



MAPLES
GROUP

Funds & Investment Management Update – Ireland and Luxembourg

Quarterly Update | July – September 2021

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1 Legal & Regulatory

1.1 UCITS Update

Ireland

On 29 July 2021, the Central Bank of Ireland ("Central Bank") issued the [32nd edition](#) of its UCITS Q&A which includes a new Q&A, ID 1100 that sets out its position with respect to UCITS gaining exposure (directly or indirectly) to cryptoassets. The Central Bank's approach in relation to cryptoassets will be kept under review, continue to be informed by European regulatory discussions on the topic and may change should new information or developments emerge in the future.

On 10 September 2021, the Central Bank issued the [33rd edition](#) which includes a new Q&A. The new Q&A, ID 1101, sets out the Central Bank's expectations in relation to a UCITS management company operating or planning to operate in the manner of a third party management company. It confirms that where new business results in a material increase in the nature, scale or complexity of a firm's business, the Central Bank deems this to be a material change to the firm's operating model which requires consultation with the Central Bank under Regulation 107 of the Central Bank UCITS Regulations. In these circumstances, management companies must engage proactively with Central Bank supervisors and ensure that they are appropriately resourced to service the additional business.

Luxembourg

On 22 September 2021, the Commission de Surveillance du Secteur Financier ("CSSF") announced the launch of a new performance fee module on its [eDesk](#) platform. Investment fund managers ("IFMs") managing Luxembourg UCITS, whether or not they are subject to a performance fee, are required to complete a performance fee declaration on the eDesk. The declaration is now available for all funds with a July to December 2021 financial year end and will be available from January 2022 for all funds with a January to June 2022 financial year end. The deadline for submission varies but the CSSF has confirmed that for funds with a July to September 2021 financial year end, it is 30 November 2021. For more information see our client update, [Luxembourg: New Performance Fee Declaration](#).

On 17 August 2021, the CSSF issued an updated [FAQ on the law of 17 December 2010 on undertakings for collective investment](#) with four new FAQs on the treatment of global exposure limit breaches. They set out the CSSF's expectations on CSSF notifications for passive breaches of the global exposure limit; the circumstances in which a breach may be considered passive; the actions to be taken; and the information to be communicated to the CSSF in the event of an active Value at Risk "VaR" limit breach.

EU

On 16 July 2021, the European Securities and Markets Authority ("ESMA") published its updated [Q&As](#) on the application of the UCITS Directive [2009/65/EC](#). It added new Q&As on ESMA's guidelines on performance fees in UCITS and certain types of AIFs relating to performance fee scenarios, where:

- An authorised management company has delegated the portfolio management function to different delegated portfolio managers.
- A new compartment or share class in an existing UCITS has been created in the course of its financial year or where a new UCITS has been created.

On 20 July 2021, ESMA published its [2020 report](#) on the use of supervisory sanctions by national competent authorities ("NCAs") under the UCITS Directive. The number of NCAs issuing sanctions (penalties and / or measures) increased slightly to 17 compared to 2019. A total of 100 sanctions

were issued during 2020, for a total amount of €1.1M showing a declining trend in the financial amount of sanctions issued since 2018.

1.2 AIFMD Update

Ireland

On 29 July 2021, the Central Bank issued the [40th edition](#) of its AIFMD Q&A, which includes a new Q&A, ID1145 that sets out its preliminary position of whether a retail investor alternative investment fund ("RIAIF") or a qualified investor alternative investor fund ("QIAIF") can invest (either directly or indirectly) in cryptoassets. It states that it is unlikely to approve a RIAIF that seeks exposure to cryptoassets and that a QIAIF must make a submission showing that the alternative investment fund manager ("AIFM") can effectively manage the risks posed by cryptoassets. The Central Bank approach will be kept under review.

On 10 September 2021, the Central Bank issued the [41st Edition](#) which includes two new Q&As. The new Q&A, ID 1146 sets out its position with respect to an AIFM where its AIF is of the view that it no longer meets the AIF criteria under Regulation 5(1) of the AIFM Regulations 2013.

Q&A, ID 1147 sets out the Central Bank's expectations on an AIFM operating or planning to operate in the manner of a third party management company. It confirms that where new business results in a material increase in the nature, scale or complexity of a firm's business, the Central Bank deems this to be a change that materially affects the basis on which authorisation has been granted and requires notification to the Central Bank under Regulation 11 of the AIFM Regulations. In these circumstances, management companies are required to engage proactively with Central Bank supervisors and to ensure that they are appropriately resourced to service the additional business.

Luxembourg

On 22 September 2021, the CSSF announced the launch of a new performance fee module on its [eDesk](#) platform. IFMs managing Luxembourg AIFs, whether or not they are subject to a performance fee, are required to complete a performance fee declaration on the eDesk. See UCITS Update above for further details on submission deadlines.

EU

On 16 July 2021, ESMA published an updated version of its [Q&As](#) on the application of AIFMD. It has added new Q&As on ESMA's guidelines on performance fees in UCITS and certain types of AIFs relating to performance fee scenarios:

- Where an authorised AIFM has delegated the portfolio management function to different delegated portfolio managers.
- Where a new compartment or share class in an existing AIF has been created in the course of its financial year or where a new AIF has been created.

On 20 July 2021, ESMA published its [second annual report](#) on the use by NCAs of sanctions under AIFMD. In 2020, 17 NCAs imposed a total of 131 penalties and / or measures, compared with 87 sanctions issued in 2019, and the total amount of financial penalties decreased to €3.3M from €9M in 2019. Thirteen NCAs did not impose any sanction during this period.

On 28 September 2021, ESMA published its [work programme for 2022](#) that sets out its priority work areas to enhance investor protection and promote stable and orderly financial markets. Among other things, ESMA will contribute to the development of the single rulebook in relation to the upcoming AIFMD review.

1.3 Cross-Border Distribution of Investment Funds Update

The European Union's (EU) new regulatory framework for facilitating the cross-border distribution of UCITS and AIFs came into effect on 2 August 2021. It comprises Regulation [EU/2019/1156](#) ("CBD Regulation") and Directive [EU/2019/1160](#) ("CBD Directive"). The [European Union \(Undertakings for Collective Investment in Transferable Securities\) \(Amendment\) Regulations 2021](#) and the [European Union \(Alternative Investment Fund Managers\) \(Amendment\) Regulations 2021](#) which give effect to the CBD Directive in Ireland came into force on 6 August 2021. The [law of 21 July 2021](#) that gives effect to the CBD in Luxembourg came into force on 2 August 2021. The main changes introduced include the so-called pre-marketing regime, the requirement to provide local facilities for AIFs and UCITS marketed to retail investors, and the marketing de-notification process of AIFs and UCITS.

On 29 June 2021, the Central Bank published [website guidance](#) on the marketing requirements and regulatory fees and charges for UCITS and AIF products.

On 1 July 2021, ESMA published its [first report](#) providing an overview of marketing requirements and marketing communications under the CBD Regulation.

Key findings include the following:

- National laws and provisions governing marketing requirements are usually based on the transposition of AIFMD and the UCITS Directive, although NCAs' responses identified many additional requirements imposed by Member States to further regulate the marketing of UCITS or AIFs in their jurisdiction.
- In relation to the verification of marketing communications, many NCAs indicated that no national rules required the ex-ante or ex-post verification of marketing communications, or that such verifications were not part of their supervisory practice. There appears to be limited harmonisation on de-notification of arrangements made for cross-border marketing as only some Member States have adopted a formal process for de-notification. In addition, there are diverging approaches between States that allow the de-notification of a fund that was previously notified for marketing in their jurisdiction.

On 30 July 2021, the CSSF published a [FAQ on the CBD Regulation](#) in order to highlight the changes for notifications to the CSSF from 2 August 2021. A webpage dedicated to [pre-marketing notifications of AIFMs](#) is also available on the CSSF's website.

On 31 July 2021, the CSSF published CSSF circular [21/778](#) (amending CSSF circular [11/509](#)) on the notification procedures applicable to UCITS marketing their shares on a cross-border basis. A new notification procedure has been introduced that requires Luxembourg UCITS that cease marketing in an EU Member State to de-register the relevant sub-fund(s) and / or share class(es). A de-notification letter (in the form in annex 6 of the circular) should be included in the notification package to the CSSF and each electronic submission to the CSSF should comply with the CSSF circular [19/708](#) and its [appendix](#). The procedure applicable to non-Luxembourg UCITS remains unchanged.

On 2 August 2021, ESMA published the [official translations](#) of its guidelines for funds' marketing communications under Article 4 of the CBD Regulation. They specify the requirements for marketing communications sent to investors to promote UCITS and AIFs, including European social entrepreneurship funds ("EuSEFs"), European venture capital funds ("EuVEcAs") and European long-term investment funds ("ELTIFs") and will apply from February 2022.

For more information please see our client update, [New EU Rules in Force: Pre-Marketing and De-Registration of UCITS and AIFs](#)

1.4 Sustainable Finance Update

On 6 July 2021, the European Commission published its [renewed strategy on sustainable finance](#) with over 50 wide-ranging proposals aimed at greening the financial services sector along with a legislative proposal for an EU green bond framework and the final Delegated Act on Article 8 Taxonomy disclosures by Non-Financial Reporting Directive "NFRD" undertakings (see further below). It sets out six aims to:

1. Extend the existing sustainable finance toolbox to facilitate access to transition finance.
2. Improve the inclusiveness of small and medium-sized enterprises, and consumers, by giving them the right tools to access transition finance.
3. Enhance the resilience of the economic and financial system to sustainability risks.
4. Increase the contribution of the financial sector to sustainability.
5. Ensure the integrity of the EU financial system and monitor its transition to sustainability.
6. Develop international sustainable finance initiatives and support EU partner countries.

Five Commission Delegated Regulations and two Delegated Directives, collectively forming part of the European Commission's work on sustainable finance came into force on 22 August 2021:

1. Commission Delegated Regulation [\(EU\) 2021/1255](#) amending Delegated Regulation (EU) No 231/2013 on the sustainability risks and sustainability factors to be taken into account by AIFMs.
2. Commission Delegated Regulation [\(EU\) 2021/1254](#) correcting Delegated Regulation (EU) 2017/565 supplementing Directive 2014/65/EU on organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.
3. Commission Delegated Regulation [\(EU\) 2021/1256](#) amending Delegated Regulation (EU) 2015/35 on the integration of sustainability risks in the governance of insurance and reinsurance undertakings.
4. Commission Delegated Regulation [\(EU\) 2021/1257](#) amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 on the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors and into the rules on conduct of business and investment advice for insurance-based investment products.
5. Commission Delegated Regulation [\(EU\) 2021/1253](#) amending Delegated Regulation (EU) 2017/565 on the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms.
6. Commission Delegated Directive [\(EU\) 2021/1270](#) amending Directive 2010/43/EU on the sustainability risks and sustainability factors to be taken into account for UCITS.
7. Commission Delegated Directive [\(EU\) 2021/1269](#) amending Delegated Directive (EU) 2017/593 on the integration of sustainability factors into the product governance obligations which amends MiFID II and contains product governance obligations.

Other than the correcting Delegated Regulation (EU) 2021/1254 relating to MiFID, the other four Delegated Regulations will apply from 2 August 2022.

Member States have to transpose the UCITS amending Directive (EU) 2021/1270 by 31 July 2022 and apply those measures from 2 August 2022.

Member States have to transpose the amending MIFID product governance Directive (EU) 2021/1269 by 22 August 2022 and apply those measures from 22 November 2022.

For more information please see our client update, [Sustainable Finance: New EU Delegated Legislation](#)

On 28 September 2021, ESMA published its [work programme for 2022](#) that sets out its priority work agenda. Among other things, ESMA will develop rules on environmental, social and governance ("ESG") disclosures and risk identification methodology for ESG factors, contribute to the work on non-financial reporting and work with national authorities to prevent the risk of greenwashing.

SFDR

The Sustainable Finance Disclosure Regulation [EU/2019/2088](#) ("SFDR") became effective on 10 March 2021 however Level 2 measures have not yet been finalised. The Level 2 regulatory technical standards ("RTS") set out the granular specifications for the content, methodology and presentation of disclosures required by SFDR. A European Commission letter dated 8 July 2021 [announced](#) a further deferral of the implementation date of the Level 2 RTS from 1 January 2022 until 1 July 2022.

The letter also confirms that the European Commission intends to use a single delegated act for these RTS, and other RTS being prepared by the European Supervisory Authorities ("ESAs") that focus on the content and presentation of sustainability disclosures under Articles 8(4), 9(6) and 11(5) of the SFDR.

For more information see [European Commission Delays Implementation of SFDR by 6 Months](#)

On 26 July 2021, ESMA published an internal [Commission Decision](#) and [annex](#) containing answers about the application of SFDR, which the European Commission adopted on 6 July 2021. The answers respond to questions the ESAs forwarded to the European Commission in January 2021 and cover the following:

- The application of the SFDR to non-EU AIFMs and registered AIFMs.
- The application of the 500 employee threshold for principal adverse impact reporting on parent undertakings of a large group.
- The meaning of 'promotion' in the context of products promoting environmental or social characteristics.
- The application of Article 9 of the SFDR (transparency of sustainable investments in pre-contractual disclosures).
- The application of SFDR product rules to portfolios and dedicated funds.

For more information see, [European Commission Replies on SFDR Priority Issues](#)

ESMA has also published the [covering letter](#) from the European Commission to the ESAs, in which the European Commission asks the ESAs to publish the answers on the website of their Joint Committee and their respective websites. On 27 July 2021, the ESAs added an update to the [webpage](#) hosting their joint supervisory statement on the application of SFDR which advises its February 2021 supervisory statement should be read in the light of the 8 July letter.

On 20 August 2021, EFAMA issued a [letter](#) to the European Commission which raises practical issues on the announcement to delay the application of the SFDR Level 2 measures to 1 July 2022. Irish Funds, the regulatory body, contributed to the EFAMA submission.

Taxonomy Regulation

On 6 July 2021, the European Commission adopted a [Delegated Regulation](#) supplementing Article 8 of the Taxonomy Regulation [EU/2020/852](#) by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of the NFRD 2014/95/EU ("") on environmentally sustainable economic activities and the methodology to comply with that disclosure obligation.

Article 8 of the Taxonomy Regulation requires large corporates to include in their non-financial statements information on how and to what extent their activities are associated with environmentally sustainable economic activities. The Delegated Regulation specifies the content and presentation of information to be disclosed by non-financial undertakings, asset managers, credit institutions, investment firms, and insurance and reinsurance undertakings. It also sets out common rules relating to key performance indicators. The Council of the EU and the European Parliament will now scrutinise it.

1.5 AML and White Collar Crime Developments

Ireland

The [European Union \(Modifications of Statutory Instrument No. 110 of 2019\) \(Registration of Beneficial Ownership of Certain Financial Vehicles\) \(Amendment\) Regulations 2021](#) apply from 1 July 2021 and amend Regulation 5 of the European Union (Modifications of Statutory Instrument No 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020 (which establish a Central Register of Beneficial Ownership of ICAVs, Credit Unions and Unit Trusts). The changes oblige existing relevant entities (including ICAVs and unit trusts) to deliver to the Registrar of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts: (i) the PPS number of each beneficial owner; and (ii) such information to be determined by the Registrar by 1 January 2022.

In September 2021 the [Companies \(Corporate Enforcement Authority\) Bill 2021](#) was published. It aims to transform the Office of the Director of Corporate Enforcement into a statutory and independent agency, the Corporate Enforcement Authority ("CEA") with additional resources and powers to investigate and prosecute white collar crime. Apart from the creation of the CEA, the Bill also make a number of changes to the Companies Act 2014 to remove certain anomalies.

Luxembourg

On 29 July 2021, the CSSF highlighted the key findings of its thematic review on AML / CFT controls applied to unregulated AIFs by the IFM. It inspected five authorised Luxembourg IFMs based on the assets under management of unregulated AIFs and the number of managed unregulated AIFs. The review identified weaknesses in: (i) the risk assessment at the level of IFMs and unregulated AIFs; (ii) the oversight of the delegated portfolio managers; (iii) the risk-based approach on investments; and (iv) the name screening on targeted financial sanctions on investments. The CSSF also noted that indirect supervision of unregulated AIFs (through the supervision of IFMs) works well and no divergence in the application of AML / CFT procedures and controls between regulated funds and unregulated AIFs were observed.

On 13 September 2021, the CSSF issued an updated [FAQ on AML / CFT market entry form](#) for funds and IFMs to reflect an update on the circumstances in which a market entry form must be completed as well as the type of form to be completed.

EU and International

On 1 July 2021, the Financial Action Task Force ("FATF") published a [report](#) on opportunities and challenges of new technologies for anti-money laundering ("AML") and counter-terrorist financing ("CTF"). On 5 July 2021, it published a [report](#) on the findings from its second 12-month review of its revised AML / CTF standards on virtual assets (also known as cryptoassets) and virtual asset service providers "VASPs". It finds that many jurisdictions have made progress in implementation. Of the 128 reporting jurisdictions, 58 have implemented the revised FATF standards, with 52 of these regulating VASPs and six of these prohibiting the operation of VASPs. The other 70 jurisdictions have not yet implemented them.

On 20 July 2021, the European Commission [adopted](#) a package of measures to strengthen the EU's AML / CTF rules. The legislative proposals, that establish a new framework for the regulation of AML / CTF, include:

- A Regulation establishing a new EU AML / CFT authority, the AML Authority ("AMLA").
- A Regulation on AML / CFT, containing directly-applicable rules creating a harmonised rulebook (including customer due diligence and beneficial ownership).
- A sixth Directive on AML / CFT ("MLD6"), replacing the Fourth Money Laundering Directive EU/2015/849 ("MLD4"), containing provisions that will be transposed into Member State national law, such as rules on national supervisors and financial intelligence units.
- A revision of the Regulation on information accompanying transfers of funds 2015/847/EU to allow tracing of transfers of cryptoassets.

The legislative proposals will now be considered by the European Parliament and the Council of the EU. The full AML / CTF rulebook, including technical standards, is expected to be in place and apply by the end of 2025. On 22 July 2021, the European Commission launched [consultations](#) on the four legislative proposals inviting feedback by 18 November 2021.

For more information please see our client update, [European Commission Publishes New AML / CFT Action Plan](#)

On 2 August 2021, the European Banking Authority ("EBA") published a [consultation paper](#) on new guidelines on the role of AML / CFT compliance officers under MLD4. The draft guidelines set clear expectations of the role of the compliance officer and the management body and how they interact. It closes on 2 November 2021.

1.6 SEAR and Individual Accountability

Ireland

The Department of Finance published [details](#) on the Individual Accountability Framework (IAF) including the Senior Executive Accountability Regime ("SEAR") on 27 July 2021. The [General Scheme](#) of the Central Bank (Individual Accountability) Bill and its Regulatory Impact Analysis were also published. When introduced, the IAF will have a significant impact on the financial services industry as it will enhance the Central Bank's supervisory and enforcement powers to hold individuals to account for regulatory breaches in the area for which they are responsible.

The IAF introduces:

- SEAR which places obligations on regulated financial services providers and senior managers within them to set out clearly where responsibility and decision-making lies
- New conduct standards
- Enhancements to the Central Bank's fitness and probity regime
- Further strengthening of the Central Bank's enforcement powers

The Minister for Finance Paschal Donohoe has indicated that he expects pre-legislative scrutiny of the draft Bill to take between four and six months followed by a four to six-month legislative process with the hope that the legislation will be enacted in Q2 2022.

For more information please see our client update, [New Irish Legislation on Individual Accountability](#)

1.7 CSSF Fund Authorisation Process Changes

On 30 July 2021, the CSSF announced changes to its fund authorisation process:

- A new fund pre-inception readiness review [questionnaire](#) to replace a number of confirmations which IFMs were previously required to provide; and
- Service provider agreements must no longer be submitted for CSSF review. Instead, the core service provider agreements must be filed in final executed format along with a [confirmation](#) that the agreements are in compliance with applicable legal and regulatory requirements.

Guidance on what is considered good practice in the [drafting of service provider agreements](#), as well as on the [supporting documentation to be filed with an authorisation application](#) has also been published. The changes are intended to optimise the CSSF's fund authorisation process and are in force.

1.8 CSSF Update to Non-Judicial Liquidation Procedure

On 31 August 2021, the CSSF announced that, effective immediately, liquidation period extension requests for UCITS, UCIs, SIFs and SICARs in non-judicial liquidation are no longer required. The CSSF will monitor the status of the fund's liquidation through the semi-annual report [form](#) submitted by the liquidator. Such forms must be submitted no later than (i) 30 September (of the same calendar year) for the period from 1 January to 30 June; and (ii) 31 March (of the following year) for the period from 1 July to 31 December. Liquidation period extension requests for sub-funds of funds that are on the official list and not in non-judicial liquidation are still required when the nine month deadline is reached.

1.9 IFR and IFD Update

The Investment Firms Directive [EU/2019/2034](#) ("IFD") and the Investment Firms Regulation [EU/2019/2033](#) ("IFR") came into force on 26 June 2021 and introduced a new prudential regime for MiFID investment firms across the EU that are currently subject to the Capital Requirements Regulation [EU/575/2013](#) ("CRR") and the Capital Requirements Directive ("CRD").

On 5 July 2021, the EBA published two [final reports](#) supplementing the IFD:

- Final report on draft RTS and implementing technical standards ("ITS") on information exchange between competent authorities of home and host Member States. The draft RTS and ITS concern the information exchanged in relation to an investment firm, which operates through a branch or through its freedom to provide services in one or more Member States other than those in which it is incorporated. The standards relate to the exchange of information between competent authorities and do not cover requests for information from the supervised institutions.
- Final report on draft RTS on colleges of supervisors for investment firm groups. The RTS specify the conditions under which colleges of supervisors, established to make supervision of cross-border investment firms more effective, exercise their tasks.

The draft RTS has been submitted to the European Commission for adoption.

On 6 August 2021, the European Commission adopted a Delegated Regulation [C\(2021\)5780](#) supplementing the IFD that contains RTS on the criteria for subjecting certain investment firms to the CRR requirements. It is now subject to scrutiny.

On 13 August 2021, the European Commission adopted two delegated regulations that supplement IFD remuneration provisions:

1. Delegated Regulation on variable remuneration [C\(2021\) 5948](#) that contain RTS specifying the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration.

2. Delegated Regulation on risk-takers [C\(2021\) 5949](#) that contain RTS specifying appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages.

The Council of the EU and the European Parliament will now scrutinize them. If neither object, they will apply from the fifth day following publication in the Official Journal of the EU.

For more information please see our client update, [Introducing IFD / IFR: A New Prudential Regime for Investment Firms](#)

In September 2021, the European Commission adopted four RTS on prudential requirements for investment firms under the IFR:

1. A [Delegated Regulation](#) adopted on 22 September 2021 supplementing the IFR with RTS that specify adjustments to the K-factor 'daily trading flow' ("K-DTF") coefficients. These reflect a mandate under Article 15(5)(c) of the IFR.
2. A [Delegated Regulation](#) adopted on 22 September 2021 supplementing the IFR with RTS that specify the methods for measuring the K-factors referred to in Article 15 of the IFR. These reflect a mandate under Article 15(5)(a) of the IFR.
3. A [Delegated Regulation](#) adopted on 24 September 2021 supplementing the IFR with RTS specifying the amount of total margin for the calculation of the K-factor "*clear margin given*". These reflect a mandate under Article 23(3) of the IFR.
4. A [Delegated Regulation](#) adopted on 24 September 2021 supplementing the IFR with RTS specifying the notion of segregated accounts to ensure client money's protection in the event of an investment firm's failure. These reflect a mandate under Article 15(5)(b) of the IFR.

The Council of the EU and the European Parliament will now scrutinise them. If neither object, they will enter into force 20 days after their publication in the Official Journal of the EU.

Ireland

On 21 September 2021, regulations to transpose IFD and IFR into Irish law were signed and came into effect:

- The [European Union \(Investment Firms\) Regulations 2021](#) complete a partial transposition of the IFD. Article 62(6) inserts a new Article 8a into CRD and essentially requires Member States to impose an obligation on certain large systemic investment firms (Class 1 Firms) to re-authorise as credit institutions. The Department of Finance will conclude work, as soon as possible, to establish in legislation a re-authorisation process for those investment firms required to re-authorise as credit institutions.
- The [European Union \(Investment Firms\) \(No 2\) Regulations 2021](#) give full effect to the IFR and make consequential amendments to the disclosure requirements of certain firms, ensures that breaches of the Regulations falls within the remit of the Central Bank's administrative sanctions procedure, and updates references and definitions in key Irish financial services legislation.

Luxembourg

On 27 July 2021, the [law of 21 July 2021](#) transposing the IFD into Luxembourg law and implementing the IFR was published in the Official Journal of Luxembourg. It amended the [law of 5 April 1993](#) on the financial sector including: (i) the introduction of four categories of investment firms according to the size and complexity of the firm; (ii) the modernisation of the status of certain professionals of the financial sector ("PFS"), including investment firms; and (iii) amendments to the [law of 17 December 2010](#) relating to undertakings for collective investment and the [law of 12 July 2013](#) on alternative investment fund managers in relation to the required levels of own funds and liquidity as set out in

Article 13 of IFR. The law entered into force on 30 July 2021, however certain provisions will only apply from 10 November 2021 and 1 January 2022.

On 2 September 2021, the CSSF announced the entry into force of the new regulatory provisions for investment firms and highlighted a number of key points: (i) investment firms' adequacy of the internal measures and levels of own funds and liquidity will be periodically assessed by the CSSF in the framework of the supervisory review and evaluation process; (ii) the CSSF will publish a 'reporting handbook' with instructions for the transmission of the new IFR reporting to the CSSF; and (iii) the CSSF and the Commissariat Aux Assurances ("CAA") will have the power to grant and withdraw the authorisation of the entities subject to their supervision.

1.10 MiFID II / MiFIR Update

The [Markets in Financial Instruments Directive 2014/65/EU](#) ("MiFID II") and the [Markets in Financial Instruments Regulation EU/600/2014](#) ("MiFIR") apply from 3 January 2018.

Ireland

On 29 July 2021, the Central Bank published a [statement](#) for MiFID investment firms authorised to deal on own account or to underwrite financial instruments on a firm commitment basis (MiFID activities (3) or (6)). It sets out the Central Bank's expectations following the EBA publication of a second consultation on the draft regulatory technical standards on the calculation of the threshold set out in Article 8a(1) of Directive 2013/36/EU as amended by Article 62(6) of the Directive 2019/2034 above which MiFID investment firms are required to seek re-authorisation as credit institutions.

EU

On 2 July 2021, ESMA and the EBA published a final report with [updated joint guidelines](#) on the assessment of the suitability of members of the management body and key function holders in accordance with the CRD IV Directive and MiFID II. The updated guidelines will apply from 31 December 2021.

On 9 July 2021, ESMA also published a [consultation](#) on its review of transparency requirements for equity and non-equity instruments under MiFIR which closes on 1 October 2021.

On 13 July 2021, ESMA published a [statement](#) on its supervisory approach to the provisions on non-discriminatory and open access to trading venues and CCPs for transferable securities, money market instruments and exchange traded derivatives under Articles 35 and 36 of MiFIR.

On 14 July 2021, the European Commission adopted a [Delegated Regulation](#) supplementing MiFID II by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level. The Council of the EU and the European Parliament will now scrutinise it.

On 19 July 2021, ESMA published a [consultation](#) paper on draft ESMA guidelines on certain aspects of the MiFID II remuneration requirements. The paper is addressed to investment firms and credit institutions providing investment services and activities, investment firms and credit institutions when selling structured deposits, UCITS management companies and external AIFMs when providing investment services and activities under the UCITS Directive and AIFMD. ESMA will consider the responses it receives to this consultation by 19 October 2021 and expects to publish a final report, and final guidelines, by end of Q1 2022.

On 21 July 2021, ESMA published a [statement](#) presenting the results of the 2020 common supervisory action with NCAs on the suitability requirements under MiFID II. It shows an adequate level of firms' compliance with key elements of suitability requirements but also identifies areas for improvement. As a result ESMA will update its guidelines on suitability to address those areas later in 2021 or 2022.

On 28 July 2021, ESMA published its annual report (following a review of the RTS supplementing MiFIR in Delegated Regulation (EU) 2017/583 ("RTS 2")) that contain amended RTS. It covers the mandate under Article 17 of RTS 2 which requires ESMA to analyse whether it is appropriate to move to the following stage in terms of transparency with regard to the average daily number of trades threshold used for the quarterly liquidity assessment of bonds, and the trade percentile used for determining the pre-trade size specific to the instrument thresholds. It has been submitted to the European Commission.

On 22 August 2021 the following came into force:

- Delegated Directive ([EU\) 2021/1269](#) on the integration of sustainability factors into MiFID II product governance obligations.
- [Commission Delegated Regulation \(EU\) 2021/1253](#) on the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms.
- [Commission Delegated Regulation \(EU\) 2021/1254](#) correcting Delegated Regulation (EU) 2017/565 supplementing MiFID II on organisational requirements and operating conditions for investment firms and defined terms.

For more information please see our Sustainable Finance Update above and our client update, [Sustainable Finance: New EU Delegated Legislation](#)

On 27 August 2021, ESMA's consultation on a draft Delegated Regulation (dated 30 July 2021) which supplements MiFIR by specifying fees, rules of procedure for measures and criteria for derogation on the supervision by ESMA of data reporting service providers ("DRSPs") closed.

On 2 September 2021, ESMA's July 2021 [consultation](#) proposing draft RTS amending the RTS on the clearing obligation and on the derivative trading obligation under Article 5(2) of EMIR and Article 32 of MiFIR respectively closed.

On 24 September 2021, ESMA's [consultation](#) on the first stage in the development of draft RTS on suitability assessments of DRSPs management body members under MiFIR closed. ESMA intends to submit the draft RTS to the European Commission by Q1/Q2 2022.

On 24 September 2021, ESMA launched a [consultation](#) on proposals for improvements to the MiFID II framework on best execution reports. These proposals aim at ensuring effective and consistent regulation and supervision and enhancing investor protection. The deadline for responses is 23 December 2021.

On 28 September 2021, ESMA published its [work programme for 2022](#). ESMA's priority areas include contributing to the MiFID II and MiFIR reviews.

On 29 September 2021 ESMA published the MiFID II/MiFIR [review report](#) on algorithmic trading. It concludes that no fundamental issues have emerged with respect to the MiFID II algorithmic trading regime. ESMA nevertheless makes some recommendations that aim at both simplifying the regime and making it more efficient. This report will be submitted to the European Commission and is expected to be taken into consideration for further legislative proposals on MiFID II.

Over the quarter, ESMA updated its MiFID II / MiFIR Q&As on [MiFIR data reporting](#) and on MiFID II and MiFIR [transparency topics](#).

1.11 Fitness & Probity - Proposed Changes to PCF Roles for Regulated Firms

On 22 September 2021, the Central Bank issued a [Notice of Intention](#) setting out proposed amendments to its pre-approval controlled functions ("PCF") list:

- Non-Executive Directors (formerly PCF-2) will be identified under separate PCF designations, depending on whether they are independent (PCF-2B) or non-independent (PCF-2A)
- The role of Head of Compliance with responsibility for Anti-Money Laundering and Counter Terrorist Financing Legislation (PCF15) will fall away - relevant roles will be the existing Head of Compliance (PCF12) and a new Head of Anti-Money Laundering and Counter Terrorist Financing (PCF-52)
- The role of Head of Investments (PCF31) is falling away, defaulting to Chief Investment Officer (PCF30)
- Branch Managers in all cases will be a PCF role (PCF-16), including non-EEA branches

Feedback on the proposals is invited from industry until 20 October 2021.

For more information, see our client update, [Central Bank Proposes Changes to PCF Categories in Regulated Firms](#)

1.12 MMFR Update

On 1 July 2021, the European Systemic Risk Board ("ESRB") published a [report](#) on systemic vulnerabilities of, and preliminary policy considerations to reform, money market funds ("MMFs"). It identifies systemic vulnerabilities in MMFs and a set of preliminary policy options to reform them. It states that there is an underlying tension between the two primary economic functions of MMFs: they offer on-demand liquidity to investors and provide short term funding to borrowers (mainly EU banks), but cannot dispose of their assets easily in all market conditions. This may become a systemic concern especially during market stress, as observed at the onset of the COVID-19 pandemic.

On 26 July 2021, the EBA launched a [consultation](#) on draft RTS that sets out the requirements for the identification of shadow banking entities for the purposes of reporting large exposures. It runs until 26 October 2021. In the draft RTS, entities that offer banking services and perform banking activities but are not regulated and are not supervised (under any of the acts that form the regulated framework) are identified as shadow banking entities. MMFs are also identified as shadow banking entities.

On 19 August 2021, the Central Bank published a [notice of intention](#) on ESMA's *Guidelines on stress test scenarios under the MMF Regulation* ("Stress Test Guidelines") which states that it expects full compliance with the guidelines from 29 August 2021. It will, in due course, consult on the incorporation of a provision in the Central Bank UCITS Regulations and AIF Rulebook that all MMF managers adhere to the Guidelines.

On 26 August 2021, the CSSF published CSSF circular [21/780](#) confirming that it has integrated the latest version of the Stress Test Guidelines into its administrative practices.

In September 2021, the Central Bank agreed to extend the deadline for the filing of the new MMF Daily Reporting Schema in order to give firms more time to prepare. The new 'go-live' date for the automated daily reporting is 1 December 2021 (previously 1 October 2021).

On 12 September 2021, Commission Delegated Regulation [\(EU\) 2021/1383](#) amending Delegated Regulation (EU) 2018/990 on requirements for assets received by MMFs as part of reverse repurchase agreements came into force.

On 28 September 2021, ESMA published its [work programme for 2022](#) that sets out its priority work areas to enhance investor protection and promote stable and orderly financial markets. Among other things, ESMA will contribute to the development of the single rulebook in relation to the upcoming MMFR review.

1.13 CSSF FAQ on the Swing Pricing Mechanism

On 17 August 2021, the CSSF issued an updated [FAQ on swing pricing](#) to reflect three updated FAQs on the circumstances in which the applied swing factor may be increased up to and beyond the maximum swing factor disclosed in an offering document.

1.14 New CSSF / CAA Authorisation Regime for Supervised Entities

On 30 July 2021, the [law of 21 July 2021](#) introducing a new authorisation regime for entities in the financial and insurance sector came into effect. The CSSF and CAA will now be solely responsible for authorising and withdrawing the authorisation of entities subject to their supervision and the Ministry of Finance will no longer have a role to play. Authorisations of existing entities will not be impacted.

1.15 PRIIPS Update

On 15 July 2021, the European Commission adopted a [legislative proposal](#) for a Directive amending the UCITS Directive on the use of key information documents ("KIDs") by management companies of UCITS ("Proposed Directive").

The Proposed Directive inserts a new Article 82a in the UCITS Directive. This states that where a KID is drawn up, provided, revised and translated for a UCITS pursuant to PRIIPs Regulation [EU/1286/2014](#), it should be considered as satisfying the requirements applicable to key investor information for the purposes of the UCITS Directive. Member States are expected to apply measures implementing the amending Directive from 1 July 2022.

UCITS qualify as PRIIPs for the purposes of the PRIIPs Regulation and require that all PRIIPs be accompanied by a KID. However, Article 32 of the PRIIPs Regulation also provides for a transitional arrangement for management companies, investment companies and persons advising on, or selling, units of UCITS and non-UCITS, temporarily exempting them from the requirement to provide retail investors with a KID. The arrangement currently applies until 31 December 2021.

On 15 July 2021, the European Commission ("Commission") also adopted a [legislative proposal](#) for a draft Regulation amending the PRIIPs Regulation on the extension of this transitional arrangement for management companies, investment companies and persons advising on, or selling, UCITS and non-UCITS. In order to give the time needed to implement the amendments to Delegated Regulation (EU) 2017/6535 and to reduce legal uncertainty, the Commission proposes this draft Regulation to extend the transitional arrangements to 30 June 2022. This would coincide with the date of application of the Delegated Regulation to amend Delegated Regulation EU/2017/6535, which is set for 1 July 2022. The Commission also published a webpage on the adopted Regulation, requesting comments by 9 September 2021.

On 2 August 2021, the Commission published a [call for advice](#) to the Joint Committee of the ESAs on the PRIIPs Regulation. The Commission invites the joint committee to provide advice on certain areas under the Regulation and requests that the joint committee deliver an advice report by 30 April 2022. The technical advice will provide input to the Commission's strategy for retail investments and make appropriate adjustments to the legislative framework.

On 5 August 2021, the European Commission published a [consultation](#) on the Proposed Directive which closed on 9 September 2021. The Commission will summarise all feedback it receives and present it to the European Parliament and Council of the EU.

On 7 September 2021, the Commission adopted a [Delegated Regulation](#) and [Annexes](#) amending the RTS in Commission Delegated Regulation 2017/653 on KIDs for PRIIPs ("PRIIPs KID Delegated Regulation"). Among other things, it amends the PRIIPs KID Delegated Regulation by setting out:

- New methodologies underpinning the calculation of appropriate performance scenarios and a revised presentation of these scenarios, as well as standards for information on past performance that needs to be provided by some investment funds.
- Revised summary cost indicators and changes to the content and presentation of information on the costs of PRIIPs.
- A modified methodology underpinning the calculation of transaction costs.
- Modified rules for PRIIPs that offer a number of options for investment.

The European Commission intends to amend the UCITS Directive and the PRIIPs Regulation to avoid investors receiving two pre-contractual disclosure documents. A related [press release](#) states the Delegated Regulation will be subject to scrutiny by the European Parliament and the Council of the EU. It is scheduled to apply from 1 July 2022.

On 28 September 2021, ESMA published its [work programme for 2022](#) which includes contributing to the PRIIPs Regulation review.

1.16 Benchmarks Regulation and LIBOR Update

Ireland

The [European Union \(Indices Used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds\) \(Amendment\) Regulations 2021](#) amend the European Union (Indices Used as Benchmarks in Financial Instruments and Financial Contracts or to Measure the Performance of Investment Funds) Regulations 2017 to designate the Central Bank as the relevant authority responsible for the carrying out of the functions of a relevant authority referred to in Article 23b of the EU Benchmarks Regulation.

Luxembourg

On 29 July 2021, the CSSF published the key findings of its thematic review on IFMs' compliance with the EU Benchmarks Regulation. The CSSF observed a low level of compliance with the regulation, in particular with respect to the required UCITS prospectus disclosures in relation to the ESMA register, which were found to be missing, incorrect or incomplete. Other areas of focus for the CSSF were (i) eligible benchmarks; and (ii) contingency measures.

EU

On 16 July 2021, ESMA published an updated version of its [Q&As](#) on the Benchmarks Regulation EU/2016/1011 ("BMR"). It includes a new Q&A on the disclosure requirements that an administrator of an EU Climate Transition Benchmark (EU CTB) or an EU Paris-aligned Benchmark (EU PAB) should comply with.

On 29 July 2021, ESMA published another [updated version](#) to add a new Q&A 4.7 clarifying that no BMR provision specifies that only public authorities located in the EU may be excluded from the BMR's scope of application. Accordingly, supervised entities in the EU can continue to use benchmarks provided by public authorities located in third countries after the end of the transitional period applicable to third country benchmarks where those public authorities meet the definition in article 3(1)(29) of the BMR and comply with the conditions in Article 2(2)(b) of the BMR.

The European Commission July 2021 [consultation](#) on a draft Delegated Regulation supplementing the BMR by specifying fees and rules of procedure for measures applicable to the supervision by ESMA of certain benchmark administrators closed on 27 August 2021.

On 2 September 2021, the following Delegated Regulations supplementing the BMR came into force and will apply from 1 January 2022:

- [Commission Delegated Regulation \(EU\) 2021/1348](#) supplementing the BMR with RTS specifying the criteria that competent authorities may require changes to the compliance statement of non-significant benchmarks.
- [Commission Delegated Regulation \(EU\) 2021/1349](#) supplementing the BMR with RTS specifying the criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical benchmark.
- [Commission Delegated Regulation \(EU\) 2021/1350](#) supplementing the BMR with RTS specifying the requirements to ensure that an administrator's governance arrangements are sufficiently robust.
- [Commission Delegated Regulation \(EU\) 2021/1351](#) supplementing the BMR with RTS specifying the characteristics of the systems and controls for the identification and reporting of any conduct that may involve manipulation or attempted manipulation of a benchmark.
- [Commission Delegated Regulation \(EU\) 2021/1352](#) supplementing the BMR with RTS specifying the conditions to ensure that the methodology for determining a benchmark complies with the quality requirements.

On 24 September 2021, ESMA published its [final report](#) containing guidelines on methodology, oversight function and record keeping under the BMR that provide further guidance to market participants and competent authorities on the application of the requirements relating to the use of a methodology for calculating a benchmark in exceptional circumstances (such as the COVID-19 pandemic). The guidelines also amend the guidelines on non-significant benchmarks on the key elements of the methodology and the oversight function. The guidelines will apply from 31 May 2022.

LIBOR

Following benchmark reform, EONIA and LIBOR will cease at the end of 2021. The exception to this is USD LIBOR, which is scheduled to continue until June 2023.

On 10 July 2021, European Commission Implementing Regulation [EU/2021/1122](#) amending Implementing Regulation EU/2016/1368 adding the Norwegian Interbank Offered Rate to and removing LIBOR from the list of critical benchmarks used in financial markets established pursuant to the BMR came into force.

On 31 August 2021, the European Commission's consultations on a [draft Implementing Regulation](#) on the designation of a statutory replacement for certain settings of Swiss Franc (CHF) LIBOR and a [statutory replacement rate](#) for the EONIA benchmark closed.

On 2 September 2021, ESMA's July 2021 [consultation paper](#) proposing draft RTS amending the RTS on the clearing obligation and on the derivative trading obligation under Article 5(2) of EMIR and Article 32 of MiFIR respectively closed. ESMA's proposals would amend the scope of both obligations to accompany the benchmark transition for OTC derivatives away from EONIA and LIBOR and on to new Risk-Free Rates.

1.17 EMIR Update

The Regulation on over the counter ("OTC") derivative transactions, central counterparties ("CCPs") and trade repositories ("TRs") [EU/648/2012](#) ("EMIR") is relevant to all Irish and Luxembourg funds trading in financial derivative instruments 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 1 July 2021, ESMA published the official translations, including the [English language version](#), of its guidelines on written agreements between members of CCP colleges under EMIR that apply to NCAs from that date.

On 13 July 2021, ESMA published a [consultation](#) on draft guidelines for reporting trades in derivatives under Article 9 of EMIR and on obligations for TRs under Articles 78 and 81 which closed on 30 September 2021. The draft guidelines, when finalised, will apply to financial and non-financial counterparties to trades in derivatives as defined in Articles 2(8) and 2(9) of EMIR, to TRs as defined in Article 2(2) of EMIR and to NCAs.

On 13 July 2021, ESMA also published its [methodology](#) for assessing third-country CCPs under Article 25(2c) of EMIR and its [final report](#) on technical advice to the European Commission on the simplification and harmonisation of fees to TRs under EMIR and SFTR.

On 15 July 2021, ESMA published its [annual report](#) on the supervisory measures and penalties that NCAs have imposed under Articles 4, 9, 10 and 11 of EMIR.

On 26 July 2021, six European Commission implementing decisions on the equivalence of the regulatory regimes of third countries under EMIR came into force. The European Commission has determined that the regulatory framework for non-EU CCPs in the following jurisdictions meet certain requirements of Article 11 of EMIR: Brazil; Canada; Singapore; Australia; Hong Kong; and the US.

On 2 September 2021, ESMA's July 2021 [consultation](#) proposing draft RTS amending the RTS on the clearing obligation and on the derivative trading obligation (under Article 5(2) of EMIR and Article 32 of MiFIR respectively) closed. ESMA's proposals would amend the scope of both obligations to accompany the benchmark transition for OTC derivatives away from EONIA and LIBOR and on to new risk-free rates.

On 9 September 2021, Delegated Regulation ([EU](#) 2021/1456) supplementing EMIR specifying the conditions that commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent ("FRANDT") came into force. It will apply from 9 March 2022. Under Article 2, commercial terms for clearing services provided by clearing service providers will be considered to be FRANDT where they meet the requirements in the Annex to the Delegated Regulation.

On 28 September 2021, ESMA published its [work programme for 2022](#). Among other things, ESMA will contribute to the development of the single rulebook in the area of OTC derivatives by reviewing and amending EMIR technical standards.

On 30 September 2021, ESMA published updated [Q&As on EMIR](#) implementation (dated 21 September). The updates are in the trade repositories section. ESMA has added a new Q&A on the timing of valuation updates under Article 9 of EMIR and has amended the answer to question 40 on legal entity identifier ("LEI") changes due to mergers and acquisitions.

1.18 EU Securitisation Regulation

On 17 September 2021, the European Commission's [July 2021 consultation](#) on the functioning of the EU securitisation framework (Regulation [EU/2017/2402](#)) closed. The consultation is part of the Commission's comprehensive review of the EU securitisation framework under its Capital Markets Union action plan 2020. The European Commission is to present a report to the European Parliament and the Council on the functioning of the Securitisation Regulation, accompanied, if appropriate, by a legislative proposal by 1 January 2022.

On 19 September 2021, Commission Delegated Regulation [EU/2021/1415](#) supplementing the Securitisation Regulation with RTS on the co-operation, exchange of information and notification obligations between competent authorities and ESMA, EIOPA and the EBA came into force. It ensures that co-operation and exchange of information under Article 36(1) of the Securitisation Regulation takes place in a timely manner and establishes common procedures to be used for requesting co-operation or information and responding to these requests.

On 28 September 2021, ESMA published its [work programme for 2022](#) which includes continuing to strengthen its role as the supervisor of securitisation repositories.

1.19 IOSCO Examination of ETF Behaviour, Consultation on ESG Ratings and Data Providers and AI Usage Report

On 12 August 2021, the Board of the International Organization of Securities Commissions ("IOSCO") published a [thematic note](#) that examines the behavior of exchange traded funds ("ETFs") during the COVID-19 induced market stresses, drawing on market data and observations gathered over the course of the first half of 2020. It reviews the operation of the primary and secondary markets of ETFs and explores the impact of the stress on the ETF structure and functioning and the causes of the pricing differences between some fixed income ETFs' secondary market prices and their net asset values ("NAVs"). It also outlines some challenging circumstances for some derivatives-based ETFs.

On 6 September 2021, IOSCO's July 2021 consultation on a set of proposed recommendations regarding ESG ratings and data providers closed. The [consultation](#) is aimed at understanding the implications of the activities of ESG ratings and data providers and in establishing frameworks to mitigate risks stemming from these activities. This follows an earlier [consultation](#) in June 2021 on "Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management".

On 7 September 2021, IOSCO published [guidance](#) to help its members regulate and supervise the use of Artificial Intelligence ("AI") and Machine Learning ("ML") by market intermediaries and asset managers, following its consultation report published in June 2021. The use of AI and ML may benefit market intermediaries, asset managers and investors by increasing the efficiency of existing processes, reducing the cost of investment services and freeing up resources for other activities. However, it may also create or amplify risks, potentially undermining financial market efficiency and harming consumers and other market participants.

1.20 CSDR Update

On 1 July 2021, the European Commission published its [report](#) following a review of the EU rules on central securities depositories ("CSDs") under the Central Securities Depositories Regulation [EU/909/2014](#) ("CSDR"). It sets out where further action may be required to achieve the CSDR's objectives. The Commission is considering amending CSDR, subject to an impact assessment. Such a proposal would aim to ensure an effective post-trading infrastructure, enhance competition among CSDs and strengthen cross-border investment.

On 16 July 2021, ESMA published a report to the European Commission with suggestions for enhancing the CSD authorisation process to provide banking-type ancillary services under CSDR.

On 6 August 2021, ESMA published a [report](#) on the use of FinTech by CSDs. It concluded that since the CSDR is intended to be technology-neutral, it should accommodate the use of new technologies. However, the report suggests some areas where further clarification could help CSDs in the deployment of distributed ledger technology ("DLT"). ESMA reports that the European Commission is expected to publish a legislative proposal on the pilot regime for market infrastructures based on DLT by the end of 2021.

On 24 September 2021, ESMA [wrote](#) to the European Commission on the implementation of the CSDR, urging it to consider a delay of the mandatory buy-in regime. ESMA is in favour of delaying the entry into force of the buy-in requirements – scheduled on 1 February 2022 – while applying the other settlement discipline requirements, such as settlement fails reporting and cash penalties regime, as planned.

On 24 September 2021, ESMA published its [final report](#) guidelines on settlement fails reporting under Article 7 of CSDR. The guidelines will be translated into the EU official languages and published on

the ESMA website. Within two months from that publication, each NCA will have to confirm whether it complies or intends to comply with those guidelines.

On 28 September 2021, ESMA published its [work programme for 2022](#) which includes contributing to the CSDR review.

1.21 SFTR Update

On 13 July 2021, ESMA published its final report on technical advice to the European Commission on the simplification and harmonisation of fees to TRs under EMIR and the Securities Financing Transactions Regulation EU/2015/2365 ("SFTR")

On 30 September 2021, ESMA published updated [Q&As](#) (dated 21 September 2021) on complying with SFTR reporting requirements. A new Q&A has been added on LEI changes due to mergers and acquisitions.

1.22 Irish Investment Funds Statistics: Q2 2021

The main points to note in the Central Bank's [Q2 2021](#) statistics issued in September 2021 are as follows:

- The NAVs of Irish-resident funds reached an all-time high of €3,683B at end-June 2021. All fund types, except MMFs, increased their NAV during the quarter
- Total NAV increased 5% in Q2 2021. This increase was split between 48% net investor inflows and 52% valuation gains. Total assets under management were €4,149B in Q2 2021
- Equity funds showed the largest increase in the quarter, up 8.2% to €1,278B. MMFs decreased slightly by 0.2%, while all other fund types increased between 3% and 7%

In equity, hedge and mixed funds, the majority of the NAV increase was driven by revaluations, while in bond and real estate it was investor inflows. Other funds were split equally between investor inflows and revaluations.

1.23 Luxembourg Undertakings for Collective Investment Statistics

The main points to note in the CSSF's [August 2021](#) update for regulated Luxembourg funds are as follows:

- Total assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") increased €106.066B from €5,541.371B as at 31 July 2021 to €5,647.437B as at 31 August 2021
- The number of Luxembourg Investment Funds active in the market and regulated by the CSSF totals 3,539
- Of the 3,539 active Luxembourg Investment Funds, 2,328 entities have adopted an umbrella structure and together have a total of 13,247 sub-funds. The remaining 1,211 Luxembourg Investment Funds are structured as stand-alone funds
- As at August 2021, there were a total of 14,458 fund units
- During August 2021, there were more subscriptions than redemptions equity funds and more redemptions than subscriptions in fixed-income funds

In addition the number of Luxembourg RAIFs reached 1,530 as of 1 October 2021.

2 Tax

Ireland

2.1 Changes to Taxation of ETFs

In September 2021, Irish Revenue published guidance indicating a change in the tax treatment of investors in certain ETFs.

Investments in Irish and EU domiciled ETFs are taxable at 41%, which is the usual rate for investments in Irish regulated funds. Prior guidance confirmed that investments in ETFs domiciled in the US, the EEA or in an OECD Member State (other than the US) with which Ireland has a double taxation treaty, were taxed differently. Capital gains from such funds would be taxable at 33% and dividends would be taxed to income (at rates of up to 55%). As most Irish investors could be expected to dispose of the ETF and generate a gain, there was a distinct tax advantage to using such ETFs, rather than an Irish or EU based ETFs.

That confirmation does not apply to such investments with effect from 1 January 2022. Instead, such funds will now generally be taxed at 41%. Investors may seek to exit these positions prior to 1 January 2022.

In relation to ETCs, the position appears to remain unchanged. In their guidance on entities domiciled in other territories (other than EU, EEA or OECD Member States), Revenue restate that ETCs structured as debt instruments can be subject to capital gains tax on gains. It is unclear as whether this applies to all ETCs, or just entities domiciled in specific jurisdictions.

2.2 Anti-Reverse Hybrids

The Department of Finance recently conducted a public consultation on the Anti-Reverse Hybrid Rule, which closed in August 2021. These are rules which are required pursuant to the EU Anti-Tax Avoidance Directives. A reverse hybrid mismatch arises where an entity is treated as tax transparent in the territory in which it is established, but is treated as a separate taxable person by some or all of its investors, such that some or all of its income goes untaxed. The most commonly cited example is an Irish partnership which is treated as tax transparent for Irish tax purposes, but treated as a corporate by its investors. For Irish purposes, the income would be allocated to the investors. However the investors would not pay any tax, until a distribution is made to them.

From an Irish perspective, attention has focused on the exclusions for collective investment vehicles. Article 9a(2) of the Anti-Tax Avoidance Directive excludes these vehicles provided they are (a) subject to investor protection; (b) widely held; and (c) hold a diversified portfolio of securities. The consultation documents indicate that Ireland will try to provide some clarity on the terms. The Minister confirmed that Finance Bill 2021 will complete the transposition of the ATAD 2 anti-hybrid rules, through the introduction of new anti-reverse-hybrid rules. Finance Bill 2021 will be published in late October 2021 and come into effect on 1 January 2022. For more details see our client update, [Irish Budget 2022: Implications for International and Irish Business](#)

2.3 OECD/G20 Base Erosion and Profit Shifting Project – 15% Minimum Tax

In October 2021, the Irish Minister for Finance announced that Ireland would sign the OCED/G20 Inclusive Framework (the "IF") on Based Erosion and Profit Shifting ("BEPS"). The IF has a number of elements, one of which is an income inclusion rules which imposes top-up tax on a parent entity in respect of the low taxed income of a subsidiary entity. The minimum rate of tax used for the purposes of this and other rules, will be 15%. In an Irish context, the statutory tax rate for trading income is 12.5%. In signing up to the IF, Ireland has agreed to increase this corporate tax rate to 15%.

These rules apply to multinational entities that have a consolidated group turnover of over €750M. This is the same threshold for country-by-country reporting. Significantly, the IF provides that groups that have a pension fund, or investment fund as the ultimate parent entity of the group, or any holding vehicles used by such entities or funds, are not subject to the rules. In an Irish context, this exemption is particularly significant in the context of large private equity and credit funds.

The implementation is intended to occur during 2022, to be effective in 2023 and 2024. The application of the exemptions is something that will require careful consideration and how investment funds are defined will be critical. In an Irish context the measures are likely to be enacted through an EU directive which will be implemented into Irish law. Previous BEPS and EU measures already provide for exemptions for investment funds and have specific definitions focusing on their diversity of ownership, regulatory status and diversity of assets. It is possible these will be employed in the implementation of the rules set out in the IF.

The Maples Group is actively involved in a number of Irish industry groups in relation to this and other BEPS related changes such as the Anti-Tax Avoidance Directive measures.

Luxembourg

2.4 New Guidance on Tax Fraud Procedures and Fines

On 28 July 2021, the Luxembourg Tax Administration ("LTA") published a [Grand Ducal circular](#) detailing guidance on procedures and penalties with respect to both civil and criminal tax offenses. It lists various classes of offenses including 'administrative' violations such as incomplete filing of tax returns, tax fraud, and involuntary tax fraud, as well as 'criminal' offences such as aggravated tax fraud and intentional tax fraud. The various administrative and criminal punishments range from fines of 5% to 25% of the avoided taxes in the case of incomplete tax return filings and up to five years in prison and fines of up to €25,000 or 10% of the avoided tax in the case of intentional tax fraud. It also clarifies the procedure and cooperation for ongoing investigations between the LTA and the state prosecutor's office.

2.5 Updated Third Tax Circular on the Interest Limitation Rules

On 28 July 2021, the LTA published the third [Grand Ducal circular](#) on interest limitation rules which consolidates the prior two versions of circulars addressing the interest limitation rules ("ILRs"). Notably, it contains a new section 6.2 which elaborates on the requirements for applying the equity escape clause to Luxembourg entities within a fiscally consolidated group.

By way of background, Luxembourg transcribed its ILRs as part of the requirements under the EU Anti-Tax Avoidance Directive. Generally, the ILRs limit the tax deduction of 'excess borrowing costs' by the Luxembourg entity to 30% of EBITDA or €3,000,000, whichever is greater. Excess borrowing costs generally include interest expense and economically similar items of expense.

For more information please see our client update, [Luxembourg Tax Authorities issue guidance on EU interest limitation rules](#).

The equity escape clause generally allows the deduction of exceeding borrowing costs (even if in excess of the 30% of EBITDA limitation) provided the equity over total assets ratio of the Luxembourg entity is equal to or higher than the comparable group ratio and that the Luxembourg entity must be a member of a consolidated financial accounting group. Most of the details of the equity escape clause were already provided for in the earlier ILR circular dated 2 June 2018.

2.6 New Luxembourg Tax Circular on Loss Carry-forwards

On 31 August 2021, the LTA published a [Grand Ducal circular](#) detailing guidance on tax loss carry-forward rules and replaces the earlier 1991 circular on loss carry-forwards. Since 2016, tax loss carry-forwards are generally limited to 17 years, while losses incurred prior to 31 December 2016 generally have no limitation. The circular clarifies such matters as the ordering of losses. For

example, losses subject to an indefinite carry-forward, i.e. prior to 31 December 2016, are to be offset before losses limited to the 17 year carry-forward rule. It also details the mechanics for calculating tax losses and elaborates on the other requirements necessary to utilise the loss carry-forwards in future years.



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