Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 October 2017 – 31 December 2017

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INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

MiFID II - Irish Developments

(i) Revised Central Bank Q&A on Investment Firms

On the 6 October 2017, the Central Bank of Ireland ("**Central Bank**") published the third edition of the Central Bank Investment Firms Q&A. This incorporates new questions ID 1026 to ID 1031:

- In question and answers ID 1026 and ID 1027, the Central Bank confirms that it will not delay the implementation of Directive 2014/65/EU ("**MiFID II Directive**") into Irish law beyond 3 January next and that it expects all investment firms to be MiFID II compliant by that date;

- In question and answers ID 1029, the Central Bank advises that it is for ESMA to determine if the existing Guidelines will remain in force after MiFID II enters into force on 3 January 2018;

- In question and answers ID 1030, the Central Bank advises that it has published a Brexit FAQ on its website which sets out it approach in relation to investment firms seeking to re-locate to or otherwise establish operations in Ireland as a result of the UK's decision to exit the European Union; and

- In question and answer ID 1031, the Central Bank provides some clarity on what constitutes a "local firm" for the purposes of Article 4(1)(4) of the Regulation (EU) No 575/2013 (the "**Capital Requirements Regulation**" or "**CRR**").

A copy of the Central Bank's Investment Firms Q&A can be found here.

(ii) Central Bank publishes Feedback from Consultation Paper 111 on the Second Edition of the Central Bank Investment Firms Regulations

On 20 November 2017, the Central Bank published its Feedback statement on Consultation Paper 111 ("**CP 111**").

CP 111 concerned certain proposed changes to the Central Bank Investment Firms Regulations (S.I. No. 60 of 2017) including certain changes arising from the European Union (Markets in Financial Instruments) Regulations 2017 (S.I. No. 375 of 2017) (the "**MiFID II Irish Regulations 2017**"). The proposed changes are summarised below:

- MiFID II necessitated changes to the Client Asset Regulations 2015 ("**CAR**");

- Integration of CAR into the Central Bank Investment Firms Regulations in line with CP 97;

- Integration of the Investor Money Regulations (S.I. No. 105 of 2015) as amended in 2016 ('**IMR**') into the Central Bank Investment Firms Regulations;

- Integration of the Central Bank rules in relation to the capital requirements applied to market operators as set out in the Central Bank's feedback statement on CP 101; and

- Some other consequential changes to the existing Central Bank Investment Firms Regulations to address matters arising since the first edition of the Central Bank Investment Firms Regulations became operational and certain changes arising out of MiFID II (including certain technical amendments in relation to the regulatory requirements applied to Fund Administrators).

In the Feedback Statement, the Central Bank indicates that it expects to publish the new edition of the Central Bank Investment Firms Regulations in advance of the MiFID II implementation deadline of 3 January 2018. The Central Bank has indicated that CAR and IMR will remain in force and effect until replaced by the Regulations. The final Regulations will have further technical and structural changes, including those required to align with other Central Bank Rulebooks where appropriate.

A copy of the Feedback Statement can be found here.

(iii) Central Bank publishes Consultation Paper 116 on proposed changes to inducement rules for intermediaries

On 22 November 2017, the Central Bank published Consultation Paper 116 "Intermediary Inducements Enhanced Consumer Protection Measures" ("**CP 116**") proposing new consumer protection measures which will apply in the area of inducements paid to financial intermediaries.

The measures will require investment firms to avoid conflicts of interest that are created by poorly designed inducement arrangements. The measures will be made through specific proposed amendments to the Consumer Protection Code 2012 (the "**Code**"). The proposed measures include:

- Clarity on what constitutes acceptable inducements;

- Further guidelines to provide explicitly that certain inducements are deemed to give rise to a conflict of interest and, therefore, must be avoided;

- Clarity about what constitutes 'independence'; and

- Guidelines concerning transparency of remuneration arrangements.

Submissions to the consultation paper, along with comments and queries, can be emailed to consumerprotectionpolicy@centralbank.ie. The closing date for submissions on 22 March 2018.

A copy of the consultation paper can be found here.

MiFID II - European Developments

(i) ESMA publishes official translations of guidelines on transaction reporting, order record keeping and synchronisation under MiFID/ MiFIR

On 2 October 2017, the European Securities and Markets Association ("**ESMA**") published the official EU language versions of its guidelines which relate to the submission of transaction reports and order record keeping under the Markets in Financial Instruments Regulation (Regulation 600/2014) ("**MiFIR**") and clock synchronisation under the MiFID II Directive.

The guidelines apply from 3 January 2018 to investment firms, trading venues, approved reporting mechanisms ("**ARMs**") and national competent authorities ("**NCAs**"). An accompanying press release states that NCAs must notify ESMA within two months whether they comply or intend to comply with the guidelines.

The official EU language versions of the guidelines can be found here.

The press release can be found here.

(ii) ESMA publishes instructions on accessing the Financial Instruments Reference Data System

On 6 October 2017, ESMA published instructions concerning the Financial Instruments Reference Data System ("**FIRDS**"). The ESMA instructions contain: (i) a description of the reference data files generated by the FIRDS system; and (ii) instructions on how to download the full and delta reference data files from the ESMA website.

FIRDS will cover the reference data collection and publication requirements under both MiFIR and the Regulation on Market Abuse (Regulation EU No.596/2014) ("**MAR**"). Under Article 27 of MiFIR, firms operating regulated markets, multilateral trading facilities, organised trading facilities and systematic internalisers are required to report reference data for instruments traded on their venues or platforms to their home regulators on a daily basis.

Copy of the instructions can be found here.

(iii) Commission Delegated Regulation exempting certain third countries' central banks from pre and post-trade transparency requirements published in the Official Journal of the EU

On 7 October 2017, Commission Delegated Regulation (2017/1799/EU) which supplements MiFIR as regards the exemption of certain third countries' central banks in their performance of monetary, foreign exchange and financial stability policies from pre- and post-trade transparency requirements was published in the Official Journal of the EU (the "**OJ**").

The Commission Delegated Regulation entered into force on 27 October 2017 and will apply from 3 January 2018.

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

(iv) ESMA highlights MiFID II and Brexit preparations as key issues in speech

On 9 October 2017, ESMA published a speech given by Mr. Steven Maijoor, ESMA Chair, to the European Parliament's Economic and Monetary Affair Committee ("**ECON**") as part of the annual hearing of the chairs of the three European Supervisory Authorities ("**ESAs**").

In the speech, Mr. Maijoor highlighted ESMA's work in preparation for the implementation of the MiFID II Directive and MiFIR and the United Kingdom's withdrawal from the European Union. In particular:

- Mr. Maijoor highlighted ESMA's readiness to operate within the MiFID II framework by the implementation deadline of 3 January 2018. However, Mr. Maijoor noted that the size and complexity of the project should not be underestimated and there is a risk of potential glitches in the initial operational period;

- Mr. Maijoor noted that ESMA has been looking closely at areas where Brexit could mean higher risks for investors and markets as a whole. ESMA is working on possible mitigating actions alongside other relevant authorities. Further ESMA has requested Brexit contingency plans from certain entities supervised by ESMA which are headquartered in London; and

- Mr. Maijoor noted that Brexit has triggered broader political discussions as to whether the current third country equivalence model is fit for its purpose. Mr. Maijoor also welcomed the proposals whereby ESMA will be assigned certain supervisory powers over third country CCPs and central counterparties.

Concluding, Mr. Maijoor referred to one particular aspect of the capital markets union ("**CMU**") namely reporting and data collection. Mr. Maijoor highlighted that ESMA has put significant resources into building various reporting systems and that ECON believes that this will benefit ESMA's risk analysis work.

A copy of the speech can be found here.

(v) ESMA highlights importance of legal entity identifier for MiFID II compliance

On 9 October 2017, ESMA published a briefing on the legal entity identifier ("**LEI**").

The briefing explained the role which the LEI will play in the new harmonised data-reporting regime under MiFID II. The briefing also clarifies which entities can apply for an LEI and it explains why the LEI is important and how an LEI can be obtained.

In the briefing, ESMA advised that reporting entities should not delay in addressing the MiFID II reporting requirements as advance preparation will help in avoiding backlogs and will help ensure that all market participants are ready for the new regime which applies from 3 January 2018.

A copy of the briefing can be found here.

A copy of the accompanying press release can be found here.

(vi) ESMA publishes Q&As on MiFID II and MiFIR post-trading issues

On 10 October 2017, ESMA published a questions and answers document ("**Q&As**") on post-trading issues under the MiFID II Directive and MiFIR.

The Q&As currently includes only one question and answer. This relates to pre-waiver checks in the context of straight through processing.

A copy of the Q&As on post-trading issues can be found here.

(vii) European Commission and CFTC announce a common approach to certain derivatives trading venues

On 13 October 2017, the European Commission and the US Commodity Futures and Trading Commission ("**CFTC**") announced a common approach to certain derivatives trading venues.

Under the common approach, it is intended that EU counterparties will be able to comply with their trading obligations under MiFIR by executing mandated derivatives on CFTC-authorised swap execution facilities ("**SEFs**") or designated contract markets ("**DCMs**") as well as on EU authorised trading venues. Similarly, US counterparties will be able to comply with their trade execution requirement under the Commodity Exchange Act ("**CEA**") by executing swaps on certain EU authorised trading venues, that are exempt from SEF registration, as well as on SEFs and DCMs.

A copy of the joint statement can be found here and a copy of the press release can be found here.

(viii) ESMA updates FAQs on transitional transparency calculations under MiFID II

On 18 October 2017, ESMA published an updated version of its FAQs on transitional transparency calculations for non-equity instruments under MiFIR and the MiFID II Directive. The FAQs address certain questions and answers as regards the transitional transparency calculations ("**TTCs**") and data availability. It also addresses certain questions and answers as regards the structure of the TTC files and the data included in the TTC Files.

A copy of the FAQs can be found here.

(ix) ESMA publishes nine opinions on MiFID II position limits proposed by Financial Conduct Authority

On 24 October 2017, ESMA published nine opinions on position limits that agrees with the position limits proposed by the Financial Conduct Authority ("**FCA**") regarding commodity derivatives under the MiFID II Directive and MiFIR. The nine opinion position limits concern london cocoa, robusta coffee, ICE white sugar, aluminium, copper, lead, nickel, tin and zinc.

ESMA also published a list of liquid contracts that will receive custom position limits and ESMA will continue to assess reports and issue opinions as needed, to ensure that the position limits are set in accordance with the MiFID II framework.

A copy of the list of liquid contracts can be found here.

A copy of the accompanying press release can be found here.

(x) European Commission publishes FAQs concerning MiFID II and the interaction with third country broker-dealers

On 26 October 2017, the European Commission published guidance in the form of Frequently Asked Questions ("**FAQs**") concerning MiFID II and the interaction with third country broker-dealers.

In the FAQs, the European Commission states that it is aware of the concerns of MiFID firms when they seek out brokerage and research services from broker-dealers in non-EU countries. It further states in the FAQs that it understands the need to ensure that MiFID II Portfolio Managers and their Third Country Sub-Advisors "can continue to access research and execution services from third country broker-dealers".

In order to facilitate these aims, the FAQs clarify the following in respect of brokerage and research services provided by broker-dealers in non-EU countries:

- Question and Answer 1: The European Commission is of the view that one single "bundled" payment may be made by a MiFID portfolio manager (or its third country sub-

advisor) to a third country broker dealer which comprises of: (i) payments for research; and (ii) payments for execution; as long as the payment attributable to the research can be identified (as further detailed in the FAQs).

- Question and Answer 2: The European Commission is of the view that if a separate research invoice is not issued by the third country broker-dealer (as contemplated by Article 13(9) of Commission Delegated Directive 2017/593), the MiFID firm (or its third country sub-advisor) may consult with the relevant broker dealer to determine the portion of the charge which is attributable to the research provided. The FAQs further state that the supply of and charges for those benefits or services shall not be influenced or conditioned by levels of payment for execution services.

In a related development, the U.S. Securities and Exchange Commission announced on 26 October 2017 that it was granting the so-called "no action relief" to US firms as a temporary measure for 30 months from 3 January 2018. This measure facilitates compliance with the new MiFID II research provisions while respecting the existing U.S. regulatory structure. It is intended to allow US broker dealers and other US investment firms to accept direct payments for research without it being considered investment advice.

A copy of the FAQ can be found here.

A copy of the SEC press release can be found here.

(xi) FIA and EFET publish an industry standard to facilitate position reporting under MiFID II

On 3 November 2017, the Futures Industry Association ("**FIA**") and the European Federation of Energy Traders ("**EFET**") published a common outline for commodity derivatives position reporting under MiFID II by trading venues to national competent authorities ("**NCA**").

A copy of the press release can be found here.

A copy of the FIA and EFET schema can be found here.

(xii) ESMA publishes consultation paper clarifying the systematic internalisers' ("SIs') quote obligations under MiFID II

On 9 November 2017, ESMA published a consultation paper concerning possible amendments to the RTS contained in Commission Delegated Regulation (EU) 2017/587. The RTS therein concerns transparency requirements in respect of certain equity and equity-like like financial instruments and transaction execution obligations in respect of certain shares on a trading venue or by an SI ("**RTS 1**").

The consultation paper outlines additional possible amendments to RTS 1 which will allow for more consistent and unambiguous application of its provisions, particularly as regards the concept of "prices reflecting prevailing market conditions" as referred to in RTS 1.

The consultation closes on 25 January 2018.

A copy of the consultation paper can be found here.

(xiii) Technical standards under MiFID II enter into force on 15 November 2017

The following technical standards under MiFID II entered into force on 15 November 2017 and apply from 3 January 2018:

- Commission Delegated Regulation (EU) 2017/1946 of 11 July 2017 with regard to RTS on an exhaustive list of information to be included by proposed acquirers in the notification of a proposed acquisition of a qualifying holding in an investment firm. A copy of the Commission Delegated Regulation can be found here.

- Commission Implementing Regulation (EU) 2017/1944 of 13 June 2017 laying down the ITS with regard to standard forms, templates and procedures for the consultation process between relevant competent authorities in relation to the notification of a proposed acquisition of a qualifying holding in an investment firm. A copy of the Commission Implementing Regulation can be found here.

- Commission Delegated Regulation (EU) 2017/1943 of 14 July 2017 with regard to RTS on the information and requirements for the authorisation of investment firms. A copy of the Commission Delegated Regulation can be found here.

- Commission Implementing Regulation (EU) 2017/1945 of 19 June 2017 laying down ITS with regard to notifications by and to applicant and authorised investment firms. A copy of the Commission Implementing Regulation can be found here.

(xiv) Commission Delegated Regulations on indirect clearing arrangements published in OJ

The following Commission Delegated Regulations on indirect clearing arrangements under EMIR and MiFIR were published in the OJ on 21 November 2017:

- Commission Delegated Regulation (EU) 2017/2154 of 22 September 2017 supplementing MiFIR regarding RTS on indirect clearing arrangements; and

- Commission Delegated Regulation (EU) 2017/2155 of 22 September 2017 amending EMIR with regard to RTS on indirect clearing arrangements.

The Commission Delegated Regulations on indirect clearing arrangements entered into force on 11 December 2017.

A copy of Commission Delegated Regulation (EU) 2017/2154 can be found here.

A copy of Commission Delegated Regulation (EU) 2017/2155 can be found here.

(xv) Delegated Regulation supplementing MiFIR on the treatment of package orders published in the OJ

On 28 November 2017, Delegated Regulation (EU) 2017/2194 supplementing MiFIR with regard to the treatment of package orders was published in the OJ. It entered into force on 18 December 2017 and applies from 3 January 2018.

A copy of the Delegated Regulation can be found here.

(xvi) ESMA publishes final report on peer review of MiFID compliance function guidelines

On 29 November 2017, ESMA published its final report on the peer review on the guidelines on certain aspects of the compliance function requirements under MiFID. The aim of the peer review is to enhance supervisory convergence in the application of the guidelines and help national competent authorities ("**NCAs**") with their supervisory approach towards the compliance function.

The assessment group ("**AG**") concluded that there is a high level of compliance with the guidelines among NCAs, but found some diversity in the approaches applied by NCAs. The report contains the good practices recommended by the AG including:

- Formal pre-approval or pre-screening (including interviews) of compliance officers by NCAs;
- Issue by NCAs of annual compliance questionnaires seeking information from the firm or the compliance function;
- Issue by NCAs of guidelines which are incorporated into their local supervisory framework; and
- Completion by NCAs of on-site visits to assess a firm's compliance function shortly after the firm's authorised.

Under the peer review ESMA will conduct a follow up review with the relevant NCAs that scored insufficiently compliant and partial compliance.

A copy of the report can be found here.

(xvii) Implementing Decision recognising certain US trading venues under MiFIR published in the OJ

On 5 December 2017, the European Commission adopted Implementing Decision 2017/2238 on the equivalence of the legal and supervisory framework applicable to designated contract markets ("**DCMs**") and swap execution facilities ("**SEFs**") in the US.

The Implementing Decision was published in the OJ on 6 December 2017.

Article 28(4) of MiFIR requires that certain derivative contracts may only be traded on specified trading venues. These must be either: (a) EU venues; or (b) third-country trading venues that the European Commission has recognised as equivalent to those imposed by EU venues.

A copy of the Implementing Decision can be found here.

(xviii) ESMA publishes transitional transparency calculations for equities and bonds

On 6 December 2017, ESMA published transitional transparency calculations ("**TTC**") for equity and bond instruments. In addition, ESMA also published Q&As required under the MiFID II Directive and MiFIR, together with a briefing note on ESMA data systems for MiFID II and the Market Abuse Regulation ("**MAR**").

A copy of the transitional transparency calculations can be found here.

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

A copy of the briefing note can be found here.

(xix) Delegated Regulation amending MiFID II systematic internaliser definition published in the OJ

On 13 December, 2017, Delegated Regulation (EU) 2017/2294 (which amends Delegated Regulation (EU) 2017/565 concerning the definition of systematic internalisers for the purposes of the MiFID II Directive) was published in the OJ.

The amending Delegated Regulation entered into force 14 December 2017 and will apply from 3 January 2018.

A copy of the amending Delegated Regulation (EU) 2017/2294 can be found here.

(xx) Implementing Decisions recognising certain third-country equities markets under MiFID II published in the OJ

On 13 December 2017, the European Commission adopted Implementing Decisions on the equivalence of the legal and supervisory framework in three third countries applicable to financial markets in accordance with the MiFID II Directive:

- **Australia**

  A copy of the Commission Implementing Decision and the Annex that specifies the relevant financial markets can be found here;

- **Hong Kong**

  A copy of the Commission Implementing Decision and the Annex that specifies the relevant recognised exchange companies can be found here; and

- **United States of America**

  A copy of the Commission Implementing Decision and the Annex that specifies the relevant national securities exchanges can be found here.

On 14 December 2017, the Implementing Decisions were published in the OJ.

(xxi) ESMA publishes opinion on position limits on ICE Brent Crude contracts

On 15 December 2017, ESMA published an opinion (dated 7 December 2017) on ICE Brent Crude contracts. The opinion states that the position limits comply with the methodology established in the Commission Delegated Regulation (EU) 2017/591 and are consistent with the objectives of Article 57 of the MiFID II Directive.

The Commission Delegated Regulation (EU) 2017/591 (RTS 21) can be found here.

A copy of the opinion can be found here.

(xxii) ESMA publishes a table overview of MiFID II deferral regimes

On 15 December 2017, ESMA published a table providing an overview of the status of different member states implementation regimes relating to deferred publication of trade data under the MiFIR.

In a related press release, ESMA explains that MiFIR provides a number of options to NCAs in the context of deferred publication of trade data.

A copy of the table can be found here.

A copy of the press release can be found here.

(xxiii) ESMA publishes revised opinions on transactions on third-country trading venues for post-trade transparency and position limits under MiFID II and MiFIR

On 15 December 2017, ESMA published revised opinions on transactions on third-country trading venues for post-trade transparency and position limits under both MiFID II and MiFIR.

By way of background, ESMA originally published the opinions in May 2017 on transactions on third-country trading venues for post-trade transparency and position limits under both MiFID II and MiFIR. The original opinions specified that, subject to third-country trading venues meeting a set of criteria, investment firms trading on those trading venues are not required to make transactions public in the EU via an approved publication arrangement ("**APA**"). Similarly, commodity derivatives contracts traded on those trading venues are not considered as economically equivalent over-the-counter ("**EEOTC**") contracts for the purpose of the position limit regime.

As ESMA will not be able to assess all 200 trading venues ahead of the application of MiFID II on 3 January 2018, the revised opinions provide (as an interim measure pending the completion of the ESMA assessments) that transactions on third-country trading venues do not need to be made post-trade transparent and positions held in those third-country venue contracts are not considered to be EEOTC contracts.

A copy of the revised opinion on transactions on third-country trading venues for post-trade transparency under MiFIR can be found here.

A copy of the revised opinion on third-country trading venues for the purpose of position limits under the MiFID II can be found here.

ESMA also published an accompanying press release which can be found here.

(xxiv) ESMA published its final report on RTS on European Single Electronic Format

On 18 December 2017, ESMA published its final report on the draft regulatory technical standards on the European Single Electronic Format ("**ESEF**"). The ESEF is the format that issuers with securities listed on regulated markets will prepare annual financial reports for financial years beginning on or after 1 January 2020.

The final report is with the European Commission for review. The European Commission has three months to decide whether to accept or reject the RTS.

ESMA has also published a reporting manual with detailed instructions to issuers to facilitate the implementation of the RTS.

A copy of the final report can be found here.

A copy of the related press release can be found here.

(xxv) ESMA issues revised procedure and templates for trading halts under MiFID

On 19 December, 2017, ESMA issued a revised procedure and template to be used by national competent authorities for the purpose of reporting the parameters used by trading venues for halting trading under MiFID.

A copy of the revised procedure and template can be found here.

(xxvi) Implementing Regulation on ITS on standard forms, templates and procedures for the transmission of information published in OJ

On 20 December 2017, the Implementing Regulation specifying the ITS with regard to the standard forms, templates and procedures for the transmission of information under the MiFID II Directive concerning notifications relating to passporting was published in the OJ.

The Implementing Regulation entered into force on 21 December 2017. It applies from 3 January 2018.

A copy of the Implementing Regulation can be found here.

(xxvii) European Commission adopts equivalence decision on Swiss share trading venues

On 21 December 2017, the European Commission adopted an Implementing Decision ("**Decision**") on the equivalence of the legal and supervisory framework applicable to stock exchanges (SIX Swiss Exchange and BX Swiss) in Switzerland in accordance with the MiFID II Directive together with an annex. The Decision provides that the European Commission recognises these Swiss trading venues as eligible for compliance with the trading obligation for shares set out in MiFID II and MiFIR.

Article 23 of MiFIR requires investment firms to trade shares on a trading venue in the EU or an equivalent third-country venue assessed by the European Commission as equivalent in accordance with Article 25(4) of the MiFID II Directive.

The recitals set out in the Decision provide that the European Commission has carried out such an equivalence assessment in respect of the Swiss stock exchanges. Details of the assessment carried out by the European Commission are outlined in the recitals.

In the accompanying press release, Valdis Dombrovskis the Vice President for Financial Stability, Financial Services and Capital Markets Union, said: "With today's decision, we are ensuring continuity for businesses and markets. Even after 3 January, Swiss operators will continue enjoying access to the EU market, and EU investment firms will be able to trade shares in Switzerland. This equivalence is limited to one year, and can be extended provided there is sufficient progress on a common institutional framework. We will be assessing progress on that by end of next year."

The Decision was published in the Official Journal of the EU on 23 December 2017 and came into force on 24 December 2017.

A copy of the Implementing Decision can be found here while a copy of the annex can be found here. The accompanying press release can be found here.

(xxviii) Delegated Regulation relating to trading obligation for derivatives under MiFIR published in the OJ

Delegated Regulation (EU) 2017/2417 supplementing MiFIR with regard to RTS on the trading obligations for certain derivatives was published in the OJ on 22 December 2017.

The Delegated Regulation identifies certain interest rate swaps ("**IRS"**) and index credit default swaps ("**CDS"**) that should be subject to the trading obligation under MiFIR.

A copy of the Delegated Regulation can be found here.

The Delegated Regulation will apply from 3 January 2018.

(xxix) ESMA publishes updated key transparency calculations for MiFID II/MiFIR

On 22 December 2017, ESMA updated its Frequently Asked Questions ("**FAQs**") on transitional transparency calculations ("**TTC**") for equity and bond instruments required under the MiFID II Directive and MiFIR.

An accompanying press release sets out that the updated FAQs mainly reflect changes in the classification of the instruments and the related parameters, and resubmission of data by some trading venues. Market participants, infrastructures and authorities should use this version.

The TTC will apply from 3 January 2018. The equity instruments TTC will apply until 31 March 2019 and for bond instruments (with respect to liquidity assessment) it will apply until 15 May 2018.

The execution of the TTC has been delegated to ESMA by the national competent authorities from the European economic area (except Poland), who have also approved the final results. The TTC includes equity instruments available for trading in September 2017 and bonds available for trading in October 2017. The TTC for instruments listed after these dates will be performed by national competent authorities and ESMA will publish that information in January 2018. ESMA expects to continuously supplement and update the information provided, where necessary. From January 2018, ESMA will publish reference data, transparency calculations and double volume cap information on a regular basis. ESMA had already provided TTC for non-equity instruments in July and September 2017.

A copy of the FAQ can be found here and the accompanying press release can be found here.

(xxx) ESMA publishes updated MiFID II Q&As on investor protection and intermediaries topics

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on investor protection topics under the MiFID II Directive and MiFIR. The updates comprise:

- Part 1 (Best Execution): Updates concern the application of best execution to OTF operators and disclosure of quality of execution when using direct electronic access.
- Part 2 (Suitability and Appropriateness): Updates concern periodic reporting of how the investment meets the client's preferences, objectives and other characteristics of the retail client;
- Part 3 (Recording of telephone conversations and electronic communications): Updates concern the scope of activities covered by the requirements in Article 16(7) of MiFID II;
- Part 4 (Record keeping): Updated Q&As concern securities financing transactions;
- Part 8 (Post-sale reporting): Updates concern various items including reporting on the depreciation, choice of value for the threshold calculation and reporting to retail and professional clients;
- Part 9 (Information on costs and charges): Updates concern various items including calculation of ex-ante transaction costs, price of the position of the investment firm, identification and disclosure of mark-ups and structuring costs, disclosure in case of zero costs and charge and timing of first annual ex-post reports on costs and charges;
- Part 11 (Client categorisation): Updates concern information to clients on categorization;
- Part 12 (Inducements): Updates concern various items including payments made to portfolio managers and status of client money;
- Part 13 (Provision of investment services and activities by third country firms): Updates concern reverse solicitation; and
- Part 14 (Application of MiFID II after 3 January 2018): Updates concern application of MiFID II including issues of 'late transposition'.

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

(xxxi) ESMA publishes updated MiFID II Q&As on commodity derivatives topics

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on commodity derivatives topics under the MiFID II Directive and MiFIR. The updates comprise:

- Part 1 (Position limits): Updates concern position limit for options and futures and definitions of spot months;
- Part 2 (Ancillary activity): Updates concerning various queries on the market size test and RTS 20;
- Part 3 (Position Reporting): Updates concern various items including reporting of end-of -day zero positions, outsourcing of position reporting and obligation to report where there is a chain of intermediaries; and
- Part 4 (Position management controls): Updates concern role in the application of position limits applied by NCAs.

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

(xxxii)ESMA publishes updated MiFID II Q&As on data reporting

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on data reporting under MiFIR. The updates relate to:

- Part 2 (Date and time of the request of admission and admission);
- Part 12 (Transaction Reporting); and
- Part 13 (Record Keeping).

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

(xxxiii)ESMA publishes updated MiFID II Q&As on transparency

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on transparency under the MiFID II Directive and MiFIR. The updates comprise:

- Part 1 (General Q&As on Transparency Topics): Q&As concerning RFQ systems, application of post trade transparency requirements by trading venues and systematic internalisers and obligations to make available data free of charge 15 minutes after publication;

- Part 2 (Equity Transparency): Q&As on scope of the trading obligation for shares and default transparency regime for equity instruments;

- Part 3 (Non-Equity Transparency): Q&As on deferred publication, supplementary deferral regime, package orders / transactions, normal trading hours for equity instruments, publication of transactions in an aggregated form by APAs, scope of temporary suspension of transparency or bonds, default liquidity status of bonds and, nominal value of bonds;

- Part 4 (Pre-Trade Transparency Waivers): Q&As on pre-trade transparency waivers under MiFID I, maximum authorised deviation around the reference price for negotiated transactions in illiquid equity instruments), partial execution of large in scale orders, size specific to the financial instrument calculations, categorisation of subscription rights, process for a waiver, reference price waiver and multi-listed shares;

- Part 6 (Systematic internaliser regime): Various Q&As concerning the systematic internaliser regime, including access to quotes, notifications to national competent authorities, calculations and exemptions from calculations;

- Part 7 (Data Reporting Services Providers): Q&As concerning timeline for approving connections to ARMs and to national competent authorities; and

- Part 8 (Third Country Issues): Q&As concerning transactions outside the EU/ trades by non-EU firms.

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

(xxxiv)ESMA publishes updated MiFID II Q&As on market structures

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on market structures under the MiFID II Directive and MiFIR. The updates comprise:

- Part 2 (Direct Electronic Access ("**DEA**") and algorithmic trading): Q&As concerning reference to "market markers", DEA provider's controls and suitability checks, persons having DEA and authorisation of DEA providers;

- Part 3 (Tick size regime): Q&As concerning default regime for tick sizes, responsible competent authority in case of dual listing, scope of the tick size regime;

- Part 4 (Multilateral & bilateral systems): Q&As concerning DEA provider's controls and suitability checks, persons having DEA for the purpose of Article 2(1)(d) of MiFID II and authorisation of DEA providers;

- Part 5 (Tick size regime): Q&As concerning default regime for tick sizes, responsible competent authority in case of dual listing and scope of the tick size regime;

- Part 6 (Multilateral & bilateral systems): Q&As concerning client relationship between two counterparties that trade on a trading venue, provisions applicable to OTFs trading REMIT wholesale energy products and OTF best execution obligations vis-à-vis third-party brokers;

- Part 7 (Access to CCPs and trading venues): Various Q&As; and

- Part 8 (Application of MiFID II after 3 January 2018): Q&As concerning application of MiFID II including issues of 'late transposition.

A copy of the updated Q&As on market structures can be found here.

Capital Requirements Directive IV / CRR

(i) EBA corrects portfolio identifiers for 2018 benchmarking exercise

On 12 October 2017, the EBA published a press release stating that it has made corrections to Annex 1 of its implementing technical standards ("**ITS**") on benchmarking of internal approaches under the CRD IV Directive (2013/36/EU) ("**CRD IV**").

The corrections eliminate some duplicate portfolio identifiers ("**IDs**") in Annex 1 of the ITS which may lead to technical and practical problems for data validation and when mapping portfolio IDs to the relevant internal models applied by banks. The EBA explains that the revised portfolio IDs should be used for data submissions in April 2018.

A copy of the press release, corrected Annex 1 and the ITS can be found here.

(ii) European Commission adopts Delegated Regulation on RTS on materiality threshold for credit obligations past due

On 19 October 2017, the European Commission adopted a Delegated Regulation supplementing the Capital Requirements Regulation (Regulation EU 575/2013) ("**CRR**") with regard to regulatory technical standards ("**RTS**") on the materiality threshold of credit obligation past due.

The Delegated Regulation specifies the conditions according to which a competent authority should set the materiality threshold for credit obligations that are past due. The final RTS are based on draft RTS submitted by the EBA in September 2016.

On 26 October 2017, the Committee examined the delegated act and a referral was announced in the European Parliament which is awaiting a committee decision.

A copy of the Delegated Regulation can be found here.

The progress of the Delegated Regulation can be viewed here.

(iii) European Commission extends the transitional periods on own funds requirements for exposures to central counterparties

On 24 October 2017, the European Commission published a draft version of an Implementing Regulation further extending the transitional periods related to own funds requirements for exposures to central counterparties ("**CCPs**") which is set out in the CRR and EMIR.

The European Commission has previously issued a number of earlier implementing regulations extending the transitional periods in question.

The draft Implementing Regulation extends the transitional periods by another six months until 15 June 2018. The deadline for feedback on the draft Implementing Regulation was 21 November 2017.

A copy of the draft Implementing Regulation can be accessed here.

(iv) EBA publishes consultation paper on draft guidelines on institutions' stress testing

On 31 October 2017, the EBA published a consultation paper on draft guidelines on institutions' stress testing. The EBA issued these guidelines to cover and update the Committee of European Banking Supervisors ("**CEBS**") guidelines on institutions' stress testing (GL32), which will be repealed and replaced by these guidelines.

The deadline for responses is 31 January 2018 and the EBA intends to finalise the guidelines in the first quarter of 2018 with the application date for the second quarter of 2018.

A copy of the consultation paper can be found here.

(v) EBA publishes consultation paper on revised guidelines on common supervisory procedures and methodologies for the SREP and supervisory stress testing

On 31 October 2017, the EBA published a consultation paper on the proposals for revisions of guidelines on common supervisory procedures and methodologies for the supervisory review and evaluation process ("**SREP**") and supervisory stress testing which are in accordance with the EBA's Pillar 2 Roadmap.

The revisions of the SREP guidelines reflect the ongoing policy initiatives related to Pillar 2 and SREP, which includes the introduction of Pillar 2 Capital Guidance ("**P2G**"), the integration of supervisory stress testing requirements and supervisory assessment of banks' stress testing. The revised guidelines now also cover supervisory stress testing, aiming to achieve convergence between competent authorities in supervisory stress testing across the EU. They provide guidance with a view to ensuring convergence for supervisory stress testing in the context of the SREP performed by competent authorities.

The deadline for responses is 31 January 2018 and for the revisions to apply from 1 January 2019. The revisions should be applied in the 2019 cycle of the SREP and joint decisions on institutions' specific prudential requirements.

A copy of the consultation paper can be found here.

(vi) EBA publishes consultation paper on revised guidelines on management of interest rate risk arising from non-trading activities

On 31 October 2017, the EBA published a consultation paper on revised guidelines on the management of interest rate risk arising from non-trading book activities ("**IRRBB**"). These guidelines take account of existing supervisory expectations and practices including the Standards on Interest rate risk in the banking book published by the Basel Committee on Banking Supervision ("**BCBS Standards**") in April 2016.

The BCBS Standards will be implemented within the EU in two phases. Firstly, through this update of the EBA Guidelines and secondly, through the ongoing revision of the CRD and the CRR.

The deadline for responses is 31 January 2018. It is anticipated that the final version of the guidelines will apply to the majority of firms and competent authorities from 31 December 2018. For certain smaller firms, the final version of the guidelines will not apply in full until 30 June 2019.

A copy of the consultation paper can be found here.

(vii) EBA publishes consultation paper on draft RTS on specifying methods of prudential consolidation

On 9 November 2017, the EBA published a consultation paper on draft RTS on the methods of prudential consolidation under Article 18 of the CRR. Under Article 18 of the CRR institutions must fully consolidate all institutions and financial institutions that qualify as their subsidiaries or, where relevant, the subsidiaries of their parent financial holding company or parent mixed financial holding company. Article 18 allows institutions to apply a different method of consolidation (other than full consolidation) for the purpose of prudential consolidation under certain circumstances.

The draft RTS contains some guidance on the conditions for the application of different methods of consolidation (such full consolidation, proportional consolidation, aggregation method) or the application of the equity method in the certain cases.

The consultation closes on 9 February 2018.

A copy of the consultation paper can be found here.

(viii) ECB publishes opinion on proposals amending the CRR and CRD IV

On 10 November 2017, the ECB published an opinion (dated 8 November 2017) on two legislative proposals published by the European Commission on 23 November, 2016 as detailed below:

- A proposal for a Regulation amending the CRR regarding the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending EMIR ("**Proposed CRR II**"); and

- A proposal for a Directive amending the CRD IV regarding exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures ("**Proposed CRD V**").

On 30 November 2017, the Council of the EU published compromise proposals amending the CRR and CRD IV as follows:

- Presidency compromise proposal (14891/17) on the Proposed CRR II Regulation; and

- Presidency compromise proposal (14892/17) on the Proposed CRD V Directive.

A copy of the ECB's opinion can be found here.

A copy of the Presidency compromise proposal on the Proposed CRR II Regulation can be found here.

A copy of the Presidency compromise proposal on the Proposed CRD V Directive can be found here.

(ix) EBA publishes its final report setting out guidelines on the treatment of connected clients under the CRR

On 14 November 2017, the EBA published its final report setting out guidelines on the treatment of connected clients as defined under Article 4(1)(39) of the CRR.

The guidelines clarify that institutions should make use of their clients' consolidated financial statements when assessing the existence of control and provide a non-exhaustive list of indicators of control that institutions should use when assessing those clients to which EU accounting rules do not apply (e.g. natural persons, central governments, and clients that prepare consolidated financial statements in accordance with third country accounting rules).

The guidelines will be translated and published on the EBA website and the deadline for competent authorities to report whether they comply with the guidelines will be two months after the publication of the translations. The guidelines will apply from 1 January 2019.

A copy of the report can be found here.

(x) EBA publishes a final peer review report on its guidelines on criteria for identifying O-SIIs

On 15 November 2017, the EBA published a final peer review report on its guidelines on the criteria to determine the conditions on the application of Article 131(3) of CRD IV in relation to the assessment of other systemically important institutions ("**O-SIIs**").

The peer review report was based on self-assessments provided by relevant authorities who were asked to respond to a targeted questionnaire sent to them for completion. The review panel found that certain practices which should have been harmonised by the guidelines were not consistently and comprehensively applied in all jurisdictions. Certain recommendations concerning amendments to the guidelines are contained in the report.

A copy of the final peer review report on the guidelines can be found here.

(xi) European Commission adopts Implementing Regulation on ITS on supervisory reporting of institutions under the CRR

On 15 November 2017, the European Commission adopted an Implementing Regulation amending Implementing Regulation (EU) No 680/2014 on ITS on supervisory reporting of institutions under CRR. The amended requirements will apply from 1 March 2018.

A copy of the amending Implementing Regulation can be found here and a copy of its Annexes can be found here.

(xii) EBA publishes its final guidelines on the application of IRB under the CRR

On 20 November 2017, the EBA published its final guidelines on the application of the internal ratings-based ("**IRB**") approach under CRR.

The guidelines specify the requirements for the estimation of:

- Probability of default;
- Loss given default ("**LGD"**) including LGD for defaulted exposures ("**LGD in-default"**); and
- Expected loss best estimate ("**ELBE**").

The EBA states that the guidelines will apply from 1 January 2021. The EBA advises institutions to engage with their competent authorities at an early stage to determine an adequate implementation plan and timeline for the supervisory assessment and approval of material model changes.

A copy of the final guidelines can be found here.

A copy of the report can be found here.

(xiii) EBA publishes third report on convergence of supervisory practices

On 21 November 2017, the EBA published a report on its assessment on the convergence of supervisory practices and its activities in promoting convergence in supervision.

The report found that competent authorities have made good progress in the implementation of the guidelines on common supervisory procedures and methodologies for the supervisory review and evaluation process ("**SREP**"). However, the report found that there are a number of remaining challenges such as the converging capital adequacy assessments and determining institution-specific additional own funds requirements such as Pillar 2 Requirements.

The report states that further progress on convergence will need to be supported by ongoing policy work, such as adjustments to the SREP framework as well as revisions to the Pillar 2 framework in the CRR/CRD. The EBA will also continue to promote supervisory convergence through active monitoring and assessment of supervisory practices, which in turn will help competent authorities in the effective implementation of the agreed policy products and expand its supervisory training offering.

A copy of the report can be found here.

(xiv) Delegated Regulation on waiver of own funds requirements for certain covered bonds under the CRR published in OJ

On 25 November 2017, the Commission Delegated Regulation (EU) 2017/2188 was published in the OJ. The Delegated Regulation amends the CRR as regards the waiver on own funds requirements for certain covered bonds.

The Delegated Regulation entered into force on 15 December 2017 and applies from 1 January 2018.

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

(xv) Implementing Regulation on templates and instructions under CRR published in the OJ

On 6 December 2017, the Commission Implementing Regulation (EU) 2017/2114, which amends the Implementing Regulation on supervisory reporting of institutions (Regulation 680/2014) as regards templates and instructions under the CRR was published in the OJ.

The Implementing Regulation was adopted by the Commission on 9 November 2017. It entered into force on 26 December 2017 and will apply from 1 March 2018.

A copy of the Implementing Regulation can be found here.

(xvi) Eighth Implementing Regulation extending transitional periods related to own fund requirements for CCP exposures published in OJ

On 7 December 2017, the Commission Implementing Regulation (EU) 2017/2241, which concerns the extension of the transitional periods related to own funds requirements for exposures to CCPs was published in the OJ.

The Implementing Regulation extends the transitional periods by an additional six months until 15 June 2018. This is to avoid disruptions to the market and to prevent institutions being subjected to higher own funds requirements during the process of authorisation and recognition of existing CCPs.

The Implementing Regulation was adopted by the Commission on 6 December 2017 and entered into force on 11 December 2017.

A copy of the Implementing Regulation can be found here.

(xvii) Delegated Regulation on disclosure of encumbered and unencumbered assets under the CRR

On 13 December 2017, the European Council published Commission Delegated Regulation (EU) 2017/2295 of 4 September 2017 supplementing the CRR with regard to regulatory technical standards for the disclosure of encumbered and unencumbered assets.

The Delegated Regulation entered into force on 2 January 2018. Article 2 will apply from 2 January 2019.

A copy of the Delegated Regulation can be found here.

(xviii) ECB publishes consultation paper on assessment methodology for IMM and A-CVA for counterparty credit risk

On 14 December 2017, the ECB published a consultation paper on the ECB guide on the assessment methodology ("**EGAM**") for the internal model method ("**IMM**") and for the

advanced method for credit valuation adjustment risk ("**A-CVA**") charge for counterparty credit risk ("**CCR**").

The deadline for responses to the consultation paper is 31 March 2018.

A copy of the consultation paper can be found here.

A copy of frequently asked questions ("**FAQs**") on the guide can be found here.

A related press release can be found here.

(xix) EBA issues advice to the European Commission on the use of the 180 days past due criterion

On 22 December 2017, the EBA issued an opinion and annex to the European Commission on the appropriateness of continuing to apply the 180 day past due ("**DPD**") exemption for material exposures.

The advice is based on the analysis of data that has been submitted by institutions still using the 180 DPD criterion. The EBA recommends that this exemption be disallowed and all institutions should consequently rely on the 90 DPD regime for all exposures. However, with the widespread use of the 90 DPD criterion, the EBA recommends to the European Commission to disallow the application of the 180 DPD criterion and to allow the institutions currently using the 180 DPD to adjust to the 90 DPD regime. The EBA recommends that an appropriate transitional period should be provided.

The CRR defines a default on the basis of two criteria, i.e. when the obligor is past due more than 90 days, and/or when the obligor is considered to be unlikely to pay. Where institutions are applying the internal ratings based approach ("**IRB**"), the CRR allows competent authorities to replace the 90 days with 180 days for exposures secured by residential or SME commercial real estate in the retail exposure class as well as for exposures to public sector entities.

A copy of the opinion can be found here and a copy of the annex can be found here.

A copy of the accompanying press release can be found here.

(xx) CRR IFRS 9 Regulation published in the OJ

Regulation (EU) 2017/2395 of 12 December 2017 amending the CRR as regards to the transitional arrangements for mitigating the impact of the introduction of International Financial Reporting Standard 9 ("**IFRS 9**") on own funds and for the large exposures treatment of certain public sector exposures denominated in the domestic currency of any Member State was published in the OJ on 27 December 2017.

The Council of the European Union adopted the Regulation on 7 December 2017 and the European Parliament adopted the Regulation on 1 December 2017. It entered into force on 28 December and will apply from 1 January 2018.

A copy of the amending Regulation can be found here.

(xxi) EBA publishes revised versions of the Single Rulebook Q&A under CRD IV / CRR

During the period 1 October 2017 to 31 December 2017, the EBA has updated its Q&A on the Single Rulebook which contains updated questions and answers relating to the CRD IV / CRR.

- Question ID: 2015_2468 (as last updated on 3 November 2017) which relates to the notification to competent authorities of model changes and in particular, alignments of a rating system;

- Question ID: 2017_3329 (as last updated on 3 November 2017) which relates to qualifying own funds and in particular, the circumstances whereby an entity should apply the restrictions on consolidated inclusion of additional tier 1 and tier 1 instruments issued by subsidiaries;

- Question ID: 2017_3163 (as last updated on 3 November 2017) relates to deposit received and deposits posted as margin for collateral exposure;

- Question ID: 2017_3339 (as last updated on 22 December 2017) relates to the validation rule v4886_m - supervisory reporting;

- Question ID: 2017_3441 (as last updated on 22 December 2017) relates to the amended validation rule v3693_s in v2.6 - supervisory reporting;

- Question ID: 2017_3456 (as last updated on 22 December 2017) relates to validation rule e4900_n - supervisory reporting;

- Question ID: 2017_3513 (as last updated on 22 December 2017) relates to cap on the own funds requirement for a net position on market risk.

A copy of the Single Rulebook Q&A can be found here.

European Banking Authority

(i) EBA publishes an opinion on issues relating to the departure of the UK from the European Union

On 12 October 2017, the EBA published an opinion on issues relating to the departure of the UK from the European Union (the "**Opinion**").

The opinion seeks to provide practical recommendations to credit institutions, investment firms and other financial services firms, and EU competent authorities. Further, it aims to highlight areas of the legislative framework that could be updated due to the challenges posed by Brexit.

The opinion focuses on a number areas namely:

- The authorisation process;
- Equivalence access for the provision of investment services;
- Internal model approvals;
- Internal governance and risk management; and
- Resolution and deposit guarantee scheme issues.

A copy of the Opinion can be found here.

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

(i) ESMA publishes updated version of EMIR Q&As

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers ("**Q&As**") on Regulation (EU) No 648/2012 of the European Parliament and of the European Council on OTC derivatives, central counterparties and trade repositories ("**EMIR**"). The updated version of the Q&A contains updates on:

- Question 1 of Part I concerning the definition of "OTC derivatives";
- Question 18b of Part I concerning the segregation level for indirect clearing accounts;
- Question 22 of Part II concerning the ongoing monitoring of collateral requirements for central counterparties ("CCPs");
- Question 3a of Part III concerning the reporting of collateral to trade repositories;
- Question 24 of Part III concerning buy/sell indicators for swaps;
- Question 34 of Part III concerning contracts with no maturity date;
- Question 24 of Part III concerning reporting to TRs: Buy/Sell indicator for swaps;
- Question 40 of Part III concerning LEI changes due to mergers and acquisitions/ up-date of identification code to LEI; and

- Question 44 of Part III concerning transition to new EMIR technical standards on reporting.

A copy of the updated EMIR Q&A can be found here.

(ii) ESMA updates its list of recognised CCPs based in third countries

On 9 October 2017, ESMA updated its list of recognised CCPs based in third countries. EMIR requires that third-country CCPs are to be recognised by ESMA in order to operate in the European Union.

A copy of the updated list can be found here.

A copy of the press release can be found here.

(iii) European Commission Implementing Decision on the equivalence of arrangements of US CFTC regime for purposes of Article 11 of EMIR published in the OJ

On 14 October 2017, the European Commission Implementing Decision ((EU) 2017/1857) on the equivalence of the legal, supervisory and enforcement arrangements of the US for derivative transactions supervised by the Commodity Futures and Trading Commission ("**CFTC**") for the purposes of Article 11 of EMIR was published in the OJ.

The Commission Implementing Decision entered into force on 3 November 2017.

A copy of the Commission Implementing Decision can be found here.

(iv) Revised RTS and ITS on EMIR trade reporting commence 1 November 2017

The following revised European Commission Regulations concerning the technical standards on data reporting under Article 9 of EMIR commenced application as and from 1 November 2017:

- Commission Delegated Regulation (EU) 2017/104 amending Commission Delegated Regulation (EU) No 148/2013 supplementing EMIR with regard to regulatory technical standard ("**RTS**") on the minimum details of the data to be reported to trade repositories (the "**Revised RTS on trade reporting**"); and

- Commission Implementing Regulation EU) 2017/105 amending Implementing Regulation (EU) No 1247/2012 supplementing EMIR with regard to implementing technical standards with regard to the format and frequency of trade reports to trade repositories ("**ITS**") (the "**Revised ITS on trade reporting**").

The revised RTS and ITS on trade reporting are based on previous ESMA consultation papers and contain a number of amendments to the trade reporting to be carried out. The revised RTS and ITS were published in the OJ on 21 January 2017.

The Revised RTS on trade reporting can be found here.

The Revised ITS on trade reporting can be found here.

(v) Updated EMIR validation rules commence 1 November 2017

The updated EMIR validation rules, as published by ESMA on 3 October 2017, commenced application on 1 November 2017. The validation rules were updated by EMSA to accompany the Revised RTS on trade reporting and the Revised ITS on trade reporting (see above).

The updated EMIR validation rules can be accessed here.

(vi) Commission Delegated Regulation revising the RTS on access to data and aggregation and comparison of data under EMIR commences 1 November 2017

Commission Delegated Regulation (EU) 2017/1800 was adopted by the European Commission on 29 June 2017. The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 151/2013 with regard to RTS specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing data under EMIR.

Commission Delegated Regulation (EU) 2017/1800 was published in the OJ on 7 October 2017 and commenced application on 1 November 2017. It revises the existing RTS by further specifying the operational standards required to aggregate and compare data across trade repositories.

A copy of the Commission Delegated Regulation (EU) 2017/1800 can be found here.

(vii) Commission Delegated Regulations on indirect clearing arrangements under EMIR and MiFIR published in the OJ

The following Delegated Regulations were published in the OJ on 21 November 2017:

- Commission Delegated Regulation (EU) 2017/2154 which supplements MiFIR with regard to RTS on indirect clearing arrangements; and

- Commission Delegated Regulation (EU) 2017/2155 which amends Commission Delegated Regulation (EU) 149/2013 with regard to RTS on indirect clearing arrangements.

The Commission Delegated Regulations entered into force on 11 December 2017 and will apply from 3 January 2018.

A copy of Commission Delegated Regulation (EU) 2017/2154 can be found here.

A copy of Commission Delegated Regulation (EU) 2017/2155 can be found here.

(viii) ESAs release joint statement regarding variation margin exchange for physically-settled FX forwards

On 24 November 2017, the ESAs released a statement regarding variation margin exchange for physically-settled FX forwards under EMIR.

The ESAs announced that they were reviewing the Commission Delegated Regulation (EU) 2016/2251 (the "**Margin RTS**") and developing draft amendments to "align the treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions".

The ESAs reiterated their commitment to apply the international standards and to "require the exchange of variation margin for physically-settled FX forwards in a risk based and proportionate manner".

In particular, the ESA's indicated that "this would most likely imply that the scope should cover transactions between institutions (i.e. credit institutions and investment firms)" but suggested that certain transactions with end-users (i.e. institution to non-institution, which would include investment funds) could be brought outside scope.

In light of the difficulties certain end-users are facing, the ESAs referred to their expectation that EU national competent authorities should "*generally apply their risk based supervisory powers in their day to day enforcement of applicable legislation in a proportionate manner.*"

A copy of the ESA's joint statement can be found here.

(ix) Update on the EMIR reform proposal

On 4 May 2017, the European Commission published its proposal to amend EMIR. The proposal seeks to introduce a number of specific changes to EMIR seeking to simplify the applicable rules and eliminating burdens. The reforms included:

- Proposed changes to the counterparty classification under EMIR (such as including all alternative investment funds within the scope of the classification of financial counterparties);
- Proposed changes to the scope of reporting activities (such as reducing the reporting burden for non-financial counterparties who contract OTCs with financial counterparties by requiring the financial counterparties to report the trades on behalf of both parties);
- Proposed changes to the clearing obligation (such as reducing the clearing thresholds for small financial counterparties FCs and extending the exemption from clearing obligations for pension scheme arrangements); and

- Enabling clearing obligations to be temporarily suspended by the European Commission for up to 12 months in certain circumstances.

A copy of the European Commission's initial proposal can be found here.

On 17 October 2017, the European Central Bank ("**ECB**") published an opinion (dated 11 October 2017) on the proposed EMIR reform proposals.

A copy of the ECB's opinion can be found here.

On 16 November 2017, the Council of the European Union published a second Council compromise proposal on the proposed EMIR reform proposal, while on 28 November 2017, it published its third Council compromise proposal on the proposed EMIR reform proposal.

A copy of the compromise proposal for 28 November 2017 can be found here.

(x) ESAs publish final draft RTS amending margin requirements for physically-settled foreign exchange ("FX") forwards

On 18 December 2017, the ESAs published a final report containing the text of their proposed amendments to the Margin RTS. The revisions to the Margin RTS exempt certain counterparties, including investment funds, from the variation margin requirement in respect of physically-settled FX forwards.

The draft RTS aims to align the treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions. The next step is for the draft amendments to the Margin RTS to be considered by the EU Commission.

A copy of the final report can be found here.

(xi) Central Bank issues statement on the variation margin requirements for physically-settled FX forwards

The Central Bank issued a statement on 19 December 2017 in response to the ESAs joint statement on 24 November 2017 in respect of the requirement under the Margin RTS to exchange variation margin for physically-settled FX forwards from 3 January 2018.

This follows similar statements recently issued by, inter alia, the Financial Conduct Authority ("**FCA**") in the UK on 7 December 2017 and the Federal Financial Supervisory Authority ("**BaFin**") in Germany on 12 December 2017 in support of the ESAs joint statement.

The Central Bank's statement provides the following:

- It welcomed the ESAs joint statement;

- It noted that the ESAs are undertaking a review of the relevant requirements and will propose some targeted amendments which are likely to continue to require the exchange of variation margin for physically-settled FX forwards in a risk-based and proportionate manner but to limit the scope to transactions between institutions (credit institutions and investment firms); and

- It confirmed that, in accordance with the recommendation from the ESAs and pending the outcome from their review, it will apply its risk-based supervisory powers in the day-to-day enforcement of applicable legislation in a proportionate manner.

Although not expressly stated, it may be inferred from the Central Bank's statement that investment funds do not need to comply with the relevant requirement to exchange variation margin for physically-settled FX forwards as and from 3 January, 2018.

For further information on EMIR, please refer to previous briefings issued by Dillon Eustace including the briefing entitled "Proposal for EMIR Reform – targeted changes with important consequences for AIFs, AIFMs and UCITS Management Companies'' can be found here.

A copy of the Central Banks statement can be found here.

Securities Financing Transactions Regulation

(i) European Commission publishes a report under the Securities Financing Transactions Regulation

On 19 October 2017, the European Commission published a report to the European Parliament and Council of the European Union under Regulation (EU) 2015/2365 (the "**Securities Financing Transactions Regulation**") ("**SFTR**") on reporting and transparency.

Article 29(3) of the SFTR requires that the European Commission produces a report on the progress of international regulatory efforts to mitigate the risks related with securities financing transactions ("**SFTs**"), which includes the Financial Stability Board's ("**FSB**") recommendations for cuts on non-centrally cleared SFTs and the appropriateness of those recommendations for the European Union market.

The Commission concludes that the FSB's recommendations on SFTs have been addressed in the European Union through the adoption of the SFTR and the specific provisions in financial services legislation and guidelines. The Commission indicates that on this basis there appears to be no need for further regulatory action at this stage, however, it will continue to monitor developments in the SFT markets.

A copy of the report can be found here.

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

(i) ESMA's work programme for 2018

On 5 October 2017, ESMA published its work programme for 2018. This sets out ESMA's priorities and areas of focus for 2018 which include:

- Increasing the level of supervisory convergence in EU legislation concerning corporate finance matters (including the areas of prospectus legislation, transparency and takeover bids);
- Increasing supervisory convergence in the area of enforcement accounting standards and increase co-operation between accounting and auditing enforcers;
- Identifying areas of non-convergence in respect of investment funds legislation (such as the UCITS Directive, AIFMD, PRIIPs and the MMF Regulation), undertaking a peer review on the ESMA guidelines on ETFs and other UCITS issues and providing further guidance to promote supervisory convergence;
- Providing guidance to promote the consistent application of the MiFID II Directive and MiFIR (including peer reviews on MiFID topics related to investor protection and intermediaries) and to promote the consistent application of the SFTR;
- Ensuring the quality, integration, usability and transparency of the data collected by ESMA relating to MiFID II, alternative investment funds, trade repositories, credit rating agencies and securities financing transactions; and
- Increasing supervision of credit rating agencies and trade repositories, issuing advice on third country equivalence and other guidance on the application of the Benchmarks Regulation via opinions, Q&A and guidelines.

A copy of the work programme for 2018 can be found here.

A copy of the accompanying press release can be found here.

(ii) EBA's work programme for 2018

On 5 October 2017, the European Banking Authority ("**EBA**") published its work programme for 2018. This sets out the EBA's priorities and areas of focus for 2018 which include:

- Contributing to the developments relating to the CRD IV Directive (2013/36/EU) ("**CRD IV**") and the Capital Requirements Regulation (Regulation 575/2013) ("**CRR**"), and the Bank Recovery and Resolution Directive (Directive 2014/59/EU) ("**BRRD**"):

- Implementing data infrastructure and data analysis to enhance the EBA's role as a data hub for banks in the EU to collect, process and disseminate high-quality data for a wide range of stakeholders;

- Monitoring and evaluating the impact of Brexit to protect the public interest;

- Evaluating and contributing to FinTech regulation;

- Fostering appropriate policy developments while monitoring the consistent application of the Single Rulebook and its impact on institutions; and

- Contributing to the Council of the EU's action plan to tackle non-performing loans ("**NPLs**") in the EU.

A copy of the work programme for 2018 can be found here.

A copy of the accompanying press release can be found here.

(iii) European Commission's work programme for 2018

On 24 October 2017, the European Commission published a communication outlining its work programme for 2018. It presents a focused list of 26 key initiatives across the Commission's ten political priorities, 15 intended withdrawals or modifications of pending proposals and 66 priority pending proposals.

The communication is accompanied by a Q&A document and by the following annexes:

- Annex I which contains key initiatives to be presented in the year ahead;

- Annex II which contains REFIT initiatives;

- Annex III which lists the priority pending legislative files;

- Annex IV which contains a list of intended withdrawals of pending proposals; and

- Annex V which contains a list of existing legislation which the European Commission intends to repeal.

A copy of the communication can be found here.

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

A copy of the Annexes can be found here.

(iv) ESMA publishes updated Q&As on its guidelines on alternative performance measures

On 30 October 2017, ESMA published updated Q&As on its guidelines on alternative performance measures ("**APMs**").

The ESMA guidelines apply to APMs disclosed in regulated information by issuers in the EU with securities traded on regulated markets and prospectuses.

The guidelines will apply to APMs disclosed in annual and interim financial reports. They will also apply to other regulated information published by an entity, for example, management reports disclosed to the market under the Transparency Directive (Directive 2004/109/EC), and disclosures under Market Abuse Regulation (Regulation 596/2014) ("**MAR**").

The updated Q&As include six new questions and answers:

- Question 12: Definition of APMs;
- Question 13: Scope of the APM Guidelines;
- Question 14: Application of the scope exemption;
- Question 15: Definition and basis of calculation;
- Question 16: Reconciliation;
- Question 17: Application of the Fair review principle to APMs;

A copy of the press release can be found here.

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

(v) ESAs' 2018 work programme

On 15 November 2017, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published its 2018 work programme. In the 2018 work programme, the ESAs states that in 2018 it will continue to:

- Prioritise and focus on consumer protection issues. In this regard, ESAs will continue to support the implementation of the PRIIPs Regulation, analyse and assess the adequacy of cross-border supervision of financial services and assess whether firms have implemented the complaints-handling guidelines;
- Monitor the evolution of the market with a view to identify the relevant FinTech and digitalisation issues that need addressing;

- Focus on cross-sectoral risk analysis and assessment;
- Focus on new and emerging anti-money laundering and counter-terrorist financing risks and to continue with its review and development of guidelines and technical standards to ensure consistency in the EU as regards these risks;
- Focus on effective supplementary supervision of financial entities;
- Serve as an important body for addressing other cross-sectoral matters, such issues as Brexit, European Commission proposals to enhance the operation of the ESAs, the revised EMIR proposals and work on long-term performance of retail investment products.

A copy of the ESAs 2018 work programme can be found here.

Capital Markets Union ("**CMU**")

(i) European Commission publishes its request to the ESAs to report on cost and past performance of main categories of retail investment, insurance and pension products

On 17 October 2017, the European Commission published its request (dated 13 October 2017) to the ESAs to issue recurrent reports on the cost and past performance of the main categories of retail investment, insurance and pension products.

The request is one of the actions announced in the European Commission's communication on the mid-term review of the CMU which was published in June 2017.

It is envisaged that the reporting should be based on data and information originating from disclosures and reporting already required under EU law or national legislation.

A copy of the request can be found here.

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

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

During the period 1 October 2017 to 31 December 2017**,** ESMA published updated versions of its questions and answers ("**Q&As**") on the Markets Abuse Regulation (Regulation 596/2014) ("**MAR**"). The updates comprise:

- Question 7.8 (trading during closed periods and prohibition of insider dealing);
- Question 7.9 (types of transactions by person discharging managerial responsibilities ("**PDMRs**") prohibited during closed periods); and

- Question 11.1 (calculations relating to emissions, allowances and emission allowances market participants ("**EAMPs**")).

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

Prospectus Regulation

(i) ESMA publishes updated Q&As on Prospectuses

On 20 October 2017 ESMA published an updated versions of its questions and answers on prospectuses ("**Q&A on Prospectuses**"). The changes arise from the implementation of the Prospectus Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") on 20 July 2017.

The updates comprise:

- Question 27 (concerning convertible or exchangeable securities);
- Question 29 (concerning the conversion or exchange of non-transferable securities and exemption from publishing a prospectus);
- Question 31 (concerning the exemption for admission to trading);
- Question 32 (concerning exemptions from the obligation to publish a prospectus in Article 1(5) of the Prospectus Regulation as stand-alone exemptions); and
- Question 44 (concerning the obligation to publish a prospectus for admission of securities to trading on a regulated market).

A copy of the Q&A on prospectuses can be found here.

(ii) ESMA publishes consultation paper on draft RTS for the Prospectus Regulation

On 15 December 2017, ESMA published a consultation paper on proposed draft RTS under the Prospectus Regulation. The RTS sets out a number of requirements concerning the following areas:

- The key financial information that should appear in the summary of the prospectus;
- Data and machine readability information that provides the public with free of charge access, storage and search functions and for submitting data to ESMA;
- Advertisements relating to public offers or admission to trading;
- Situations which require the publication of a supplement to a prospectus; and

- Publication of a prospectus.

The consultation is open for comments until 9 March 2018.

A copy of the consultation paper can be found here.

Securitisation

(i) ESMA publishes three consultation papers on draft technical standards implementing the Securitisation Regulation

On 19 December 2017, ESMA published three consultation papers on draft technical standards implementing the Securitisation Regulation. The consultation papers seek stakeholder views on:

- The underlying exposures;
- Investor report templates;
- The operational standards for the reports to and accessing the information from securitisation repositories; and
- The notification to ESMA of a securitisation's status as a simple, transparent and standardised ("**STS**") securitisation.

The consultation is open for feedback until 19 March 2018 and a copy of the consultation papers can be accessed here.

(ii) Update on the Securitisation Regulation and consequential amendments to the CRR

Two new Regulations have been adopted by the European Parliament and the European Council during the period 1 October 2017 to 31 December 2017 as follows:

- Regulation (EU) 2017/2402 laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation (the "**Securitisation Regulation**"); and
- Regulation (EU) 2017/2401 making consequential amendments to the CRR (the "**Securitisation Prudential Regulation**").

The Regulations are part of the Capital Markets Union action plan adopted by the European Commission on 30 September 2015. The Regulations aim to promote a safe and liquid market for securitisation.

The Securitisation Regulation seeks to consolidate the patchwork of legislation governing European securitisations. It also introduces the long awaited rules for issuing simple,

transparent and standardised ("**STS**") securitisations. It will apply to all securitisation products and includes due diligence, risk retention and transparency rules together with a clear set of criteria to identify STS securitisations

The Securitisation Prudential Regulation seeks to make certain consequential amendments to the CRR in the context of STS securitisations.

Both Regulations were published in the OJ on 28 December 2017 and will apply from 1 January 2019.

A copy of the Regulation (EU) 2017/2402 can be found here.

A copy of the Regulation (EU) 2017/2401 can be found here.

Payment Services Directive 2 ("**PSD2**")

(i) EBA publishes final guidelines on procedures for complaints of infringements of PSD2

On 13 October 2017, the EBA published its final guidelines to be followed by competent authorities to ensure and monitor effective compliance by payment service providers ("**PSP**") with the revised Payment Services Directive (Directive EU 2015/2366) ("**PSD2**").

The guidelines govern the process through which payment service users, and other interested parties, can submit complaints to national competent authorities ("**NCAs**") with regard to PSPs' alleged infringements of PSD2.

The EBA consulted on the guidelines initially in February 2017. As a result of the feedback received, the EBA has introduced a number of changes to the guidelines. The guidelines will come into force on 13 January 2018, which is the date from which PSD2 applies.

The guidelines will be translated into the official EU languages and published on the EBA website. NCAs will have two months following the publication of the translations to report whether or not they comply with the guidelines.

A copy of the guidelines can be found here.

(ii) EBA publishes consultation on RTS for home-host co-operation under PSD2

On 27 October 2017, the EBA published a consultation paper on the draft RTS which specifies the framework for the co-operation and the exchange of information between competent authorities under PSD2.

The RTS covers the procedure for requests and replies for co-operation and exchange of information between national competent authorities which includes a standardised form, single contact point, language and timelines. The RTS also sets out the reporting

requirements that host competent authorities can request from payment institutions operating in their territories. The reporting requirements define the data breakdown, reporting periods, frequency and reporting deadlines.

The consultation closes on 5 January 2018.

A copy of the consultation paper can be found here.

(iii) EBA publishes the official translations of the final guidelines on authorisation and registration under PSD2

On 8 November 2017, the EBA updated its webpage to make available the official EU language translations of the finals guidelines on the information to be provided by applicants intending to obtain authorisation as payment and e-money institutions, or to register as account information service providers ("**AISPs**") under PSD2. The final guidelines were published by the EBA on 11 July 2017 and they apply from 13 January 2018.

The EBA webpage to access the official EU language translations of the finals guidelines and the form for compliance can be found here.

(iv) Delegated Regulation on RTS on passporting under PSD2 published in the OJ

On 11 November 2017, Commission Delegated Regulation ((EU) 2017/2055) supplementing PSD2 on RTS for the cooperation and exchange of information between competent authorities for passporting was published in the OJ.

The Delegated Regulation seeks to establish standard procedures covering the language and means of communication of passport applications between competent authorities of home and host Member States. The Delegated Regulation also sets out the standard templates for the transmission of such information and clarifies that a Legal Entity Identifier ("**LEI**") should be included in such information.

The Delegated Regulation entered into force on 1 December 2017. A copy of the Delegated Regulation can be found here.

(v) European Commission adopts the Delegated Regulation on RTS for a strong customer authentication and common and secure communication under PSD2

On 27 November 2017, the European Commission adopted a Delegated Regulation and an Annex supplementing PSD2 with regard to the RTS for strong customer authentication ("**SCA**") and a common and secure open standards of communication ("**CSC**").

The RTS sets out the requirements for:

- The SCA and exemptions from the application of the SCA;

- The security measures protecting the confidentiality and integrity of payment service users' personalised security credentials; and

- The CSC between account servicing payment service providers, payment initiation service providers, account information service providers, payers, payees and other payment service providers.

The European Commission has published a related press release and a fact sheet with FAQs on the Delegated Regulation stating it has made limited but substantive amendments to the draft RTS that was submitted by the EBA in February 2017.

On 29 November 2017, the Committee examined the delegated act and a referral was announced in the European Parliament which is awaiting a committee decision.

The press release of the European Commission can be found here.

The fact sheet with FAQs on the Delegated Regulation can be found here.

A copy of the Delegated Regulation can be found here.

The progress of the Delegated Regulation can be viewed here.

A copy of the Annex can be found here.

(vi) EBA publishes a final report and RTS relating to central contact point under PSD2

On 11 December 2017, the EBA published a final report containing draft RTS on central contact points under PSD2.

Article 29(4) of PSD2 gives member states the option to require payment institutions that have their head office in another member state and that operate through agents in a host member state territory to establish a central contact point in the host member state's territory. The purpose of these contact points is to ensure adequate communication and information reporting and to facilitate supervision.

The EBA consulted on the RTS in June 2017. The next step is for the draft RTS to be submitted to the European Commission for endorsement. Thereafter the draft RTS will need to be considered by the European Parliament and the Council of the EU.

A copy of the final report can be found here.

(vii) EBA publishes its final report on security measures for operational and security risks under PSD2

On 12 December 2017, the EBA published its final report on guidelines on the security measures for operational and security risks under PSD2.

The EBA consulted on these draft guidelines in May 2017 and in light of the responses received, the EBA amended the guidelines to provide further clarification.

The guidelines will apply from 13 January 2018.

A copy of the final report can be found here.

(viii) EBA publishes its final report on the RTS and ITS on EBA electronic central register under PSD2

On 13 December 2017, the EBA published its final report on the:

- Draft RTS containing the requirements on the development, operation and maintenance of the electronic central register and on access to the information contained therein under PSD2; and

- Draft ITS on the details and structure of the information entered by competent authorities in their public registers and notified to the EBA under PSD2.

The EBA is required to develop, operate and maintain an electronic central register that contains information as reported by competent authorities under PSD2 with an aim of providing transparency on payment and e-money institutions across the EU.

The EBA consulted on the draft RTS and ITS in July 2017.

The next step is for the draft RTS and ITS to be submitted to the European Commission for adoption. Thereafter the RTS and ITS will need to be considered by the European Parliament and the Council of the EU. As a result, it is anticipated that the electronic central register will be delayed until later in 2018.

A copy of the final report can be found here.

(ix) EBA opinion on transition from PSD to PSD2

On 19 December 2017, the EBA published an opinion on the transition from the Payment Services Directive (2007/64/EC) ("**PSD1**") to PSD2. The opinion clarifies a number of issues identified by market participants and Member State competent authorities, including with regard to the transitional period foreseen under PSD2.

A copy of the opinion can be found here.

Guidelines for the Prudential Assessment of Acquisitions in the Financial Sector

(i) Guidelines for the prudential assessment of acquisitions in the financial sector

As from 1 October, 2017, potential acquirers of qualifying holdings in an EU credit institution, assurance, insurance or reinsurance undertaking or an investment firm should refer to the guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector under Directive 2007/44/EC (the **Acquisitions Directive**") (the "**Guidelines**").

The Guidelines were jointly published by the EBA, ESMA, the European Insurance and Occupational Pensions Authority ("**EIOPA**") and the ESAs in December 2016.

The purpose of the Guidelines is to set out a unified supervisory approach to the treatment of proposed acquirers throughout the financial sector in the EU and harmonise the approach to situations which will trigger a requirement for a proposed acquirer to notify its relevant competent authority of its proposed acquisition.

A copy of the Guidelines can be found here.

Central Bank of Ireland

(i) Department of Finance and the Central Bank of Ireland jointly publish feedback statement to Consultation Paper 95 (Funding the Cost of Financial Regulation)

On 3 July 2015, the Central Bank and the Department of Finance published a joint consultation paper ("**CP 95**") entitled 'Funding the Cost of Financial Regulation'. The aim of CP 95 was to gather views on a move from the current approach of partial industry funding of financial regulation towards full industry funding

On 28 September 2017, the Department of Finance and the Central Bank jointly published a feedback statement in response CP 95 (the "**Feedback Statement**"). As set out in the Feedback Statement, the Minister and the Central Bank have decided in favour of a phased introduction of a full industry funding model, beginning with an increase from 50% to 65% in 2017. The Minister's approval will be required for any further increases beyond 65% in future years.

A copy of the Feedback Statement to CP 95 can be found here.

(ii) Central Bank publishes feedback statement to Consultation Paper 108 (New methodology to calculate funding levies)

On 27 March 2017, the Central Bank published Consultation Paper 108 entitled "New Methodology to Calculate Funding Levies: Credit Institutions, Investment Firms, Fund Service Providers and EEA Insurers" ("**CP 108**"). In CP 108, the Central Bank proposed to

revise the way the current industry funding levy is calculated for credit institutions, investment firms, fund services providers and EEA insurers.

On 2 October 2017, the Central Bank published a feedback statement in response to CP 108 (the "**Feedback Statement**"). The Feedback Statement clarifies the changes which will be introduced which can be summarised as follows:

- **Credit institutions:** The Central Bank will proceed with the adapted ECB methodology for the calculation of the industry funding levies as outlined in CP 108. However, institutions that were admitted to the ELG scheme will continue to pay 100% of their levy contribution;

- **Irish Investment firms and fund service providers**: The proposed new levy methodology will be applied once the MiFID II implementation is complete and to facilitate changes to PRISM impact scores which will first apply from 3 January 2018;

- **EEA insurance companies**: In respect of EEA insurers, the Central Bank intends to proceed with the changes to levies based on three categories as highlighted in the consultation whereby:

  - Category 1: Large non-life and life insurers, to be levied at half the rate of medium high insurers;

  - Category 2: Non-life insurers not belonging to category 1 having written motor insurance in Ireland in 2016, to be levied at half the rate of medium low insurers;

  - Category 3: Insurers not belonging to category 1 or 2, to be levied as before; and

- **EEA Investment Firms and Fund Service Providers**: The Central Bank intends proceed with introducing a fixed levy equal to the flat levy component of Irish investment firms and Irish fund service providers.

A copy of the Feedback Statement on CP 108 can be found here.

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

(i) European Commission adopts Delegated Regulation amending the Commission's list of high-risk third countries under the Fourth Money Laundering Directive ("MLD4")

On 27 October 2017, the European Commission adopted a Delegated Regulation amending the Commission's list of high-risk third countries under the Fourth Money Laundering Directive ((EU) 2015/849) ("**MLD4**") to include Ethiopia.

The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing MLD4 by identifying high-risk third countries.

On 23 November 2017, the initial period for examining the delegated act was extended by one month, at the European Parliament's request and is awaiting a committee decision.

A copy of the Delegated Regulation can be found here.

The progress of the Delegated Regulation can be viewed here.

(ii) Outcomes of the Joint Plenary of FATF/GAFILAT

In November 2017, FATF and the Financial Action Task Force of Latin America ("**GAFILAT**"), held the first joint plenary meeting in Buenos Aires.

According to FATF's press release of 3 November 2017, the main issues dealt with at the plenary meeting were:

- Combatting terrorist financing, including the adoption of a report on the financing of recruitment for terrorist purposes;
- Information sharing and the adoption of revisions to Recommendations 18 and 21 on information sharing;
- Adoption of a supplement to the 2013 FATF Guidance on AML/CFT measures and financial inclusion;
- The mutual evaluation reports of Mexico and Portugal;
- The follow up report for the mutual evaluation of Austria;
- AML/CFT improvements in Uganda;
- Brazil's progress in addressing the deficiencies identified in its mutual evaluation reports since the June 2017 FATF report;
- Approval of a statement about the proliferation financing risk emanating from the Democratic People's Republic of Korea, which stresses the global obligations and the importance of a robust application of the FATF standards and relevant UN Security Council Resolutions;
- Revisions to methodology;
- Strengthening of FATF's institutional basis, governance and capacity;
- Outcomes of the meeting of the Forum of FATF Heads of Financial Intelligence Units ("**FIUs**");

- Publication of a statement by FATF expressing its strong support for responsible financial innovation in line with FATF Standards and an exploration of the opportunities that new financial and regulatory technologies present for improving the effective implementation of AML/CFT measures;

- FATF/GAFILAT Outreach Prosecutorial Services and Criminal Justice Systems;

- GAFILAT Private Sector engagement;

- Training activities of the FATF Training and Research Institute in Busan, Korea; and

- Considering jurisdictions with strategic AML/CFT deficiencies or which a call for action applies, including an update on Iran's engagement with FATF and an update on AML/CFT improvements in Uganda.

A copy of the press release can be found here.

(iii) ESAs publish a final report on draft RTS on strengthening group-wide management of money laundering and terrorist financing risk under MLD4

On 6 December 2017, the ESAs published a final report on draft RTS on strengthening group-wide management of money laundering and terrorist financing risks under MLD4.

The final report on the draft RTS indicates that additional policies and procedures will be required to be taken by credit and financial institutions to manage money laundering and terrorist financing risks ("**ML/TF Risk**") where one or more branches or majority-owned subsidiaries are located in third countries whose laws do not permit some or all parts of a group's AML and CTF policies and procedures to be implemented in full by such branches/ subsidiaries.

The final report on draft RTS indicates that such additional policies and procedures should be risk-based. However in order to ensure a consistent EU wide approach, the RTS sets out the specific minimum actions which such credit and financial institutions should be required to take in those situations.

The report also indicates that if the relevant competent authority believes that the additional measures taken by a credit institution or financial institution are insufficient to manage that risk, the competent authority should be able to direct the credit institution or financial institution to take specific measures to ensure the credit institution's or financial institution's compliance with its AML/CFT obligations.

The final draft RTS will be sent to the European Commission for its review and approval.

A copy of the final draft RTS can be found here.

(iv) Central Bank publishes the third edition of the Anti-Money Laundering Bulletin

In December 2017, the Central Bank published the third edition of the Anti-Money Laundering Bulletin with the purpose of providing guidance on customer due diligence ("**CDD**") in relation to the discontinuation of a business relationship where: (i) a firm is unable to identify and verify its customers, or (ii) where there is insufficient documentation or information on file to verify a customer.

The Central Bank states that in such circumstances a "firm must not allow the situation to perpetuate". It states that it expects that firms will have remediation plans in place in order to obtain the outstanding documentation and/or information.

In the bulletin, the Central Bank indicates that it has identified compliance deficiencies in the past which have arisen as a result of a firm acquiring a book of business and thereafter it is unable to verify the identity of these customers, and does not hold sufficient documentation or information to verify these customers. In such cases, the Central Bank indicates that the anti-money laundering function within the firm acquiring /transferring such a book of business should be involved in the due diligence process in order to assess the magnitude of any compliance deficiencies. This involvement will allow firms to commence a remediation exercise should the acquisition/transfer proceed.

The bulletin sets out certain steps to be considered by firms when conducting customer due diligence ("**CDD**") in respect of new customers. The list is stated not to be exhaustive. The steps to be taken by a firm include:

- Implementation of policies and procedures which specify the defined timeframe in which CDD must be completed (if CDD is completed during the establishment of the business relationship). This is to minimize the risk that a firm should be unable to contact the customer or return the funds to the original source, should there be a requirement to discontinue the business relationship;

- Obtaining customer consent as part of the on-boarding process in order to deal with the requirement to discontinue the customer relationship should the need arise; and

- Implementation of processes that allow firms to return funds directly to the source from which they came. Firms should exercise caution when considering the means of doing this, so as not to appear to convert or legitimise such funds.

The bulletin also sets out steps to be considered by firms when conducting CDD measures in respect of existing customers. These include:

- Review of all customer records to ascertain the extent of any deficiencies in CDD;

- Creation of a comprehensive plan to address any failure of customers to provide the required CDD documentation and/or address circumstances in which there is insufficient information in respect of the customer for the firm to demonstrate that the

CDD requirements are met. In circumstances where it will take a longer period of time to fully implement remediation plans, firms should consider prioritising remediating customers that would represent a higher risk of ML/TF before remediating other areas;

- Exploration of all options to source CDD, to include other types of identification documents and information which may be acceptable given the ML/TF risk profile of the customer. In cases where customers appear to be non-contactable, firms should employ all available methods that could be utilised in order to locate such customers, for example engaging with the customer's intermediary;

- Where CDD is not forthcoming from customers with whom the firm has been able to successfully correspond, firms must ensure that there are documented policies and procedures in place that outline the action required to discontinue the business relationship;

- In circumstances where there remains a cohort of customers for whom it has not been possible to obtain CDD despite all efforts to contact those customers, firms should design and document policies and procedures to be applied in order to ensure that the associated ML/TF risks are appropriately managed. This may include for example applying measures whereby these accounts are clearly identified as 'discontinued', ring fenced from normal accounts and flagged accordingly, subject to additional and more robust measures to be applied should the customer re-present;

- Consider whether there is any cause for suspicion in circumstances where CDD is not forthcoming and ensure suspicious transaction reporting obligations are fulfilled.

A copy of the third edition of the Anti-Money Laundering Bulletin can be found here.

(v) European Commission adopts a further Delegated Regulation which further amends the Commission's list of high-risk third countries under MLD4

On 13 December 2017, the European Commission adopted a further Commission Delegated Regulation amending the Commission's list of high-risk third countries. The Commission Delegated Regulation adds Sri Lanka, Trinidad, Tobago and Tunisia to the Commission's list of high-risk third countries.

The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing MLD4 by identifying high-risk third countries.

The Council of the European Union and the European Parliament will review the Commission Delegated Regulation and if neither of them objects, it will be published in OJ.

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

(vi) Political agreement reached on MLD5

On 15 December 2017, the European Commission published a press release confirming that the Council of the European Union and the European Parliament have reached a political agreement on the proposed MLD5. This was followed by similar press releases of the European Parliament and by, the Council of the European Union.

MLD5 sets out a series of measures to better counter the financing of terrorism and to ensure increased transparency of financial transactions. In particular MLD5 aims to:

- Increase transparency on who really owns companies and trusts by establishing beneficial ownership registers;
- Prevent risks associated with the use of virtual currencies for terrorist financing and limiting the use of pre-paid cards;
- Improve the safeguards for financial transactions to and from high-risk third countries; and
- Enhance the access of Financial Intelligence Units to information, including centralised bank account registers.

A copy of the European Commission's press release and the accompanying factsheet can be found here.

(vii) MLD4 – Update as regards to Central Register for beneficial ownership in Ireland

Under MLD4 each Member State is required to establish a central register of beneficial ownership of corporate and other legal entities, including trusts, by 26 June 2017. As a result of the ongoing discussions concerning the MLD5 proposals, the Department of Finance has indicated that it is envisaged that the central register of beneficial ownership is now expected to be launched in Quarter 1, 2018.

Data Protection / GDPR

(i) Article 29 Data Protection Working Party adopts draft Guidelines on personal data breach reporting

On 3 October 2017, the Article 29 Working Party (the "**Working Party**") adopted guidelines on personal data breach reporting (the "**Draft Breach Reporting Guidelines**").

The Working Party is a collective of EU data privacy supervisory authorities (**"DPAs"**), including the Irish Data Protection Commissioner ("**DPC**").

The Draft Breach Reporting Guidelines seek to provide clarity on data controller's and processor's notification obligations under the General Data Protection Regulation (Regulation (EU) 2016/679) ("**GDPR**").

The Draft Breach Reporting Guidelines will be a useful tool for data controllers in light of the GDPR's mandatory reporting requirements for all personal data breaches (save for those that are unlikely to result in a risk to the rights and freedoms of individuals) and in light of the potential ramifications for failing to report a breach.

In particular the Draft Breach Reporting Guidelines address the:

- Definition of a personal data breach;
- Timelines for reporting breaches to the Supervisory Authority and the data subject;
- Information that needs to be provided;
- Meaning of "risk," and
- Role of the Data Protection Officer ("**DPO**") in the context of breach notification reporting.

In addition, the Working Party has provided a flowchart illustrating the notification requirements along with the provision of practical examples of personal data breaches and who to notify.

Organisations are advised to develop an incident response plan in advance of the implementation of the GDPR, including processes to detect and promptly contain data breaches and to assess the risk to individuals arising from potential breaches.

The deadline for comments on the Draft Breach Reporting Guidelines passed on 28 November 2017. The Working Party are considering the comments received with a view to adopting a final version.

The Draft Breach Reporting Guidelines are available here.

(ii) Article 29 Data Protection Working Party adopts draft Guidelines on application and setting of administrative fines

On 3 October 2017, the Working Party adopted the draft guidelines on the application and setting of the administrative fines under the GDPR (the "**Draft Administrative Fines Guidelines**"). The Draft Administrative Fines Guidelines are intended for use by supervisory authorities to ensure improved application and enforcement of the GDPR and to encourage its consistent and harmonised interpretation and application.

Administrative fines are a powerful part of the 'enforcement toolbox' of the supervisory authorities under the GDPR.

Under the GDPR, the scope and nature of administrative fines which can imposed has increased exponentially and may be up to €20 million or 4% of total worldwide annual turnover, whichever is greater.

The Draft Administrative Fines Guidelines state that supervisory authorities must assess each case individually to identify the most "effective, proportionate and dissuasive" corrective measure (or combination of measures) having regard to a number of assessment criteria (both aggravating and mitigating). These criteria include:

- The nature, gravity and duration of the infringement (including number, purpose of processing and level of damage suffered);
- The intentional or negligent character of the infringement;
- Any action taken by the controller or processor to mitigate the damage suffered by data subjects;
- The degree of responsibility of the controller or processor;
- Any relevant previous infringements by the controller or processor;
- The degree of cooperation with the supervisory authority;
- The categories of the personal data affected by the infringement;
- The manner in which the infringement became known to the supervisory authority;
- Whether, and if so to what extent, the controller or processor notified the infringement;
- Adherence to approved codes of conduct pursuant; and
- Any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

Dillon Eustace has published an article on Administrative Sanctions under the GDPR which is available here.

The Draft Administrative Fines Guidelines are available for download here.

(iii) Article 29 Data Protection Working Party adopts Guidelines on automated individual decision making and profiling

On 17 October 2017, the Working Party adopted guidelines on automated individual decision making and profiling for the purpose of GDPR (the "**Draft Automated Decision Making Guidance**"). The Guidelines aim to clarify the GDPR's provisions that address the risks arising from profiling and automated decision-making and cover the following areas:

- Definitions of profiling and automated decision-making and the GDPR approach to these in general;
- Specific provisions on automated decision-making;
- General provisions on profiling and automated decision-making;
- Children and profiling; and
- Data protection impact assessments.

The deadline for comments on the Draft Automated Decision Making Guidance passed on 28 November 2017.

The Draft Automated Decision Making Guidance is available here.

(iv) Article 29 Data Protection Working Party November plenary meeting

On 28 and 29 November 2017, the Working Party held its November plenary meeting (the "**Plenary**") to examine certain critical matters with regards to the implementation of the GDPR and the Privacy Shield and to adopt certain key documents. In addition, discussions were held at the Plenary on:

- The preparation of guidelines on 'certification' and on 'derogations for transfers' under the GDPR, which are expected to be proposed for adoption at the February plenary;
- The organisation and structure of the European Data Protection Board ("**EDPB"**);
- The Working Party's mandate to work on the development of a position relating to territorial scope of the GDPR; and
- The Working Party's mandate to develop a new opinion on the proposal for an ePrivacy regulation and a statement on encryption.

Regarding the financial matters issues, discussions were held at the Plenary on the Working Party's continued active collaboration with ESMA on the establishment of a framework for the exchange of information between European and non-European financial supervisory

authorities and the implementation of revised Payment Services Directive (Directive EU 2015/2366) ("**PSD2**") and its compatibility with the GDPR.

The public agenda for the Plenary is available here.

The press release issued following the Plenary is available here.

(v) Article 29 Data Protection Working Party adopts Guidelines on US Privacy Shield

On 28 November 2017, the Working Party adopted a report on the EU-US Privacy Shield adequacy decision (the "**Privacy Shield**") after the first Joint Annual Review which took place in September 2017 in Washington DC (the "**Privacy Shield Report**").

The Privacy Shield Report acknowledges the progress of the Privacy Shield in comparison to the now invalid Safe Harbour Decision and the efforts made by US authorities and the European Commission to implement the Privacy Shield.

In the Privacy Shield Report, the Working Party identifies a number of significant concerns and it advises that such concerns need to be addressed by both the European Commission and the US authorities by setting up an action plan immediately in order to demonstrate that these concerns will be addressed.

The Working Party's concerns relate to:

- Lack of guidance and information;
- HR Data;
- Lack of oversight and supervision of compliance with the Principles;
- Application of the Privacy Shield to processors established in the US;
- Automated-decision making/Profiling; and
- Self-Certification Process and Cooperation between U.S. authorities in the Privacy Shield mechanism.

The Privacy Shield Report states that if these concerns are not adequately addressed the Working Party will take appropriate action, including the possibility of challenging the Privacy Shield adequacy decision before the national courts (who would refer the case to the European Court of Justice ("**CJEU**") for a ruling.

The Privacy Shield Report is available here.

The Working Party press release announcing the publication of the Privacy Shield Report is available here.

(vi) Article 29 Data Protection Working Party adopts Guidelines on transparency

Following on from the Plenary, the Working Party published guidelines on the obligation of transparency under the GDPR in relation to the processing of personal data (the "**Transparency Guidelines**"). The transparency principle under the GDPR applies to three central areas:

- Provision of information related to fair processing to individuals;
- Communication with individuals in relation to their rights under the GDPR; and
- Facilitating the exercise by individuals of their data protection rights.

The Transparency Guidelines are vital for data controllers and data processors as they provide practical guidance and interpretive assistance on the principle of transparency, which has not defined within the GDPR.

Comments on the Transparency Guidelines can be submitted to the Working Party before the public consultation closes on 23 January 2018.

The Transparency Guidelines are available here.

(vii) Article 29 Data Protection Working Party adopts a working document on adequacy referential

On 28 November 2017, the Working Party adopted a working document on adequacy referential (the "**Adequacy Referential Working Document**") which is a means of ensuring an adequate level of protection during the transfer of personal data outside of the European Union.

The aim of the Adequacy Referential Working Document is to update the previously published working document on transfers of personal data to third countries ("**WP 12**") as a result of the replacement of the EU Data Protection Directive by the GDPR with effect from 25 May 2018.

The Adequacy Referential Working Document is focused solely on adequacy decisions and it seeks to provide guidance primarily to the European Commission on the core data protection principles that have to be present in a third country legal framework or an international organisation in order to ensure essential equivalence with the European Union framework.

While the principles set out in the Adequacy Referential Working Document are not addressed directly to data controllers or data processors, third countries and international organisations seeking to obtain adequacy may use the working document as a guide.
Comments on the the Adequacy Referential Working Document can be submitted to the Working Party before the public consultation closes on 17 January 2018.

The Adequacy Referential Working Document is available here.

(viii) Article 29 Data Protection Working Party adopts Guidelines on consent

On 28 November 2017, the Working Party adopted its Guidelines on consent under the GDPR (the "**Consent Guidelines**").

In order for a data subject to give lawful consent to the processing of their personal data under the GDPR, a data controller must ensure that the consent meets all of the enhanced requirements as set out in the GDPR. To assist with this, the Working Party has published the Consent Guidelines, which provide a thorough analysis of the notion of consent under the GDPR and provides guidance on what constitutes a valid consent.

The Consent Guidelines should be read in conjunction with existing Working Party Opinions on consent, including Opinion 15/2011, where consistent with the GDPR.

Comments on the Guidelines on Consent can be submitted to the Working Party before the public consultation closes on 23 January 2018.

The Consent Guidelines are available here.

(ix) Article 29 Data Protection Working Party adopts working documents setting up tables with the elements and principles to be found in binding corporate rules for controllers and for processors

On 29 November 2017, the Working Party adopted two working documents setting up tables with the elements and principles to be found in binding corporate rules for controllers and for processors (the "**BCR Working Documents**").

The aim of the BCR Working Documents is to amend the working document 153 (which was adopted in 2008 for controller transfers ("**BCR-C**")) and the working document 195 (which was adopted in 2012 for processor transfers ("**BCR-P**")) setting up a table with the elements and principles to be found in binding corporate rules in order to reflect the requirements referring to BCRs now expressly set out in the GDPR.

BCR-Cs and BCR-Ps allow a corporate group or a group of enterprises engaged in a joint economic activity to transfer personal data from organisations established in the European Union to organisations within the same group established outside the European Union.

BCR-Cs are suitable for framing transfers of personal data from controllers established in the European Union to other controllers or to processors (established outside the European Union) within the same group, whereas BCR-Ps apply to data received from a controller (established in the European Union) which is not a member of the group and then processed by the concerned group members as processors and/or sub-processors.
The aim of the BCR Working Documents is to:

- Clarify the necessary content of BCR-Cs and BCR-Ps;
- Provide a distinction on what must be included in the BCRs and what must be presented to the competent Supervisory Authority in the BCRs application; and
- Provide explanations/comments on each of the requirements.

Comments on the BCR Working Documents can be submitted to the Working Party before the public consultation closes on 17 January 2018.

The BCR-C Working Document is available here.

The BCR-P Working Document is available here.

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

(i) ESMA publishes a final report containing technical advice on the evaluation of certain elements of the SSR

On 21 December 2017, ESMA published a final report containing technical advice to the European Commission on the evaluation of certain elements of Regulation 236/2012 the ("**Short Selling Regulation** or "**SSR**").

The final report follows ESMA's consultation on the SSR in July 2017.

ESMA was asked to provide technical advice on issues arising in respect of the following three main areas: (i) exemption for market making activities; (ii) short-term bans on short-selling; and (iii) transparency of net short positions. Annex II contains the resultant technical advice provided to the European Commission on these issues.

A copy of the final report can be found here.

International Swaps and Derivatives Association ("**ISDA**")

(i) ISDA documentation post Brexit

In October 2017, the International Swaps and Derivatives Association ("**ISDA**") wrote to members asking for feedback on whether to add the option of being governed by Irish or French law to the current choice of English or New York law for derivatives documentation. ISDA has decided to explore this option in order to meet the needs of counterparties wanting to have their contracts governed by the laws of an EU member state.

ISDA also released a Brexit FAQ in September 2017. A copy of the Brexit opinion can be found here.

Mediation Act 2017

(i) The Mediation Act 2017

On 2 October 2017, the Mediation Act 2017 (the "**Act**") was signed into law and is expected to come into force in the coming weeks. The Act applies to all litigation disputes apart from arbitration and certain disputes under tax and customs legislation.

The Act encourages the use of mediation which may achieve a better outcome for parties while also reducing legal costs and therefore improving access to justice and easing the strain on the court system.

The Act is expected to increase the number of mediations which means that parties will need professional or expert advice, including financial expertise, at an earlier stage in the dispute process. This will ensure that parties are in a position to fully consider the financial and taxation ramifications of any settlement proposal. The Act also introduces an obligation on solicitors and barristers to advise their clients to consider using mediation as a means of resolving disputes.

A copy of the Act can be found here.

Dillon Eustace
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This Investment Firms Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 31 December 2017, and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace

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