Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 January 2016 – 31 March 2016

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INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

Markets in Financial Instruments Directive ("MiFID")

(i) Thematic Review: Conflicts of Interest

The Central Bank of Ireland (the "**Central Bank**") recently conducted a themed inspection (the "**Themed Inspection**") to examine the processes for the identification and management of conflicts of interest ("**COI**") in investment firms and on 25 February 2016 the Central Bank issued its findings from the Themed Inspection (the "**Feedback Statement**") with respect to COI.

By way of background, firms are obliged to establish and maintain an effective organisational model that actively monitors COI on a day-to-day basis so as to ensure that the best interests of clients are not negatively impacted. The Feedback Statement details the Central Bank's findings and highlights a number of trends that it has identified with respect to COI. While the Feedback Statement is given in the context of investment firms, it is also relevant to AIFMs and UCITS management companies of all types.

There are a number of key areas where the Central Bank identified failings around management of COI. These are, as follows:

General trends

- Lack of board ownership in relation to identification and management of COI;
- Policies and procedures not being sufficient to address COI requirements;
- Failure to implement policies and procedures in line with requirements;
- COI logs not live documents and some COI logs being blank;
- Failure on behalf of firms to demonstrate that they had considered, at a minimum, all of the different COI scenarios listed in applicable regulations; and
- Failure to communicate with and train employees on their obligations around COI, in order to identify COI from the ground up.

Personal Account Dealing

- Failure to perform post-trade analysis on personal account dealing.

Gifts and Entertainment

- Firms not considering that accepting gifts and entertainment could compromise their duty to act in clients' best interest; and
- Firms having no control processes in place around incoming or outgoing gifts, non-monetary benefits and entertainment.

Intragroup Relations

- Improvement of the management of COI that arise where part of group entities; and
- Improvement of the management of COI that arise where management or a director propose to take on a role in other group entities.

The Feedback Statement also sets out a schedule of good and poor practices which it observed during its Themed Inspection and has indicated that the following actions are required with respect to the findings. These action points are stated as follows:

- Review of all COI policies and procedures to ensure they meet relevant regulatory requirements;
- Consider all good and poor practices listed in Appendix 2 of the Feedback Statement against the firm's own procedures; and
- Review the current list of identified COI to ensure that it remains up to date and relevant.

The Central Bank expects the content of the Feedback Statement to be discussed, considered and minuted by the board of directors of firms before 30 June 2016 and that where there is non-compliance with regulatory requirements, it will have regard to consideration given by any firm to the Feedback Statement when exercising its regulatory and enforcement powers.

A copy of the full Feedback Statement is available at the following link:

http://www.centralbank.ie/regulation/industry-sectors/investment-firms/mifid-firms/Documents/Thematic Review of Conflicts of Interest 25 February 2016.pdf

(ii) Central Bank of Ireland – MiFID Application Form

The Central Bank is the competent authority in Ireland for the authorisation of investment firms. In order for an investment firm to establish a business in Ireland it must apply to the

Central Bank for authorisation under Regulation 11 of the European Communities (Markets in Financial Instruments) Regulations 2007 (as amended), (the "**MiFID Regulations**").

On 9 March 2016 the Central Bank published an updated MiFID application form which contains updated references to the European Union (Capital Requirements) Regulations 2014 (S.I. no. 158 of 2014) which came into effect on 1 January 2014. The updated application form along with the other MiFID forms, can be found at the following link:

http://www.centralbank.ie/regulation/industry-sectors/investment-firms/mifid-firms/Pages/forms.aspx

Markets in Financial Instruments Directive ("MiFID II")

(i) ESMA publishes translations of its Guidelines on complex debt instruments and structured deposits

On 4 February 2016, ESMA publishes its translations of its Guidelines (the "**Guidelines**") on complex debt instruments and structured deposits. The Guidelines focus on the "execution-only exemption" contained within the Markets in Financial Instruments Directive ("**MiFID Directive**") and the amendments made to this exemption under the MiFID II Directive.

Under the MiFID II Directive, investment firms may provide investment services that consist only of execution or reception and transmission of orders without obtaining client information necessary to assess the appropriateness of the service or product for the client in certain circumstances. One of the conditions for the application of the exemption is that the services relate to products which are "non-complex" - including certain debt instruments as well as certain structured deposits. The purpose of the Guidelines is to provide some guidance on the circumstances when a financial instrument would be regarded as "complex" or "non-complex".

The Guidelines can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/2015-1783_-_final_report_on_complex_debt_instruments_and_structured_deposits.pdf

(ii) ESRB response to ESMA on temporary exclusion of exchange traded derivatives from articles 35 and 36 of MiFIR

The European Systemic Risk Board ("**ESRB**") has responded to ESMA on the proposed temporary exclusion of exchange-traded derivatives ("**ETDs**") from Articles 35 and 36 of MiFIR. The European Commission is required to submit a report to the European Parliament and the Council of the European Union by 3 July 2016 assessing the need to

temporarily exclude ETDs that require open and non-discriminatory access to central counterparties ("**CCPs**") and trading venues from the scope of Articles 35 and 36 of MiFIR.

The report is to be based on a risk assessment carried out by ESMA in consultation with the ESRB. Depending on the conclusions of the report, the European Commission may adopt a delegated legal act to exempt ETDs from the scope of Articles 35 and 36 for up to 30 months following MiFIR's entry into force.

The response concludes that the balance between the different financial stability implications, in the light of the relevant risk containment measures, does not lead to the identification of significant macro-prudential risks or benefits that would clearly argue either in favour of or against a temporary exclusion of ETDs from Articles 35 and 36 of MiFIR.

The ESRB's response can be found at:

http://www.esrb.europa.eu/pub/pdf/other/160210_ESRB_response.pdf?575e9a4de779af8582e55e4acfbc61ad

(iii) European Commission extends by one year the application date for the MiFID II package

On 10 February 2016, the European Commission formally proposed to extend the MiFID II implementation date by one year which pushes the implementation deadline back to 3 January 2018.

The European Commission has stated that the reason for the extension lies in the complex technical infrastructure that needs to be set up for the MiFID II package to work effectively. Jonathan Hill**,** Commissioner for Financial Services, Financial Stability and Capital Markets Union said: *"Given the complexity of the technical challenges highlighted by ESMA, it makes sense to extend the deadline for MiFID II. We will therefore give people another year to prepare properly and make the necessary changes to their systems. Meanwhile, we are pressing ahead with the level II legislation to implement MiFID II and expect to announce those measures shortly."*

The extension to the effective date of MiFID II does, we expect, bring welcome relief and legal certainty for market participants.

The European Commission has said that the delay will not impact upon the timeline for the adoption of Level 2 implementing measures and the European Commission intends to proceed with the adoption of such measures to create legal certainty for new provisions.

Capital Requirements Directive ("CRD IV")

(i) EBA updates Single Rulebook Q&As: 15 January 2016

On 15 January 2016, the European Banking Authority (the "**EBA**") updated its Q&As on the single rulebook relating to CRD IV, adding two additional questions covering the following:

- Question ID: 2015_2276– Clarification regarding the reference year for the purpose of the remuneration data to be collected by competent authorities.
- Question ID: 2015_2366 - Application of Article 11 CRR in terms of determining the scope of application for multi-national banking groups.

The Q&As can be accessed at the following location:

http://www.eba.europa.eu/single-rule-book-qa?p_p_id=questions_and_answers_WAR_questions_and_answersportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_pos=1&p_p_col_count=2&_questions_and_answers_WAR_questions_and_answersportlet_jspPage=%2Fhtml%2Fview.jsp&_questions_and_answers_WAR_questions_and_answersportlet_viewTab=1

(ii) EFAMA and AIMA responses to EC's public consultation on the impacts of the maximum remuneration ratio under CRD IV

On 13 January 2016, the Alternative Investment Management Association ("**AIMA**") published its response to the questionnaire issued by the Services of the Directorate-General for Justice and Consumers on the impact of the maximum ratio between variable to fixed remuneration on competitiveness, financial stability and staff in non-EEA countries, set by the CRD IV as well as views on the overall efficiency of CRD IV remuneration rules (the "**Consultation**").

Under the maximum ratio rule, the variable remuneration of a CRD IV firm's staff whose professional activities have a material impact on the firm's risk profile cannot exceed 100% (or 200% with shareholder's approval)) of the fixed remuneration.

AIMA disagreed with the application of the bonus cap to CRD IV investment firms and noted that compliance with the bonus cap by CRD IV investment firms is likely to negatively impact CRD IV investment firms' competitiveness in the sector, as CRD IV investment firms would only be able to compete with non-CRD firms, from a remuneration perspective, by paying higher fixed remuneration in order to attract the best staff.

On 22 January 2016, EFAMA published its response to the Consultation.

The European Fund and Asset Management Association ("**EFAMA**") is the representative association for the European investment management industry, with its members consisting of both subsidiaries of an EEA parent that is a credit institution and stand-alone investment firms, with both types of entities becoming subject to the maximum ratio rule.

EFAMA provided views on the impact on the competitiveness of undertakings as a result of compliance with the maximum ratio rule, the financial stability of undertakings and the impact on staff working in subsidiaries established outside the EEA of parent institutions established within the EEA. It also provided its views on the overall efficiency of the CRR and CRD IV remuneration provisions.

For the responses of AIMA and EFAMA, please see the following links:

http://www.aima.org/objects_store/sec_liquidity_management_proposal_-_response_to_consultation.pdf

https://www.efama.org/Publications/Public/UCITS/EFAMA response to EC consultation on impacts of maximum remuneration ratio under CRD IV.pdf

(iii) ESMA Opinion on Draft RTS on main indices and recognised exchanges under Capital Requirements Regulation ("CRR")

On 28 January 2016, ESMA issued an opinion on the draft implementing technical standards ("**ITS**") on main indices and recognised exchanges under the CRR. This opinion follows the draft ITS it submitted to the European Commission on 19 December 2014, specifying main indices and recognised exchanges, as well as a corrigendum to those draft ITS which it also submitted to the European Commission. The opinion considers whether the Hang Seng Composite Index and the Russell 3000 Index should be added to the list of main equity indices contained in the draft ITS.

The opinion goes into detail on the use of a relative approach for specifying main indices for equities and how the Hang Seng Composite Index and the Russel 3000 Index would meet the numerical criteria established for the relative approach but that they are not indices containing relatively liquid instruments in an EEA economy, given that they are mainly composed of United States and Asian stocks; therefore, it is not recommended that they be added to the list of main equity indices. Instead, ESMA suggests adding the Russell 1000 Index, the Shanghai Shenzhen CSI 300, the S&P BSE 100 Index and the FTSE Nasdaq Dubai UAE 20 Index to the list of main equity indices.

Further, ESMA recommends replacing Nikkei 225 with Nikkei 300 and the NZSE 10 with the S&P NZX 15 and provides detailed analysis tables to support this recommendation. Finally, ESMA updated the existing list of main indices and recognised exchanges, providing information on this updated list in the opinion as well.

The full ESMA opinion can be accessed at the following link:-

https://www.esma.europa.eu/press-news/esma-news/esma-updates-crr-standard-main-indices-and-recognised-exchanges

(iv) European Central Bank (the "ECB") opinion on a proposal for a regulation amending Regulation (EU) No 575/2013 as regards exemptions for commodity dealers

On 3 March 2016 the ECB published its opinion on a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards exemptions for commodity dealers (the "**Proposed Regulation**") (the "**Opinion**").

The purpose of the Proposed Regulation is to ensure that investment firms whose business consists exclusively of the provision of investment services or activities in relation to certain financial instruments do not become subject to all requirements contained in the Capital Requirements Regulation concerning large exposures and own funds on 1 January 2018 without a conscious and informed decision that such treatment is appropriate for them.

The Opinion notes that the Proposed Regulation has not tailor-made its requirements on large exposures and own fund requirements for commodity dealers. However it recommends that any exemption from these prudential requirements should take into consideration any potential systemic risks posed by commodity dealers.

While stating that there are so far no concrete indications of systemic risk requiring the removal of the current exemption for requirements concerning large exposures and own funds, the ECB believes that it is necessary to carry out a detailed impact analysis before taking the most appropriate decision regarding the removal or the temporary extension of the exemption. The opinion goes on to say that an extension of the current exemption should only be of a temporary nature due to the European Commission's expected presentation of a proposal for a comprehensive review of the prudential regulation of investment firms.

For the full Opinion please see the following link:

https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2016_10_f_sign.pdf

(v) European Commission – Implementing Technical Standards supplementing CRR and CRD – State of Play

On 10 March 2016, the European Commission published the updated state of play of the implementing technical standards (the "**ITS**") supplementing Regulation (EU) 575/2013 (CRR) and Directive 2013/36/EU (CRD) (the "**State of Play**").

The State of Play provides EBA/ESMA submission and EC adoption dates for each of the ITS, both deadlines to have passed and deadlines still to come to pass.

The State of Play document can be found at the following location:

http://ec.europa.eu/finance/bank/docs/regcapital/acts/overview-crr-crdiv-its_en.pdf

International Organisations of Securities Commission ("IOSCO")

(i) Emerging market regulators reinforce commitment to strengthen resilience while ensuring fair and orderly markets

In a media release dated 21 January 2016, IOSCO published information on the annual IOSCO Growth and Emerging Markets Committee (the "**GEM Committee**") annual meeting which took place in Bali, Indonesia. At the meeting the GEM Committee, in a roundtable discussion, talked about the risks in emerging markets, the regulatory policy priorities and the need to strengthen cyber resilience in emerging markets.

The IOSCO media release also published information on a public conference, entitled "*Optimising Innovation and Strengthening Governance in Emerging Markets*" which was held on 22 January 2016.

For the IOSCO media release, please see the following link:-

https://www.iosco.org/news/pdf/IOSCONEWS418.pdf

(ii) IOSCO publishes Securities Markets Risk Outlook 2016

On 2 March 2016, IOSCO published its Securities Markets Risk Outlook 2016 (the "**Outlook**"), identifying and examining key trends in global financial markets and the potential risks to financial stability.

The key trends discussed in the Outlook include the impact on securities markets from interventions of central banks worldwide; the impact on securities markets from falling commodity prices and uncertainty over global growth trends; general growth trends in corporate bond, equity and securitized product markets; recent trends in emerging market securities markets related to leverage, capital flows, and market-based financing; and the increasing digitalization of financial markets and potential for technological disruptors.

IOSCO also highlighted what it considers potential risks to financial stability:

- *Corporate bond market liquidity* – The expansion in corporate bond primary markets has raised some concern about whether the secondary market structure

will withstand periods of market stress going forward.

- *Risks associated with the use of collateral in financial instruments* – Services such as collateral optimization, collateral transformation, collateral arbitrage, re-hypothecation and reuse may have inherent risk transfer as part of their make-up, lead to greater market interconnections, have greater asset encumbrance (in some circumstances) and may create the potential of risk concentration in those participants that provide such services.

- *Harmful conduct in relation to retail financial products and services* – Harmful conduct in retail financial products and services can appear in many different forms. These products are inherently complex and many investors and advisers fail to understand them sufficiently. High commissions on these sales also can drive investment advisers to "push" these products, to the detriment of some investor classes.

- *Cyber threats* - In securities markets, cyber threats have increased in frequency, sophistication, and complexity over the past few years, and have become a systemic risk.

The Outlook also discusses the issues around the asset management industry, in light of the current debate over the systemic importance of this industry and the regulatory work underway.

The Outlook can be found at the following location:

https://www.iosco.org/library/pubdocs/pdf/IOSCOPD527.pdf

Capital Markets Union ("CMU")

(i) Stocktaking and challenges of the EU Financial Services Regulation – European Parliament resolution of 19 January 2016

The European Parliament adopted a resolution on 19 January 2016, discussing the challenges and way forward to develop a more efficient and effective EU framework for financial regulation and a CMU (the "**Resolution**"). The Resolution talks about the work to date in respect of the CMU, highlighting the areas where there have been advancements and noting the areas requiring further improvement. It outlines the aims and concerns of the European Parliament going forward in developing the CMU including calling for the European Commission, Member States and European Supervisory Authorities to carry out specific actions in achieving a better EU financial services regulation framework to include regular checks and assessments on a number of areas listed in the Resolution.

For the full Resolution, please see the following link:-

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0006+0+DOC+PDF+V0//EN

ESMA

(i) ESMA publishes 2016 Annual Work Programme

On 29 January 2016, ESMA published its 2016 Annual Work Programme (the "**Programme**"). The Programme outlines that from 2016 onwards, ESMA's focus will shift increasingly from rulemaking to implementation, specifically dealing with the supervisory convergence relating to the implementation, supervision and enforcement of common EU rules. ESMA confirmed that, as in previous years, a significant portion of its focus will be dedicated to MiFID II and MiFIR and in particular in assisting with the consistent implementation of MiFID II across NCAs.

ESMA confirmed that the 2015 – 2017 IT work programme will be focussed on the legal requirements for data collection and reporting stemming from MiFID II and MiFIR. However, ESMA advised that it shall also focus on CRA supervision and investor protection as well as continuing to develop systems to support activities on supervision, risk monitoring and the single rulebook. The IT work programme also includes the following two projects delegated to ESMA by NCAs:

(i) Financial Instruments Reference Data System: a project whereby ESMA collects, stores and processes instruments reference data from trading venues, including executing transparency calculations and managing suspensions from trading; and

(ii) Access to Trade Repositories (**"TRs"**): a project to set up a portal to act as a single access point for querying data from a TR without storage.

A copy of the Programme is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2015-1475_rev_2016_work_programme.pdf

(ii) ESMA issue guidelines compliance table on the exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps (the "Compliance Table")

On 2 February 2016, ESMA published details of the NCAs who either comply or intend to comply with ESMA's guidelines on the exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps (the "**Guidelines**").

The following NCAs have indicated that they do not intend to comply in full with the Guidelines:

- Financial Supervisory Authority, Denmark;
- BaFin, Germany;
- Autorité des Marchés Financiers, France;
- Finansinspektionen, Sweden; and
- Financial Conduct Authority, United Kingdom.

ESMA has decided to publish the reasons why certain NCAs have decided not to comply in full with the Guidelines.

The Compliance Table is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-205_compliance_table_guidelines_market.pdf

(iii) ESMA release statement on its supervisory work on potential closet index tracking

On 2 February 2016, ESMA released a statement informing stakeholders and investors about the potential for some collective investment funds to be "closet index trackers", and to provide details on the work ESMA has been doing in this context (the "**Statement**").

ESMA issued the following recommendations to management companies and investors:

- Management companies should carefully consider whether the information they provide to investors is an accurate interpretation of the performance objectives of the fund and the amount of risk taken to generate that return is in line with their obligations under the KIID Regulation;
- In circumstances where a UCITS uses benchmark, there are different approaches to the extent to which they may deviate from that benchmark;
- Where reference to a benchmark is implied in the "objectives and investment policy" section of the KIID, the degree of freedom in respect of the benchmark shall be indicated and where a UCITS has an index-tracking objective, this shall be stated also; and
- ESMA has advised investors (both retail and professional) that to ensure they are in a position to make an informed investment decision, they should utilise all investment

documentation available to them. ESMA has also advised investors that when considering investing in a UCITS equity fund, they should compare the key elements of the product against a number of other products.

A copy of the Statement is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-165_public_statement_-_supervisory_work_on_potential_closet_index_tracking.pdf

(iv) ESMA publishes 2015 annual report and 2016 work plan relating to trade repositories ("TRs") and credit rating agencies ("CRAs")

On 5 February ESMA published its annual report and work programme relating to TRs and CRAs (the **"Report"**). The Report highlights the direct supervisory activities carried out by ESMA during 2015 regarding TRs and CRAs and outlines ESMA's main priorities in these areas in 2016.

In 2015 TR supervision focussed on the quality of TRs' data, access to data held by TRs and the operation/performance of TRs' systems. ESMA also monitored NCAs access to TR data. In 2015, ESMA entered into a number of memoranda of understanding to assist third country regulatory authorities access TR data and is developing an IT system which will allow NCAs submit data queries through a centralised web portal.

ESMA focussed its supervisory efforts on CRAs' governance, risk management, internal decision making and business development processes. Some notable achievements highlighted in the report include:

- Investigating techniques used to validate credit rating methodologies by CRAs and using the differences identified to encourage debate relating to appropriate validation standards;
- Identifying that CRAs are facing serious risks in several areas including IT operations and information security;
- Investigating the process of issuing credit ratings followed by one CRA and raising concerns about the preparations of issue ratings, the workloads of credit rating analysts and their involvement in the provision of ancillary services; and
- Concluding an enforcement case for internal control failures and the imposition of a €30,000 fine in respect of past record-keeping breaches, highlighting the requirement on CRAs to establish clear decision making procedures, organisational structures and effective compliance functions.

The Report also highlighted the following areas which ESMA will focus its supervisory activities in 2016 on, namely:

- TR data quality and data access;
- CRA governance and strategy and the quality of credit ratings; and
- Fees charged and information security for all supervised entities.

A copy of the Report is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-234_esma_2015_annual_report_on_supervision_and_2016_work_plan.pdf

(v) Call for expression of interest: Consultative Working Group of the ESMA Market Data Standing Committee

On 9 February 2016, ESMA issued a press release calling for expressions of interest from market participants, consumers and end-users to make up the Consultative Working Group (the **"CWG"**) of the Market Data Standing Committee (the **"MDSC"**). The CWG will meet two times per year at the ESMA premises in Paris and will be expected to advise and assist the MDSC on technical standards to be submitted to the European Commission as well as advise and assist the MDSC in assessing the potential impact of proposed technical standards and recommendations. The application deadline closed on 7 March 2016.

For more information, please see the following location:-

https://www.esma.europa.eu/sites/default/files/library/2016-272_-_call_for_expression_of_interest_-_cwg_renewal.pdf

(vi) ESMA publishes Supervisory Convergence Work Programme 2016 ("SCWP")

On 11 February 2016, ESMA published its SCWP detailing the activities and tasks to be carried out in promoting sound and efficient supervision across the EU. The SCWP expands on the high level 2016 Annual Work Programme released by ESMA on 29 January 2016. The priority areas outlined in the SCWP are:

- Preparing for sound, efficient and consistent implementation and supervision of MiFID II and MiFIR;
- Finalising the data and IT infrastructures required to support the effective implementation and supervision of MiFID II, MiFIR and MAR;
- Facilitating the sound and constant supervision of OTC derivatives markets and in particular of EU CCPs; and

- Supporting the effective application of the Commission's Capital Markets Union plan.

A copy of the SCWP is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-203_2016_supervisory_convergence_work_programme.pdf

(vii) ESMA Follow-up Peer Review – Money Market Fund Guidelines

On 16 February 2016, ESMA published a follow-up peer review into the compliance of NCAs with guidelines regarding money market funds. The review period covered 1 May 2014 to 1 May 2015 and follows on from the first peer review report published in April 2013, which measured compliance by NCAs with the CESR Guidelines on a common definition of European money market funds (CESR/10-049).

The first peer review report set out the results of the assessment by peers on the level of compliance with the CESR Guidelines by those NCAs which had implemented the CESR Guidelines as of August 2012. It showed that, where implemented in Member States, the CESR Guidelines were implemented in the form of:

- Mandatory provisions (Ireland being one of the countries which followed this implementation approach):

- Measures which did not have force in law but which NCAs could follow in all instances.

It found that in the case of one Member State the CESR Guidelines were not adequately implemented, while ten countries had not implemented the CESR Guidelines within the review period. The follow-up peer review report provides an update on the findings of the first peer review and sets out the result of this second assessment by peers.

As Ireland had been assessed as fully compliant with the CESR Guidelines, it was not subject to the follow-up review, however the full ESMA follow-up report can be found at the following link:

https://www.esma.europa.eu/press-news/esma-news/esma-issues-follow-review-money-market-fund-guidelines

European Markets Infrastructure Regulation ("EMIR")

(i) MoU related to ESMA's monitoring of the ongoing compliance with recognition by CCPs established in South Africa and the United Mexican States ("Mexico")

On 26 January 2016, ESMA published the Memorandum of Understanding (the "**MoU**") it had entered into with each of the Financial Services Board of South Africa and the Comisión Nacional Bancaria y de Valores of Mexico. Article 25(2)(c) of EMIR requires the establishment of cooperation arrangements as a precondition for ESMA to recognise CCPs established in non-EEA jurisdictions to provide clearing services to clearing members or trading venues established in the EU. The MoU provides ESMA with the tools to monitor the ongoing compliance of non-EU CCPs with the recognition conditions under EMIR.

The MoU with South Africa has been effective since 30 November 2015 and the MoU with Mexico has been effective since it was signed on 25 January 2016.

The MoU for South Africa and Mexico can be found at the following locations:

https://www.esma.europa.eu/sites/default/files/library/signed_mou_for_south_africa_fsb.pdf
https://www.esma.europa.eu/sites/default/files/library/signed_mou_for_mexico_cnbv.pdf

(ii) FCA publishes list of Pension Scheme Arrangements Exempted from the Clearing Obligation

On 2 February 2016, ESMA published a set of opinions (the "**Opinions**") to exempt 16 UK-based pension schemes from clearing obligations contained in EMIR. The Opinions were requested by the UK's FCA and relate to 16 different kinds of pension schemes.

To obtain an exemption, requests must be made by the pension scheme to the relevant national regulator. Under EMIR, the national regulator must seek an Opinion from ESMA before making a final exemption decision. ESMA, in turn, must consult with EIOPA before issuing its Opinion. The FCA has now granted exemptions and ESMA will publish the list of the types of entities that have been given exemptions in the near future. To date we are not aware of any Irish pension scheme requesting such an exemption.

The Opinions can be found at this link:

https://www.esma.europa.eu/press-news/esma-news/esma-issues-opinions-uk-pension-schemes-be-exempt-central-clearing-under-emir

(iii) ESMA publishes updated Q&A Document on the practical implementation of EMIR

On 4 February 2016 and 16 February 2016, ESMA issued updates of its Questions & Answers Document ("**Q&A**") on practical questions regarding the implementation of EMIR. The updated Q&A concern information relating to default management at CCPs, competent authorities' access to trade repository data, the reporting of notional in position reports for options and futures, the frontloading requirement for the clearing obligation and the application of the clearing obligation to "swaptions".

The purpose of the Q&A is to promote common supervisory approaches and practices in the application of EMIR. It provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of EMIR. The content of the Q&A is aimed at competent authorities under EMIR to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. It should also help investors and other market participants by providing clarity on the requirements under EMIR

The updated Q&A can be found at this link:

http://iaisweb.org/page/news/global-insurance-market-report-gimar/file/58465/2015-global-insurance-market-report-gimar

(iv) Responses to ESMA Consultation on review of EMIR standards relating to CCP client accounts

On 4 February 2016, ESMA published the responses it had received following the launch of its Consultation Paper on 14 December 2015 on a Review of Article 26 of Regulatory Technical Standards ("**RTS**") No 153/2013 with respect to Margin Period of Risk ("**MPOR**") for client accounts. The closing date for responses was 1 February 2016.

The MPOR determines the amount of initial margins collected by a CCP and the ESMA proposal was to reduce from 2-day to 1-day the MPOR for gross omnibus accounts and individual segregated accounts for exchange traded derivatives and securities. Respondents to the consultation paper include the European Association of CCP Clearing Houses, Deutsche Bank, the US Committee on Capital Markets Regulation and Financial Markets Law Committee, the Alternative Investment Management Association, Managed Funds Association and the Alternative Investment Management Association.

The full set of responses can be viewed at the following link:

https://www.esma.europa.eu/press-news/consultations/consultation-paper-review-article-26-rts-no-1532013-respect-mpor-client

(v) ESMA resumes US CCP recognition process following EU-US agreement

On 10 February 2016, ESMA released a statement welcoming the common approach on the equivalence of central counterparty ("**CCP**") regimes between the Commission and the US Commodity Futures Trading Commission (the "**CFTC**"). The common approach is to be welcomed as it allows market participants to be able to use clearing infrastructures in both the US and in the EU.

The proposed determination of equivalence is based on the condition that CFTC-registered US CCPs seeking recognition in the EU confirm that their internal rules and procedures conform to EU equivalent standards. Once adopted, the equivalence decision will require ESMA to resume the recognition process of specific CFTC-supervised US CCPs to be recognised in the EU. EMIR gives ESMA one hundred and eighty working days to conclude the recognition process, however ESMA intends to shorten this period as far as possible and proceed with the recognition as soon as the US applicant CCPs meet the conditions contained in the equivalent decisions. ESMA has said that it will not commit to specific recognition dates as its recognition depends upon the level of compliance by the applicants.

The next step for ESMA is to continue, as a matter of priority, with its consultation on the amendment to its regulatory technical standards regarding the minimum period of risk for different types of clearing accounts in EU CCPs.

For further information please see the following link:

https://www.esma.europa.eu/press-news/esma-news/esma-resumes-us-ccp-recognition-process-following-eu-us-agreement

(vi) EMIR Clearing for Credit Default Swaps

On 1 March 2016, the Commission adopted a delegated regulation (the "**Delegated Regulation**") that makes it mandatory for certain OTC credit default derivative contracts to be cleared through CCPs. The Delegated Regulation applies the clearing obligation to untranched iTraxx Index credit default swaps and untranched iTraxx Index credit default swaps. The Delegated Regulation sets out four different categories of counterparties to which the clearing obligation applies and specifies the phase-in period for each.

The Delegated Regulation is subject to scrutiny by the EU Parliament and Council of the EU. Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication.

The text of the Delegated Regulation can be found at the following link:

http://ec.europa.eu/finance/financial-markets/docs/derivatives/160301-delegated-

act_en.pdf

(vii) ESAs submit final draft regulatory technical standards on margin for non-cleared derivatives to the European Commission

On 8 March 2016, the European supervisory authorities (EBA, ESMA and EIOPA) ("**ESAs**") submitted to the Commission their final draft regulatory technical standards ("**RTS**") on risk-mitigation techniques for OTC derivative contracts not cleared by a CCP under Article 11 of EMIR. The RTS detail the requirements for firms to exchange margins on non-centrally cleared OTC derivatives as well as specify the criteria regarding intragroup exemptions.

The Commission has three months to decide whether to endorse the RTS. If it does endorse the RTS, this will be followed by a period of non-objection by the European Parliament and Council of the EU.

In order to ensure a proportionate implementation, the RTS confirm that the requirements will enter into force on 1 September 2016 subject to certain phase-ins, giving firms who are subject to these requirements time to prepare for the implementation.

The phase-in is as follows:

Variation margin (VM)

- September 2016 for entities with group's notional amount of derivatives above €3 trillion.
- March 2017 for all other entities.

Initial margin (IM)

- September 2016 for entities with group's notional amount of derivatives above €3 trillion.
- September 2017 for those above €2.25 trillion.
- September 2018 for those above €1.5 trillion.
- September 2019 for those above €0.75 trillion.
- September 2020 for those above €8 billion.

The RTS can be found at the following link:

https://www.eba.europa.eu/documents/10180/1398349/RTS+on+Risk+Mitigation+Techniques+for+OTC+contracts+ JC-2016-+ 29.pdf/fb0b3387-3366-4c56-9e25-74b2a4997e1d

(viii) ESMA fines DTCC Derivatives Repository Limited €64,000 for data access failures

On 31 March 2016, ESMA published a decision of its board of supervisors announcing that it has fined the trade repository DTCC Derivatives Repository Ltd ("**DDRL**") €64,000.

In an accompanying press release, ESMA explained that it had found that DDRL had failed to provide direct and immediate access to derivatives data from 21 March 2014 to 15 December 2014, during which period access delays increased from two days to sixty two days after reporting and affected 2.6 billion reports. This was due to its negligence in:

- Failing to put in place data processing systems that were capable of providing regulators with direct and immediate access to reported data;
- Failing, once they became aware, to inform ESMA in a timely manner of the delays that were occurring; and
- Taking three months to establish an effective remedial action plan even while delays were worsening.

DDRL's failures caused delays to regulators accessing data, revealed systemic weaknesses in its organisation (particularly its procedures, management systems and internal controls) and negatively impacted the quality of the data it maintained.

The press release is available at the link below:

https://www.esma.europa.eu/sites/default/files/library/2016-468_esma_fines_dtcc_derivatives_repository_limited_eu64000_for_data_access_failures.pdf

Securities Financing Transactions Regulation

(i) Securities Financing Transactions Regulation comes into force

On 23 December 2015, EU Regulation on the reporting and transparency of securities financing transactions (the "**Regulation**") was published in the Official Journal of the EU

and came into force on 12 January 2016.

The Regulation provides for reporting and disclosure requirements (subject to certain transitional implementation dates) in relation to securities financing transactions ("**SFTs**").

The Regulation introduces measures to improve transparency in three main areas, mainly:

- The monitoring of the build-up of systematic risks in the financial system relating to SFTs;
- The disclosure of information on such transactions to investors whose assets are employed in the transactions; and
- Re-use of collateral provided by counterparties.

The Regulation applies to counterparties to an SFT and also to a counterparty that is engaging in reuse of collateral (not just confined to SFT counterparties). It also applies in respect of total return swaps (as defined in the Regulation) and SFTs which are defined as:

(a) Repurchase transactions;

(b) Securities or commodities lending and securities or commodities borrowing;

(c) Buy-sell back transactions or sell-buy back transactions; and

(d) Margin lending transactions.

It is important to note that the Regulation shall apply to certain entities located outside the EU, namely:

(i) An EU entity's non-EU branch that is party to an SFT or engaging in collateral reuse; or

(ii) A non-EU entity that is party to an SFT or engaging in collateral reuse (in circumstances where certain specific requirements are met).

The Regulation introduces a number of key requirements, summarised below:

- *Reporting* – Counterparties to an SFT are required to report certain details to a trade repository within one working day of the conclusion, modification or termination of the SFT and are obliged to maintain records of the SFT for a period of not less than five years following its termination. The reporting obligation extends to both counterparties, however, there are exceptions for certain non-financial counterparties

whereby a financial counterparty is obliged to report on behalf of both parties. The UCITS management company or AIFM shall be responsible for reporting on behalf of its respective funds under management;

- *Periodic Accounts* – UCITS management companies and AIFMs shall inform investors on the use they make of SFTs and total return swaps and this shall be included in annual and semi-annual accounts, in the case of a UCITS and in annual accounts, in the case of an AIF;

- *UCITS Prospectus and disclosure by the AIFM to investors* – the Regulation introduces specific disclosure requirements for the UCITS Prospectus and the disclosure made by the AIFM to investors relating to the SFT, the total return swaps that the fund can use and shall include specific data provided for in Section B of the Annex to the Regulation;

- *Collateral Reuse* – the Regulation defines reuse as the use by a receiving counterparty, in its own name and on its own account or on the account of a counterparty, of financial instruments received under a title transfer or security collateral arrangement. A party considered to be reusing collateral shall be obliged to disclose the risks and consequences of either granting a right of use of collateral provided under a security collateral arrangement or concluding a title transfer arrangement;

- *Additional matters* – the Regulation also sets out requirements relating to the registration and supervision of a trade repository, transparency and availability of such data, supervision, NCAs and administrative sanctions. In terms of administrative sanctions and other measures, the Regulation provides that Member States must empower NCAs to impose sanctions for breaches of SFT reporting and reuse requirements. The Regulation also imposes requirements on counterparties to have in place appropriate internal procedures for employees to report any breaches of the SFT reporting and reuse requirements. Finally, the Regulation also amends the definition of "OTC derivative or OTC derivative contract" under EMIR.

Dillon Eustace has published an article on the impact of the Securities Financing Transactions Regulation (the "**Article**"). A copy of the Article is available at the following link:

http://www.dilloneustace.ie/download/1/Publications/Financial Services/The Securities Financing Transaction Regulation.PDF

(ii) ESMA issue Discussion Paper on draft regulatory technical standards ("RTS") and implementing technical standards ("ITS") under the Securities Financing Transactions Regulation (the "Regulation")

On 11 March 2016 ESMA published a discussion paper on draft RTS and ITS under the Regulation (the "**Discussion Paper**").

The Discussion Paper sets out proposals for implementing the reporting framework under the Regulation, including:

- The procedure and registration requirements for trade repositories ("**TRs**") which want to accept reports on security financing transactions:
- Reporting standards and reporting logic under the Regulation:
- Data transparency requirements and aggregation and comparison of data: and
- Tables of the fields with the proposed data to be reported.

ESMA is seeking feedback on or before 22 April 2016 from all stakeholders, in particular from financial and non-financial counterparties to securities financing transactions, tri-party agents, agent lenders, central counterparties and TRs, as well as from all the authorities having access to the TR data. ESMA will use the responses to the Discussion paper to develop rules on which it will publish a follow-up consultation in the second half of 2016. ESMA shall send its draft rules for approval to the Commission by 13 January 2017.

A copy of the Discussion Paper is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-356.pdf

Packaged Retail Investment Products

(i) IFIA responds to ESAs Joint Consultation on the PRIIPS Key Investor Document Regulation – Draft Regulatory Technical Standards

On 29 January 2016, the IFIA published its response to the ESA consultation on the PRIIPs Key Investor Documents ("**KIDs**"). The responses followed a series of questions set out by the Joint Committee of the ESAs in November 2015 in order to gather stakeholder views on proposed rules on the content and presentation of the KIDs.

The main point underlying the responses of the IFIA is to seek confirmation as to when the final guidelines will become available in order to develop and produce the PRIIPs

KIDs by the 31 December 2016 (the date from which the PRIIPs Regulation becomes applicable). Otherwise, there is a concern that companies will have to expend unnecessary but significant time, effort and cost in the absence of such guidance.

For the full set of responses from the IF please see the following link:

http://files.irishfunds.ie/1454335884-ESMA_-PRIIPS_Irish-Funds-Response-Jan-2016.pdf?_cldee=YnJlZWRhLmN1bm5pbmdoYW1AZGlsbG9uZXVzdGFjZS5pZQ%3d%3d&urlid=7

(ii) EFAMA recommends delay of implementation of the PRIIPS Key Investor Document Regulation (Regulation (EU) 1286/2014) (the "Regulation")

In February 2016, EFAMA released a statement (the "**Statement**") commenting that it was concerned about the limited time available to product manufacturers between the publication of final regulatory technical standards ("**RTS**") and essential guidelines and the deadline to produce key information documents ("**KIDs**") from 31 December 2016 onwards.

EFAMA outlined that the RTS are not due to be published in the Official Journal of the EU until quarter 3 of 2016, leaving only a few months for the industry to create a huge number of KIDs. Having regard to their experience in implementing the UCITS key investor information document, EFAMA highlighted three key deliverables to underline the intricacies from a project management perspective:

- Building and testing the relevant IT build;
- Drafting the statement of objectives in plain language; and
- Working with distributors, execution only platforms and fund data repositories and ensuring they understand their respective duties.

EFAMA also pointed out that the following issues are in need of urgent clarification and attention:

- Calculation of transitional costs;
- Additional work required for the summary risk indicator methodologies; and
- KIDs for "multi-option" products.

A copy of the Statement is available at the following link:

http://www.efama.org/Publications/Public/PRIPS/EFAMAsuggestsPRIIPsdelay.pdf

(iii) Insurance Europe express concern over content and presentation of KID for PRIIPS

On 1 February 2016, Insurance Europe issued a press release expressing concern over the content and presentation of the PRIIPs KID as the KID does not take into account the specific features of insurance-based investment products in comparison to other PRIIPs.

The press release follows Insurance Europe's response to the consultation paper issued by the ESAs on the draft regulatory technical standards on the content and presentation of the KID.

Insurance Europe also expressed concern over the time available to prepare KIDs as the majority of the time, in the run up to the implementation date, is being spent by insurance companies working on Level 2 measures, leaving only an estimated three to four months to implement the KID.

For the full press release please see the following link:

http://www.insuranceeurope.eu/sites/default/files/attachments/PRIIPS%20ESA%20consultation%20release_0.pdf

Benchmark Regulation

(i) ESMA publishes Discussion Paper on the Benchmarks Regulation

On 15 February 2016, ESMA published a discussion paper in respect of the technical implementation of the Benchmark Regulation (the "**Discussion Paper**"). The purpose of the Discussion Paper was to invite stakeholders to provide input to assist in the draft Regulatory Technical Standards and Technical Advice which ESMA will submit to the Commission.

It is hoped that the Benchmark Regulation will:

- Improve the quality of the input data and methodologies used by benchmark administrators;
- Ensure that benchmark contributors provide adequate data and are subject to proper controls; and
- Ensure the supervision and viability of critical benchmarks.

The Discussion Paper sought stakeholders' feedback on the following areas:

- Definition of benchmarks;

- Requirements for the benchmark oversight function;
- Governance and control requirements for supervised benchmark contributors;
- Requirements for the benchmark input data;
- Authorisation and registration of an administrator; and
- Transparency requirements regarding the benchmark methodology.

Comments on the Discussion Paper were to be received by ESMA by 31 March 2016. The full Discussion Paper can be found at the following location:

https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf

Short Selling Regulation ("SSR")

(i) ESMA Peer Review Report on Compliance with SSR

On 5 January 2016, ESMA published a peer review report on how National Supervisory Authorities (the "**NCAs**") comply with the SSR in respect of applying the exemption for market making activities. The review was carried out by an Assessment Group appointed by the Board of Supervisors of ESMA and, for practical and resource reasons, focused on the following NCAs; BaFin (Germany), Consob (Italy), FCA (United Kingdom), FI (Sweden) and MNB (Hungary).

Some of the conclusions of the Assessment Group included praise for the dedicated resources and capable staff of the NCAs to handle the notification of exemptions, the great robustness in the intensity of the scrutiny of notifications and firms by the NCAs and the best efforts which have been made by the NCAs to comply with the ESMA Guidelines on the "*Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of credit default swaps*" (the "**Guidelines**").

There were a number of concerns identified by the Assessment Group requiring further consideration:

- The NCAs are not satisfying themselves, in advance, that market makers comply with the organisational requirements of the Guidelines when intending to avail of the exemption;
- The Guidelines require a review of the notifications instrument by instrument, but

NCAs are applying a "per firm" approach to processing the notifications;

- The NCAs have been relying on monitoring by trading venues when instead they need to check for themselves that the Guidelines are being complied with; and

- As a general concern, the Assessment Group noted that the practices of the different NCAs comes from different interpretations of the SSR which is a problem that should be addressed when the SSR is being reviewed.

The full peer review report is available at the following location:-

https://www.esma.europa.eu/sites/default/files/library/2015-1791_peer_review_report_compliance_with_ssr_as_regards_market.pdf

The Joint Committee (ESMA, EIOPA and EBA)

(i) The Joint Committee issue request to the European Commission to address legislative inconsistencies between the banking, insurance and investment sectors

On 26 January 2016, the Joint Committee informed the Commission that following its work on the guidelines on cross-selling practices, it has identified some legal issues in the existing regulatory framework between the three financial sectors. The Joint Committee advised that the inconsistencies are impeding the establishment of the desired levels of consumer protection, expose consumers to the risk of detriment and are preventing the Joint Committee from ensuring a level playing field across the three sectors.

The Joint Committee requested that the Commission assess the differences in existing legislation and consider any necessary steps to ensure that the Joint Committee can regulate cross-selling practices in a consistent way across the three sectors.

A copy of the letter is available at the following link:

http://www.eba.europa.eu/documents/10180/15736/ESAs+letter+to+European+Commission+on+cross-selling+of+financial+product....pdf

European Fund and Asset Management Association ("EFAMA")

(i) EFAMA issues response to the European Commission's Consultation on the call for evidence "EU regulatory framework for financial services"

On 29 January 2016, EFAMA issued its response to the Commission's Consultation on the call for evidence "EU regulatory framework for financial services" (the "**Response**"). In the Response, EFAMA made a number of comments, summarised below:

- *Coordination and consistency* – EFAMA encouraged further coordination among ESMA, EIOPA and the EBA (the "**ESAs**") as an important number of regulatory issues often concern a number of them. Additionally, EFAMA commented that further cooperation among the various units within the Commission would promote efficient work on cross-consistency and in particular cross-impact assessments when proposing new pieces of legislation. EFAMA pointed out that asset management companies are often impacted by horizontal pieces of legislation which may have unintended consequences if the sector is not properly considered.

- *Realistic implementation timelines* – EFAMA pointed out that the restrictive implementation deadlines of EU legislation, which often cannot be met due to delays or unforeseen difficulties in the implementation of level 2 measures, lead to increased costs for the industry and, indirectly, investors. EFAMA also stated that unrealistic implementation deadlines lead to legal uncertainty and cause serious challenges for asset managers in the implementation of EU legislation and that further consideration should be given to ensuring realistic timeframes are afforded for the development and implementation of level 2 measures. In this respect, EFAMA suggested the possibility of a period of 18 months starting from the date the industry has all necessary information to start applying new rules.

- *Need for regulatory stability* – EFAMA acknowledged that it is of critical importance that the Commission works closely with the ESAs on the implementation and enforcement of existing EU rules prior to launching new regulatory initiatives. EFAMA pointed out that review clauses in EU legislation cause instability in market participants' way of working, as they have to constantly adapt to new rules which may stem solely from review clauses, where there may not be a case to justify such a review. Additionally, EFAMA pointed out that review clauses are often required too soon after implementation of existing new market rules by participants.

- *Need for targeted improvements* – EFAMA is of the opinion that there is a need for targeted improvements in existing and forthcoming EU legislation to allow EU-based players and products to facilitate the financing of the EU economy and be more competitive vis-à-vis non-EU based players and products both within the EU Single Market and in third country markets. EFAMA pointed out that there is an increasing number of pieces of EU legislation which offer access for 3rd country players and products to the EU market, while the whole set of regulations to be applied to them is not always required to be the same as for EU-based players and products.

A copy of the Response is available at the following link:

http://www.efama.org/Publications/EFAMA%20response-EC Call for Evidence -financial-regulatory-framework-review-2015.pdf

(ii) EFAMA 2015 year review

On 18 February 2016, EFAMA published its latest investment funds industry factsheet for the year ending December 2015. The data published shows net sales of UCITS and AIFs for the 2015 calendar year as well as net assets data for 2015.

Alongside the factsheet, EFAMA published some notes to provide context for the figures:

- *Record results* – For the second year in a row, the European investment fund industry posted record results in 2015. Net sales of European investment funds rose to an all-time high of €717 billion in 2015 and assets under management broke through the €12 trillion mark due to a growth rate of 12%.
- *Resilient investor confidence* – The ECB's quantitative easing program announced in January 2015 and the expectation of stronger economic growth and lower interest rates, increased investors' optimism and boosted the demand for long-term UCITS for several months. Investor confidence took a hit following the sudden reversal in bond yields in April and the slowdown in major emerging market economies during the summer. However, despite the rise in uncertainty and market volatility, the net sales of long-term UCITS remained positive except in August when the market turbulences intensified.
- *Strong inflows* - Multi-assets funds have attracted the largest net inflows as the broad market, asset class and sector diversification offered by balanced funds attracted investors. Equity funds recorded the best year for net sales since 2000 as investors remained overall confident in the economic outlook for Europe and the willingness of the ECB to maintain its accommodative monetary stance to support activity. Bond funds recorded lower net sales compared to 2014 against the background of a reversal in bond yields and the associated uncertainty concerning the evolution of the bond market. The higher uncertainty and renewed downside risks for growth increased the demand for money market funds, which ended the year with positive net inflows, which had not occurred since 2008.

For more information, please see the following link:

https://www.efama.org/Pages/European-investment-fund-industry-posts-record-results-in-2015-for-second-year-in-a-row.aspx

Market Abuse Directive

(i) Changes in the Market Abuse Regime – Investment Funds and Debt Issuers

Regulation 596/2014 on market abuse ("**MAR**"), and Directive 2014/57/EU on criminal sanctions for market abuse ("**CS MAD**") were published in the Official Journal of the EU

on 12 June 2014 and will apply from 3 July 2016. MAR and CS MAD are collectively referred to as "**MAD II**".

The existing Market Abuse Directive is repealed as of the effective date of the new Regulation. MAR has direct effect in all Member States and does not require any further legislation for it to have effect in national laws.

MAR aims at enhancing market integrity and investor protection. To this end, MAR updates and strengthens the existing market abuse framework by (a) extending its scope to new markets and trading strategies and (b) introducing new requirements and standards. The definition of financial instruments in MAR refers to the definition under MIFID II, which is very broad.

In addition, MAR does not limit its scope to financial instruments traded on regulated markets ("**Regulated Markets**") in the EU, but extends its requirements to financial instruments listed or traded on Multilateral Trading Facilities (**"MTFs"**) and Organised Trading Facilities (**"OTFs"**) and emission allowances, and to issuers who have made application for securities to be listed or traded on such markets.

Dillon Eustace has published an article on the impact of MAD II on investment funds and the issuers of debt securities listed on the Irish Stock Exchange. A copy of the article is available at the following link:

http://www.dilloneustace.ie/download/1/Publications/Listings/Market%20Abuse%20Directive Changes in the Market Abuse Regime –Investment Funds and Debt Issuers.pdf

(ii) ESMA publishes Consultation Paper on Draft Guidelines on the Market Abuse Regulation ("MAR")

On 28 January 2016, ESMA opened a public consultation on draft guidelines clarifying the implementation of the MAR (the "**Consultation**"). The Consultation contains the following:

- Draft guidelines for persons receiving market soundings; and
- Draft guidelines on the legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public.

The closing date for comments was 31 March 2016. ESMA intend to finalise the guidelines and publish a final report in respect of same by quarter 3, 2016.

A copy of the Consultation is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-162.pdf

(iii) European Commission issue proposal to delay certain provisions of MAR relating to MiFID II

On 10 February 2016, the Commission issued a proposal relating to certain dates contained in the MAR (the "**Proposal**"). The Commission outlined that MAR will apply to certain definitions and concepts of MiFID II. MAR is set to enter into force on 3 July 2016 and contains a provision stating that prior to the entry into applicability of MiFID II (which is now 3 January 2018), the provisions of MiFID I shall apply. To ensure legal certainty for the period between the original date of entry into application and the new date of entry into application of MiFID II, the Commission advised that it would be necessary to clarify in MAR that the concepts and definitions as set out in MiFID I should apply until the new date of entry into application of MiFID II.

MAR also refers to certain concepts to be introduced by MiFID II, such as organised trading facilities, small and medium sized enterprises growth markets, emission allowances or auctioned products based thereon and as such it is necessary to clarify that any such concepts shall not apply until the new date of entry into application of MiFID II.

A copy of the Proposal is available at the following link:

http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-57-EN-F1-1.PDF

(iv) European Commission Implementing Regulation ((EU) 2016/347) published in the Official Journal of the EU

On 10 March 2016, the European Commission Implementing Regulation ((EU) 2016/347) (the **"Implementing Regulation"**) laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) 596/2014 of the European Parliament and Council was published in the Official Journal of the EU.

The establishment of a precise format, including the use of standard templates, should facilitate the uniform application of the requirement to draw up and update insider lists laid down in Regulation (EU) 596/2014. It should also ensure that competent authorities are provided with the necessary information to fulfil the task of protecting the integrity of the financial markets and investigate possible market abuse. Issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor, or any person acting on their behalf or on their account shall ensure that their insider list, which shall be kept in electronic format, is divided into separate sections relating to different inside information. Each section of the insider list shall only include details of individuals having access to the inside information relevant to that section.

The electronic format of the insider list shall ensure at all times:

- The confidentiality of the information included by ensuring that access to the insider list is restricted to clearly identified persons;
- The accuracy of the information contained in the insider list; and
- The access to and the retrieval of previous versions of the insider list.

The insider lists shall be submitted using electronic means as specified by the competent authority.

The Implementing Regulation entered into force on 11 March 2016 and shall apply from 3 July 2016.

A copy of the Implementing Regulation is available at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2016%3A065%3ATOC&uri=uriserv%3AOJ.L_.2016.065.01.0049.01.ENG

(v) European Commission Implementing Regulation ((EU) 2016/378) published in the Official Journal of the EU

On 17 March 2016, the Commission Implementing Regulation ((EU) 2016/378) (the "**Implementing Regulation**") laying down implementing technical standards ("**ITS**") regarding the timing, format and template of the submission of notifications to competent authorities under MAR was published in the Official Journal of the EU.

The ITS apply to the notification requirement in Article 4(1) of MAR for market operators of regulated markets and investment firms, and market operators operating a multilateral trading facility or an organised trading facility, to make certain notifications to competent authorities including in relation to financial instruments admitted to trading. Competent authorities are required by Article 4(2) of MAR to transmit such notifications to ESMA, which will publish them on its website.

The Implementing Regulation entered into force on 18 March 2016 and will apply from 3 July 2016.

A copy of the Implementing Regulation is available at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0378&from=EN

European Commission

(i) Guideline (EU) 2016/256 of the European Central Bank

On 24 February 2016, Guideline 2016/256 of the ECB concerning the extension of common rules and minimum standards to protect the confidentiality of the statistical information collected by the ECB assisted by the national central banks to NCAs of participating Member States and to the ECB in its supervisory functions (ECB/2016/1) (the "**Guideline**") was published in the Official Journal of the EU.

The Guideline came into effect on 15 March 2016 and is addressed to NCAs and the ECB insofar as they receive confidential statistical information from the European System of Central Banks. The Guideline requires NCAs and the ECB to implement measures to prevent unauthorised access to confidential statistical information to include, at minimum, a unique user identifier and personal password to access the information as well as implementing physical authorisation and protection measures. These measures are also to be complied with by third parties who have access to the confidential data.

NCAs are required to report annually to the ECB any problems experienced, actions taken to address those problems and plans to improve on the protection of statistical information. The ECB will also draw up a report annually covering the same issues. The Guideline also requires that staff are made aware and kept up to date on the procedures surrounding the protection of confidential information and that all rules and procedures relating to this protection are documented.

For the full Guideline, please see the following link:

https://www.ecb.europa.eu/ecb/legal/pdf/celex_32016o0001_en_txt.pdf

Payment Services Directive

(i) Revised Payment Services Directive (the "PSD2") comes into effect and EBA Discussion Paper on future Draft RTS on strong customer authentication and secure communication under revised PSD2

Following its publication in the Official Journal of the EU on 23 December 2015, the PSD2 entered into force on 12 January 2016. Member States have 2 years from that date to transpose it into national law.

Some of the changes that the PSD2 will introduce are:

- Introduction of strict security requirements for the initiation and processing of electronic payments and the protection of consumers' financial data;

- Opening the EU payment market for companies offering consumer or business oriented payment services based on the access to information about the payment account – the so called "payment initiation services providers" and "account information services providers";

- Enhancing consumers' rights in numerous areas, including reducing the liability for non-authorised payments, introducing an unconditional ("no questions asked") refund right for direct debits in euro; and

- Prohibition of surcharging (additional charges for the right to pay e.g. with a card) whether the payment instrument is used in shops or online.

The European Banking Authority (the "**EBA**") is mandated to provide Regulatory Technical Standards (the "**RTS**") under the PSD2 by January 2017. The RTS will specify the requirements of strong customer authentication, exemptions from the application of these requirements, requirements to protect the user's security credentials, requirements for common and secure open standards of communication and security measures between the various types of providers in the payment sector.

To assist in drafting the RTS, the EBA published a discussion paper in December 2015 with responses to have been submitted up until 8 February 2016. No update on the RTS has been provided as of yet by the EBA since this deadline passed.

Investor Money Regulations

(i) Implementation of the Investor Money Regulations postponed until 1 July 2016

The implementation date for the Central Bank (Supervision and Enforcement) Act, 2013 (Section 48(1)) Investor Money Regulations, 2015 for Fund Service Providers (the "**Investor Money Regulations**") is being postponed from 1 April 2016 to 1 July 2016 in order to give industry additional time to take all the necessary steps required to address the new regime.

The Investor Money Regulations introduce a new investor money regime which will have an impact on, amongst others, Irish regulated UCITS and AIFs, as well as on a variety of different types of fund service providers including UCITS management companies, AIFMs and Depositaries (each a Fund Service Provider (**"FSP"**)).

The additional time with which the Central Bank has afforded the industry is extremely welcome as the practical implications of the new arrangements and in some cases documenting existing arrangements has proved more challenging than originally envisaged.

The Central Bank's Markets Directorate has written to individual FSPs in relation to the potential applicability of the Investor Money Regulations to their business models. FSPs will be required to provide the Central Bank, by 1 July 2016, with a detailed account of the arrangements that have been put in place to comply with the new requirements.

Dillon Eustace has prepared an article on the Investor Money Regulations which is available at the following link:

http://www.dilloneustace.ie/download/1/Publications/Financial Services/Investor Money Regulations Update.PDF

On 15 March 2016, the Central Bank issued an updated Guidance on the Investor Money Regulations for FSPs (the "**Guidance**"), which have been amended to reflect the new implementation date of 1 July 2016.

A copy of the Guidance is available at the following link:

http://www.centralbank.ie/regulation/ClientAssetsandInvestorMoney/InvestorMoneyRegulations/Documents/Guidance on Investor Money Regulations for Fund Service Providers March2016.pdf

(ii) Central Bank publish revised guidance on Umbrella Cash Accounts

On 24 March 2016, the Central Bank published revised guidance on umbrella funds cash accounts holding subscription, redemption and dividend monies (the "**Guidance**").

The Guidance applies to the holding of cash assets of umbrella funds in a single account at the level of an umbrella (an "**umbrella cash account**") in the name of the investment fund, the fund management company on behalf of the investment fund or the depositary and outlines that an umbrella cash account can only be established where the fund management company and the depositary are satisfied that:

1. At all times, the amounts, whether positive or negative, within the umbrella cash account can be attributed to the individual sub-funds in order to comply with the constitutional documents of the umbrella fund; and

2. The holding of cash assets in an umbrella cash account will not compromise the ability of the depositary to carry out its safe-keeping and oversight duties and responsibilities in accordance with UCITS and AIFM Regulations.

The Guidance outlines that sub-funds should not participate in an umbrella cash account in any of the following circumstances:

- Where the sub-funds are highly leveraged;

- Where there is an increased possibility that investors subscribing to those sub-funds are likely to make late payments;

- Where the umbrella fund commenced trading before 30 June 2005 and does not have segregated liability between sub-funds; or

- Where the constitutional document does not set out consequences for investors who do not provide subscription proceeds by the stated settlement date.

The Guidance provides that the management company shall, in conjunction with the depositary, establish a policy (which shall be reviewed on an annual basis) to govern the operation of an umbrella cash account and that the policy should require, as a matter of procedure, that specific criteria relating to the umbrella cash account are identified at the outset and are updated on a continuous basis.

The policy shall also implement the following procedures (to be agreed between the management company and the depositary):

- A daily reconciliation process, including procedures to apply to the prompt investigation of any money remaining in the umbrella cash account. In circumstances where sub-funds of the umbrella fund do not deal on a daily or weekly basis, the reconciliation process shall be carried out in accordance with the dealing frequency of the sub-funds but at least on a monthly basis;

- The treatment of money in the cash account when calculating the net asset value of the sub-funds;

- The procedure to apply where money will be transferred from the umbrella cash account to an investor money collection account held by a fund service provider in accordance with the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1) Investor Money Regulations 2015 for Fund Service Providers, where applicable;

- The procedure to apply to the resolution of shortfalls due to a late or non-payment from a subscribing investor, including the cancellation of units if appropriate;

- The reports to be provided to the fund management company in relation to the operation of the umbrella cash account.

The Guidance also addresses the following issues:

1. Specific disclosures to be made to investors, relating to the channels through which subscription and redemption monies shall be paid in the umbrella cash account and the additional risks associated with umbrella cash accounts;

2. Treatment of subscription, redemption and dividend monies in umbrella cash accounts; and

3. The process involved in circumstances where one of the sub-funds within an umbrella cash account becomes insolvent.

A copy of the Guidance is available at the following link:

http://www.centralbank.ie/regulation/marketsupdate/Documents/160324_UMBRELLA FUNDSREVISED CASH ACCOUNTS GUIDANCE FINAL_PH.pdf?_cldee=YW5kcmV3LmJhdGVzQGRpbGxvbmV1c3RhY2UuaWU%3d&urlid=2

Central Bank of Ireland

(i) Irish Funds Response to Consultation Paper CP 97

On 27 January 2016, Irish Funds ("**IF**") published its response to the Central Bank's consultation on the Investment Firm Regulations 2015 (Consultation Paper 97), (the "**Response**").

CP 97 highlighted the Central Bank's intention to publish an Investment Firms rulebook in the form of Central Bank regulations under the Central Bank (Supervision and Enforcement) Act 2013 (referred to in CP 97 as the proposed Central Bank Investment Firm Regulations). It is intended that the proposed Central Bank Investment Firm Regulations will consolidate all of the current regulatory requirements issued by the Central Bank under the Investment Intermediaries Act 1995 (as amended) ("**IIA**") as applicable to Fund Administrators by regulations to be introduced by the Central Bank.

The Response contains general comments on the proposed regulations and also contains specific comments on the regulations. The general comments relate to the following topics;

- Structure and layout of the regulations;
- Proposed capital changes;
- Annual return of outsourced activities;
- Conditions for release of final NAV by Outsourcing Service Provider; and
- Preliminary NAV release by Outsourcing Service Provider.

The deadline for responses to CP97 was 27 January 2016. It is expected that all

responses to CP 97 will be available on the Central Bank's website shortly.

The IF Response can be found by clicking the following link:

http://files.irishfunds.ie/1454333563-2016-01-Response-to-CP-97-Investment-Firm-Regulations-2015-Final.pdf?_cldee=YnJlZWRhLmN1bm5pbmdoYW1AZGlsbG9uZXVzdGFjZS5pZQ%3d%3d&urlid=6

(ii) Consultation Paper 100

On 22 December 2015, the Central Bank published Consultation Paper 100 Consultation on Risk Assessment and Capital Planning for Fund Administrators ("**CP 100**").

The Central Bank proposes introducing a risk assessment and capital planning requirement for Fund Administrators authorised under the Investment Intermediaries Act, 1995 to reflect improvements in capital planning in recent years throughout the financial services sector. It is proposed that this requirement would be introduced by way of additional regulations to be inserted into Part 5 of the proposed Central Bank Investment Firm Regulations (the "**Proposed Regulations"**). It is also proposed to issue guidance on the Proposed Regulations (referred to herein as the "**Proposed Guidance**"). The text of the Proposed Regulations and the Proposed Guidance are attached to CP 100.

The proposed new requirements would broadly align the capital planning requirements applicable to Fund Administrators to those already applying to MiFID investment firms in Ireland under the Capital Requirements Directive ("**CRD IV**") and Capital Requirements Regulation ("**CRR**"). In summary, CRD IV requirements include a requirement to:

- Carry out an internal capital adequacy assessment process;
- Assess, in that context, a number of specifically identified risks to the institution; and
- Set aside capital to meet those risks based on the capital adequacy assessment undertaken.

The deadline for responses to CP 100 was 15 March 2016. It is expected that all responses to CP 100 will be available on the Central Bank's website shortly.

Financial Services Ombudsman

(i) S.I. 592/2015 – Central Bank Act 1942 (Financial Services Ombudsman Council) Levies and Fees Regulations 2015

On 23 December 2015, the FSO signed the Central Bank Act 1942 (Financial Services Ombudsman Council) Levies and Fees Regulations 2015 (the "**Regulations**"), providing for a scheme of levies on regulated entities to fund the operation of the FSO's Bureau for the year ended 31 December 2016.

The Regulations amend the schedule to S.I. No. 42 of 2015 — Central Bank Act 1942 (Financial Services Ombudsman Council) Levies and Fees (Amendment) Regulations 2014 and apply to credit institutions, insurance undertakings, intermediaries and debt management firms, investment business firms, collective investment schemes and other service providers, credit unions, approved moneylenders, approved professional bodies, bureaux de change and money transmission service providers, electronic money institutions, home reversion firms/retail credit firms as well as other regulated financial service providers.

The full Regulations can be found at the following link:

http://www.irishstatutebook.ie/eli/2015/si/592/made/en/print

(ii) How complaints made to the FSO are handled

On 19 February 2016, the FSO issued a press release on the new changes it has introduced with respect to its handling of complaints with the aim being to deliver a faster, more effective and efficient service. The key change introduced is the establishment of a dedicated Dispute Resolution Service which will resolve disputes at an early stage, with minimal formalities.

The focus will be to encourage informal methods of dispute resolution, such as mediation, with the FSO investigating and adjudicating should these fail to resolve disputes.

In conjunction with the press release, the FSO published a guide on how it handles complaints, covering topics such as pre-conditions, methods to register a complaint, how complaints are handled, information on the Dispute Resolution Service as well as adjudication, time limits, appeals and issues to consider before lodging a complaint.

The complaints guide can be found at the following link:

https://www.financialombudsman.ie/documents/FSO%20Information%20Booklet.pdf

Statutory Audit Directive

(i) Rotation of Auditors under the Statutory Audit Directive

The Statutory Audit Directive 2014/56/EU ("**SAD**") and its associated Regulation (EU) 537/2014 (the "**Regulation**") require public-interest entities (which includes listed investment funds and other listed entities which are admitted to trading on a regulated market within the EU) to rotate their auditors every 10 years, and include a limitation on auditors providing non-audit services to such public-interest entities.

SAD enters into force on 16 June 2016 and will have implications for listed funds from that date. The 10 year period for the audit rotation requirement begins at the date of the audit engagement or the date of listing.

SAD and the Regulation set out three deadlines by which the audit rotation must be complied with. These require immediate attention for listed issuers with a listing/audit engagement since June 2003 and allow additional time for issuers with engagements in place prior to that date:

(a) Issuers with a listing or audit engagement date prior to, or on, 16 June 1994 - rotation by 16 June 2020;
(b) Issuers with a listing or audit engagement date between 17 June 1994 and 16 June 2003 – rotation by 16 June 2023; or
(c) Issuers with a listing or audit engagement date between 16 June 2003 and 17 June 2006 – rotation by 16 June 2016 (i.e. by the date of applicability of the Regulation). Issuers which have listed or engaged an auditor after 17 June 2016 must rotate within 10 years of the relevant listing or engagement date

As an alternative solution to the standard Main Securities Market listing, the Irish Stock Exchange ("**ISE**") propose to establish a "funds MTF" which would have identical requirements to the standard listing, save that the listing would not be on an EU regulated market, but would instead be an exchange regulated market. This proposal is currently with the Central Bank for approval and the ISE is confident that the funds MTF will be in place by the June 2016 deadline.

However, it is important that any listed fund should consider whether they need to remain listed on a regulated market (for example if the fund is being marketed to pension funds/UCITS, or other entities which would require the fund to be listed on an EU regulated market). Many investment restrictions are based around securities which are listed/traded on regulated markets (which an MTF would not be), therefore a fund could make itself less marketable and cause issues for existing investors that were counting an investment in the fund in the "listed on a regulated market" basket.

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

(i) Opinion of Advocate General in ECJ case relating to application of customer due diligence to payment institutions under MLD3

Safe Interenvios, SA v Liberbank, SA, Banco de Sabadell, SA, and Banco Bilbao Vizcaya Argentaria, SA Case C-235/14 – Opinion of the Advocate General (the "**AG**")

This case concerns a payment institution (Safe Interenvios, SA) ("**Safe**") and three banks (Liberbank, SA, Banco de Sabadell, SA and Banco Vizcaya Argentaria, SA) (collectively, the "**Banks**"). The Banks closed accounts which Safe held with them due to money laundering concerns (as per Directive 2005/60/EC (the "**MLD3**")).

Safe refused to provide certain information to the Banks which had been requested by them as a result of information which showed irregularities with the agents whom Safe had authorised to transfer its clients' money abroad. This refusal resulted in the closure of bank accounts it held with the Banks. The information had been requested pursuant to Law 10/2010, the Spanish national law transposing the MLD3.

Safe argued before the Commercial Court Number 5, Barcelona that the closure of its bank accounts amounted to an act of unfair competition as *inter alia* it prevented Safe from transferring funds abroad. The Banks, in response to the arguments of Safe, said that their actions were in accordance with Law 10/2010, justified because of the money-laundering risks associated with the transfer of funds abroad and did not amount to a breach of competition law. The Spanish court rejected Safe's application, holding that the Banks were entitled to ask Safe for data relating to its customers subject to the condition that they had detected in Safe's behaviour signs of conduct that infringed Law 10/2010. In terms of the justification in closing the accounts which Safe held with the Banks, the court held that none of the three Banks infringed anti-competitive law however, Liberbank, SA and Banco de Sabadell, SA, by failing to give reasons for the bank account closures, had acted unfairly. Safe, Liberbank, SA and Banco de Sabadell, SA appealed the decision to the provincial court, Barcelona which referred certain issues to the European Court of Justice.

Money Laundering Issues considered by the AG

From a money laundering perspective the main issue to be considered is whether Article 11(1) of the MLD3 (allowing for a derogation from the requirement to apply customer due diligence where the customer is itself subject to the directive i.e. is itself a financial (including a payment) institution or credit institution) is a genuine derogation from the need to apply customer due diligence or whether it is simply an authorisation that a derogation is possible. The context of a consideration of this issue is as to whether the Banks were correct in applying due diligence against Safe or were simply using the MLD3 to carry out unfair commercial practices.

Opinion

It was noted by the AG that the customer due diligence measures in Articles 8 and 9(1) of the MLD3 are not to be applied in certain circumstances where they would otherwise be required under Article 7(a), (b) and (d) as a result of certain conditions laid down in Article 11. One condition is the situation where a customer of a covered entity is a payment or credit institution itself. The AG reasoned that the rationale for the derogation in Article 11(1) is that the credit or payment institution customer is itself covered by the MLD3 and so must comply with all the requirements of the Directive, including the application of due diligence to its own customers. This allows for more cost-effective risk management and a proportionate prevention of the risk of money laundering.

However, considering Article 7(c) (which provides that customer due diligence measures are always required regardless of any derogation, exemption or threshold), the AG reasoned that this could be extended to apply regardless of the customer being a credit or payment institution, where there exists a suspicion of money laundering or terrorist financing. Thus the Banks were justified in interpreting the MLD3 to apply the due diligence measures they did against Safe and the AG.

The full opinion of the AG, including a consideration of all of the questions referred for a preliminary ruling, can be found at the following link:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=166842&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=709141

(ii) AIMA and IFrespond to joint European Supervisory Authorities' consultation on guidelines under the Fourth AML Directive

On 22 January 2016, the Irish Funds ("**IF**") published its response to the Joint Guidelines issued by the European Supervisory Authorities (the "**ESAs**") on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (the "**Response**").

The Response sets out that the IFIA considers the Joint Guidelines overall to be conducive to firms adopting risk-based, proportionate and effective AML/CTF policies and procedures and are also conducive to competent authorities' monitoring of firms' compliance with the Fourth AML Directive. The IFIA recommends generally that joint ESAs should seek to ensure that the Joint Guidelines are implemented and interpreted in a consistent way across jurisdictions.

In respect of the risk factors to be considered in the appendices to the Joint Guidelines, the IFIA agrees that a holistic risk-based approach should be followed when determining which factors are relevant for different customers and risk scenarios. It also recommends

that the Joint Guidelines distinguish between the processes for new customers and the process for existing customers.

The Alternative Investment Management Association (the "**AIMA**"), in its response to the Joint Guidelines, also agrees that firms should apply a holistic methodology in their risk assessments and that the presence of isolated risk factors should not necessarily move a relationship into a higher or lower risk category. It also believes that customer due diligence should be carried out in a manner proportionate to the risk posed by the specific client and situation and that firms should be aware of how their processes will be assessed by competent authorities.

AIMA also recommends that the Joint Guidelines should only contain examples where they relate to an issue that would always indicate a higher or lower risk and where the examples are directly related to the guideline which it attaches.

The IFIA Report can be accessed at the following location:

http://files.irishfunds.ie/1454333168-2016-01-IF-Response-to-ESA-Consultation-AML-Risk-Factor-Guidelines-Final.pdf

(iii) Department of Finance and the Department of Justice and Equality publish consultation paper on Member States discretions in transposing fourth AML Directive

On 29 January 2016, the Department of Finance and the Department of Justice and Equality (the "**Departments**") issued a consultation paper on the transposition of the Fourth AML Directive into Irish law and the discretions available to Ireland (the "**Consultation Paper**").

Some of the areas where the Consultation Paper requested feedback included:

- *Beneficial ownership registers (corporate)* – The Fourth AML Directive requires Member States to ensure that corporate entities obtain and hold accurate information on their beneficial ownership which can be made available when due diligence is being undertaken on them. The information on beneficial ownership is required to be held in a central register and Member States are obliged to ensure that the information on beneficial ownership is accurate, adequate and current. Member States must also ensure that the beneficial ownership information register is readily accessible to competent authorities without restrictions, obliged entities within the due diligence framework and any person or organisation who can demonstrate a legitimate interest. The Consultation Paper asked for feedback on the level of access to the register for corporate and other entities and further asked whether access should be extended to the public at large. It also asked for views as to whether beneficial owners should be required to apply, on a case-by-case basis, to restrict access to certain information and, if so, what circumstances and information could be

restricted.

- *Beneficial ownership register trusts* – Under the Fourth AML Directive Member States are required to hold trust-related information in a central register where the trust generates tax consequences, with the Revenue Commissioners indicating its openness to being the body to maintain such a register. The Consultation Paper suggested that evidence of the generation of a tax consequence could be the receipt by the trustees of income or capital gains, disposal of income or capital assets by the trust and/or the movement of funds by the trust. The Consultation Paper asked for feedback on the registration requirements for trusts and on the list of tax consequences, as well as any other views on how this article may be transposed.

The Consultation Paper also asked for views on other areas of the Fourth AML Directive such as the ability to exempt certain gambling services from AML/CFT laws, the discretion to allow certain obliged entities not apply customer due diligence measures, the discretions available in relation to due diligence carried out in high risk jurisdictions by wholly owned subsidiaries of entities established in the EU and the appointment of a central contact point for e-money issuers.

The Consultation Paper can be accessed at the following link:

http://www.finance.gov.ie/sites/default/files/AMLD National Discretions Consultation Paper.pdf

The deadline for responses to the Consultation Paper was 4 March 2016. The responses are currently being considered by the Departments.

(iv) Commission establishes Action Plan for strengthening the fight against terrorist financing

On 2 February 2016 the Commission published its action plan aiming to strengthen the fight against terrorist financing (the "**Action Plan**"). The Action Plan seeks to prevent the movement of terrorism-derived funding and aims to target the sources of terrorist funding. It also comments on the international dimension to terrorism and the need for the EU to be an active player on the international scene in the fight against terrorist financing to include closer cooperation with third countries in identifying terrorist entities and being at the forefront of international forums on the issue of terrorist financing.

In order to better prevent the movement of funds and identify terrorist financing, the Action Plan proposes certain amendments to the Fourth AML Directive, as follows:

- *Concrete effect to the EU "list of high risk third countries*" – Under the Fourth AML Directive, where a country is listed as having strategic deficiencies in the area of AML or CTF, EU obliged entities will have to apply enhanced due diligence measures, however the exact nature of these measures is not currently specified.

The Action Plan recommends clarifying the obligation in respect of applying the enhanced due diligence measures.

- *Virtual currency exchange platforms* – Virtual currencies are not currently regulated at EU level and lack the reporting mechanism currently found in the mainstream banking system to report suspicious activity. On this basis, the Action Plan seeks to bring the anonymous currency exchanges under the control of competent authorities by extending the scope of the Fourth AML Directive to include virtual currency exchange platforms.

- *Prepaid instruments* –The Commission is currently considering how to address the concerns raised by the anonymity of such general purpose cards without eliminating the benefits that they offer in their normal day-to-day use. The Commission stated that it will present further changes to the Fourth AML Directive, which could focus in particular on reducing existing exemptions such as thresholds below which identification is not required, notably for cards used face-to-face, and requiring customer identification and verification at the time of online activation of the prepaid cards. The Commission is currently exploring the detailed design of such measures, taking into account their impact and the need for proportionality.

- *Centralised bank and payment account registers and central data retrieval systems* – The Commission proposes amending the Fourth AML Directive to ensure that each Member State must establish centralised bank and payment accounts registers or electronic data retrieval systems as, currently, Member States are not bound by EU legislation to maintain such registers or retrieval systems.

The Commission has also said in the Action Plan that it will adopt an EU blacklist to identify high risk third countries with strategic deficiencies in their AML/CTF by the second quarter of 2016 at the latest. It also said that it will publish a report on a supranational assessment of ML and TF risks and recommendations to Member States on measures suitable to address those risks by the second quarter of 2017.

The full Action Plan can be found by accessing the following link:

https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-50-EN-F1-1.PDF

Data Protection

(i) European Data Protection Supervisor: EU Institutions making steady progress

A report was published on 21 January 2016 by the European Data Protection Supervisor (the "**EDPS**"), entitled "*Measuring compliance with data protection rules in EU institutions*", (the "**Report**") on the levels of compliance by EU institutions with data protection

obligations and privacy principles across EU services. In general, the Report found evidence of high levels of compliance among the EU institutions.

The Report is based on a survey conducted by the EDPS, issued to 61 EU institutions, on the state of registers and inventories which contain information on each operation involving the processing of personal data. Other areas addressed by the survey included data transfers to non-EU countries and how data protection officers are involved in the development of new processing operations.

The full Report can be accessed at the following location:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Inquiries/2016/16-01-21_Report_Survey_2015_EN.pdf

(ii) Data Protection Commissioner (the "DPC") outlines priorities for 2016

At the National Data Protection Conference held on 28 January 2016, the DPC outlined the priorities for the upcoming year. These priorities build on the work completed in 2015 and address the challenges which the DPC expects to face in 2016.

The priorities for 2016 include:

- *Resource expansion* – A key issue for the DPC is the expansion of resources, involving the recruitment of more staff such as lawyers, audit staff, a new communications director and call centre staff. It also includes moving the office of the DPC to new premises within Dublin city centre. The aim with the expansion of resources is to improve the performance and quality of response by the DPC.

- *Guidance and DPC website* – A new DPC website and more streamlined guidance were listed as two areas which will be focused on by the office of the DPC in 2016.

- *Challenges faced by big data* – The DPC highlighted the need to ensure that the development of big data was matched with adequate monitoring to ensure that the collection and processing of data would not breach the rights of the subjects. Health data was also highlighted by the DPC as a new area requiring monitoring, due to the growth in wearable health technology and mobile applications.

- *Social media* – An area which has been the subject of focus over the past number of years, the DPC mentioned the consultation carried out with Facebook and the recommendations which followed, including cross-device opt-outs and data subject access requests.

- *WiFi tracking* – Noting that guidance from the Article 29 Working Party was imminent, the DPC discussed the area of WiFi tracking which involves data subjects connecting

to WiFi networks and providing data which can then be combined with smart video analysis to allow for high level analytics to be carried out.

- *Special Investigations Unit* – Within the office of the DPC, a new special investigations unit has been established to investigate and prosecute for data legislation breaches. It also assists the Office of the Information Commissioner in the United Kingdom.

- *Security* – The DPC talked about security and the necessity of having effective security surrounding the processing of data. It was highlighted that encryption is not solely the answer to resolving security issues, but it must be used in the right manner, at the right time and during the entire course of the data retention.

While the above were the specific issues highlighted as areas on which it would focus during 2016, the DPC also spoke of the General Data Protection Regulation (5455/16) and the work being carried out by the office of the DPC in preparation for its implementation, once it has been adopted by the Council and approved by the European Parliament.

(iii) Notice 2016/C 33/01

On 28 January 2016, a notice from the European Data Protection Supervisor (the "**EDPS**") on establishing an external advisory group on the ethical dimensions of data protection (the "**Notice**") was published in the Official Journal of the EU.

The Notice establishes an external advisory group on the ethical dimensions of data protection (the "**Advisory Group**") whose tasks shall include:

- An analysis of the ethical dimensions of data protection;

- Submitting recommendations to the EDPS upon request;

- Producing at least two public reports;

- Submitting research suggestions;

- Including experts in its work where experts can bring additional knowledge and experience; and

- Presenting assumptions to a critical audience in order to receive feedback on the research it carries out.

The Advisory Group will sit for a two year period from 1 February 2016 to 31 January 2018 and will consist of six members with considerable background experience in the area of the ethical dimension of data protection, appointed by the EDPS, with a chair appointed from the six members. No remuneration will be received for carrying out the work of the Advisory Group except for certain expenses and members of the public have access to the documents produced by the Advisory Group in accordance with Regulation (EC) 1049/2001.

A copy of the Notice can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:033:FULL&from=EN

(iv) The European Commission Releases EU-US Privacy Shield

Following the European Court of Justice ruling in October 2015, that the Safe Harbour framework was invalid, the Commission published the texts of the replacement EU-US Privacy Shield (the "**Privacy Shield**") on 29 February 2016. The Commission also made public a draft adequacy decision (allowing for the transfer of EU citizens' data outside of the EU) including the Privacy Shield Principles companies have to abide by, as well as written commitments by the US Government (to be published in the US Federal Register) on the enforcement of the arrangement.

The main aim of the new Privacy Shield is to safeguard the data on EU citizens by providing greater transparency in the transfer of their data to the US as well as placing stronger obligations on US companies to protect the data. The US Department of Commerce (the "**DoC**") and Federal Trade Commission (the "**FTC**") are required to carry out stronger monitoring on US entities and work more closely with European Data Protection Authorities to ensure that the Privacy Shield is being properly implemented.

The Privacy Shield involves US companies registering to be on the Privacy Shield list, following which they will self-certify annually that they comply with the relevant data protection requirements. They will also display their privacy policies prominently on their websites. The DoC monitors the compliance of US companies with the Privacy Shield on an ongoing basis and can remove companies from the Privacy Shield list should it find that companies are not complying in practice with the Privacy Shield, for example, where privacy policies displayed on US companies' websites are not in line with the Privacy Shield principles. The FTC has a civil law enforcement authority to promote consumer protection and competition across the US so will be in charge of enforcement of the Privacy Shield.

A key benefit to EU citizens under the Privacy Shield is in respect of redress which they can seek, both cost and ease benefits. Under the Privacy Shield, any EU citizen has the following redress options available to them:

- *Complain directly to the company* – Companies will then have 45 days within which they must respond to the complaint.

- *Alternative Dispute Resolution* – Available free of charge to complainants, companies which register to be on the Privacy Shield list must designate a body either in the US or the EU to handle and resolve any complaints made against them.

- *Ombudsman mechanism* – An ombudsman mechanism, independent but located within the US Department of State, will follow-up complaints and enquiries by individuals and inform them whether the relevant laws have been complied with. This follows the US government giving the EU written assurance from the Office of the Director of National Intelligence that any access of public authorities for national security purposes will be subject to clear limitations, safeguards and oversight mechanisms, preventing generalised access to personal data.

- *Arbitration* – As a last resort, where other means have failed to resolve the dispute, complainants can engage the arbitration mechanism. This consists of a Privacy Shield Panel who can take binding decisions against US companies self-certifying on the Privacy Shield list.

The Judicial Redress Act passed on 10 February 2016, together with the Privacy Shield, provides an additional redress option for EU citizens. It allows for non-US citizens to take private action in US courts for alleged misuse of their personal data.

An annual review of the functioning of the Privacy Shield will take place between the Commission and the DoC, including the commitments and assurance as regards access to data for law enforcement and national security purposes. A public report will then be presented by the Commission to the European Parliament and Council on foot of the joint review. It is also envisaged to hold a privacy summit on an annual basis with NGOs and relevant stakeholders on developments in US privacy law and the impact it has on EU citizens.

The next step in the implementation of the Privacy Shield involves an Article 29 Working Party, consisting of representatives of EU Member States' data protection agencies, reviewing the legal texts of the Privacy Shield and assessing whether they meet the requirements of EU data protection law. On the US side, the necessary preparations are currently being made for the framework to implement the Privacy Shield.

For more information on the EU-US Privacy Shield, please see the following link:

http://europa.eu/rapid/press-release_IP-16-433_en.htm

(v) European Commission publish EU-US Privacy Shield FAQ document (the "FAQ")

On 29 February 2016, in conjunction with the publication of the EU-US Privacy Shield, the Commission issued the FAQ to assist stakeholders understanding and to address any queries arising in respect of the Privacy Shield.

The FAQ addresses, inter alia, the following issues:

- The main differences between the old Safe Harbour arrangement and the Privacy Shield;
- How the Privacy Shield will operate in practice;
- How Europeans can get redress in the US in the event their data is misused by commercial companies
- The role of the Ombudsperson mechanism;
- The role of the Judicial Redress Act; and
- The EU-US data protection "Umbrella Agreement".

A copy of the FAQ is available at the following link:

http://europa.eu/rapid/press-release_MEMO-16-434_en.htm

Irish Stock Exchange

(i) ISE publish review of 2015

On 20 January 2016 the ISE published a review of the year 2015 (the **"Review"**). The Review highlighted a successful year for the ISE and its markets. There are currently in excess of 34,300 securities listed from over 80 countries on its markets, and the ISE is now ranked first for listing bonds and investment funds worldwide with 551 new issuers joining the ISE's debt markets in 2015.

Companies trading on the ISE raised €3,124 million in equity funds from international investors during 2015. Four initial public offerings ("**IPOs**"), from a range of sectors including life sciences, retail, banking and technology, raised in excess of €980 million.

Additionally, equity trading experienced growth of 26% in 2015 with in excess of 5.6 million equity trades carried out on the ISE's Main Securities Market and Enterprise Securities Market.

The ISEQ Index stood at 6,792, up 30% during the year and was one of the best performing indices in Europe, having doubled in value over the past three years. The ISEQ 20 (representing the 20 most liquid and largest companies on the ISE) rose by over 30.7% throughout the year and has experienced a growth of 105% over the previous three years.

A copy of the Review is available at the following link:

http://www.ise.ie/Media/News-and-Events/2016/Irish-Stock-Exchange-year-in-review-2015-infographic-pdf.pdf

Alternative Investment Management Association ("AIMA")

(i) AIMA publish new guide to operational risk management for asset management firms

On 10 February 2016 AIMA published a new guide to operational risk management for asset management firms (the "**Guide**"). This is the first time that AIMA has produced a Guide covering all aspects of operational risk (previously, AIMA guides only focused on certain, specific areas of operational risk).

The purpose of the Guide is to identify the risks that an investment manager has to contend with on a day-to-day basis in order to ensure that the risks are adequately addressed. The Guide includes information on risks such as trading, execution and market manipulation risks, post-trading risks, counterparty risks, business conduct and reputational risks, technology and cyber security risks, business continuity and disaster recovery risks, internal and external fraud and financial crime prevention, outsourcing risks, communication risks, financial risks and insurance. Also included in the Guide is an appendix to assist emerging managers with key considerations in respect of the top organisational risk management challenges.

The full Guide is available to AIMA members at the following link:

http://www.aima.org/en/utilities/no-access.cfm/restrictedGRAid/1F6EC11D-F867-4D95-923FC1DFDA71F8F1/objectsStore/gsp_operational_risk_management_-_2016_final.pdf

Dillon Eustace
April 2016

CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 667 0022
Fax: +353 1 667 0042

Cayman Islands

Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022
Fax: +1 345 945 0042

New York

245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

E-mail: enquiries@dilloneustace.ie
Website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the Regulatory and Compliance team members below.

Breeda Cunningham
E-mail:
breeda.cunningham@dilloneustace.ie
Tel : + 353 1 673 1846
Fax: + 353 1 667 0042

Valerie Bowens
E-mail: valerie.bowens@dilloneustace.ie
Tel : + 353 1 673 1846
Fax: + 353 1 667 0042

Michele Barker
E-mail: michele.barker@dilloneustace.ie
Tel : + 353 1 673 1886
Fax: + 353 1 667 0042

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