MAPLES GROUP

# Funds & Investment Management Update – Ireland

## Quarterly Update | January – March 2019

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# 1 Legal & Regulatory

## 1.1 UCITS Update

There have been a number of developments over the quarter:

**Investments by UCITS (and retail investor AIFs) in UK funds and counterparties**

On 7 March 2019 the Central Bank of Ireland (the "Central Bank") published a notice of intention providing clarity in relation to investments by UCITS and retail investor AIFs ("RIAIFs") in UK funds and UK counterparties which will be relevant to market participants impacted by Brexit.

In the event of a hard Brexit, the Central Bank will consider whether:

- UK UCITS, which at that point will become UK AIFs, should be identified in Central Bank guidance as a category of investment fund in which UCITS and RIAIFs may invest. For the period while this is under consideration, the Central Bank has indicated that it will not treat the UK AIFs as ineligible. For UCITS, any investment in UK AIFs must fall within with the aggregate limit of 30% for investments in all AIFs; and
- UK investment firms, currently authorised under MiFID, should be a category of eligible financial derivative counterparty for UCITS and RIAIFs. For the period while this is under consideration, the Central Bank will not treat UK MiFID investment firms as ineligible.

**ESMA and Central Bank Q&As**

On 29 March 2019 the European Securities and Markets Authority ("ESMA") updated its Q&As on the application of the UCITS Directive 2009/65/EC. The Q&As on past performance now clarify that where funds name a target in their investment objectives and policies, the performance should be disclosed against the target, even if the comparator is not named a "benchmark". The performance disclosed in a key investor information document ("KIID") on a benchmark index should be consistent with performance disclosure in other investor communications.

The Q&As on the disclosure of the benchmark index clarify that:

- UCITS should clearly indicate, in a KIID, whether their strategy is active (or actively managed) or passive (or passively managed);
- A UCITS managed in reference to a benchmark is one where the benchmark plays a role in the management of the UCITS, for example, in the explicit or implicit definition of its portfolio composition or performance objectives and measures; and
- Investors should be provided with an indication of how actively managed the UCITS is, compared to its reference benchmark index.

For more information see our client update, *KIID review required in light of new ESMA requirements around benchmark disclosures*.

On 29 March 2019 the Central Bank issued the 25th edition of its UCITS Q&A which includes a new Q&A ID 1089 in relation to Irish UCITS which acquire Chinese bonds through the Bond Connect infrastructure. The Q&A clarifies that if an Irish authorised UCITS proposes to acquire Chinese bonds through Bond Connect, the depository of the UCITS, or an entity within its custodial network, must ensure it retains control over the bonds at all times (see also "Investment via Bond Connect Permitted" below).

## 1.2 AIFMD Update

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

**Central Bank Q&A**

On 4 February 2019 the Central Bank published an updated edition of its AIFMD Q&A. It includes a new Q&A ID 1129 which clarifies that UK AIFMs will become non-EU AIFMs under AIFMD when the UK exits the EU. A QIAIF will be permitted to designate a UK AIFM as its AIFM provided that the QIAIF and its UK AIFM comply with the AIF Rulebook provisions that apply to QIAIFs with registered AIFMs.

QIAIFs adopting this arrangement will need to assess its impact including the loss of the marketing passport under AIFMD and related investor notifications, amendments to documentation and filings with the Central Bank.

On 7 March 2019 the Central Bank issued another edition which updated Q&A ID 1129, in relation to Irish QIAIFs with UK AIFMs. It clarifies that the QIAIFs with UK AIFMs (which become non-EU AIFMs) are subject to the full AIFMD depositary regime including the AIFMD depositary liability provisions.

On 29 March 2019 the Central Bank issued a further edition of its AIFMD Q&A which includes a new Q&A ID 1130 in relation to Irish AIFs which acquire Chinese bonds through the Bond Connect infrastructure. The Q&A clarifies that if an Irish authorised AIF proposes to acquire Chinese bonds through Bond Connect, the depository of the AIF, or an entity within its custodial network, must ensure it retains control over the bonds at all times (see also "Investment via Bond Connect Permitted" below).

**ESMA Q&A**

On 29 March 2019 ESMA updated its AIFMD Q&A and added two new Q&As on the calculation of leverage under AIFMD. The Q&As provides clarification on the:

(a) Treatment of short-term interest rate futures for the purposes of AIFMD leverage exposure calculations according to the gross and commitment methods; and

(b) Required frequency of the calculation of leverage by an AIFM managing an EU AIF which employs leverage.

**Investments by retail investor AIFs in UK funds and counterparties**

For further information, see 1.1 above.

## 1.3 UK Temporary Permissions Regime

On 12 April 2019 the UK Financial Conduct Authority (the "FCA") announced its intention to extend the window for notifications under its temporary permissions regime ("TPR") until 30 May 2019. Firms must notify the FCA if they wish to enter the regime. The TPR enables relevant firms and funds which passport into the UK to continue operating in the UK if the passporting regime falls away abruptly when the UK leaves the EU.

## 1.4 Central Bank Updates and ESMA Statement on Brexit

**Notice of intention**

On 4 February 2019 the Central Bank issued a notice of intention in relation to the location requirement for directors and designated persons of Irish UCITS management companies and AIFMs. It refers to the Effective Supervision Requirement introduced as part of CP86. The text of this requirement is set out in the annex to the notice. Existing Fund Management Companies must be in compliance with the Effective Supervision Requirement as and from 1 January

2019. It requires that a minimum number of directors and designated persons be EEA-resident (e.g. at least half of the managerial functions should be performed by at least two EEA-resident designated persons).

In the event of a hard Brexit, this confirmation clarifies the Central Bank will not immediately move to treat the UK as a third country for the purposes of this requirement and will not require UK based directors and designated persons to be replaced by EEA based ones.

The Central Bank has made it clear that this would be a temporary measure while it considers whether the UK is a country to be determined as meeting the Effective Supervision Requirement in the event of hard Brexit.

**Central Bank Brexit FAQ**

The Central Bank's Brexit FAQ - Financial Services Firms was updated on 6 March 2019 to clarify that the Multilateral Memoranda of Understandings which were agreed between European securities regulators and the UK FCA on 1 February 2019 will facilitate delegation or outsourcing arrangements between Irish UCITS management companies/AIFMs/MiFID firms and UK entities by allowing the sharing of information relating to, amongst others, market surveillance, investment services and asset management activities.

**ESMA statement**

On 12 April 2019 ESMA confirmed that its statements and measures on no-deal Brexit scenario preparations referring to 12 April 2019 should now be read as referring to 31 October 2019.

## 1.5 Investment via China Bond Connect Permitted

Launched in 2017 Bond Connect is mutual market access scheme that allows investors from Mainland China and overseas to trade in each other's bond markets through connection between the respective Mainland Chinese and Hong Kong market infrastructures. Like Stock Connect, represents a straightforward and efficient market access alternative to the Qualified Foreign Institutional Investor ("QFII") and Renminbi Qualified Foreign Institutional Investor ("RQFII") regimes.

Before Bond Connect, international investors needing access to China's bond market could use the China Interbank Bond Market ("CIBM") Direct, QFII and RQFII routes.

On 21 March 2019 the Central Bank sent a letter to Irish Funds concluding that from that date Bond Connect may be applied by Irish UCITS and AIFs. Similar to Stock Connect, the Central Bank will require Irish depositaries to be satisfied that they will be in a position to comply with their safekeeping obligations in respect of Irish collective investment schemes accessing Bond Connect.

The Central Bank has also updated its UCITS and AFIMD Q&As to reflect this development, for more detail see "UCITS Update" and "AIFMD Update" above.

## 1.6 Money Market Funds Regulation

The Money Market Funds Regulation (EU) 2017/1131 ("MMFR") applies to money market funds established, managed or marketed in the EU and aims to make these investment products more resistant to contagion risks. Most provisions apply from 21 July 2018 (with the exception of Article 11(4), Article 15(7), Article 22 and Article 37(4) which have applied since 20 July 2017). Existing MMFs benefited from a transitional period and were required to comply by 21 January 2019.

On 14 February 2019 ESMA's consultation paper on draft guidelines on reporting to national competent authorities ("NCAs") under Article 37 of the MMFR closed. MMF managers must

send to NCAs their first quarterly reports under Article 37 in the first quarter of 2020. There is no requirement to retroactively provide historical data for any period before this date.

**Share cancellation**

On 11 January 2019 the Central Bank issued a joint statement with the Commission de Surveillance du Secteur Financier ("CSSF") Luxembourg on the treatment of share cancellation under the MMFR. It follows clarification that the practice of cancelling shares under a reverse distribution mechanism ("RDM") is to be prohibited under the MMFR and notes Article 44 of the MMFR requirements for existing MMFs to submit an application for authorisation by 21 January 2019 and for the competent authority to notify the MMF of its decision within two months of the application. On that basis, the Central Bank and the CSSF required MMFs using RDM to confirm in writing by 21 March 2019 that they have ceased using RDM.

## 1.7 AML and Beneficial Ownership Register Update

Most of the provisions of Fourth Money Laundering Directive (EU) 2015/849 ("MLD4") were implemented in Ireland by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018. The Act does not cover the beneficial ownership elements of the MLD4 (Articles 30 and 31).

**Beneficial ownership - trusts**

The European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019 came into effect on 29 January 2019 and require a trustee (or a manager in the case of a collective investment scheme) to obtain and hold "adequate, accurate and current information" (name, date of birth, nationality and residential address) in respect of the beneficial owners of the trust on an internal register. The register must be made available to the Revenue Commissioners, Central Bank, Department of Finance and other competent authorities on request. Failure by a trustee to comply is an offence and the trustee (or manager) may be liable, on summary conviction, to a fine not exceeding €5,000.

**Beneficial ownership – corporate entities**

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 which required companies and other legal entities incorporated in Ireland to hold adequate, accurate and current information on their "beneficial owners" on an internal register since November 2016 were revoked and replaced on 22 March 2019 by the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019. Part 2 of these regulations contain similar requirements as the 2016 Regulations (as regards the internal register). Part 3 (which takes effect on 22 June 2019) establishes a central Registrar of Beneficial Ownership of Companies and Industrial and Provident Societies.

A relevant entity (a corporate or other legal entity incorporated in the State) in existence before 22 June 2019 must deliver certain information to the Registrar (this is expected to be undertaken by the Registrar of Companies) by 22 November 2019: name, date of birth, nationality and residential address of each beneficial owner; details of the nature and extent of the beneficial interest held, or control exercised by, each beneficial owner; its name and company number; and PPS numbers of each Irish resident beneficial owner who has one.

Relevant entities that come into existence after 22 June 2019 must deliver this information to the Registrar within five months of incorporation.

The Garda Síochána, Ireland's Financial Intelligence Unit, the Revenue Commissioners, the Criminal Assets Bureau and other competent authorities will have unrestricted free access to the Central Register with the exception of beneficial owners' PPS numbers.

Access by members of the public and designated persons (with whom a relevant entity enters into an occasional transaction or a business relationship) is limited to the name, month and year of birth, country of residence, nationality, and statement of the nature and extent of the interest held/control exercised by each beneficial owner.

A relevant entity that fails to comply with its obligations commits an offence and is liable on summary conviction to a fine not exceeding €5,000; or on conviction on indictment, to a fine not exceeding €500,000.

For more information see our client update, *Central Register of Beneficial Ownership of Corporates: Deadline for filing November 2019*

**Other developments**

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 in Ireland was published in January 2019. EU Member States have to transpose it into national law by 10 January 2020.

On 15 January 2019 the Joint Committee of the European Supervisory Authorities ("ESAs") (that is, the EBA, EIOPA and ESMA) published a multilateral agreement on the practical modalities for the exchange of information between the European Central Bank (the "ECB") and all competent authorities responsible for supervising compliance of credit and financial institutions with AML and CFT obligations under MLD4.

On 31 January 2019 the European Commission adopted a Delegated Regulation supplementing MLD4 with RTS specifying the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries. The next step is for the Council of the EU and the European Parliament to consider it. If neither objects, it will enter into force 20 days after it is published in the Official Journal of the EU and will apply three months later.

On 14 March 2019 the European Parliament published the provisional edition of its adopted resolution on the urgency for an EU blacklist of high-risk third countries in line with MLD4. It welcomes the Commission's February 2019 Delegated Regulation identifying high-risk third countries and regrets that the Council of the EU has objected to it. The Parliament encourages the Commission to take the Council's concerns into account and come up with a new Delegated Regulation as soon as possible. The aim of the list of high-risk third countries is to protect the EU financial system by better preventing money laundering and terrorist financing risks.

## 1.8 Cross Border Distribution of Investment Funds Proposals

On 12 March 2018 the European Commission published a draft regulation on facilitating cross-border distribution of collective investment funds, amending the European Venture Capital Funds Regulation 345/2013/EU ("EuVECA Regulation") and the European Social Entrepreneurship Funds Regulation 346/2013/EU ("EuSEF Regulation") and covering aspects such as marketing communications and EU Member States' marketing requirements. It also published a proposed directive amending the UCITS Directive and AIFMD relating to, among other things, pre-marketing and the discontinuation of marketing.

On 22 February 2019 the Council of the EU published an "I" item note with the final compromise texts of the proposed Directive and the proposed Regulation.

In the "I" item note, the Council invites its Permanent Representatives Committee ("COREPER") to approve the final compromise texts. It also asks COREPER to confirm that the Council Presidency can indicate to the European Parliament that, should the Parliament

adopt its positions on the two proposals, as set out in the addenda, at first reading, the Council would approve the Parliament's positions and adopt the acts in the wording that corresponds to the Parliament's positions.

The Parliament has indicated that it plans to consider them at its plenary session on 15 to 18 April 2019.

For more information see our client update, *UCITS and AIFMD Update: Cross-Border Fund Distribution Proposals*

## 1.9 Draft Guidelines on Liquidity Stress Testing of UCITS and AIFs Consultation

On 5 February 2019 ESMA published a consultation paper on draft guidelines on liquidity stress tests of investment funds applicable to AIFs and UCITS which closes on 1 April 2019. The guidelines aim to promote convergence in the way that NCAs supervise funds liquidity stress testing across the EU.

The consultation lists 14 principle-based criteria for managers' liquidity stress tests to follow when executing liquidity stress tests on their funds. These require that the stress tests are tailored towards the individual fund; reflect the most applicable risks to the fund; are sufficiently extreme or unfavourable; sufficiently model how a manager is likely to act in times of stressed market conditions; and are embedded into the fund's overall risk management framework. The guidelines should be followed by all in-scope managers and depositaries when undertaking or overseeing liquidity stress test (one guideline relates to depositaries).

## 1.10 Proposed Investment Firms Regulation and Directive

On 26 February 2019 the Council of the EU announced that it and the European Parliament have reached political agreement on the proposed Investment Firms Regulation ("IFR") and the proposed Investment Firms Directive ("IFD").

Agreement was reached on the following:

- Equivalence. The IFR will amend MiFIR to strengthen the equivalence regime applying to third country investment firms. The European Commission will be required to assess capital requirements applicable to firms providing bank-like services to make sure that those are equivalent to those applicable in the EU. It may also apply some specific operational conditions to an equivalence decision to ensure that ESMA and NCAs can prevent regulatory arbitrage and monitor the activities of third country firms, where activities performed by third country firms are likely to be of systemic importance;
- Tick-size regime. The IFR will amend MiFIR to apply the tick size regime to systematic internalisers; and
- Disclosure requirements. Investment firms will be subject to additional disclosure requirements about their investments and their voting behaviour during shareholder meetings.

On 19 March 2019 COREPER was invited by the Council to approve final compromise texts of proposed IFR and IFD released on that date (and linked above). The Parliament will consider them at its plenary session of 15 to 18 April 2019.

## 1.11 Delegated Regulations Supplementing EuSEF and EuVECA Regulations

On 1 February 2019 the European Commission adopted a Delegated Regulation supplementing the EuSEF Regulation 346/2013/EU with regard to conflicts of interest, social impact measurement and information to investors which specifies:

- The types of conflicts of interest which managers of qualifying EuSEFs need to identify and manage;
- The details of procedures to measure the extent to which qualifying portfolio undertakings, in which the EuSEF invests, achieve the impact to which they are committed (Article 10); and
- The content of investor information under Article 14.

On 4 February 2019 the European Commission adopted a Delegated Regulation supplementing the EuVECA Regulation 345/2013/EU with regard to conflicts of interest which specifies the types of conflicts of interest, referred to in Article 9 of the EuVECA Regulation, and the steps that managers of EuVECA funds need to take to identify, prevent, manage, monitor and disclose conflicts.

The next step is for both delegated regulations to be considered by the European Parliament and the Council of the EU.

## 1.12 Central Bank Investment Firms Q&A

On 16 January 2019 the Central Bank issued the sixth edition of its Investment Firms Q&A which includes a new Q&A ID 1031 on Regulation 5 of the European Union (Markets in Financial Instruments) Regulations 2017. Regulation 5 requires, amongst other things, that a cooperation agreement be in place between the Central Bank and a third country competent authority before a third country firm supervised by that third country competent authority can provide investment services to professional clients and eligible counterparties without being deemed to operate in Ireland. The new question confirms that the IOSCO MoU is a co-operation arrangement that satisfies the Regulation 5(5)(b) requirements.

On 7 March 2019 the Central Bank issued the seventh edition which includes new Q&As ID 1041 and 1042, in relation to tied agents under the European Union (Markets in Financial Instruments) Regulations 2017. These Q&As clarify that only EEA MiFID firms can appoint tied agents and that tied agents must be persons established in the EEA.

## 1.13 Central Bank Additional Supervisory Levy

From 1 January 2019 an additional supervisory levy ("ASL") applies to any IIA firm, MiFID firm, AIFM or UCITS management company authorised by the Central Bank on or after that date. The ASL is distinct from the existing Central Bank annual industry funding levy to which asset managers are already subject. The applicable ASL rate depends on the relevant firm's PRISM rating (which the Central Bank issues on authorisation).

## 1.14 EMIR Update

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

There have been a number of developments over the quarter:

On 4 February 2019 ESMA published an updated version of its Q&As on EMIR which:

- Amends Q&A 34 on TRs to confirm how counterparties should report a derivative with no maturity date;

- Amends Q&A 38 on TRs to clarify when reports should be submitted in relation to reporting derivatives that are terminated before the reporting deadline; and
- Creates a new Q&A 50 on TRs that clarifies the approach counterparties should take for reporting field "confirmation means".

On 20 February 2019 the Central Bank issued a letter to counterparties to provide feedback on the main issues identified from the EMIR data quality work undertaken by the Central Bank of Ireland in 2018. Counterparties are reminded that failure to report details of a derivative contract to a trade repository by the end of the working day following the conclusion, modification or termination of the contract constitutes a prescribed contravention under EMIR.

NCAs must notify ESMA whether they comply or intend to comply with the ESMA guidelines relating to the management by CCPs of conflicts of interest under EMIR by 5 June 2019 as they will apply from that date.

**EMIR Refit Regulation**

On 31 January 2019 ESMA acknowledged potential difficulties that small financial counterparties will face if proposed EMIR Refit Regulation, which will exempt them from the clearing obligation, is not in force by 21 June 2019 (the deadline for certain small financial counterparties to start clearing and trading some of their OTC derivative contracts on trading venues). It has encouraged regulatory forbearance. On 4 February 2019 the Central Bank issued a statement confirming that, pending the entry into force of this amending regulation, it will apply its risk based supervisory powers in a proportionate manner in the day-to-day enforcement of the reporting and clearing obligations under EMIR and MiFIR's trading obligation.

On 5 February 2019 the Council of the EU and the European Parliament reached a preliminary agreement on the EMIR Refit Regulation. The following elements were agreed:

- New category of "small financial counterparties" that will be exempt from the clearing obligation (although they will remain subject to the risk mitigation requirements);
- Two year extension (further extendable twice by an additional year) of the temporary exemption from the clearing obligation for pension scheme arrangements;
- Streamlining of rules on reporting OTC derivatives trades to improve the quality of the data reported, including removal of the "backloading" requirement and requirements relating to intragroup transactions involving non-financial counterparties; and
- New obligation on clearing brokers to provide services on fair, reasonable, non-discriminatory and transparent commercial terms (or FRAND) by ensuring transparency on fees and unbiased and rational contractual arrangements.

On 1 March 2019 the Council of the EU published an "I" item note and an addendum with the final compromise text of the EMIR Refit Regulation. In the note, the General Secretariat Council invites its COREPER to approve the final compromise text. The European Parliament is to consider the EMIR Refit Regulation at its 15 to 18 April 2019 plenary session.

On 28 March 2019 ESMA published guidance for financial counterparties ("FCs") and non-financial counterparties ("NFCs") on the clearing obligation under the proposed EMIR Refit Regulation. It sets out when they need to determine whether they are subject to the clearing obligation under the new regime and equally when they need to notify ESMA and their relevant competent authority that they are subject to the clearing obligation i.e. on the day the Refit Regulation enters into force.

**Regulation amending EMIR supervisory regime**

On 20 March 2019 the Council of EU invited COREPER to approve final compromise text of proposed Regulation amending EMIR supervisory regime for EU and third country CCPs agreed on 13 March 2019 by the Council Presidency and the European Parliament. The agreed text establishes a CCP supervisory committee within ESMA; strengthens the existing system for recognising and supervising third country clearing houses; and on the basis of a fully reasoned assessment, ESMA would also be able to recommend that a CCP or some of its clearing services are of such substantial systemic importance that the CCP should not be recognised. The European Commission could decide, as a measure of last resort that the CCP will need to establish itself in the EU. The third country CCP would then need to establish in the EU to operate.

## 1.15 ELTIF Costs Disclosure – Draft Regulatory Technical Standards

On 28 March 2019 ESMA published a consultation paper on draft regulatory technical standards ("RTS") under Article 25(3) of the Regulation on European Long-Term Investment Funds (EU) 2015/760 ("ELTIF Regulation") in the light of the PRIIPs Regulation (EU) 1286/2014 framework and because of the differences between the new framework of cost disclosure introduced by it as compared to the existing cost disclosure requirements of key investor information under the UCITS Directive 2009/65/EU. The draft RTS set out the:

- Criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purposes;
- Circumstances in which the life of an ELTIF is considered sufficient in length;
- Criteria to be used for certain elements of the itemised schedule for the orderly disposal of the ELTIF assets; and
- Costs disclosure and facilities available to retail investors.

Comments on the draft RTS are requested by 29 June 2019.

## 1.16 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. 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.

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.

On 31 January 2019 ESMA published an opinion containing a revised set of draft RTS and implementing technical standards ("ITS") under the Securitisation Regulation, which require certain information to be reported about securitisations by the originator, sponsor or special purpose entity. The opinion includes the format for making the required information available and reporting templates for different types of securitisation. ESMA also published Q&As which

give guidance to market participants of how to comply with the RTS/ITS. The opinion has been submitted to the European Commission for endorsement.

Also on 31 January 2019 the International Capital Market Association's Asset Management and Investors Council published a guide to due diligence requirements for investing in a securitisation position.

For more information see our client update, *Irish Implementation of the Securitisation Regulation – European Market Update*

## 1.17 MiFID II/MiFIR Update

The Markets in Financial Instruments Directive (2014/65/EU) ("MiFID II") and the Markets in Financial Instruments Regulation (Regulation 600/2014) ("MiFIR") apply from 3 January 2018. The European Union (Markets in Financial Instruments) Regulations 2017 and the Markets in Financial Instruments Act 2018 transpose MiFID II into Irish law.

On 14 March 2019 ESMA updated its Interactive Single Rulebook which includes all Level 2 and Level 3 measures related to MIFID II and MiFIR.

On 20 March 2019 Delegated Regulation (EU) 2019/442 correcting Delegated Regulation (EU) 2017/587 under MiFIR to specify the requirement for prices to reflect prevailing market conditions and to update and correct certain provisions and Delegated Regulation (EU) 2019/443 amending Delegated Regulation (EU) 2017/588 as regards the possibility to adjust the average daily number of transactions for a share where the trading venue with the highest turnover of that share is located (MiFID II tick size regime) were published in the Official Journal of the EU. Both come into force on 9 April 2019.

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

## 1.18 Benchmark Regulation

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

On 30 January 2019 ESMA published updated Q&As on the BMR. It includes a new Q&A 4.5, which confirms that the scope of application of the Commission Delegated Regulations adopted under the BMR is identical to the scope of the corresponding requirement specified in the BMR (that is, depending on the type of benchmark). This includes the transitional provisions in Article 51 of the BMR. Reference is made in ESMA's response to regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, significant benchmarks, and non-significant benchmarks.

On 29 March 2019 the Central Bank published a Key Facts Document in relation to Benchmark Administrator applications.

## 1.19 PRIIPs KID Regulation

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

On 8 February 2019 the Joint Committee of ESAs published a final report on proposed amendments to Delegated Regulation (EU) 2017/653 on KIDs for PRIIPs (which sets out RTS

with regard to the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide KIDs). Based on feedback from a prior consultation and political developments on the application of the PRIIPs KID Regulation to UCITS, the ESAs have decided that it is not the time to propose substantive amendments to the Delegated Regulation. Instead, the ESAs will provide input towards a comprehensive review to be carried out during 2019. They did however issue a supervisory statement recommending the inclusion of an additional risk warning in the KID to ensure that retail investors are aware of the limitations of the figures provided in the performance scenarios.

On 7 March 2019 the Joint Committee of the ESAs sent to the European Commission, for endorsement, its draft RTS amending Delegated Regulation (EU) 2017/653 to clarify the application of the KID to multi-option products or MOPs.

MOPs are UCITS and certain non-UCITS funds offered as underlying investment options to a packaged retail and insurance-based investment product or PRIIP. The draft RTS are necessary following a decision during the trialogue on the cross-border distribution of investment funds that will extend the time period for which MOPs are exempted from preparing a PRIIPs KID from 31 December 2019 until 31 December 2021. They align the date of the exemption in Article 18 of the Delegated Regulation with the revised date in the PRIIPS Regulation. The ESAs ask that the issue be addressed within the current legislative term of the European Parliament, to ensure that clarity is provided to market participants by the end of 2019.

## 1.20 CSDR: Regulating Central Securities Depositories

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

On 29 January 2019 the European Central Securities Depositories Association published an updated version of its draft settlement fail penalties framework which creates a harmonised set of rules for the creation and operation of settlement discipline cash penalties mechanisms. It will apply to all CSDs subject to CSDR or equivalent legislation.

On 30 January 2019 ESMA published an updated version of its Q&As on the implementation of CSDR. Two new Q&As have been added to the section relating to settlement discipline. Both new Q&As concern the cash penalty mechanism provided for under Article 7(2) of the CSDR.

## 1.21 SFTR

The SFTR (or Regulation on securities financing transactions ("SFTs") EU/2015/2365 covers all forms of lending, borrowing and re-use of securities in the EU and in all the branches of counterparties to SFTs no matter where they are located. It requires market participants to report details of SFTs to an approved EU trade repository and introduced new transparency requirements for prospectuses and financial statements for investment funds using securities financing transactions and total return swaps.

On 22 March 2019 the following regulations supplementing SFTR were published in the Official Journal of the EU and come into force on 11 April 2019:

- Delegated Regulation (EU) 2019/356 specifying the details of SFTs to be reported to trade repositories;
- Delegated Regulation (EU) 2019/358 on the collection, verification, aggregation, comparison and publication of data on SFTs by trade repositories;

- Delegated Regulation (EU) 2019/360 on fees charged by ESMA to trade repositories;
- Delegated Regulation (EU) 2019/357 on access to details of SFTs held in trade repositories;
- Delegated Regulation (EU) 2019/359 specifying the details of the application for registration and extension of registration as a trade repository;
- Implementing Regulation (EU) 2019/363 on the format and frequency of reports on the details of SFTs to trade repositories and amending Implementing Regulation (EU) 1247/2012 with regard to the use of reporting codes in the reporting of derivative contracts;
- Implementing Regulation (EU) 2019/365 on the procedures and forms for exchange of information on sanctions, measures and investigations;
- Implementing Regulation (EU) 2019/364 on the format of applications for registration and extension of registration of trade repositories in accordance with the SFTR;
- Delegated Regulation (EU) 2019/361 amending Delegated Regulation (EU) 151/2013 (which relates to EMIR) on access to the data held in trade repositories; and
- Delegated Regulation (EU) 2019/362 amending Delegated Regulation (EU) 151/2013 (which also relates to EMIR) specifying the details of the application for registration as a trade repository.

## 1.22 Capital Requirements Regulation Update

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

On 17 January 2019 the EBA published its final report on guidelines on the specification of types of exposures to be associated with high risk under the CRR. The guidelines clarify the notion of investments in venture capital firms and private equity in Article 128(2) and specify which other types of exposures should be considered as high risk and under which circumstances by way of application of Article 128(3). They apply from 1 July 2019.

The European Union (Capital Requirements) (Amendment) Regulations 2019 made on 3 February 2019 amend the European Union (Capital Requirements) (No. 2) Regulations 2014. They give the Central Bank the necessary powers to introduce and apply national measures to address domestic macro prudential or systemic risks that could potentially have serious negative consequences to the financial system and the real economy. They also allow the Central Bank to reciprocally recognise such measures taken by another EU Member State.

On 15 February 2019 the Council of the EU announced that COREPER had endorsed the European Commission's legislative proposals for banking reforms adopted by the Commission in November 2016. These reforms consist of proposals for the CRR II Regulation, the CRD V Directive, the BRRD II Directive and the SRM II Regulation. The next steps will be for the Parliament and Council to adopt the proposed regulations at first reading.

Note that the proposed Investment Firms Regulation and Investment Firms Directive will, for most existing investment firms, replace the existing prudential requirements for investment firms set out in the CRR and the CRD IV Directive 2013/36/EU once finalised by the EU. Negotiations between the European Council and the Parliament are the next step in this process. See "Proposed Investment Firms Regulation and Directive" above.

### 1.23 Investment Funds Statistics: Q4 2018

The main points to note in the Central Bank's March 2019 Q4 2018 update are as follows:

- The net asset value of Irish resident investment funds decreased 6% to €1,934bn during Q4 2018, driven by a fall in global equity markets. This is the first quarter in the last five years to witness negative net flows across investment funds resident in Ireland;
- Total assets held by Irish investment funds decreased €119bn from €2,446bn in Q3 2018 to €2,327 in Q4 driven by net sales of €27bn and revaluations of €98bn. This was in line with large losses in European and particular US equity markets and follows similar trends seen throughout euro area investment funds;
- Equity holding of funds (including shares/units of other funds) decreased to €1,001bn by the end of Q4 from €1,103bn the previous quarter;
- Irish resident investment fund holdings of debt securities fell slightly from €931bn at end-September to €929bn at end-December; and
- Irish resident exchange traded funds decreased €27bn in value from €396bn to €369bn from Q3 to Q4 reflecting the significant fall in equities markets and mirroring the performance of other investment funds in this period.

# 2 Tax

### 2.1 Maples Group Tax Update

The latest edition of the Maples Group Tax Update examines a number of current Irish, Luxembourg and international tax issues:

- Ireland and Luxembourg are implementing significant changes to their national tax regimes under the EU Anti-Tax Avoidance Directive ("ATAD");
- The introduction of anti-hybrid legislation, an interest limitation cap, controlled foreign company ("CFC") rules and an exit tax under ATAD;
- The OECD Multilateral Instrument ("MLI") which is updating tax treaties around the world, most significantly introducing a "principal purpose test" for treaty eligibility; and
- The recent important European Court of Justice case law on beneficial ownership in the context of European investment structures.

# 3 Listing

### 3.1 ESMA Q&A on the Market Abuse Regulation – Insider Information

On 29 March 2019 ESMA updated its Q&As on the Market Abuse Regulation EU/596/2014 ("MAR") which contain four new Q&As on the scope of firms subject to the MAR obligation to detect and report suspicious orders and transactions. Two relate to a collective investment undertakings ("CIUs") voluntarily admitted to trading or traded on a trading venue.

New Q 5.6 confirms that such a CIU is subject to the obligation to disclose inside information under Article 17 of MAR (which establishes the obligation of the issuer to inform the public as soon as possible of inside information which directly concerns that issuer). A CIU meets the definition of "issuer" in MAR regardless of the fact that the effective issuance/redemption of the

shares/units of the CIU, and any obligations arising from MAR (or other legislation) are discharged by the relevant asset manager. In that context, the asset manager could be held responsible for a potential infringement of the CIU's obligation to disclose inside information under MAR.

New Q 5.7 sets out a non-exhaustive list of examples of cases where inside information may arise for CIUs (including ETFs) such as: any situation with significant impact (appreciation or depreciation) on the valuation of the CIU assets and, as a result, on the value of the CIU's units; or cases where the CIU has been affected by fraud, theft or an adverse tax ruling; unexpected circumstances in the creation/redemption of units of a CIU; failure or delay of a counterparty to an OTC derivative impacting the return or the risk of the CIU; failure or delay of a counterparty in a securities lending transaction; or issues related to the total or partial liquidation of the CIU's assets.

## 3.2 Euronext Rebrand

Effective from 4 February 2019, Euronext Dublin's regulated market, the Main Securities Market or MSM, was rebranded as "Euronext Dublin" and is now simply referred to as the "regulated market". Euronext have also rebranded their listing rules to reflect this change.

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# About The Maples Group

The Maples Group is a leading service provider offering clients a comprehensive range of legal services on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg, and is an independent provider of fiduciary, fund services, regulatory and compliance, and entity formation and management services. The Maples Group distinguishes itself with a client-focused approach, providing solutions tailored to their specific needs. Its global network of lawyers and industry professionals are strategically located in the Americas, Europe, Asia and the Middle East to ensure that clients gain immediate access to expert advice and bespoke support, within convenient time zones.

The Maples Group's Irish legal services team is independently ranked first among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Ireland Fund Report, as of 30 June 2018).

For more information, please visit: maples.com.