maplesandcalder.com
maplesfs.com

MAPLES

Maples and Calder Funds Update – Ireland

Quarterly Update | April – June 2018

maplesandcalder.com
maplesfs.com

Contents

1 Legal & Regulatory

1.1 UCITS Update

There have been a number of developments over the quarter:

Irish UCITS regulatory framework review

On 29 June 2018 the Central Bank of Ireland's (the "**Central Bank's**") March 2018 consultation paper ("**CP119**") which proposes to consolidate and amend the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 closed. CP119 focused on amendments arising from review of the Central Bank UCITS Regulations, amendments to UCITS share class provisions to reflect the ESMA Opinion, amendments related to UCITS performance fee provisions and amendments arising from the EU Money Market Fund Regulation.

For more information see our client update, *Central Bank Review of the Regulatory Framework for Irish UCITS (CP119)*

Depositary safekeeping duties

Article 22a(3)(c) of the UCITS Directive 2009/65/EC requires that where a depositary delegates safe-keeping functions to third parties (custodians), the assets also need to be segregated at the level of the delegate. Delegated Regulation (EU) 2016/438 on safe keeping duties of depositaries details how this obligation is to be fulfilled. On 29 May 2018 the European Commission published a Draft Commission Delegated Regulation which amends Delegated Regulation (EU) 2016/438 for consultation (which closed on 26 June 2018). It issued one in relation to AIFs also.

The draft regulation sets out further detailed requirements where custody of UCITS clients' assets is delegated to a third party. This follows ESMA's 2017 opinion on asset segregation in which ESMA asked the Commission to clarify certain obligations of depositaries where they delegate safe keeping functions to third parties. It also aims to ensure a consistent approach across the EU and address concerns arising because securities and insolvency laws are not harmonised throughout the EU.

In response to industry requests, the Commission decided to defer the application date of the new delegated regulation for 18 months post finalisation and it published a further draft on 12 July 2018.

The next step is for it to be considered by the European Parliament and the European Council.

ESMA Q&A

On 25 May 2018 the European Securities and Markets Authority ("**ESMA**") published an updated version of its questions and answers or Q&A on the application of the UCITS Directive which includes one new Q&A on the application of remuneration disclosure requirements, under Article 69(3)(a), to staff of the delegate of an UCITS management company to whom investment management functions have been delegated.

For more information see *ESMA says UCITS Accounts Should Disclose Staff Pay of Delegates*

Central Bank Q&A

On 5 July 2018 the Central Bank published the twenty third edition of its UCITS Q&A amending Question ID 1002 on UCITS investing in non-UCITS investment funds. The amendments clarify that where a UCITS invests in a non-UCITS fund, the constitutional document of the non-UCITS must include a prohibition on investing more than 10% in other investment funds; and that the non-UCITS must be subject to requirements in its jurisdiction of domicile which are equivalent to certain UCITS investor protections. If this is not the case the non-UCITS fund must have requirements of the same effect in its constitutional or offering document.

UCITS should be in compliance with this revised Q&A as soon as possible taking into account the best interests of the investors. In any event, compliance should be ensured no later than 5 October 2018.

1.2 AIFMD Update

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

Depositary safekeeping duties

Delegated Regulation (EU) 231/2013 on safe keeping duties of depositaries supplements AIFMD. In particular, it specifies depositaries' duties with regard to the safe keeping of alternative investment fund ("**AIF**") clients' assets. On 29 May 2018 the European Commission published a Draft Commission Delegated Regulation amending Delegated Regulation (EU) 231/2013 for consultation (which closed on 26 June 2018). It issued one in relation to UCITS also.

It sets out further detailed requirements where custody of AIF clients' assets is delegated to a third party. This follows ESMA's 2017 opinion on asset segregation in which ESMA asked the Commission to clarify certain obligations of depositaries where they delegate safe keeping functions to third parties. The draft regulation aims to ensure a consistent approach across the EU and address concerns arising because securities and insolvency laws are not harmonised throughout the EU.

In response to industry requests, the Commission decided to defer the application date of the new draft delegated regulation for 18 months post finalisation and it published a further draft

on 12 July 2018. The next step is for it to be considered by the European Parliament and the European Council.

Central Bank Q&A

On 4 May 2018 the Central Bank published the thirtieth edition of its AIFMD Q&A. Existing Question ID 1083 on loan originating QIAIFs and obligations to report under the Central Credit Act 2013 is updated. It confirms that a loan originating QIAIF, in so far as their activities relate to the provision of credit, may fall within the scope of the Credit Reporting Act 2013. The Credit Reporting Act 2013 established a statutory central credit register. It requires most consumer and commercial lenders to register information concerning credit granted above €500 and basic information about the borrower. Since 31 March 2018 in scope lenders are required to submit credit information to the register by 30 September 2018.

1.3 CP86 – Fund Management Companies Guidance Notice

In December 2016 the Central Bank issued its CP86 feedback statement together with the final guidance for fund management companies on managerial functions, operational issues and procedural matters. Its' requirements in relation to the organisation of fund management companies came in to full effect on 1 July 2018. The requirements are supported by the December 2016 guidance.

The Central Bank has clarified that from 1 July 2018 its supervisory focus will shift to assessing how fund management companies have implemented and embedded the new requirements and related guidance into their organisations. Specific emphasis will be placed on assessing the appropriateness of resources and organisational structure. It will focus on the assessment work performed by the organisational effectiveness role holder and, in particular, how the boards have implemented any proposals to improve organisational effectiveness.

1.4 Fund Profile Return Guidance

The Central Bank Fund Profile Return replaces the IF Annual Sub-Fund Profile Return. The first Fund Profile Return has to be prepared for the period up to 30 June 2018 and submitted by 31 August 2018 by all Irish authorised sub-funds at 30 June 2018. The Central Bank issued a Guidance Note in June 2018 on how to complete the return.

For more information see *Regulatory Reporting for Irish Funds - New CBI Fund Profile Return and CRO Form FS1*

1.5 Corporate Governance Requirements for Investment Firms: Second Consultation

A 2015 Central Bank consultation paper (CP94) which proposed a number of corporate governance requirements for investment firms noted that these would be subject to the coming into effect of MiFID II. Given the recent implementation of MiFID II the Central Bank

wants to finalise these requirements in order to promote high standards of corporate governance.

These requirements have therefore been updated to take into consideration the European Union (Markets in Financial Instruments) Regulations 2017, delegated acts under MiFID II and the joint EBA and ESMA Guidelines on the assessment of the suitability of members of the management body and key function holders and form the basis of a second consultation paper (CP120) issued on 10 May 2018. It proposes rules relating to the:

- Composition of a board. In particular, it requires that the board is composed of a majority of independent non-executive directors, subject to certain exceptions where firms are subsidiaries of groups;
- Appointment of a Chairman who has sufficient expertise, qualifications and experience and who is an independent non-executive director. Again there is an exception to this requirement for subsidiary firms to allow the Chairman to be a group director; and
- The establishment and composition of certain committees of a board.

Responses are requested by 31 July 2018. The revised requirements will apply from 1 July 2019.

For more information see our client update *CP120 – CBI Consults on Corporate Governance Requirements for Investment Firms*

1.6 Fitness and Probity - Fund Management Company Directors

The Central Bank published a notice on fund management company directors who act as a designated person on 15 June 2018. This clarifies arrangements for submitting applications under the Central Bank's fitness and probity regime, in order to act as a designated person (PCF-39) of a fund management company. A PCF-39 application is required where: (i) an individual is seeking to perform a designated person role; or (ii) a director (acting as PCF-1 or PCF-2) also seeks to perform a designated person role. The Central Bank also issued a new fitness and probity guidance and forms in June 2018.

1.7 €443,000 Central Bank Fine for Regulatory Breaches Causing Loss of Client Funds

On 13 June 2018 the Central Bank fined an AIFM €443,000 and reprimanded it for significant breaches across three regulatory regimes: client asset, anti-money laundering and fitness and probity. The breaches were admitted by the firm whose failures left it exposed to a cyber fraud by a third party where, acting on the instructions of a fraudster impersonating a client, it facilitated transactions resulting in the loss of €650,000 of a client’s funds. The client was reimbursed. The Central Bank would have imposed a penalty of €825,000 had it not been for the financial position of the firm.

1.8 GDPR for Irish Funds

The General Data Protection Regulation (EU) 2016/679 ("**GDPR**") became law across the EEA on 25 May 2018. It updates the data protection regime in Ireland and mostly replaces the current rules on the collection, storage and processing of personal data in the Data Protection Acts 1988 to 2003. The Data Protection Act 2018 gives further effect to GDPR under Irish law and also came into force on 25 May 2018 (with the exception of a few provisions).

A corrigendum to GDPR was published on 23 May 2018 in the Official Journal of the EU making a number of minor corrections to its text. While the majority of the changes simply clarify the existing text, the corrigendum revises Article 37 of the GDPR which relates to the requirement to appoint a data protection officer ("**DPO**") in certain circumstances. The existing text is amended changing an "and" to an "or", which now means that a DPO must be designated where the core activities of the controller or the processor consist of processing on a large scale of special categories of data under Article 9 or personal data relating to criminal convictions and offences in Article 10. Given the categories of data involved, it is expected the revisions will have limited, if any, impact on funds, fund service providers and investment firms.

Maples' GDPR update package helps ensure compliance for funds and fund management companies. For more information see our client updates:

GDPR and the Funds Industry – What you Need to Know

GDPR for Funds: Is Consent Required From Investors?

1.9 Cross-Border Distribution of Investment Funds Proposals

On 12 March 2018 the European Commission published a regulation on facilitating cross-border distribution of collective investment funds, amending the European Venture Capital Funds Regulation 345/2013/EU ("**EuVECA Regulation**") and the European Social Entrepreneurship Funds Regulation 346/2013/EU ("**EuSEF Regulation**") and a proposal for a directive amending the UCITS Directive and AIFMD. On 15 June 2018 the Council of the EU published a note from the Council's General Secretariat to its Permanent Representatives Committee ("**COREPER**") confirming that these proposals have been examined by the working party on financial services and that the latest draft compromise proposals for a negotiating mandate (also published on 15 June 2018) are now supported by all delegations. On 20 June 2018 the European Commission announced that the Council of the EU has agreed its negotiating mandate on the proposed Directive and Regulation.

1.10 EU Securitisation Regulation

Regulation (EU) 2017/2402 on a general framework for securitisation and creating a specific framework for simple, transparent and standardised ("**STS**") securitisation ("**Securitisation Regulation**") and Regulation (EU) 2017/2401 amending the Capital Requirements Regulation 575/2013/EU entered into force on 17 January 2018. It applies to securitisations the securities of which are issued on or after 1 January 2019 or which create new securitisation positions on or after that date.

The Securitisation Regulation impacts both AIFs and UCITS. AIF managers' current due diligence, transparency and risk retention requirements under AIFMD will be repealed and replaced by the Securitisation Regulation. It will also bring UCITS management companies and internally managed UCITS that are authorised investment companies into the framework. For UCITS management companies and internally managed UCITS, no due diligence rules will apply initially. The European Commission may adopt delegated regulations under the UCITS Directive to bring them under the due diligence rules in the future.

ESMA is to publish draft technical standards implementing the Securitisation Regulation in July 2018 for a securitisation's STS status notification and third party application requirements, and by the end of 2018 for the reporting requirements and operational standards/access conditions.

For more information see our client update, *New EU Securitisation Regulation: Impact for Investment Funds*

1.11 Money Market Funds Regulation

The Money Market Funds Regulation (EU) 2017/1131 ("**MMFR**") came into force on 20 July 2017. It applies to money market funds established, managed or marketed in the EU and aims to make these investment products more resistant to contagion risks.

Most provisions apply from 21 July 2018 (with the exception of Article 11(4), Article 15(7), Article 22 and Article 37(4) which apply from 20 July 2017). Existing MMFs can avail of a further six month transition period to submit an application to the national competent authority ("**NCA**") demonstrating compliance with the MMFR.

Commission Implementing Regulation (EU) 2018/708 laying down implementing technical standards ("**ITS**") on the template to be used by MMF managers when reporting to competent authorities came into force on 4 June 2018 and applies from 21 July 2018.

Commission Delegated Regulation (EU) 2018/990 amending and supplementing the MMF Regulation with regard to simple, transparent and standardised ("**STS**") securitisations and asset-backed commercial papers, requirements for assets received as part of reverse repurchase agreements and credit quality assessment methodologies approved by the European Parliament in June 2018 enters into force on 2 August 2018. It will apply from 21 July 2018, with the exception of Article 1, which will apply from 1 January 2019. It covers MMF investment requirements and ensures coherence of those requirements by giving the people subject to them an overview and single point of access to them.

1.12 EMIR Update

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

There have been a number of developments over the quarter:

On 4 May 2018 the Joint Committee of the European Supervisory Authorities ("**ESAs**") published two consultations (which closed on 15 June 2018):

(i) A consultation paper on amendments to regulatory technical standards ("**RTS**") relating to the EMIR clearing obligation as a result of the Securitisation Regulation (EU) 2017/2402. The draft RTS amend the existing RTS on the EMIR clearing obligation to clarify which arrangements under covered bonds or securitisations adequately mitigate counterparty risk and, as a result, may benefit from an exemption from the clearing obligation.

(ii) A consultation paper on draft RTS amending Delegated Regulation (EU) 2016/2251 on RTS on risk mitigation techniques for OTC derivative contracts not cleared by a CCP under Article 11(15) of EMIR in the context of simple, transparent and standardised or STS securitisations under the Securitisation Regulation. The draft RTS amend the existing RTS on the EMIR margining obligation to clarify which securitisations may benefit from an exemption from the initial margin obligation and the obligation to post (though not collect) variation margin (again due to adequate mitigation of counterparty risk).

On 28 May 2018 ESMA published its final report on guidelines on anti-procyclicality or APC margin measures for CCPs under EMIR. The guidelines aim to ensure a common, uniform and consistent application of EMIR to limit procyclicality of CCP margins. They cover the monitoring of margin procyclicality, the implementation of APC margin measures and disclosures intended to facilitate margin predictability. They will apply from 3 December 2018 and national competent authorities must notify ESMA whether they comply, or intend to comply, with the guidelines within two months of the date of publication on ESMA's website.

On 30 May 2018 ESMA updated its EMIR Q&As to clarify reporting to trade repositories.

On 22 June 2018 ESMA published an opinion which sets out how CCPs in the EU should consider in their internal risk models the liquidity risk posed by all entities towards which the CCP has a liquidity exposure, such as liquidity providers.

EMIR amending regulations

On 12 June 2018 the European Parliament adopted and published the provisional text of the proposed Regulation amending EMIR (the "**EMIR Refit Regulation**") which simplifies clearing rules for small financial counterparties (and, in some cases exempts, them from cleaning) and temporarily extends the pension funds exemption from the mandatory clearing of derivatives. The proposal would take most funds out of scope for OTC clearing (currently scheduled to take effect on 21 June 2019 for the majority of funds) unless exposure to an OTC derivative class exceeds the relevant clearing threshold (between €1-3bn depending on underlying asset and not including hedging trades). It also mandates that national regulators pre-review collateral risk management processes; places legal responsibility for reporting on the UCITS manco/AIFM (currently with the fund board); and brings QIFs in to scope as financial counterparties (subject to the full scope of EMIR requirements). It is due to be considered by the Council of the EU and the Commission in July 2018. It will enter into force 20 days after publication in the Official Journal of the EU.

On 27 June 2018 the Council of the EU published a revised proposal for a consolidated Presidency compromise text on the proposed Regulation amending the ESMA Regulation 1095/2010 and EMIR with regard to the procedures and authorities involved for the authorisation of CCPs and the recognition of third-country CCPs.

1.13 Central Beneficial Ownership Register Update

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 which transpose parts of the Fourth Anti-Money Laundering Directive 2015/849/EU ("**MLD4**") require companies and other legal entities incorporated in Ireland to hold adequate, accurate and current information on their "beneficial owners" on an internal register since 15 November 2016. MLD4 also required EU Member States to establish a central register of beneficial ownership by 26 June 2017.

On 11 June 2018 the Companies Registration Office ("**CRO**") newsletter stated that the Department of Finance has advised that a statutory instrument is expected shortly assigning separate legal responsibility to the Registrar of Companies for the establishment of the central register of beneficial ownership of companies and that it is on track to have the beneficial ownership elements of MLD4 transposed soon. Other regulations are planned to cover trusts and ICAVs. It is envisaged that there will be an extended timeframe for companies to make their beneficial ownership filings after the register launch. On 10 July 2018 following the adoption of the Fifth Anti-Money Laundering Directive the CRO has advised that it is considering the implications of it for the central register of beneficial ownership and will provide an update in the near future (see "AML Update" below for more details).

1.14 AML Update

EU Member States were obliged to transpose the Fourth Money Laundering Directive (EU) 2015/849 ("**MLD4**") into national law by 26 June 2017. Only parts of it have been transposed into Irish law; the rest of its provisions will be implemented by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2018 which is progressing through the legislative process.

On 7 May 2018 the European Commission adopted a Delegated Regulation with RTS relating to central contact points under MLD4. It sets out the criteria for the appointment of central contact points for electronic money issuers and payment service providers. The next step is for the Council of the EU and the European Parliament to consider it.

On 7 June 2018 COREPER endorsed the informal trialogue agreement reached by European Parliament, Council and European Commission on the proposed Directive on countering money laundering by criminal law. It aims to harmonise the definitions of criminal offences and sanctions related to money laundering across the EU and remove obstacles to cross-border judicial and police co-operation, while bringing the EU rules in line with international obligations.

The European Parliament's Civil Liberties Committee will now vote on it. The Directive will then need to be formally adopted by the European Parliament and the Council.

Central Bank AML Bulletin

In May 2018 the Central Bank issued its 4th Anti-Money Laundering Bulletin focusing on investment firms. It highlights emerging trends noting that firms are moving away from face-to-face relationships with their customers and increasingly using online platforms to distribute products and that some are facilitating trading through options or futures in new products such as cryptocurrencies. Both are acknowledged as increasing the risk of money laundering and terrorist financing and it states that firms must ensure they enhance their procedures to identify these risks.

It also identifies compliance issues in the following areas:

(i) Money laundering ("**ML**") and terrorist financing ("**TF**") risk assessments. Some firms' risk assessments were not tailored to their specific ML/TF risks. Some were not reviewed regularly and residual risk was often not adequately assessed.

(ii) PEPs ("**politically exposed persons**") screening and transaction monitoring – it was not demonstrated by some firms that all customers were screened regularly to determine any changes in PEP status. It was thought that the parameters used in relation to transaction monitoring of PEP customers were too generic and not bespoke to the individual firm. These parameters must also be reviewed or approved by compliance and/or senior management.

(iii) Resourcing and training – some firms did not have a permanent MLRO or head of compliance with responsibility for AML/CTF. It was noted that some training programmes were too generic.

The ESAs issued Risk Factor Guidelines in June 2017. The Bulletin reminds all designated persons in Ireland were expected to have considered and, where applicable, implemented them by 26 June 2018.

MLD5

The Fifth Money Laundering Directive (EU) 2018/843 ("**MLD5**") which amends MLD4 enters into force on 9 July 2018. EU Member States have to transpose it into national law by 10 January 2020. It improves co-operation between EU FIUs (financial intelligence units) and their access to information including centralised bank account registers; enhances due diligence requirements for financial transactions to and from high-risk third countries; addresses risks associated with the use of pre-paid cards and virtual currencies; and widens access to the central beneficial ownership registers (introduced by MLD4) for companies and other legal entities to the general public (but not for trusts, which will still require demonstration of a legitimate interest). For more details see "Central Beneficial Ownership Register Update" above, section 1.13.

1.15 EU Proposals on Sustainable Finance

On 24 May 2018 the European Commission published legislative proposals on reforms relating to sustainable finance. They aim to integrate environmental, social and governance ("**ESG**") considerations into the investment and advisory process in a consistent manner across sectors. The proposals are as follows:

(i) A Regulation on the establishment of a framework to facilitate sustainable investment which introduces an EU-wide taxonomy of environmentally sustainable activities;

(ii) A Regulation on disclosures by financial institutions relating to sustainable investments and sustainability risks; and

(iii) A Regulation amending the Benchmarks Regulation introducing a new category of benchmarks comprising low carbon benchmarks and positive carbon impact benchmarks. (For more details see "Benchmark Regulation" below, section 1.19.)

Both (i) and (ii) above apply to "financial market participants" offering financial products as environmentally sustainable investments or as investments having similar characteristics and include: a manager of an AIFM; an investment firm that provides portfolio management; a UCITS management company and a manager of a EuVECA or a EuSEF. As EU long-term investment funds or ELTIFs may only be managed by AIFMs, AIFMs managing ELTIFs also fall under the definition and must meet the transparency requirements on ELTIFs.

The Commission also published for consultation a draft delegated regulation under MiFID II which will require investment firms to ask their clients about their preferences on ESG and then to take them into account when advising their clients (For more details see "MiFID II/MiFIR Update" below, section 1.18).

1.16 Criminal Justice (Corruption Offences) Act 2018

This Act was signed into law on 5 June 2018 and is expected to be commenced on 30 July 2018. It modernises and consolidates existing legislation relating to bribery and corruption dating back to 1889. The Act introduces a number of new corruption offences and penalties including a strict liability offence where a corporate body can be liable for the actions of directors, managers, employees or agents who commit a corruption offence for the benefit of that body. The penalty for the company can be an unlimited fine. Other new offences include active and passive trading in influence; an Irish official doing a corrupt act in relation to his or her office; giving a gift, consideration or advantage knowing that it will be used to commit a corrupt offence and creating or using false documents.

Corruption offences are also given extra-territorial effect under the Act similar to the UK Bribery Act 2010.

1.17 ESMA One-Stop Company Portal - MiFID/UCITS/AIFMD Entities

On 7 May 2018 ESMA published a new one-stop company portal, which enables investors to establish whether a financial service provider is authorised within the EU. It provides information on certain types of firms including:

(i) Investment firms authorised under MiFID II;

(ii) MiFID trading venues;

(iii) MiFID data reporting service providers;

(iv) UCITS management companies; and

(v) Fund managers authorised under AIFMD including funds that are managed, or marketed, in the EU.

1.18 MiFID II/MiFIR Update

The Markets in Financial Instruments Directive (2014/65/EU) ("**MiFID II**") and the Markets in Financial Instruments Regulation (Regulation 600/2014) ("**MiFIR**") apply from 3 January 2018. The European Union (Markets in Financial Instruments) Regulations 2017 (as amended by the European Union (Markets in Financial Instruments) (Amendment) Regulations 2017) transpose MiFID II into Irish law. Some complementary measures (for instance, to provide for significant penalties for convictions on indictment) require primary legislation and therefore the Markets in Financial Instruments Bill 2018 was published in April 2018 for this purpose. The Bill also makes technical amendments to the Credit Reporting Act 2013 and the Financial Services and Pensions Ombudsman Act 2017 and is progressing through the legislative process.

On 10 April 2018 ESMA published a letter to the European Commission on the exemption from authorisation as an investment firm that non-financial entities are eligible for when their commodity derivative trading activity is ancillary to their main business as set out in MiFID II. It asks for further guidance on how the ancillary criteria in Article 2(4) of MiFID II are to be implemented and at which level the tests should be performed.

On 15 May 2018 ESMA updated its FAQs on transitional transparency calculations for equity and bond instruments required under MiFID II.

EU legislative proposals on sustainable finance published on 24 May 2018 included a consultation on a draft Delegated Regulation which amends Delegated Regulation (EU) 2017/565 which supplements MiFID II as regards organisational requirements and operating conditions for investment firms and defined terms. It states that investment firms providing financial advice and portfolio management should carry out a mandatory assessment of ESG preferences of their clients and should take these ESG preferences into account when selecting the financial products that are offered to those clients; and requires investment firms to provide information to clients regarding the ESG factors of financial products before the provision of investment advice and portfolio management services and also report to the client how their recommendation meets the client's investment objectives, risk profile, capacity for loss bearing and ESG preferences. The deadline for feedback on this draft Delegated Regulation was 21 June 2018.

On 28 May 2018 ESMA published final guidelines on MiFID II suitability requirements. The assessment of suitability is one of the most important requirements for investor protection in the MiFID framework and applies to the provision of any type of investment advice, whether independent or not, and portfolio management.

Over the quarter ESMA updated its MiFID II/MiFIR Q&As on investor protection and intermediaries topics (covering best execution; client categorisation; and provision of investment services and activities by third country firms); on data reporting under MiFIR; on transparency (elating to pre-trade transparency requirements for request for quote systems, the requirements to publish information on post-trade data 15 minutes after publication free of charge, the publication of transactions and pre-trade transparency requirements for voice trading systems) and market structures topics;

On 1 June 2018 the following two ESMA decisions under Article 40 of MiFIR implementing temporary product intervention measures prohibiting the provision of binary options and restricting the provision of contracts for difference ("**CFDs**") were published in the Official Journal of the EU:

(i) ESMA Decision (EU) 2018/796 which restricts the marketing, distribution or sale of CFDs to retail investors. It will apply from 1 August 2018 for three months.

(ii) ESMA Decision (EU) 2018/795 to temporarily prohibit the marketing, distribution or sale of binary options to retail clients in the EU. It will apply from 2 July 2018 for three months.

ESMA has also published a set of Q&As to explain the action it has taken, together with product intervention analyses for the measures it has taken for both CFDs and binary options.

On 22 June 2018 ESMA published a letter from the European Commission Vice President on the exemption in Article 2(1)(j) of MiFID II clarifying the ancillary activity test under MiFID II.

The second edition of the Irish Funds MiFID II Q&A was published on 25 June 2018 with new Q&As on: operational considerations for setting up research payment accounts; delegation of portfolio management activities to a third country investment manager and client reporting for investment funds in the event of a 10% depreciation in the overall portfolio value.

1.19 Benchmark Regulation

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

On 24 May 2018 ESMA updated its questions and answers on the BMR with a new answer on how prospectuses should include reference to the register of administrators depending on whether they were approved prior to or after 1 January 2018.

EU legislative proposals on sustainable finance published on 24 May 2018 include a regulation amending the BMR to introduce a new category of benchmarks comprising low carbon benchmarks and positive carbon impact benchmarks. It proposes: requiring administrators of benchmarks or of families of benchmarks that pursue or take into account ESG objectives to explain how the key elements of the methodology reflect the ESG factors; provisions setting out the key requirements applicable to the methodology for low-carbon or positive carbon impact benchmarks; and requiring administrators to explain in the benchmark statement how ESG factors are reflected for each benchmark or family of benchmarks provided that pursue or take into account ESG objectives.

The Commission is inviting feedback on these proposals by 19 July 2018.

1.20 PRIIPs KID Regulation

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

On 16 May 2018 the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published its report on sustainable finance which recommends that the European Commission should use its powers under the PRIIPs KID Regulation to adopt a delegated act specifying the details of procedures for establishing whether a PRIIP targets specific environmental or social objectives.

1.21 CSDR: Regulating Central Securities Depositories

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

On 25 May 2018 the European Commission published a Delegated Regulation supplementing CSDR with regard to RTS on settlement discipline (measures to prevent and address settlement fails). The next step will be for the Council of the EU and the European Parliament to consider it.

On 30 May 2018 ESMA updated its CSDR implementation Q&As to cover CSDs' investment policy and clarifies the requirement to have "access to assets" on the same business day when a decision to liquidate those assets has been made. It states that a CSD should be able to dispose of the financial instruments on the day when the decision to liquidate is made. It does not necessarily entail that a CSD should liquidate these financial instruments on the same business day.

1.22 Central Bank: Lack of Diversity in Management and Gender Pay Gap Analysis

On 4 May 2018 the Central Bank announced that it will challenge supervised firms over lack of diversity at board and management level and published its first gender pay gap analysis report.

Challenge over lack of diversity at board and management level

Available research suggests diversity can lead to improved outcomes in terms of governance, decision making and productivity. In the absence of voluntary improvements in diversity on the part of firms, the Central Bank will consider putting specific requirements in place according to a speech given by Sharon Donnery, Deputy Governor, Central Banking at the Central Bank of Malta's 50th anniversary conference.

Gender pay gap analysis report

The report shows that 50% of Central Bank staff are male and 50% are female, with women making up 39% of directors and 49% of division heads. There are some differences in gender profiles across different grades and consequently, there is an overall difference of 2.7% between the average pay for males and females across the Central Bank. Deputy Governor Donnery concluded by saying that while the Central Bank's pay gap is less than other organisations, there is room for continued improvement.

1.23 FCA Policy Changes for the Asset Management Industry

Following its asset management market study, the UK Financial Conduct Authority ("**FCA**") published a policy statement in April 2018 announcing remedies aimed at improving practices in the asset management industry. It requires fund managers to assess value offered to investors and increases emphasis on the duty of fund managers to act in the best interests of investors and improved board governance. The measures will be rolled out over the next 12 to 18 months.

Maples have considered whether they may influence future guidance for Irish funds. (Note however that the FCA's core objective is to promote competition in the interests of consumers and although the Central Bank's mission is to safeguard financial stability and protect consumers it is not mandated to promote effective competition). Some measures of interest are:

- **Fund governance.** Fund managers will be required to appoint a minimum of two independent directors to their board and for them to comprise at least 25% of the total board membership.

  The rules provide that an independent director can serve up to five years (renewed once to a maximum of ten years) within one group, starting from the time of first appointment. The clock starts on the date the rules come into effect. Independent members are not eligible for reappointment until five years after the end of the maximum 10 year period.

Noting the Central Bank often follows this type of FCA guidance, this could potentially drive a bigger shake up than CP86 location rules if it adopted a similar requirement.

The FCA is also extending its new accountability rules (the senior manager and certification regime) to certain fund manager board members by creating a new prescribed responsibility for fund managers. This requires a senior manager to take reasonable steps to ensure that the firm complies with its obligations to carry out the assessment of value; the duty to recruit independent directors; and the duty to act in the best interests of fund investors. Fund managers will not however need to appoint an independent chair.

- **Cheaper share classes.** Fund managers will have to move investors into the cheapest share class, when it is in their interests. The requirement to get individual consent from each investor before converting them has been removed. Fund firms will be required to make a simple one-off notification to investors, a minimum of 60 days before a conversion. From an Irish funds' perspective, this could potentially be carried over to non-UK funds registered in the UK, particularly post-Brexit.

FCA Consultation

In a separate April 2018 consultation paper on further remedies the FCA has issued draft non-handbook guidance which apply to UK fund managers managing authorised funds on:

- **Fund objectives and benchmarks.** Noting that managers use the term 'benchmark' to denote an index or similar factor used to constrain investment and to target or compare performance, the FCA observed that investors would benefit from a more precise use of the term. The proposals aim to ensure that benchmarks are referred to consistently across each fund's prospectus and relevant communications. Where a manager has not used a benchmark, the FCA proposes that the manager must explain to investors how they should assess a fund's performance.

The FCA observes that fund managers tend to present benchmarks inconsistently in different consumer-facing documents for the same fund. It proposes that where a fund is constrained by and/or targets a benchmark, any presentation of past performance must be compared to that benchmark – and not against benchmarks lower than or different to those used in other disclosures for that fund. Where a manager uses comparator benchmarks, no equivalent requirement to show fund performance against the benchmarks is proposed. However, if a manager chooses to compare their performance against one or more comparator benchmark, they must do so consistently.

An implementation period of three months for the new handbook rules and guidance covered in the 'benchmarks' section is proposed for the new funds, and six months for existing funds.

The above proposals could have a corresponding application or influence on future guidance for Irish funds in the context of (i) fund governance / accountability (ii) cheaper share classes and (iii) fund objectives and benchmarks.

- **Performance fees.** The FCA is proposing that performance fees be calculated on performance net of other fees in all cases, preventing the charging of fees on a gross basis. Noting again that, unlike the FCA, the Central Bank's mandate does not extend to promoting effective competition, it remains to be seen whether these will influence the Central Bank's recent consultation on its UCITS Regulations which seeks to capture, amongst other changes, existing performance fee guidance and restrict paying a performance fee more frequently than annually (for more detail see 1.1 above).

1.24 ELTIF Regulation

On 12 April 2018 Commission Delegated Regulation (EU) 2018/480 supplementing the Regulation on European Long-Term Investment Funds (EU) 2015/760 ("**ELTIF Regulation**") with regard to RTS on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the ELTIF, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors entered into force.

1.25 EU Distribution Systems of Retail Investment Products Report

On 24 April 2018 the European Commission published a final report analysing the distribution systems of retail investment products across the EU. It covers 15 EU Member States (including Ireland) chosen because of their market size, date of EU integration, and range of specific policy frameworks in place.

It focuses on the:

- Supply through various distribution channels of the following retail investment products: investment funds, listed bonds and equities, life insurance products with investment components, and pension products;
- Access to financial advice by retail investors, and related risks and benefits;
- Impact of online distribution on the retail investment offering (particularly the breadth and terms of the offer) and investor protection; and
- Risks and benefits of new distribution models developed by FinTech companies.

1.26 Capital Requirements Regulation

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

The European Union (Capital Requirements) (Amendment) Regulations 2018 amends the European Union (Capital Requirements) Regulations 2014 (which implement the CRD IV Directive 2013/36/EU and the CRR in Ireland) and includes technical amendments to definitions, to notifications to be sent to competent authorities of other Member States in certain circumstances, to the provision ensuring that institutions have in place procedures for employees to internally report potential or actual breaches, to the provision covering contraventions, and to clarify that a failure by the Central Bank to notify an applicant of rejection in the case of certain applications is an appealable decision.

On 7 June 2018 Commission Delegated Regulation (EU) 2018/728 on RTS on the procedures for excluding transactions with non-financial counterparties ("**NFCs**") established in a third country from the own funds requirement for credit valuation adjustment ("**CVA**") risk came into force.

1.27 Investment Funds Statistics: Q1 2018

The main points to note in the Central Bank's June Q1 2018 update are as follows:

(a) The net asset value of investment funds resident in Ireland increased by 1% (€23bn) over Q1 2018, to €1,935bn. The total value of assets held by investment funds increased by €53bn to €2,293bn.

(b) The total equity holdings of all funds amounted to over a trillion euro (€1,004bn) at end-March, increasing by €5bn from Q4 2017, driven by strong net purchases of €34bn, which more than offset negative revaluations.

(c) Holdings of debt securities by all funds amounted to €908bn at end-March, reflecting net purchases of €44bn and negative revaluations of €11bn over the quarter.

2 Tax

2.1 Irish Real Estate Fund – Filing Deadlines

The Finance Act 2016 introduced a new tax regime for Irish regulated funds which have invested in Irish real estate assets, including direct and indirect interests in Irish property. If a fund is classified as an Irish Real Estate Fund (or IREF), it is obliged to deliver a specific IREF tax return. The Irish Revenue Commissioners ("**Revenue**") published the return and related guidance on 29 June 2018. Managers and funds subject to these requirements should confirm that the return is being prepared in order to avoid fines and penalties.

Funds with a 31 December financial year end must file their 2017 returns by 30 July 2018, although this may be extended in certain cases. As set out in the Revenue's guidance, the tax due under the return must be paid by 30 July 2018 under the "pay and file" system.

Funds which are treated as IREFs should ensure that an appropriate service provider is tasked with the preparation and filing of the return. Although many administrators deal with VAT and investment undertaking tax returns, the IREF return may not be specifically listed in the schedule of services. It may be necessary to amend the administration agreements to deal with the preparation of the IREF return.

Detailed information is required to complete the return and this may take considerable effort and time to collate. In addition, there are elements of the return that will require specialist tax advice prior to submission.

2.2 Irish Funds – Financial Accounts Reporting

The Finance Act 2017 introduced a potential obligation on Irish regulated funds to file their financial statements with Revenue (see section 730FA of the Taxes Consolidation Act 1997). This requirement will be implemented by regulations issued by the Irish Minister for Finance.

The consultation on these regulations has commenced. They are expected to apply to Irish Real Estate Funds initially and will require them to submit their financial statements electronically using a prescribed format. The returns will likely be aligned with the IREF tax payment dates, such that a financial year ending on 31 December 2018 will be the subject of a return by 30 July 2019.

2.3 Mandatory Disclosure of Aggressive Tax Planning by Promoters

Given their international focus, investment managers, directors and advisors of Irish funds will be interested in the new EU regime on tax planning.

Directive (EU) 2018/822 entered into force on 25 June 2018 and provides for the mandatory and automatic exchange of information regarding aggressive tax planning by EU taxpayers.

EU Member States are required to implement the Directive by 31 December 2019 with first reporting to start from July 2020. However, importantly, the reporting obligations have retrospective effect and intermediaries should, in broad terms, keep a record of disclosable transactions from 25 June 2018.

The information exchange will apply to cross border transactions (those involving more than one EU Member State or involving a Member State and a third country) which bear certain "hallmarks". The Directive sets out 15 hallmarks including where payments are made to no and low tax jurisdictions or transactions which benefit from a preferential tax regime in a recipient jurisdiction.

Persons who are considered to be "intermediaries" are required to disclose cross-border arrangements which bear one of the "hallmarks". The definition of intermediary is broadly drafted and includes any person who had a role in the design, marketing, organisation, management, or in aiding, assisting or advising in relation to the transaction. Tax advisers, accountants, investment managers and lawyers may all be intermediaries. However, information held by lawyers will most likely be protected by legal professional privilege and should, therefore, not be disclosable. If no intermediary is obliged or permitted to satisfy the disclosure, then the obligation falls to the taxpayer.

It is unclear how the Irish government will implement these measures. Mandatory disclosure rules already exist in Ireland and require promoters or taxpayers to disclose information to Revenue in relation to certain transactions. It is likely that the Directive will now bring more transactions within scope by virtue of the broader concept of intermediary and the number of

hallmarks included. Information disclosed under the new regime will also be subject to automatic exchange with other EU national tax authorities.

2.4 Certificates of Irish Tax Residency for Funds

On 27 June 2018 Revenue issued revised guidance on letters of Irish tax residency, including letters relating to Irish regulated funds. Persons (individuals, partnerships, and companies) resident in Ireland for tax purposes may be in receipt of income from another jurisdiction. Such foreign jurisdictions often require Irish resident persons to obtain certification or clarification from Revenue that they are tax resident in Ireland. Revenue may be requested by the Irish resident person to issue a letter of residence for transmission by the taxpayer to the foreign jurisdiction. Requests for certification of residence for funds are to be submitted via ROS (Revenue Online Service) and can be submitted by the fund itself via their ROS digital certificate or by an agent using an agent's ROS digital certificate, where the agent is linked to that fund via a TAIN (Tax Agent Identification Number). Funds should ensure that where tax residency certificates are required they can be secured in a timely manner.

3 Listings

3.1 Funds - Listing Rule Changes

Euronext Dublin (formerly the Irish Stock Exchange) on 1 June 2018 amended their listing rules for investment funds and, in particular, for UCITS funds.

There is no longer a strict requirement to appoint a listing sponsor for UCITS funds and the role can be taken on by a UCITS management company (or Manco) authorised under the UCITS Directive. The UCITS Manco may delegate the application process for "*admission of the units of a UCITS fund to the markets of Euronext Dublin and for monitoring a UCITS fund's compliance with the listing rules but ultimate responsibility for a UCITS fund's compliance with LR1.2 of the code lies with the authorised UCITS Management Company. Such delegation may only be to a professional services firm with an established investment funds practice with significant experience in providing professional advice to UCITS funds and UCITS Management Companies*".

A UCITS fund can still employ a listing sponsor and this role remains a requirement for other Irish and EU regulated funds and for all offshore funds.

Euronext Dublin has also reduced the notification requirements for UCITS funds listed on its Main Securities Market ("**MSM**"). In terms of specific notifications any listed UCITS fund must notify by announcement, without delay, of the following information:

(i) Any decision to cancel the listing of a listed fund, sub-fund, class or series;

(ii) The net asset value per share, upon calculation, or any material amendment thereto;

(iii) Any change in the names of the listed fund, sub-funds, classes or series;

(iv) Any change in the financial year end of the listed fund;

(v) Any material change in the listed fund's constitutive documents;

(vi) Any change in sponsor, registrar, auditor or transfer agent; and

(vii) Any change of director, administrator, investment manager, depositary, prime broker, or any credit institution holding cash assets.

Among the matters no longer requiring notification for UCITS funds are changes in investment policy or strategy; changes in valuation policy; changes in dividend policy; change in the tax status of the fund; change in frequency of calculation of net asset value; change in the redemption policy; suspension of redemptions, transfers and calculation of net asset value; changes of directors, AGMs or EGMs; and dividend payments.

All listed funds will still need to make notifications under the EU Market Abuse Regulation 596/2014; file annual accounts; make appropriate notifications regarding interests in shares and issue notifications relating to dealings by the investment manager.

For funds listed on the Global Exchange Market, similar notification requirements apply to all Irish regulated funds and other EU regulated funds authorised in EU Member States deemed to be equivalent by Euronext Dublin, such as Luxembourg regulated funds.

3.2 MiFID II Temporary Period for LEIs ends in July 2018

The Legal Entity Identifier or ("**LEI**") is a 20-digit, alpha-numeric code that enables clear and unique identification of legal entities participating in financial transactions. On 20 December 2017 ESMA published a statement on the implementation of the LEI requirements under MiFIR because of indications that not all investment firms would have been able to obtain LEI codes from all of their clients before 3 January 2018 (the date from which MiFIR applies). Consequently, for six months after 3 January 2018 ESMA allowed:

(i) Investment firms to provide a service triggering the obligation to submit a transaction report to the client, from which it did not previously obtain an LEI code, under the condition that before providing such service the investment firm obtains the necessary documentation from this client to apply for an LEI code on their behalf.

(ii) Trading venues to report their own LEI codes instead of the LEI codes of non-EU issuers that do not currently have their own LEI codes.

On 20 June 2018 ESMA issued a statement stating that there is no need to extend this initial six month period. As the application of the December 2017 statement also required NCAs to temporarily amend a validation rule in their transaction reporting systems, this amendment will be reversed for transactions executed after the six month period. However, reports for

transactions executed between 3 January 2018 and 2 July 2018 will still be accepted even if the LEI issuance date is after the execution date. Investment firms are invited to contact their NCA (in Ireland, the Central Bank) for the specific details regarding this adjustment. The end of the six month period means that NCAs' activities regarding LEI requirements are shifting from monitoring to ongoing supervisory actions.

Contacts

DUBLIN

Peter Stapleton
Partner, Head of Investment Funds, Dublin
peter.stapleton@maplesandcalder.com
+353 1 619 2024

Stephen Carty
Partner, Dublin
stephen.carty@maplesandcalder.com
+353 1 619 2023

Ian Conlon
Partner, Dublin
ian.conlon@maplesandcalder.com
+353 1 619 2714

Eimear O'Dwyer
Partner, Dublin
eimear.o'dwyer@maplesandcalder.com
+353 1 619 2065

Ciara O'Leary
Partner, Dublin
ciara.o'leary@maplesandcalder.com
+353 1 619 2034

Deirdre McIlvenna
Partner, Dublin
deirdre.mcilvenna@maplesandcalder.com
+353 1 619 2064

Emma Conaty
Head of Global Registration Services, Dublin
emma.conaty@maplesandcalder.com
+353 1 619 2708

John Gallagher
Partner, Dublin
john.gallagher@maplesandcalder.com
+353 1 619 2073

Andrew Quinn
Partner, Head of Tax, Dublin
andrew.quinn@maplesandcalder.com
+353 1 619 2038

Ciaran Cotter
Head of Debt Listing, Dublin
ciaran.cotter@maplesandcalder.com
+353 1 619 2023

LONDON

Adam Donoghue
Partner, London
adam.donoghue@maplesandcalder.com
+44 120 7466 1711

CAYMAN ISLANDS

Pádraig Brosnan
Partner, Cayman
padraig.brosnan@maplesandcalder.com
+1 345 814 5441

HONG KONG

Michelle Lloyd
Partner, Hong Kong
michelle.lloyd@maplesandcalder.com
+852 3690 7504

About Maples

Maples and Calder is a leading international law firm advising financial, institutional and business clients around the world on the laws of the Cayman Islands, Ireland and the British Virgin Islands. The firm's affiliated organisation, MaplesFS, provides specialised fiduciary, accounting and administration services to corporate, finance and investment funds entities. The Maples group comprises more than 1,600 staff in 16 offices worldwide.

Since establishing in Ireland in 2006, the Dublin office has grown to over 350 people and has advised on many high profile and complex transactions in Ireland.

Maples and Calder is independently ranked first amongst law firms in Ireland in terms of total number of funds advised and number of new funds established (based on Monterey's most recent report, as at 30 June 2017).

To find out more about the firm visit maplesandcalder.com and maplesfs.com