



MAPLES  
GROUP

# Funds & Investment Management Update – Ireland and Luxembourg

**Quarterly Update | April – June 2022**

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# 1 Legal & Regulatory

## 1.1 UCITS and AIFMD Update

### Ireland

On 16 May 2022, the Central Bank of Ireland ("Central Bank") published a [Notice of Intention](#) on its approval process for Irish UCITS side-pocketing arrangements in relation to Russian, Belarusian and Ukrainian assets that have been impacted by Russia's invasion of Ukraine and / or by sanctions imposed as a result of the invasion.

For more information, please see our update, [Central Bank of Ireland Approval Process for UCITS Side-Pocketing Arrangements](#).

On 1 July 2022, the Central Bank published new guidance regarding its pre-submission requirements for certain types of Qualifying Investor AIF ("QIAIF") products, and confirming the 24-hour approval process for all other QIAIFs, including loan-originating QIAIFs.

For more information, please see our update, [Welcome Enhancements to the QIAIF Pre-Submission Process](#).

### EU

On 20 May 2022, the European Authorities and Securities Markets Authority ("ESMA") published an updated version of its [Q&As](#) on the application of the UCITS Directive 2009/65/EC. The Q&A on the performance reference period for the benchmark model has been updated and there is a new Q&A on the performance reference period for the hurdle rate model.

On 20 May 2022, ESMA published an updated version of its [Q&As](#) on the application of AIFMD. ESMA has updated Q&As, and added a new Q&A, relating to ESMA's guidelines on performance fees in UCITS and certain types of AIFs.

### Proposed Amending Directive

On 17 June 2022, the Council of the EU [announced](#) that it had agreed its general approach on the proposed directive amending AIFMD and the UCITS Directive relating to delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services, and loan origination by alternative investment funds ("AIFs"). The general approach:

- Emphasises the importance of consistent harmonisation in liquidity risk management. In particular, the need to improve the availability of liquidity management tools, with new requirements on fund managers to provide for the activation of these instruments. This is to ensure fund managers are well-equipped to deal with significant outflows in the event of financial turbulence.
- Supports the European Commission's proposed EU framework for loan-originating funds supplemented with requirements to alleviate risks for financial stability and ensure an appropriate level of investor protection.

- Further clarifies the rules on outsourcing and the delegation of certain functions by fund managers to third parties. It also increases the supervisory co-operation in this area and introduces new reporting requirements on delegation arrangements.
- Considers other key issues on the framework for the provision of cross-border services by depositaries, new reporting obligations for UCITS for risk monitoring and new transparency rules to enhance investor protection.

On 21 June 2022, the Council published a [note](#) containing the final Presidency compromise text of the proposed directive.

The Council will now enter into trilogue negotiations with the European Parliament to agree on the final text of the proposed directive.

## 1.2 Cross-Border Distribution of Investment Funds

The EU's 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](#) give effect to the CBD Directive in Ireland. The [law of 21 July 2021](#) gives effect to the CBD Directive in Luxembourg.

On 17 May 2022, ESMA issued a [consultation](#) on the information and templates to be provided, and used by firms, when they inform regulators of their cross-border marketing and management activities under the UCITS Directive and AIFMD.

The purpose of the draft implementing technical standards ("ITS") and regulatory technical standards ("RTS") is to facilitate the process for notifying cross-border marketing and management activities in relation to UCITS and AIFs. This will be achieved by defining harmonised information to be notified to competent authorities, and developing common templates to be used by management companies, UCITS and AIFMs.

The closing date for responses is 9 September 2022. ESMA expects to publish a final report by the beginning of 2023. Once the RTS and ITS drafts are finalised, ESMA will submit them to the European Commission.

For more information, please see our update, [ESMA Consultation on Notifications for Cross-Border Marketing and Management of Funds](#).

### Luxembourg

On 12 May 2022, the Commission de Surveillance du Secteur Financier ("CSSF") published [circular 22/810](#) informing Luxembourg undertakings for collective investment ("UCI") and investment fund managers ("IFMs") that a number of pre-marketing and cross-border marketing procedures will now only be available on the [CSSF's electronic portal](#) ("eDesk"). Additional procedures will be made available on the eDesk over time and the CSSF will notify UCIs and IFMs when these become available.

On 20 June 2022, the CSSF issued a press release noting the various marketing notification and de-notification procedures that will be exclusively available on the eDesk from 1 July 2022. The list of procedures available will be updated on the eDesk home page and should be regularly checked. In

addition, a user guide with detailed information on the procedures and the required documentation to be submitted via the eDesk was also published. Russian Invasion of Ukraine and Investment Funds From 13 April 2022, EU sanctions prohibit EU investment funds (that invest in Euro-denominated transferable securities) from accepting new investments from Russian or Belarusian persons (unless they are EU nationals or have EU residency).

For more information, please see our update, [New EU Ban on Selling Investment Funds to Russian or Belarusian Persons](#).

On 16 May 2022, ESMA published a [statement](#) for fund managers on their obligations to investors in the light of the conflict in Ukraine. It provides overarching messages to fund managers, including high-level guidance on:

- The appropriate action in case of exposures to Russian, Belarusian and Ukrainian assets, given valuation and liquidity uncertainties.
- The process fund managers should follow when evaluating these assets.
- Whether fund managers may consider using liquidity management tools, such as side pockets or similar arrangements, to segregate these assets.

ESMA expects fund managers of investment funds with exposures to assets facing liquidity issues to assess whether a fair value of these assets can still be determined and adapt the valuation without undue delay.

On 20 June 2022, the Central Bank issued a letter to business and professional representative bodies providing information and requesting that the information be shared, in order to assist members in meeting their obligations under the EU Financial Sanctions. In particular, attention is drawn to the Central Bank's dedicated Russian / Ukraine Regulations webpage and a related FAQs section.

For more information, see [CBI Issues Further Letter on EU Financial Sanctions Regarding Russian Invasion of Ukraine](#).

### 1.3 Sustainable Finance Update

#### Ireland

On 23 June 2022, the Central Bank updated its guidance on how EU taxonomy-related pre-contractual disclosures are to be addressed following publication of the recent Commission [Q&A response](#) to ESMA. The guidance sets out three options for funds in scope of the disclosures as appropriate to their specific situation. These relate to funds that are not subject to Article 8 or 9 of [Regulation \(EU\) 2019/2088](#) ("SFDR") where the manager decides to take into account the EU Taxonomy and where the manager decides not to take into account the EU Taxonomy. The Central Bank is not requiring disclosures for existing funds to be immediately updated but these updates must be carried out no later than 1 January 2023.

#### EU

A range of new EU legislative measures on sustainable finance become effective on 1 August 2022. The various delegated directives and delegated regulations are designed to complement the obligations in SFDR and the Taxonomy Regulation and form part of the European Commission's package of measures to help improve the flow of money towards sustainable activities across the EU.

For more information, please see our update, [New Mandatory Consideration of ESG Factors for EU Investment Fund Managers](#).

On 6 April 2022, the European Commission adopted [final RTS](#) to be used by financial market participants when disclosing sustainability-related information SFDR. They specify the exact content, methodology and presentation of the information to be disclosed, thereby improving its quality and comparability. Under these rules, financial market participants will provide detailed information about how they tackle any possible negative impacts that their investments may have on the environment and society in general. The Council of the EU and the European Parliament will now scrutinise the Delegated Regulation. It is scheduled to apply from 1 January 2023.

On 29 April 2022, the European Financial Reporting Advisory Group published a [consultation](#) on draft EU sustainability reporting standards ("ESRS") that it is developing. The consultation closes on 8 August 2022. The ESRS will support the reporting requirements of the proposed Corporate Sustainability Reporting Directive ("CSRD") (the Council and the European Parliament on 21 June 2022 reached a provisional [agreement](#) on it). The consultation is on the first set of ESRS, which cover environmental, social and governance ("ESG") matters. The proposed CSRD will align with reporting obligations under SFDR and the EU Taxonomy and is due to apply from 1 January 2024.

On 6 May 2022, ESMA published a [letter](#) from the European Commission to the European Supervisory Authorities ("ESAs") (the EBA, EIOPA and ESMA) requesting that they propose amendments to the adopted Commission Delegated Regulation supplementing SFDR with regard to RTS on content and presentation of information (SFDR RTS).

On 25 May 2022, ESMA published a [Commission Decision](#) and [Annex](#) with answers about SFDR and the Taxonomy Regulation which the European Commission adopted on 13 May 2022. The answers focus on:

- Principal adverse impact ("PAI") disclosures and whether a financial market participant is able to not consider PAI at entity level but still consider PAI under Article 7 of SFDR for some of the financial products it manages.
- Financial advisers and recommendations of financial products.
- The transparency of the integration of sustainability risks and rules for financial products that are no longer made available.
- Good governance practices, including financial products investing solely in government bonds.
- The scope of Articles 5 and 6 of the Taxonomy Regulation.

The answers respond to questions the ESAs forwarded to the Commission in December 2021, which ESMA published on 13 May 2022.

On 31 May 2022, ESMA published a [supervisory briefing](#) with guidance for NCAs on how they should approach supervision of sustainability-related disclosures and the integration of sustainability risks. The guidance is to be applied on a proportionate basis and covers the review of the mandated pre-contractual, periodic and website disclosures as well as consistency of sustainability-related disclosures across the fund documentation and marketing material. It also sets out expectations on the use of ESG-related names for funds, as well as clarity around investment policies and objectives.

For more information, please see our update, [New ESMA Guidance on Sustainability Risks and Disclosures](#).

On 2 June 2022, the ESAs published a [statement](#) to clarify their draft RTS issued under SFDR. The statement contains:

- Clarifications about the disclosure of PAIs of investment decisions on sustainability factors.
- Guidance about pre-contractual financial product disclosures.
- Guidance about periodic financial product disclosures.
- Guidance about taxonomy-related financial product disclosures.
- Guidance about 'do not significantly harm' disclosures.
- Guidance about disclosures for financial products with investment options.

The clarifications concern the draft RTS relating to the content, methodologies and presentation of disclosures under Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of the SFDR from February 2021 and the draft RTS on the content and presentation of disclosures under Article 8(4), 9(6) and 11(5) from October 2021.

The ESAs also note that the European Commission has adopted a Delegated Regulation with the provisions from both the draft RTS and that their statement does not refer to the Commission's text. They explain that, in the absence of the Delegated Regulation, they published a supervisory statement in February 2021 to mitigate the risk of divergent application and updated this in March 2022.

They also refer to the Commission's November 2021 announcement that the RTS' application date would be delayed to 1 January 2023 so that financial market participants have time to adjust their practices to apply the forthcoming Delegated Regulation, including the product-specific disclosures stemming from the Taxonomy Regulation ([EU](#)) 2020/852.

On 14 June 2022, the European Parliament [objected](#) to the Complementary Climate Delegated Act, which sets out the conditions under which nuclear and natural gas energy activities can be included in the list of economic activities covered by the Taxonomy Regulation. It is concerned the technical screening criteria in the Complementary Climate Delegated Act do not respect the criteria for environmentally sustainable economic activities under Article 3 of the Taxonomy Regulation. The resolution also requests that any new or amended delegated acts should be subject to a public consultation and impact assessments. The resolution is scheduled for a vote during the Parliament's plenary session on 4 to 7 July 2022.

On 30 June 2022, the European Commission published a [request for input](#) to the ESAs relating to greenwashing risks and the supervision of sustainable finance policies. Based on the ESAs' input, the Commission will assess and monitor greenwashing risks in the financial market while the implementation of key policies is ongoing. It will also consider whether further steps are necessary for effective supervision and enforcement in the context of greenwashing and risks.

## 1.4 CSSF Circular on Outsourcing

On 22 April 2022, the CSSF published [circular 22/806](#) and a [FAQ](#) on outsourcing arrangements. The circular, which came into force on 30 June 2022, integrates the EBA's guidelines on outsourcing arrangements ([EBA/GL/2019/02](#)) into its administrative practice and regulatory approach. While the guidelines apply to credit institutions, investment firms and payment and electronic money institutions only, the CSSF has extended the scope of the circular to include IFMs and UCITS in the context of ICT outsourcing as well as professionals of the financial sector. The FAQ supplements the circular and clarifies the CSSF's outsourcing arrangements expectations.

On 1 July 2022, the CSSF published a [notification template](#) to be used when a critical or important business process (BPO) is outsourced under points 59 and 60 of circular 22/806 from this date. The template should not be used to notify the CSSF of: (i) a critical or important outsourcing of operational tasks of UCI administration; or (ii) a critical or important ICT outsourcing as dedicated templates for such outsourcing arrangements will be made available in due course. In the meantime, the templates (for [UCI administration](#) and [ICT activities](#)) on the CSSF's website should be used.

## 1.5 CSSF Circular on UCI Administrators

On 16 May 2022, the CSSF issued [Circular 22/811](#) replacing Chapter D of [Circular IML 91/75](#) and clarifying the activity of 'UCI administration' by specifying the three main functions covered by this activity, i.e. the registrar function; the NAV calculation and accounting function; and the client communication function. It entered into force with immediate effect but provides a grandfathering period (until 30 June 2023) for those entities acting as UCI administrators on 16 May 2022, i.e. the date on which the circular came into effect.

On 1 June 2022, the CSSF published an [FAQ](#) on the circular clarifying the type of data backup that is expected from UCI administrators under the circular. Further FAQ updates are expected.

## 1.6 CSSF FAQ on SICARs

On 10 June 2022, the CSSF published an updated [FAQ](#) on investment companies in risk capital (*société d'investissement en capital à risque* - SICAR). This clarifies additional prudential reporting requirements following publication on 22 December 2021 of CSSF [circular 21/790](#) relating to the practical rules on the self-assessment questionnaire to be submitted annually by Luxembourg UCIs to the CSSF.

## 1.7 CSSF Assessment of Investment Funds' Liquidity Management Tools

On 14 June 2022, the CSSF [published](#) a working paper *An Assessment of Investment Funds' Liquidity Management Tools*. It presents an empirical assessment of the effectiveness of liquidity management tools used by Luxembourg domiciled UCITS during and prior to the COVID-19 crisis. The results generally confirm the relevance and effectiveness of liquidity management tools in contributing to the overall liquidity risk management of open-ended funds. However, it also calls for further guidance for fund managers in this area, including on liquidity assessments, swing pricing and the use of suspensions.

## 1.8 AML Developments

### Luxembourg

On 31 May 2022, the CSSF [published](#) its updated Money Laundering / Terrorist Financing ("ML / TF") Sub-sector Risk Assessment for the Luxembourg Collective Investment Sector.

The update builds on the CSSF's initial ML / TF Sub-Sector Risk Assessment for the Collective Investment sector published in January 2020 focusing on the evolution in ML / TF risks, including in the areas of: cybercrime; organised crime; virtual assets; and the impact of geopolitical crises.

It is a useful resource and should be used by investment funds and fund managers in compiling their own ML / TF risk assessments. The update also:



- contains the CSSF's assessment that the inherent ML / TF risk for the collective investment sector remains high;
- notes the CSSF's view that there has been an improvement in the quality of Anti-Money Laundering / Counter the Financing of Terrorism ("AML / CFT") mitigating measures taken by fund sector entities regulated by the CSSF over the past two years; and
- lists a number of the CSSF's recommendations to the fund industry to improve its AML / CFT compliance.

## EU and International

On 1 June 2022, the ESAs published a [joint report](#), which provides a comprehensive analysis on the completeness, adequacy and uniformity of the applicable laws and practices on the withdrawal of license for serious breaches of AML / CFT rules. It advocates for the introduction in all relevant EU sectoral laws of a specific legal ground to revoke licenses for serious breaches of AML / CFT rules. It also calls for the inclusion of assessments by competent authorities of the adequacy of the arrangements and processes to ensure AML / CFT compliance as one condition for granting authorisation or registration.

On 14 June 2022, the EBA published a [final report](#) with guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML / CFT compliance officers under Article 8 and Chapter VI of the Fourth Money Laundering Directive (EU) 2015/849.

The guidelines apply to all existing management body structures and are described as complementing relevant guidelines issued by the ESAs on wider governance arrangements and suitability checks and need to be translated and published on the EBA website. The deadline for competent authorities to report whether they intend to comply with the guidelines is six months after the publication of the translations. The guidelines will apply from 1 December 2022.

On 29 June 2022, the European Council agreed its [partial position](#) on the proposal to create a dedicated Anti-money Laundering Authority ("AMLA"). The AMLA will contribute to the harmonisation and coordination of supervisory practices in the financial and non-financial sectors, the direct supervision of high-risk and cross-border financial entities and the coordination of financial intelligence units. In its position, the Council adds powers to the AMLA to directly supervise certain types of credit and financial institutions, including cryptoasset service providers, if they are considered risky. It also entrusts the AMLA to supervise up to 40 groups and entities and to ensure a complete coverage of the internal market under its supervision.

On 29 June 2022, the European Parliament and Council negotiators reached a [provisional deal](#) on a new bill aiming to ensure that crypto transfers can always be traced and suspicious transactions blocked. The legislation is part of the EU AML package and will be aligned with the Markets in Cryptoassets rules (see further below).

On 30 June 2022, the Financial Action Task Force ("FATF") published a [targeted update](#) on the implementation of the FATF Standards on virtual assets ("VAs" also known as cryptoassets) and virtual asset service providers ("VASPs"). To address the findings of the report, FATF calls on all countries to rapidly implement its Standards on VAs and VASPs.

### 1.9 Proposed Regulation on Markets in Cryptoassets

On 30 June 2022, the Council of the EU [announced](#) that it has reached political agreement with the European Parliament on the proposed Regulation on markets in cryptoassets ("MiCA"). It will

introduce provisions on supervision, consumer protection and environmental safeguards for cryptoassets, including cryptocurrencies and includes the following provisions:

- Cryptoasset service providers ("CASPs") will need an authorisation to operate within the EU. NCAs will be required to issue authorisations within a three month time period.
- Non-fungible tokens will be excluded from the scope of MiCA unless if they fall under existing cryptoasset categories.
- Significant CASPs will be required to disclose their energy consumption.

This agreement is subject to the approval of the Council and Parliament before going through the formal adoption procedure. For more information, please see our update, [MiCA and Central Bank Feedback on VASP Registrations](#).

## 1.10 ESMA Final Report on Common Supervisory Action on Costs and Fees of Investment Funds

On 31 May 2022, ESMA published a [final report](#) on the costs and fees for investment funds that was carried out with NCAs during 2021. It sets out ESMA's conclusions and its findings include:

- There is room for improvement on the application of ESMA's June 2020 supervisory briefing on the supervision of costs in UCITS and AIFs, particularly for smaller management companies.
- Questions arise on compliance with delegation rules where portfolio managers exercise significant influence or decide the level of costs.
- Divergent market practices on what is a due or undue cost, and conflicts of interest at UCITS managers.
- A lack of policies and procedures on efficient portfolio management and lack of clear disclosures as required under ESMA's guidelines on exchange traded funds ("ETFs") and other UCITS issues.
- Widespread use of fixed fee splits arrangements for securities lending continues, with unfavourable results for retail investors.

ESMA concludes that to promote retail participation in the fund market, continued supervisory attention is required.

## 1.11 Revised Central Bank Investment Firms Regulations

On 23 June 2022, the Central Bank [published](#) final revised [Central Bank Investment Firms Regulations](#) amending to the Client Asset Requirements ("CAR"), which are set out in Part 6 and a guidance note. The regulations are expected to be published in the Irish Statute Book shortly. The Central Bank has also granted a transitional period for compliance. The revised CAR will be applicable to investment firms from 1 July 2023 and credit institutions from 1 January 2024. The revisions include broadening the scope and application of CAR to credit institutions, targeted enhancements to include investment firms and credit institutions holding client assets in the context of conducting wholesale activities as well as other amendments applicable to all investment firms currently in scope of CAR.

## 1.12 IFR and IFD Update

The Investment Firms Directive ([EU](#) 2019/2034 ("IFD")) and the Investment Firms Regulation ([EU](#) 2019/2033 ("IFR")) introduced a new prudential regime for MiFID investment firms across the EU that

were subject to the Capital Requirements Regulation ([EU 575/2013](#) ("CRR")) and the Capital Requirements Directive ([EU 2013/36](#) ("CRD")).

## Ireland

On 27 June 2022, the Minister for Finance [signed](#) three regulations to complete the transposition of the IFD and IFR into Irish law. Article 62(6) of IFD requires Member States to oblige large systemic investment firms or Class 1 Firms to apply for re-authorisation as credit institutions. These regulations, which should be read along with the European Union (Investment Firms) Regulations 2021 and the European Union (Investment Firms) (No. 2) Regulations 2021 transpose Article 62(6) into national law by inserting a new authorisation process (Part IIA) into the Central Bank Act 1971 enabling Class 1 Firms to apply for re-authorisation as credit institutions.

## EU

On 25 April 2022, the European Commission published a [Delegated Regulation](#) that it adopted on 11 April 2022 containing RTS on fixed overheads requirements under the IFR which specify:

- Elements to be deducted by investment firms from their total expenses used for the calculation of the fixed overheads requirement.
- Additional deductions from total expenses by commodity and emission allowance dealers.
- The conditions for determining whether a material change has occurred in the activity of an investment firm.

The Council of the EU and the European Parliament will now scrutinise it.

On 30 June 2022, the EBA published two reports containing the final versions of guidelines on benchmarking exercises on remuneration practices and the gender pay gap under CRD ([final report EBA/GL/2022/06](#)) and the IFD ([final report EBA/GL/2022/07](#)). Both apply from 31 December 2022. The first data collection under the new guidelines will be conducted in 2023 for the financial year 2022 and the first data on the gender pay gap will be collected in 2024 for the financial year 2023.

On 30 June 2022, the EBA also published a [final report and guidelines](#) on the data collection exercises regarding high earners under Article 75(3) of CRD and Article 34(4) of the IFD. The guidelines apply from 31 December 2022 for the data to be collected in 2023 for the financial year 2022.

### 1.13 ELTIF Regulation Update

On 20 June 2022, the European Parliament's Economic and Monetary Affairs Committee ("ECON") [announced](#) that it has adopted its report on the proposed regulation amending the Regulation on European long-term investment funds (EU) 2015/760 ("ELTIF Regulation"). The amending regulation contains targeted amendments to the ELTIF Regulation intended to improve the attractiveness and effectiveness of the ELTIF framework for investment managers and investors and consequently to increase the uptake of ELTIFs across the EU. The announcement highlights the following:

- **Protecting investors** - Among other things, ECON proposes that in addition to all ELTIFs marketed in the EU having to be authorised, ESMA will maintain a central public register of authorised ELTIFs with updated links to their annual reports and, where available, the key information document. This will enable investors to compare existing ELTIFs.

- **Greener investments** - ECON proposes complementing the existing rules so that green bonds and financial products that aim to make sustainable investments are explicitly included in the list of investment assets eligible for ELTIFs.

ECON will now open negotiations with the Council of the EU, which adopted its position in May 2022. On 1 July 2022, ECON published its [report](#) (dated 28 June 2022).

### 1.14 Money Market Funds Update

On 4 May 2022, ESMA published [translations](#) in the official EU languages of its updated guidelines on stress test scenarios under the MMF Regulation ([EU](#) 2017/1131). The guidelines ensure common, uniform and consistent application of Article 28 of the MMF Regulation. In particular, and as specified in Article 28(7), they establish common reference parameters of the stress test scenarios to be included in the stress tests, taking into account the factors specified in Article 28(1).

The guidelines apply to NCAs, MMFs and managers of MMFs from 4 July 2022. This is in respect of the parts of the guidelines in red text (that is, the updates to the guidelines). The other parts of the guidelines already apply from the dates specified in Articles 44 and 47 of the MMF Regulation. The guidelines need to be updated at least annually to take into account the latest market developments. ESMA has indicated that, in 2022, it intends to publish a consultation on the revision of section 4.8 of the guidelines.

A European Commission April 2022 [consultation](#) which sought comments on the impact of existing rules closed on 13 May 2022. The MMF Regulation requires the Commission to submit a report to the co-legislators assessing the adequacy of the Regulation from a prudential and economic point of view. The consultation aims to complement the information collected by other initiatives and work on the functioning of the existing rules.

### 1.15 MiFID II / MiFIR Update

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

On 1 April 2022, ESMA announced that it has postponed the annual review of Commission Delegated Regulation (EU) 2017/583 (MiFIR RTS 2) on non-equity transparency and published an updated version of its Q&As on data reporting under MiFIR.

On 8 April 2022, ESMA published the [results](#) of the annual transparency calculations for equity and equity-like instruments that apply from 14 April 2022 until 31 March 2023.

On 12 April 2022, ESMA published the [official translations](#) of its guidelines on aspects of the appropriateness and execution-only requirements under MiFID II (which will apply from 12 October 2022). The guidelines cover the requirements in Article 25(3) and (4) of MiFID II and Articles 55 to 57 of Commission Delegated Regulation (EU) 2017/565 and enhance clarity and foster convergence in the application of the appropriateness and execution-only requirements.

On 20 April 2022, the European Commission adopted a [Delegated Regulation](#) and Annex supplementing MiFID II with regard to RTS for the application of position limits to commodity derivatives and procedures for applying for exemption from position limits. It will repeal Commission Delegated Regulation (EU) 2017/591 ("RTS 21") and: contains the method for calculating the size of the net position of a person; sets out procedures for the risk-reducing exemption for financial entities

that are part of a predominantly commercial group and for applying the liquidity provision exemption; and builds on the RTS 21 list of non-financial entities. On 30 June 2022, European Parliament published a [motion for a resolution](#) to object to it and instructs its President to forward the resolution to the Commission and to notify it that the Delegated Regulation cannot enter into force.

On 29 April 2022, ESMA published a [final report](#) containing technical advice to the European Commission on certain aspects relating to retail investor protection under MiFID II which includes proposals to make it easier for investors to get the key information they need to take well informed investment decisions. The report has been submitted to the Commission and will feed into its development of a retail investment strategy.

On 3 May 2022, Commission Delegated Regulation ([EU](#)) 2022/629 amending Delegated Regulation (EU) 2017/583, which contains RTS on the adjustment of liquidity thresholds and trade percentiles used to determine the size specific to the instrument applicable to certain non-equity instruments came into force.

On 18 May 2022, two amended RTS on clearing and derivative trading obligations under EMIR and MiFIR came into force (see "EMIR Update" below for more information).

On 20 May 2022, ESMA published an updated version of its [Q&As](#) on transparency topics under MiFID II and MiFIR. The updated Q&As relate to non-equity transparency.

On 25 May 2022, ESMA published a [final report](#) on a review of the MiFID II framework on best execution reports which sets out proposals for revisions to the requirements for best execution reporting, in particular the RTS in Delegated Regulation (EU) 2017/576 (RTS 28) on information published by investment firms on the identity of their top five execution venues or third-party executing entities. The proposals are intended to enhance RTS 28 reports' quality of information and facilitate their use and the report has been submitted to the European Commission.

On 1 June 2022, the European Central Bank published an [opinion](#) on the proposed regulation amending MiFIR as regards enhancing market data transparency, removing obstacles to the emergence of a consolidated tape, optimising the trading obligations and prohibiting receiving payments for forwarding client orders.

On 20 June 2022, Commission Delegated Regulation ([EU](#)) 2022/930 supplementing MiFIR by specifying fees relating to the supervision by ESMA of data reporting service providers came into force.

On 22 June 2022, Regulation ([EU](#)) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology came into force. It makes certain amendments to MiFID II, MiFIR and CSDR.

## **1.16 Fitness and Probity: Central Bank Amends Pre-Approval Controlled Functions List**

With effect 5 April 2022, the Central Bank [made](#) a number of changes to its pre-approval controlled functions ("PCF") including the introduction of an independent non-executive director role. New [Fitness and Probity Regulations](#) give effect to new categories of PCFs under its fitness and probity framework.

In short, the PCF list has been amended as follows:

- Non-Executive Directors (formerly PCF-2) are 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 AML / CTF (PCF-15) has fallen away and is replaced with either the existing head of Compliance (PCF-12) or the new Head of AML / CTF (PCF-52);
- The role of Head of Investments (PCF-31) has been discontinued, defaulting to Chief Investment Officer (PCF-30);
- Branch Managers in all cases will be a PCF role (PCF-16), including non-EEA branches; and
- All roles relating to the chairing of a board or committee have been amended to refer to the 'Chair' as opposed to 'Chairman'.

For more information, please see [Updated Central Bank of Ireland PCF List - Required Actions and Filings](#).

## 1.17 COVID-19 – Remote Meetings of Companies and other Legal Entities

In Ireland, the [interim period](#) of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 has been extended again to 31 December 2022. Until that date, among other things, both general and creditors' meetings may be held virtually; and documents which are required to be executed under seal can be executed in counterpart as separate documents which will be regarded as a single document under the Companies Act 2014.

For more information on the Act's provisions, see our update, [COVID-19 Ireland Update: Company Law Changes](#).

## 1.18 PRIIPs Update

### Ireland

On 31 May 2022, the [European Union \(Undertakings for Collective Investment in Transferable Securities\) \(Amendment\) Regulations 2022](#) were published and come into operation on 1 January 2023 and give effect to Directive (EU) 2021/2261 amending the UCITS Directive 2009/65/EC as regards the use of key information documents ("KIDs") by UCITS management companies. UCITS also qualify as packaged retail investment and insurance products ("PRIIPs") and from 2023 they will have to provide a KID under the PRIIPs Regulation (EU) 1286/2014. The UCITS KID and the PRIIPs Regulation KID cover essentially the same information requirements. Investors (other than retail investors, investment companies and management companies) should continue to draw up a UCITS KID, unless they decide to draw up a PRIIPS KID. The amendments to the UCITS Directive, provided for in these regulations, aim to overcome duplicating requirements to provide both documents for the same financial product.

### Luxembourg

The [law of 25 February 2022](#) transposed Directive (EU) 2021/2261 into Luxembourg law. Article 4 of the law of 25 February 2022, which introduces a new article 163-1 to the [law of 17 December 2010](#) relating to undertakings for collective investment, as amended ("2010 Law"), will come into operation on 1 January 2023 and similarly aims to overcome the duplicating requirements noted above as the CSSF will consider a PRIIPs KID prepared in accordance with the PRIIPs Regulation to meet the requirements of articles 55 and 159 to 163 of the 2010 Law.

## EU

On 2 May 2022, the Joint Committee of the ESAs published a report (dated 29 April 2022) setting out their [technical advice](#) to the European Commission in response to a call for advice on the Commission's review of the PRIIPs Regulation. It suggests that significant changes should be made and encourages the Commission to consider a broad review of the PRIIPs framework and undertake consumer testing before formulating changes. In particular, the advice recommends changes to improve the presentation of the information provided to consumers and make it easier for them to compare products.

On 10 May 2022, the ESAs issued a [joint supervisory statement](#) on the 'What is this product?' section of the key information document for PRIIPs. The expectations in the supervisory statement aim at improving the quality of descriptions provided by PRIIPs manufacturers. The ESAs have identified a range of poor practices in how PRIIP manufacturers describe products under this section. Most issues relate to a general lack of clarity in the text, which makes it difficult for retail investors to understand the key features of products.

On 24 June 2022, Commission Delegated Regulation ([EU 2022/975](#)) amending the RTS in Commission Delegated Regulation (EU) 2017/653 and Commission Delegated Regulation (EU) 2021/2268 was published in the Official Journal of the EU and comes into force on 14 July 2022.

In a related statement, the European Commission explains that it prolongs the application of Article 14(2) of Delegated Regulation (EU) 2017/653 until 31 December 2022 (instead of 30 June 2022).

This extends transitional arrangements on the ability to use UCITS key investor information to provide specific information for the purposes of disclosures relating to PRIIPs offering a range of options for investment. The new Delegated Regulation also postpones the application date of certain PRIIPs-related disclosures to 1 January 2023, instead of 1 July 2022 as initially foreseen in Article 2(2) of Delegated Regulation (EU) 2021/2268. National supervisors are advised to take this timing into account when discharging their supervisory tasks.

For more information, please see our update, [Preparing for the PRIIPs KID for UCITS](#).

### 1.19 Benchmarks Regulation Update

On 20 May 2022, the European Commission published a [consultation paper](#) to gather views on possible enhancement of the rules for using third-country benchmarks in the EU (which closes on 12 August 2022). It is aimed in particular at benchmark administrators (located both in the EU and in third countries), EU supervised entities that use benchmarks, and businesses and investors that are end-users of benchmarks for investment, hedging or other purposes.

The consultation builds on the Commission's 2019 consultation on its review of the Benchmarks Regulation (EU) 2016/1011 ("BMR") and seeks views on further possible improvements in the functioning of the BMR, specifically on the rules applicable to non-EEA benchmarks and the impact on market participants of the full entry into application of the third-country regime from 1 January 2024.

### 1.20 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.

Commission Implementing Decisions on the equivalence of a number of US exchanges and equivalence of the US regulatory framework for CCPs authorised and supervised by the Securities and Exchange Commission to EMIR requirements came into force in April 2022.

On 18 May 2022, the following amended RTS on clearing and derivative trading obligations under EMIR and MiFIR came into force:

- Commission Delegated Regulation [\(EU\) 2022/749](#) amending the RTS in Delegated Regulation (EU) 2017/2417 as regards the transition to new benchmarks referenced in certain OTC derivative contracts. These RTS specify the classes of OTC derivatives that are subject to the derivatives trading obligation under MiFIR. The Delegated Regulation removes from the derivative trading obligation those classes of derivatives that reference GBP LIBOR or USD LIBOR, as they no longer meet the relevant conditions in MiFIR.
- Commission Delegated Regulation [\(EU\) 2022/750](#) amending the RTS in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts. The RTS specify the classes of OTC interest rate derivatives denominated in Euro, Pound Sterling, Japanese Yen and US Dollar that are subject to the clearing obligation under EMIR. The Delegated Regulation removes from the clearing obligation those classes of derivatives that reference EONIA, GBP, LIBOR or JPY LIBOR as they no longer meet the relevant conditions in EMIR.

On 19 May 2022, ESMA published a [final report](#) on highly liquid financial instruments for the investment policy of CCPs which concludes that further research is needed to determine whether to extend the list of eligible financial instruments to certain public entities and potentially to covered bonds. It also concludes that it would be premature to allow CCP investments in MMFs, as no category of MMFs currently meets all the conditions that define highly liquid financial instruments.

On 3 June 2022, ESMA published its [final report](#) following a review of the commodity derivative clearing thresholds under EMIR. It proposes that the clearing threshold for commodity derivatives is increased from EUR3 billion to EUR4 billion and has sent the draft RTS to the European Commission for endorsement.

On 10 June 2022, the European Commission adopted six Delegated Regulations and Implementing Regulations containing RTS and ITS respectively supplementing under EMIR relating to reporting, data quality, data access and the registration of TRs.

On 13 June 2022, the ESAs [announced](#) the publication of final reports containing draft RTS and a proposal to extend the temporary exemptions regime for intragroup contracts under EMIR for three years (it expired on 30 June 2022). Given the potential for negative consequences, the fact only some equivalence decisions have been adopted, as well as the forthcoming review of EMIR, the following outline how the temporary regime will be extended by three years:

- Final report contains draft RTS amending the bilateral margin requirements with regards to intragroup contracts, developed under Article 11(15) of EMIR.
- Final report contains draft RTS on amendments to the clearing obligation on intragroup contracts, developed under Article 5(2) of EMIR.



The draft RTS may take some time to be approved, therefore, from 1 July 2022 until the end of the approval process of these RTS, the ESAs expect competent authorities not to prioritise their supervisory actions on the related requirements applicable to intragroup transactions.

On 16 June 2022, ESMA published a [statement](#) on the implementation of the clearing obligation for pension scheme arrangements under EMIR (which expired on 18 June 2022). As consequence, from 19 June 2022 and until the approval of the Delegated Regulation to extent the exemption has been completed, ESMA expects competent authorities not to prioritise their supervisory actions in relation to the clearing obligation.

Implementing Decisions on EMIR equivalence for CCPs in five non-EU jurisdictions (Chile, Indonesia and Malaysia, India and South Africa) came into effect in June 2022 and will come into effect for China and Israel in July 2022.

## 1.21 EU Securitisation Regulation

The EBA on 12 April 2022 published its [final draft RTS](#) specifying the requirements for originators, sponsors and original lenders related to risk retention as laid down in the Securitisation Regulation (EU) 2017/2402 and as amended by the Capital Markets Recovery Package. These provide clarity on the risk retention requirements ensuring a better alignment of interests and reducing the risk of moral hazard, while these RTS will replace the existing 2014 Regulation, the Securitisation Regulation contains transitional provisions on the application of the existing Delegated Regulation to those securitisations whose securities were issued before its application date.

On 2 May 2022, the ESAs published a [consultation](#) on draft RTS on the content, methodologies and presentation of information in respect of the sustainability indicators for simple, transparent and standardised ("STS") securitisations that aim to:

- Facilitate disclosure by the originators of the principal adverse impacts of assets financed by STS securitisations on ESG-related factors;
- Supplement the single rulebook under the Securitisation Regulation as amended by the Capital Markets Recovery Package;
- Draw upon the ESAs' work in respect of sustainability-related disclosures in the financial services under SFRD.

## 1.22 IOSCO Consultation on Exchange Traded Funds – Good Practices for Consideration

On 6 April 2022, the International Organization of Securities Commissions ("IOSCO") published a [consultation](#) on good practices for IOSCO members, asset managers, and trading venues to consider when trading ETFs (which closes on 6 July 2022). The consultation:

- Explains why the IOSCO 2013 ETF Principles should be supplemented by a set of good practices. IOSCO's discussion includes the arbitrage mechanism, disclosure-related issues, ETF product structuring, volatility control mechanisms and financial stability.
- Sets out the 11 proposed good practices in detail and seeks feedback on the proposals and on other issues.

### 1.23 CSDR Update

On 20 May 2022, ESMA published an updated version of its [Q&As](#) on the implementation of the Central Securities Depositories Regulation ([EU](#) 909/2014 ("CSDR")) adding a question relating to the review and evaluation of central securities depositories.

On 2 June 2022, ESMA published its [final report](#) on its approach to the implementation of buy-in provisions under Article 7 of CSDR and Articles 21 to 28 of Commission Delegated Regulation (EU) 2018/1229 (RTS on settlement discipline).

ESMA proposes to suspend the application of the mandatory buy-in rules for three years. It published a statement on its approach in December 2021. The proposed amendment to the RTS on settlement discipline is based on the expected changes to the CSDR buy-in regime presented in the European Commission's proposed CSDR review (published in March 2022). It is also based on the amendment made to CSDR through the DLT Pilot Regulation (EU) 2022/858, which allows ESMA to propose a later start date for the CSDR buy-in regime.

The CSDR settlement discipline regime has applied since 1 February 2022. However, market participants have serious difficulties in implementing the mandatory buy-in regime on the scheduled date due to the absence of clarity on some open questions necessary for its implementation; and the uncertainty as to whether the Commission's proposal on amending CSDR would include amendments to the mandatory buy-in rules.

ESMA has sent the draft RTS to the Commission for endorsement and ESMA's December 2021 statement will remain in place until the buy-in regime is formally suspended.

### 1.24 SFTR Update

On 1 April 2022, ESMA published an updated version of its Q&As (dated 22 March 2022) on complying with reporting requirements under Securities Financing Transactions Regulation ([EU](#) 2015/2365 ("SFTR")). It has amended Q&A 12 on the currency of the overview and margin reports.

### 1.25 Irish Investment Funds Statistics: Q1 2022

The main points to note in the Central Bank's [Q1 2022 statistics](#) issued in June 2022 are as follows:

- The net asset values ("NAVs") of Irish-resident funds showed a first quarterly decline in two years having reached an all-time high the previous quarter, falling to €3,918bn at the end of March 2022.
- The total NAV decreased by €152bn (3.7%) in Q1 2022. This decrease was nearly all revaluations (96%) with net investor outflows (4%) minimal.
- All fund types, except real estate, showed drops in their NAV during the quarter. Bond funds had the largest NAV decrease in both percent (-5.7%) and amount (-€56bn) during the quarter. This consisted of net outflows (-€12bn) and revaluations (-€44bn).
- Equity, mixed, other and real estate fund types had positive net inflows in Q1 2022 but only MMF and Hedge funds had positive revaluations.

### 1.26 Luxembourg Undertakings for Collective Investment Statistics

The main points to note in the CSSF's [May 2022](#) update for regulated Luxembourg funds are as follows:

- Total net assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") amounted to €5,367.849 billion as at 31 May 2022.
- The number of CSSF-regulated Luxembourg Investment Funds active in the market totals 3,443.
- Of the 3,443 active Luxembourg Investment Funds, 2,256 entities have adopted an umbrella structure and together have a total of 13,205 sub-funds. The remaining 1,187 are structured as stand-alone funds.
- As at May 2022, there were a total of 14,392 fund units.
- During May 2022, there were more redemptions than subscriptions in equity funds and fixed-income funds.
- In addition the number of Luxembourg RIAFs reached 1,885 as of 1 July 2022.

## 2 Tax

### Ireland

#### 2.1 VAT Treatment of Depositary Services and Global Custody Services

On 23 May 2022, the Revenue Commissioners ("Irish Revenue") issued an updated [guidance manual](#) on the VAT treatment of depositary services and global custody services. Historically, these services have been treated as VAT exempt where they form a package of services known as 'global custody' services. The guidance notes that Irish Revenue accepts that a global custody service, which includes taxable elements such as physical safe-keeping and oversight, can be treated as VAT exempt. On the other hand, the pure supervising of the investment activities of a fund, referenced as the 'oversight' function in the guidance is recognised as a supply which is subject to VAT. Where such oversight services are provided as part of a broad package, they can be treated as incidental with the overall supply being VAT exempt. The updated guidance confirms that position. It provides some additional detail, specifying that:

- Where an oversight function is the only service supplied, it is taxable at the standard rate.
- Where a composite supply is provided where the oversight function is the predominant supply, the composite supply is taxable at the standard rate.
- Where a composite supply is provided and the global custody function is the predominant supply, the composite supply is VAT exempt.
- Where the supply comprises separate supplies of oversight services and global custody services, the former will be taxable, and latter will be VAT exempt.

From a practical perspective, Irish funds are required to appoint a depositary established in Ireland. As a domestic supply, i.e. Ireland to Ireland, if VAT is payable, it will be invoiced by the depositary. Irish funds and their managers should review the position with respect to services supplied to them by depositaries and whether they are documented and invoiced as separate services or as part of an overall package.

#### 2.2 Public Consultation on Pillar Two Minimum Tax Rate Implementation

On 26 May 2022, the Irish Government launched a [public consultation](#) on the implementation of the Pillar Two Minimum Tax Rate proposal in Ireland. It is intended to consider any challenges such measures may present. The consultation closes on 22 July 2022. Pillar Two consists of the Global anti-Base Erosion ("GloBE") rules, which will introduce a global minimum effective tax rate of 15% for

in-scope businesses. It is intended that the legislation will be transposed into Irish law through future Finance Acts. The consultation comprises 25 questions on Pillar Two's scope; charging provisions; computation of GloBE income or loss, adjusted covered taxes, qualified refundable tax credits, ETR and top up tax, qualified domestic top-up tax; administration (pay and file) requirements; transition rules, the subject to tax rule; and large scale domestic groups.

## EU

### 2.3 VAT Treatment of Services Supplied by Sub-Participants in Sub-Participation Transactions

A recent decision of the Advocate General ("AG") of the European Court of Justice ("ECJ") creates some uncertainty on the VAT treatment of services supplied under sub-participation transactions. In *Szef Krajowej Administracji Skarbowej v O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A.* ([Case 250/21](#)), the AG opined that a supply made by a Polish investment fund under a sub-participation was not a VAT exempt supply.

As generally understood, a funded sub-participation involves one party ("Sub-Participant") paying an upfront amount to the original creditor ("Originator"). The Originator agrees to pay to the Sub-Participant the proceeds it obtains from the debtors under the original loans which are subject to the sub-participation. In doing so, the Originator transfers the credit risk to the Sub-Participant but retains legal title to the loans. The Sub-Participant has no recourse against either the Originator or the underlying debtors.

In this case, the services provided by the Sub-Participant were held to involve two indivisible elements, namely the funding of the upfront amount payable for the loans; and the management or assumption of credit risk. The AG held that the objective purpose of the transaction is more than the mere granting of credit to the Originator by the Sub-Participant. Therefore, the exemption in Article 135(1)(b) of the VAT Directive for the granting, negotiation and management of credit should not apply to that supply as it not cover the assumption of credit risk by the Sub-Participant. Assumption of credit risk was considered by the AG to be an essential part of the proposed transaction. As such, the AG opined that the remuneration received by the Sub-Participant, being the difference between the upfront amount paid to the Originator and the sums received by the Sub-Participant from the Originator, should be subject to standard rate VAT.

The AG's opinion is not binding and it will be interesting to see whether the ECJ follows the line of argument advanced. A couple of points are worth noting:

- While the AG opined that the exemption in Article 135(1)(b) for negotiation of credit did not apply to the services supplied by the Sub-Participant, they did leave open the potential application of the exemption of the services under Article 135(1)(f) which covers "*transactions... in shares, interests in companies or associations, debentures and other securities*".
- In Ireland, there is no published guidance from Irish Revenue on the VAT treatment of sub-participations but those services would generally be treated as exempt financial services either in the nature of the granting or management of credit or transacting in securities. The VAT neutrality of financial services is fundamental given the limited ability of participants in those transactions to recover VAT charged to them.

Where Irish based originators and lenders sub-participate a portion of their loan assets to a non-Irish participant, the question as to whether VAT is chargeable on the participation services should be considered. The progress of this case will be one to watch for those Irish originators.

## 2.4 New Luxembourg and UK Double Tax Treaty

On 7 June 2022, Luxembourg and the UK signed a new tax treaty and an additional protocol (together the "New Treaty") replacing the 1967 treaty.

The New Treaty contains substantial changes to reflect the latest OECD standards ([2017 OECD Model Tax Convention](#)), in particular, the introduction of: (i) a 'real estate rich' clause (allowing gains from the sale of shares in real estate rich companies, i.e. entities that derive more than 50% of their value from real estate assets, to be taxed in the jurisdiction where these assets are located); (ii) a 0% dividend withholding tax in most cases; (iii) a 0% royalty withholding tax; and (iv) a competent authority / mutual agreement dual-residency tiebreaker (instead of the current place of effective management tiebreaker).

In addition, a Luxembourg collective investment vehicle in corporate form may qualify, subject to certain conditions, as a resident and therefore be entitled to treaty benefits. The absence of withholding tax on interest payment is continued.

The New Treaty will enter into effect at the earliest on 1 January 2023 for Luxembourg taxes assuming that it is ratified by both countries in 2022.

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# About the Maples Group

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