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GROUP

# Funds & Investment Management Update – Ireland and Luxembourg

**Quarterly Update | April – June 2020**

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# 1 Legal & Regulatory

## 1.1 UCITS Update

There have been a number of developments over the quarter:

On 3 April 2020 the European Securities and Markets Authority ("ESMA") published a final report containing guidelines on performance fees in UCITS and certain types of AIFs – see "ESMA Guidelines on Performance Fees" below for more detail.

On 4 June 2020 ESMA published a [supervisory briefing](#) on the supervision by national competent authorities ("NCAs") of costs applicable to UCITS and AIFs. For more information see "New ESMA Guidance on Fund Costs Reporting" below and our client update, [Introducing the Pricing Process: New ESMA Guidance on Fund Costs Reporting](#)

## 1.2 AIFMD Update

There have been a number of recent developments in relation to the Alternative Investment Fund Managers Directive [2011/61/EU](#) ("AIFMD"):

On 3 April 2020 ESMA published a final report containing guidelines on performance fees in UCITS and certain types of AIFs – see "ESMA Guidelines on Performance Fees" below for more detail.

On 4 June 2020 ESMA published a [supervisory briefing](#) on the supervision by NCAs of costs applicable to UCITS and AIFs. For more information see "New ESMA Guidance on Fund Costs Reporting" below and our client update, [Introducing the Pricing Process: New ESMA Guidance on Fund Costs Reporting](#)

On 10 June 2020 the European Commission published a report to the European Parliament and Council of the EU assessing the application and scope of AIFMD. It finds that AIFMD has improved the monitoring of risks to the financial system and the cross-border raising of capital for investments in alternative assets and AIFMs are operating with more transparency for investors and supervisors.

The report also identifies areas where AIFMD could be further improved such as further enhancing utility of the AIFM passport; discusses streamlining reporting requirements and concludes that the national private placement regimes which permit access of third country AIFMs and/or AIFs to the markets of individual member states, play an important bridging role while the AIFMD passport for the third country entities has not been activated yet by means of a delegated act.

The Commission is still assessing whether there is a need for any proposals, including amendments to AIFMD. The next step in the AIFMD review process is a public consultation which is planned for autumn 2020.

## 1.3 COVID-19 – Central Bank, CSSF and ESMA Statements

### Ireland

On 9 June 2020 the Central Bank of Ireland ("Central Bank") updated its [COVID-19 – Regulated Firms FAQ](#). On 16 June 2020 it published a [statement](#) setting out its expectations as regards due diligence arrangements and periodic on-site visits to outsourcing service providers and delegates in the context of COVID-19.

### Luxembourg

The CSSF published the latest iteration of its [COVID-19 FAQ](#) on 19 June 2020 and a range of other relevant circulars and press releases, the most relevant of which are:

### **CSSF Circular 20/740**

On 10 April 2020 the CSSF published [CSSF circular 20/740](#) on financial crime and AML/CFT implications during the COVID-19 pandemic which gives guidance to all professionals subject to the AML/CFT supervision of the CSSF ("Professionals") in relation to money laundering ("ML") and terrorist financing ("TF") risks and AML/CFT implications of the COVID-19 pandemic and should be read in conjunction with related guidance on COVID-19 issued by the EU, international and national authorities as well as related CSSF AML/CFT guidance (e.g. [CSSF Circular 19/732](#) and [CSSF Circular 17/661](#)).

Professionals must continue putting in place and maintaining effective systems and controls to ensure that Luxembourg's financial system is not abused for ML/TF purposes. The circular addresses: (i) new and emerging ML/TF threats resulting from COVID-19; (ii) possible areas of particular vulnerability for the financial sector; (iii) mitigating actions that require particular focus for supervised professionals and (iv) the CSSF's approach to AML/CFT supervision during this period.

### **AML/CTF in the Collective Investment Sector**

On 4 May 2020 the CSSF released a [presentation](#) on AML/CFT supervision in the Collective Investment Sector ("CIS") which complements CSSF Circular 20/740 and provides sector-specific detail on this circular. Supervised CIS entities may use the document as part of their training process for staff working remotely to create awareness of the implications of the pandemic in the fight against ML and TF.

It elaborates on the particular ML and TF threats and vulnerabilities posed by COVID-19 for CIS entities; suggests AML and CTF mitigation measures which may be implemented by CIS entities in the context of the current remote working environment and identifies the ML and TF typologies and red flags which may arise during the pandemic.

### **Extension of Deadlines for the Financial Sector**

On 18 March 2020 the Luxembourg government declared a state of emergency for three months. Further to this the law of 12 May 2020 on the extension of certain deadlines provided for in the sectorial laws of the financial sector during the state of emergency ("Law") and the law of 22 May 2020 extending the deadlines for filing and publication of annual accounts, the consolidated financial statements and related reports during the state of emergency ("General Law") came into force on 12 May 2020 and 29 May 2020 respectively.

The Law applies to a range of regulated entities including credit institutions, securitisation vehicles, SICARs, SIFs and UCIs to whom certain filing obligations pertain and gives them a three month extension on certain preparation, publication and filing obligations. The General Law applies generally to all Luxembourg companies and partnerships and extends certain deadlines during this period, including the filing and publication of annual and consolidated accounts as well as the holding of AGMs.

Both apply only to deadlines that had not expired by 18 March 2020 and financial years ending during and by the end of the three month state of emergency. CSSF regulated entities not covered by the Law or the General Law should refer to the CSSF's [COVID-19 FAQ](#) in which the CSSF indicated that, for the annual and half yearly reports required under the UCITS Directive and AIFMD, it will follow the ESMA public statement of 22 April 2020.

### **EU**

On 15 June 2020 ESMA published a revised [work programme](#) for 2020. ESMA's key priorities for 2020 are implementing new mandates, supervisory convergence, risk assessment, developing the single rulebook and direct supervision. It originally published its 2020 work programme in October 2019 but in March 2020 it reallocated resources away from its planned work into its response to the pandemic. Until June 2020 ESMA's focus has been on maintaining markets that are open and orderly and that allow prices to adjust and liquidity to be provided.

To respond to the repercussions of COVID-19 on the financial markets, each activity in the original programme was assessed against criteria of relevance for the market and urgency, as well as impact on stakeholders. On that basis, it was classified into high, medium or low priority. The results of the assessment are provided in the revised work programme, which includes the changes in relation to new items added as high priority and elements that are delayed or removed from the programme.

#### 1.4 Programme for Government – ILP Legislation and Policy Initiatives

Following the conclusion of the coalition talks between Irish political parties, a Programme for Government was published in June 2020. This contains a range of commitments on taxation, carbon reduction measures and financial services and covers areas such as potential support for remote working to strengthening Ireland's attractiveness as a location for business.

The programme provides that the new government will encourage competition within the Irish banking sector and develop the Fintech sector as a source of employment and competition. It announces commitments to implement the "Ireland for Finance – Financial Services Strategy" which will continue the work of the prior administration. It will prioritise Green Finance strategic actions that are developed in line with climate justice targets and Sustainable Development Goals and seek to enact the long awaited investment limited partnership ("ILP") legislation. Although there have been clarifications to the tax treatment of ILPs, the main reforming legislation has not been enacted. This is hoped to be matter of priority to bolster Ireland's offerings as an international private equity hub.

#### 1.5 New ESMA Guidance on Fund Costs Reporting

On 4 June 2020 ESMA published a [supervisory briefing](#) on the supervision by NCAs of costs applicable to UCITS and AIFs. Among other things, it found that there is a lack of convergence in the way that the "undue costs" concept is interpreted in the EU and the supervisory approach to cost related provisions. It also found that NCAs also consider that the concept is equally applicable to UCITS and AIFs.

This lack of supervisory convergence gives rise to the risk of different investor protection levels depending on where a fund is domiciled. ESMA has, therefore, developed criteria (set out in the briefing) to support NCAs in assessing the notion of undue costs and supervising the obligation to prevent undue costs being charged. It provides guidance on their supervision of how costs are charged to investors by the relevant UCITS and AIFs, as well as guidance on their managers' obligation to prevent undue costs being charged. It is also provides market participants with indications of NCAs' expectations and compliant practices on the cost related provisions in the UCITS and AIFMD frameworks.

For more information see our client update, [Introducing the Pricing Process: New ESMA Guidance on Fund Costs Reporting](#)

#### 1.6 ESMA Guidelines on Performance Fees

On 3 April 2020 ESMA published a final report containing [guidelines](#) on performance fees in UCITS and certain types of AIFs. They apply to fund managers and NCAs and promote convergence in the way that NCAs supervise performance fee structures and the circumstances in which performance fees can be paid.

They provide guidance to fund managers when designing performance fee models, including the assessment of the consistency between the performance fee model and the fund's investment objective, policy and strategy, particularly when the fund is managed in reference to a benchmark. The five guidelines cover: the calculation method for the performance fee; consistency between the performance fee model and the fund's investment objectives, strategy and policy; frequency for the crystallisation of the performance fee; negative performance (loss) recovery and disclosure of the performance fee model. The guidelines will be translated into the official EU languages and then

published on ESMA's website. They will become applicable two months after the translations are published.

For more information see our client update, [ESMA Final Guidance on Performance Fees in UCITS and certain AIFs](#)

## 1.7 AML and Beneficial Ownership Register Update

### Ireland – MLD5 and ICAV BOR

The [General Scheme of the Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Bill 2019](#) which will implement the Fifth Money Laundering Directive EU/2018/843 ("MLD5") in Ireland was published in January 2019 but has not progressed any further. The deadline for transposition into national law was 10 January 2020. On 14 May 2020, the European Commission sent a [letter of formal notice](#) to Ireland (along with seven other EU member states and the UK) for having only partially transposed MLD5 and subsequently issued infringement proceedings.

For more information see our client update [MLD5 Update and New EU AML Action Plan](#)

The [European Union \(Modifications of Statutory Instrument No. 110 of 2019\) \(Registration of Beneficial Ownership of Certain Financial Vehicles\) Regulations 2020](#) came into force on 25 June 2020 and amends the European Union (Anti-Money Laundering: Beneficial Ownership Of Corporate Entities) Regulations 2019. They establish the Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts in Ireland to be overseen by the Central Bank with a six month lead in period for submission of information. The Register will co-exist alongside the existing Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies operated by the Companies Registration Office.

For more information see our client update, [Central Beneficial Ownership Register Introduced for ICAVs and Unit Trusts](#)

### Luxembourg

On 4 May 2020 the CSSF published CSSF circular 20/742 on the entry into force of the law of 25 March 2020 amending, in particular, the law of 12 November 2004 on the fight against money laundering and terrorism financing (the "AML Law") and the [law of 25 March 2020](#) establishing a central electronic data retrieval system concerning IBAN accounts and safe deposit boxes. It highlights the main amendments to the AML Law. For more information, see our [Q1 2020 quarterly update](#). The establishment of a central electronic data retrieval system for IBAN accounts and safe deposit boxes will be addressed in a separate CSSF circular as this does not amend the AML Law.

### EU and International

On 5 May 2020 the Financial Action Task Force ("FATF") published COVID-19-related Money Laundering and Terrorist Financing Risks and Policy Responses report. It identifies an increase in COVID-19-related crimes, such as fraud, cybercrime, misdirection or exploitation of government funds and international financial assistance. It concludes by recommending adequate AML/CFT policy responses to help support the implementation of measures to respond to COVID-19, including domestic coordination to assess the impact of COVID-19 on AML/CFT risks and systems; strengthened communication with the private sector; encouraging the full use of a risk-based approach to CDD and supporting electronic and digital payment options.

There is an increasing focus on AML/CFT as the European Commission published a six-point [Action Plan](#) on 7 May 2020 to further strengthen the EU's rules and remove any weak links together with a [public consultation](#) on the effectiveness of existing enforcement tools which closes on 26 August 2020. It suggests that legislation in this area should be more granular, more precise and less subject to diverging implementations.

The Commission also published a staff [working document](#) setting out a new methodology for identifying high-risk third countries with strategic AML and CTF deficiencies. Its aim is to clarify the Commission's process for identifying third countries.

For more information see our client update [MLD5 Update and New EU AML Action Plan](#)

On 5 June 2020 Europol launched its [European Financial and Economic Crime Centre](#) to provide operational support to EU member states and EU bodies in combatting financial and economic crime and to promote the systematic use of financial investigations. It will be a resource for EU financial investigators and will collaborate with them in targeting and proceeding against criminals operating within the EU wherever those criminals might reside.

On 17 June 2020 the European Banking Authority ("EBA") [announced](#) that it has added MLD4 and the Wire Transfer Regulation (EU) 2015/847 ("WTR") to the Q&A tool in its interactive single rulebook. This means that institutions, supervisors and other stakeholders can use the rulebook to submit questions on the application of MLD4 and WTR.

On 19 June 2020 Commission Delegated Regulation [\(EU\) 2020/855](#), which amends the list of high-risk third countries with strategic AML and CT deficiencies under Article 9(2) of MLD4 was published in the Official Journal of the EU and comes into force on 9 July 2020. It amends the Annex to Delegated Regulation (EU) 2016/1675 by removing third countries that no longer present strategic AML and CTF deficiencies (Bosnia-Herzegovina, Ethiopia, Guyana, Lao People's Democratic Republic, Sri Lanka and Tunisia) and adding third countries that have been identified as having strategic AML and CTF deficiencies (the Bahamas, Barbados, Botswana, Cambodia, Ghana, Jamaica, Mauritius, Mongolia, Myanmar/Burma, Nicaragua, Panama and Zimbabwe). However, the article adding third countries to the list does not apply until 1 October 2020.

## 1.8 Thematic Inspection on Appropriateness Test under MiFID II for Investment Firms

On 29 June 2020 the Central Bank published the [findings](#) of a Thematic Inspection of investment firms' compliance with their legal requirements to determine whether a product is appropriate for their customers. Firms are required to gather and assess information on the consumer's knowledge and experience in order to determine whether the product is appropriate for them. If the product is not appropriate, they must issue a clear warning to the consumer.

The main findings were as follows:

- Several firms failed to provide evidence that they are paying sufficient attention to the application of the appropriateness requirements, instead placing undue reliance on standardised questionnaires and 'box-ticking' to demonstrate compliance.
- In many cases, firms' practical application of the requirements was undermined by weak processes, systems, and controls; resulting in errors and assessments proceeding with incomplete information.
- Many firms are relying on a blanket approach for gathering client information that fails to consider the significant differences in risk and complexity that occurs between investment products.
- In many cases, it was not clear how firms reached the appropriateness decision.
- The review found evidence of inadequate and weak warnings issued where products were found to be inappropriate for clients, including the use of vague, ambiguous language. The appropriateness warning should not be viewed by firms as a disclaimer which overrides the legal obligations of firms to act in the best interests of the consumer.

The Central Bank is engaging directly with those firms where issues have arisen. It has also sent a letter to all MiFID firms, detailing the findings of the inspection together with recommendations to enhance their compliance arrangements, where relevant.

## 1.9 Central Bank - Interest Rate Benchmark Reform Letter

The Central Bank issued a [letter](#) to fund management companies in February 2020 reminding them to take appropriate action for funds that will be affected by ongoing developments in the area of interest rate benchmark reform. This was published on the Central Bank's website on 17 April 2020.

The letter identifies some examples of where funds may use interest rate benchmarks (reference rates in financial contracts, for performance measurement and in valuation and risk models) and may therefore need to take appropriate action soon to ensure a smooth transition to alternative or reformed benchmark rates ahead of the deadline of the end of 2021 specified in the revised EU Benchmark Regulation.

It also states that the "Board of each Fund Management Company is responsible for ensuring that appropriate preparations for the impact of the benchmark reforms are in place for each fund it manages."

Based on the analysis of the impact of the changes undertaken by the relevant fund management company, the letter advises that "the Board should develop plans to address any potential risks, documentation or prospectus changes or engagement with investors where appropriate."

## 1.10 CSSF - Notification of Fund Issues and Large Redemptions

On 13 May 2020 the CSSF issued a [communication](#) advising that certain investment fund managers ("IFMs") that have been contacted by the CSSF are required to notify it ("IFM Notification") of significant issues in respect of investment funds managed by them. This broadens the scope of the original CSSF obligation on the largest IFMs issued on 10 March 2020.

An IFM Notification must be made through the CSSF's electronic portal ("eDesk Portal") on the occurrence of:

- Significant events/issues affecting the functioning of the investment funds managed by the IFM; and
- Larger redemptions at the level of Luxembourg regulated investment funds managed by the IFM (i.e. daily net redemptions exceeding 5% of the NAV, net redemptions over a calendar week exceeding 15% of the NAV and/or the application of gates/ deferred redemptions).

This notification obligation applies from 2 June 2020. It also clarified that the specific monitoring of the largest IFMs, which was established on 10 March 2020, is replaced by the new IFM Notification and the "early warning on large redemptions" reporting, which is applicable to a limited number of UCITS, is suspended until further notice.

## 1.11 CSSF Weekly IFM Questionnaire

On 9 April 2020 the CSSF issued a [press release](#) advising IFMs that it had launched a new questionnaire which must be completed and submitted to the CSSF through the eDesk Portal weekly until further notice. It enables the CSSF to obtain financial data (total net assets, subscriptions and redemptions) and information on governance arrangements for the activities performed by IFMs in light of the circumstances and risks to which IFMs (and, presumably, the funds that they manage) are exposed as a result of the pandemic. The questionnaire is in addition to the IFM Notification (see "Notification of Fund Issues and Large Redemptions" above).

For more information see our client update, [Luxembourg Update: CSSF's Weekly IFM Questionnaire](#)

## 1.12 EU Money Market Fund Regulation

On 4 June 2020 ESMA [announced](#) that it has published updated reporting instructions under EU Money Market Fund Regulation EU/2017/1131 ("MMFR"). Article 37 requires MMF managers to

submit data to their NCAs who will then transmit the data to ESMA. A reporting webpage explains that the first reports by MMF managers should be submitted in September 2020 to cover Q1 and Q2 reporting periods. Updated reporting instructions, validations and schemas have been published. The updates follow feedback received by market participants. The postponed deadline for reporting was announced in March 2020.

On 22 June 2020 ESMA issued the official translations of its [guidelines](#) on standardised procedures and messaging protocols under Article 37 of the MMFR. NCAs to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, within two months of the date of publication by ESMA of the guidelines in all EU official languages.

### 1.13 Sustainable Finance Update

On 8 April 2020 the European Commission published a [consultation](#) on a renewed sustainable finance strategy which is open until 15 July 2020. For more information see our client update, [Ireland Update: Sustainable Finance Developments](#)

On 8 June 2020 the European Commission [published](#) for consultation draft texts of six Commission Delegated Regulations and Directives as part of the EU's action plan on sustainable finance. It incorporates sustainability considerations into frameworks for the UCITS Directive, AIFMD, the MiFID II Directive, the Solvency II Directive 2009/138/EC, and the Insurance Distribution Directive (EU) 2016/97. The proposals focus on the integration of sustainability into existing organisational rules and conduct of business rules under each regime. Feedback on the draft Delegated Regulations and Directives must be provided to the Commission by 6 July 2020. The legislation will apply 12 months after they enter into force.

For more information see our client update, [European Commission Initiatives on Sustainable Finance – Draft Acts](#)

#### Disclosure Regulation RTS

[Regulation \(EU\) 2019/2088](#) on sustainability-related disclosures in the financial services sector lays down harmonised rules for financial market participants including AIFMs, UCITS management companies and investment firms authorised under MiFID II (providing portfolio management or investment advice) ("Disclosure Regulation"). It provides for transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes, as well as the provision of sustainability-related information on financial products and, with some exceptions, will apply from 10 March 2021.

On 23 April 2020 the Joint Committee of the European Supervisory Authorities ("ESAs") published a [consultation](#) on proposed regulatory technical standards ("RTS") on content, methodologies and presentation of disclosures under the Disclosure Regulation which closes on 1 September 2020. The draft RTS aim to ensure that financial market participants and financial advisers provide the necessary information on the adverse impacts of investment decisions and financial advice to enable end-investors to make informed investment decisions.

For more information see our client update, [Ireland Update: Sustainable Finance Developments](#)

#### Taxonomy Regulation

The [Taxonomy Regulation](#) on the establishment of a framework to facilitate sustainable investment was published in the Official Journal of the EU on 22 June 2020 and enters into force on 12 July 2020 (but many key provisions will not apply until a later date). It amends the Disclosure Regulation and introduces an EU-wide classification system of environmentally sustainable activities and new disclosure requirements for certain financial services firms and large public interest entities.

It lays down six environmental objectives and allows economic activity to be labelled as environmentally sustainable if it contributes to at least one of the objectives without significantly

harming any of the others. The European Commission will regularly update the technical screening criteria for transition and enabling activities. By 31 December 2021, it should review them and define criteria to identify activities that have a significant negative impact.

## 1.14 Capital Markets Union Report

The High-Level Forum of the European Commission on capital markets union ("CMU") on 10 June 2020 published its [final report](#) for feedback until 30 June 2020. It proposes 17 inter-connected 'game changers' – measures the EU needs to implement in order to remove the biggest barriers in its capital markets. Proposals to note include the following:

- A recommendation that the Commission mandates ESMA to set up a European Single Access Point for company data.
- A review of the framework for European long-term investment funds ("ELTIFs") and the introduction of tax incentives for investments through ELTIFs.
- A review of the securitisation framework to address obstacles to the development of a robust securitisation market.
- Targeted modifications of, in particular, the prospectus, market abuse and MiFID regulatory framework to make public listing more attractive to small and medium-sized enterprises.
- A review of the existing financial legislation to clarify its application to cryptoassets and digital assets.
- A review of Central Securities Depositories Regulation to strengthen the CSD passport and improve supervisory convergence among NCAs.
- A targeted review of the Shareholder Rights Directive 2007/36/EC, as amended by Directive EU/2017/828 ("SRD II"), to clarify the exercise of voting rights and corporate action processing as well as to provide a harmonised definition of "shareholder".
- Targeted amendments, in particular to the MiFID II Directive and the PRIIPs Regulation to improve disclosure.
- That the Commission strengthens the mandate of ESMA and EIOPA to enhance EU supervisory convergence, including giving ESMA and EIOPA wider crisis management powers.

The Commission intends to publish a CMU action plan in Q4 2020.

## 1.15 EMIR Update

The Regulation on over the counter ("OTC") derivative transactions, central counterparties ("CCPs") and trade repositories ([Regulation 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 ("FCs") for EMIR purposes and subject to the full scope of EMIR obligations.

There have been a number of developments over the quarter:

On 27 April 2020 the International Swaps and Derivatives Association, Inc. ("ISDA®") and other trade associations published a joint letter on the mandatory delegated reporting effective date under the EMIR Refit Regulation (EU) 2019/834 in the context of the COVID-19 pandemic asking ESMA to set an expectation that NCAs should:

- Not prioritise supervisory actions relating to the EMIR Refit Regulation mandatory delegated reporting requirement.
- Apply their risk-based supervisory powers in day-to-day enforcement of this requirement in a proportionate manner until 21 November 2020.

On 4 May 2020 ISDA® and other trade associations published the following two letters sent to the European Commission and the ESAs requesting that the existing time-related margin exemptions under EMIR are extended:

- [Letter](#) on the time-limited derogation under the margin RTS for equity options and indexes.
- [Letter](#) on the time-limited derogation under the margin RTS for intragroup transactions.

On the same date the Joint Committee of the ESAs published a [second version](#) of its final report containing RTS under EMIR on various amendments to the bilateral margin requirements in view of the international framework. In response to the COVID-19 pandemic, the ESAs have updated the report to take into account the decision by the BCBS and IOSCO in April 2020 to defer by one year the implementation of the remaining phases of the initial margin requirements under EMIR.

On 28 May 2020 ESMA published an updated version of its [Q&As](#) on the implementation of EMIR which includes a new Q&A on the reporting of OTC derivatives by a FC on behalf of a non-financial counterparty below clearing threshold ("NFC") following amendments to EMIR made by the EMIR Refit Regulation.

On 2 June 2020 ESMA published a [final report](#) with technical advice to the European Commission on the fair, reasonable, non-discriminatory and transparent ("FRANDT") commercial terms for the provision of clearing services under Article 4(3a) of EMIR.

On 9 June 2020 ISDA®, the European Banking Federation and the Futures Industry Association published a [letter](#) sent to the European Commission and ESMA to extend the derogation from EMIR clearing requirements for intragroup transactions from 21 December 2020 until 21 December 2023. Article 3(2) of Commission Delegated Regulations (EU) 2015/2205, (EU) 2016/1178 and (EU) 2016/592 contain RTS that provide for a temporary intragroup derogation from the clearing obligation that applies where an EU counterparty and a third-country counterparty to an OTC derivative subject to the clearing obligation meet the conditions for an intragroup transaction and no equivalence decision has been adopted for the relevant third country under EMIR. To date, no such decisions have been adopted.

On 9 June 2020 ESMA [extended](#) the response date for the consultation on the technical standards on reporting, data quality, data access and registration of trade repositories under EMIR Refit Regulation to 3 July 2020.

## 1.16 IFD and IFR Consultations - New Regulatory Framework for Investment Firms

In May 2020 the Irish Department of Finance [invited](#) interested parties to make submissions in relation to the exercise of national discretions in the Investment Firm Directive (EU) 2019/2034 ("IFD") which introduces a new prudential framework for MiFID-authorized investment firms. While the Investment Firm Regulation (EU) 2019/2033 ("IFR") applies directly without requiring transposition, there are a number of provisions in the IFD to which full harmonisation does not apply and Member States are given discretion as to the application of these provisions. The consultation period ends on 6 July 2020.

## 1.17 EU Whistleblowing Directive Consultation

Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law in the context of their work-related activities came into force on 16 December 2019. Protection applies only to reports of wrongdoing relating to EU law, such as tax fraud, money laundering or public procurement offences, product and road safety, environmental protection, public health and consumer and data protection. It will establish channels for reporting both within an organisation and to public authorities. Ireland's Protected Disclosures Act 2014 will need to be updated to reflect the Directive. The most notable change will be the extension of protected disclosures law to the private sector.

Member states have to transpose the majority of the new rules into their national law by 17 December 2021. On 9 June 2020 the Irish Department of Public Expenditure and Reform opened a [public consultation](#) on the transposition of those matters in the Directive where Member States have a choice on implementation. It closes on 10 July 2020.

### 1.18 ESRB Recommendation on Liquidity Risks in Investment Funds and Statement on Use of Liquidity Management Tools

On 14 May 2020 the European Systemic Risk Board ("ESRB") published a [recommendation](#) on liquidity risks in investment funds. It states that, in the light of the economic shock caused by the COVID-19 pandemic, its General Board has decided to focus on five priority areas where co-ordination between authorities in the EU is likely to be particularly important to safeguard financial stability. One of these areas relates to financial market liquidity and implications for asset managers and insurers. While market conditions have subsequently stabilised, it has identified two segments of the investment funds sector as high priority areas. In this context, the recommendation is for ESMA to:

- Co-ordinate with the NCAs to undertake supervisory work with investment funds that have significant exposures to corporate debt and real estate assets to assess the preparedness of these two segments to potential future adverse shocks, including any potential resumption of significant redemptions or an increase in valuation uncertainty.
- Report to the ESRB on conclusions reached on the preparedness of the relevant investment funds.

ESMA must communicate the actions taken in response to the European Parliament, the Council of the EU, the European Commission and the ESRB by 31 October 2020. It has also published a statement emphasising the importance of the availability and timely use of liquidity management tools as a key element of prudent liquidity risk management by investment funds with exposures to less liquid assets. Separately, ESMA expressed its support for the ESRB recommendation and statement.

### 1.19 IOSCO Consultation - The Use of Artificial Intelligence and Machine Learning

The International Organization of Securities Commissions ("IOSCO") issued a [consultation](#) on 25 June 2020 on proposed guidance to help its members regulate and supervise the use of Artificial Intelligence ("AI") and Market Learning ("ML") by market intermediaries and asset managers which closes on 26 October 2020. The use of these technologies may benefit firms and investors however, it may also create risks, potentially undermining financial markets efficiency and causing harm to consumers and other market participants. The consultation proposes six measures to assist IOSCO members in creating regulatory frameworks to supervise market intermediaries and asset managers that use AI and ML.

### 1.20 CSDR Update

The European Commission adopted a [Delegated Regulation](#) on 8 May 2020 amending Delegated Regulation [EU/2018/1229](#) supplementing the Central Securities Depositories Regulation [EU/909/2014](#) ("CSDR") with RTS on settlement discipline. Delegated Regulation EU/2018/1229 is due to enter into force on 13 September 2020, but in February 2020 ESMA submitted to the Commission draft RTS proposing a postponement of this date given the extent and the impact of the new settlement discipline regime under the CSDR, which will affect a wide range of market participants. The next step is for the Council of the EU and the European Parliament to consider the amending Delegated Regulation.

## 1.21 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.

On 1 April 2020 ESMA published a:

- [Review report](#) on the impact of the application of position limits and position management provisions on commodity derivatives markets;
- [Final report](#) to the European Commission setting out its technical advice on the impact of inducements and costs and charges disclosure requirements under MiFID II; and
- [Public statement](#) clarifying issues relating to the rules under MiFID II on publication of general best execution reports by execution venues and firms.

On 21 May 2020 the International Capital Market Association published a [response](#) received from ESMA confirming proposals for reporting of central bank repurchase transactions ("repos") under the MiFIR.

On 3 June 2020 ESMA [published](#) updated versions of its opinions on transparency and position limits for third-country trading venues under MiFID and MiFIR.

On 5 June 2020 ESMA published its final [guidelines](#) on aspects of the compliance function requirements under MiFID II addressed to investment firms and credit institutions providing investment services and activities, investment firms and credit institutions selling or advising clients in relation to structured deposits, UCITS management companies and external AIFMs when providing investment services and activities under the UCITS Directive and AIFMD ("MiFID top-ups"). These 12 guidelines replace the current ESMA guidelines and will become applicable two months after the official EU language translations are published.

On 8 June 2020 the European Commission [published](#) for consultation draft texts of six Commission Delegated Regulations and Directives as part of the EU's sustainable finance action plan. It incorporates sustainability considerations into frameworks for various directives including MiFID II. For more information see our client update, [European Commission Initiatives on Sustainable Finance – Draft Acts](#)

On 11 June 2020 ESMA published a [statement](#) on open access provisions for exchange traded derivatives which are due to apply from 4 July 2020 under MiFIR in the light of the COVID-19 pandemic. On 16 June 2020 the Central Bank [confirmed](#) that it will apply these statement as regards the matters that it expects NCAs to consider in assessing open access requests under MiFIR.

Over the quarter ESMA updated its MiFID II/MiFIR Q&As on [investor protection and intermediaries topics](#); [transparency and market structures](#); [transparency topics](#) and [market structures topics](#).

## 1.22 Irish Investment Funds Statistics: Q1 2020

The main points to note in the Central Bank's [Q1 2020](#) issued in May 2020 update are as follows:

- The net asset value ("NAV") of Irish-resident investment funds decreased by €389 billion, or 12%, to €2,161 billion in Q1 2020. Almost all fund types saw net asset values decline, mostly as a result of valuation losses;
- Investors withdrew €42 billion from investment funds during the quarter, the first quarter of net investor outflows from investment funds since Q4 2018; and
- Equity fund assets saw the biggest decline during Q1 2020, which was driven by significant valuation losses (€183 billion). However, bond funds experienced the largest investor outflows (€38 billion).

## 1.23 Luxembourg Undertakings for Collective Investment Statistics

The main points to note in the CSSF's [May 2020](#) update are as follows:

- Total assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") increased €79,550 billion from €4,403.683 billion as at 30 April 2020 to € 4.483,233 billion;
- The total number of Luxembourg Investment Funds active in the market and regulated by the CSSF decreased from 3,693 during May 2020 to 3,686;
- From the 3,686 active Luxembourg Investment Funds, 2,414 have adopted an umbrella structure and have together a total of 13,455 sub-funds. The remaining 1,272 Luxembourg Investment Funds are structured as stand-alone funds;
- As at May 2020 there were a total of 14,727 sub-funds; and
- During May 2020 there were more subscriptions than redemptions in equity funds and more subscriptions than redemptions in fixed-income funds.

The number of Luxembourg reserved alternative investment funds reached 1,055 on 15 June 2020.

# 2 Tax

## Ireland

### 2.1 BlackRock Investment Management VAT ECJ Case

On 2 July 2020 the European Court of Justice ("ECJ") delivered its [judgment](#) in a VAT case concerning BlackRock Investment Management in the UK. The decision notes that BlackRock received supplies of services from a US entity through a software platform, known as the Aladdin platform. Blackrock used these services in the management of certain funds. As the services were received from outside the UK, Blackrock had to apply the "reverse charge" VAT mechanism to those services and determine the VAT treatment in the UK. It treated a portion of the fees paid as exempt from VAT on the basis that they related to special investment funds (as defined under UK law) ("SIFs"). The supply of management services to a SIF is exempt from VAT. So it appears the treatment applied was to have VAT charged on a reverse charge basis only an element of the fees paid and not the portion that related to management of SIFs.

The ECJ rejected this treatment and held that the supplies were a single supply and that all of the fees were subject to VAT. It was not open to BlackRock to determine and apportion the VAT treatment of the services received according to the nature of the funds managed. There were a number of points of note in the ECJ's judgment:

- The UK First Tier and Upper Tier Tribunals accepted that provision of services through a software programme could constitute management for the purposes of the VAT exemption. As such, that question was not referred to the ECJ.
- The ECJ noted that the exemptions for management of SIFs are to be interpreted strictly since these exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.
- The ECJ agreed with the Advocate General's decision that the services supplied through the Aladdin software platform constituted a single indivisible economic supply on the basis that the value of the services lay in the combined use of the various functionalities of the platform.

- The ECJ reiterated the general rule that a single supply of services must be subject to a single rate of VAT. In this context, the ECJ opined that the case of Commission v Luxembourg was irrelevant to this particular case. In that case, the relevant exemption specifically provided that the VAT treatment could be varied depending on the use to which the supply was put whereas the VAT exemption for management of SIFs is defined exclusively by reference to the nature of the supply. Therefore, it was not open to BlackRock to determine and apportion the VAT treatment of the services received according to the nature of the funds managed.

### Implications for EU Investment Managers

It is unlikely that many managers will have a fact pattern or a history of apportionment of fees entirely similar to the BlackRock model. However, there are lessons to be learned from the decision for managers who receive services from a single supplier that are used for the purposes of managing both SIFs and other funds, or indeed services received from a number of entities with different VAT treatment. Such managers may want to consider whether it is possible or appropriate to separate such services according to whether they are used to manage SIFs or other funds, particularly in light of the AG's comment that the exemption for management may apply where the services supplied to SIFs are capable of being identified "precisely and objectively".

The decision emphasises the importance of ensuring the nature of services provided has been accurately determined and described in the investment management and other legal documentation, analysed from a VAT perspective and that the invoicing arrangements correctly reflect those contractual arrangements. In essence it shows how legal drafting of the investment management agreement is key in allocating differing VAT treatments appropriately.

## 2.2 EU DAC6 – Deferral of Reporting Dates and Guidance - Ireland

On 26 June 2020 the Irish Revenue Commissioners announced that the first filings of DAC6 returns, which were originally scheduled to be made by 31 August 2020, will be deferred by up to six months. DAC6 is the new EU mandatory disclosure regime of certain cross border transactions which are considered to involve potentially aggressive tax planning arrangements. All reporting for DAC6 in Ireland is postponed until after 1 January 2021 due to the pandemic. Council Directive (EU) 2020/876 is the EU legislative measure which provides for the deferral of DAC6 at the option of EU Member States for a period up to six months. For further details on the dates and impact of DAC6 for intermediaries and taxpayers generally, please see our client update [Ireland and Luxembourg: Extension of Reporting Deadlines for DAC6, FATCA and CRS](#)

Irish Revenue also published [guidance](#) on how the DAC6 regime will operate in Ireland. It contains useful commentary on the operation of certain hallmarks, including on the use of standardised documentation and the reliefs and exemptions which are excluded from the scope of that particular hallmark.

## Luxembourg

### 2.3 EU DAC 6 Reporting Deferral - Luxembourg

Further to 2.2 above the Luxembourg Ministry of Finance is to amend its law to provide for the six month deferral of DAC6 deadlines. It will set out the following updated DAC6 reporting deadlines (note the text is not yet published):

- Reportable cross-border arrangements implemented between 25 June 2018 and 30 June 2020 should be reported by 28 February 2021 (i.e. up to six months after the original deadline of 31 August 2020);

- Reportable cross-border arrangements occurring between 1 July 2020 and 31 December 2020 should be disclosed within 30 days as from 1 January 2021; and
- Reportable cross-border arrangements, occurring on or after 1 January 2021, should be disclosed within a 30 day period.

For further details please see our client update [Ireland and Luxembourg: Extension of Reporting Deadlines for DAC6, FATCA and CRS](#)

## **2.4 Luxembourg and Portugal to Remove the Securitisation Vehicle Exemption**

On 14 May 2020 the European Commission sent formal notice letters to advise Luxembourg and Portugal to remove the exemptions from the 30% EBITDA interest limitation rules currently available to certain securitisation vehicles under their ATAD I domestic laws. Luxembourg securitisation vehicles in corporate form and which earn income other than interest income could be impacted by this development. The removal of the exemption would result in a limitation of tax deductible commitment payments to 30% of EBITDA for such entities.

## **2.5 New Protocol in Force for the France/Luxembourg Double Tax Treaty**

On 6 April 2020 the Luxembourg parliament approved the pending protocol to Luxembourg's double tax treaty with France. On 3 June 2020 the French government approved the draft ratification law of the pending protocol. The protocol to the 2018 income and capital tax treaty with France clarifies the apportioning of taxation rights between the two countries for cross-border professionals who work in Luxembourg but reside in France. France will apply the exemption using the progression method instead of the credit method to income of French cross-border workers for their employment in Luxembourg. The protocol applies retroactively as from 1 January 2020.

## **2.6 Other Luxembourg Tax Treaty Developments**

On 8 June 2020 Luxembourg's tax treaty network expanded to 84 tax treaties in force with three pending ratification and 10 more tax treaties under negotiation. New double tax treaties entering into force since August 2019 include Argentina, Kosovo and Uzbekistan. Treaties currently under negotiation include Colombia, Lebanon and Kyrgyzstan. Tax treaties pending ratification include Botswana, as well as an updated protocol with Kazakhstan.

## **2.7 ECJ Case on Luxembourg Fiscal Unity**

On 14 May 2020 the ECJ [ruled](#) that Luxembourg's fiscal unity regime which separates vertical from horizontal fiscal unity groups violates the principle of freedom of establishment (C-749/18). The decision means that Luxembourg fiscal unities should be able to claim combined vertical and horizontal groups regardless of an actual change to applicable law.

## Contacts

### Dublin

**Peter Stapleton**

Partner, Head of Funds & Investment Management

[peter.stapleton@maples.com](mailto:peter.stapleton@maples.com)

**Stephen Carty**

Partner, Funds & Investment Management

[stephen.carty@maples.com](mailto:stephen.carty@maples.com)

**Ian Conlon**

Partner, Funds & Investment Management

[ian.conlon@maples.com](mailto:ian.conlon@maples.com)

**Ronan Cremin**

Partner, Funds & Investment Management

[ronan.cremin@maples.com](mailto:ronan.cremin@maples.com)

**John Gallagher**

Partner, Funds & Investment Management

[john.gallagher@maples.com](mailto:john.gallagher@maples.com)

**Philip Keegan**

Partner, Funds & Investment Management

[philip.keegan@maples.com](mailto:philip.keegan@maples.com)

**Deirdre McIlvenna**

Partner, Funds & Investment Management

[deirdre.mcilvenna@maples.com](mailto:deirdre.mcilvenna@maples.com)

**Aaron Mulcahy**

Partner, Funds & Investment Management

[aaron.mulcahy@maples.com](mailto:aaron.mulcahy@maples.com)

**Eimear O'Dwyer**

Partner, Funds & Investment Management

[eimear.o'dwyer@maples.com](mailto:eimear.o'dwyer@maples.com)

**Niamh O'Shea**

Partner, Funds & Investment Management

[niamh.o'shea@maples.com](mailto:niamh.o'shea@maples.com)

**Emma Conaty**

Head of Global Registration Services

[emma.conaty@maples.com](mailto:emma.conaty@maples.com)

**Andrew Quinn**

Partner, Head of Tax

[andrew.quinn@maples.com](mailto:andrew.quinn@maples.com)

**William Fogarty**

Partner, Tax

[william.fogarty@maples.com](mailto:william.fogarty@maples.com)

**Ciaran Cotter**

Head of Debt Listing

[ciaran.cotter@maples.com](mailto:ciaran.cotter@maples.com)

### Luxembourg

**Johan Terblanche**

Managing Partner, Head of Funds & Investment Management

[johan.terblanche@maples.com](mailto:johan.terblanche@maples.com)

**Michelle Barry**

Associate, Funds & Investment Management

[michelle.barry@maples.com](mailto:michelle.barry@maples.com)

**James O'Neal**

Principal, Tax

[james.o'neal@maples.com](mailto:james.o'neal@maples.com)

### Cayman Islands

**Pádraig Brosnan**

Partner, Funds & Investment Management

[padraig.brosnan@maples.com](mailto:pdraig.brosnan@maples.com)

### Hong Kong

**Michelle Lloyd**

Partner, Funds & Investment Management

[michelle.lloyd@maples.com](mailto:michelle.lloyd@maples.com)



**MAPLES**  
GROUP

**London**

**Adam Donoghue**

**Partner, Funds & Investment Management**

[adam.donoghue@maples.com](mailto:adam.donoghue@maples.com)



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