Funds Quarterly Legal and Regulatory Update

Period covered:
1 January 2018 – 31 March 2018

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

Undertakings in Collective Investments and Transferable Securities ("**UCITS**")

(i) The Central Bank issues revised UCITS Q&As

During the period 1 January 2018 to 31 March 2018, the Central Bank published the Twenty-Second Edition of the Central Bank UCITS Question & Answers ("**Q&A**").The revisions to the Q&As comprise:

- **Question ID 1086**: confirms that, with respect to the requirement to disclose whether the benchmark administrator is authorised/registered under the Benchmarks Regulation regime in the prospectus of a UCITS, it is not necessary to include the name of the relevant administrator; and

- **Question ID 1087**: confirms that a UCITS is not required to prepare a PRIIPs KID until 31 December 2019.

A copy of the Twenty-Second Edition of the Central Bank UCITS Q&A can be found here.

(ii) Central Bank outlines new procedure for submission of Risk Management Process Document by UCITS Funds

On 19 January 2018, the Central Bank issued a letter which sets out its new procedure for submission of the risk management processes ("**RMPs**") by UCITS investment funds.

The main changes are as follows:

- As of 19 January 2018, draft RMPs are no longer required by the Central Bank;

- In their place, a UCITS must complete the RMP application form. This form, together with the final signed RMP, must be submitted by 12pm on the day of authorisation. Failure to do so will result in the delay of authorisation; and

- While the Central Bank will no longer review RMPs in advance of authorisation, ad hoc reviews will be carried out periodically to assess compliance standards.

The letter may be accessed here.

(iii) European Commission Proposals on Cross-Border Distribution of Investment Funds

On 12 March 2018, the European Commission published a legislative proposal amending the UCITS Directive and the AIFMD Directive with respect to the cross-border distribution of collective investment funds. The proposal, more generally, forms part of the development of the Capital Markets Union.

The purpose of the proposed Directive is to improve the transparency of national rules in the area of cross-border distribution and to remove existing barriers to cross-border distribution of funds within the EU in order to make distribution simpler, quicker and cheaper. It also aims to harmonise diverging national rules, thus eliminating gold plating by Member States.

A number of amendments were proposed for the UCITS Directive and the AIFMD Directive, including:

- Provision for enhanced requirements for marketing communication, which will harmonise the principles established for such communications, across the EU;
- Provision for the definition of pre-marketing and conditions under which an EU AIFM can engage in pre-marketing activities;
- Provision for the enhanced transparency of national law and regulations;
- The proposal that although UCITS management companies must establish facilities to perform processing of subscription, redemption requests and provide copies of documentation to investors in the relevant Member State, the Member State in question cannot require a UCITS management company to establish a physical presence for such purposes; and
- The setting out of new procedures on de-notification (i.e. setting down circumstances in which a fund can be deregistered).

The proposals will now be discussed by the European Parliament and the Council.

The text of the proposal can be accessed here.

An accompanying press release and FAQ/Factsheet can be accessed here and here, respectively.

(iv) Consultation paper on amendments to the Central Bank UCITS Regulations published

On 29 March 2018, the Central Bank published a consultation paper on amendments to (and consolidation of) the Central Bank UCITS Regulations (the "**Regulations**"). The Central Bank reviews the Regulations annually, and updates them if necessary. As part of this review, the Central Bank has identified a number of potential amendments which are set out in this paper. Furthermore, it is proposed to consolidate previous amendments into a consolidated version of the Regulations.

The purpose of this paper is to invite feedback from stakeholders on these proposals. The closing date for responses is 29 June 2018.

The paper may be accessed here.

Alternative Investment Fund Management Directive ("**AIFMD**")

(i) The Central Bank issues revised AIFMD Q&A

During the period 1 January 2018 to 31 March 2018, the Central Bank published the Twenty-Eight and the Twenty-Ninth Editions of the Central Bank UCITS Question & Answers ("**Q&A**") on the application of Directive 2011/61/EU ("**AIFMD Directive**"). The updates to the Q&As comprise:

- **Question ID 1125**: confirms that a QIAIF which can be marketed to non-professional investors within the meaning of MiFID II must prepare a KIID;
- **Question ID 1126**: advises that the Central Bank is likely to require an AIF to file a PRIIP KIID on an ex-post basis however it will confirm to industry once these filing requirements have been finalised;
- **Question ID 1127**: confirms that an AIF is not required to comply with the prospectus disclosure obligations arising under Article 29(2) of the Benchmarks Regulation unless the AIF is subject to the Prospectus Directive;
- **Question ID 1128**: which confirms that a loan origination fund cannot use derivatives for purposes other than hedging. It should be noted that in the section on 'Loan Originating Qualifying Investor AIF' Question ID 1079, Question ID 1081, Question ID 1117 and Question ID 1118 have been deleted as they are no longer relevant; and Question ID 1119 has been amended.

A copy of the Twenty-Ninth Edition of the Central Bank UCITS Q&A can be found here.

(ii) The Central Bank publishes notice of intention to amend the requirements for Loan Origination Qualifying Investor AIF ("L-QIAIFs")

On 7 February, 2018, the Central Bank published a notice (the "**Notice**") indicating its intention to amend certain of the current requirements applicable to L-QIAIFs as set out under the Central Bank's AIF Rulebook (the "**Rulebook**"), details of which are provided below.

The Rulebook sets out certain prescribed operational requirements and key limitations on the activities which L-QIAIFs can undertake. In particular, L-QIAIFs are currently required to limit their operations to the business of: (i) issuing loans; (ii) participating in loans; (iii) participations in lending; and (iv) and to operations relating thereto, including investing in debt and equity securities of entities or groups to which the loan originating Qualifying Investor AIF lends or which are held for treasury, cash management or hedging purposes.

In the Notice, the Central Bank has indicated that with effect from 7 March, 2018, the list of permitted operations of L-QIAIFs will be expanded to include the ability to "invest in debt/credit instruments". Previously, L-QIAIFs were only permitted to invest in debt/credit instruments other than loans or participations in loans if the issuer was from the corporate

group of a borrower to a loan originated by the L-QIAIF or if the investment was part of the treasury management operations of the L-QIAIF. This rule amendment will permit L-QIAIFs to invest in a broad range of debt/credit instruments as part of its core investment strategy. While the Central Bank's other requirements applicable to L-QIAIFs will continue to apply and remain unchanged, this change to the Central Bank's Rulebook in respect of the permitted activities of L-QIAIFs will provide significant and welcome flexibility to the composition of the portfolios of L-QIAIFs. This will be broadly welcomed and will further enhance the attractiveness of the L-QIAIF to asset managers looking to use Ireland as a fund domicile for raising capital in Europe.

Following the Notice, the Central Bank has subsequently published a revised Rulebook in March 2018, which incorporates this change at paragraph 2 of Section 4, Chapter 2 of the Rulebook.

The Central Bank has also published a revised AIFMD Q&A, as mentioned in (i) above which includes a new ID 1128 that confirms a loan origination fund cannot use derivatives for purposes other than hedging. In addition, ID 1119 has been revised in light of the changes made to the Rulebook.

The AIF Rulebook, dated March 2018, can be accessed here.

The text of the Notice is available here.

(iii) The European Commission publishes an online survey on the functioning of AIFMD

On 8 February 2018, the European Commission published an online survey about the functioning of the AIFMD. The survey aims to gather the views of stakeholders on:

- The AIFMD requirements,
- The experience of applying the AIFMD requirements;
- The impact that AIFMD had on the information provided to investors before they invest;
- If retail investors are affected by AIFMD;
- If other legislation has assisted or hindered AIFMD's objectives; and
- The impact of the AIFMD on the market.

The information gathered from the survey will help in producing a final report, however the survey does not specify when it will close to submissions.

The survey can be accessed here.

International Organisation of Securities Commissions ("**IOSCO**")

(i) IOSCO publishes recommendations and good practices for fund liquidity and risk management

On 1 February 2018, the International Organisation of Securities Commissions ("**IOSCO**") published two final reports.

The first report is titled "Recommendations for Liquidity Risk Management for Collective Investment Schemes." This report outlines IOSCO's recommendations to entities regarding liquidity risk management, with the aim of protecting the interests of investors. It also makes recommendations regarding the design process of investment funds, day-to-day liquidity management and contingency planning. This final report replaces the existing liquidity risk management framework contained in IOSCO's previous report, published in 2013. IOSCO expects that the implementation of these guidelines will be actively promoted by securities regulators. The first report can be accessed here.

The second report is titled "Open-ended Fund Liquidity and Risk Management – Good Practices and Issues for Consideration." This report provides practical advice to entities implementing the above recommendations throughout the life cycle of a fund. It addresses topics such as stress testing and liquidity risk management tools. It is intended to assist regulators, investors and industry. The second report can be accessed here.

(ii) IOSCO publishes consultation report on mechanisms used by trading venues to manage extreme volatility

On 7 March 2018, IOSCO published a consultation report titled, "Mechanisms used by Trading Venues to Manage Extreme Volatility and Preserve Orderly Trading."

The report sets out IOSCO's proposed recommendations to assist trading venues and regulatory authorities manage extreme volatility. For example, it makes a number of recommendations regarding the implementation, operation and monitoring of volatility control mechanisms. The report is part of IOSCO's ongoing work on the impact of technology on markets and how regulators respond to such developments.

IOSCO is seeking public comment on its analysis and recommendations. The closing date for the receipt of comments is 6 May 2018.

The report can be accessed here.

(iii) IOSCO publishes report on senior investor vulnerability

On 8 March 2018, IOSCO published a report titled, "Senior Investor Vulnerability." The report acknowledges the correlation between age-induced cognitive decline and an increased susceptibility to financial exploitation and fraud. The report also acknowledges that many countries are now facing the demographic challenge of an ageing population.

Given this background and building on research and feedback received from IOSCO members, the report sets out sound practices that regulators and financial services providers may use to address these issues. It also provides practical examples of how better outcomes may be achieved for senior investors.

The report may be accessed here.

Packaged Retail Insurance-based Investment Products ("**PRIIPs**")

(i) European Union (Key Information Documents for Packaged Retail and Insurance-Based Investment Products ("PRIIPs")) Regulations (the "Irish Regulations") published

The European Union (Key Information Documents for Packaged Retail and Insurance-Based Investment Products ("**PRIIPs**")) Regulations 2017 (S.I. No. 629 of 2017) (the "**Irish Regulations**") came into operation on 31 December 2017 and were published in January 2018.

The purpose of the Irish Regulations is to give full effect to Regulation EU No 1286/2014 (the "**PRIIPs Regulation**") which took effect on 1 January 2018. In particular it designates the Central Bank as the competent authority in Ireland responsible for carrying out the functions of a competent authority set down in the PRIIPs Regulation. The Irish Regulations provide as follows:

- Regulated financial services providers (which will include UCITS ManCos, AIFMs and those regulated firms selling PRIIPs) must put in place whistleblowing arrangement to allow their employees to report actual or potential infringements of the PRIIPs Regulation. Therefore the whistleblowing policy of the relevant UCITS Man Co, AIFM or self managed investment company should be updated accordingly to incorporate specific reference to the PRIIPs Regulation;

- The Central Bank, as the relevant competent authority, can impose sanctions for any infringements listed in Article 24(1) of the PRIIPs Regulation;

- Regulation 5 of the Irish Regulations set down the criteria which will be taken into account by the Central Bank in determining the type and level of administrative sanctions to be applied in respect of an infringement of the PRIIPs Regulation; and

- Regulation 6 of the Irish Regulations provides that any decision taken/sanction imposed by the Central Bank is an appealable decision.

A copy of the Irish Regulations can be found here.

European Markets Infrastructure Regulation ("**EMIR**")

(i) Central Bank issues revised FAQ's on EMIR

During the period 1 January 2018 to 31 March 2018, the Central Bank issued a revised Frequently Asked Questions document ("**FAQs**") on Regulation (EU) No 648/2012 of the European Parliament and of the European Council on OTC derivatives, central counterparties and trade repositories ("**EMIR**"). Question 2 has been revised in order to update references to MiFID II as required, with Questions 3 and 4 being deleted as they are no longer relevant.

The revised FAQ can be found here.

(ii) ESMA publishes updated Q&As on EMIR implementation

During the period 1 January 2018 to 31 March 2018, ESMA published an updated version of its Question & Answers ("**Q&A**") on the implementation of EMIR. The revisions to the Q&As comprise:

- **TR Q&A 45**: A new Q&A has been inserted regarding the timelines applicable to trade repositories in the case of scheduled (or non-scheduled) maintenance that impacts TR services related to authorities' access to data.

A copy of the Q&A on the implementation of EMIR can be accessed here.

(iii) ECON Committee publishes draft report on the EMIR Reform Proposal

On 30 January 2018, the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published its draft report (dated 26 January 2018) on the proposals published by the European Commission in May 2017 to amend EMIR (the "**EMIR Reform Proposals**").

The draft report sets out ECON's suggested amendments to the proposed EMIR Reform Proposals.

A number of the key amendments are set out below:

- Reporting of OTC transactions between a financial counterparty and a non-financial counterparty: ECON supports the Commission's proposal that OTC transactions between a financial counterparty and a non-financial counterparty would be reported by the financial counterparty on behalf of both parties, and the financial counterparty would be responsible for the accuracy of the details that are reported. However, ECON suggests that a non-financial counterparty must be allowed to choose to carry out this reporting if it wishes (in which case the non-financial counterparty would be responsible for the accuracy of the details that are reported). ECON also suggests amendments to clarify how the reporting should be done in case of OTC derivatives contracts concluded between a non-financial counterparty established within the European Union that does not report itself and a financial counterparty established in a third-country;

- Reporting of intra-group OTC transactions; ECON supports the Commission's proposals whereby intragroup OTC transactions, where at least one counterparty is an non-financial counterparty, should be exempted from the reporting obligation. ECON also suggests amendments to clarify that this exemption should apply regardless of the non-financial counterparties' place of establishment;

- Clearing obligation & exchange of collateral/ segregation requirements: ECON supports the Commission's proposal that the scope of the clearing obligation for non-financial counterparties should be narrowed, so that those non-financial counterparties who are subject to the clearing obligation will only be required to clear with regards to the asset class or asset classes that exceed the clearing threshold. However, ECON also recommends that non-financial counterparties exceeding the clearing threshold ("NFCs+") should not be subject to segregation and exchange of collateral requirements for other asset classes than the one where the threshold has been breached;

- Restriction of the categories of AIFs to be treated as a financial counterparty: Under the Commission's proposals, all AIFs would be treated as a financial counterparty. ECON has rejected this proposal, instead stating that the definition of a "financial counterparty" should only include AIFs established in the Union or managed by an EU AIF;

- Classification of securitisation special purpose entities ("**SSPEs**"): Under the Commission's proposals, SSPEs would be treated as a financial counterparty. ECON has rejected this proposal and recommends that SSPEs should remain in the category of non-financial counterparties on the basis that SSPEs neither carry the risks nor have the same financial and operational capacities as financial institutions;

- Clearing access; ECON supports the Commission's proposals aiming to make clearing more accessible to smaller entities, particularly non-financial counterparties. ECON has suggested further amendments to further this aim;

- Physically-settled FX forwards and physically-settled FX swaps: ECON has suggested that the Commission's proposal to exclude physically settled FX forwards from the requirement to exchange of variation margin should be extended. In this regard, ECON recommends that the exemption should relate to physically settled foreign exchange swap derivatives, as well as physically settled FX forwards;

  Exchange-traded derivatives ("**ETDs**"): ECON supports the Commission's proposals that ETDs would be reported by the central counterparty ("**CCP**") only (on behalf of both parties) and the CCP would be responsible for the accuracy of the details that are reported. ECON has suggested that it should also be clear that the counterparty should be able to choose to which trade repository the CCP should report the ETDs;

- Pension Scheme Arrangements ("**PSAs**"): The European Commission has suggested that the exemption for PSAs from central clearing should be extended by a further 3 years and then possibly by two more years via a delegated act. Whilst ECON is supportive of this, it has suggested that the European Commission could step in to propose measures in the absence of a market-led solution;

- Small financial counterparties: The European Commission has suggested that small financial counterparties would benefit from an exemption from the clearing obligation if they fall below certain thresholds. ECON is supportive of this.

ECON has suggested other amendments in relation to CCPs (their insolvency and transparency), back loading and front loading requirements and requirements relating to the suspension of the clearing obligation.

ECON is to vote to finalise the draft report, before it is considered by the Parliament in plenary in Spring 2018.

A copy of the draft report can be found here.

(iv) ESMA publishes a final report on guidelines relating to the management by Central Counterparties of conflicts of interest

On 7 February 2018, ESMA published a final report on guidelines relating to the management by central counterparties ("**CCPs**") of conflicts of interest. Under EMIR, the CCPs are required to have organisational arrangements and policies in place to prevent potential conflicts of interest and to solve them should the preventative measures fail to be sufficient. The guidelines will help CCPs' how to manage conflicts of interests by:

- Clarifying how CCPs should prevent or mitigate risks of conflicts of interest;
- Ensuring a consistent implementation across all CCPs;
- Setting out circumstances where conflicts of interests could arise; and
- Specifying the organisational arrangements and procedures to be established.

The final report contains feedback to ESMA's June 2017 consultation on the guidelines and highlights where ESMA has changed the proposed guidelines following the consultation process.

National competent authorities must notify ESMA whether or not they intend to comply with the guidelines within two months of the date of publication.

A copy of the final report can be accessed here.

(v) ESMA publishes updated validation rules for EMIR

On 1 March 2018, ESMA published updated validation rules with regard to revised technical standards on reporting under Article 9 of EMIR.

ESMA updated the validation rules to allow for the reporting of exchange-traded derivatives in products for when the effective date may be earlier than the date of execution and to

clarify how the identification of a product should be validated in the reports that are submitted on or after 3 January 2018.

A copy of the validation rules and the accompanying press release can be accessed here.

(vi) European Commission adopts proposal for a Council Decision on incorporating EMIR Implementing and Delegated Regulations into the EEA Agreement

On 21 March 2018, the European Commission adopted a proposal regarding the incorporation of EMIR Delegated and Implementing Regulations into the EEA Agreement. It is proposed that the two draft decisions of the EEA Joint Committee (available at Annex 1 and Annex 2 to the proposal) amend Annex IV (Financial Services) to the EEA Agreement in order to incorporate these Regulations. The proposal has been sent to the Council for approval.

The text of the proposal is available here.

Annex 1 and 2 are available here and here respectively.

(vii) ESMA publishes Guidelines for position calculation by Trade Repositories under EMIR

On 27 March 2018, ESMA published its final report on Guidelines for position calculation by Trade Repositories ("**TRs**") under EMIR. The aim of the Guidelines is to create a framework for TRs to calculate positions in derivatives in a harmonised and consistent manner in accordance with Article 80(4) EMIR.

The Guidelines provide specific instructions on the aggregation of certain data fields and how these should be calculated by TRs before the data is provided to regulatory authorities.

The Guidelines will become applicable on 3 December 2018, and will require an annual assessment of compliance.

The report is available here.

Central Clearing Counterparties ("**CCPs**")

(i) ECON publishes its report on the proposed Regulation on the recovery and resolution of CCPs

On 1 February 2018, the European Parliament's Committee on Economic and Monetary Affairs ("**ECON**") published its report (dated 31 January 2018) on the proposals previously published by the European Commission on a framework for the recovery and resolution of CCPs (the "**Proposed Regulation**") in the event of the failure of a CCP. ECON has voted to adopt the Proposed Regulation and it has tabled a number of amendments to strengthen the Commission's proposed text. Some of the amendments are highlighted below:

- ECON has suggested that the framework should also address the possibility of CCPs entering into resolution for reasons other than the default of one or several of their clearing members;

- As regards the minimum standards for the the contents and information to be included in recovery plans, ECON has suggested that the plans should contemplate an appropriate range of scenarios envisaging both systemic stress and stress specific to the CCP and that the scenarios should contemplate situations of stress that would be more extreme than those used for the purposes of regular stress testing under the RTS on CCPS under EMIR;

- Recovery plans should ensure that the CCP's capital is relied upon to bear first losses in default cases and even more so in non-default cases. Substantial loss absorption by clearing members should be foreseen before any tools are used that allocate losses to clients;

- Recovery plans should explicitly set out actions to be taken by the CCP in case of cyber-attacks; and

- As regards the early intervention powers afforded to competent authorities, ECON recommends that early intervention rights shall include the power to restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering outright default.

The European Parliament, the Council of the European Union and the European Commission will negotiate between one another on the Proposed Regulation, once the Council of the European Union has agreed its negotiating position. A copy of the report can be accessed here.

(ii) ECON publishes its draft report on proposed Regulation amending EMIR supervisory regime for the European Union and third-country CCPs

On 2 February 2018, ECON published its draft report (dated 31 January 2018) on the proposed Regulation amending the ESMA Regulation (Regulation (EU) No 1095/2010) and EMIR with regard to the procedures and authorities involved for the authorisation of CCPs and the recognition of third-country CCPs.

In the explanatory memorandum to the report, ECON welcomes the proposal for the proportionate treatment and classification of third-country CCPs depending on their systemic importance. This is because it agrees that one of the major weaknesses of the current EMIR regime is the over-reliance on the third country supervisory authorities as regards the authorisation and recognition of CCPs, particularly as regards CCPs which could be deemed to have systemic importance.

ECON also indicates that it agrees with the proposal that the Commission, acting upon a recommendation of ESMA and the central bank of issue, could deny recognition to a third country CCP on the basis of the significance of the activities of that CCP for the Union.

Whilst it recognises that this is a last resort tool, it feels that it should remain. However, ECON states that the process for denying recognition should be made on a "fact and evidence based" approach to increase market certainty. ECON proposes that the discretionary nature of the procedure for denying recognition to a third-country CCP should be mitigated by requiring ESMA and the central bank of issue to conduct a prior impact analysis and consider clear criteria.

The draft report also contains a number of other amendments to the proposals received from the European Commission.

A copy of the draft report can be accessed here.

(iii) Results of second European Union-wide CCP stress test published by ESMA

On 2 February 2018, ESMA published the results of the second European Union wide stress test exercise for CCPs. The purpose of the stress test is to:

- Assess the resilience of CCPs to detrimental market developments;
- Identify any deficiencies in the CCPs' resilience; and
- Issue recommendations in light of these findings.

The results confirm that European Union CCPs are generally resilient to multiple defaults and common shocks. The report also highlights individual CCP specific results.

The results may be accessed here.

An accompanying press release and Q&A are available here and here respectively.

(iv) ESMA publishes responses to its Consultation on Draft Guidelines on Anti-Procyclicality Margin Measures for CCPs

On 8 March 2018, ESMA published the responses it received to its Consultation on Draft ESMA Guidelines on Anti-Procyclicality Margin Measures for CCPs. The purpose of the guidelines is to provide direction on the requirements for CCPs to set prudent and stable margins to limit procyclicality under Article 16(2) of the ESMA Regulation.

The consultation paper, published on 8 January 2018, invited feedback from stakeholders on the draft guidelines. Nine responses were received from parties such as the London Stock Exchange Group and Eurex Clearing AG.

ESMA expects to publish the final guidelines by June 2018. The responses can be accessed here.

The consultation paper can be accessed here.

(v) ESMA publishes list of trading venues benefiting from a transitional exemption from the access provisions under Article 36(5) MiFIR

On 26 March 2018, ESMA published a list of trading venues benefiting from the transitional exemption from the access provisions under Article 36(5) of MiFIR.

Articles 35 and 36 of MiFIR establish the legal framework for trading venues to access CCPs, and for CCPs to access trading venues.

Each trading venue on the list has notified ESMA and its competent authority that it intends to temporarily opt-out from the access provisions for exchange-traded derivatives ("**ETDs**"). These trading venues, as a result, do not benefit from any of the access rights under Article 35 and 36 of MiFIR for ETDs within the relevant threshold for the duration of the opt-out.

The list of trading venues is available here.

(vi) ESMA publishes list of trading venues and CCPs benefiting from a transitional exemption from the access provisions under Article 54(2) MiFIR

On 26 March 2018, ESMA published a list of trading venues benefiting from the transitional exemption from the access provisions under Article 54(2) of MiFIR.

Article 54(2) MiFIR provides that a trading venue may apply to its competent authority for permission to avail of transitional arrangements. Where such a transitional period is approved, the CCP or trading venue cannot benefit from access rights under Article 35 and 36 MiFIR regarding exchange-traded derivatives for the duration of the transitional period which is in place until 3 July 2020.

The list of trading venues is available here.

Securitisation Regulation

(i) ESMA launches consultation on securitisation requirements

On 23 March 2018, the European Securities and Markets Authority ("**ESMA**") published two consultation papers on draft technical standards implementing the Securitisation Regulation.

- The first consultation paper seeks the views of shareholders on the application requirements for firms seeking to register with ESMA as securitisation repositories. It also includes draft Guidelines on the transfer of data between securitisation repositories. The paper can be accessed here.

- The second consultation paper sets out ESMA's proposed technical advice on supervisory fees, and can be accessed here.

The closing date for feedback is 23 May 2018. ESMA expects to publish its final report on securitisation repositories application requirements by the end of 2018 and its final technical advice on fees by the end of Q3 2018.

Central Securities Depositories Regulation ("**CSDR**")

(i) The European Central Bank announced that the TARGET2-Securities collective agreement will enter into force on 20 March 2018

On 9 March 2018, the European Central Bank ("**ECB**") has announced that the TARGET2-Securities ("**T2S**") collective agreement will enter into force on 20 March 2018.

The collective agreement is between the Central Banks operating TARGET2 component systems and the central securities depositories ("**CSDs**") operating on T2S which concerns information and liability in the event of a participant becoming insolvent and defines common entry for payments and securities transfer orders that are matched in the systems operated by its signatories which provides certainty to participants regarding the treatment of outstanding securities transactions should one become insolvent.

The ECB published an explanatory note concerning the T2S collective agreement and published the final version of the agreement.

A copy of the explanatory note can be accessed here.

A copy of the final version of the T2S collective agreement can be accessed here.

(ii) ESMA publishes updated Q&As on improving securities settlement and on central securities depositories ("CSDs")

On 23 March 2018, ESMA published updated Q&As on the implementation of the Regulation on improving securities settlement in the EU and on central securities depositories ("**CSDR**"). Under CSD Question 1, the question ""Should CSD links be assessed as part of an application for authorisation by a CSD under Art. 16 of the Regulation?" has been added.

Under CSD Question 10, the question "Are links between CSDs participating in T2S interoperable links as defined in the CSDR?" has been added.

Finally, CSD Question 4 has been modified to reflect the extent of the flexibility that can be granted to CSDs in their use of international standards to communicate with their participants or with other market infrastructures.

The updated Q&As can be accessed here.

(iii) ESMA publishes final report on Guidelines on Internalised Settlement Reporting under CSDR

On 28 March 2018, ESMA published its final report on Guidelines on Internalised Settlement Reporting under Article 9 of the Regulation on improving securities settlement in the EU and on central securities depositories ("**CSDR**").

This paper summarises and analyses the responses received following publication by ESMA of a consultation paper on this topic in 2017. The purpose of these Guidelines is to ensure the uniform application of Article 9 CSDR. Article 9 requires that entities such as credit institutions and investment firms must report to their national competent authority, on a quarterly basis, the aggregated volume and value of all securities transactions that they settle outside of the securities settlement systems. The Guidelines clarify the type of transactions that are to be included and the scope of data to be reported.

The Guidelines apply from their date of publication, and can be accessed here.

(iv) ESMA publishes official translations of ESMA Guidelines under CSDR

On 29 March 2018, ESMA published translations of three ESMA Guidelines under the Regulation on improving securities settlement in the EU and on central securities depositories ("**CSDR**") in each of the official languages of the EU. Translations of the following Guidelines are now available:

- CSDR Guidelines on substantial importance of CSDs, which can be accessed here.

  These Guidelines provide guidance on the process for the collection, processing and aggregation of data and on the information necessary for the calculation of the indicators to determine the substantial importance of a CSD for the functioning of the securities markets and the protection of investors in a host Member State. These Guidelines will apply from 29 March 2018.

- CSDR Guidelines on relevant currencies, which can be accessed here.

  These Guidelines provide guidance on the process for the collection, processing and aggregation of the data necessary for the calculation of the indicators to determine the most relevant currencies in which settlement takes place. These Guidelines will apply from 29 March 2018.

- CSDR Guidelines on cooperation between authorities under Articles 17 and 23, which can be accessed here.

  The purpose of these Guidelines is to ensure the consistent application of certain cooperation requirements for authorities in accordance with Article 14 CSDR.

These Guidelines will apply from 29 May 2018.

Credit Rating Agencies Regulation ("**CRAR**")

(i) ESMA launches consultation on supplementary guidance on assessing "as stringent as" requirements under CRAR

On 27 March 2018, ESMA published a consultation paper regarding Guidelines on the application of the endorsement regime under Article 4(3) of the Credit Rating Agencies Regulation ("**CRAR**") - supplementary guidance on how to assess of a requirement is "as stringent as" the requirements set out in CRAR.

CRAR allows an EU CRA endorse a credit rating issued by a third-country CRA if the endorsing CRA has verified that the third-country CRA has internal requirements in place that are at least as stringent as those set out in the relevant endorsement provisions of CRAR.

The supplementary guidance proposed in this consultation paper aims to provide clarity on when an alternative internal requirement can be considered "as stringent" as a requirement already provided for under CRAR.

The closing date for responses is 25 May 2018. The paper can be accessed here.

Benchmarks Regulation

(i) ESMA updates its webpage concerning the register under the Benchmarks Regulations

In October 2017, ESMA updated its webpage on benchmarks regarding the publication of the register of administrators and third country benchmarks in accordance with Article 36 of Regulation (EU) 2016/1011 (the "**Benchmarks Regulation**"). It is expected that a web-based register interface will be available from the third quarter of 2018 but in the interim, the latest registers information will be published daily in CSV format and will be available here.

(ii) ESMA publishes updated Q&As on Benchmarks Regulation

During the period 1 January 2018 to 31 March 2018, ESMA published an updated version of its Question & Answers ("**Q&A**") on the implementation of the Regulation on indices used in financial instruments and financial contracts or to measure the performance of investment funds. The updated version of the Q&As includes two new Q&As:

- **Q&A 4.4 - Commodity benchmarks**: This Q&A concerns how the threshold in the exemption under Article 2(2)(g) of the Benchmarks Regulation should be calculated;
- **Q&A 5.3 - Definition of a benchmark and investment funds**: This Q&A concerns what types of investment funds are considered to be using an index for the purpose of "tracking the return of [an] index"; and

- **Q&A 6.1 - Supervised contributors**: This Q&A considers how supervised contributors should apply Article 16 during the transitional period.

A copy of the updated version of the Q&A on the Benchmarks Regulation can be accessed here.

(iii) Delegated Regulations under the Benchmarks Regulation published in the Official Journal of the European Union

On 17 January 2018, the following Delegated Regulations under the Benchmarks Regulation were published in the Official Journal of the European Union:

- Commission Delegated Regulation (EU) 2018/64, which supplements the Benchmarks Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds with regard to specifying how the criteria of Article 20(1)(c)(iii) of the Benchmarks Regulation are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States. A copy of Delegated Regulation (EU) 2018/64 can be found here;

- Commission Delegated Regulation (EU) 2018/65, supplements the Benchmarks Regulation specifying technical elements of the definitions laid down in Article 3(1) of the Benchmarks Regulation. A copy of Delegated Regulation (EU) 2018/65 can be found here;

- Commission Delegated Regulation (EU) 2018/66, which supplements the Benchmarks Regulation specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value ("**NAV**") of investment funds are to be assessed. A copy of Delegated Regulation (EU) 2018/66 can be found here;

- Commission Delegated Regulation (EU) 2018/67, which supplements the Benchmarks Regulation with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks. A copy of Delegated Regulation (EU) 2018/67 can be found here.

The Delegated Regulations will enter into force on 6 February 2018

Short Selling Regulation ("**SSR**")

(i) ESMA updates Q&A on the implementation of the Short Selling Regulation

During the period 1 January 2018 to 31 March 2018, ESMA published an updated Question & Answers ("**Q&A**") on the implementation of the Short Selling Regulation (Regulation 236/2012) ("**SSR**"). The updates to the Q&As comprise:

- The answer to Q&A 10.6 has been expanded to explain that rights to subscribe for new shares cannot be used to cover a short sale in accordance with Article 5(1)(e) of European Commission Implementing Regulation (EU) No 827/2012 where, at the time of entering into the short sale, there is uncertainty as to whether the new shares subscribed for will be available for settlement in due time. The answer provides examples of when this would be the case;

A copy of the updated Q&A on the implementation of the Short Selling Regulation can be accessed here.

European Long-Term Investment Funds Regulation ("**ELTIF Regulation**")

(i) Delegated Regulation on RTS supplementing the ELTIF Regulation published in the Official Journal of the European Union

The following Delegated Regulation was published in the Official Journal of the European Union on 23 March 2018.

- Commission Delegated Regulation (EU) 2018/480 of 4 December 2017 supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council with regard to regulatory technical standards on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the European long-term investment funds, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors. The text of the Delegated Regulation may be accessed here.

The Delegated Regulation enters into force on 12 April 2018.

Payment Services Directive ("**PSD2**")

(i) Central Bank issues Frequently Asked Questions on PSD2

In January 2018, the Central Bank issued Frequently Asked Questions ("**FAQs**") on PSD2 which came into force on 13 January 2018.

The FAQs on PSD2 can be found here.

(ii) Minister for Finance signs the European Union (Payment Services) Regulations 2018 into law

On 12 January 2018, the Minister for Finance, Mr. Paschal Donohoe, signed the European Union (Payment Services) Regulations 2018 [S.I. No. 6 of 2018] into law to give effect to the revised Payment Services Directive ("**PSD2**").

The objective of PSD2 is to harmonise the rules for a European Union single market for payments, by creating greater integration and an efficient European payments market. PSD2 introduces two new categories of payment services providers to be regulated. It also seeks

to provide greater protection for consumers and it introduces new rules on strong customer authentication and secure communication which are intended to make payments safer.

The vast majority of the provisions of PSD2 came into operation on 13 January 2018 with a small number of provisions coming into operation 18 months from the date the regulatory technical standards on strong customer authentication and common and secure open standards of communication enter into force.

A copy of the Department of Finance press release can be found here.

A copy of the European Union (Payment Services) Regulations 2018 [S.I. No. 6 of 2018] can be found here.

(iii) EBA publishes a letter to the European Commission on RTS on strong customer authentication under PSD2

On 29 January 2018, the EBA published a letter (dated 26 January 2018) from Andrea Enria, the EBA Chairman, to Olivier Guersent the European Commission Director-General, on the status of RTS on strong customer authentication and common and secure communication under the revised PSD2.

In the letter, Mr Enria welcomes the adoption of the RTS by the European Commission. He welcomes the fact that some of the EBA's concerns as expressed in its opinion of 26 June 2017 had been addressed by the European Commission, namely to enable account servicing payment service providers ("**ASPSPs**") to be exempted from the obligation to allow contingency access for account information service providers ("**AISPs**") and payment initiation service providers ("**PISPs**") via so-called 'screen scraping'. However, Mr Enria mentions that it is felt that the EBA should have been granted the opportunity to provide its opinion on the new changes applied and adopted by the European Commission in its further RTS of 27 November 2017.

In particular, Mr. Enria refers to the new provisions introduced in the RTS of 27 November 2017 which may impose significant additional administrative and operational burden on payment service providers ("**PSPs**") as well as national competent authorities ("**NCAs**"). Certain queries are raised by Mr. Enria as regards the scope of certain duties imposed on NCAs, the EBA and the industry group referred to (e.g. relating to the new certification requirements for ASPSPs that choose to develop dedicated interfaces to exempt them from having in place a "fallback" solution, as well as other testing requirements applicable to ASPSPs). The letter concludes by recognising that the timely adoption of the RTS by the European Commission is welcome, but may need to be complemented by efforts to ensure consistent interpretation and application of some provisions.

A copy of the letter can be found here.

(iv) European Commission issues Notice to Stakeholders in the payment services field post Brexit

On 8 February 2018, the European Commission (the "**Commission**") issued a notice to stakeholders in the banking and payment services industry on some of the main legal and regulatory repercussions arising from the United Kingdom becoming a "third country" following Brexit (the "**Notice**").

The purpose of the Notice is to remind stakeholders of the need to assess the potential impact that Brexit may have on their businesses and plan accordingly. Examples include:

- **Authorisations**

  United Kingdom entities that provide banking and payment services, as well as e-money issuing, will lose their authorisation (their "**European Union passport**") to provide these services in the European Union. Going forward, these United Kingdom entities will be treated as third-country entities. If an entity has been authorised by the United Kingdom, and has subsequently established branches in other Member States, these branches will be treated as if their head office is in a third country. If an entity has been authorised by a competent authority in the European Union and has established branches in the United Kingdom, the services covered by the scope of the authorisation will continue to be subject to the supervisory powers of the competent authority which granted the authorisation.

- **Arrangements and Exposures**

  An assessment will need to be made regarding entities authorised in the European Union that rely on outsourcing, supervisory arrangements, exemptions from the application of large exposures or risk mitigation requirements that involve counterparties established in the United Kingdom. This will need to be made by the competent authority which granted the authorisation.

- **Impact on Contracts**

  Loss of authorisation following the withdrawal of the United Kingdom from the European Union will result in United Kingdom entities losing the ability to service certain types of contracts. As a result, in certain circumstances, parties will be unable to enforce their rights and obligations. This Notice recommends that parties to contracts either governed by the law of the United Kingdom, or contain a choice of law or agreement in favour of the jurisdiction of a court in the UK, carefully assess the impact of the United Kingdom's exit from the European Union.

A copy of the Notice can be accessed here.

(v) The European Commission publishes letter to the EBA on RTS on strong customer authentication under PSD2

On 16 February 2018, the European Commission published a letter (dated 13 February 2018) from Olivier Guersent, European Commission Director-General to Andrea Enria, the EBA Chairman, relating to the RTS on strong customer authentication and common and secure communication under the revised PSD2. The letter is in response to a letter (dated 26 January 2018) from the EBA to the European Commission on the RTS.

In the letter, Mr. Guersent states that the Commission understands the position that the EBA should have been consulted on some of the changes introduced in the RTS of 27 November 2017, However, Mr. Guersent indicates that some of these changes took on board the concerns expressed by the EBA and Member States at a meeting in July 2017 at which the EBA was present.

In respect of the API standards, Mr. Guersent indicates that it is not possible for the EBA or the European Commission to anticipate all of the possible problems with application programming interfaces ("**APIs**") and how to address these in the RTS. The European Commission and the EBA will have to rely on industry participants to develop APIs together that work for banks, third party providers and payment service users. The European Commission can help NCAs by supporting the work of market participants, to ensure that such market participants identify and solve problems at an early stage - sparing NCAs the difficult task of investigating problems with APIs.

The letter goes on to state that the differences between the EBA and the European Commission with regard to the RTS are about the processes. Whether these processes become a burden for the EBA and NCAs depends most of all on the behaviour of market participants.

A copy of the European Commission letter to the EBA can be accessed here.

(vi) European Commission Delegated Regulation regarding RTS for strong customer authentication and common and secure open standards of communication published in Official Journal of the European Union

On 13 March 2018, the Commission Delegated Regulation (EU) 2018/389 supplementing the revised payment services in the internal market Directive regarding regulatory technical standards for strong customer authentication and common and secure open standards of communication was published in the Official Journal of the European Union.

The Delegated Regulation will enter into force on 14 March 2018 and will apply from 14 September 2019, with the exception of Article 30(3) and (5), which will apply from 14 March 2019.

The text of the Delegated Regulation is available here.

(vii) EBA publishes consultation paper on the guidelines for complaints handling

On 27 March 2018, the European Banking Authority published a consultation paper on the application of the existing Joint Committee Guidelines on complaints-handling to authorities competent for supervising the new institutions under the Mortgage Credit Directive and/or the revised Payment Services Directive.

In 2014, the EBA and ESMA finalised joint committee guidelines on complaints-handling in the securities and banking sectors. The EBA is now proposing to extend the scope of these guidelines for authorities competent for supervising:

- Credit intermediaries and creditors that are not credit institutions, as defined in the Mortgage Credit Directive; and
- Payment initiation service providers ("**PISPs**") and account information service providers ("**AISPs**"), as defined in PSD2.

It is proposed that the revised guidelines will apply from 1 May 2019. The revised version of the guidelines are contained in the Annex to the consultation paper.

The deadline for receipt of comments is 27 May 2018 and the paper can be accessed here.

Securities Financing Transactions Regulation ("**SFTR Regulation**")

(i) EU (Securities Financing Transactions) Regulations 2017 published in Ireland

The EU (Securities Financing Transactions) Regulations 2017, S.I. No. 631 of 2017 (the "**Irish Regulations**") were published in Ireland on 9 January 2018. The purpose of the Irish Regulations is to give full effect to Regulation EU No 2015/2365 EU (Securities Financing Transactions) Regulations 2017 (the "**SFTR Regulation**").

In particular it designates the Central Bank as the competent authority in the State responsible for carrying out the functions of a competent authority set down in the SFTR Regulation and those responsibilities are set down in the Irish Regulations.

The Irish Regulations grant the Central Bank with a number of far-reaching powers in order to monitor compliance with the provisions of the SFTR Regulations and the Irish Regulations, as outlined in more detail below. It also imposes obligations on UCITS ManCos and AIFMs to ensure that there are appropriate whistleblowing arrangements in place to allow employees to report actual or potential infringements of the SFTR.

The publication of the Irish Regulations serve as a reminder to in-scope firms of the necessity of ensuring that they are in a position to comply, and evidence compliance, with their obligations under the SFTR Regulations, including the obligation under Article 4 thereof to keep records of any securities financing transaction that they have concluded, modified or terminated for at least 5 years following the termination of the relevant transaction.

Under the Irish Regulations, the Central Bank must exchange information and cooperate with ESMA and other competent authorities in order to identify and remedy infringements of the SFTR.

The Irish Regulations grant the Central Bank the following powers:

- **Right of access, inspection and questioning**: Authorised officers of the Central Bank are granted the power to search and inspect any place which the Central Bank reasonably believes (i) has relevant records relating to the SFTR Regulations or (ii) is a place where a person is carrying on or carried on business activities which are relevant to the SFTR Regulation. The Central Bank may also require production of relevant records, may take copies of such records and may require explanation of entries in the relevant records;

- **Power to issue directions**: The Central Bank may impose a direction in writing to any person (either a financial counterparty or a non-financial counterparty) where it considers it necessary to do so in order to ensure the integrity of the financial markets, enhance investor confidence in those markets or in order to prevent a person from contravening or continuing to contravene the SFTR Regulations or the Irish Regulations. Such direction can, inter alia, require (i) that person to take specific action in respect of a securities financing transaction, (ii) that person not to dispose of any assets or specified assets unless specific conditions have been complied with or (iii) a credit institution to refrain from making any payment from an account held with it by a specified person. A full list of actions which may be ordered by the Central Bank is set down in Regulation 9(3) of the Irish Regulations. Where such direction is not complied with, the Central Bank can apply for a court order in order to enforce the direction. Failure to comply with the court order can result in the person being liable on summary conviction to a class A fine or imprisonment for a period not exceeding 12 months or both;

- **Power to issue a contravention notice to a non-financial counterparty**: The Irish Regulations also provide the Central Bank with the power to issue a notice to a non-financial counterparty (i.e. those counterparties to a securities financing transaction which are not regulated under EU law), requesting it to take such action, or refrain from taking such action in order to ensure compliance by that party with the provisions of the SFTR Regulation or Irish Regulations or to prevent any person from contravening or continuing to contravene either piece of legislation. Where the terms of the contravention notice are not complied with by the non-financial counterparty, the Central Bank can apply to court for a compliance order. A right of appeal is afforded to non-financial counterparties against any such contravention notice;

- **Enforcement powers**: Part 4 of the Irish Regulations goes on to grant the Central Bank with certain enforcement powers, including the ability to appoint an assessor to conduct an assessment as to whether a prescribed contravention is or has been committed. In the event of an adverse assessment, the Central Bank has the power to impose specific sanctions set down in Regulation 22, including pecuniary sanctions;

- **Sanctions**: Part V of the Irish Regulations confirm that the Central Bank may impose the specific sanctions against regulated financial service providers set down in Regulation 25(2) for infringements of Article 4 (reporting and record-keeping obligations) and Article 15 (re-use of collateral). These are again quite far-reaching and include, by way of example only, the ability of the Central Bank to withdraw/suspend authorisation of the financial services provider and administrative pecuniary sanctions against both an entity and a natural person;

- **Whistleblowing**: Under Regulation 29 of the Irish Regulations, both financial counterparties (therefore including our AIFM and UCITS ManCo clients) and non-financial counterparties must have appropriate procedures in place to allow employees to report actual or potential infringements of the SFTR through a "*specific, independent and autonomous channel*". Interestingly, Regulation 34(1) of the Irish Regulations make clear that where a corporate entity has committed an offence under the Irish Regulations and the offence has been committed with the consent of, or is attributable to neglect on the part of a director/manager/secretary or other officer, that person is also guilty of an offence and may be punished as if they were guilty of the offence first alleged against the corporate entity.

  A copy of the Irish Regulations can be accessed here.

Money Market Funds Regulation ("**MMF Regulation**")

(i) The European Commission calls for feedback on the roadmap for delegated acts under the MMF Regulation

In November 2017, the European Securities and Markets Authority ("**ESMA**") published its final report setting out its technical advice, implementing technical standards and guidelines under Regulation (EU) 2017/1131 on money market funds (the "**MMF Regulation**").

The MMF Regulation empowers the Commission to adopt three delegated acts following technical advice from ESMA. One of these delegated acts will specify quantitative and qualitative requirements applicable to collateral received as part of a reverse repurchase agreement while another of the delegated acts will relate to the credit quality assessment in respect of the assets in which a manager invests directly. The Commission has decided to bundle the two delegated acts into one delegated act.

On 16 January 2018, the European Commission published a roadmap in respect of this empowerment. The roadmap aims to define the scope of the new legislation and sought feedback. The feedback period was for four weeks 15 January 2018 until 12 February 2018.

The roadmap can be accessed here.

(ii) The European Commission publishes letter to ESMA on share cancellation under MMF Regulation

On 2 February 2018, the European Commission published a letter from Mr. Olivier Guersent, the European Commission Director-General, to Mr. Steven Maijoor, the ESMA Chair on the implementation of the MMF Regulation. The letter relates to the practice of share cancellation, which is sometimes referred to as the reverse distribution mechanism or share destruction.

In May 2017, ESMA issued its final report on its technical advice and ITS and guidelines under the MMF Regulation. In this report, it indicated that share cancellation was not allowed under the MMF Regulation. Following feedback, ESMA sought the European Commission's advices on the issue in November 2017.

In January 2018, the European Commission replied that it agrees with ESMA's analysis that the practice of share cancellation is not compatible with the MMF Regulation. The European Commission called for ESMA to take appropriate action to ensure consistent application of the MMF Regulation in this regard and to provide guidance to market participants. ESMA is now assessing the consequences of the letter and considering possible next steps.

The European Commission's letter to ESMA can be accessed here.

ESMA's press release on the letter can be accessed here.

(iii) ESMA publishes Guidelines on stress tests scenarios under Article 28 of the MMF Regulation

On 21 March 2018, ESMA published the Guidelines on stress tests scenarios under Article 28 of the Money Markets Funds Regulation (the "**MMF Regulation**") and the official translations of same.

Member State NCAs must notify ESMA whether they comply or intend to comply with the Guidelines within two months of the date of publication.

A copy of the Guidelines on stress tests scenarios under Article 28 of the MMF Regulation can be accessed here.

European Commission

(i) The European Commission publishes results of public consultation on a revision of the European Union Consumer Law Directives

On 6 February 2018, the European Commission published a summary of the main results from a public consultation issued by the European Commission in June 2017 on a revision of the European Union Consumer Law Directives.

The summary report groups the responses into a number of categories. In total, 414 responses were received in the consultation, with a mix of individual citizens, companies, business and consumer associations, public bodies and Member States responding. The European Commission will prepare an Impact Assessment on the results received from the consultation and will consider legislative amendments to the current consumer law framework.

The summary report can be accessed here and the consultation outcome page can be accessed here.

(ii) The European Commission issues Notice to Stakeholders in the Asset Management industry post Brexit

On 8 February 2018, the European Commission published a notice (the "**Notice**") to stakeholders (funds and management companies) setting out the position of United Kingdom entities after the proposed withdrawal date of 30 March 2019. The Notice states that subject to any transitional arrangements agreed in a withdrawal agreement, as of 30 March 2019, the UCITS Directive and AIFMD Directive will no longer apply to the United Kingdom. The Notice goes on to state that in such an instance:

- United Kingdom UCITS ManCos and AIFMs will lose their European Union passport and will be treated as "third-country AIF managers". They will not be able to continue to manage and market funds in the European Union on the basis of their current authorisations;
- All United Kingdom domiciled funds will be considered to be non-European Union AIFs (including UCITS funds, AIF funds and Money Market Funds);
- United Kingdom AIFMs will only be able to market AIFs in the European Union under the National Private Placement Regimes (where a Member State operates);
- European Union UCITS Manco's managing United Kingdom UCITS will need to seek authorisation under Article 6 of Directive 2011/61/EU to manage non-European Union AIFs in order to continue to manage such funds;
- Under both UCITS and AIFMD, the impact of the withdrawal of the United Kingdom from the European Union will need to be disclosed to investors;
- For UCITS investing in a United Kingdom fund, they will now need to assess the eligibility of such funds on the basis that these funds will now be non-UCITS funds;
- For any investor invested in a United Kingdom UCITS fund, they will need to make sure that they can, under their own rules, invest in non-EU AIF instead of UCITS;
- In the context of delegation of portfolio management or risk management/investment management, it reiterates that the ESMA opinion issued last year must be adhered to and the need for a cooperation agreement to be put in place with the United Kingdom;

- For depositaries of UCITS who intend to delegate custody functions to a United Kingdom domiciled depositary, the depositary will need to demonstrate objective reasons for delegation and ensure that assets held in custody are unavailable for distribution to the creditors of the sub-custodian. United Kingdom AIFs managed by a European Union AIFM can appoint a United Kingdom domiciled depositary provided that certain specific requirements set down in Article 21(6) of AIFMD are complied with.

Further information on the Notice can be found on the Dillon Eustace article – "Brexit - EU Commission issues Notice to Stakeholders in the Asset Management industry" which can be found here.

A copy of ESMAs opinion on investment management in the context of the United Kingdom withdrawing from the European Union can be accessed here.

A copy of the Notice can be accessed here.

(iii) European Commission issues Notice to Stakeholders in the MiFID field post Brexit

On 8 February 2018, the European Commission (the "**Commission**") has issued a notice to stakeholders in the field of markets in financial instruments on some of the main legal and regulatory repercussions arising from the United Kingdom becoming a "third country" following Brexit (the "**Notice**").

While the Notice acknowledges that there are currently "considerable uncertainties", particularly in relation to a finalised withdrawal agreement and any transitional arrangements that may be contained therein, the purpose of the Notice is to remind stakeholders of the need to assess the potential impact that Brexit may have on their businesses and plan accordingly, with the impact on the United Kingdom in particular the following consequences, such as:

- **Authorisations**

  United Kingdom investment firms that provide MiFID investment services across the European Union will no longer be able to provide these services on the basis of their current authorisations. They will be classified as 'third-country' firms following the United Kingdom's exit from the European Union. An EU-27 subsidiary (that is a legally independent company established in the EU and controlled by or affiliated to an undertaking established in the United Kingdom), may continue to operate across the European Union, subject to it having MiFID authorisation in at least one Member State and it complies with MiFID requirements. If a firm in the European Union is a branch of a United Kingdom established investment firm, it will need to comply with the national requirements of the Member State in which it is established or with the applicable regime under MiFID. Finally, United Kingdom investment firms operating a trading or execution venue will no longer be authorised under MiFID, thus ceasing to be permissible venues for trading shares. They will also no longer benefit from open access to EU trading venues and central counterparties ("**CCPs**").

- **Contracts**

  Due to the loss of European Union authorisation, United Kingdom established firms will no longer be able to perform their obligations under contracts concluded prior to the date the United Kingdom leaves the European Union. Firms will be required, under MiFID, to take measures to ensure continuity of services.

- **Outsourcing**

  Outsourcing of certain operational functions to United Kingdom providers may only be permitted when in compliance with relevant MiFID requirements.

- **Disclosure of Information**

  Taking into account MiFID obligations on disclosure of information, firms will be obliged to inform clients about the potential impact on their rights and on the provision of services that will follow the United Kingdom's withdrawal from the European Union.

- **Data Reporting**

  United Kingdom based data reporting services which have not obtained a MiFID authorisation by a competent authority will be unable to serve European Union markets following the United Kingdom's withdrawal from the European Union.

A copy of the Notice may be accessed here.

(iv) The European Systemic Risk Board publishes recommendation on leverage and liquidity in investment funds

On 14 February 2018, the European Systemic Risk Board ("**ESRB**") published a recommendation that ESMA and the European Union Commission develop legislation and guidance on liquidity and leverage risks in investment funds (dated 7 December 2017).

The ESRB is concerned that increased financial intermediation by investment funds may result in increasing any future financial crisis, due to the mismatches between the liquidity of funds' assets and their redemption profiles which may result in "fire sales" in order to meet redemption requests at times of market stress. Financial market participants that own the same or correlated assets could be affected by such "fire sales", the ESRB recommends that:

- The European Commission develop legislation that sets out a legal framework governing liquidity management tools in the design of investment funds; and develop legislation that includes measures to limit the extent to which the use of liquidity transformation in open-ended AIFs can contribute to the build-up of systemic risks or the risk of disorderly markets;

- ESMA develop guidance for managers of AIFs and UCITS for the stress testing of liquidity risk for individual funds;

- The European Commission develop legislation that requires reporting of UCITS liquidity risk and leverage data to NCA;

- ESMA provide guidance on Article 25 of the AIFMD, to include guidance on the framework to assess the extent to which use of leverage within the AIF sector contributes to systemic risk and on macro prudential leverage limits; and

- Section 2.3 of the recommendation contains a timeline, with suggested dates in 2019 and 2020.

A copy of the press release can be accessed here.

A copy of the recommendation can be accessed here.

(v) ECB publishes opinion on proposal to amend ESRB Regulation

On 5 March 2018, the European Central Bank (the "**ECB**") published an opinion dated 2 March 2018 on the proposal for a regulation amending the Regulation on the EU macro-prudential oversight of the financial system and establishing a European Systemic Risk Board ("**ESRB"**).

The opinion was issued in response to a request from the Council of the EU. The proposed Regulation under review forms part of the European Commission's legislative proposals for reforms to the European System of Financial Supervision.

In its opinion, the ECB supports the limited amendments to the operational and governance framework of the ESRB proposed by the European Commission that aim to increase its effectiveness and efficiency. The ECB notes that these changes are necessary to accurately reflect the establishment of the Single Supervisory Mechanism ("**SSM**") and to ensure the ESRB is able to perform macroprudential oversight, particularly following the establishment of the Capital Markets Union ("**CMU**").

The opinion went on to propose the revision of the information sharing regime set out in the current regulation. Under the current regime, the exchange of information between the ESRB and macropudential authorities established after the ESRB's adoption in 2010 is not regulated. The ECB's proposal aims to remedy this regulatory gap.

A copy of the opinion is available here.

(vi) European Commission publishes communication on the Capital Markets Union

On 8 March 2018, the European Commission published a communication titled 'Completing the Capital Markets Union by 2019 – time to accelerate delivery.'

In its communication, the European Commission sets out the progress made on delivering the CMU by 2019, and the steps that will need to be taken to achieve this goal. It emphasises the importance of the CMU, noting that the integration of capital markets will foster cross-border private risk-sharing in the euro area. This in turn will diversify funding sources to the real economy and reduce the amount of public sector risk-sharing. The communication further notes that the opening up of markets will increase the access to finance for EU businesses and provide more innovative investment options for savers.

The communication set out the priorities for the CMU going forward under three headings:

- **Making the most of the Single Market**

  As part of its aim to ensure stakeholders make the most of the Single Market, the communication proposed the adoption of the following three measures:

  - A European label for investment-based and lending-based crowdfunding platforms;
  - An EU enabling framework for covered bonds; and
  - Measures to decrease regulatory barriers to the cross-border distribution of investment funds in the EU.

    These measures are in addition to rules already in place to boost European venture capital funds ("**EuVECA**") investment in SMEs and the proposal for a pan-European personal pension's label.

- **Supporting businesses through clearer rules**

  In the communication, the commission proposes new rules to facilitate cross-border transactions by providing legal certainty on who owns a financial claim.

- **More efficient supervision of EU capital markets**

  The Commission, in the communication, notes that financial integration requires integrated and effective supervision. The communication therefore proposed both reforms to strengthen the supervision of EU central counterparties ("**CCPs**") and strengthen the ability of ESMA to ensure consistent and direct supervision of certain capital markets.

The communication concludes by confirming that by May 2018, the Commission will have presented all the legislative initiatives that were announced in 2015, with the intention of ensuring the adoption of all pending legislative proposals relevant for the completion of the CMU by mid-2019 at the latest.

A copy of the communication can be accessed here.

(vii) European Commission publishes communication on Fintech Action Plan

The European Commission, on 8 March 2018, published a communication titled, 'FinTech Action plan: For a more competitive and innovative European financial sector.' In its communication, the European Commission emphasises that in the future Europe's financial services regulatory framework should allow both consumers and investors to benefit from technological developments, while ensuring both protection of these parties and the integrity of the financial system. To this end, the European Commission, while noting that the case for broad regulatory reform at this point is limited, presents a number of targeted initiatives for the EU to embrace digitalisation of the financial sector.

The proposed initiatives are listed in an annex to the communication, available here. Specific proposals of note include:

- This Action Plan proposes an EU Regulation establishing a common EU legislative framework for the regulation of crowdfunding service providers, which will offer a European passporting regime. It is intended that such a framework will both protect investors and consumers, while providing incentives for such service providers to scale-up their operations;

- The Commission will present a report on best practices for regulatory sandboxes by the first quarter of 2019;

- The Commission will set up an expert group to assess, by the second quarter of 2019, whether there are unjustified regulatory obstacles to financial innovation in the financial services regulatory framework;

- The Commission will facilitate the development of standard contractual clauses for cloud outsourcing by financial institutions, with the aim of increasing legal certainty and increasing the efficiency of the digital infrastructure;

- Following the launch of the EU Blockchain Observatory and Forum in February 2018, it will be assessed whether block chain can be deployed as a digital services infrastructure under the Connecting Europe Facility, and evaluate legal, governance and scalability issues surrounding its use.

The proposals, more generally, form part of the development of the Capital Markets Union.

The communication may be accessed here.

An accompanying set of FAQs and factsheet can be accessed here and here, respectively.

(viii) European Commission publishes communication on financing sustainable growth

The European Commission, on 8 March 2018, published a communication on its Action Plan titled 'Financing Sustainable Growth.' This Action plan builds upon the High-Level Expert Group on sustainable finance, and aims to set out an EU strategy for sustainable finance.

Sustainable finance generally refers to the process of taking account of environmental and social considerations in investment decision-making.

To this end, the Action Plan sets out a number of proposals, including:

- The development of an EU classification system for climate change and environmentally and sustainable activities and the exploration of the EU Ecolabel framework for certain financial products;

- Ensuring sustainability preferences are taken into account in the suitability assessment used by investors. This will be achieved via the amendment of MiFID II and recast Insurance Distribution Directive acts in the second quarter of 2018;

- The development of sustainability benchmarks; and

- The introduction of a legislative proposal that will explicitly require investors and asset managers to integrate sustainability considerations in their decision-making processes, and increase transparency toward end-investors regarding these considerations.

The proposals, more generally, form part of the development of the Capital Markets Union.

The Commission will report on the implementation of this Action Plan in 2019.

The communication may be accessed here and the accompanying set of FAQs can be accessed here.

(ix) ECB Speech on a Euro Cyber Resilience Board for pan-European Financial Infrastructures

On 9 March 2018, Benoît Cœuré, a member of the executive board of the ECB on the Establishment of the Euro Cyber Resilience Board for pan-European Financial Infrastructures ("**ECRB**") delivered a speech at the first meeting of the ECRB, in Frankfurt.

While acknowledging that the advancement of technology has increased the sophistication of cyber-attacks, the speech outlined efforts undertaken thus far by the ECB and the Eurosystem to tackle these threats. Part of these efforts includes the establishment of the ECRB. Mr. Cœuré outlined that the ECRB will coordinate efforts made by the Eurosystem in the field of cyber risk with that of market participants and other public authorities. Its aim is to enhance the cyber resilience of financial market infrastructures and their critical service providers.

Mr. Cœuré concluded his speech by inviting feedback on two recent initiatives of the ECRB. First, he addressed the cyber resilience survey, which highlighted a number of issues regarding cybersecurity. Second, he highlighted that the Eurosystem is finalising the main elements of the European Threat Intelligence-Based Ethical Red-Teaming (TIBER-EU) Framework. This is a Framework which Mr. Cœuré hopes will enable cross-border, cross-authority testing for the first time. The text of the speech can be accessed here.

2018 Work Programmes of ESMA, European Commission, EBA and ESAs

(i) ESMA publishes its 2017 Annual Report and 2018 Work Programme for CRAs, trade repositories and third country CCPs

On 8 February 2018, ESMA published its "*2017 Annual Report and 2018 Work Programme*" (the "**Report**") setting out its main supervisory activities for credit rating agencies ("**CRAs**"), trade repositories ("**TRs**") and third country central counterparties ("**Third Country CCPs**") in the European Union.

ESMA supervises eight registered TRs, 26 registered CRAs and four certified CRAs from third-countries. The report also details ESMA's supervisory activities and achievements in 2017.

ESMA's supervisory work in 2017 delivered a number of important achievements, such as:

- The work on fees charged by CRAs and TRs (which resulted in the publication of a thematic report at the beginning of January 2018);
- The thematic review following the publication of the guidelines on validation;
- The publication of the Endorsement Guidelines for CRAs;
- Guidelines on Portability for TRs;
- Various Q&As for CRAs and TRs; and
- ESMA's Data Quality Action Plan delivered improvements in the quality of data reported by TRs.

ESMA's identified key supervisory themes for 2018, which are centred on ESMA's risk-based approach such as:

- Its supervision on the quality of the credit rating process, including CRAs' validation practices and the quality of data reported by TRs;
- Continuing to focus on information technology, internal control, governance structures and management quality.
- Common themes in the supervision of both TRs and CRAs with further work on Brexit, fees charged by CRAs and TRs, cloud computing and preparing guidelines for periodic information.
- Brexit will be a priority for ESMA in 2018 with all supervised entities being ready should the United Kingdom leaves the European Union under a "hard Brexit" scenario.

A copy of the Report can be accessed here, with the accompanying press release available here.

(ii) ESMA publishes its 2018 regulatory work programme

On 8 February 2018, ESMA published its 2018 regulatory work programme which provides a detailed breakdown of the individual workstreams and covers various areas including the following initiatives to provide:

- Regulatory Technical Standards ("**RTS**") and Technical advice on the Prospectus Regulation;
- ITS and RTS on the European Social Entrepreneurship Funds ("**EuSEF**") Regulation;
- ITS and RTS on the European Venture Capital Funds ("**EuVECA**") Regulation;
- RTS on the European Long-term Investment Funds ("**ELTIFs**") Regulation;
- RTS on the Securities Financing Transactions Regulation ("**SFTR**");
- Technical advice on the Markets in Financial Instruments Directive ("**MiFID II Directive**");
- Technical advice on the Benchmarks Regulation;
- RTS on the European Market Infrastructure Regulation ("**EMIR**"); and
- ITS, RTS, Technical Advice and Reports on the Market Abuse Regulation.

The comprehensive 2018 regulatory work programme can be accessed here.

(iii) ESMA publishes risk assessment work programme for 2018

On 9 February 2018, ESMA published its Risk Assessment Work Programme which sets out its priorities in assessing risks for securities markets for 2018. The Risk Assessment Work Programme provides an overview of the analytical, research, data and statistical activities by ESMA.

ESMA is working closely with NCAs collecting market data under the AIFMD, MiFID and EMIR directives as it becomes available in order to complete the necessary technical processing, programming routines for management and the relevant analytical evaluation, which enhances its risk monitoring capacities, generates market descriptive statistics and sophisticated risk indicators and metrics.

A copy of the press release and the Risk Assessment Work Programme can be accessed here.

(iv) ESMA launches interactive single rulebook

On 14 February 2018, ESMA launched a new service for market participants and other interested stakeholders across the European Union with its Interactive Single Rulebook ("**ISRB**") to help aid with the consistent application of the European Union single rulebook in the securities markets area.

This is an online tool which gives easy access to all level 2 (Commission Delegated Regulations, RTS, ITS) and level 3 measures (ESMA Guidelines, Opinions and Q&As) which have been published to supplement the relevant provisions of the UCITS Directive. This is a very helpful tool to see at a glance whether a specific provision of a Level 1 text has been supplemented by Level 2 or Level 3 text.

ESMA plans to launch interactive versions of the Credit Rating Agencies Regulation ("**CRA Regulation**"), the MiFID II Directive and Markets in Financial Instruments Regulation ("**MiFIR**") that are under their remit.

The ISRB can be accessed here and the accompanying press release is available here.

(v) Joint Committee of ESAs publish Final Report on Big Data

On 15 March 2018, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published its final report on big data (the "**Report**"). The committee is made up of representatives from ESMA, EIOPA and the EBA.

In December 2016, the Committee issued a Discussion Paper on the use of Big Data by financial institutions. The Report sets out in detail the feedback received following its publication and presents the ESAs reaction to this feedback.

Respondents to the paper expressed concern regarding the accuracy of the data used in Big Data analyses, whilst acknowledging that new legislation such as the General Data Protection Regulation ("**GDPR**") will go some way to mitigate these risks. Concerns were also raised regarding the increased segmentation of consumers facilitated by Big Data and the growing risk from cyber attacks. Respondents too acknowledged the benefits of Big Data, for example it allows financial institutions develop more targeted products.

The ESAs, in their response to the feedback, emphasised the relevance of the existing legislative framework to mitigate the risks identified by respondents, noting that this framework is strengthened by recent developments such as MiFID II and GDPR. Consequently, the ESAs concluded that any legislative intervention at this point would be premature. Finally, the committee invited financial institutions to develop and implement good practices on the use of Big Data, and set out an indicative list of arrangements to this end.

The text of the final report can be accessed here.

An accompanying factsheet can be accessed here.

Market Abuse Regulation ("**MAR**")

(i) ESMA publishes updated Q&As on the Market Abuse Regulation

During the period 1 January 2018 to 31 March 2018, ESMA published updated versions of its questions and answers ("**Q&As**") on the Markets Abuse Regulation (Regulation 596/2014) ("**MAR**"). The update comprises of:

- **Q&A 5.1**: Disclosure of inside information related to Pillar II requirements under Article 17 of MAR.

A copy of the Q&As can be found here.

(ii) ESMA publishes final report on draft ITS on forms and procedures for co-operation under MAR

On 6 February 2018, ESMA published its final report on draft ITS on forms and procedures for co-operation under Articles 24 and 25 of MAR.

The draft ITS aims to clarify how NCAs and ESMA should cooperate and communicate with each other as well as with other European Union authorities, entities and public bodies that fall under MAR or the Regulation on wholesale energy market integrity and transparency ("**REMIT**"). The report sets out procedures and forms for NCAs and ESMA to exchange information and assist each other as well as the rest of European Union authorities, entities and public bodies mentioned in Article 25 of MAR. The relevant forms for the co-operation and exchange of information activities to be used are set out in the annexes of the draft ITS.

The final report has been submitted to the European Commission for its endorsement, whereby the European Commission has three months to decide whether to endorse the draft ITS.

A copy of the final report can be accessed here.

The accompanying press release can be found here.

(iii) Commission Implementing Regulation on ITS on co-operation under MAR published in the Official Journal of the European Union

Further to a final report on draft ITS prepared by ESMA in June 2017, the Commission Implementing Regulation (EU) 2018/292 which lays down the ITS on forms and procedures for co-operation between NCAs under MAR was published in the Official Journal of the European Union on the 27 February 2018 and entered into force on 19 March 2018.

A copy of the Commission Implementing Regulation (EU) 2018/292 can be accessed here.

(iv) The European Court of Justice judgment on whether both a criminal and administrative penalty can be imposed for same market abuse offence

On 20 March 2018, the European Court of Justice ("**ECJ**") handed down its judgment in *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob).*

The judgment relates to a request for a preliminary ruling by the Corte suprema di cassazione (the "**Court of Cessation**") concerning the interpretation of the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights of the European Union (the "**Charter**") and Protocol 7 of the European Convention on Human Rights ("**ECHR**") in the context of proceedings being brought under the Criminal Sanctions for Market Abuse Directive ("**CSMAD**") which precludes national legislation from allowing administrative proceedings to be brought in respect of market manipulation for which the same person has already been convicted in criminal proceedings.

The court held that it was possible for the *ne bis in idem* principle to be limited so that both "criminal proceedings and penalties" and "administrative proceedings and penalties of a criminal nature" could be brought against the same person in respect of the same acts. However, any such limitation must be justified.

The court concluded that the objective of guaranteeing the integrity and public confidence of the financial markets was a justification for a duplication of proceedings and penalties of a criminal nature. It noted that the Italian legislation penalising market manipulation did not appear to respect the principle of proportionality. In addition, the legislation did not appear to guarantee that all of the penalties are proportionate to the seriousness of the offence.

A copy of the full judgment can be accessed here.

Prospectus Regulation

(i) ESMA publishes responses to its Consultation on draft RTS under the new Prospectus Regulation

On 21 March 2018, ESMA published the responses it received to its consultation on draft RTS under the new Prospectus Regulation (Regulation (EU) 2017/1129) which may be of particular interest to investors, issuers, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who are affected by the new Prospectus Regulation.

The response to the consultation can be accessed here and the accompanying press release can be found here.

(ii) ESMA publishes updated Q&As on Prospectuses

On 28 March 2018, ESMA published the Twenty-Eight Edition of the updated version of its questions and answers ("**Q&A**") on prospectuses related issues to include a new Q&A on

profit forecasts. ESMA notes that although the Prospectus Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") will become applicable on 21 July 2019, repealing Prospectus Regulation 809/2004, the definition of a profit forecast should be carried over to the new prospectus regime.

The March update comprised:

- **Q&A 102 - Definition of Profit Forecasts**

  The new Q&A provides clarification on how to identify profit forecasts and explains the definition of profit forecasts by providing examples on what may or not constitute a profit forecast.

A copy of the Q&A on prospectuses and the associated press release can be found here.

Central Bank of Ireland

(i) Fund Administrator Outsourcing Guidance

In January 2018, the Central Bank published its new guidance to assist fund administrators in completing the Annual Outsourcing Return required under Regulation 25 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017) S.I. No. 604 of 2017.

The new guidance can be accessed here.

(ii) Central Bank publishes response to the Law Reform Commission's Issues Paper "Regulatory Enforcement and Corporate Offences"

On 9 January 2018, the Central Bank published its response to the Law Reform Commission Issues Paper "Regulatory Enforcement and Corporate Offences." The Central Bank, drawing from its regulatory experience, makes a number of recommendations, including:

- That reforms assigning responsibility to senior personnel, modelled on the UK's Senior Managers and Certification Regime, be adopted in this jurisdiction;

- Regarding fitness and probity regulations, the duration of suspension for individuals under investigation should be extended beyond six months, owing to the complexity of such investigations;

- The introduction of an criminal offence of "egregious recklessness in risk-taking" which would apply in cases where misconduct is so egregious that it merits a criminal sanction;

- The introduction of a set of 'core common standards.' This proposed framework would be non-sector specific and would guide individuals who exercise authority and influence in regulated entities as to what standards are expected of them; and

- Support for a dedicated division within an existing criminal agency to investigate white collar crime.

The Paper can be accessed here.

An accompanying Press Release which summarises the paper can be accessed here.

(iii) Central Bank speech - Financial regulation, technological innovation and change

On 17 January 2018, the Director of Policy and Risk of the Central Bank, Gerry Cross, delivered a speech to the Association of Compliance Officers in Ireland concerning on financial regulation, technological innovation and change. Mr. Cross's speech focused on the following areas:

- Mr. Cross first addressed recent European legislative developments, such as the entry into force of MiFID II and MiFIR on 3 January 2018; the entry into force of the Payments Services Directive on 13 January 2018 and the entry into force of the Packaged Retail and Insurance-based Investment Products Regulation ("**PRIIPS**").

- Regarding financial technology ("**FinTech**"), Mr. Cross confirmed that the Central Bank is currently engaged in an internal review regarding its regulatory approach. As part of this review, the Central Bank will be examining the ways in which this innovation is relevant for the Irish financial services sector, and how it can enhance the quality and efficiency of supervision.

- To date, the Central Bank has sought to develop a clearer picture of FinTech in Ireland. The Central Bank is currently reviewing survey responses to the Discussion Paper on the Consumer Protection Code and the Digitalisation of Financial Services, with the aim of assessing how the Consumer Protection Code may best address developments in FinTech.

- In light of the increased reliance on information technology by financial firms, the Central Bank is continuing to develop its supervisory and inspections capacity in this area.

- Finally, Mr. Cross addressed the topic of initial coin offerings ("**ICOs**") and virtual currencies. Depending on how they are structured, ICOs may fall outside the regulatory space, and Mr. Cross noted that further work is to be done on clarifying this distinction. Similarly with regard to virtual currencies, Mr. Cross reiterated the Central Bank's warning that they exist in an unregulated space, and that users of such currencies cannot avail of the protections that regulation provides in respect of financial instruments.

A copy of the full speech can be found here.

(iv) Central Bank publishes Markets Update Issue 4 of 2018

On 15 February 2018, the Central Bank published Issue 4 2018 of its Markets Update.

Topics of note include the following:

- Update on Enhancements to the Regulated Disclosures Submission Process

  The Central Bank advises that the Regulated Disclosures teams are currently upgrading their document management system, and as a result submissions under the Prospectus, Transparency and Short Selling legislative regimes will be affected. "Submission templates" will now be required under the new system. These new templates are expected to be available in early April, with instructions related to their use posted online 10 – 14 days prior to adoption.

- Survey for the European Commission on the Alternative Investment Fund Managers Directive ("**AIFMD**")

  The European Commission is carrying out a study on how AIFMD has worked in practice and to what extent its objectives have been met. KPMG was seeking input from stakeholders on behalf of the European Commission in the form of an online survey, which closed 15 March 2018.

Issue 4 2018 of the Markets Update can be accessed here.

(v) The Central Bank Communication to firms seeking authorisation in 2018

On 16 February 2018, the Central Bank published a communication addressed to firms that will be seeking authorisation in the Republic of Ireland in 2018. The communication emphasises the need for any firm seeking authorisation in 2018, not just those seeking authorisation in light of Brexit, to engage with the Central Bank as soon as possible. It further emphasises the need for firms that have already engaged with the Central Bank, but who have not yet commenced the application process, to be aware of the authorisation timelines.

The communication goes on to note that the Brexit FAQs have been updated with two new questions in light of this communication, addressing the impact of any transitional period agreed for Brexit and the need for Irish firms in the UK to engage with the Bank of England, and its own authorisation timelines.

The communication can be accessed here and the updated Brexit FAQ can be accessed here.

(vi) Central Bank issues response to ESMA Opinions on consistency of approach to Brexit

In July 2017, ESMA issued three opinions on the consistency of approaches to authorisation, supervision and enforcement regarding the relocation of entities, activities and functions from the United Kingdom following Brexit.

In its response, published on 14 March 2018, the Central Bank noted it has concluded a comprehensive review of the issues covered and confirmed that its current approach to the issues are materially aligned with those set out in the opinions.

The Central Bank review identified procedural enhancements to ensure facts underpinning outcomes are formally documented during the authentication processes of investment fund managers under UCITS and AIFMD. These enhancements will be made by updating the Central Bank's application forms and internal procedures. The application forms for UCITS Management Companies, UCITS Self-Managed Investment Companies, Alternative Investment Fund Managers and MiFID Firms will be updated accordingly.

Dillon Eustace has published a briefing on the topic, which can be accessed here.

The Central Bank response can be accessed here.

(vii) Thematic Inspection of Performance Fees announced by the Central Bank

The Central Bank has been in contact with Irish fund industry members to inform them of a planned thematic inspection which will be the first to be undertaken by the recently established Securities and Markets Supervision Division of the Central Bank. The focus of this thematic inspection will be to review practices relating to the calculation and verification of performance fees which are charged to investors in Central Bank authorised UCITS Funds.

The Central Bank will pay on-site visits to the regulated administrators and depositories of UCITS. It is expected that they will focus initially on the calculation methodologies of the performance fee as carried out by relevant administrators to ensure that performance fees are calculated accurately and in accordance with the disclosures contained in the relevant fund prospectus. It is expected that the Central Bank will also check that performance fees as calculated are verified being by the fund's depository. The Central Bank will assess their findings by the end of May, 2018 and then decide what, if any, communications might be appropriate with the administrators, depositaries and/or the funds.

Dillon Eustace has published a briefing on the topic, which can be accessed here.

Irish Stock Exchange ("**ISE**")

(i) The Irish Stock Exchange publishes 2017 review

On 16 January 2018, the Irish Stock Exchange ("**ISE**") published its review of 2017. This confirms that the ISE has experienced another exceptional year with total securities on the ISE's markets now standing at over 36,700 securities.

The ISE is ranked number 1 for new and total bond listings (attracting 10,360 new bond listings) and number 1 for investment fund listings among exchanges worldwide. There were three initial public offerings ("**IPOs**") in 2017 (€5.1bn equity funds raised including AIB, the largest IPO in Europe in 2017), with turnover in equity markets recorded their sixth successive year of growth.

The ISE attracted 917 new fund classes during the year and had 5,310 fund and exchange-traded fund ("**ETF**") securities listed at the end of the 2017.

The full 2017 review can be accessed here.

(ii) Euronext acquires Irish Stock Exchange

On 27 March 2018, Euronext completed its acquisition of the ISE. The ISE has joined Euronext's federal model and with effect from 9 April 2018 will be known as "The Irish Stock Exchange trading as Euronext Dublin" and can be referred to as Euronext Dublin.

A copy of the press release can be accessed here.

Anti-Money Laundering ("**AML**") / Counter-Terrorist Financing ("**CTF**")

(i) European Parliament to debate and vote on MLD5 at its plenary session to be held in April 2018.

On 12 January 2018, the European Parliament updated its procedure file on the proposed Fifth Money Laundering Directive ("**MLD5**") which indicates that the European Parliament will debate and vote on MLD5 at its plenary session to be held in April 2018.

The European Commission published its MLD5 proposal in July 2016 and the European Parliament and the Council of the European Union reached a political agreement on MLD5 in December 2017, with the final compromise text set out in an Annex to a European Council note on 19 December 2017.

When MLD5 has been adopted, Member states will have 18 months to transpose MLD5 into national legislation after its publication in the Official Journal of the European Union.

A copy of the European Parliament's procedure file can be found here.

(ii) ESAs publish opinion on use of innovative solutions in customer due diligence process

On 23 January 2018, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published an opinion on the use of innovative solutions by credit and financial institutions in the customer due diligence process. In the opinion, the ESAs consider:

- The use by firms of innovative solutions in the CDD process such as non-face-to-face verification of customers' identity through portable devices such as smartphones and by the use of know your customer ("**KYC**") repositories;
- NCAs should consider a number of factors when assessing the extent to use, or intention to use innovative CDD solutions such as adequate money laundering and terrorist finance risks, oversight and control mechanisms and the quality and adequacy of the CDD measures;
- NCAs should support developments relating to innovative solutions and for firms to demonstrate to NCAs that they have identified, assessed and mitigated all relevant risks before introducing the innovative solution in their CDD process;
- NCAs should work together in exchanging information on their experiences with the use of the innovative solutions to increase their understanding of these new solutions and their awareness of the benefits and risks associated with them; and
- Firms should be encouraged to keep NCAs informed about the innovative solutions that they intend to use so that NCAs can engage in the process at an early stage.

A copy of the opinion can be accessed here.

(iii) Delegated Regulation adding Ethiopia to the list of high-risk third countries under MLD4 is published in the Official Journal of the European Union

On 24 January 2018, the Commission Delegated Regulation (EU) 2018/105 amending the Commission Delegated Regulation (EU) 2016/1675, which supplements the Fourth Money Laundering Directive ("**MLD4**") by identifying high-risk third countries with strategic deficiencies, was published in the Official Journal of the European Union. The amending Delegated Regulation adds Ethiopia to the list. The amending Delegated Regulation was adopted by the European Commission in October, 2017 and it entered into force on 13 February, 2018.

A copy of the amending Delegated Regulation can be found here.

(iv) European Parliament votes to approve the inclusion of Tunisia, Sri Lanka and Trinidad and Tobago on list of high-risk third countries under MLD4

On 7 February 2018, the European Parliament published a press release announcing that it had voted not to object to a Commission Delegated Regulation amending the list of high-

risk third countries as set out in Commission Delegated Regulation (EU) 2016/1675. The amending Delegated Regulation includes of Tunisia, Sri Lanka and Trinidad and Tobago in list of high-risk third countries under MLD4. The amending Delegated Regulation was adopted by the European Commission in December, 2017.

The European Parliament's Committee on Economic and Monetary Affairs ("**ECON**") and its Committee on Civil Liberties, Justice and Home Affairs ("**LIBE**") had published a press release in January 2018 stating that MEPs only narrowly supported the amending Delegated Regulation as some MEPs expressed concerns that the inclusion of Tunisia on the list was inappropriate. The press release states that the European Commission intends to reassess Tunisia "*as soon as possible in 2018*" and that it will "swiftly" remove it from the list if it is found to be implementing its AML / CFT commitments.

A copy of the press release of the European Parliament can be found here.

The Commission Delegated Regulation (EU) 2018/212 was adopted on the 14 February 2018 and can be found here.

(v) Committee on Foreign Affairs of the European Parliament adopts draft recommendation on cutting the sources of terrorist income

On 21 February 2018, the European Parliament's Foreign Affairs Committee ("**AFET**") published a press release announcing that it has adopted a draft recommendation titled "*Cutting the sources of income for Jihadists: targeting the financing of terrorism*."

The draft recommendation urges the European Council, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to:

- Increase information sharing and coordination between financial institutions, law enforcement, intelligence agencies and judicial bodies through the establishment of a European counter-terrorism financial intelligence platform;
- Increase the monitoring of suspicious organisations engaged in fraudulent and illegal practices; and
- Assess whether technological developments such as crypto currencies and FinTech help fund terrorists and whether they should be regulated by EU rules.

The text has be adopted by AFET on 2 March 2018 which can be accessed here.

The press release is available here, and the draft recommendation is available here.

(vi) FATF Report to the G20 Finance Ministers and Central Bank Governors

On 16 March 2018, the Financial Action Task Force ("**FATF**") published its report to the March 2018 G20 Finance Ministers and Central Bank Governors' meeting. The Report sets

out FATF's ongoing work to fight money laundering and terrorist financing in a number of areas, including:

- FATF has agreed a new Operational Plan to develop its work in the area of terrorist financing, in response to the evolving nature of terrorist threats faced;
- FATF is working to improve transparency regarding legal arrangements such as corporate vehicles, and is cooperating with international bodies regarding implementation of FATF recommendations on beneficial ownership;
- FATF is continuing to review the risks related to FinTech, RegTech and virtual currencies, and explore opportunities to ensure a more coherent approach to mitigate these risks; and
- FATF will continue to prioritise financial inclusion and de-risking as part of its strategy to counter terrorist financing.

The Report can be accessed here.

(vii) Wolfsberg Group published FAQs on assessments for financial crime country risk

On 19 March 2018, the Wolfsberg Group (the "**Group**") published its Frequently Asked Questions ("**FAQs**") on how to manage country risk in the context of financial crime compliance.

The FAQs relate to financial crime risk which includes money laundering, sanctions, bribery and corruption risks, financial secrecy and tax transparency. The Group has prepared the FAQs, based on its members' views on current best practices and how it believes those practices should develop over time. The FAQs will contribute to the promotion of effective risk management and help to prevent the use of its members for criminal purposes and explains what they mean by the term "country risk" which refers to the additional risk created by investing in, or lending across borders to, a foreign country in the context of credit facilities. The issues covered by the FAQs include:

- The data sources considered when developing a methodology to assess country risk;
- What models or methodologies should be considered to measure country risk and how they can be tested and validated;
- Who should own country risk methodologies and what resources are required.

The Group intends to publish guidance on models and methodologies later in 2018.

A copy of the FAQs can be accessed here.

Data Protection / General Data Protection Regulation ("**GDPR**")

(i) Data Protection Bill 2018 is published in Ireland

On 1 February 2018, the text of the Data Protection Bill was published in Ireland (the "**Bill**"). The Bill gives effect to the provisions of the General Data Protection Regulation (EU) 2016/679 ("**GDPR**") which will enter into force on 25 May 2018.

The GDPR regulates the processing of the personal data by individuals, companies or organisations relating to individuals in the EU. The GDPR introduces higher standards for the protection of personal data and accordingly increases the compliance obligations on data controllers and processors. In particular, it gives individuals more control over their data, for example by introducing the 'right to be forgotten' and the right to request that their personal data be erased. The GDPR also grants increased supervisory and enforcement powers to national supervisory authorities, which will now have the power to issue fines of up to €20m or 4% of global turnover in the case of a serious data breach.

The Bill also transposes the Police and Criminal Justice Data Protection Directive and Law Enforcement Data Protection Directive (EU) 2016/680 into Irish law. This Directive sets data protection standards for the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection and prosecution of criminal offences.

The Bill itself gives effect to the GDPR in areas where Member States may derogate from the GDPR. For example, section 44 of the Bill proposes that health data may be processed for insurance purposes provided it is necessary and proportionate. The Bill also proposes the establishment of a new Data Protection Commission as the State's data protection authority.

The text of the Data Protection Bill 2018 can be accessed here and is expected to be signed into law in the coming weeks.

(ii) Data Protection Commissioner publishes 2017 Annual Report

On 27 February 2018, the Data Protection Commissioner ("**DPC**") published the Annual Report of the Irish Data Protection Commissioner for 2017 (the "**Annual Report**").

The Annual Report highlights the increased activities of the DPC in 2017 and the priorities of the DPC for the coming years. The increase in the DPC's activities has been matched by an increase in resources, with budget of €7.5 million for 2017 (increasing to €11.7 million in 2018) and a significant increase in staffing levels. Highlights of the 2017 Annual Report include:

- An increase both in the number of complaints received with the largest single category being data subject access requests and a record number of data breach notifications the majority of which related to the financial services sector;
- 91 audit / inspections were carried out by the DPC in 2017 across a broad range of sectors and organisations and large scale investigations related to the hospital sector in

relation to the handling of medical files in public areas of hospitals, direct marketing activities and the governance of personal data in case management files by the Child and Family Agency (TUSLA) and the introduction of the controversial Public Services Card;

- Prosecutions for offences in respect of electronic marketing;
- The DPC appeared before the High Court in relation to ongoing litigation regarding the validity of standard contractual clauses facilitating the transfer of data outside the European Economic Area;
- The Article 29 Working Party plenary and subgroup meetings and the DPC acted as lead rapporteur on the GDPR transparency guidance;
- Case Studies and a number of significant judgments delivered by the Court of Justice of the European Union regarding data protection cases law; and
- Preparing for the General Data Protection Regulation ("**GDPR**") with a dedicated GDPR Awareness and Training Unit being established in 2017 with responsibility for driving the DPC's awareness activities.

A copy of the press release can be accessed here and a copy of the full Annual Report can be accessed here.

(iii) Proposal for a Regulation on Privacy and Electronic Communications

On 7 March 2018, the Council of the European Union issued an updated Presidency note on the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) (the "**Proposal**").

The Presidency has asked delegations to provide written comments and drafting suggestions on the issues covered in this updated note, on articles 18 to 29, as well as on any additional comments on the remaining articles by the end of March.

A copy of the initial European Commission proposal dated 10 January 2017 can be accessed here and a copy of the European Commission's press release can be accessed here.

A copy of the updated Presidency note Proposal can be accessed here.

(iv) Rights of Individuals under the General Data Protection Regulation ("GDPR")

On 15 March 2018, the Data Protection Commissioner published the "Rights of Individuals under the General Data Protection Regulation" (the "**Guide**"). The GDPR applies from 25

May 2018 and is designed to give individuals more control over their personal data. The rights of the data subject are:

- **The right to be informed**

  The data controller must provide the data subject with the following information such as:

  - The identity and contact details of the data controller and the Data Protection Officer;
  - The purpose(s) of the processing and the lawful basis for the processing of the personal data;
  - If the processing is based on the legitimate interests of the controller or a third party;
  - The retention period (how long an organisation holds onto data);
  - Details of any intended transfers to a third country (non-EU Member State) or international organisation and details of adequacy decisions and safeguards;
  - Where processing is based on consent, the right to withdraw consent at any time without affecting the lawfulness of the processing based on the consent before its withdrawal;
  - The right to lodge a complaint with a supervisory authority;
  - Whether the personal data is a statutory or contractual requirement necessary to enter into a contract, or an obligation, and the consequences of failing to provide the personal data;
  - That automated decision making processes existence and will be applied to the data, including profiling, and how decisions are made, the significance and the consequences of the processing of personal data.

- **The right to access information**

  A data subject can establish whether a data controller processes information relating to them, to access and obtain a copy of that data and certain additional information in relation to the processing, such as its purposes, the categories of data, the recipients of the data and the existence of additional rights such as the rights to erasure and objection.

- **The right to rectification**

  If your personal data is inaccurate, the data subject has the right to have the data rectified, by the controller, without undue delay. If personal data is incomplete, the data subject has the right to have the data completed, including by means of providing supplementary information.

The right to erasure

The right to erasure is also known as the “right to be forgotten”. A data subject has the right to their data erased, without undue delay, by the data controller in circumstances where:

- The data is no longer necessary for the purpose for which it was collected;
- Processing is based on consent, but the data subject has withdrawn consent and there is no other legal ground for continued processing available to the controller;
- A data subject has exercised their right to object, and there is no overriding legitimate interest on which the controller can continue to legitimise its processing;
- The data is unlawfully processed;
- The erasure is required by a law applicable to the controller; or
- The data was collected in connection with the offer of information society services to a child.

The right to data portability

The right to data portability is a new right introduced by the GDPR, which allows the data subject to obtain and reuse their personal data. A data subject can either obtain the data themselves to provide it to a third party or require the data controller to transfer the personal data directly to a third party.

This right only applies where processing of personal data (supplied by the data subject) is carried out by automated means, and where you have either consented to processing, or where processing is conducted on the basis of a contract between you and the data controller.

The right to object to processing of personal data

The data subject has the right to object to certain types of processing of their personal data where this processing is carried out in connection with tasks in the public interest, or under official authority, or in the legitimate interests of others.

The right to object to processing of personal data in relation to direct marketing. Where a data controller is using personal data for the purpose of marketing something directly, or profiling for direct marketing purposes, the data subject can object at any time and the data controller must stop processing as soon as they receive the objection.

- **The right of restriction**

  The data subject has a limited right of restriction of processing of personal data by a data controller. Where processing of data is restricted, it can be stored by the data controller but most other processing actions, such as deletion, will require the data subjects permission.

- **Your rights in relation to automated decision making, including profiling**

  The data subjects right to not to be subject to a decision based solely on automated processing where the processing is "automated" without human intervention and where it produces legal effects or significantly affects the data subject. Automated processing is permitted only with the data subjects express consent.

A copy of the Guide can be accessed here.

Financial Services and Pensions Ombudsman

(i) Financial Services Ombudsman publishes 2017 Annual Review

On 29 March 2018, the Financial Services and Pensions Ombudsman ("**FSO**") published its Annual Review of the Financial Services Ombudsman for the year 2017.

The Annual Review provides a summary of complaints made to the FSO in 2017 which contains the details of the complaints made against individual financial service providers with three or more complaints that were upheld or partly upheld and includes case studies which outline the types of complaints dealt with during 2017 and how they have been resolved.

The number of complaints that were adjudicated has reduced significantly as a direct result of the introduction of a new Dispute Resolution Service in 2016 as this service resolves disputes through mediation at an early stage with 5,000 complaints being resolved through this process since its introduction.

The Financial Services and Pensions Ombudsman, Mr. Ger Deering stated that:

"*I am very pleased to see the significant changes to our services undertaken in 2016 continuing to bear fruit. The vast majority of complaints resolved by the FSO in 2017 were resolved through mediation, which is proving to be a very fast method of resolving complaints. Of the 2,370 complaints closed in 2017 through mediation, 57% were resolved in less than three months. The outcome of both mediations and adjudications can have a significant impact on the lives of real people. In 2017, a total of 1,482 complainants received some form of financial compensation, rectification and redress*."

A copy of the full Annual Review for 2017 can be accessed here.

Dillon Eustace
31 March 2018

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This Funds Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 31 March 2018, and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace.

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