MAPLES GROUP

Funds & Investment Management Update – Ireland and Luxembourg

Quarterly Update | October – December 2019

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1 Legal & Regulatory

1.1 UCITS Update

There have been a number of developments over the quarter:

EU

UCITS performance fees

The Securities and Markets Stakeholder Group of the European Securities and Markets Authority ("ESMA") on 14 November 2019 welcomed ESMA's consultation on performance fees in UCITS as part of its key supervisory priorities. The SMSG advises ESMA to gather more data and analyses regarding the use and the effects of performance fees. It encourages ESMA to finalise these guidelines to allow for pan-European convergence in the field of performance fee calculation. The SMSG agrees with the framework proposed by ESMA and the strong link with the IOSCO principles.

Sanctions

On 12 December 2019 ESMA issued its second Pan-EU Overview on the Use of Supervisory Sanctions for UCITS covering the year 2018. While the number of national competent authorities ("NCAS") issuing sanctions remains stable at 15, compared to the previous report for the period 2016-2017, the total number of sanctions issued has decreased based on a year on year comparison.

1.2 AIFMD Update

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

ESMA Q&A

On 4 December 2019 ESMA added one new Q&A on AIFMD reporting to NCAs on liquidity stress tests for closed-ended unleveraged AIFs in accordance with Article 24(2) of AIFMD. For closed-ended unleveraged AIFs, given the mandatory character of field 280 of the AIFMD reporting template, AIFMs should indicate the question is "Not Applicable" and at least report in this field the fact that the relevant fund is a closed-ended unleveraged AIF. However, where an AIFM decides to conduct liquidity stress tests for unleveraged closed-ended AIFs, it should report the results of the liquidity stress tests in the same field.

1.3 Brexit Update

The exit date for the UK to leave the EU was pushed out to 31 January 2020 in October 2019 to allow time to agree withdrawal terms.

As a result the deadline for opting into the UK Temporary Permissions Regime or TPR for inbound passported firms and funds or for amending existing TPR notifications has been extended until 30 January 2020. In the case of TPR amendment notifications, the UK FCA must be informed by 15 January of the intention to file the amendment notification.

ESMA also issued a statement noting that the date for Brexit in all its published measures and actions, including public statements, issued regarding the possibility of a no-deal Brexit scenario, should now be read as 31 January 2020.

Luxembourg

On 6 November 2019 Luxembourg's financial regulator, the Commission de Surveillance du Secteur Financier (the "CSSF"), issued press release 19/54 on mandatory notifications in the context of Brexit. In this press release, the CSSF extended the deadline for submission of Brexit notifications in the event of a hard Brexit to 15 January 2020.

For more information see our client update, *Luxembourg Update: CSSF Mandatory Notifications Deadline Extended*

1.4 Sustainable Finance - The Disclosure Regulation and Other Measures

Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector lays down harmonised rules for financial market participants including AIFMs, UCITS management companies and investment firms authorised under MiFID II (providing portfolio management or investment advice). It provides for transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes, as well as the provision of sustainability-related information on financial products. It came into force on 29 December 2019 and, with some exceptions, will apply from 10 March 2021.

Initial website and pre-contractual disclosure requirements will apply from 10 March 2021. Periodic reporting requirements will apply from 1 January 2022. Certain financial product specific pre-contractual disclosures will apply from 30 December 2022.

The European Supervisory Authorities are now required to develop technical standards on the content, methodology and presentation of information relating to the disclosure requirements.

For more information see our client update, *New ESG Disclosure Requirements for EU Funds and Asset Managers*

In a related development the Low Carbon Benchmarks Regulation (EU) 2019/2089 came into force 10 December 2019 (see "Benchmark Regulation" below for more information). Further on 17 December 2019 the EU Parliament reached agreement with the EU Council on new criteria to determine whether an economic activity is environmentally sustainable. The EU taxonomy will provide investors with clarity on which activities are considered environmentally and socially sustainable. The agreement reached will now have to be approved first by the two committees involved and by a plenary vote.

1.5 AML and Beneficial Ownership

Ireland

The European Union (Money Laundering and Terrorist Financing) Regulations 2019 amended the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 ("CJA") from 18 November 2019. They require a designated persons to have appropriate internal procedures for their employees to report a CJA contravention through a specific, independent and anonymous channel, proportionate to the nature and size of the designated person. They also create a criminal offence of failing to inform a competent authority such as the Central Bank of Ireland ("Central Bank") where certain persons are convicted of CJA or other offences relating to other financial activities. They also confirm that competent authorities should apply a risk based approach to supervision and ensure that their employees have access to information on ML/TF risks and that competent authorities who supervise designated persons have a duty to cooperate with competent authorities in other EU Member States.

Registrar of Beneficial Ownership

Companies incorporated before 22 June 2019 were obliged to report their beneficial ownership information to the Central Register of Beneficial Ownership of Companies and Industrial and

Provident Societies ("RBO") by 22 November 2019. Entities incorporated after 22 June 2019 must report to the RBO within five months of the date of incorporation. Reporting must be made online on the RBO website available here.

For more information see our client update, *Deadline Nears for Filings with the Central Register of Beneficial Ownership*

Luxembourg

CSSF AML/CFT market entry forms

On 7 November 2019 the CSSF issued a press release regarding the availability of two anti-money laundering and countering the financing of terrorism ("AML/CFT") investment market entry forms (the "AML/CFT Entry Form") on its website. The purpose of the AML/CFT Entry Form is to collect standardised key information in relation to (i) the money laundering and terrorist financing risks ("ML/TF risks") to which all professionals supervised by the CSSF are exposed; and (ii) the measures put in place to mitigate these ML/TF risks.

The AML/CFT Entry Form must be completed and submitted to the CSSF by all funds and investment fund managers ("IFMs") supervised by the CSSF and each AML/CFT Entry Form will be accompanied by specific ancillary documentation. The exact documentation to be provided will depend on the money laundering/terrorist financing residual risk scoring of the relevant fund/IFM.

For more information see our client update, *Luxembourg Update: CSSF AML/CFT Investment Market Entry Forms*

CSSF AML/CFT FAQ for investment funds and IFMs

On 25 November 2019 the CSSF published a FAQ in relation to persons involved in AML/CFT for a Luxembourg investment fund ("Fund") or IFM supervised by the CSSF for AML/CFT purposes. The FAQ contains two questions and relevant responses:

- Question 1 clarifies that Funds and IFMs subject to the AML/CFT supervision of the CSSF are legally required to appoint two different individuals responsible for AML/CFT (a requirement which stems from article 4(1) of law of 12 November 2004, as amended (the "AML Law")):
    - One individual from among the members of its management body or the management body itself (e.g. board of managers) responsible for compliance with AML/CFT obligations (*responsable du respect des obligations*) ("RR"); and
    - One individual at the appropriate hierarchical level (*responsable du contrôle du respect des obligations*) ("RC"). The RC of a Fund may either be a member of the management body or a third party delegate. For IFMs, the RC must be the compliance officer at the appropriate hierarchical level responsible for the AML/CFT aspects.
- Question 2 clarifies the criteria for appointment to the role of RR and RC.

Notwithstanding that the FAQ only applies to entities subject to the CSSF's AML/CFT supervision, unregulated funds should be cognisant of these provisions as they are also subject to the AML Law.

CSSF survey

On 28 November 2019 the CSSF issued press release 19/57 on its 2019 online survey on the fight against money laundering and terrorist financing which will be launched on 3 February 2020. Its purpose is to collect standardised key information concerning (i) the ML/FT risks to

which professionals under the CSSF's AML/CFT supervision (the "Professional") are exposed; and (ii) the implementation of related risk mitigation and targeted financial sanctions measures.

The survey must be initiated and submitted by a member of the management body of each Professional (preferably the member of the management body responsible for AML/CFT compliance) and must be submitted through the CSSF's electronic portal ("eDesk Portal") within six weeks (or four weeks for the banking sector), but may be completed by another employee of the Professional. However, the ultimate responsibility for completion of the survey remains with the aforementioned member of the management body.

The submission of the survey requires an account on the eDesk Portal for which a LuxTrust authentication is required.

CSSF AML/CFT conference

On 3 December 2019 the CSSF held an AML/CFT conference for registered AIFMs and self-managed non-AIFs in order to raise awareness of their obligations within the context of applicable Luxembourg AML/CFT legislation. The CSSF used this occasion to communicate the results of its assessment of AML/CFT procedures implemented by registered AIFMs and self-managed non-AIFs as of 31 December 2018 and highlighted a number of key points:

- AML/CFT procedures must be tailored to each entity's specific activity and monitored on a continuous basis in order to update these procedures to take into account legal and regulatory changes, internal changes and/or the evolution of the entity's business;
- AML/CFT procedures must be based on the so-called "Risk Based Approach" and each entity must undertake such a risk assessment;
- Entities must ensure that AML/CFT training sessions take place within each entity annually and such training must be tailored to the activity of the entity;
- An entity's AML/CFT procedure must foresee the so-called "Targeted Financial Sanctions Screening" and such screening must be undertaken regularly;
- Transaction monitoring forms an integral part of any AML/CFT procedure and where there is delegation to a third party (e.g. registrar and transfer agent ("RTA")), the entity must ensure that it exercises proper oversight of such transaction monitoring. This can be achieved by requiring regular reports from the RTA for the attention of the entity's senior management/management body; and
- Each entity must be registered on the "goAML" platform of the Luxembourg Financial Intelligence Unit in order to be able to communicate any suspicious activity an entity detects when applying its AML/CFT policy.

CSSF circular 19/732

On 20 December 2019 the CSSF published CSSF circular 19/732 regarding clarifications on the identification and verification of the identity of ultimate beneficial owners ("UBO"). The circular aims to provide guidance to all professionals subject to the AML/CFT supervision of the CSSF (the "Professionals") on the practical implementation of UBO identification requirements and verification measures.

The circular addresses: (i) the UBO identification requirements for customers of Professionals that are natural persons, legal persons or legal arrangements; (ii) the measures to be taken to verify the relevant UBO's identity; and (iii) certain indicators that may help detect potential concealment of beneficial ownership information. A number of FATF reports and guidance documents are also incorporated into the circular.

For more information see our client update, *Luxembourg Update: CSSF Provides Clarification on UBO Identification and Verification*

EU

On 5 December 2019 the European Council adopted conclusions on strategic priorities on AML which point to significant recent enhancements to the AML regulatory framework. They also build on the Commission's communication and four reports published in July 2019 that set out current challenges that conclude that there is fragmentation in both AML rules and supervision. The Council therefore invites the Commission to explore further enhancements to the existing AML rules, in particular, by considering: ways of ensuring a more robust and effective cooperation between the relevant authorities and bodies; whether some aspects could be better addressed through a regulation; and the possibilities of conferring certain supervisory responsibilities and powers to an EU body.

The three European Supervisory Authorities (EBA, ESMA and EIOPA) published Joint Guidelines on cooperation and information exchange between competent authorities supervising credit and financial institutions on 16 December 2019. They clarify the practicalities of supervisory co-operation and information exchange. AML/CFT colleges will serve as permanent structures for cooperation and communication between supervisors from different Member States and third countries that are responsible for the AML/CFT supervision of the same firms. The guidelines apply from 10 January 2020, although a transitional period is set out in guideline 16.

MLD5 implementation

The General Scheme of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019 which will implement the Fifth Money Laundering Directive EU/2018/843 ("MLD5") in Ireland was published in January 2019. EU Member States have to transpose it into national law by 10 January 2020.

Bill of Law n° 7467, which will implement certain provisions of MLD5 that have not yet been implemented in Luxembourg. The current draft aims to amend the AML Law as well as other national laws relating to the organisation of regulated professions and to ensure that the Financial Action Task Force ("FATF") recommendations, in particular those which are not the subject of equivalent provisions under MLD5, are implemented.

The main proposed amendments to the AML Law include:

- Extending the category "financial institutions" to include all persons subject to the AML/CFT supervision of the CSSF;
- Extending the scope of the AML Law to include, among others, virtual asset service providers and custodian wallet providers;
- Permitting identification and verification of a customer's identity to occur on the basis of electronic identification means or any other secure remote or electronic identification process that is regulated, recognised, approved, and accepted by the relevant national authorities;
- Limiting the use of prepaid cards;
- Strengthening and improving the application of enhanced due diligence measures for business relationships and transactions to and from high-risk countries;
- Aligning and harmonising the powers of the supervisory authorities and self-regulatory bodies; and
- Strengthening the cooperation between the Luxembourg supervisory authorities and their foreign counterparts.

Once adopted, the bill of law will be immediately applicable, as it does not provide for any transitional period.

A second bill of law (Bill of Law n° 7512) will introduce a new framework for AML/CFT supervision of virtual asset service providers active in Luxembourg into the AML Law. Under this new framework, virtual asset service providers will be required to register with the CSSF, who will maintain and update this register and make it available online. Registration of virtual asset service providers is a requirement under MLD5.

1.6 Shareholders' Rights Directive II

The Shareholders' Rights Directive EU/2017/828 ("SRD II") which amends the existing Shareholders' Rights Directive 2007/36/EC ("SRD") was due to be transposed by all EU Member States by 10 June 2019. Ireland's implementing regulations to transpose SRD II into Irish law are expected shortly. Luxembourg implemented SRD II into law on 1 August 2019. For more information see our Q3 2019 quarterly update.

SRD II impacts institutional investors (insurers and pension funds) and asset managers (MiFID firms providing portfolio management services, AIFMs, UCITS management companies and self-managed UCITS) by imposing an obligation to provide greater transparency on their shareholder engagement policy, on how they engage with companies they or their clients invest in and on their equity strategy.

For investment funds invested in by the relevant EU institutional investors, it creates an obligation to put a shareholder engagement policy in place and new transparency requirements that will apply to asset managers. While it is expected that Ireland will exercise its discretion to exempt asset managers from many SRD II requirements including the provisions relating to the director remuneration, identification of shareholders and the facilitation of the exercise of shareholder rights, as it did with SRD, the publication of the implementing regulations is necessary to confirm this.

1.7 CSSF Implementation of IOSCO Liquidity Risk Management Recommendations

On 20 December 2019 the CSSF published CSSF Circular 19/733 with the objective of implementing into Luxembourg regulation the International Organization of Securities Commissions ("IOSCO") recommendations on liquidity risk management for open-ended undertakings for collective investment.

The CSSF explicitly provides that it expects all entities which fall within the scope of the circular to implement the IOSCO recommendations and to draw on the related IOSCO good practices for the implementation of a robust and effective liquidity risk management process for open-ended undertakings for collective investment. For more information see our Q1 2018 funds quarterly update.

1.8 Central Bank Guidance on Enforcement Sanctions

The Central Bank published a new guide to sanctions imposed under its Administrative Sanctions Procedure ("ASP") for the financial services sector on 14 November 2019. This increases transparency by providing greater clarity on the Central Bank's general approach to sanctioning of firms and individuals. It provides guidance on the application of a variety of factors relevant to sanctioning under the ASP, including cooperation, self-reporting and remediation. The guidance aims to promote an improved culture of compliance in financial firms by clarifying the behaviours which may aggravate or mitigate a breach of financial services law.

1.9 CSSF eDesk Portal

New UCI applications

The recent launch of the eDesk Portal marked a new approach to submitting certain requests to the CSSF. Currently a limited number of requests must be made via the eDesk Portal in respect of credit institutions, investment firms and payment institutions/electronic money institutions. The same applies with respect to investment vehicles. However, since 1 November 2019, all applications for the approval of a new UCITS, undertakings for collective investment governed by the provisions of Part II of the law of 17 December 2010 relating to undertakings for collective investment ("Part II UCI"), specialized investment funds governed by the law of 13 February 2007 relating to specialised investment funds ("SIF") or investment companies in risk capital governed by the law of 15 June 2004 relating to the investment company in risk capital ("SICAR", together with UCITS, Part II UCI and SIF "UCI"), as well as the approval of a new sub-fund of an existing UCI, must be submitted via the eDesk Portal.

Law firm and legal advisor mandate

Since 11 December 2019 law firms or legal advisors may submit requests on behalf of UCIs through the eDesk Portal. In order to do so, UCIs must complete and execute the relevant mandate form, which is available on the eDesk Portal. This form also needs to be executed by the law firm or legal advisor in question.

By completing and executing the mandate form, UCIs agree to (i) check on a regular basis and at least once per year the data released on the eDesk Portal regarding the UCI; (ii) inform the CSSF immediately if it notices that any information, request or assessment transmitted to the CSSF and/or the data released on the eDesk Portal regarding the UCI is incomplete, inaccurate or false; and (iii) inform the CSSF immediately in the event that the law firm or legal advisor is no longer allowed to liaise with the CSSF as regards the UCI.

1.10 EMIR Update

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

There have been a number of developments over the quarter:

On 2 October 2019 ESMA published an updated version of its Q&As on the implementation of EMIR. Following the entry into force of the EMIR Refit Regulation (EU) 2019/834 on 17 June 2019, ESMA has been reviewing the Q&As to align them with the new requirements. The latest amendments relate to matters including when counterparties that start taking positions in OTC derivatives need to notify the relevant NCAs and ESMA, and whether counterparties not subject to the clearing obligation should also obtain representation.

On 3 October 2019 ESMA published a consultation paper which closed on 2 December 2019 on draft technical advice to the European Commission on commercial terms for providing clearing services under EMIR.

On 4 October 2019 ESMA published a consultation paper on the alignment of MiFIR with the changes introduced by the EMIR Refit Regulation which amends EMIR which closed on 22 November 2019. The EMIR Refit Regulation requires the European Commission to prepare a report on the necessity of aligning the trading obligation for derivatives under MiFIR with changes made under the EMIR Refit Regulation to the derivatives clearing obligation. ESMA intends to submit its final report to the European Commission in early 2020.

On 5 December 2019 the European Supervisory Authorities (ESMA, EIOPA and the EBA) (the "ESAs") published a final report and draft regulatory technical standards ("RTS") on various amendments to the European Commission's Delegated Regulation (EU) 2016/2251 on bilateral margining ("2016 DR"). The proposed RTS would amend the 2016 DR to take account of the international framework for margin rules agreed by the Basel Committee on Banking Supervision and IOSCO. The proposed amendments adapt the timelines and rules to facilitate the current implementation of the 2016 DR, and the international framework. Each proposed amendment is limited in scope. The draft RTS are with the European Commission for endorsement. The ESAs also published a joint statement on the introduction of fallbacks in OTC derivative contracts and the requirement to exchange collateral to ensure legal certainty on the issue in case, or to the extent, it is not already provided in some jurisdictions.

On 12 December 2019 Regulation (EU) 2019/2099 amending EMIR as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs ("EMIR 2.2") was published in the Official Journal of the EU. EMIR 2.2 applies from 1 January 2020.

On 16 December 2019 the European Commission adopted a Delegated Regulation supplementing EMIR with regard to RTS on the specification of criteria for establishing the arrangements to adequately mitigate CCP credit risk associated with covered bonds and securitisations. The next step will be for the Council of the EU and the European Parliament to consider it.

On 17 December 2019 the European Commission adopted a Delegated Regulation amending Commission Delegated Regulation (EU) 2016/2251, which contains RTS supplementing EMIR on risk mitigation techniques for OTC derivative contracts, in connection with certain simple, transparent and standardised ("STS") securitisations for hedging purposes. Article 11 of EMIR requires counterparties to OTC derivative contracts that are not cleared by a CCP to mitigate their trading risks by using a number of different techniques set out in Commission Delegated Regulation (EU) 2016/2251. The Securitisation Regulation amended Article 11(15) to require amendments to these RTS to include rules on the risk mitigation techniques for OTC derivative contracts not cleared by a CCP concluded by a securitisation special purpose entity ("SSPE") in connection with a securitisation. The Delegated Regulation provides that SSPEs, for OTC derivatives in connection with securitisations that meet the requirements to be classified as STS, will be exempted from posting and collecting initial margins and from posting variation margins. The next step will be for the Council of the EU and the European Parliament to consider it.

Luxembourg - CSSF press release 19/49

On 14 October 2019 the CSSF issued press release 19/49 on the results of the questionnaire on EMIR which the CSSF had issued to IFMs supervised by it in August 2018.

The results revealed that, in general, IFMs are not compliant with EMIR requirements or the EMIR requirements set out in CSSF Circular 18/698, where applicable and that they should improve the supervision and oversight of their respective obligations. In particular, the following require specific attention:

- Adequate written procedures and arrangements to cover the supervision of all obligations under EMIR must be documented even when a specific obligation does not apply on the basis of the IFM's assessment results;
- IFMs' assessments on the adequacy of their monitoring and oversight procedures under EMIR need to be documented and reviewed on a regular basis;

- In the event EMIR obligations are delegated to a third party, the roles and responsibilities of the IFM and the third party must be clearly allocated and the IFM must ensure adequate ongoing oversight of the delegated EMIR obligations;
- IFMs must carry out initial and ongoing due diligence on the delegate to appropriately monitor the delegated EMIR obligations;
- EMIR applies to derivative contracts concluded for hedging purposes and investment purposes; and
- IFMs subject to registration under article 3(3)(a) of the law of 12 July 2013 on alternative investment fund managers, as amended, are within the scope of EMIR and as such, the CSSF is the competent authority to ensure compliance with EMIR.

In its press release, the CSSF indicated that it will proceed with an assessment of compliance with EMIR requirements and seek to improve the data quality of trades reported to trade repositories.

The CSSF also reminded IFMs that the EMIR Refit Regulation entered into force on 17 June 2019 and that IFMs may need to adapt their procedures to comply with all the modifications introduced by the EMIR Refit Regulation.

For more information see our client update, *Luxembourg Update: CSSF EMIR Questionnaire Results*

1.11 Draft ELTIF RTS on Costs Disclosure in Final Report

On 10 December 2019 ESMA published its final report on draft RTS on costs disclosure requirements applicable to ELTIF managers under Article 25(3) of the Regulation on European long-term investment funds (EU) 2015/760 ("ELTIF Regulation").

The draft RTS depend to a great extent on the costs section of the PRIIPs KID, which is currently being revised in the context of the review of the PRIIPs Delegated Regulation (EU) 2017/653. ESMA has decided to postpone finalising the draft RTS until the new PRIIPs delegated acts have been published.

Once the review of the PRIIPs Delegated Regulation is finished, ESMA will assess the most appropriate way to finalise the draft ELTIF RTS. It may carry out another consultation on a revised draft RTS.

1.12 PRIIPs: KID Consultation, UCITS and CSSF Communication

The EU Regulation on key information documents ("KIDs") for packaged retail and insurance-based investment products ("PRIIPs") (Regulation 1286/2014/EU) ("PRIIPs KID Regulation") introduced a new pan-European pre-contractual product disclosure document for PRIIPS in EU Member States on 1 January 2018. The KID is a mandatory, three-page A4 information document to be provided to consumers before purchasing a PRIIP.

The ESAs issued a consultation paper on 16 October 2019 on amendments to the existing KID rules to:

- Address issues that have been identified by stakeholders and supervisors since the implementation of the KID in 2018;
- Make changes to allow the rules to be applied to investment funds that are expected to have to prepare a KID from 1 January 2022 onwards.

The paper proposes changes on the following topics:

- Illustrations of what the retail investor might receive in return from their investment (performance scenarios);
- Information on what the costs of the investment are;
- Specific issues for different types of investment funds; and
- Specific issues for PRIIPs offering a range of options for investment ("Multi-Option Products").

The deadline for feedback is 13 January 2020. As part of this review, the European Commission is undertaking a consumer testing exercise to assess the effectiveness of different presentations of performance scenarios. The results are expected in Q1 2020.

Commission Delegated Regulation (EU) 2019/1866 came into force on 28 November 2019 and aligns the transitional arrangements for PRIIP manufacturers offering units of UCITS and non-UCITS funds as underlying investment options. It extends the transitional arrangements by two years to 31 December 2021.

Luxembourg – Updated CSSF communication on PRIIPs assessment

The CSSF confirmed in press release 19/60 that all SIFs, Part II UCIs and SICARs created after October 2019 must complete the PRIIPs assessment through the eDesk Portal. In addition, in respect of PRIIPs assessments completed before October 2019, all information provided must be kept up-to-date.

1.13 IFR and IFD Update

The Investment Firms Regulation (EU) 2019/2033 ("IFR") and the Investment Firms Directive 2019/2034//EU (IFD") both entered into force on 25 December 2019. The IFR will apply from 26 June 2021, except for Articles 63(2) and (3) which will apply from 26 March 2020, and Article 62(30) which will apply from 25 December 2019. By 26 June 2021, Member States have to implement the IFD from 26 June 2021 (with the exception of point (5) of Article 64 from 26 March 2020). The European Banking Authority has already started preparing some of the draft RTS required under the IFR and the IFD.

Both update the prudential requirements of investment firms so that they factor in size, nature and complexity. The current capital requirements regime set out in the Capital Requirements Regulation 575/2013/EU ("CRR") and the CRD IV Directive 2013/36/EU is based on international standards for banks and does not take account of the nature of investment firms. In future, investment firms will be subject to the same key measures, in particular, as regards capital holdings, reporting, corporate governance and remuneration, but the requirements they will apply will be differentiated according to their size, nature and complexity.

1.14 EU Whistleblowing Directive Finalised

Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law came into force on 16 December 2019. It will guarantee a high level protection to whistleblowers across a wide range of sectors including anti-money laundering, financial services, money laundering, product and transport safety, nuclear safety, public health, consumer and data protection. It will establish safe channels for reporting both within an organisation and to public authorities. Member states have to transpose the new rules into their national law by 17 December 2021.

There is one derogation - as regards legal entities in the private sector with 50 to 249 workers, Member States shall by 17 December 2023 bring into force the laws necessary to comply with the obligation to establish internal reporting channels under Article 8(3).

1.15 EU Securitisation Regulation

Regulation (EU) 2017/2402 on a general framework for securitisation and creating a specific framework for simple, transparent and standardised ("STS") securitisations ("Securitisation Regulation") and Regulation (EU) 2017/2401 amending the Capital Requirements Regulation 575/2013/EU applies to securitisations the securities of which are issued on or after 1 January 2019 or which create new securitisation positions on or after that date. It impacts both AIFs and UCITS. AIF managers' due diligence, transparency and risk retention requirements under AIFMD were replaced by the Securitisation Regulation. It also brings UCITS management companies and internally managed UCITS that are authorised investment companies into the framework. The European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 which came into force on 1 January 2019 designates the Central Bank as the competent authority in Ireland for STS securitisations.

On 12 November 2019 the European Commission published a Delegated Regulation with RTS specifying the information to be provided in accordance with the STS notification requirements. It sets out the information that must be notified to ESMA for securitisations seeking STS status. It will enter into force on the twentieth day following its publication in the Official Journal of the EU.

On 15 November 2019 ESMA updated its Q&A on the Securitisation Regulation which provide guidance on how specific fields should be completed in the templates in ESMA's draft technical standards on disclosure requirements. They also provide guidance on notifications to ESMA of STS securitisations.

Delegated Regulation (EU) 2019/1851 supplementing the Securitisation Regulation with regard to RTS on the homogeneity of the underlying exposures in securitisation came into force on 26 November 2019. Homogeneity of the underlying exposures is one of the requirements for STS securitisations. The Regulation sets out conditions that the underlying exposures of a securitisation must satisfy in order to be deemed homogenous.

The European Commission adopted two Delegated Regulations containing RTS for securitisation repositories relating to mandates under the Securitisation Regulation on 29 November 2019. The next step is for these to be considered by the European Parliament and Council of the EU.

On 2 December 2019 ESMA published guidance on its registration process for companies that intend to apply to become securitisation repositories under the Securitisation Regulation. It explains that, where an applicant is already registered under EMIR or SFTR and intends to register under the Securitisation Regulation as well, it needs to apply for an extension of registration.

In December 2019 the European Commission adopted two Delegated Regulations on the specification of criteria for establishing the arrangements to adequately mitigate CCP credit risk associated with covered bonds and securitisations and on risk mitigation techniques for OTC derivative contracts, in connection with certain STS securitisations for hedging purposes. For more detail please see "EMIR Update" above.

1.16 SFTR Update

On 31 October 2019 ESMA published further technical details for the reporting of securities financing transactions ("SFTs") as required under the Regulation on reporting and transparency of SFTs (EU) 2015/2365 ("SFTR"). Under the SFTR, both parties to an SFT need to report new, modified or terminated SFTs to a registered or recognised trade repository ("TR"), including the composition of the collateral.

The materials ESMA has published are validation rules for SFTR reporting together with the XML schemas that reporting entities should use, including: counterparty and TR data exchange; intra-TR data exchange; and TR to authority data exchange.

On 6 January 2020 ESMA published its final report, its guidelines on reporting under the SFTR, amended SFTR validation rules and a statement on Legal Entity Identifiers or LEIs. The guidelines clarify certain SFTR provisions and will contribute to the reduction of costs along the complete reporting chain - the counterparties that report the data, the TRs which put in place the procedures to verify the completeness and correctness of data, and the authorities which use the data to supervise risks to financial stability. The LEI statement clarifies the expectations on reporting of LEI for issuers of securities used in SFTs, as well as the relevant supervisory actions to be carried out by authorities. Finally, ESMA has updated the SFTR validation rules to fully align them with the updated XML schemas published in December 2019 as well as with the above LEI statement.

1.17 Benchmark Regulation

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

The European Commission's October 2019 consultation on a review of the BMR closed on 6 December 2019.

On 3 December 2019 ESMA issued an update of its Q&As on the BMR to provide clarification on the annual review of IOSCO principles for oil pricing reporting agencies and the legal representative under Article 32(3) of BMR.

The Low Carbon Benchmarks Regulation (EU) 2019/2089 which introduces a regulatory framework that lays down minimum requirements for EU climate transition benchmarks and EU Paris-aligned benchmarks at the EU level, to ensure that these benchmarks do not significantly harm other environmental, social and governance ("ESG") objectives came into force 10 December 2019. On 11 December 2019 ESMA issued a further update of its Q&As to reflect Regulation (EU) 2019/2089. In particular, the Q&As now provide clarification on the transitional provisions applicable to third-country benchmarks (see Q&A 9.3).

On 11 December 2019 ESMA published a briefing on implementing the recognition regime under Article 32 of the BMR addressed to administrators of benchmarks located outside the EU that intend to apply for recognition in the EU. In a related press release, ESMA explains that when no equivalence decision is adopted by the European Commission, the BMR requires third-country benchmarks and their administrators to be recognised or endorsed for them to be used by EU clients beyond January 2022.

On 20 December 2019 the EU technical expert group on sustainable finance published a handbook on climate benchmarks and benchmarks' ESG disclosures.

1.18 Framework for Assessing Leverage in Investment Funds IOSCO Report

On 13 December 2019 IOSCO published its final report setting out recommendations for a "two step" framework assessing leverage in investment funds that may pose stability risks. Step 1 indicates how regulators could exclude from consideration funds that are unlikely to produce financial stability risks, while identifying a subset of funds for further analysis that may pose such risks. Step 2 consists of a risk-based analysis of the subset of funds identified in Step 1.

IOSCO recommends that regulators use the framework to assess leverage-related risks in funds. The framework aims to achieve a balance between precise leverage measures and

simple, robust metrics that regulators can apply consistently to the wide range of funds offered in different jurisdictions.

1.19 MiFID II/MiFIR Update

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

On 4 October 2019 ESMA published an opinion on frequent batch auctions ("FBAs") and the double volume cap mechanism which clarifies the application of pre-trade transparency requirements by FBA systems and the price determination process of FBA systems. FBAs are a type of periodic auction trading system for equity instruments under the MiFID II and MiFIR.

On 5 November 2019 ESMA published a consultation on commodity derivatives position limits, position management controls and position reports under MiFID II which closes on 8 January 2020. It seeks views on amendments proposed to the existing legal framework, aiming in particular at:

- Limiting the scope of commodity derivatives subject to position limits to key contracts;
- Introducing a limited position limit exemption for financial counterparties; and
- Enhancing convergence in the implementation of position management regimes by trading venues.

On 19 December 2019 the European Commission published a consultation seeking views on the suitability of the existing regulatory framework for cryptoassets. The questions cover cryptoassets that fall under existing EU legislation such as those that qualify as financial instruments under MiFID II.

Over the quarter ESMA updated its MiFID II/MiFIR Q&As on transparency topics; market structures; MiFIR data reporting; and investor protection and intermediaries topics.

1.20 Irish Investment Funds Statistics: Q3 2019

The main points to note in the Central Bank's December Q3 2019 update are as follows:

- Total assets held by Irish investment funds grew by €200bn to €2,867bn in Q3 2019, driven by net transactions of €71bn and revaluations of €129bn. This transaction growth was mainly in debt securities, which had net transaction increases of €57bn;
- All fund types, except hedge funds, recorded net purchases of assets during Q3 2019, with bond funds (€53bn) accounting for the majority of the €71bn;
- All fund types recorded an increase in the value of their assets. Bond funds saw the largest gains, registering at €34bn, with equity funds next at €31bn;
- 'Other' funds grew by €45bn, with the majority from asset value increase, at €29bn; and
- Debt securities continued to be the largest type of asset held by investment funds, with a Q3 total of €1,167bn, an increase of €110bn (10%) in the quarter. US dollar-denominated securities were the largest component of holdings by IFs, accounting for €469bn (40%) of the total. Sterling-denominated holdings were the second largest, at €385bn (33%), with growth of 11% this quarter. Euro-denominated debt securities accounted for €223bn (19%), increasing by 6% in Q3. No other single currency accounted for more than 1%of total debt holdings.

1.21 Luxembourg Undertakings for Collective Investment Statistics

The main points to note in the CSSF's November 2019 update are as follows:

- Total assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") increased €91bn from €4,577bn as at October 2019 to €4,669bn as at November 2019;
- The total number of Luxembourg Investment Funds active in the market and regulated by the CSSF decreased from 3,785 to 3,779 during November 2019;
- From the 3,779 active Luxembourg Investment Funds, 2,476 have adopted an umbrella structure and have together a total of 13,524 sub-funds. The remaining 1,303 Luxembourg Investment Funds are structured as stand-alone funds;
- As at November 2019, there were a total of 14,827 sub-funds;
- During November 2019, there were more subscriptions than redemptions in equity funds; and
- During November 2019, there were more subscriptions than redemptions in fixed-income funds.

The number of Luxembourg reserved alternative investment funds reached 902 on 15 January 2020.

2 Tax

2.1 Ireland - Investment Limited Partnerships

In our Q3 update, we noted proposed amendments to the tax treatment of Irish ILPs. These changes, which have been sought for a number of years, merely clarify that the ILP is taxed in Ireland as a partnership. For ILPs authorised on or after 1 January 2020, the profits of the ILP are allocated in accordance with the partnership deed. The partnership itself is not subject to tax, with gains and losses treated as arising to the partners. The Finance Act also provides that if any portion of profits of the partnership is not allocated to particular partners, those profits will be treated as arising or accruing to the general partner.

The changes should complement, but are independent of, the enhancements provided for in the Investment Limited Partnership (Amendment) Bill.

2.1 Transfer Pricing

Finance Act 2019 also extends Ireland's transfer pricing rules to bring Ireland's transfer pricing legislation in line with the 2017 OECD Transfer Pricing Guidelines.

Irish investment funds are not within the relevant charge to Irish tax and are not directly subject to the new rules. However, they may be indirectly impacted where, for example, they hold investment in a subsidiary company which is a qualifying company under section 110 of the Irish Taxes Consolidation Act, 1997 (a "Section 110 Company"). While the Finance Act 2019 provides a specific exception from transfer pricing for profit participating or results dependent debt issued by a Section 110 company, a fixed rate debt instrument or other arrangement entered into between an investment fund and an associated Section 110 company may be within the scope of the new transfer pricing rules.

2.2 Irish Real Estate Funds

As referenced in our Q3 update, Budget 2019 introduced significant changes to the tax rules affecting regulated Irish funds which in invest Irish real estate ("IREFs"). The changes are targeted anti-avoidance rules which have no impact on the majority of Irish regulated funds. Only funds which invest in Irish real estate are affected.

The key points to note are as follows:

- IREFs will be subject to Irish income tax at 20% on deemed income if their leverage exceeds 50% of the cost of their assets. An additional tax charge can arise on deemed income if the interest expense is greater than four (4) times profits;
- There is relief where the debt giving rise to the excess leverage qualifies as third party debt. Third party debt is narrowly defined. Significant amounts of genuine bank debt may not qualify as third party debt; and
- Non-interest expenses may lead to a further tax charge unless incurred for the purposes of the IREF's business. This could impact the tax efficiency of certain fees although bona fide expenses should not be impacted

The Minister for Finance has noted that he will continue to review the tax treatment of IREFs and is open to further legislative amendments if he perceives the IREF regime is being used for Irish tax avoidance. Investors, lenders and managers of IREFs should consider the impact of the changes on their structures including:

- Examining the impact of the tax imposed based on the current debt and expense structure;
- Determining whether third party debt, including bank debt, qualifies for relief, based on the history of the borrowing;
- Where possible, restructuring excess debt; and
- Examining banking covenants in order to determine the consents required to adapt the structure.

2.3 Luxembourg

Luxembourg law for ATAD 2 expanding anti-hybrid rules

On 19 December 2019 the Luxembourg parliament voted into law the European Union's Anti-Tax Avoidance Directive 2017/952 focusing on hybrid mismatches with third countries ("ATAD 2"). The law generally applies as from 1 January 2020, except for the "reverse hybrid" rule which should apply as from 1 January 2022. The final version of the law mirrors the content of the draft version published on 8 August 2019.

ATAD 2 follows ATAD 1 (Directive 2016/1164) in extending the anti-hybrid mismatch rules (i.e. deductions with no inclusion or double-deductions) on hybrid instruments to countries outside the EU and also includes new anti-hybrid mismatch rules to apply to certain hybrid entities, hybrid permanent establishments, reverse hybrids and imported hybrid mismatches.

Broadly, a hybrid instrument is an instrument that is treated as equity in one jurisdiction but debt in another, and a hybrid entity is an entity that is tax transparent in one jurisdiction but tax opaque in another. The anti-hybrid mismatch rules generally aim to deny an otherwise available

tax deduction in the event of a deduction in one jurisdiction but no inclusion of that same income in another or when there is a double deduction occurring in more than one jurisdiction.

Prior to the approval of the law, the Luxembourg Council of State clarified that no hybrid mismatch should arise under the anti-hybrid financial instrument rule when the recipient is in a jurisdiction with no tax system or a territorial regime. Additionally, the Council of State affirmed that with respect to funds, the "acting together" concept should not be applicable to investors with less than 10% of the ownership rights or less than 10% entitlement to profits.

For more information see our client update, *Luxembourg Publishes Draft Law for ATAD 2 Expanding Anti-hybrid Rules*

Tax rulings before 1 January 2015 no longer binding

On 19 December 2019, the Luxembourg parliament voted to approve the draft 2020 budget law. Notably, the Budget Law for 2020 provides that all advance tax agreements ("tax rulings") granted before 1 January 2015 will cease to have validity as from 1 January 2020.

The Luxembourg tax administration has requested any taxpayers affected by the cancellation of pre-2015 rulings to submit a request for renewal of their agreement. Requests can be submitted in the course of 2020 (for tax payers with divergent fiscal years, the cut-off date is before the end of fiscal year 2020). The Budget Law for 2020 also includes other tax measures including updates on the methodologies for valuing real estate assets for computing capital gains, the extension of the "super reduced" VAT rate of 3% to certain creative artists, and increases in certain energy related taxes.

Other tax updates

The double tax treaty between Luxembourg and France has been amended to clarify the apportioning of taxation rights between the two countries for cross border professionals who work in Luxembourg but reside in France.

Luxembourg adapted the EU Directive on Tax Dispute Resolution Mechanisms 2017/1852 which aims at standardising the tax dispute and resolution procedures for avoiding double taxation risks between two or more EU Member States. The Directive clarifies the process by dividing it into three phases should no mutual agreement be reached: the complaint, the mutual agreement procedure, and the dispute resolution phase. It is particularly relevant in light of the substantial amount of recent anti-tax abuse reforms at EU and OECD levels and which increases the risk of double taxation situations.

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