Maples Group Funds & Investment Management Update – Ireland

Quarterly Update | October – December 2018

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1 Legal & Regulatory

1.1 UCITS Update

There have been a number of developments over the quarter:

Revised guidance on the use of financial indices

On 8 October 2018 the Central Bank of Ireland ("**Central Bank**") published updated guidance on the use of financial indices by UCITS. It clarifies its requirements and introduces a certification process regarding the use of financial indices by UCITS.

UCITS – review process

On 9 October 2018 the Central Bank advised of its updated review processes for UCITS and RIAIFs which simplify authorisation procedures and, in some cases, eliminate a review period of several weeks.

For more information see our client update, *Improvements to Central Bank of Ireland Review Process for UCITS and RIAIFs*

Central Bank Q&A

On 19 November 2018 the Central Bank published the 24th edition of the Central Bank's UCITS Q&A. One Q&A is updated and one added to address (i) the ability to establish unlisted share classes in an exchange traded fund or ETF; and (ii) the possibility of having different dealing cut-off times for hedged and unhedged share classes in an ETF.

Depositary safekeeping duties

Article 22a(3)(c) of the UCITS Directive 2009/65/EC requires that where a depositary delegates safe-keeping functions to third parties (custodians), the assets also need to be segregated at the level of the delegate. Delegated Regulation (EU) 2016/438 on safe keeping duties of depositaries details how this obligation is to be fulfilled.

On 19 November 2018 Delegated Regulation 2018/1619 amending Delegated Regulation (EU) 2016/438 on safekeeping duties of depositaries came into force. It will apply from 1 April 2020 and sets out further requirements where custody of UCITS clients' assets is delegated to a third party.

Closet indexing UCITS funds

On 4 December 2018 the Central Bank announced that it had begun analysis on 2000-plus Irish domiciled UCITS that report to be actively managed with supervisory follow-up where indications of 'closet indexing' are found. The objective of this review to ensure investors are not misled or misinformed about their investments in Irish domiciled funds.

1.2 AIFMD Update

There have been a few recent developments in relation to Directive 2011/61/EU ("**AIFMD**"):

ESMA Q&A

On 4 October 2018 the European Securities and Markets Authority ("**ESMA**") added a new Q&A clarifying the application of AIFMD notification requirements with regard to alternative investment fund managers ("**AIFMs**") managing umbrella alternative investment funds ("**AIFs**") on a cross-border basis. It confirms that an AIFM has to identify all the compartments of the umbrella AIF in the notification as well as the name and investment strategy of its

compartments, to facilitate administrative procedure in home and host EU Member States. Any change in the composition of an umbrella AIF that is managed on a cross-border basis has to be notified to the competent authorities under Article 33(6) of AIFMD.

RIAIFs – review process

On 9 October 2018 the Central Bank updated its review processes for UCITS and RIAIFs which simplify authorisation procedures and, in some cases, eliminate a review period of several weeks.

For more information see our client update, *Improvements to Central Bank of Ireland Review Process for UCITS and RIAIFs*

Real asset depositaries

On 19 November 2018 the Central Bank published a notice of intention which sets out that it is minded to permit entities to seek authorisation under regulation 22(3)(b) of the European Union (Alternative Investment Fund Managers) Regulations 2013 (which transpose AIFMD into Irish law) to act as a depositary for specific types of AIFs which generally do not invest in assets that must be held in custody. It explains the Central Bank's proposed regulatory framework for these types of entities, providing stakeholders the opportunity to comment on them until 15 January 2019.

Depositary safekeeping duties

Delegated Regulation (EU) 231/2013 on safe keeping duties of depositaries supplements AIFMD and specifies depositaries' duties on the safe keeping of alternative investment fund ("**AIF**") clients' assets. On 19 November 2018 Delegated Regulation 2018/1618 amending Delegated Regulation (EU) 231/2013 on safekeeping duties of depositaries came into force. It will apply from 1 April 2020 and sets out further requirements where custody of AIF clients' assets is delegated to a third party.

1.3 Marketing UCITS and AIFs in the UK Post Brexit: the Temporary Permissions Regime

The UK Financial Conduct Authority ("**FCA**") consultation on the Temporary Permissions Regime ("**TPR**") for inbound firms and funds closed on 7 December 2018. The FCA has also published draft regulations on UCITS and AIFs which will come into effect should a no deal Brexit arise.

The consultation provided information on the functioning of the TPR due to begin after Brexit day for up to three years and which allows funds that currently market to UK investors to continue to do so after registering.

Investment funds that wish to avail of the TPR must opt in by filing a notification through the FCA's Connect system. The FCA started accepting notifications on 7 January 2019 and any funds that wish to avail of the TPR must opt in by filing a notification by 28 March 2019 (the "**Notification Date**").

In the case of umbrella funds, the notification to the FCA must specify each sub-fund that will avail of the TPR post Brexit.

Investment funds for which no notification has been filed by the Notification Date will not be permitted to market in the UK post Brexit under the TPR.

There is one exception to this where a UCITS umbrella fund which has been notified under the TPR by the Notification Date may subsequently notify additional sub-funds under the TPR which are newly established post Brexit.

For more information see our client update, *Marketing of UCITS and AIFs in the UK Post Brexit*

Central Bank on MoU with FCA allowing delegation to UK post-Brexit

On 3 December 2018 in a Central Bank speech on Brexit and the evolving landscape of the asset management sector, Michael Hodson, Director of Asset Management & Investment Banking stated that the industry should take comfort from the ESMA statement that the memoranda of understanding or MoUs would be in place by the end of March 2019 in relation to the ability of Irish AIFMs, UCITS management companies and Irish funds to delegate their portfolio management to UK investment managers.

At the time of writing the most recent positive statement on this came from the Central Bank on 17 January 2019. Extract below and link here.

"I am confident that the necessary MOUs will be in place to facilitate the continued high level of cooperation between UK and European authorities, including on a bilateral basis. It is reasonable for firms to plan on the basis that MOUs will be in place by 29th March. Firms that delegate portfolio management to the UK can have sufficient confidence that this will continue to be allowed post 29th March."

Central Bank Brexit FAQ

The Central Bank's Brexit FAQ - Financial Services Firms was updated on 10 December 2018.

EU preparations and statement for no-deal Brexit

On 19 December 2018 ESMA published a statement providing a reminder to firms on their MiFID obligations on the disclosure of information to clients in the context of Brexit. The European Commission has also implemented a “no-deal” contingency action plan in specific sectors.

GDPR – transfer of data to UK Post-Brexit

Further the Irish Data Protection Commission and its UK equivalent, the Information Commissioner's Office, have both set out guidance on what companies transferring personal data between Ireland and the UK should do if a no deal Brexit becomes a reality.

For more information see our client update" *"No Deal" Brexit - Impact on Personal Data Transfers to and from the UK*

1.4 ESMA - Factoring ESG into UCITS and AIF Investment Processes

On 19 December 2018 ESMA launched three public consultations on sustainable finance initiatives to support the European Commission’s Sustainability Action Plan in the areas of securities trading, investment funds and credit rating agencies.

In the consultation paper on integrating sustainability risks and factors into the UCITS Directive and AIFMD, ESMA is aiming to clarify that all authorised fund managers subject to the UCITS Directive and AIFMD will need to incorporate sustainability risks into certain internal processes. Sustainability risks are the risks of fluctuation in the value of positions in a fund's portfolio due to environmental, social and governance ("**ESG**") factors.

Proposed changes to both frameworks include:

- Incorporation of sustainability risks into organisational procedures, consideration of the types of conflicts of interest that can arise, and systems and controls to ensure that they are properly taken into account in the investment and risk management processes.
- Consideration of required resources and expertise for the integration of sustainability risks, including clarification that this is a senior manager responsibility.

- Consideration of sustainability risks when selecting and monitoring investments, designing written policies and procedures, and implementing effective arrangements.

The consultation closes on 19 February 2019.

1.5 Corporate Governance Requirements for Investment Firms and Market Operators

On 6 November 2018 the Central Bank published Corporate Governance Requirements for Investment Firms and Market Operators 2018 (the Requirements) and a Feedback Statement on CP120: Corporate Governance Requirements for Investment Firms and Market Operators. The Requirements are intended to apply to firms authorised by the Central Bank that are designated as High, Medium High or Medium Low Impact under the Central Bank's Probability Risk Impact System ("**PRISM**") with effect from 1 July 2019. The Requirements will not apply to firms designated as Low Impact by the Central Bank. However, such firms are encouraged to adopt them.

1.6 Outsourcing Activities in Financial Service Providers

On 19 November 2018 the Central Bank published a paper "Outsourcing - Findings and Issues for Discussion" which is open for comment until 18 January 2019. This two-part paper uses findings from supervisory engagements combined with survey results from a sample of regulated firms to assess industry practice.

(i) Part A emphasises the most obvious and minimum supervisory expectations around the management of outsourcing risks; and

(ii) Part B highlights some of the key risks and evolving trends associated with outsourcing and invites feedback and discussion on these matters.

The paper comments that governance, risk management and business continuity practices remain far below expected levels, therefore the paper is a summary of the key issues and risks identified that require urgent attention. The Central Bank will hold an outsourcing industry conference in Q1 2019. The feedback received on the paper and at the conference will help inform the regulatory response.

1.7 Investor Money Regulations Q&A and Guidance

The investor money regime safeguards investor money by ensuring fund service providers adhere to general principles and prescriptive requirements in this regard. The investor money requirements were updated by (and are now contained in) Part 7 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017. The Investor Money Requirements Guidance and Q&A were revised by the Central Bank on 10 December 2018 so that they are in line with Part 7 of those Regulations.

1.8 Money Market Funds Regulation

The Money Market Funds Regulation (EU) 2017/1131 ("**MMFR**") applies to money market funds established, managed or marketed in the EU and aims to make these investment products more resistant to contagion risks. Most provisions apply from 21 July 2018 (with the exception of Article 11(4), Article 15(7), Article 22 and Article 37(4) which have applied since 20 July 2017). Existing MMFs benefit from a transitional period and are required to comply with the MMFR by 21 January 2019.

On 13 November 2018 ESMA published a consultation paper on draft guidelines on reporting to national competent authorities ("**NCAs**") under Article 37 of the MMFR (which obliges the manager of the MMF, for each MMF managed, to report information to the MMF's NCA at certain intervals (mostly quarterly) depending on the MMF's total assets under management). It closes on 14 February 2019. MMF managers must send to NCAs their first quarterly reports under Article 37 in the first quarter of 2020. There is no requirement to retroactively provide historical data for any period before this date.

Share cancellation

On 11 January 2019 the Central Bank issued a joint statement with the Commission de Surveillance du Secteur Financier ("**CSSF**") Luxembourg on the treatment of share cancellation under the MMFR. It follows clarification that the practice of cancelling shares under a reverse distribution mechanism ("**RDM**") is to be prohibited under the MMFR and notes Article 44 of the MMFR requirements for existing MMFs to submit an application for authorisation by 21 January 2019 and for the competent authority to notify the MMF of its decision within two months of the application. On that basis, the Central Bank and the CSSF will require MMFs using RDM to confirm in writing by 21 March 2019 that they have ceased using RDM.

1.9 Cross Border Distribution of Investment Funds Proposals

On 12 March 2018 the European Commission published a draft regulation on facilitating cross-border distribution of collective investment funds, amending the European Venture Capital Funds Regulation 345/2013/EU ("**EuVECA Regulation**") and the European Social Entrepreneurship Funds Regulation 346/2013/EU ("**EuSEF Regulation**") and covering aspects such as marketing communications and EU Member States' marketing requirements. It also published a proposed directive amending the UCITS Directive and AIFMD relating to, among other things, pre-marketing and the discontinuation of marketing.

On 4 December 2018 the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") voted to adopt reports on the proposed Regulation and proposed Directive and suggested some changes including:

(i) Marketing communications to small investors in funds should include a detailed account of risks, summary of investors' rights and information about national collective redress mechanisms in case of litigation. ESMA should devise guidelines on marketing communications.

(ii) If a fund makes an offer to repurchase all its UCITS units held by investors in a EU member state, following a decision to cease activities in that member state, it should inform investors of the consequences of continuing to hold the units.

(iii) The exemption for UCITS concerning obligations under the PRIIPs Regulation relating to KIDs should be extended for a further two years.

The next step will be for European Parliament to consider the reports (which were published on 7 December 2018) in plenary:

(i) Report on the proposal for a Directive on the cross-border distribution of collective investment funds.

(ii) Report on the proposal for a Regulation on facilitating cross-border distribution of collective investment funds.

1.10 Central Bank Funding Strategy and Additional Supervisory Levy

On 15 November 2018 the Central Bank published a guide as to how the industry funding levy for 2018 is calculated. In addition, it also provides an overview of the Central Bank's funding strategy and important changes to the 2019 levy.

From 1 January 2019 an additional supervisory levy ("**ASL**") will apply to any IIA firm, MiFID firm, AIFM or UCITS management company authorised by the Central Bank on or after that date. The ASL is distinct from the existing Central Bank annual industry funding levy to which asset managers are already subject. The applicable ASL rate will be dependent on the relevant firm's PRISM rating, which the Central Bank issues on authorisation.

1.11 EMIR Update

The European Market Infrastructure Regulation (Regulation on over the counter ("**OTC**") derivative transactions, central counterparties ("**CCPs**") and trade repositories ("**TRs**") (Regulation 648/2012)) ("**EMIR**") is relevant to all Irish funds trading in financial derivative instruments ("**FDI**") whether on an exchange or otherwise. UCITS and AIFs are financial counterparties for EMIR purposes and subject to the full scope of EMIR obligations.

There have been a number of developments over the quarter:

On 29 November 2018 the European Supervisory Authorities ("**ESAs**") (that is, the EBA, ESMA and EIOPA) published their final report on draft regulatory technical standards ("**RTS**") on the novation of bilateral contracts not subject to bilateral margins under Article 11(15) of EMIR. They are part of the EU's Brexit preparations for OTC derivative contracts and are with the European Commission for endorsement. They allow UK counterparties to be replaced with EU ones without triggering related margining requirements under Delegated Regulation (EU) 2016/2251 procedures. This limited exemption would ensure a level playing field between EU counterparties, and preserve the regulatory and economic conditions under which the contracts were originally entered into.

On 3 December 2018 ESMA published an updated version of its EMIR Q&As amending the answer to question 9 on margin requirements under Article 41 of EMIR. On the same date the Council of the EU's Permanent Representatives Committee ("**COREPER**") agreed its position relating to the proposed Regulation amending EMIR on the procedures and authorities involved in the authorisation of CCPs and requirements for the recognition of third-country CCPs taking into account the effects of Brexit. In particular, it introduces a two-tier system differentiating between non-systemically important CCPs and systemically important CCPs. Having agreed this, COREPER has called on the EU Council Presidency to begin trialogue negotiations with the Parliament

On 18 December 2018 the ESAs published two joint RTS amending Commission Delegated Regulation (EU) 2016/2251 on RTS on the clearing obligation and risk mitigation techniques for OTC derivative contracts not cleared by a CCP under Article 11(15) of EMIR in the context of STS securitisations under the Securitisation Regulation. The draft RTS are with the European Commission for endorsement.

On 19 December 2018 the European Commission adopted:

- A Delegated Regulation amending RTS on the clearing obligation under EMIR to extend the dates of deferred application of the clearing obligation for certain OTC derivatives contracts until 21 December 2020;
- A Delegated Regulation amending Commission Delegated Regulation (EU) 2016/2251, which supplemented EMIR with RTS on risk mitigation techniques for uncleared OTC

derivative contracts, to allow for the novation of OTC derivatives contracts with a UK counterparty if there is a no-deal Brexit; and

- A Delegated Regulation amending the three European Commission Delegated Regulations (EU) 2015/2205, (EU) 2016/1178 and (EU) 2016/592 on the clearing obligation under EMIR to allow for the novation of OTC derivatives contracts if there is a no-deal Brexit. They relate to the treatment of OTC derivative contracts novated from a UK counterparty to a counterparty established in another member state, as a consequence of Brexit.

The next step is for these to be considered by the Parliament and Council of the EU.

On 21 December 2018 the Commission Implementing Decision (EU) 2018/2031 on the temporary equivalence of the UK's regulatory framework for CCPs in the event of a no-deal Brexit came into force.

1.12 EU Securitisation Regulation

Regulation (EU) 2017/2402 on a general framework for securitisation and creating a specific framework for simple, transparent and standardised ("**STS**") securitisation ("**Securitisation Regulation**") and Regulation (EU) 2017/2401 amending the Capital Requirements Regulation 575/2013/EU applies to securitisations the securities of which are issued on or after 1 January 2019 or which create new securitisation positions on or after that date. The European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 which came into operation on 1 January 2019 designates the Central Bank as the competent authority in Ireland for STS securitisations.

The Securitisation Regulation impacts both AIFs and UCITS. AIF managers' current due diligence, transparency and risk retention requirements under AIFMD will be repealed and replaced by the Securitisation Regulation. It will also bring UCITS management companies and internally managed UCITS that are authorised investment companies into the framework.

On 13 November 2018 ESMA has published final reports on technical standards on securitisation repository application requirements, operational standards, and access conditions and a statement. They are with the European Commission for endorsement.

On 12 December 2018 the European Banking Authority ("**EBA**") published final guidelines on the interpretation of the criteria for term and short-term securitisations to be eligible as STS. They will apply from 15 May 2019 but the EBA expects market participants to apply the approach set out in the Guidelines as from 1 January 2019.

On 14 December 2018 ESMA received a letter from the European Commission regarding the draft regulatory and implementing technical standards on securitisation disclosures submitted by ESMA on 22 August 2018. It states that the Commission intends to endorse those draft standards only if certain amendments are introduced.

On 18 December 2018 the ESAs published two joint RTS to amend the RTS on the clearing obligation and risk mitigation techniques for non-cleared OTC derivatives under EMIR. These set out specific treatment for STS securitisation to ensure a level playing field with covered bonds. The Securitisation Regulation amends EMIR to ensure consistent treatment of derivatives associated with covered bonds and derivatives associated with securitisations, in relation to the clearing obligation and the margin requirements on non-centrally cleared OTC derivatives –see also "EMIR" above.

1.13 AML Update

Most of the provisions of Fourth Money Laundering Directive (EU) 2015/849 ("**MLD4**") were implemented in Ireland by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 which came into force on 26 November 2018 (with the exception of section 32). The main theme of 4MLD is more emphasis on the risk based approach. Designated persons are now required to conduct a business wide risk assessment to identify and assess the risk of ML/TF involved in carrying out their business activities. Also, they must risk assess their customers as part of the due diligence process in order to determine what level of customer due diligence should be applied as well as comprehensively monitor business relationships which will include scrutinising transactions. Further the definition of politically exposed persons or PEPs now includes individuals residing in Ireland.

The Act does not cover the beneficial ownership elements of the MLD4 (Article 30). The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 requires companies and other legal entities incorporated in Ireland to hold adequate, accurate and current information on their "beneficial owners" on an internal register since November 2016. MLD4 also required EU Member States to establish a central register of beneficial ownership by 26 June 2017. On 4 December 2018 the Companies Registration Office newsletter stated that the Department of Finance has advised that the drafting of statutory instruments to establish this central register is expected to be concluded soon.

For more information see, *Ireland Implements 4MLD: Key Changes for Investment Funds*

On 21 December 2018 the Central Bank published CP128 - Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector. The Central Bank has invited feedback on the guidelines in addition to responses to the specific questions in the consultation paper. It is open for comments until 5 April 2019.

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019 which will implement the Fifth Money Laundering Directive (EU) 2018/843 in Ireland is expected to be published shortly. EU Member States have to transpose it into national law by 10 January 2020.

1.14 MiFID II/MiFIR Update

The Markets in Financial Instruments Directive (2014/65/EU) ("**MiFID II**") and the Markets in Financial Instruments Regulation (Regulation 600/2014) ("**MiFIR**") apply from 3 January 2018. The European Union (Markets in Financial Instruments) Regulations 2017 (as amended by the European Union (Markets in Financial Instruments) (Amendment) Regulations 2017) transpose MiFID II into Irish law. Some complementary measures (for instance, to provide for significant penalties for convictions on indictment) require primary legislation and therefore the Markets in Financial Instruments Act 2018 was enacted in October 2018 (see "Markets in Financial Instruments Act 2018" below).

On 2 October 2018 ESMA published an updated opinion intended to help market participants assess whether their commodity derivatives activities can be considered as ancillary to their main business under MiFID II.

On 8 October 2018 the Central Bank published the fifth edition of its Investment Firms Q&A adding question ID 1039 on the scope of “transferable securities” and the circumstances where securities have restricted transferability. The response reiterates the understanding of the term “transferable securities” set out in the European Commission’s MiFID Q&A. It also indicates that investments firms should consider whether securities with restricted transferability are “transferable securities” for the purposes of the definition of investment instruments in the Investment Intermediaries Act 1995. In circumstances where investment firms are providing

services in relation to securities with restrictions on transferability firms should assess on a case-by-case basis whether those securities are “transferable securities” under the European Union (Markets in Financial Instruments) Regulations 2017 or the Investment Intermediaries Act 1995. Based on that assessment an investment firm must provide its services in compliance with the applicable regulatory requirements.

On 6 November 2018 ESMA issued the official translations of its guidelines on certain aspects of the MiFID II suitability requirements. NCAs must notify ESMA whether they comply or intend to comply with the guidelines by 6 January 2019. The guidelines will apply from 7 March 2019. ESMA's existing 2012 guidelines on suitability will cease to apply on the same date.

On 19 December 2018 ESMA published a consultation on the integration of sustainability risks and factors into MiFID II. The deadline for comments is 19 February 2019.

On 20 December 2018, ESMA published an update on its assessment of third-country trading venues ("**TCTVs**") for the purpose of post-trade transparency and position limits under MiFID II and MiFIR. To ensure that all TCTVs receive the same treatment ESMA will delay publishing the list until a more significant number have been assessed. Pending publication of the lists, investment firms do not have to publicise their transactions concluded on TCTVs via an approved publication arrangements.

ESMA originally adopted guidelines on definitions of commodity derivatives and their classification in 2015. It published amended guidelines on 21 December 2018 to adapt them to the MiFID II regulatory framework which will apply two months after the date of their publication on ESMA's website in all EU official languages.

An ESMA decision notice relating to its decision to renew the prohibition of the marketing, distribution or sale of binary options to retail clients came into force on 28 December 2018. It applies from 2 January 2019 until 1 April 2019.

Over the quarter ESMA updated its MiFID II/MiFIR Q&As on transparency topics; commodity derivatives; on market structures; on temporary product intervention measures; and on investor protection and intermediaries topics.

1.15 Markets in Financial Instruments Act 2018

The Markets in Financial Instruments Act 2018 came into force on 29 October 2018. When MiFID II was transposed into Irish law by the European Union (Markets in Financial Instruments) Regulations 2017 ("**MiFID II Regulations**") some measures (for instance, to provide for penalties on foot of conviction on indictment) required primary legislation. The Act's main purpose is to introduce those criminal sanctions for breaches of the MiFID II Regulations such as operating without authorisation and not complying with a requirement given by a Central Bank authorised officer who monitors compliance.

A person guilty of an offence is liable to a fine of up to €10,000,000 or imprisonment for up to 10 years or both.

The Act also amends the definition of "credit" in the Credit Reporting Act 2013 to extend it to hire purchase agreements, personal contract plans and leasing agreements where the lender remains the owner of the goods financed. Credit providers will have to report information about these to the Central Credit Register, but the Central Bank has yet to confirm timelines for reporting this newly-in-scope credit.

1.16 Prospectus Rules Amendments Consultation

Certain amendments to the Prospectus Rules are required as a result of the Prospectus Regulation (EU) 2017/11293 which will apply in full from 21 July 2019. The Central Bank

proposes to: amend the Prospectus Rules in light of the changes to Irish prospectus law as a result of the Prospectus Regulation; and to consolidate the Prospectus Rules into the Central Bank (Investment Market Conduct) Rules. The consultation (CP127) closes on 11 March 2019.

1.17 IOSCO Consultation on Use of Leverage by Investment Funds

IOSCO issued a consultation paper on 15 November 2018 on a proposed framework for the assessment of leverage by investment funds. It considers the merits of gross notional exposure and also considers the concepts of adjusted gross notional exposure and net notional exposure.

The outcome of this consultation (which closes on 1 February 2019) could be important as it may form the basis of how future regulatory rules are shaped for UCITS and AIFs regarding how leverage is measured, disclosed and restricted.

1.18 Benchmark Regulation

The Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds 2016/1011/EU ("**BMR**") applies since 1 January 2018.

STIBOR (the Stockholm Interbank Offered Rate) was added to the list of critical benchmarks under the BMR with effect from 18 October 2018.

On 25 November 2018 ten Delegated Regulations setting out RTS supplementing the BMR came into force and will apply from 25 January 2019.

On 19 December 2018 the Council of the EU reported that it has agreed its general approach on legislative proposals (which form part of the European Commission's sustainable finance reforms) including the proposed Regulation amending the BMR on low carbon benchmarks and positive carbon impact benchmarks. The next step is that negotiations between the Council and the Parliament are ready to begin.

BMR Q&A

On 7 November 2018 ESMA published an updated version of its Q&As on the BMR. It added a new Q&A 5.11, which confirms that a reference to an index in a bilateral agreement on the interest to be paid on exchanged collateral under various OTC derivatives does not amount to "use of a benchmark". On 18 December 2018 ESMA published a further version of its Q&As with new clarifications on methodology and input data: parameters to be considered as input data.

On 20 December 2018 ESMA published its final report on guidelines on non-significant benchmarks under the BMR proposing lighter requirements for non-significant benchmarks, their administrators and their supervised contributors in relation to:

- Procedures, characteristics and positioning of oversight function;
- Appropriateness and verifiability of input data;
- Transparency of methodology; and
- Governance and control requirements for supervised contributors.

The first three areas are applicable to administrators of non-significant benchmarks while the fourth one is directly applicable to supervised contributors to non-significant benchmarks.

1.19 PRIIPs KID Regulation

The Regulation on key information documents ("**KIDs**") for packaged retail and insurance-based investment products (Regulation 1286/2014) ("**PRIIPs**") ("**PRIIPs KID Regulation**") introduced a new pan-European pre-contractual product disclosure document for PRIIPS in EU Member States from 1 January 2018.

On 8 November 2018 the ESAs published a consultation paper on draft amendments to Commission Delegated Regulation (EU) 2017/653 on KIDs for PRIIPs which closed on 6 December 2018. These provide for the appropriate application of the PRIIPs KID requirements by UCITS and relevant non-UCITS funds and address specific issues that have arisen from the practical application of detailed technical requirements, before the overall review of the PRIIPs Regulation (which has been deferred).

Section 4 of the paper contained proposed amendments:

- To change the approach for performance scenarios and a description of other options identified.
- On other issues based on the information gathered by the ESAs since the KID implementation.
- In view of the pending expiry of the exemption in Article 32 of the PRIIPs Regulation and the use of the PRIIPs KID by UCITS and relevant non-UCITS funds from 1 January 2020.

The ESAs will submit the amendments as RTS to the Commission for endorsement during January 2019 and subsequent adoption by the European Parliament and Council of the EU. The ESAs intend the amendments to apply from 1 January 2020. Given the forthcoming Parliament elections in May 2019, these processes would need to be concluded early 2019 for the proposed changes to take effect from that date.

1.20 CSDR: Regulating Central Securities Depositories

Central securities depositaries or "CSDs" operate the infrastructure that enables securities settlement systems and are regulated by Regulation 909/2014/EU ("**CSDR**") since 2014. Article 3(1) of CSDR will apply from 1 January 2023 to transferable securities issued after that date, and from 1 January 2025 to all transferable securities. Certain other implementing measures will apply from the date that they enter into force.

On 12 November 2018 ESMA published an updated version of its Q&As on the implementation of CSDR. It added a new Q&A on settlement discipline and the calculation of cash penalties. It has also expanded an existing Q&A on the provision of services in another member state by a CSD.

On 19 December 2018 ESMA published a statement clarifying its arrangements to recognise UK CSDs in the event of a no-deal Brexit.

On 20 December 2018 ESMA published two consultation papers on settlement fails reporting and standardised procedures and messaging protocols under Articles 6(2) and 7(1) of CSDR. These represent a first step in the development of the guidelines in these areas and remain open for feedback until 20 February 2019.

On 21 December 2018 the Commission Implementing Decision (EU) 2018/2030 on the temporary equivalence of the UK's regulatory framework for CSDs in the event of a no-deal Brexit came into force.

1.21 SFTR

The SFTR (or Regulation on securities financing transactions ("**SFTs**") EU/2015/2365 covers all forms of lending, borrowing and re-use of securities in the EU and in all the branches of counterparties to SFTs no matter where they are located. It requires market participants to report details of SFTs to an approved EU trade repository and introduced new transparency requirements for prospectuses and financial statements for investment funds using securities financing transactions and total return swaps.

On 13 December 2018 the European Commission adopted seven delegated regulations supplementing the SFTR relating to trade repositories including an amending Delegated Regulation on access to the data held in trade repositories and a Delegated Regulation with RTS on the details of SFTs to be reported to trade repositories. The next step is for them to be considered by the European Parliament and Council of the EU.

On the same date the Commission also adopted an Implementing Regulation laying down implementing technical standards ("**ITS**") on the format and frequency of reports on the details of SFTs to trade repositories, and amending Implementing Regulation (EU) 2012/1247 on the use of reporting codes in the reporting of derivative contracts. It will enter into force 20 days after publication in the Official Journal of the EU.

1.22 Capital Requirements Regulation Update

The Capital Requirements Regulation 575/2013/EU ("**CRR**") applies to credit institutions and investment firms and contains provisions relating to, among other things, own funds and capital requirements, large exposures, securitisations, liquidity, leverage and supervisory reporting.

Commission Implementing Regulation (EU) 2018/1580 which updates the list of closely correlated currencies in the annex to Implementing Regulation (EU) 2015/2197 in accordance with the CRR came into force on 11 November 2018. This ensures that the currency pairs in the annex continue to reflect the actual correlation between the relevant currencies.

Delegated Regulation (EU) 2018/1620 amending Commission Delegated Regulation (EU) 2015/61 on the liquidity coverage requirement (which supplements the CRR) came into force on 19 November 2018 and will apply from 30 April 2020.

Commission Implementing Regulation (EU) 2018/1627 that amends the Commission Implementing Regulation 680/2014 on supervisory reporting of institutions under the CRR in relation to prudent valuation for supervisory reporting applies from 1 December 2018. It keeps CRR reporting requirements in line with changes in the regulatory framework and with the evolving needs for supervisory authorities' risk assessments. In particular, it introduces additional reporting obligations for prudent valuation requirements, securitisation positions and the geographical distribution of exposures.

Commission Implementing Regulation (EU) 2018/1889 on the extension of the transitional periods related to own funds requirements for exposures to CCPs to 15 June 2019 set out in CRR and EMIR came into force on 8 December 2018.

On 16 December 2018 Regulation (EU) 2018/1845 on the exercise of the discretion under Article 178(2)(d) of the CRR in relation to the threshold for assessing the materiality of credit obligations past due came into force.

Note that the proposed Investment Firms Regulation and Investment Firms Directive will, for most existing investment firms, replace the existing prudential requirements for investment firms set out in the CRR and the CRD IV Directive 2013/36/EU once finalised by the EU. Negotiations between the European Council and the Parliament are the next step in this process.

1.23 Investment Funds Statistics: Q3 2018

The main points to note in the Central Bank's December 2018 Q3 2018 update are as follows:

(i) The net asset value of investment funds resident in Ireland increased by 2.7% to €2,055bn during Q3 2018. This increase was comprised of inflows of €29bn and valuation gains of €26bn. Total assets held by Irish investment funds increased from €2,380bn in Q2 2018 to €2,444bn in Q3 2018.

(ii) Equity holding (including shares/units of other funds) increased to €1,101bn in Q3-2018 from €1,058bn in Q2-2018. US based non-financial corporation equity contributed strongly to the growth, recording net purchases of €11bn and a valuation gain of €20bn.

(iii) Leverage1 has increases across all fund types except hedge funds since September 2014. The other fund category now has leverage equal to 37% of their total assets.

2 Tax

2.1 ATAD Consultation – Hybrids and Interest Limitation

On 14 November 2018 the Irish Government launched a consultation on the implementation into Irish law of measures contained in the EU Anti-tax Avoidance Directive ("**ATAD**") relating to cross border hybrids and the interest limitation rule.

The cross border hybrid rules seek to counter tax outcomes that exploit differences in treatment between jurisdictions e.g. where the same instrument generates a payment which is deductible in one jurisdiction but not taxable in another jurisdiction. ATAD requires these measures to be implemented in all Member States by 1 January 2020 (except for reverse hybrid rules which must be implemented by 1 January 2022). The consultation on these rules is expected to continue throughout 2019 with a view to inclusion in Finance Bill 2019.

The interest limitation rule in ATAD requires EU Member States to limit deductions for net borrowing costs to 30% of a taxpayer's earnings before interest, tax, depreciation and amortisation deductions ("**EBITDA**"). Since ATAD was first adopted by the European Council in July 2016 Ireland took the position that existing Irish rules are "equally effective" to the ATAD restrictions. This would allow Ireland to defer adoption until 1 January 2024. However more recent statements from the Department of Finance indicates that the transposition of the rules may occur earlier than previously indicated and could advance to as early as Finance Bill 2019.

The implementation of the anti-hybrid rules will be particularly relevant for groups which include entities availing of US check-the-box elections and may affect businesses which make use of certain structured capital market instruments. As a general point, the approach with respect to investment funds to date has been to take the view that fund entities themselves should not be within the scope of the anti-hybrid rules on the basis that they are generally not liable to tax in Ireland.

The interest limitation rules are particularly relevant for Ireland's funds and securitisation sectors as section 110 companies used in funds and securitisation structures rely on an ability to fully deduct profit dependent interest.

Interested stakeholders were invited to give their views to the Department of Finance on the implementation of these rules by 18 January 2019. The Maples Group Tax team has been

working with Irish Funds, the Irish Debt Securities Association and individual clients to prepare responses and submissions to the consultation, and also made a submission on behalf of the Maples Group.

3 Listing

3.1 Diversity Reporting Obligations for Listed Fund Companies

Under the European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 investment funds that are either Part 24 companies or are UCITS companies which have shares admitted to trading on a "regulated market" of any EEA Member State (e.g. the Main Securities Market ("**MSM**") of Euronext Dublin) must comply with diversity reporting obligations for financial years beginning on or after 1 August 2017.

The obligation under these regulations is to include a report on the company's diversity policies in the corporate governance statement section of the directors' report or include an explanation as to why there is no such policy. This report must include a description of the diversity policy applied in relation to the board with respect to age, gender, educational and professional backgrounds. It should detail the objective of the diversity policy, how it has been implemented and the results of the policy in the financial year. The statutory auditors must state whether in their opinion, based on the work undertaken in the course of the audit, that the diversity report in the corporate governance statement contains the requisite information.

These regulations do not apply to securities listed on the Global Exchange Market ("**GEM**") as it is not a regulated market.

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About The Maples Group

The Maples Group is a leading service provider offering clients a comprehensive range of legal services on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg, and is an independent provider of fiduciary, fund services, regulatory and compliance, and entity formation and management services. The Maples Group distinguishes itself with a client-focused approach, providing solutions tailored to their specific needs. Its global network of lawyers and industry professionals are strategically located in the Americas, Europe, Asia and the Middle East to ensure that clients gain immediate access to expert advice and bespoke support, within convenient time zones.

The Maples Group's Irish legal services is independently ranked first among Irish law firms in Ireland in terms of total number of funds advised (based on the latest Monterey Ireland Fund Report, as of 30 June 2018).

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