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GROUP

# Funds & Investment Management Update – Ireland and Luxembourg

**Quarterly Update | July - September 2020**

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# 1 Legal & Regulatory

## 1.1 Liquidity Stress Testing – UCITS and AIFs

### Ireland

On 13 July 2020 the Central Bank of Ireland ("Central Bank") published a [notice of intention](#) in relation to the European Securities and Markets Authority ("ESMA") final report on 'Guidelines on liquidity stress testing in UCITS and AIFs (the "Guidelines")'. The notice sets out that the Central Bank will consult on the incorporation of a requirement in the Central Bank UCITS Regulations and AIF Rulebook that UCITS management companies, AIFMs and depositaries adhere to the Guidelines. In the interim, the Central Bank expects full compliance with the Guidelines from 30 September 2020.

It also issued the 29th edition of the Central Bank [UCITS Q&A](#), which includes new Q&A IDs 1095, 1096 and 1097 in relation to liquidity stress testing ("LST") in UCITS and the 34th edition of the Central Bank [AIFMD Q&A](#), which includes new Q&A IDs 1131 and 1132 on LST in AIFs. Both Q&As clarify the Central Bank's expectations in relation to LST in UCITS and AIFs, particularly in relation to the application of the Guidelines.

The UCITS Q&As set out that the LST policy may be documented within the UCITS Risk Management Policy, that LST should generally be carried out at least quarterly and that LST should be employed at all stages in a UCITS lifecycle, including at the design phase.

The AIFMD Q&As set out that the Central Bank considers that LST should generally be performed at least quarterly and that LST should be employed at all stages in an AIF's lifecycle, including at the design phase.

### Luxembourg

On 29 September 2020 the Commission de Surveillance du Secteur Financier ("CSSF") issued [Circular 20/752](#) confirming that it applies the Guidelines and integrates them into its administrative practice and regulatory approach. It reiterates that the Guidelines apply to investment fund managers for the UCITS and the AIFs they manage, including exchange traded funds and leveraged closed-ended AIFs, as well as self-managed UCITS, internally managed AIFs and certain open-ended and leveraged closed-ended SIFs that are not governed by part II of the [Law of 13 February 2007](#). Certain provisions of the Guidelines also apply to money market funds, depositaries and national competent authorities ("NCAs"). Full compliance with the Guidelines and the circular was required from 30 September 2020.

## 1.2 AIFMD ESMA Review

On 19 August 2020 ESMA published a [letter](#) it had sent to the European Commission, highlighting the areas in which it considers improvements could be made under the Commission's review of AIFMD.

Annex I to the letter sets out the key areas in the legislative framework where ESMA proposes that amendments are made. Annex II to the letter sets out more specifically ESMA's proposed changes to the AIFMD in relation to the reporting regime and data use.

ESMA comments that, in many cases, its proposals also require consideration of changes to the current UCITS framework.

## 1.3 ILP Legislation

On 21 September 2020 the Irish Government published the [Investment Limited Partnerships \(Amendment\) Bill 2020](#) which is progressing through the Irish parliament. The ILP is a regulated

common law partnership structure which is of significant interest to international managers marketing to EU investors and wider global markets.

The Bill will introduce a number of important changes which aim to position the ILP as a leading EU fund vehicle for private equity and sustainable investments. It will also make technical amendments to the ICAV Act 2015 to align it with certain Companies Act 2014 provisions and extends the beneficial ownership requirements applicable to corporate and unit trust fund structures to ILPs and common contractual funds ("CCFs") (see "AML Update" below).

#### **1.4 CSSF – Exclusion of Loan Investments for UCITS**

On 7 August 2020 the CSSF published an updated [FAQ](#) on the [Law of 17 December 2010](#) on undertakings for collective investment (the "2010 Law") to reflect one new FAQ on the eligibility of loans for UCITS. FAQ 1.13 confirms that loans cannot be considered eligible assets under Article 41(1) and (2) (a) of the 2010 Law as they do not qualify as:

- Money market instruments under Article 1(23) of the 2010 Law and Articles 3 and 4 of the [Grand-Ducal Regulation of 8 February 2008](#) relating to certain definitions of the amended Law of 20 December 2002 on undertakings for collective investment ("2008 Regulation"), further clarified by the [CESR guidelines](#) concerning eligible assets for investment by UCITS ("CESR Guidelines"); or
- Transferable securities under Article 1(34) of the 2010 Law and Article 2 of the 2008 Regulation, further clarified by the CESR Guidelines.

Therefore, UCITS that are invested in loans have to disinvest from these positions by 31 December 2020. Also those UCITS that allow for investment in loans must update their prospectuses by 31 March 2021, to reflect that an investment in loans is no longer possible.

#### **1.5 Brexit and Temporary Permissions Regime Update**

On 1 February 2019 the UK Financial Conduct Authority ("FCA") announced the agreement of Memoranda of Understanding ("MoUs") with ESMA and EU regulators covering cooperation and exchange of information in the event the UK left the EU without a withdrawal agreement. The UK has since left the EU with the Withdrawal Agreement in place on 31 January and the UK entered into a transition period. As EU law continues to apply in the transition period, these MoUs were not required to take effect.

The FCA, ESMA, and EU national securities regulators on 17 July 2020 [confirmed](#) that these MoUs remain relevant to ensure continued good cooperation and exchange of information. The MoUs will come into effect at the end of the transition period, which is set to expire on 31 December 2020.

The temporary permissions regime ("TPR") will enable relevant firms and funds which passport into the UK to continue operating in the UK when the passporting regime falls away at the end of the transition period. The TPR will now take effect at the end of the transition period.

On 30 September 2020 the FCA published an [updated webpage](#) on the TPR which states that EEA firms and fund managers can now notify it if they wish to use the TPR. Notifications should be submitted before the end of 30 December 2020. Firms that have already submitted a notification do not need to take any further action. Fund managers that want to update a previously submitted notification should email the FCA by 9 December 2020.

#### **1.6 AML Update**

**Ireland**

On 16 July 2020 the Court of Justice of the EU ordered Ireland to pay a fine of €2 million to the European Commission, due to Ireland's failure to fully transpose the Fourth Anti-Money Laundering Directive EU/2015/849 ("MLD4") by the deadline of 26 June 2017. MLD4 was not finally fully transposed into Irish law until 3 December 2019.

The [Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Bill 2020](#) which will implement the criminal justice elements of the Fifth Money Laundering Directive EU/2018/843 ("MLD5") in Ireland was published in September 2020 and is progressing through the Irish parliament. It is expected to be enacted shortly. The deadline for transposition into national law was 10 January 2020. It extends the categories of designated persons; prescribes actions for enhanced customer due diligence ("CDD"); improves the identification of politically exposed persons and gives expanded powers to EU financial intelligence units to request information from any firm.

The [Investment Limited Partnerships \(Amendment\) Bill 2020](#) which is progressing through the Irish parliament (see "ILP Legislation" above) introduces beneficial ownership register requirements for ILPs and CCFs as well as outlining the proper interaction with designated persons and the procedure for occasional transactions. It will require the ILP's general partner and a CCF's management company to maintain a register of beneficial ownership of the ILP and to submit that information to the Central Bank for its central register of beneficial ownership of certain financial vehicles.

A beneficial owner in these circumstances is any individual who ultimately is entitled to or controls, whether the entitlement or control is direct or indirect, more than a 25% share of the capital or profits of the partnership/CCF or more than 25% of the voting rights in the partnership/CCF; or otherwise controls the partnership/CCF. It will also allow the Central Bank to verify PPSN information on its beneficial ownership registers.

Existing ICAVs and unit trusts have until 25 December 2020 under the European Union (Modifications of Statutory Instrument No. 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020 to submit their beneficial ownership information to the Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts in Ireland managed by the Central Bank. See our client update [Central Beneficial Ownership Register Introduced for ICAVs and Unit Trusts](#) for further information on these requirements.

## Luxembourg

The [Law of 10 July 2020](#) which establishes a register of fiduciary arrangements and trusts was published on 13 July 2020 and completes the transposition of MLD5 into Luxembourg law. It applies to each fiduciary arrangement and express trust whose (i) fiduciary or trustee is established or residing in Luxembourg; and (ii) fiduciary or trustee is not established in Luxembourg or another Member State but establishes, in the name of the fiduciary arrangement or express trust, a business relationship with a professional within the meaning of the [Law of 12 November 2004](#) on the fight against money laundering ("ML") and terrorist financing ("TF"), as amended ("AML Law") or acquires real property in the Grand Duchy of Luxembourg.

Trustees and fiduciaries must obtain and hold information on the beneficial owner(s) of the trust or fiduciary arrangement and keep it in a register of fiduciary arrangements and trusts ("RFT") managed by the Luxembourg Registration Duties, Estates and VAT Authority. National authorities, self-regulatory bodies and professionals have full access to the information kept in the RFT in the context of performing their duties and/or legal obligations. Members of the public may only access the RFT if they can demonstrate a legitimate interest in preventing the use of the financial system for ML or TF. Failure to comply may result in administrative sanctions, which include monetary fines of up to €1.25 million.

CSSF [Regulation No 20-05](#) which amends CSSF [Regulation No 12-02](#) of 14 December 2012 on the fight against "ML" and "TF" and the [Grand Ducal Regulation of 14 August 2020](#) which amends the

[Grand Ducal Regulation of 1 February 2010](#) on certain provisions of the AML Law were published on 20 August 2020. Both apply from 24 August 2020 and reflect the most recent developments in the AML/TF legislative framework following the complete implementation of MLD4 and MLD5 into Luxembourg law.

The CSSF Regulation applies to professionals subject to Article 2 of the AML Law and supervised, authorised or registered with the CSSF. It updates existing definitions, introduces new definitions and covers, among others, the use of an automated client acceptance process in low risk scenarios, the use of simplified CDD measures, specific measures to be applied for certain non-face-to-face business relationships, the use of outsourcing arrangements and the responsibilities of the person responsible for AML compliance ("RR") and the person responsible for AML control ("RC"). The Grand Ducal Regulation addresses the frequency of the application of CDD measures, the application of CDD measures for virtual assets service providers carrying out transactions exceeding €1,000 and cooperation with the authorities. On 3 July 2020 the CSSF published [CSSF Circular 20/744](#) which complements [CSSF Circular 17/650](#) on the extension of Luxembourg's AML and CFT laws to cover serious tax crimes: aggravated tax fraud and tax evasion. It amends Annex I of Circular 17/650 by: (i) clarifying, that in the context of the collective investment sector, the reference to 'customer' should be read as a fund 'investor'; and (ii) providing a supplementary list of nine indicators which are specific to collective investment activities and to professionals working in the asset management sector. The CSSF expects professionals of the financial sector ("PFS") under its supervision to take these new indicators into account in their AML/CFT risk assessment and when designing risk mitigation measures.

On 20 July 2020 the CSSF published a ML/TF sub-sector [risk assessment](#) on specialised PFS providing corporate services. It complements the general national ML and TF risk assessment published by the CSSF in December 2018 which was mandated by MLD4. The CSSF has already published dedicated sub-sector risk assessments for [private banking](#) and [collective investments](#). The CSSF expects specialised PFS to reflect the findings and conclusions of the risk assessment in their frameworks to ensure they remain appropriate to effectively mitigate ML/TF risks.

### EU and International

On 14 September 2020 the Financial Action Task Force ("FATF") published a [report](#) on virtual assets: red flag indicators of money laundering and terrorist financing. It identifies key red flag indicators (such as technological features that increase anonymity) and notes that the existence of a single indicator does not necessarily indicate criminal activity and that, often, it is the presence of multiple indicators in a transaction with no logical business explanation that raises suspicion of potential criminal activity. The report aims to help virtual asset service providers, financial institutions, designated non-financial businesses and professions, and other reporting entities, detect and report suspicious transactions and facilitate a risk-based approach to CDD requirements.

On 16 September 2020 the European Commission published a [report](#) assessing whether member states have duly identified and made subject to MLD4 all trusts and similar legal arrangements governed under their laws. The review reveals that, in the area of funds, transparency of beneficial ownership information may vary from one member state to another based on their legal form. This creates an uneven level of transparency which might merit being addressed with common specific rules for funds.

## 1.7 Central Bank Q&A on MiFID Firms Making Distributions – COVID-19

On 6 August 2020 the Central Bank issued a [Q&A](#) on payment of distributions by Irish MiFID investment firms during the COVID-19 pandemic. The impact of COVID-19 on MiFID investment firms remains uncertain. In this context, and in line with the ESRB Recommendation of 27 May 2020 on restriction of distributions during the pandemic, the Central Bank requests all MiFID investment firms to exercise a high degree prudence at the EU group level (or at the individual level where the MiFID investment firm is not part of an EU group) if considering making any distributions (dividend

distributions, or giving an irrevocable commitment to make a dividend distribution, or buying back ordinary shares) until they can forecast their costs and future revenues with more certainty.

Further, MiFID investment firms which are designated as "medium-high" or above under the Central Bank's Probability Risk Impact System ("PRISM") are requested to exercise strong restraint from making any distributions until 1 January 2021.

Where the board of any MiFID investment firm forms the view that a high level of certainty has been reached in relation to forecasts of its costs and future revenues and wishes to make a distribution, the Central Bank expects the firm to engage with their supervision team before proceeding with the distribution. The firm should be able to evidence that it has immediate access to sufficient financial resources to meet all of its capital and liquidity requirements post-distribution over an extended period of time. MiFID investment firms subject to CRR/CRD IV are also expected to take the same approach in respect of their variable remuneration policies.

## 1.8 CSSF - Luxembourg Third Country Regime Update

The CSSF published two further measures on third-country firms ("TCFs") providing investment services or performing investment activities in Luxembourg on 1 July 2020: CSSF [Circular 20/743](#) and CSSF [Regulation N° 20-02](#).

The circular amends CSSF [Circular 19/716](#) to clarify that the CSSF will presume that investment services or activities as well as ancillary services ("MiFID Services") are provided by a TCF in Luxembourg if any of the following conditions are met:

- The TCF has a permanent establishment (e.g. branch) in Luxembourg;
- The TCF provides a MiFID Service to a retail client established or located in Luxembourg; or
- The essential MiFID Service for which payment is due is performed in Luxembourg.

Each TCF must individually assess whether they are providing MiFID Services in Luxembourg and the assessment, as well as its outcome, should be documented. If the TCF determines that the MiFID Service is not provided in Luxembourg, it will fall outside the scope of the circular and may provide MiFID Services to *per se* professional clients or eligible counterparties without further action.

The regulation provides a list of third countries, i.e. Canada, Switzerland, the US, Japan, Hong Kong and Singapore, that the CSSF considers to have equivalent supervision and authorisation rules for the purposes of Article 32-1 of the [Law of 5 April 1993](#) on the financial sector, as amended. Article 32-1 recognises that TCFs may provide MiFID Services in Luxembourg either through a Luxembourg branch or on a cross-border basis. However, the provision of MiFID Services on a cross-border basis requires, amongst other things, either the European Commission to adopt an equivalence decision or, in the absence of such decision, a decision from CSSF on equivalent third countries. To date, the European Commission has not adopted any such equivalence decisions.

It is expected that the UK will be added to the list of third countries at the end of the Brexit transition period.

## 1.9 EU Money Market Fund Regulation

On 9 July 2020 ESMA published a [statement](#) on external support under Article 35 of the Money Market Fund Regulation [EU/2017/1131](#) ("MMFR") in the light of actions by financial markets authorities to mitigate the impact of the pandemic. Under Article 35, MMFs are not allowed to receive external support, which is defined as "direct or indirect support offered to an MMF by a third party, including a sponsor of the MMF, that is intended for or in effect would result in guaranteeing the liquidity of the MMF or stabilising the NAV per unit or share of the MMF".

ESMA explains that the market liquidity brought by certain measures taken by central banks and securities and markets regulators may have indirectly benefited MMFs through the intermediation of credit institutions, including through the purchasing of short-term assets held by MMFs.



The statement clarifies that MMFs may enter into transactions with third parties, including affiliated or related parties, provided the requirements of Article 35 are met. It is also intended to co-ordinate the supervisory approaches of NCAs in the light of these and any future liquidity challenges for MMFs in the context of the COVID-19 pandemic.

On 22 July 2020 the CSSF [announced](#) that it will accept the submission of reports under Article 37 of MMFR under the amended XML schema published by ESMA on 4 June 2020 in the test environment. Submission of the reporting is exclusively authorised through the transmission channels currently accepted by the CSSF, namely the communication platform [e-file](#) or the communication platform [SOFiE](#). Article 37 requires MMF managers to submit data to their NCAs, who will then transmit the data to ESMA.

On 31 August 2020 the Central Bank [published](#) a guidance note on MMFR reporting which was updated on 11 September 2020. It provides information on the completion of MMFR reporting by UCITS management companies and AIFMs.

The first reports by MMF managers were due in September 2020 to cover Q1 and Q2 reporting periods after the postponed deadline for reporting was announced in March 2020.

#### **Guidelines on stress test scenarios**

On 27 August 2020 ESMA [announced](#) that it intends to update the 2019 guidelines on stress test scenarios produced under the MMFR to include a modification of the risk parameters to reflect recent market developments relating to the COVID-19 pandemic. The guidelines need to be updated at least annually to take account of the latest market developments.

ESMA has found that applying the 2019 scenarios in the current market environment generally leads to absolute levels of stress similar to the levels observed in March 2020. However, for some parameters the 2019 scenarios have been exceeded by the extreme market movements observed during the COVID-19 crisis. It therefore will update the relevant factors accordingly.

ESMA will publish the 2020 update in Q4 2020. The updated guidelines will then be translated, and the changes will apply from two months after the publication of the translations. ESMA has [confirmed](#) that the 2019 guidelines will continue to apply pending the application date for the 2020 update. This includes the existing calibrated scenarios and the internal stress test exercise to be carried out by MMF managers.

## **1.10 Measures Facilitating Virtual Meetings for Companies and Other Changes – COVID-19**

### **Ireland**

The [Companies \(Miscellaneous Provisions\) \(Covid-19\) Act 2020](#) recognises the cash flow and practical difficulties that have arisen for Irish companies due to COVID-19 and temporarily amended the Companies Act 2014 from 21 August 2020. It is in force for an interim period (currently up until 31 December 2020) and:

- Allows companies to postpone AGMs until 31 December 2020;
- Provides that both general and creditors' meetings may be held virtually;
- Allows documents which are required to be executed under seal to be executed in counterpart;
- Increases the amount at which a statutory demand can be issued;
- Extends the examinership process from 100 to 150 days (subject to court approval); and
- Provides the Minister with regulation making power in respect of extending the interim period and amending the operational detail of hybrid and virtual general meetings.

For more information see our client update, [COVID-19 Ireland Update: Company Law Changes](#)

On 22 September 2020 the Office of the Director of Corporate Enforcement issued updated guidance on [COVID-19 Arrangements for AGMs](#) which reflect the provisions of the Act.

### Luxembourg

In light of the continuing COVID-19 pandemic, the [Law of 23 September 2020](#) extends an emergency measure introduced in March 2020 allowing the governing bodies of any Luxembourg company to hold meetings of shareholders and boards of directors/managers without requiring the physical presence of their members, notwithstanding any provision to the contrary in their articles of incorporation. This measure was due to expire on 30 September 2020 but has been extended to 31 December 2020.

## 1.11 Central Bank - Use of Electronic Signatures in Regulatory Documents and Forms

Due to the increased instance of remote working arising from the COVID-19 pandemic, the Central Bank on 25 August 2020 issued [guidance](#) to regulated firms on the admissibility of electronic signatures as opposed to "wet ink" signatures in relation to regulatory documents and forms submitted to the Central Bank. It confirms that, in the absence of any specific legal provisions to the contrary, regulated firms may use electronic signatures.

## 1.12 BMR and Sustainable Finance Update

On 17 July 2020 the European Commission updated its webpage on implementing and delegated acts relating to Benchmarks Regulation [EU/2016/1011](#) ("BMR") to announce the adoption of Commission Delegated Regulations supplementing the BMR on the following sustainable finance issues:

- The explanation in the benchmark statement of how environmental, social and governance ("ESG") factors are reflected in each benchmark provided and published. This [Regulation](#) sets out the explanation that should be included in the benchmark statement about how ESG factors are reflected in each benchmark or, where applicable, family of benchmarks provided and published. The Commission has published the Annexes to this Regulation separately;
- The minimum content of the explanation on how ESG factors are reflected in the benchmark methodology. This [Regulation](#) lays down the minimum content of the explanation of how the key elements of the benchmark methodology reflect ESG factors for each benchmark, with the exception of interest rate and foreign exchange benchmarks, as well as the standard format to be used. The Commission has published the Annex to this Regulation separately; and
- Minimum standards for EU climate transition benchmarks and EU Paris-aligned benchmarks. This [Regulation](#) sets out the minimum standards that EU climate transition and EU Paris-aligned benchmarks should meet in order to be labelled as such, and lays down the transparency requirements on the methodology for both benchmarks.

The Commission was mandated to produce these regulations following BMR amendments made by the Low Carbon Benchmarks Regulation [EU/2019/2089](#).

The European Commission July 2020 consultation on a [roadmap](#) on a delegated regulation on taxonomy-related disclosures by undertakings reporting non-financial information supplementing the Taxonomy Regulation [EU/2020/852](#) closed on 8 September 2020.

On 21 September 2020 the European Supervisory Authorities ("ESAs") (that is, the EBA, EIOPA and ESMA) published a [survey](#) for comments on presentational aspects of product templates under Article 8(3), Article 9(5) and Article 11(4) of the Sustainable Finance Disclosure Regulation [EU/2019/2088](#)) (SFDR or Disclosure Regulation).

It focuses on pre-contractual and periodic disclosures by financial market participants, including AIFMs and UCITS management companies. Three illustrative mock-ups of templates have been created for the survey. However, the final content of the templates is subject to the outcome of a concurrent consumer testing exercise and the final report of the ESAs on draft regulatory technical standards ("RTS") under the Disclosure Regulation.

### 1.13 BMR Update: LIBOR Cessation and Draft New Rules

On 24 July 2020 the European Commission adopted a [legislative proposal](#) amending the BMR to address LIBOR cessation risks. The proposal regulation as regards the exemption of certain third-country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation aims is to ensure that when a widely used benchmark is phased out, as is currently the case with LIBOR, it does not cause disruptions to the economy. On 11 August 2020 the European Commission updated its webpage on this proposed regulation and is asking for comments on it until 6 October 2020. The European Central Bank published its [opinion](#) on the regulation on 21 September 2020.

On 29 September 2020 ESMA published its [final report](#) containing new sets of draft RTS under the BMR which contain additional rules to implement the framework aimed at ensuring the accuracy and integrity of benchmarks across the EU. They include provisions ensuring:

- That the governance arrangements of administrators are sufficiently robust;
- The potential manipulation of benchmarks is minimised, through additional rules regarding the methodology of calculation and controls to ensure the integrity of the data; and
- Common criteria are used across different Member States for the assessment of the mandatory administration of critical benchmarks and the compliance statement for non-significant benchmarks.

ESMA will submit the final draft RTS to the European Commission which will then have three months in which to approve or reject them.

### 1.14 EMIR Update

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

There have been a number of developments over the quarter:

On 8 July 2020 ESMA updated its [Q&As](#) on under EMIR to amend a Q&A on the frequency of reports for TRs.

On 22 September 2020 Commission Implementing Decision [EU/2020/1308](#) determining, for a limited period of time, that the regulatory framework applicable to CCPs in the UK is equivalent to EMIR came into force. The decision applies from 1 January 2021 and expires on 30 June 2022. It avoids EU firms having to exit UK clearing houses before the end of 2020.

On 22 September 2020 the following delegated regulations supplementing EMIR concerning CCPs established in third countries came into force:

- [EU/2020/1302](#) supplementing EMIR on fees charged by ESMA to TC-CCPs;
- [EU/2020/1303](#) supplementing EMIR on the criteria ESMA should take into account to determine whether a TC-CCP is systemically important or likely to become systemically important for the financial stability of the EU or of one or more of its member states; and

- [EU/2020/1304](#) supplementing EMIR on the minimum elements to be assessed by ESMA when assessing TC-CCPs' requests for comparable compliance and the conditions of that assessment.

They reflect amendments made by EMIR 2.2 [EU/2019/2099](#).

On 28 September 2020 ESMA updated its [Q&A](#) on data reporting under EMIR. The updated TR Q&A 1(c) clarifies that the counterparties should use the underlying to determine the asset class of total return swaps when reporting under EMIR. A new TR Q&A clarifies that the reporting of the field reference entity for credit derivatives can be made with a country code only in the case where the reference entity is a supranational, a sovereign or a municipality. Another new TR Q&A indicates how the fields, execution timestamp, effective date, maturity date and settlement date should be reported for forward rate agreement derivatives.

### **1.15 CSSF – Central Electronic Data Retrieval**

On 23 July 2020 following the publication of the [Law of 25 March 2020](#) establishing a central electronic data retrieval system concerning IBAN accounts and safe deposit boxes held by credit institutions in Luxembourg, the CSSF issued CSSF [Circular 20/747](#) on technical requirements relating to its application.

It provides technical guidance to all entities providing payment and/or bank accounts identified by an IBAN and/or safe deposit boxes and details how the central electronic data retrieval system operates as well as the contents and structure of the file these entities must submit to the CSSF. Entities providing payment and/or bank accounts identified by an IBAN and/or safe deposit boxes were required to establish an application programming interface by 10 September 2020 in order to identify themselves to the CSSF and make their files accessible to the CSSF. In August 2020 the CSSF issued a [FAQ](#) on the circular to provide further clarification.

### **1.16 CSSF FAQ on NAV Calculation Errors and Correction of Investment Breaches**

On 7 July 2020 the CSSF published a [FAQ](#), which was further updated on 28 July 2020, on CSSF [Circular 02/77](#). It addresses the protection of investors in the event of NAV calculation errors and the correction of the consequences resulting from non-compliance with the investment rules applicable to undertakings for collective investment ("UCIs").

The FAQ applies to UCITS and UCIs subject to Part II of the 2010 Law and outlines the principles to be applied by SIFs. It comprises 21 FAQs which are divided into three sections: (i) general application of CSSF Circular 02/77; (ii) selection of the correction method; and (iii) tolerance thresholds of CSSF Circular 02/77. The FAQ formalises the CSSF's practice on certain aspects of the circular and also includes helpful decision trees on NAV calculation errors, investment breaches and the use of the economic/accounting method.

### **1.17 €1,660,000 Central Bank Fine for Cyber Security Regulatory Breaches**

The Central Bank can sanction regulated financial service providers for committing prescribed contraventions under its Administrative Sanctions Procedure. It can impose various sanctions (by way of settlement or on foot of findings at an inquiry), ranging from reprimands to financial penalties of up to €10 million or 10% of turnover on a regulated financial service provider (whichever is the greater), and fines of up to €1 million on individuals involved in that firm's management.

On 27 July 2020 the Central Bank fined the Bank of Ireland €1,660,000 for a range of regulatory breaches in connection with cyber security failings. The investigation arose from a 2014 cyber fraud incident perpetrated on its subsidiary resulting in a finding that it had not applied adequate cyber security arrangements.

For more information see our client update, [Central Bank of Ireland Enforces €1.6m Fine for Cyber Security Failures](#)

The European Parliament's Economic and Monetary Affairs Committee's ("ECON's") September 2020 report on digital finance states that there should be a common approach to cyber resilience of the financial sector and calls for legislative changes in the area of ICT and cyber security requirements for the EU financial sector, focusing on modernisation, compliance with international standards and operational resilience testing.

### 1.18 EU Digital Finance Strategy

On 24 September 2020 the European Commission adopted a [digital finance package](#) including a digital finance strategy and legislative proposals on crypto-assets and digital resilience, for a competitive EU financial sector that gives consumers access to innovative financial products, while ensuring consumer protection and financial stability. It includes legislative proposals for a Regulation on markets in cryptoassets, a Regulation on a pilot regime for market infrastructures based on distributed ledger technology and a Regulation on digital operational resilience for the financial sector.

It also adopted a legislative proposal for a Directive amending existing EU financial services legislation - Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, 2013/36/EU, 2014/65/EU, EU/2015/2366 and EU/2016/2341. The purpose of the proposed Directive is that, to provide legal certainty as regards cryptoassets and achieve the objectives of strengthening digital operational resilience, it is necessary to establish a temporary exemption for multilateral trading facilities and amend or clarify certain provisions in existing EU financial services directives.

### 1.19 Second CMU Action Plan

On 24 September 2020 the European Commission published its [second action plan](#) on the Capital Markets Union ("CMU"). It sets out 16 initiatives intended to achieve three key objectives:

- Making financing more accessible to EU companies. For example, it will consider simplifications for the listing rules for public markets, undertake a review of the ELTIF Regulation (see further below) and review the EU securitisation framework;
- Making the EU a safer place for individuals to invest long-term. Among other things, the Commission will make amendments to MiFID II relating to retail investors and assess potential amendments to the Insurance Distribution Directive, the PRIIPs Regulation and MiFID II on inducements and disclosure; and
- Integrating national capital markets into a genuine single market. For instance, the Commission will review CSDR and legislate to establish a post-trade consolidated tape for equity and equity-like financial instruments.

### 1.20 European Long-term Investment Funds – Review of EU Rules

On 16 September 2020 the European Commission published a webpage on its inception impact assessment concerning its [review](#) of the Regulation on European long-term investment funds [EU/2015/760](#) ("ELTIF Regulation"). The review evaluates the effectiveness of the ELTIF framework to identify the reasons for the market's failure to develop in line with expectations. The deadline for providing feedback is 14 October 2020. The Commission indicates that it will publish a consultation on the ELTIF review in October 2020 and to adopt a legislative proposal for a Regulation amending the ELTIF Regulation in Q3 2021.

On 24 September 2020 the European Commission published its [second action plan](#) on the CMU (see above). Among other things, it will review the ELTIF Regulation.

## 1.21 ESMA/EBA Consultation on Guidelines for Suitability of Members of Management Board

On 31 July 2020 ESMA and EBA launched a [public consultation](#) on revised joint guidelines in relation to the assessment of the suitability of members of the management board and key function holders in accordance with the CRD IV Directive and MiFID II. This review reflects the amendments introduced by the fifth Capital Requirements Directive ("CRD V") and the Investment Firms Directive EU/2019/2034 in relation to the assessment of the suitability of members of the management body.

The draft guidelines clarify that the knowledge, experience and skill requirements are important aspects in the fit and proper assessment of members of the management body as they contribute to identifying, managing and mitigating money laundering and financing of terrorism risks. They also specify that a gender-balanced composition of the management body is particularly important.

The consultation runs until 31 October 2020 after which the updated joint guidelines will be finalised. The amended guidelines are expected to enter into force six months after publication.

## 1.22 ESAs Review of PRIIPs Delegated Regulation

On 21 July 2020 the Joint Committee of the ESAs published a [letter](#) to the European Commission. It sets out the outcome of the ESAs' review of proposed amendments to Delegated Regulation EU/2017/653 on key information documents ("KIDs") for packaged retail and insurance-based investment products ("PRIIPs Delegated Regulation").

The ESAs published a consultation on draft RTS to amend the technical rules on the presentation, content, review and revision of PRIIPs KIDs in October 2019. Subsequently, it submitted a draft final report (dated 30 June 2020) included as an annex to the letter, to the three ESA boards for their approval.

The draft RTS were adopted at the EBA and ESMA boards on the basis of qualified majority voting. At the EIOPA board it did not receive the support of a qualified majority. Those that did not support the RTS argued that a partial revision of the PRIIPs Delegated Regulation is not appropriate at this stage, ahead of a comprehensive review of the PRIIPs Regulation EU/1286/2014. Several board members also indicated that for investment funds, they would prefer the past performance graph from the UCITS key investor information document to be included in the PRIIPs KID itself, rather than in a separate publication. Given that the draft RTS was not adopted by the three ESA boards, the ESAs are not in a position to formally submit an RTS to the Commission.

On 24 September 2020 the European Commission published its [second action plan](#) on the CMU (see above). Among other things, it will assess potential amendments to the Insurance Distribution Directive, the PRIIPs Regulation and MiFID II relating to inducements and disclosure.

## 1.23 Shareholder Identification - SRD II

The second [Shareholders' Rights Directive EU/2017/828](#) ("SRD II") introduced a range of new rules on investor engagement and investment strategy transparency for institutional investors and asset managers that invest on their behalf. The [European Union \(Shareholders' Rights\) Regulations 2020](#) transpose SRD II into Irish law. The [Law of 1 August 2019](#) transposes SRD II into Luxembourg law.

SRD II requires EU Member States to ensure that companies have the right to identify their shareholders. Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0.5%.

On 31 July 2020 ESMA published a [document](#) listing the thresholds above which shareholders can be identified in the various EU Member States. It sets out: national thresholds for shareholder identification in Member States; relevant national legislation; and Member States where SRD II has not yet been transposed into national law.

## 1.24 CSDR Update

On 8 July 2020 ESMA updated its [Q&As](#) on the implementation of the Central Securities Depositories Regulation EU/909/2014 ("CSDR").

On 27 August 2020 Commission Delegated Regulation EU/2020/1212 which amends Delegated Regulation EU/ 2018/1229 supplementing CSDR with regard to RTS on settlement discipline came into force. Delegated Regulation EU/2018/1229 (RTS on settlement discipline) was due to enter into force on 13 September 2020. However, this has been [postponed](#) until 1 February 2020. On 28 August 2020 ESMA published its [final report](#) on draft RTS definitively postponing this date until 1 February 2022. This further postponement is due to the impact of the COVID-19 pandemic and follows a request from the European Commission in July 2020.

On 24 September 2020 the European Commission published its [second action plan](#) on the CMU (see above). Among other things, the Commission will review CSDR and legislate to establish a post-trade consolidated tape for equity and equity-like financial instruments.

## 1.25 SFTR Update

On 13 July 2020 ESMA [received](#) reports from TRs indicating that the first day of reporting by financial and non-financial market participants under the Securities Financing Transactions Regulation [EU/2015/2365](#) ("SFTR") had gone smoothly. On 15 September 2020 ESMA's July 2020 [consultation](#) on draft guidelines on the calculation of positions by TRs under SFTR closed.

## 1.26 MiFID II/MiFIR Update

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

On 1 July 2020 the CSSF published two further measures regarding third-country firms providing investment services or performing investment activities in Luxembourg, namely CSSF [Circular 20/743](#) and CSSF [Regulation N° 20-02](#) (see "CSSF - Update on Luxembourg Third Country Regime" above).

On 10 July 2020 ESMA published an [updated opinion](#) intended to help market participants assess whether their commodity derivatives activities can be considered as ancillary to their main business under MiFID II.

On 17 July 2020 ESMA published an [opinion](#) on the assessment of pre-trade transparency waivers for equity and non-equity instruments under MiFIR.

On 23 July 2020 ESMA published its [final report](#) on the transparency regime for non-equity instruments under MiFIR.

On 28 July 2020 ESMA [announced](#) that it has updated information about transparency opinions for third-country trading venues under MiFID II and MiFIR.

On 31 July 2020 ESMA and the EBA published a [consultation](#) on revising their joint guidelines on the assessment of the suitability of members of the management body and key function holders in accordance with the CRD IV Directive and MiFID II (see "ESMA/EBA Consultation on Guidelines for Suitability of Members of Management Board" above for further details).

On 6 August 2020 the Central Bank issued a [Q&A](#) on payment of distributions by Irish MiFID investment firms during the pandemic (see "Central Bank Q&A on MiFID Firms Making Distributions – COVID-19" above).

On 22 September 2020 ECON published a [draft report](#) on the proposed Directive amending MiFID II as regards information requirements, product governance and position limits to help the recovery from the COVID-19 pandemic. The proposal for a Directive, which is designed to contribute to the

EU's recovery by facilitating investments in the real economy and freeing up resources for both firms and investors, was published on 24 July 2020.

On 24 September 2020 ESMA published a [consultation paper](#) with proposals for possible amendments to the transaction reporting and reference data regime under MiFIR. On 25 September 2020 it published a [consultation paper](#) on the functioning of organised trading facilities under Article 90(1)(a) of MiFID II.

On 28 September 2020 ESMA published its [final report](#) with draft RTS and ITS on the provision of investment services and activities in the EU by third-country firms under MiFIR and MiFID II for approval by the European Commission. These follow the changes to MiFIR and MiFID II regimes for the provision of investment services and activities in the EU by third-country firms, introduced by the Investment Firms Regulation EU/2019/2033 and Directive EU/2019/2034. The changes include new reporting requirements from third-country firms to ESMA annually in accordance with Article 46 of MiFIR, and the possibility for ESMA to ask third-country firms to provide data relating to all orders and transactions in the EU. New annual reporting requirements from branches of third-country firms to NCAs are also included.

On 29 September 2020 ESMA published the [final report](#) on the MiFID II/MiFIR transparency regime applicable to non-equity financial instruments. The proposals aim to simplify and bring more efficiency to an overly complex regime and invites the European Commission to translate these recommendations into legislative proposals. On the same date ESMA also published [guidance](#) on the Annex to its opinion determining third-country trading venues for the purpose of transparency under MiFIR.

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

## 1.27 Irish Investment Funds Statistics: Q2 2020

The main points to note in the Central Bank's [Q2 2020](#) issued in September 2020 update are as follows:

- The net asset value ("NAV") of Irish resident investment funds increased by €266 billion, or 12% to €2,423 billion in Q2 2020. All fund types saw net asset values increase;
- Investment funds saw investor inflows of €74 billion and positive revaluations of €192 billion during the quarter; and
- Equity fund assets saw the biggest increase during Q2 2020, which was driven by significant valuation gains (€114 billion). However, bond funds experienced the largest investor inflows (€44 billion).

## 1.28 Luxembourg Undertakings for Collective Investment Statistics

The main points to note in the CSSF's [August 2020](#) update for regulated Luxembourg funds are as follows:

- Total assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") increased €79.367 billion from €4,617.395 billion as at 31 July 2020 to €4,696.762 billion;
- The number of Luxembourg Investment Funds active in the market and regulated by the CSSF totals 3,655;
- Of the 3,655 active Luxembourg Investment Funds, 2,396 have adopted an umbrella structure and have a total of 13,427 sub-funds. The remaining 1,259 Luxembourg Investment Funds are structured as stand-alone funds;
- As at August 2020 there were a total of 14,686 sub-funds; and



- During August 2020 there were more subscriptions than redemptions in equity funds and more subscriptions than redemptions in fixed-income funds.

In addition, the number of Luxembourg RAIFs reached 1,112 on 15 September 2020.

## 2 Tax

### Ireland

#### 2.1 ESMA Report on Withholding Tax Schemes

On 24 September 2020 ESMA published its [final report](#) on its inquiry into Cum/Ex, Cum/Cum and withholding tax ("WHT") reclaim schemes. These include the type of "Cum/Ex" schemes most notoriously involving German issuers and which have been widely reported in the financial press. The report relies on information received from NCAs through ESMA's formal inquiry under Article 22(4) of the ESMA Regulation.

The report highlights that WHT schemes involving financial institutions are primarily a tax related issue. Therefore, it recognises that the response should be within the boundaries of the tax legislative and supervisory framework.

The report notes that, in almost all EU member states, NCAs consider that tax authorities have competence over detection and investigation of WHT reclaim schemes. NCAs consider that those schemes do not fall within their remit, unless they involve violations of rules pertaining to financial markets laws, e.g. the short selling or market abuse regimes. Against that backdrop, ESMA is not proposing to enhance NCAs' remit to cover WHT schemes.

In an Irish context, it notes that the Central Bank did not carry out *ad hoc* analysis or investigations involving potential WHT schemes. However, if individuals or companies regulated and supervised by the Central Bank were found to be involved in unlawful activities in this context, this would be relevant to the assessment of the fitness and probity of any individuals and the adequacy of the governance, systems and controls of any regulated entity.

In its conclusion, ESMA notes that enhanced cooperation and mutual assistance between NCAs, tax authorities and other law enforcement bodies could help to detect and prosecute WHT reclaim schemes. ESMA recommends pursuing a legislative change to remove the legal limitations on NCAs in exchanging information with tax authorities and to provide a common legal basis for the exchange with its relevant national tax authorities of the information directly acquired by the NCA within its national supervisory activity. The report will be submitted to the European Parliament for further consideration.

#### 2.2 DAC6 – Irish Update

As highlighted in earlier updates, DAC 6 (Directive [EU/2018/822](#)) was implemented into Irish law in Finance Act 2019. The initial Irish reporting date was August 2020, but this has been deferred to February 2021. Investment managers and funds are increasingly taking a coordinated approach to securing their compliance with DAC6, given its international scope.

Under DAC6 it is necessary to analyse actions, schemes, and transactions ("Arrangements") to determine whether they have features ("Hallmarks") indicative of tax avoidance or abuse. Such transactions may be reportable to the Irish Revenue Commissioners or other tax authorities. Failure to report is an offence which can lead to penalties of up to €5000 plus additional penalties for any delays.

Irish Revenue published guidance on a number of Hallmarks in July 2020 and further guidance on Hallmark C is expected shortly.

For many funds, the investment manager, or a trusted advisor, is best placed to coordinate a review of the transactions undertaken by fund vehicles to assess whether reporting obligations arise. Such a coordinated approach would see historic transactions (DAC6 potentially requires reporting of transactions entered into from June 2018) reviewed. Where a report is necessary, the manager will coordinate the report and notify other intermediaries. For future transactions, managers and funds are increasingly requiring their advisors to deal with DAC6 as part of a term of business. This requires advisors and other service providers to notify the manager if a transaction is potentially reportable and to engage in a dialogue on the form and manner of any report.

## Luxembourg

### 2.3 Extension of Reporting Deadlines for DAC6, FATCA and CRS

The [Law of 24 July 2020](#) sets out reporting extensions for DAC6, FATCA and CRS in light of COVID-19. It defers the reporting deadlines by up to six months for DAC6 and by up to three months for certain 2019 reporting obligations under CRS and FATCA as set out below.

#### DAC6 reporting

- Reportable cross-border arrangements implemented between 25 June 2018 and 30 June 2020 must be reported by 28 February 2021 (i.e. up to six months after the original deadline of 31 August 2020);
- Reportable cross-border arrangements occurring between 1 July 2020 and 31 December 2020 must be disclosed within 30 days as from 1 January 2021; and
- Reportable cross-border arrangements occurring on or after 1 January 2021 must be disclosed within a 30 day period.

#### FATCA and CRS reporting

Luxembourg reporting financial institutions had a three month extension to file 2019 reports under FATCA and CRS up to 30 September 2020.

For additional information see our client update [Luxembourg Parliament Approves Extended Deadlines for DAC6, FATCA & CRS](#)

### 2.4 Tax and Social Security Measures for Luxembourg Cross-Border Workers

On 24 August 2020 the Luxembourg Minister of Finance announced the extension of the tax and social security agreements with neighbouring countries, allowing for the days that cross-border workers are required to work from home to be treated as working days in Luxembourg.

Cross-border workers from Belgium, France and Germany working from their countries of residence due to the COVID-19 pandemic may continue to do so up to 31 December 2020 without adverse tax or social security implications.

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## About The Maples Group

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