8 of the Taxonomy Regulation, any asset manager which falls within the scope of the NFRD reporting requirements (as extended under the CSRD) will be subject to the disclosure obligations set down in Article 8 of the Taxonomy Regulation.

The first of these notices was published on 6 October 2022 and provides general guidance on the disclosure obligations arising under Article 8 of the Taxonomy Regulation, with the notice covering (i) General FAQ, (ii) Non-Financial Undertakings, (iii) Financial Undertakings, (iv) Asset Managers, (v) Insurers, (vi) Credit Institutions, (vii) Debt Markets and (viii) Interaction with Other Regulations.

The second notice, which was published by the European Commission in draft form on 19 December 2022, is intended to provide specific guidance to non-financial undertakings falling within the scope of Article 8 of the Taxonomy Regulation (who must commence reporting their Taxonomy key performance indicators as of 1 January 2023). It contains General FAQs as well as specific FAQs on turnover, CapEX and OpEX key performance indicators.

A copy of the notice published by the European Commission on 6 October 2022 is available here.

A copy of the draft notice published by the European Commission on 19 December 2022 is available here.

4. CENTRAL BANK

4.1 Central Bank "Dear Chair" Letter issued to Irish Fund Management Companies

Following on from a survey it issued to Irish fund management companies (**FMC**) in June 2022, the Central Bank issued a "Dear Chair" letter to all FMC on 7 December 2022 in which it outlined its findings from the survey which included the following:

- A notable increase in resources deployed by FMCs since 2020; and
- Progress in areas such as CEO appointments, director time commitments and resourcing of managerial functions.

The Central Bank noted that as the nature, scale and complexity of third-party FMC continues to grows, the resources and expertise of such third party FMCs should increase accordingly. It also noted that those FMC with additional "MiFID" permissions to provide individual portfolio management services will be an area of focus for the Central Bank.

The Central Bank also noted that it expected tenure and independence of INEDs to be considered as part of the organisational effectiveness director's review of Board composition. It also restated the need for FMCs to consider diversity as part of ongoing internal governance reviews.

A copy of the "Dear Chair" letter is available here,

Key Action Points	Irish fund management companies are expected to consider and discuss the Central Bank's Dear Chair letter and give due consideration to any areas requiring improvement in order to ensure that the governance arrangements in place align with the Central Bank's supervisory expectations

4.2 Central Bank Letter- Liability Driven Investments Funds

On 30 November 2022, the Central Bank wrote to Irish management companies managing Liability Driven Investment Funds (**LDI Funds**) in which it noted that following a recent period of volatility, it does not consider that any reduction in the resilience at individual sub-fund level is appropriate.

The Central Bank goes on to note that to the extent that a management company may consider it necessary to advertently reduce the resilience of a GBP-denominated LDI fund below the levels that were achieved in the period following the dislocation in the UK gilt market, that management company should take the actions set down in the letter, including notifying the relevant NCA and carrying out a documented analysis as to why such reduction is necessary, completing a full risk assessment with relevant modelling and documenting a step-by-step plan for returning the fund to current levels of resilience.

The Central Bank also notes that GBP-denominated LDI Funds which inadvertently experience a decrease in resilience due to a changing market environment should have procedures in place to recapitalise and/or de-risk their portfolios by reducing their exposures in a timely manner.

The letter also outlines the Central Bank's expectations that management companies of LDI Funds denominated in currencies other than GDP should maintain an appropriate level of resilience at an individual sub-fund level in order to be able to absorb possible market shocks.

A copy of the Central Bank's letter is available here.

4.3 Central Bank "Dear Chair" Letter -Protecting Consumers in a Changing Economic Landscape

On 17 November 2022, the Central Bank published a "Dear Chair" Letter in which it emphasised the importance of financial services firms meeting the obligations set out in the Central Bank's Consumer Protection Outlook Report in March 2022 in light of the materialisation of a more challenging economic outlook since the Report's publication.

The Central Bank outlines additional steps to be taken by firms in the following areas:

- Affordability and suitability;
- Provision of relevant, clear and timely information;
- Effective operational capacity; and
- Sales and product governance.

A copy of the "Dear CEO" Letter is available here.

Key Action Points	Irish fund management companies should analyse the specific matters identified by the Central Bank in its letter and take any appropriate action in order to ensure that existing arrangements align with the Central Bank's supervisory expectations.

4.4 Central Bank (Individual Accountability Framework) Bill 2022

On 7 December 2022, the Central Bank (Individual Accountability Framework) Bill 2022 (**Bill**) completed the Committee Stage in the Dáil. The Bill will soon move into the Report Stage in the Dáil and is expected to be put before the Seanad for its consideration early this year.

Under the Bill, a new individual accountability framework will include the establishment of a "Senior Executive Accountability Regime" (**SEAR**) as well as well as the introduction of new enforceable conduct standards (or standards of behaviour) expected of regulated entities, their senior executive functions and other staff, enhancements to the fitness and probity regime and a unified enforcement process which aims to break the existing "participation link" whereby the relevant regulated entity must be found to have committed a breach before individuals within it can be held to account.

For more information on the key amendments to the Bill put forward at Committee Stage, please refer to our recent briefing here.

You can access a copy of the text of the Bill and follow the progress of the Bill here.

Key Action Points	Management companies and funds should continue to monitor the progress of the Bill and the publication by the Central Bank of draft secondary legislation and guidance for consultation once the Bill has been enacted in order to assess the actions which will need to be taken to ensure compliance with the IAF framework once implemented.

5. PRIIPs

5.1 PRIIPS KID-Questions and Answers (updated 14 November 2022 and 22 December 2022)

On 14 November 2022, the ESAs published a revised version of their Q&A on the PRIIPs Key Investor Document (**PRIIPs KID)** in which they provided additional guidance on a number of matters, including:

- the obligation on funds to disclose in the "What is this product?" section of the PRIIPs KID as to whether the fund is actively or passively managed;
- disclosure obligations imposed on index-tracking and index-tracking leveraged UCITS funds
- the product categories which must be used for performing market risk assessment;
- the calculation and disclosure of performance scenarios;
- the calculation and disclosure of costs incurred by the relevant fund;
- how past performance signposted to in the PRIIPs KID should be presented on the relevant website/other document; and
- use of "representative" share class PRIIPs KID.

On 21 December 2022, the ESAs subsequently published an updated Q&A on the PRIIPs KID.

The revised Q&A included by the ESAs address the new Level 2 measures introduced via Commission Delegated Regulation (EU) 2021/2268 which apply from 1 January 2023 onwards. It provides updated guidance on the calculation methodology (i) for performance scenarios and (ii) for costs (including transaction costs) as well as providing additional guidance on the presentation of costs.

The updated PRIIPs KID Q&A dated 22 December 2022 is available here.

Key Action Points	Management companies with funds which produce a PRIIPS KID should review the revised guidance provided by the ESAs in the Q&A and assess whether any changes need to be made to the performance scenarios and costs calculation methodologies or to the disclosures contained in the PRIIPS KID itself in light of the additional guidance provided by the ESAs in the revised Q&As.

5.2 New Central Bank Webpage on PRIIPs KID

The Central Bank has created a webpage which sets down the filing requirements for PRIIPs KID for UCITS funds. This webpage should be read in light of the additional guidance provided by the Central Bank in its recently updated UCITS Q&A and Q&A on AIFMD as detailed in Sections 2.2 and 2.3 above.

The Central Bank's webpage on PRIIPs KID is available here.

Separately, please refer to our briefing on the implications of the introduction of PRIIPs KID for foreign filings for UCITS funds which is available here.

6. CROSS-BORDER DISTRIBUTION FRAMEWORK

6.1 ESMA Final Report on Notifications for Cross-Border Marketing and Management of Funds

On 21 December 2022, ESMA published its final report on the draft regulatory technical standards (RTS) and draft implementing technical standards (ITS) on the notifications for cross-border marketing and cross-border management of AIFs and UCITS (**Draft Technical Standards**).

The purpose of the Draft Technical Standards is to facilitate the process for notifying cross-border marketing and management activities in relation to UCITS and AIFs as well as the cross-border provision of services by fund managers. The Draft Technical Standards specify the information which UCITS management companies, UCITS and AIFMs wishing to carry out cross-border marketing or cross-border management activities and to provide services in host Member States must provide to the national competent authorities of those Member States, as well as the content and format of the notification letters which must be submitted.

The Draft Technical Standards have now been submitted to the European Commission for adoption. From the date of submission, the European Commission shall take a decision on whether to adopt the Draft Technical Standards within three months. The Commission may extend that period by one month.

The final report containing the Draft Technical Standards is available here.

6.2 ESMA updates its webpage on Cross-Border Distribution of Investment Funds

On 9 December 2022, ESMA updated its website to provide hyperlinks to the websites of competent authorities where they publish information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS.

The updated webpage is available here.

7. PROPERTY FUNDS

7.1 Central Bank Publishes Guidance on Leverage Limits on Real Estate Funds in Ireland

The Central Bank has finalised and published its guidance on leverage and liquidity in Irish authorised funds investing in Irish real estate (**Guidance**).

The Guidance is relevant to AIFs domiciled in Ireland, authorised under domestic legislation and investing 50% or more directly or indirectly in Irish property assets (**Property Funds**).

Under the Guidance, newly established Property Funds will be subject to a 60% total debt-to-total assets limit (**Leverage Limit**). For existing Property Funds, the Leverage Limit will be subject to a five year implementation period which will last until 24 November 2027. Social housing funds investing at least 80% of assets under management in social housing will not be subject to the Leverage Limited provided certain conditions are met.

The Guidance re-confirms the existing position that Property Funds must be structured as (i) closed-ended or (ii) open-ended with limited liquidity. It also requires AIFMs managing Property Funds which are open-ended with limited liquidity to ensure that the liquidity timeframe (being the period between the dealing deadline and the payment of redemption proceeds) for the relevant fund takes into account the liquidity of property assets in both normal and stressed market conditions and should be at least 12 months, taking into account the nature of the asset held. Existing Property Funds have 18 months from the date of the Guidance within which to take appropriate action in order to comply with this minimum liquidity timeframe requirement.

On 23 November 2022, ESMA issued its advice on the Guidance, confirming that it considered the Leverage Limit appropriate to address concerns relating to the stability and integrity of the financial system, and recommending that the Central Bank closely monitors the evolution of the Irish real estate sector to assess the relevance of its measure and the necessity to recalibrate the Leverage Limit.

For a more detailed analysis of the Guidance, please refer to our recent briefing on this topic which is available here.

A copy of the Guidance is available here.

ESMA's advice on the Central Bank's guidance is available here.

Key Action Points	Property Funds falling within the scope of the Guidance should assess the implications of the new Leverage Limit on their portfolios and, where applicable, the minimum liquidity timeframe requirement and take appropriate action to comply with the Guidance within the timeframes outlined above.

8. MONEY MARKET FUNDS

8.1 ESMA Updates Guidelines on Stress Tests for Money Market Funds

ESMA has published its Final Report on Guidelines on Stress Testing under the Money Markets Funds Regulation (**MMFR**). The report contains updated guidelines on the specifications on the types of stress testing and their calibration which must be used by management companies with money market funds when completing the reporting template required to be filed with the Central Bank under Article 37 of the MMFR.

ESMA has confirmed that the new 2022 parameters set out in the updated guidelines must be used for the purpose of the first period to be reported following the start of the application of the updated guidelines (i.e. 2 months after the publication of their translations in each of the official languages of the EU on the ESMA website). Until then, management companies should use the parameters set in the 2021 Guidelines and report the results accordingly.

ESMA has noted that it intends to consult on the revision of the methodology used in the guidelines in the first half of 2023.

The ESMA Final Report on Guidelines on Stress Tests under the MMFR is available here.

8.2 Reporting requirements for Fund Management Companies of Irish Authorised Money Market Investment Funds

In October 2022, the Central Bank published a guidance note on MMFR reporting requirements. The guidance note is relevant to all Irish authorised Money Market Investment Funds (**MMFs**) and Fund Management Companies of MMFs. The guidance provides information and direction on the completion of the following MMF reporting:

- Money Market Fund Returns under Article 37 of the MMFR;
- Stress Test Reporting under Article 28 of the MMFR;
- Other Ad-Hoc reporting under MMFR; and
- Daily Reporting for MMFs.

The Central Bank's guidance note on MMFR Reporting is available here.

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

9.1 Central Bank now collects PPS numbers of beneficial owners of CFVs for the Beneficial Ownership Register

On 27 October 2022, the Central Bank released an update on proposed changes for the Beneficial Ownership Register for Certain Financial Vehicles (**CFVs**) (the **Register**). From 11 November 2022, the Central Bank now collects PPS numbers of beneficial owners for the purpose of verifying the information delivered to the Register.

Further to previous correspondence in August, the current reporting template has been updated to provide for the mandatory inclusion of a PPS number, or a Central Bank of Ireland reference number as applicable for each beneficial owner. The updated template is now available along with guidance on how to complete it.

The Central Bank's Beneficial Ownership Register for Certain Financial Vehicles website page is available here.

A copy of the Guidance is available here.

9.2 Update to Central Bank Beneficial Ownership Register FAQ

On 9 November 2022, the Central Bank updated its Beneficial Ownership FAQs, reflecting updated information that is required by the Central Bank to be submitted to the Register for CFVs, namely a PPS number or Central Bank of Ireland Reference Number.

The following FAQs have been added:

- Why is PPSN Required?
- How is PPSN used to verify the identity of a beneficial owner?
- What happens if the PPSN provided does not match DSP records?
- What happens if the Central Bank of Ireland reference number provided does not match Central Bank records?
- How will my PPSN be stored?
- What if a beneficial owner has not been issued with a PPSN?
- What if a beneficial owner has not been issued with a PPSN, nor been appointed in a PCF role?
- Where a beneficial owner does not have a PPS or Central Bank of Ireland Reference Number, can the unique (Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies (**RBO**)) number be provided?
- Is PPSN/Central Bank of Ireland Reference Number required for beneficial owners who cease being a beneficial owner?

The FAQs are available on the Central Bank's website here.

9.3 EBA publishes guidelines on remote customer onboarding

On 22 November 2022, the European Banking Authority (**EBA**) published its final guidelines (**Guidelines**) on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive 2015/849 (**Fourth Money Laundering Directive** or **MLD4**).

The Guidelines set common EU standards on the development of comprehensive, risk-sensitive initial customer due-diligence (**CDD**) processes in the remote customer onboarding context. The European Commission asked the EBA to issue the Guidelines due to differing supervisory expectations in respect of remote onboarding across Member States. The Covid-19 pandemic accelerated non-face-to-face customer take-on demand, creating more risks and challenges for financial institutions in their CDD processes.

The Guidelines set out steps credit and financial institutions should adhere to when choosing remote customer onboarding tools and what they should do to ensure that the chosen tool is adequate and reliable and enables them to act in accordance with their initial CDD obligations.

The Guidelines will apply 6 months following their publication in the official languages of the European Union on the EBA website.

A copy of the Guidelines is available here.

9.4 CJEU judgment on public access to beneficial ownership registers and the implications for AML/CFT rules

On 22 November 2022, the Court of Justice of the European Union (**CJEU**) published a ruling regarding the public access to information on the beneficial owners of companies and certain other entities (**In-Scope Entities**) pursuant to MDL4, deeming such access invalid (the **Judgment**).

In its Judgment, the CJEU found that the unrestricted nature of public access to beneficial ownership registers is repugnant to the fundamental rights to respect for private life and to the protection of personal data, as enshrined in Articles 7 and 8 of the of the Charter of Fundamental Rights of the European Union (the **Charter**).

The CJEU ruled that the public access constituted an infringement to individual's rights that was not limited to what was strictly necessary and was not proportionate to the objective of the beneficial ownership register of combatting money laundering and terrorist financing. The CJEU noted that the principal of transparency could not be considered an objective of general interest capable of justifying the interference with fundamental individual rights.

On 6 December 2022, the co-rapporteurs of the upcoming 6th Anti-Money Laundering Directive (**MDL6**), released a statement in light of the Judgment, in which they emphasised the importance of access to the beneficial ownership registers by competent authorities and financial intelligence units (**FIUs**). The co-rapporteurs condemned certain reactive closures to registers, even to competent authorities in the wake of the Judgment, but vowed that the reformative Judgment would be enshrined in any future beneficial ownership rules.

On 6 December 2022, the Central Bank published an updated guidance on beneficial ownership register of certain financial vehicles in response to the CJEU's Judgment, in which they removed reference to access by the public of certain information on the register (**Guidance**).

The Guidance refers to the recent Judgment, stating access requests by members of the public will not be processed, pending clarification of the legislative position by the law-making body. Chapters 3 and 4 have been updated to reflect the recent Judgment.

A copy of the CJEU press release on the Judgment is available here.

A copy of the statement by the co-rapporteurs of MDL6 is available here.

A copy of the updated Guidance by the Central Bank is available here.

9.5 Application of Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer under Article 8 and Chapter VI of MLD4

On 1 December 2022, the final guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT compliance officer under Article 8 and Chapter VI of MLD4 (**Guidelines**) came into effect.

The key areas addressed in the Guidelines are:

- Role and responsibilities of the management body in the AML/CFT framework and of the senior manager responsible for AML/CFT;
- Role and responsibilities of the AML/CFT compliance officer; and
- Organisation of the AML/CFT compliance function at group level.

The Guidelines, which were published by the EBA on 14 June 2022 are available here. For more information, please see our Dillon Eustace briefing on this topic which is available here.

9.6 Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures

On 2 December 2022, the European Commission published a proposal for a Directive on the definition of criminal offences and penalties for the violation of European Union restrictive measures (the **Proposal**). The Proposal sets out definitions for various criminal offences related to violations of sanctions and sets out minimum penalties for such violations for legal and natural persons.

The Proposal aims to harmonise criminal offences and penalties in respect of EU sanctions and restrictive measures across the EU. Currently, the responsibility to legislate for offences and penalties for sanctions breaches rests with individual Member States, each with a different system of criminal law and so enforcement of such violations is not presently harmonised.

Interested stakeholders can provide feedback on the Proposal until 30 January 2023.

A copy of the Proposal from the European Commission website is available here.

9.7 EBA consults on new guidelines amending the ML/TF Risk Factors Guidelines and proposing a new set of guidelines on policies and controls for the effective management of ML/TF risks when providing access to financial services

On 6 December 2022, the EBA launched a public consultation (the **Consultation**) amending the guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (EBA/2021/02) (The **ML/TF Risk Factors Guidelines**) and proposing new guidelines on the effective management of money laundering and terrorist financing (**ML/TF**) risks when providing access to financial services.

The EBA aim, through these guidelines, to ensure that all customers are not impeded access to financial services without just cause. The draft guidelines set out in the consultation paper have been developed at the European Commission's request following the publication of the EBA's Opinion and annexed report on de-risking, and the EBA's Opinion on the application of customer due diligence measures to customers who are asylum seekers from higher-risk third countries or territories in 2016.

The first of the draft guidelines under consultation builds on the existing ML/TF Risk Factors Guidelines, adding a new annex, setting out what financial institutions should consider when assessing the ML/TF risks associated with a business relationship with customers that are Not-for-Profit organisations (NPOs).

The second of these draft guidelines under consultation addresses the effective management of ML/TF by financial institutions when facilitating access to financial services. These draft guidelines identify the relationship between the access to financial services and the obligation of financial institutions to comply with AML/CFT regulations, including situations where vulnerable customers may have valid reasons to be unable to provide traditional forms of identification.

The deadline for submission of comments on the Consultation is 6 February 2023.

A copy of the consultation paper is available here.

9.8 European Council agrees its position on MLD6

On 7 December 2022, the European Council (the **Council**) agreed its position on an anti-money laundering regulation and a new directive which will replace the existing MDL4 (as amended by Directive 2018/843, the fifth AML Directive) (**MLD6**).

The Council's intention for MLD6 is to close existing loopholes allowing for money laundering and terrorist financing by:

- extending the AML rules to the entire crypto sector, obliging crypto-asset service providers (CASPs) to conduct CDD on their customers for any transactions over 1,000 EUR;
- ensuring that large transactions are not used for ML/TF by limiting large cash payments to a maximum EU-wide limit of 10,000 EUR with Member States being given flexibility to impose a lower maximum limit if they wish;
- having third countries with AML deficiencies listed by the Financial Action Task Force (FATF) also being listed by the EU, creating two EU lists, the so called "black list" and a "grey list" reflecting the FATF listings;
- clarifying beneficial ownership rules to allow for more transparency and harmonisation across the EU. Both ownership and control needs to be assessed to identify natural persons. The Council has clarified rules applicable to multi-layered ownership and control structures and for the identification of beneficial owners for different types of entities, including non-EU entities; and
- new third party financing intermediaries i.e. jewellers, horologists and goldsmiths will also be covered by the new AML rules.

MLD6 and the new recast regulation for the transfer of funds will form the new strengthened EU AML rulebook.

The next step in the legislative process is to begin trialogue negotiations with the European Parliament with the aim of agreeing on a final version of the text.

The Council's press release is available here.

A copy of the proposal for the AML/CFT regulation is available here.

A copy of the proposal for MLD6 is available here.

10. EMIR & SFTR

10.1 EMIR - Update on recent regulatory developments

During the period 1 October 2022 to 31 December 2022, a number of Regulation (EU) No 648/2012 (**EMIR**) related regulatory developments took place.

Please see our Dillon Eustace briefing which provides an overview of these developments which can be accessed here.

11. CSDR

11.1 ESMA Proposes Amendment to Simplify Cash Penalties Process for Cleared Transactions Under CSDR

On 21 November 2022, the ESMA published a final report outlining proposed amendments to existing RTS on settlement discipline under the Central Securities Depositaries Regulation. The purpose of such amendments is to simplify the cash penalties process by putting central securities depositaries in charge of collection and distribution of cash penalties for settlement fails, including in respect of those transactions which are centrally cleared via a clearing counterparty, thereby establishing a single harmonised process for all transactions (both cleared and uncleared).

The revised draft RTS has been sent to the European Commission for endorsement in the form of a Commission Delegated Regulation. Following its endorsement by the European Commission, the Commission Delegated Regulation will then be subject to the non-objection of the European Parliament and of the Council.

A copy of the final report which contains ESMA's proposed amendments to the existing RTS on the settlement discipline is available here.

11.2 Publication of revised ESMA Q&A on Central Securities Depositaries Regulation

On 17 November 2022, ESMA updated its Q&A on the Central Securities Depositaries Regulation which has been updated to include a new Q&A relating to settlement fails which confirms that CSD should publish information on failed trades for the securities settlement systems which they operate by the end of February each year, with the first publications to be made by end of February 2023.

A copy of the updated ESMA Q&A is available here.

12. CONFLICT IN UKRAINE

In reaction to Russia's continued military aggression against Ukraine, the European Union has adopted additional economic sanctions against Russia and Belarus which have been introduced through a suite of additional packages adopted by the Council of the European Union announced on 5th October 2022 and 16 December 2022 respectively.

These packages included, amongst others, an extension to the list of those individuals and entities subject to restrictive measures. Commission Regulation (EU) 2022/2474 also provide individual national competent authorities with the power to authorise specific transactions which are necessary for the divestment and withdrawal by European companies from those Russian state-owned entities subject to the transaction ban subject to such conditions as the relevant national competent authority deems necessary.

For a complete overview of the additional measures introduced by the Council on 6 October 2022, please see the related press release which is available from here.

For a detailed overview of the additional measures introduced by the Council on 16 December 2022, please see the related press release which is available from 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.

13. DATA PROTECTION

13.1 The EU-U.S. Data Privacy Framework: European Commission starts process to adopt adequacy decision for safe data flows with the United States

On 13 December 2022, the European Commission published a draft commission implementing decision on the adequate level of protection of personal data under the EU-US Data Privacy Framework (**Draft Adequacy Decision**). The new privacy framework is based on a self-certification process similar to the original EU-U.S. Privacy Shield which was struck down by the CJEU in the Schrems II[3] ruling of 16 July 2020.

The Draft Adequacy Decision follows the Executive Order signed by President Biden and regulations issued by the US Attorney General introducing the new binding safeguards to address concerns raised by the CJEU in Schrems II by limiting access to EU data by US intelligence agencies and establishing a redress mechanism, namely the Data Protection Review Court (DPRC). In relation to the limiting

[3] Case: C-311/18

of access to EU data, the Executive Order requires that US intelligence activities should be subject to appropriate measures for safeguards; that the surveillance activities shall be necessary to advance a validated intelligence activity and only conducted in a manner that is proportionate to the intelligence activity itself. The Draft Adequacy Decision follows the European Commission's publication of Questions and Answers on the new EU-U.S. Data Privacy Framework on 7 October 2022.

US companies will be able to certify their participation in the EU-U.S. Data Privacy Framework by committing to comply with a detailed set of privacy obligations (such as purpose limitation and data retention, as well as specific obligations concerning data security and the sharing of data with third parties).

The Draft Adequacy Decision states that the new privacy framework will provide comparable safeguards to those of the EU. The proposal text has been sent to the European Data Protection Board (**EDPB**) for its opinion.

A copy of the Draft Adequacy Decision is available here.

A copy of the EU-U.S. Data Privacy Framework Q&As are available here.

14. MISCELLANEOUS

14.1 EU legislation on Digital Operational Resilience for the Financial Sector published in the Official Journal

On 27 December 2022, Regulation (EU) 2022/2554 on digital operational resilience was published in the Official Journal of the European Union which creates a harmonised regulatory framework strengthening the information and communication technology (**ICT**) security of financial entities (**DORA Regulation)**.

Also published in the Official Journal on the same date was Directive (EU) 2022/2556 which will, once transposed into national law, amend various other EU directives, including the UCITS Directive and AIFMD, to bring them in line with the DORA Regulation (**DORA Directive)**.

Together, the DORA Regulation and the DORA Directive create a regulatory framework on digital operational resilience whereby all financial services firms, including UCITS management companies and alternative investment fund managers, will be required to make sure they can withstand, respond to and recover from all types of ICT-related disruptions and threats. The aim of the framework is to replace multiple ICT risk management frameworks with a single unified approach by imposing a common set of standards on in-scope firms to manage and mitigate ICT risks.

The DORA Regulation comprises of five key pillars:

- ICT risk management requirements- Firms will be required to develop and maintain resilient ICT systems to mitigate against cyber risks
- ICT-related incident management, classification and reporting- Firms will be required to implement a process for monitoring and logging ICT-related incidents
- Digital operational resilience testing- Firms will be required to periodically test their ICT risk management framework
- Managing of ICT third-party risk- Firms will be required to implement strong controls around third-party risk management
- Information-sharing arrangements- Firms will be encouraged to share cyber security information with regulators and other financial institutions.

Firms will be required to comply with the legislation in a manner which is proportionate taking into account their size and overall risk profile and the nature, scale and complexity of their services, activities and operations.

Both the DORA Regulation and the DORA Directive will enter into force on 16th of January 2023 and will apply from 17 January 2025.

A copy of Regulation (EU) 2022/2554 is available here.

A copy of Directive (EU) 2022/2556 is available here.

A Dillon Eustace briefing on the new DORA framework is available here.

14.2 European Commission Report on the functioning of the Securitisation Regulation

On 7 October 2022, the European Commission published its report (**Report)** on the functioning of the Securitisation Regulation (**Regulation**) in which it considers various aspects of the Regulation, including private securitisations, STS equivalence, sustainable securitisation as well as the jurisdictional scope of the Regulation.

On the topic of jurisdictional scope, the European Commission outlines that due diligence obligations imposed on "institutional investors" (which includes UCITS management companies and AIFMs) apply regardless of whether the securitisation is issued by EU entities or by third-country entities. The report also provides that sub-threshold AIFMs and third-country AIFMs which manage and market funds in the EU fall within the scope of the obligations imposed under the Regulation in respect of such funds.

A copy of the Report is available here.

Key Action Points	Fund management companies which invest in "securitisations" within the meaning of the Regulation should assess any implications for their existing due diligence arrangements arising from the Report.

14.3 Council of EU Releases Political Agreement Text of Regulation Amending ELTIF Regulation

On 7 December 2022, the Council of the EU published the text of the amending regulation to the ELTIF Regulation on which negotiators from the Council and the Parliament have reached provisional agreement (**Draft Amending Regulation**).

Once implemented, the Draft Amending Regulation is intended to make European long-term investment funds (ELTIFs) more attractive to both managers and investors in order to increase the level of investment in the EU economy and to help improve the financing of EU companies and projects which require long-term capital but which cannot access public capital markets.

The Draft Amending Regulation broadens the scope of eligible assets which can be acquired by an ELTIF, introduces more flexible diversification requirements as well as introducing a differentiated regime for ELTIFS which are solely marketed to professional investors and those which can be sold to both professional investors and retail investors. Under further amendments proposed by the Council and the Parliament, the Draft Amending Regulation was updated to allow ELTIFs to invest in green bonds issued under the future EU Green Bond Standard and innovative new financial undertakings, to remove any limitation on the minimum value of real assets that can be acquired by ELTIFs and to reduce the minimum investment threshold in eligible assets to 55%.

The European Parliament will now consider the finalised legislative text in its plenary session to be held from 1 to 2 February 2023. Once the Council and Parliament formally adopt this text, it will be published in the Official Journal of the European Union and will enter force 20 days following such publication. The updated regime will apply nine months after its entry into force.

The text of the amending regulation is available here.

A Dillon Eustace Briefing on the Drafting Amending Regulation is available here.

14.4 Companies Act 2014 (Section 12A(1)) (Covid-19) (No.2) Order 2022

On 7 December 2022, a statutory instrument further extending the interim period of two measures of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (Act), which makes temporary amendments to the Companies Act 2014 to address certain issues arising from the Covid-19 pandemic, until 31 December 2023 was signed into law.

The measures which have been extended until 31 December 2023 are:

- Increase to the threshold at which a company is deemed unable to pay its debts from €10,000/€20,000 to €50,000; and
- Provision to allow companies to hold AGMs and general meetings virtually.

The below measures were not extended and as a result ceased to be effective as at 31 December 2022:

- Provision to allow documents required to be executed under seal to be executed in counterpart; and
- Extension of the time period for the examinership process from 100 to 150 days, subject to court approval.

A copy of the Order is available 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

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