



MAPLES
GROUP

Funds & Investment Management Update – Ireland and Luxembourg

Quarterly Update | April – June 2021

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1 Legal & Regulatory

1.1 UCITS Update

Ireland

On 18 May 2021, the Central Bank of Ireland ("Central Bank") published an [industry letter](#) following the European Securities and Markets Authority ("ESMA") project to review liquidity risk management frameworks for UCITS. The letter closely follows ESMA's March 2021 public statement at the conclusion of its Common Supervisory Action ("CSA") on UCITS liquidity risk management ("LRM"). The letter is addressed to all Irish authorised UCITS managers and directs them to review their liquidity risk management practices, documentation, systems and controls. The review must be completed and an action plan approved by the board of each UCITS manager by the end of Q4 2021.

For more information see our client update, [CBI Calls for UCITS Managers to Review Liquidity Risk Management Frameworks](#)

On 24 June 2021, the Central Bank issued the [31st edition](#) of its UCITS Q&A which includes a new Q&A, ID 1099. The new Q&A confirms the Central Bank's position in relation to a UCITS having a share class that makes distributions to charity. It confirms that this is permissible, subject to a number of requirements being met by the UCITS.

Luxembourg

On 22 June 2021, the Commission de Surveillance du Secteur Financier ("CSSF") published a [report](#) following the conclusion of ESMA's CSA on UCITS LRM. It presents the CSSF's main observations in the context of the CSA together with recommendations for improvements in light of applicable regulatory requirements and confirms the CSSF is currently engaging with investment fund managers ("IFMs") on these observations. In addition, the report directs each IFM to assess the compliance of its LRM set-up against ESMA's and the CSSF's observations by the end of 2021 and, where necessary, to take corrective measures.

On 10 June 2021, the CSSF [published](#) an updated [FAQ on the law of 17 December 2010](#) to reflect one new FAQ on the application of MiFID II to IFMs, which includes UCITS management companies authorised in Luxembourg. IFMs are generally exempt from MiFID II as managing an investment fund is not a MiFID II regulated activity, however, many IFMs delegate the portfolio management function to an external party. The FAQ clarifies that the exemption foreseen under Article 2(1)(i) of MiFID II does not apply to such a delegate, and that MiFID II rules may apply to the delegate if: (i) the service qualifies as an investment service or activity under MiFID (e.g. portfolio management); (ii) the service relates to financial instruments as defined under MiFID; and (iii) the service is provided by an EU entity or is considered to be provided in Luxembourg by a third country entity. Where a delegate is an IFM, it must be authorised to provide the MiFID top-up services listed in Article 101(3) of the [law of 17 December 2010](#) relating to undertakings for collective investment, as amended ("2010 Law"), and will also be required to comply with certain requirements under MiFID II and the [law of 5 April 1993](#) on the financial sector, as amended ("1993 Law"). The FAQ also clarifies the application of MiFID II to: (i) the marketing of a fund; and (ii) investment advice provided by investment advisors and IFMs to other IFMs.

EU

On 28 May 2021, ESMA published an updated version of its UCITS Q&A's which add two new [Q&As](#) to the performance reference period for the benchmark model and the performance reference period in case of funds' mergers.

1.2 AIFMD Update

Ireland

On 24 June 2021, the Central Bank issued the [39th edition](#) of its Alternative Investment Fund Managers Directive [2011/61/EU](#) ("AIFMD") Q&A, which updates Q&As ID 1021 and ID 1136 and includes two new Q&As, ID 1143 and ID 1144.

Q&A ID 1021 has been updated generally and to clarify the extent to which an Irish entity can perform duties for non-EU alternative investment funds ("AIFs") under AIFMD Article 36(1)(a). Q&A ID 1136 updates the types of AIF for which a Depository of Assets other than Financial Instruments ("DAoFI") can act.

New Q&A ID 1143 outlines the circumstances in which a DAoFI can accept an appointment from a non-EU AIF under AIFMD Article 36(1)(a) to perform the duties in AIFMD Article 21(7)-(9).

New Q&A ID 1144 confirms the Central Bank's position on AIFs having a share class that makes distributions to charity. The Q&A confirms this is permissible, subject to a number of conditions being met by the AIF.

Luxembourg

On 10 June 2021, the CSSF published an updated [FAQ on the law of 12 July 2013 on alternative investment fund managers](#) ("AIFMs") to reflect one new FAQ on the application of MiFID II to IFMs, which includes AIFMs authorised in Luxembourg.

See UCITS Update above for further details noting that the reference to "*article 101(3) of the law of 17 December 2010 relating to undertakings for collective investment*" should be read as "*article 5(5) of the law of 12 July 2013 on AIFMs*" ("2013 Law") in the context of the FAQ on the law of 12 July 2013 on AIFMs.

On 30 June 2021, the CSSF published an updated FAQ on the law of 12 July 2013 on AIFMs to amend the FAQ on accounting standards accepted under Article 20(3) of the 2013 Law. The previous response, which suggested the only accounting standards that may be employed with respect to a Luxembourg AIF were Luxembourg GAAP and IFRS, has been replaced with "*No longer applicable*".

This follows the Ministry of Finance's proposed amendment to bill of law n°[7737](#), which will implement Directive [EU/2019/1160](#) on cross-border distribution of collective investment undertakings in Luxembourg by amending the 2010 Law and the 2013 Law, to clarify the accounting standards (including US GAAP) that may be used by Luxembourg AIFs in the form of a special limited partnership ("SCSp"). The bill of law has yet to be passed by the Luxembourg Parliament.

EU

On 8 April 2021, ESMA published its third annual statistical [report](#) on the AIF sector. It found that the sector increased by 15% in 2019 to EUR 6.8trn in net assets from EUR 5.9trn in 2018. The main risks faced by the sector relate to a mismatch between the potential liquidity of the assets, and the redemption timeframe offered to investors.

On 28 May 2021, ESMA published an [updated opinion](#) on the collection of information for the effective monitoring of systemic risk under Article 24(5) of AIFMD. In it, ESMA provides additional information that national competent authorities ("NCAs") could require AIFMs to report on periodically under Article 24(5). In particular, it clarifies three risk measures (value-at-risk, net FX delta and net commodity delta) that are already included in its 2013 opinion in the section: Information on risk measures. ESMA has amended this section to provide guidance to AIFMs, with definitions of the above risk measures and practical examples for the reporting. The rest of the opinion that does not relate to these matters is unchanged.

On 28 May 2021, ESMA also published an updated version of its AIFMD [Q&As](#) on reporting to NCAs under Articles 3, 24 and 42 of AIFMD and its guidelines on performance fees in UCITS and certain types of AIFs. It has also added new Q&As relating to: the risks measured by NET DV01, NET CS01 and Net Equity Delta; the guidelines on performance fees in UCITS and certain types of AIFs; and setting performance reference periods.

On 10 June 2021, ESMA issued a [compliance table](#) on its guidelines on performance fees in UCITS and certain types of AIFs which indicates with member states intend to comply with its guidelines.

On 23 June 2021, ESMA published [official translations](#) of its guidelines to address leverage risks under Article 25 of AIFMD. The guidelines provide NCAs with indicators to consider when performing their risk assessment and principles to take into account when calibrating and imposing leverage limits. They follow the two-step approach introduced by the International Organisation of Securities Commissions and translate this approach into the EU framework.

The guidelines will apply from 23 August 2021 and NCAs must make every effort to comply with the guidelines by incorporating them into their national legal and supervisory frameworks, as appropriate. Within the two-month period, NCAs must notify ESMA whether they comply, or intend to comply. Reasons must be given for non-compliance.

1.3 AML Developments

Ireland

The [Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Act 2021](#) implements certain elements of the Fifth Money Laundering Directive [EU/2018/843](#) ("MLD5") in Ireland and came into force on 23 April 2021 (with the exception of Part 8 which came into force on 24 April 2021). It extends the categories of: designated persons; prescribes actions for enhanced customer due diligence; improves the identification of politically exposed persons; and gives expanded powers to financial intelligence units. For more details, see our client update, [Ireland Implements 5MLD](#).

MLD5 also introduces a new registration and supervision regime for virtual asset service providers ("VASPs") and the Act brings VASPs within the scope of the Irish anti-money laundering and countering the financing of terrorism ("AML / CFT") regime for the first time. For more details, see our client update, [Introducing the Irish AML Regime for Crypto Providers](#).

The Central Bank published revised [Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector](#) on 23 June 2021 to reflect changes made by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021. For more details, see our client update, [CBI Issues Revised AML and CFT Guidelines: Key Changes](#).

BOR developments

The [European Union \(Anti-Money Laundering: Beneficial Ownership of Trusts\) Regulations 2021](#) came into effect on 24 April 2021 and revoke the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019. They reflect changes made by the transposition of MLD5 and deal with the establishment and management of the central register of beneficial ownership of trusts by the Revenue Commissioners as well as the internal register to be complied by trustees. A number of trust arrangements are excluded from these regulations, including a unit trust for which, by virtue of existing regulations, is required to be registered in the Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles ("ICAVs"), Credit Unions and Unit Trusts.

The [European Union \(Modifications of Statutory Instrument No. 110 of 2019\) \(Registration of Beneficial Ownership of Certain Financial Vehicles\) \(Amendment\) Regulations 2021](#) apply from 1 July 2021 and amend Regulation 5 of the European Union (Modifications of Statutory Instrument No 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020 (which establish a Central Register of Beneficial Ownership of ICAVs, Credit Unions and Unit Trusts). The

changes oblige existing relevant entities (including ICAVs and unit trusts) to deliver to the Registrar of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts: (i) the PPS number of each beneficial owner; and (ii) such information to be determined by the Registrar by 1 January 2022.

Luxembourg

On 21 June 2021, the CSSF published a new [FAQ](#) on the completion of the AML / CFT market entry form through the CSSF's [eDesk](#) portal. It addresses, among other things: (i) when the form should be completed; (ii) who can initiate, contribute and / or submit a form; (iii) what documents must be filed when a new compliance officer, who is not a member of the board of managers / directors, is appointed; and (iv) in respect of signed documents, the type of signature the CSSF will accept.

EU and International

The European Banking Authority ("EBA") on 6 May 2021 launched a [consultation](#) on draft regulatory technical standards ("RTS") on a central database on AML / CFT in the EU. This database will be a key tool for the EBA's recently enhanced mandate to lead, coordinate and monitor AML / CFT efforts in the EU. It closed on 17 June 2021.

On 18 May 2021, a [speech](#) by Mairead McGuinness, European Commissioner for Financial Services, Financial Stability, and Capital Markets Union was published in which she outlines the reforms the European Commission intends to present to implement the May 2020 AML / CFT action plan. It will be published in July 2021. Points of interest include a single AML and CFT rulebook. The Commission will review the list of sectors covered by AML rules in the new proposal, ensuring alignment with the latest Financial Action Task Force ("FATF") standards and coverage of all types of VASPs as 'obliged entities'.

On 27 May 2021, the EBA published a [consultation paper](#) on draft guidelines on co-operation and information exchange between prudential supervisors, AML / CFT supervisors and financial intelligence units which closes on 27 August 2021. The draft guidelines complement the Joint Committee of the European Supervisory Authorities' AML / CFT guidelines, which were published in December 2019, and form part of the EBA's wider work to strengthen the link between prudential and AML / CFT supervision.

On 25 June 2021, FATF published for consultation a [white paper](#) on potential amendments to recommendation 24 on transparency and beneficial ownership of legal persons. It aims to strengthen the international standard on beneficial ownership of legal persons to ensure greater transparency about their ultimate ownership and control and to take more effective action to mitigate the risks of misuse. The consultation closes on 20 August 2021.

On 29 June 2021, FATF published [guidance](#) on proliferation financing risk assessment and mitigation. The guidance has been developed following the introduction of new obligations on proliferation financing risk assessment and mitigation and explain how both public and private sectors should conduct risk assessments in the context of proliferation financing, and how identified risks can be mitigated.

On 30 June 2021, the Wolfsberg Group published a statement for financial institutions on demonstrating the effectiveness of their AML / CFT programmes. It considers how the 'Wolfsberg Factors' (that is, as set out in a December 2019 statement on effectiveness) can serve as a useful framework for these purposes.

1.4 Sustainable Finance Update

On 21 April 2021, the European Commission [adopted](#) a package of measures under the EU Sustainable Finance Action Plan which includes measures amending the UCITS Directive and the AIFMD Delegated Regulation EU/231/2013. This draft, amending delegated regulation, obliges

UCITS managers and AIFMs to assess the risks to fund returns arising from environmental, social or governance ("ESG") matters. The form of assessment of these risks must be reflected in those fund managers' policies and procedures. The European Commission also [adopted](#) the following six Commission Delegated Regulations and Directives as part of its work on sustainable finance. The package comprises:

- The EU Taxonomy Climate Delegated Act which aims to support sustainable investment by making it clearer which economic activities most contribute to meeting the EU's environmental objectives (see Taxonomy Regulation further below).
- A proposed Corporate Sustainability Reporting Directive to improve the flow of sustainability information in the corporate world. It will make sustainability reporting by companies more consistent, so that financial firms, investors and the public can use comparable and reliable sustainability information. The Irish Department of Enterprise, Trade and Employment sought views on the proposal in order to inform Ireland's negotiating position and launched a [consultation](#) on 12 May 2021 which closed on 23 June 2021.
- Six Commission Delegated Regulations and Directives as part of its work on sustainable finance. These have been adopted but are not yet final:
 1. [Commission Delegated Directive](#) amending Directive [2010/43/EU](#) ("Organisation Directive") on the sustainability risks and sustainability factors to be taken into account for UCITS. The Organisation Directive supplements the UCITS Directive by specifying organisational requirements, identification of the types of conflicts of interest, conduct of business and risk management for UCITS management companies. The Delegated Directive inserts a new Article 5a into the Organisation Directive, which is an obligation for investment companies to integrate sustainability risks in the management of UCITS. It also amends Articles 9(2), 17, 23 and 38(1) of the Organisation Directive to incorporate sustainability risks into risk management and conflict procedures.
 2. [Commission Delegated Regulation](#) amending Delegated Regulation [EU/231/2013](#) ("AIFMD Level 2 Regulation") on sustainability risks and sustainability factors to be taken into account by AIFMs. The AIFMD Level 2 Regulation supplements AIFMD and sets out operating conditions, including rules on due diligence and identification of the types of conflicts of interest, for AIFMs. The Delegated Regulation amends the AIFMD Level 2 Regulation to include the consideration of sustainability risks in due diligence requirements, to require AIFMs to retain the necessary resources and expertise for the effective integration of sustainability risks, and to state that the identification of conflicts of interest must also include those conflicts of interest that may arise as a result of the integration of sustainability risks. The amendments will also require senior management of AIFMs to be responsible for the integration of sustainability risks and will require risk management policies to consider exposures to sustainability risks.
 3. [Commission Delegated Directive](#) amending Delegated Directive [EU/2017/593](#) as regards the integration of sustainability factors and preferences into the product governance obligations. Delegated Directive [EU/2017/593](#) supplements MiFID II and contains product governance obligations. The amendments mean that investment firms manufacturing and distributing financial instruments should consider sustainability factors in the product approval process of each financial instrument and in the other product governance and oversight arrangements for each financial instrument that is intended to be distributed to clients seeking financial instruments with a sustainability-related profile.
 4. [Commission Delegated Regulation](#) amending Delegated Regulation [EU/2017/565](#) on the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms. Delegated Regulation [EU/2017/565](#) supplements MiFID II and contains organisational requirements and operating conditions for investment firms. The amendments mean that investment firms giving financial advice and portfolio management will have to carry out a mandatory assessment of sustainability preferences of clients. Investment firms

should take these sustainability preferences into account in the selection process of financial products. Investment firms will also have to prepare client reports that explain how the recommendation meets a client's investment objectives, risk profile, capacity for loss bearing and sustainability preferences.

5. [Commission Delegated Regulation](#) amending Delegated Regulation EU/2015/35 on the integration of sustainability risks in the governance of insurance and reinsurance undertakings.
6. [Commission Delegated Regulation](#) amending Delegated Regulation EU/2017/2358 and Delegated Regulation EU/2017/2359 on the integration of sustainability factors and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors and into the rules on conduct of business and investment advice for insurance-based investment products.

The next step is for the Council of the EU and the European Parliament to consider the legislation. A set of Commission Q&As states the new requirements are expected to apply from October 2022.

SFDR

The Sustainable Finance Disclosure Regulation [EU/2019/2088](#) ("SFDR") became effective on 10 March 2021 however Level 2 Measures remain in draft and at various stages of completion. The Level 2 RTS set out the granular specifications for the content, methodology and presentation of disclosures required by SFDR. The European Commission on 8 July 2021 announced a further deferral of the implementation date of the Level 2 RTS from 1 January 2022 until 1 July 2022. For more information see [European Commission Delays Implementation of SFDR by 6 Months](#)

Taxonomy Regulation

On 2 June 2021, the European Commission May 2021 consultation on draft [Delegated Regulation](#) supplementing Article 8 of the Taxonomy Regulation [EU/2020/852](#) specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of the Non-Financial Reporting Directive EU/2014/95 on environmentally sustainable economic activities and the methodology to comply with that disclosure obligation closed. It specifies the content and presentation of information to be disclosed by non-financial undertakings, asset managers, credit institutions, investment firms, and insurance undertakings; and sets out rules on key performance indicators.

The Delegated Regulation, when final, should apply from 1 January 2022.

On 4 June 2021, the European Commission adopted the Taxonomy Climate [Delegated Act](#) on criteria for climate change mitigation or climate change adaptation under the Taxonomy Regulation. It contains a set of technical screening criteria that define which activities contribute to environmental objectives contained in the Taxonomy Regulation (climate change adaptation and climate change mitigation). The European Parliament and Council may reject or approve the text but cannot amend it during its scrutiny period. The Delegated Act is to apply from 1 January 2022.

On 16 June 2021, the European Commission published the [EU Taxonomy Compass](#) and a new webpage. It is a visual representation of the EU Taxonomy and aims to enable users to access the contents of the EU Taxonomy more easily, by allowing them to check which activities are included in the EU Taxonomy (taxonomy-eligible activities), which objectives they substantially contribute to and what criteria they have to meet. It also aims to make it easier to integrate the criteria into business databases and other IT systems by including a number of download options.

EBA report and IOSCO consultation

On 23 June 2021, the EBA published its [report](#) on ESG risks management and supervision. It provides a comprehensive proposal on how ESG factors and ESG risks should be included in the regulatory and supervisory framework for credit institutions and investment firms and focuses on the resilience of institutions to the potential financial impact of ESG risks across different time horizons.

In June 2021, IOSCO issued a [consultation](#) on 'Recommendations for Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management'. It focuses on investor protection issues and proposes that securities regulators consider setting regulatory and supervisory expectations for asset managers on sustainability-related risks and opportunities. The deadline for responses is 15 August 2021.

1.5 IFR and IFD Update

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

On 31 May 2021, the EBA, jointly with ESMA, published a [provisional list](#) of additional instruments and funds that NCAs may permit to use as own funds in addition to the instruments included in the Common Equity Tier 1 list published by the EBA in accordance with CRR.

On 7 June 2021, the EBA published a [consultation](#) on RTS on the reclassification of investment firms as credit institutions. Article 8a of the CRD IV Directive 2013/36/EU, which was amended by the IFD specifies the triggers for when a systemically important investment firm must seek authorisation as a credit institution. Broadly, the trigger is that the average of the firm's monthly total assets, calculated over a period of 12 consecutive months on a solo consolidated basis, is equal to or exceeds EUR30bn. The deadline for responses is 17 July 2021.

On 25 June 2021, the EBA published its [final report](#) setting out final draft ITS with regard to the format, structure, contents list and annual publication date of the information to be disclosed by competent authorities in accordance with Article 57(4) of the IFD. The draft ITS will enter into force 20 days after publication in the Official Journal of the EU and NCAs will be required to disclose this information for the first time by 30 June 2022. The EBA will submit the draft ITS to the European Commission for endorsement.

Ireland

Irish implementing legislation has not yet been published, although the Department of Finance on 24 May 2021 published its IFD [public consultation feedback statement](#) on the exercise of Irish national discretions which indicates how it intends to exercise them. For more information, see our client update, [Ireland Exercises National Discretions under IFD / IFR](#).

On 23 June 2021, the Central Bank issued a [feedback statement](#) providing further guidance on its proposed approach and perspectives regarding how it will exercise competent authority discretions in the IFR and IFD. As expected, it has been confirmed that the Central Bank is to be designated as the NCA for IFD / IFR purposes.

Luxembourg

The bill of law n°7723, which will implement the IFD in Luxembourg, was introduced into Luxembourg Parliament on 27 November 2020. The current draft envisages Luxembourg exercising a number of the national discretions, including designating the CSSF as the NCA for IFD / IFR purposes.

1.6 MMFR Update

On 15 June 2021, the European Commission adopted a [Delegated Regulation](#) amending Commission Delegated Regulation (EU) 2018/990 in respect of requirements for assets received by money market funds ("MMFs") as part of reverse repurchase agreements.

Under Article 2 of Delegated Regulation (EU) 2018/990, which supplements the Regulation on money market funds EU/2017/1131 ("MMFR"), eligible investments in reverse repurchase agreements by managers of MMFs are subject to supplementary qualitative and quantitative requirements. These

requirements do not apply to transactions entered into with credit institutions, investment firms and insurance undertakings established in the EU or covered by an equivalence decision.

This Amending Regulation revises Article 2(6) of Delegated Regulation (EU) 2018/990 to specify the relevant provisions in the Capital Requirements Regulation 575/2013, MiFID II and the Solvency II Directive 2009/138/EC on which equivalence decisions should be adopted for the exemption to be applied in relation to these entities. The next step will be for the Council of the EU and the European Parliament to consider it.

On 29 June 2021, ESMA published translations of the 2020 [Guidelines](#) on stress test scenarios under the MMFR which apply to competent authorities, MMFs and MMF managers. They apply in relation to Article 28 of the MMFR and establish common reference parameters for the stress test scenarios to be included in the stress tests conducted by MMFs or MMF managers. The guidelines apply from two months after the date of publication of these translations (with respect to parts in red; the other parts already apply from the dates specified in Articles 44 and 47 of the MMFR).

1.7 Benchmarks Regulation and LIBOR Update

On 6 May 2021, the European Commission adopted five draft Delegated Regulations supplementing the Benchmarks Regulation (EU) 2016/1011 ("BMR"):

1. [Draft Delegated Regulation](#) (C(2021) 3125 final), with RTS specifying the characteristics of the systems and controls for identifying and reporting any conduct that may involve manipulation or attempted manipulation of a benchmark.
2. [Draft Delegated Regulation](#) (C(2021) 3123 final), with RTS specifying the requirements to ensure that an administrator's governance arrangements are sufficiently robust.
3. [Draft Delegated Regulation](#) (C(2021) 3143 final), with RTS specifying the conditions to ensure that the methodology for determining a benchmark complies with the quality requirements (that is, it is robust and reliable).
4. [Draft Delegated Regulation](#) (C(2021) 3117 final), with RTS specifying the criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical benchmark.
5. [Draft Delegated Regulation](#) (C(2021) 3116 final), with RTS specifying the criteria under which competent authorities may require changes to the compliance statement of non-significant benchmarks.

The Council of the EU and the European Parliament will scrutinise these draft regulations which will enter into force on the 20th day following their publication in the Official Journal of the European Union and they will apply from 1 January 2022.

On 28 May 2021, ESMA published a [supervisory briefing](#), Benchmark administrators' presence in their member states of location and outsourcing. It is designed to provide some guidance to NCAs in respect of the presence of a benchmark administrator in its member state of location and the outsourcing of functions or any relevant services and activities in the provision of a benchmark under the BMR. The purpose of the supervisory guidance is to ensure a consistent application of the BMR across the EU.

On 28 May 2021, ESMA also published an updated version of its BMR [Q&As](#) to include a new section on EU climate transition benchmarks, EU Paris-aligned benchmarks and sustainability-related disclosures for benchmarks.

LIBOR

On 24 June 2021, the European Commission issued a [joint statement](#) with the EBA, ESMA and the European Central Bank in its banking supervisory capacity encouraging all market participants to cease their use of all LIBOR settings.

The statement notes that LIBOR will shortly cease to be published and to ensure a smooth transition away from LIBOR, market participants are encouraged to actively reduce their exposure to LIBOR and not wait for the exercise by the Commission of its new powers to designate a replacement for LIBOR under Article 23b of the BMR.

1.8 Central Bank Fitness and Probity Interview Guide, SEAR and Supervisory Priorities

The Central Bank's Director General, Financial Conduct, Derville Rowland, [spoke](#) at a webinar on 10 June 2021 where she provided an overview of the importance of effective culture in firms and the relationship of the fitness and probity ("F&P") regime to good culture. In addition, she launched a new [Fitness & Probity Interview Guide](#) to assist applicants for certain senior roles who have been called to attend an F&P interview with the Central Bank. It sets out for Pre-Approval Controlled Function ("PCF") applicants and firms the practicalities around attending both assessment and specific interviews.

In a [speech](#) on Supervisory Priorities in Uncertain Times given on 23 June 2021, the Central Bank notes that it continues to see significant shortcomings in compliance with F&P obligations and a lack of awareness in the industry regarding the scope of the F&P regime. In response, the Central Bank has been working with the Department of Finance to develop an Individual Accountability Framework.

The core aspects of the reform package include the introduction of conduct standards for individuals in regulated firms, conduct standards for firms themselves, and the Senior Executive Accountability Regime ("SEAR"). SEAR will impose obligations on firms to set out clearly where responsibility and decision-making lies and will provide for senior executive accountability.

For more information, see our client update, [Central Bank of Ireland Supervisory Priorities for the Insurance Sector](#).

1.9 Central Bank Review of Firms Undertaking Algorithmic Trading

The Central Bank on 11 May 2021 [wrote](#) to CEOs of firms undertaking algorithmic trading following a thematic review which assessed how such firms have complied with risk management and control framework requirements as required by MiFID II RTS for investment firms. Some positive practices were identified but risk and control frameworks require continued improvement and engagement is ongoing with firms where specific concerns were identified.

1.10 CSSF Circular on Teleworking

On 9 April 2021, the CSSF issued [Circular 21/7691](#) on teleworking which clarifies the governance and security requirements applicable in the context of remote working and applies to all entities supervised by the CSSF ("Supervised Entities"). It also applies to: (i) branches of Supervised Entities irrespective of whether such branches are located in Luxembourg or abroad, and provided remote working is permitted in those other jurisdictions; (ii) Luxembourg branches of entities originating outside of the European Economic Area ("EEA"); and (iii) Luxembourg branches of entities from a EEA member country if remote working is permitted in such other EEA member state. It will enter into force on 30 September 2021 assuming working conditions have returned to normal.

For more information see our client update, [Luxembourg CSSF Publication of Guidance on Teleworking](#).

1.11 Updated CSSF Guidance on Granting Loans to the Public

On 15 June 2021, the CSSF published an updated [FAQ \(Part II\) on the statuses of PFS](#) with one amended FAQ on the granting of loans to the public as envisaged by Article 28-4 of the 1993 Law. It clarifies the CSSF's position on the concept of 'public' in this context by confirming that lending activities are not aimed at the public if: (i) loans are granted to a limited circle of previously determined persons; or (ii) the nominal value of the loan is at least €3,000,000 (or equivalent in

another currency) and the loans are granted exclusively to professionals as defined in the [Luxembourg Consumer Code](#), i.e. any natural or legal person, whether public or private, who acts, including through another person acting in its name or on its behalf, for purposes relating to its trade, business, craft or profession.

1.12 European Commission Consultation: A Retail Investment Strategy for Europe

The European Commission on 11 May 2021 launched a [public consultation](#) on the upcoming retail investment strategy, which is planned for adoption in early 2022, as announced in last year's Capital Markets Union Action Plan. The Commission is seeking feedback on how to improve the EU's existing retail investor protection framework. In particular, it is seeking views on the limited comparability of similar products that are regulated by different legislation and are therefore subject to different disclosure requirements, which prevents individual investors from making informed investment choices. For example, currently, requirements are set out in legislation including the MiFID II Directive 2014/65/EU, the PRIIPs Regulation EU/1286/2014 and the UCITS Directive 2009/65/EC.

1.13 EMIR Update

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

There have been a number of developments over the quarter:

EU

On 6 April 2021, ESMA published its [final report](#) and guidelines (both dated 23 March 2021) on the reporting of periodic information and material changes by TRs to ESMA. The guidelines aim to increase the transparency of TRs supervised by ESMA under EMIR and SFTR. The guidelines will apply from 30 June 2021. All periodic information items that have annual frequency and a reporting deadline of 31 January should, in the first year, be submitted by 30 June 2021.

On 8 April 2021, ESMA published a [final report](#) (dated 31 March 2021) on draft regulatory technical standards ("RTS") relating to changes to CCPs' activities and models under EMIR 2.2 [EU/2019/2099](#). ESMA has submitted the draft RTS to the European Commission. Following their endorsement, they are then subject to non-objection by the European Parliament and the Council of the EU.

On 12 April 2021, the European Commission published a [report](#) on whether certain post-trade risk reduction services should be exempted from the clearing obligation for OTC derivatives under EMIR. The report is addressed to the European Parliament and the Council of the EU. It considers that, generally, certain OTC derivatives should only be exempted from the clearing obligation where the risks of granting an exemption are smaller than the risks of keeping the position as it is currently.

On 15 April 2021, ESMA published its [final report](#) on EMIR and SFTR data quality. The report covers the progress made to date in improving EMIR data quality for regulatory and supervisory use and concludes that, while good progress has been made, additional efforts are needed by NCAs and ESMA to further improve EMIR data quality.

On 7 May 2021, Delegated Regulation [EU/2021/731](#) which supplements EMIR (as amended by EMIR 2.2) with regard to rules of procedure for penalties imposed on CCPs or related third parties by ESMA came into force. Delegated Regulation [EU/2021/732](#) supplementing EMIR on procedure for penalties imposed on trade repositories also came into force on the same date.

The European Commission April 2021 [consultation](#) on a draft Implementing Regulation extending the transitional period during which EU institutions can treat exposures to a third-country CCP that has

not been recognised in accordance with EMIR as if they were exposures to a recognised (or qualifying) CCP closed on 26 May 2021.

On 28 May 2021, ESMA published an updated version of its EMIR [Q&As](#) to amend two questions in the TR section on access to data by the authorities and reporting of reference rates not included in Commission Implementing Regulation (EU) 2017/105. It has also added a new Q&A on reporting of the field 'delivery type' for credit derivatives.

On 28 May 2021, ESMA published a [consultation](#) on guidelines for the transfer of data between TRs under EMIR and SFTR which proposes changes to three of its existing guidelines on data transfer together with the addition of nine new guidelines to provide additional clarification. It also proposes a set of new guidelines under the SFTR. These build on the existing (and proposed new) EMIR guidelines.

On 2 June 2021, the European Commission adopted a [Delegated Regulation](#) supplementing EMIR which specifies the conditions under which commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent ("FRANDT"). It will now be subject to the scrutiny of the European Parliament and the Council of the EU.

On 11 June 2021, ESMA published a [statement](#) on the requirement to provide clearing services for OTC derivatives on FRANDT terms. The deadline for complying with this obligation was 18 June 2021.

ESMA refers to the Delegated Regulation adopted by the European Commission on 2 June 2021 and acknowledges that, although it cannot be known when the Delegated Regulation will start to apply, this will likely happen after 18 June 2021. This could cause a timing gap during which clearing members and clients would need to provide clearing services in accordance with FRANDT commercial terms before the Delegated Regulation specifying the conditions under which the commercial terms are to be considered to be FRANDT comes into force. Therefore, ESMA encourages market participants to prepare to comply. However, it also acknowledges the challenges that certain clearing members and clients may face. ESMA therefore expects competent authorities not to prioritise their supervisory actions towards clearing members and clients expected to provide clearing services under FRANDT commercial terms before the date the Delegated Regulation will apply.

On 24 June 2021, the European Commission [confirmed](#) the extension of the transitional period during which EU credit institutions can treat exposures to a third-country CCP that has not been recognised in accordance with EMIR as if they were exposures to a qualifying CCP.

1.14 Regulation on Cross-Border Distribution of Investment Funds

On 27 May 2021, ESMA published the final report on its guidelines under the Regulation on cross-border distribution of funds [EU/2019/1156](#). They clarify the requirements that funds' marketing communications must meet, which is to:

- Be identifiable as such;
- Describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner; and
- Contain clear, fair and not misleading information, taking into account the online aspects of marketing communications.

Once translated into the official languages of the EU, they will be published on ESMA's website. The publication will trigger a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the guidelines. The guidelines will apply six months after the date of the publication of the translations.

For more information see our client update, [EU Cross-Border Fund Distribution Rules – Are You Ready?](#)

On 15 June 2021, Commission Implementing Regulation [EU/2021/955](#) laying down implementing technical standards ("ITS") produced under Articles 5(3), 10(3) and 13(3) of the Regulation on the cross-border distribution of investment funds was published in the Official Journal of the EU.

The ITS relate to the publication of information by NCAs on their websites on the national rules governing marketing requirements for funds, and the regulatory fees and charges levied by NCAs relating to fund managers' cross-border activities. They also cover the notification of information by NCAs to ESMA for maintaining a central database listing UCITS and AIFs marketed cross-border on ESMA's website.

The Implementing Regulation will enter into force on 5 July 2021. It will apply from that date with some exceptions. Articles 1 and 3(1) apply from 2 August 2021, and Article 5 applies from 2 February 2022.

1.15 Central Bank Consultation: Cross-Industry Guidance on Operational Resilience

On 9 April 2021, the Central Bank published a [consultation paper](#) and draft cross-sectorial guidance on operational resilience ("CP140"). The deadline for responses is 9 July 2021.

The paper seeks views across the financial services sector on the proposed new cross-industry guidance on operational resilience ("Guidance"). The Guidance aims to address existing vulnerabilities and weaknesses within the sector and how best to insulate the sector against any future events or crisis.

The new Guidance will apply to all regulated financial service providers, as defined in section 2 of the Central Bank Act 1942. It expects that once the Guidance is published, regulated firms should be able to demonstrate the application of the Guidance within an appropriate timeframe.

1.16 New ESMA Cloud Outsourcing Guidelines

On 10 May 2021, ESMA published final [Cloud Outsourcing Guidelines](#) which apply to the outsourcing of functions to cloud service providers by regulated entities, including UCITS managers and AIFMs. They apply to all cloud outsourcing arrangements entered into, renewed or amended on or after 31 July 2021. Firms should review and amend accordingly existing cloud outsourcing arrangements with a view to ensuring that they take into account these guidelines by 31 December 2022.

1.17 Central Bank Annual Report and Performance Statement

The Central Bank on 2 June 2021 published its [2020 Annual Report](#) and Annual Performance Statement for 2020-2021. The Statement sets out its key focus areas for the rest of 2021. This includes the introduction of a Senior Executive Accountability Regime ("SEAR"), effective AML and CFT supervision, the new framework for investment firms that came into force on 26 June 2021 (see "IFR and IFD Update" above) and strengthening its client assets regime.

1.18 Securitisation Regulation

On 9 April 2021, Regulation [EU/2021/558](#) came into force and made amendments to the CRR relating to synthetic excess spread; credit risk mitigation; non-performing exposures ("NPEs") securitisations and simple, transparent and standardised ("STS") on-balance-sheet securitisation. The provisions relating to STS do not apply until 10 April 2022.

Regulation [EU/2021/557](#) amending the Securitisation Regulation [EU/2017/2402](#) to help the recovery from COVID-19 came into force on 9 April 2021. The amendments include:

- Extending the STS securitisation framework to on-balance sheet synthetic securitisation as this type of securitisation is an important risk management tool for bank lending to corporates.
- Removing regulatory obstacles to the securitisation of NPEs to enable broader use of securitisation by banks to free their balance sheets from NPEs.

On 12 April 2021, ESMA published [interim templates](#) for STS synthetic securitisation notifications following amendments to the Securitisation Regulation. The interim templates allow originators to notify ESMA of synthetic securitisations that meet the STS criteria.

The Joint Committee of the European Supervisory Authorities on 17 May 2021 published its [analysis](#) of the functioning of the Securitisation Regulation, including recommendations on how to address initial inconsistencies and challenges, which may affect the overall efficiency of the current regime. The report is meant to provide guidance to the European Commission in the context of its review of the functioning of the regulation.

On 27 May 2021, ESMA published a [consultation](#) on draft RTS implementing the amended Securitisation Regulation. The amended Securitisation Regulation requires that certain securitisations meeting pre-defined STS requirements must be reported using standardised templates for STS notification published on ESMA's website.

The consultation (which closes on 20 August 2021) sets out ESMA's proposed draft RTS and ITS specifying the content and the format of the standardised templates for STS notification of on-balance sheet (synthetic) securitisations. It builds on the existing technical standards for STS notification of traditional securitisations, while taking into account specific features of synthetic securitisations. It also includes certain technical amendments to the STS notification templates for traditional securitisations.

On 28 May 2021, ESMA published updated [Q&As](#) on the Securitisation Regulation which modifies some existing questions and adds new questions on character limitations in template fields and underlying auto exposures.

1.19 CSDR Update

On 27 May 2021, ESMA published the [letter](#) it sent to the European Commission setting out its proposals on certain important topics it considers the Commission should address under its current review of the Central Securities Depositories Regulation [EU/909/2014](#) ("CSDR"). ESMA's proposals relate to: (i) the status of TARGET2-Securities ("T2S"); (ii) the arrangement for the supervision and oversight of T2S; (iii) and the third-country CSD ("TC-CSD") recognition regime.

On 28 May 2021, ESMA published updated [Q&As](#) on the implementation of CSDR which added a Q&A in Part III (Settlement discipline) relating to the scope of cash penalties.

1.20 SFTR Update

On 6 April 2021, ESMA updated its Q&As related to reporting under the Securities Financing Transactions Regulation [EU/2015/2365](#) ("SFTR"). The Q&As were updated to simplify reporting of SFTs when an external portfolio manager is used and aims to ensure that the supervisory activities of the competent authorities under the Regulation converge along the lines of the responses adopted by ESMA.

On 6 April 2021, ESMA also published its [final report](#) and guidelines (dated 23 March 2021) on reporting periodic information and material changes by TRs to ESMA. The guidelines aim to increase the transparency of TRs supervised by ESMA under EMIR and SFTR. They apply from 30 June 2021. All periodic information items that have annual frequency and a reporting deadline of 31 January should, in the first year, be submitted by 30 June 2021.

On 13 April 2021, ESMA published an [updated statement](#) on the implementation of legal entity identifier or LEI requirements for third-country issuers under the reporting regime set out in SFTR.

On 15 April 2021, ESMA published its final [report](#) on EMIR and SFTR data quality. The report covers the progress made to date in improving EMIR data quality for regulatory and supervisory use and concludes that, while good progress has been made, additional efforts are needed by NCAs and ESMA to further improve EMIR data quality.

On 26 May 2021, ESMA published its [final report](#) on guidelines on calculating positions by TRs under SFTR. Their purpose is to ensure that a uniform methodology is used under EMIR and the SFTR, while taking into account the specificities of securities financing transactions ("SFT") reporting. They will apply from 31 January 2022.

On 28 May 2021, ESMA published a [consultation](#) on guidelines for the transfer of data between TRs under EMIR and SFTR which proposes changes to three of its existing guidelines on data transfer together with the addition of nine new guidelines to provide additional clarification. It also proposes a set of new guidelines under the SFTR. These build on the existing (and proposed new) EMIR guidelines. It also published updated SFTR [Q&As](#) to add a new Q&A relating to reporting changes to the reference rate in a securities financing transaction.

Luxembourg

On 14 April 2021, the CSSF published [Circular CSSF 21/770](#) regarding the updated ESMA guidelines on reporting under Articles 4 and 12 of SFTR. It integrates the revised guidelines into the CSSF's administrative practices and regulatory approach and applies with immediate effect.

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.

Ireland

On 13 May 2021, the Central Bank updated the [reporting requirements](#) for MiFID investment firms in relation to the submission of prudential returns for the period ending 30 June 2021 and the timing of first reporting under the IFR.

The [European Union \(Markets in Financial Instruments\) \(Amendment\) Regulations 2021](#) were signed into law in June 2021 and come into operation on 10 November 2021. They provide that MiFID II does not apply to crowdfunding service providers as defined in the [Crowdfunding Regulation EU/2020/1503](#).

EU

On 8 April 2021, ESMA published its [final report](#) on the functioning of organised trading facilities. It contains recommendations and possible amendments to MiFID II / MiFIR with a view to reducing the level of complexity for market participants and making the legal framework more effective.

On 21 April 2021, the European Commission adopted delegated legislation integrating sustainability into UCITS Directive, AIFMD, MiFID II, Solvency II and IDD – for more detail see [Sustainable Finance Update](#) above.

On 21 April 2021, the European Commission adopted a [Delegated Regulation](#) and Annex correcting Delegated Regulation EU/2017/565 supplementing MiFID II as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of MiFID II. The next step is for the Council and the European Parliament to consider the draft.

On 6 May 2021, ESMA published an [updated opinion](#) on ancillary activity calculations under MiFID II. It updates the July 2020 version opinion on ancillary activity calculations.

On 12 May 2021, ESMA published a [consultation](#) on its annual review of the RTS supplementing MiFIR set out in Commission Delegated Regulation EU/2017/583 or RTS 2. The phasing-in of the MiFIR transparency regime for non-equity instruments is being undertaken in four stages, set out in Article 17 of RTS 2. This relates to both the determination of the liquidity status of bonds (based on the average daily number of trades) and the level of the pre-trade size specific to the instrument threshold for bonds and most derivatives (based on trade percentiles).

On 26 May 2021, ESMA published a [consultation](#) (which closes on 23 July 2021) on draft technical standards for commodity derivatives which seeks stakeholders' views on the RTS that ESMA must develop under the MiFID II Amending Directive EU/2021/338 and forms part of the post-COVID-19 MiFID II recovery package. This Amending Directive amends MiFID II regarding information requirements, product governance and position limits, and the CRD IV Directive and CRD V Directive on their application to investment firms.

The May 2021 ESMA [consultation](#) on its MiFID II / MiFIR annual report closed on 11 June 2021.

On 1 June 2021, ESMA published its [final report](#) containing guidelines on obligations relating to market data under MiFID II and MiFIR. The aim is to ensure better and uniform application of Articles 13, 15(1) and 18(8) of MiFIR and Articles 64(1) and 65(1) and (2) of MiFID II by providing clarity for market participants.

On 24 June 2021, the European Commission May 2021 [consultation](#) on a draft Delegated Regulation supplementing MiFID II by specifying the criteria for establishing when an activity can be considered to be ancillary to the main business at group level closed.

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

1.22 Irish Investment Funds Statistics: Q1 2021

The main points to note in the Central Bank's [Q1 2021 statistics](#) issued in June 2021 are as follows:

- The net asset values ("NAVs") of Irish-resident funds reached an all-time high in Q1 2021. All fund types, except money market funds, increased their NAV during the quarter.
- Equity funds showed the largest increase in the quarter, up 14% to €1,181bn. Money market funds decreased by 4% to €589bn, while all other fund types increased by between 2% and 6%.
- In equity, hedge and mixed funds the majority of the NAV increase was driven by revaluations, while in the other fund types it was net investor inflows.

1.23 Luxembourg Undertakings for Collective Investment Statistics

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

- Total assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") increased €38,576bn from €5,293.816bn as at 31 May 2021 to €5,332.392bn.
- The number of Luxembourg Investment Funds active in the market and regulated by the CSSF totals 3,547. Of the 3,547 active Luxembourg Investment Funds, 2,340 entities have adopted an umbrella structure and together have a total of 13,257 sub-funds. The remaining 1,207 Luxembourg Investment Funds are structured as stand-alone funds.
- As at May 2021, there were a total of 14,464 fund units.
- During May 2021, there were more subscriptions than redemptions in equity funds and more redemptions than subscriptions in fixed-income funds.

In addition, the number of Luxembourg RAIFFs reached 1,403 as of 1 July 2021.

2 Tax

Ireland

2.1 Irish Real Estate Funds Tax Filing Obligations

A new version of IREF tax return ("Form IREF") was released in June 2021. IREFs with accounting periods ending on or after 1 July 2020 and on or before 31 December 2020 are required to file this updated Form IREF on or before 30 July 2021. The new return requires significant additional information, including:

- Details of Irish-associated enterprises;
- Details of agricultural land held as an IREF asset and holdings in other IREFs; and
- A narrative where no IREF withholding tax has been deducted on a taxable event.

The new requirements may require significant work and with only a limited time to prepare the returns, administrators and managers should take the necessary steps to collate such information promptly.

Luxembourg

2.1 Tax Authorities Update Guidance on EU Interest Limitation Rules

On 2 June 2021 the Luxembourg tax authorities updated their guidance on the interest limitation rules ("ILR") with the issuance of [Circular L.I.R. n° 168bis/1 of 2 June 2021](#). This replaces the 8 January 2021 circular, and introduces a new section with guidance on the 'equity escape rules' for members of consolidated groups for financial accounting purposes.

Generally, a taxpayer, which is part of a consolidated group for accounting purposes, may use the group's equity over assets ratio to allow for the deduction of a higher amount of 'exceeding borrowing costs', i.e. higher than the general rule limitation to €3M or 30% of tax EBITDA, whichever is higher. To qualify, the taxpayer must demonstrate that its ratio of equity over its total assets is the same or higher than the group ratio. The circular also clarifies that the Luxembourg entity's accounts must be updated to the group accounting method when calculating the comparative ratios. Further, it confirms that any EU Member State accounting method - US GAAP, IFRS, Korean GAAP, Chinese GAAP, and Canadian GAAP - are acceptable accounting methods for the purposes of ratio calculation.

2.2 Amazon Wins Appeal Against the European Commission's State Aid Transfer Pricing Charges

On 12 May 2021, the General Court of the European Union ("General Court") ruled in favour of Amazon on its appeal against EU State Aid charges citing that the European Commission had failed to prove any specific tax advantage in its transfer pricing-focused strategy of attack.

The case relates to tax years 2006 to 2014, during which the Amazon group had a Luxembourg transparent limited partnership ("LuxSCS") that held valuable IP rights related to technology, trademarks, and customer lists. The LuxSCS received substantial royalty payments from its wholly-owned Luxembourg tax resident subsidiary ("LuxOpCo"). These tax deductible royalty payments resulted in a large portion of Amazon's European-related profits to be outside of Luxembourg taxation (and EU tax as a whole) due to the transparent nature of the LuxSCS for Luxembourg tax purposes.

The Commission's arguments included the following:

- The LuxSCS did not have any physical presence or employees in Luxembourg and had only one function, which was to passively hold the IP rights;

- The LuxOpCo functioned as the European headquarters of the Amazon group with a substantial physical presence and several key functions including operating Amazon's European online retail and sales business and managing inventory;
- Luxembourg should have applied more appropriate transfer pricing methodologies, which, if so applied, would have resulted in lower royalty payments and a thus higher taxable base for the LuxOpCo;
- The LuxSCS was only providing a mere 'intermediary function' and thus Luxembourg should have applied the transactional net margin method, i.e. costs plus a percentage mark-up; and
- The Commission also relied heavily on applying the 2017 OECD transfer pricing guidelines even though the tax years in question were related to years before such updated guidelines were issued.

Despite the Commission's arguments, the General Court ruled that the Commission had not provided a convincing case based on its challenges of transfer pricing methods that Luxembourg awarded a selective tax advantage to the Amazon Luxembourg entities.

This case highlights the ever-increasing importance of applying OECD transfer pricing methodologies correctly to all related party transactions.

2.3 Engie Loses Appeal on European Commission's State Aid Findings

On 12 May 2021, (the same day Amazon won its appeal), the General Court upheld the Commission's state aid charges against the Engie Group (formerly GDF Suez). What is particularly unique about the case is that the Commission claimed Luxembourg failed to consistently apply its own domestic general anti-avoidance rules as well as its own participation exemption rules.

The Engie case involved a series of Luxembourg tax rulings, which included the use of mandatory redeemable convertible bonds ("ZORAs") and forward sale contracts of shares, which resulted in tax deductible amortizations on the ZORA but no corresponding taxable income pick-up within Engie's Luxembourg corporate group.

The European Court agreed with the Commission's charges of State Aid by taking the 'economic approach' and linking the various seemingly separate transactions, which when taken together, resulted in the mismatch of taxable deductions and exempt income elsewhere. The resulting exemption was due to Luxembourg's domestic rules at the time, which did not tax the appreciation of convertible debt when converted into equity (these have since been amended).

This case demonstrates that the Commission has a variety of avenues of attack when launching state aid charges.

2.4 COVID-19 Specific Measures - Cross-Border Workers

The Luxembourg tax authorities have confirmed extensions of the existing tax agreements for cross-border workers working from their residence countries without adverse tax implications. These COVID-19 waivers have been extended for both French and Belgian-resident cross-border workers until 30 September 2021.

Germany and Luxembourg have agreed to automatically renew the waiver monthly as from 1 January 2021 until such time as one party objects to further automatic renewals. On 29 July 2021, Luxembourg and Germany extended their existing social security agreement for cross-border workers until 31 December 2021. It is assumed therefore that no changes should occur on the existing tax agreements for cross-border workers until that date and the existing tax agreement will be automatically extended each month for an additional month.

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