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Funds
Quarterly Legal and
Regulatory Update

Period covered:
1 October 2019 - 31 December 2019

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

1 UNDERTAKINGS IN COLLECTIVE INVESTMENTS AND TRANSFERABLE SECURITIES (“UCITS”)

1.1 EFAMA publishes response to ESMA consultation on performance fees in UCITS

On 31 October 2019, the European Fund and Asset Management Association (“**EFAMA**”) published a response to the public consultation on draft guidelines on performance fees in UCITS published by the European Securities and Markets Authority (“**ESMA**”) in July 2019. In the response paper, EFAMA makes the following points of note:

- Minimum Crystallisation Period: EFAMA agrees with the proposed minimum for a crystallisation period of no less than one year, but recognises that shorter crystallisation periods should be conceivable in relation to “pure” high water mark models as well as under a series of limited exceptional circumstances;
- Performance Fee Models: in line with IOSCO’s 2016 Best Practices, EFAMA believes that various performance fee models would all prove compatible with the key principles of ESMA’s draft guidelines;
- Disclosure of Performance Fee in UCITS key investor information document (“**KIID**”): a reference to a benchmark for the mere purpose of calculating performance fees against it should not be construed as an indication that that benchmark defines the UCITS’ ultimate investment objective; and
- Alternative Investment Fund (“**AIF**”) Products: It would be premature to extend the final guidelines to include retail AIF products in the absence of a comparable product regulation under Directive 2011/61/EU (the “**AIFM Directive**”) and where retail AIF distribution is currently only possible in selected EU jurisdictions.

The EFAMA response can be accessed [here](#).

1.2 IFIA publishes response to ESMA consultation on performance fees in UCITS

On 5 November 2019, the Irish Funds Industry Association (“**IFIA**”) published a response to the public consultation on draft guidelines on performance fees in UCITS published by ESMA in July 2019. In the response paper, the IFIA makes the following points of note:

- Performance Fee Models: the final guidelines need to be sufficiently flexible to allow management companies to be able to tailor their performance fee model in line with a fund’s investment objectives, strategy and policy;
- Unhedged Share Classes: the final guidelines should incorporate provisions regarding the calculation and disclosure of performance fees based on a high water mark model for an unhedged share class denominated in a currency other than the base currency of the UCITS;
- Prospectus Disclosure: the inclusion of specific examples of how the performance fee will be calculated in the Prospectus of a fund could be misleading. Management companies may be at risk of misleading investors if certain outcome permutations are not included;

- Verification by Depositary: the requirement by depositaries to verify all performance fee calculations on crystallisation and before payment is good practice and is in the interests of investors. This should be included in the final guidelines;
- Regulatory alignment: Various national competent authorities have already implemented new performance fee regimes. It is important that ESMA implements any new requirements in a manner that ensures regulatory alignment.

The IFIA response can be accessed [here](#).

2 ALTERNATIVE INVESTMENT FUND MANAGEMENT DIRECTIVE (“AIFMD”)

2.1 ESMA publishes updated Q&As on the application of AIFMD

On 4 December 2019, ESMA published updated Questions and Answers (“**Q&As**”) on the application of the Alternative Investment Fund Managers Directive (2012/61/EU) (“**AIFMD**”). Section III of the Q&As, which relates to reporting to national competent authorities, has been updated to include a new Q&A clarifying how AIFMs should report the results of liquidity stress tests for closed-ended unleveraged AIFS.

A copy of the updated Q&As on the application of AIFMD can be accessed [here](#).

3 PACKAGED RETAIL INSURANCE-BASED INVESTMENT PRODUCTS (“PRIIPS”)

3.1 Joint Committee of ESAs publishes consultation on amendments to PRIIPS Delegated Regulation

On 16 October 2019, the Joint Committee of the European Supervisory Authorities (“**ESAs**”) published a consultation paper on proposed amendments to Regulation (EU) 2017/653 (“**PRIIPS Delegated Regulation**”) regarding the existing rules on key information documents (“**KIDs**”) for PRIIPS. The proposed amendments relate to:

- Performance scenarios;
- Information regarding the costs of the investment; and
- Specific issues for PRIIPs offering multi-option products for investments.

The Joint Committee has also proposed amendments to allow the requirements to be applied to UCITS that are expected to prepare a KID from 1 January 2022.

The Joint Committee is welcoming comments on the proposals until 13 January 2020. It intends to conclude the review during the first quarter of 2020 and to submit its final proposals to the European Commission shortly afterwards.

The consultation paper can be accessed [here](#).

3.2 Joint Committee of ESAs publishes supervisory statement on application of PRIIPS Regulation to bonds

On 24 October 2019, the Joint Committee of ESAs published a supervisory statement on the application of Regulation (EU) 1286/2014 (the “**PRIIPS Regulation**”) to bonds. The supervisory statement contains an Annex containing guidance on the consistent application of the scope of the PRIIPs Regulation to bond markets.

The Joint Committee also recommends that during the upcoming review of the PRIIPS Regulation, the co-legislators introduce amendments to the PRIIPS Regulation in order to specify more precisely which financial instruments fall within its scope.

The supervisory statement can be accessed [here](#).

3.3 Commission Delegated Regulation amending PRIIPs Delegated Regulation to align transitional arrangements is published in Official Journal

On 8 November 2019, the Commission Delegated Regulation (EU) 2019/1866 (the “**Revised PRIIPS Delegated Regulation**”) which amends the PRIIPS Delegated Regulation was published in the Official Journal of the European Union.

The Revised PRIIPS Delegated Regulation amends Article 18 of the PRIIPs Delegated Regulation to extend the transitional arrangements for PRIIP manufacturers offering units of UCITS and non-UCITS funds as underlying investment options by two years, to 31 December 2021.

The Revised PRIIPS Delegated Regulation entered into force on 28 November 2019 and can be accessed [here](#).

4 EUROPEAN MARKETS INFRASTRUCTURE REGULATION (“EMIR”)

4.1 ESMA publishes consultation paper on draft technical advice on commercial terms for providing clearing services under EMIR

On 3 October 2019, ESMA published a consultation paper on its draft technical advice to the European Commission regarding commercial terms for providing clearing services under Regulation (EU) 648/2012 (“**EMIR**”) as revised by Regulation (EU) 2019/834 (the “**EMIR Refit Regulation**”).

The consultation closed on 2 December 2019 and ESMA expects to publish a final report and to submit the technical advice to the European Commission in the first quarter of 2020.

The consultation paper can be accessed [here](#).

4.2 ESMA publishes consultation paper on MiFIR alignment following introduction of EMIR Refit Regulation

On 4 October 2019, ESMA published a consultation paper on the alignment of Regulation (EU) 600/2014 (“**MiFIR**”) with the changes introduced by the EMIR Refit Regulation.

ESMA’s proposes that the scope of counterparties which are subject to the MiFIR trading obligations for derivatives should be aligned with the scope of counterparties subject to the clearing obligation for derivatives as revised by the EMIR Refit Regulation.

The consultation closed on 22 November 2019 and ESMA is expected to submit its final report to the European Commission in early 2020.

The consultation paper can be accessed [here](#).

4.3 EMIR 2.2 Regulation

On 12 December 2019, the Regulation amending the EMIR supervisory regime for EU and third country central counterparties (“**CCPs**”) (“**EMIR 2.2**”) was published in the Official Journal of the EU.

EMIR 2.2. introduces new rules on the classification and supervision of CCPs, a new tiering system of classification for third country CCPs and it establishes a CCP Supervisory Committee to manage the new tiering system and promote supervisory convergence.

On 11 November 2019, ESMA published three reports relating to EMIR 2.2 containing technical advice to the European Commission:

- [Final report](#) on criteria for tiering under Article 25(2a) of EMIR 2.2: ESMA proposes a range of indicators to consider in determining a third country CCP’s tiering and provides guidance on what it may consider in this assessment;
- [Final report](#) on comparable compliance under Article 25a of EMIR 2.2: ESMA proposes that tier 2 third country CCPs will be required to evidence how compliance with the requirements applicable in their home country also satisfies the requirements under EMIR 2.2;
- [Final report](#) on ESMA fees for third country CCPs under EMIR 2.2: ESMA proposes the fees to be charged for each category of third country CCP, along with the payment and reimbursement conditions.

ESMA has sent the technical advice to the European Commission so it can assist with the development of corresponding delegated legislation under EMIR 2.2, which the Commission will consult on in due course.

EMIR 2.2 can be accessed [here](#).

4.4 Joint Committee of ESAs publishes final report on EMIR RTS on amendments to the bilateral margin requirements

On 5 December 2019, the Joint Committee of ESAs published its final report on regulatory technical standards (“**RTS**”) it has developed under Article 11(15) of EMIR. The proposed draft RTS propose amendments to the Commission Delegated Regulation (EU 2016/2251) on bilateral margining in view of the international framework agreed by the Basel Committee on Banking Supervision (“**BCBS**”) and IOSCO.

In addition, the Joint Committee published joint statement on the introduction of fallbacks in OTC derivative contracts and the requirement to exchange collateral. The Joint Committee is of the view that this is useful to ensure legal certainty on the issue in case, or to the extent, it is not already provided in some jurisdictions.

The final report can be accessed [here](#) and the joint statement can be accessed [here](#).

4.5 European Commission adopts two Delegated Regulations supplementing EMIR on risk mitigation techniques

On 16 December 2019, the European Commission adopted a Delegated Regulation supplementing EMIR with regard to RTS on the specification of criteria for establishing the arrangements to adequately mitigate CCP credit risk associated with covered bonds and securitisations and amending Delegated Regulations (EU) 2015/2205 and (EU) 2016/1178. It can be accessed [here](#).

On 17 December 2019, the European Commission adopted a Delegated Regulation amending Commission Delegated Regulation (EU) 2016/2551 which contains RTS supplementing EMIR on risk mitigation techniques for OTC derivative contracts, in connection with certain simple, transparent and standardised securitisations for hedging purposes. It can be accessed [here](#).

The Delegated Regulations will be considered by the European Parliament and the Council of the European Union and will enter into force 20 days after their publication in the Official Journal of the European Union.

4.6 Trade Associations publish a master regulatory reporting agreement for reporting under EMIR and SFTR

On 19 December 2019, the Trade Associations (made up of the AFME, the FIA, the ICMA, the ISLA and the ISDA) published a new master regulatory reporting agreement (“**MRRA**”), accompanied by an explanatory memorandum, intended to simply reporting across different EU regulatory regimes.

The MRRA is drafted to cover market participants’ regulatory reporting obligations in respect of derivative transactions under EMIR and/or securities financing transactions under Regulation (EU) 2015/2365 (the “**Securities Financing Transaction Regulation**” or “**SFTR**”), entered into under standard industry documentation.

The MRRA can be accessed [here](#) and the explanatory memo can be accessed [here](#).

5 SECURITISATION REGULATION

5.1 Delegated and Implementing Acts supplementing the Securitisation Regulation published by the European Commission

A number of Delegated Regulations which supplement Regulation (EU) 2017/2402 (the “**Securitisation Regulation**”) with regard to regulatory technical standards have been published by the European Commission during the period 1 October 2019 to 31 December 2019.

In addition, a number of Commission Implementing Regulations which supplement the Securitisation Regulation with regard to implementing technical standards have been published by the European Commission during this period.

The Delegated and Implementing Acts can be accessed [here](#).

5.2 ESMA publishes updated version of Q&As on Securitisation Regulation

On 15 November 2019, ESMA published an updated version of its Q&As on the Securitisation Regulation.

The updated Q&As can be accessed [here](#).

6 BENCHMARKS REGULATION

6.1 European Commission publishes consultation on review of the Benchmarks Regulation

On 11 October 2019, the European Commission published a consultation on a review of Regulation (EU) 2016/1011 (the “**Benchmarks Regulation**”).

The consultation closed on 6 December 2019 and the European Commission is expected to submit a report to the European Parliament and Council of the European Union by 1 January 2020.

The consultation can be accessed [here](#).

6.2 ESMA publishes updated version of its Q&As on the Benchmarks Regulation

On 11 December 2019, ESMA published an updated version of its Q&As on the Benchmarks Regulation.

The updated Q&As can be accessed [here](#).

7 EUROPEAN SECURITIES AND MARKETS AUTHORITY (“ESMA”)

7.1 ESMA publishes final report on draft RTS under Article 25 of the ELTIF Regulation

On 10 December 2019, ESMA published its final report on draft RTS issued under Regulation (EU) 2015/760 (the “**ELTIF Regulation**”) in respect of European long-term investment funds (“**ELTIFs**”).

The report addresses cost disclosure requirements applicable to ELTIF managers.

Upon completion of the review of the Delegated Regulation 2017/653 (the “**PRIIPS Delegated Regulation**”), ESMA will assess the most appropriate way to finalise the draft RTS as regards applicable cost disclosure requirements for ELTIFs. Based on this assessment, ESMA may carry out another round of consultation on the revised proposed RTS.

The report can be accessed [here](#).

8 INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS (“IOSCO”)

8.1 IOSCO publishes final report on framework for assessing leverage in investment funds

On 13 December 2019, IOSCO published its final report setting out recommendations for a “two step” framework assessing leverage in investment funds that may pose stability risks as follows:

- Step 1 indicates how regulators could exclude from consideration funds that are unlikely to produce financial stability risks, while identifying a subset of funds for further analysis that may pose such risks.
- Step 2 consists of a risk-based analysis of the subset of funds identified in Step 1. A set of tools for each step is offered, which can be adjusted to the needs of a jurisdiction and the characteristics of funds.

IOSCO shall, incrementally over time, publish an annual report reflecting leverage trends within the asset management industry at the global level. The first report is scheduled to be published in 2021.

The report can be accessed [here](#).

9 MARKET ABUSE REGULATION (“MAR”)

9.1 ESMA publishes consultation paper on MAR review report

On 3 October 2019, ESMA published a consultation paper on the review report of Regulation (EU) 596/2014 (“**MAR**”). The consultation paper covers the scope of MAR and analyses whether it should be extended to include spot FX contracts. It also addresses buy-back programmes, inside information, collective investment undertakings and market surveillance by national competent authorities.

The consultation closed on 29 November 2019 and can be accessed [here](#).

9.2 ESMA publishes final report with draft RTS on co-operation arrangements under MAR

On 8 October 2019, ESMA published a final report containing draft RTS on co-operation arrangements under MAR between national competent authorities and the supervisory authorities of third countries.

ESMA has submitted the draft RTS to the European Commission for endorsement.

A copy of the final report can be accessed [here](#).

10 PROSPECTUS REGULATION

10.1 ESMA publishes guidelines on risk factors under the Prospectus Regulation

On 1 October 2019, ESMA published its final guidelines on risk factors under Regulation (EU) 2017/1129 (the “**Prospectus Regulation**”).

The final guidelines can be accessed [here](#).

10.2 ESMA publishes updated list of national thresholds below which the obligation to publish a prospectus does not apply

On 2 December 2019, ESMA published an updated list of national thresholds below which the obligation to publish a prospectus does not apply.

ESMA’s list can be accessed [here](#).

10.3 ESMA publishes updated version of its Q&As on the Prospectus Regulation

On 4 December 2019, ESMA published an updated version of its Q&As on the Prospectus Regulation.

A copy of the Q&As on the Prospectus Regulation can be accessed [here](#).

10.4 ESMA publishes final report on draft RTS amending Prospectus Delegated Regulation

On 4 December 2019, ESMA published its final report on the draft RTS which makes minor amendments to Delegated Regulation (EU) 2019/979 (the “**Prospectus Delegated Regulation**”).

The report can be accessed [here](#).

11 CENTRAL BANK OF IRELAND

11.1 Central Bank’s Michael Hodson delivers speech on key topics to be considered by INEDs

On 7 October 2019, Michael Hodson, the Central Bank’s Director of Asset Management and Investment Banking, delivered a speech to the independent non-executive director (“**INED**”) community. In his speech, Mr. Hodson covered:

- Fund Management Company Effectiveness (better known as CP86);
- A number of key topics from a regulatory perspective, such as sustainable finance, cyber security, corporate governance, liquidity management and the regulatory landscape generally; and
- Brexit.

The Central Bank is expected to issue a Dear CEO letter on cyber-security risk management. The Central Bank is also expected to issue a Dear CEO letter on the risk framework controls and documentation which firms should implement and update annually.

The Central Bank emphasised the need of Boards to take appropriate actions relating to management of liquidity risk as outlined in the Central Bank’s Dear CEO letter of 7 August 2019.

The Central Bank noted that the principles set down in the 2019 EBA Guidelines on Outsourcing Arrangements will be relevant to fund management companies (although these entities are not subject to the EBA guidelines).

A copy of the speech can be accessed [here](#).

11.2 Central Bank’s Colm Kincaid delivers speech on the Regulatory Philosophy and Priorities in Funds

On 15 October 2019, Colm Kincaid, Director of Securities and Markets Supervision of the Central Bank, delivered a speech entitled “Our Regulatory Philosophy and Priorities in Funds”. In his speech, Mr. Kincaid highlighted that the Central Bank of Ireland has identified five overarching priority themes, as follows:

- Brexit;
- strengthening resilience (such the Central Bank’s supervisory engagement with supervised entities under its PRISM model, its focus on liquidity management and the use of leverage in funds);
- strengthening consumer/investor protection (such as the Central Bank’s work on closet-indexing and the Central Bank’s ongoing work in respect of CP86);
- enhancing organisational capability (such as the work of the Central Bank of Ireland in developing its innovation hub); and
- engaging and influencing (such as the Central Bank’s work on ETFs).

Mr. Kincaid’s speech can be accessed [here](#).

11.3 Central Bank’s Derville Rowland delivers speech on the Senior Executive Accountability Regime

On 22 October 2019, Derville Rowland, Director General of the Central Bank of Ireland (CBI), delivered a speech in relation to the proposed Senior Executive Accountability Regime (“SEAR”). In her speech, Ms. Rowland indicates that the Central Bank the proposed SEAR regime will be complimented by enhancements to the current Fitness & Probity (“F&P”) regime.

The speech can be accessed [here](#).

11.4 Central Bank launches ASP sanctions guidance

On 14 November 2019, the Central Bank launched ASP sanctions guidance, providing detail on the sanctioning factors which it takes into account when imposing sanctions in enforcement cases under its Administrative Sanctions Procedure (“ASP”).

The ASP sanctions guidance can be accessed [here](#).

In addition, please see the Dillon Eustace article entitled ‘Central Bank launches ASP Sanctions Guidance’ (15 November 2019) which can be accessed [here](#).

11.5 Central Bank announces changes to the post-authorisation process for UCITS and RIAIFs

On 28 November 2019, the Central Bank wrote to the IFIA to announce changes with respect to the post-authorisation submission process for UCITS and RIAIFs. The post-authorisation submissions process will move from hard copy to soft copy, therefore, from 9 December 2019, all post-authorisation submissions should be sent by soft copy in accordance with the Central Bank guidelines.

The Central Bank announcement can be accessed [here](#).

11.6 Central Bank's Michael Hodson delivers speech on the asset management sector

On 3 December 2019, Michael Hodson, Director of Asset Management and Investment Banking of the Central Bank, delivered a speech entitled "Resilience in the face of changing winds". Topics of note include:

- CP86 review: the Central Bank is scheduled to commence its on-site inspections in the coming weeks, and these will continue into the first quarter of 2020. The Central Bank is expected to communicate with the Funds Industry in the second half of 2020. This may include a Dear CEO letter, consultation and/or risk mitigation programmes.
- Evolving supervision: the Central Bank intends to communicate with industry in the coming weeks on the first phase of changes to prudential impact models for fund service providers and asset managers (i.e. potential changes to their impact categorisation under the PRISM regime which are likely to take effect in 2020); and
- Supervisory priorities for 2020: these include (i) the conclusion of the CP86 review; (ii) further consultation work on errors in investment funds; and (iii) a focus on liquidity and leverage.

A copy of the speech can be accessed [here](#).

12 ANTI-MONEY LAUNDERING ("AML") / COUNTER-TERRORIST FINANCING ("CTF")

12.1 Joint Committee of ESAs publishes opinion on money laundering and terrorist financing risks

On 4 October 2019, the Joint Committee of European Supervisory Authorities ("ESAs") published an opinion on current and emerging money laundering and terrorist financing risks affecting the European Union's financial sector.

The opinion identifies the primary cross-sectoral risks which arise from Brexit, new technologies, virtual currencies, legislative divergence, divergent supervisory practices weaknesses in internal controls, terrorist financing and de-risking. The Joint Committee has also proposed a number of potential mitigating actions for national competent authorities.

The opinion can be accessed [here](#).

12.2 Council of the European Union publishes note on the identification of high-risk third countries under MLD4

On 10 October 2019, the Council of the European Union published a note to COREPER relating to the identification of high-risk third countries under Article 9 of Directive (EU) 2015/849 ("MLD4").

The note attaches an outline by the European Commission of the key elements of a refined methodology for identifying high-risk third countries. These include the following:

- Interaction between the European Union and the Financial Action Task Force ("FATF") listing processes;
- Enhanced engagement with the third countries, through a staged approach; and

- Consultation with experts of member states at every stage of the process, including consultation with law enforcement agencies, intelligence services and financial intelligence units.

The note can be accessed [here](#).

12.3 FATF publishes list of jurisdictions with AML/CFT deficiencies

On 18 October 2019, the FATF published a list identifying several jurisdictions that have strategic AML/CFT deficiencies. Each jurisdiction has provided a written high-level political agreement to address the identified deficiencies. The jurisdictions are:

- The Bahamas;
- Botswana;
- Cambodia;
- Ghana;
- Iceland;
- Mongolia;
- Pakistan;
- Panama;
- Syria;
- Trinidad and Tobago;
- Yemen; and
- Zimbabwe.

Additionally, the FATF confirmed that three jurisdictions, Ethiopia, Sri Lanka and Tunisia are no longer subject to monitoring. The FATF continues to identify additional jurisdictions, on an ongoing basis, that pose a risk to the international financial system.

The FATF publication can be accessed [here](#).

12.4 FATF issues public statement on DPRK and Iran

On 18 October 2019, the FATF issued a public statement calling on its members and other jurisdictions to apply counter-measures to protect the international financial system from the ongoing and substantial money laundering and financing of terrorism risks. The specific risks apply to the Democratic Peoples' Republic of Korea ("DPRK") and Iran.

The FATF urges all jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with the DPRK, including DPRK companies, financial institutions, and those acting on their behalf, and to adopt all measures to facilitate targeted financial sanctions.

In June 2016, the FATF welcomed Iran's high-level political commitment to address its strategic AML/CFT deficiencies. However in October 2019, the FATF noted that there are still items not completed. The FATF urges all jurisdictions to continue to advise their financial institutions to apply enhanced due diligence with respect to business relationships and transactions with natural and legal persons from Iran, consistent with FATF Recommendations.

The FATF publication can be accessed [here](#).

12.5 FATF publishes report on best practices on beneficial ownership for legal persons

On 25 October 2019, the FATF published a report on best practices on beneficial ownership for legal persons. The report has been published in advance of Directive (EU) 2018/843 (“**MLD5**”) which is required to be transposed by 10 January 2020.

The results of the FATF mutual evaluations indicate that jurisdictions find it challenging to achieve a satisfactory level of transparency regarding the beneficial ownership of legal persons. The paper aims to provide suggested solutions, supported by cases and examples of best practices from delegations.

The paper also identifies suggested key features of an effective system, which include adequate risk assessment; adequacy, accuracy and timeliness of information on beneficial ownership; access by competent authorities; forbidding or immobilising bearer shares and nominee arrangements; and effective, proportionate and dissuasive sanctions.

The paper can be accessed [here](#).

12.6 FATF publishes consultation on draft guidance on digital identity

On 31 October 2019, the FATF published a consultation on draft guidance on digital identity. The guidance is intended to clarify how digital ID systems can be used to conduct certain elements of customer due diligence in order to help governments, financial institutions and other relevant entities to apply a risk-based approach to the use of digital identification for customer due diligence.

The FATF sought feedback on particular areas and specific proposals regarding the text of the draft guidance. In particular, the FATF sought to hear from financial institutions, virtual asset service providers and other regulated entities.

The consultation closed on 29 November 2019 and can be accessed [here](#).

12.7 BCBS publishes consultation on guidelines on cooperation between prudential and AML/CFT supervision

On 8 November 2019, the BCBS published a consultation on guidelines on the interaction and cooperation between prudential and AML/CFT supervision.

The proposed guidelines are intended to enhance the effectiveness of the supervision of banks' money laundering and financing of terrorism risk management, consistent with the goals and objectives of the standards issued by the FATF.

The BCBS is welcoming feedback until 6 February 2020. The consultation can be accessed [here](#).

12.8 FATF publishes follow up report on Ireland's AML and CFT measures

On 12 November 2019, the FATF published a follow-up report and technical compliance re-rating in relation to Ireland's anti-money laundering and counter-terrorist financing measures.

The report provides that Ireland is currently compliant with 17 recommendations of the 40 FATF recommendations and largely compliant with 16 of them. It remains partially compliant with 7 of the 40 recommendations.

Ireland will move from enhanced to regular follow-up and will continue to report back to the FATF on progress to strengthen its implementation of AML/CFT measures.

The report can be accessed [here](#).

12.9 Publication of European Union (Money Laundering and Terrorist Financing) Regulations 2019

On 25 November 2019, the European Union (Money Laundering and Terrorist Financing) Regulations 2019 [S.I. No. 578] (the "**Regulations**") were published. The Regulations amend the primary AML and CFT legislation in Ireland and have been introduced to give further effect to MLD4.

The Regulations came into effect on 18 November 2019 and can be accessed [here](#).

Please see the Dillon Eustace article entitled 'New AML/CFT requirements' (3 December 2019) for further details which can be accessed [here](#).

12.10 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) (Cross Border Crime Agency) Bill 2019

On 19 December 2019, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) (Cross Border Crime Agency) Bill 2019 (the "**Bill**") completed Dáil Éireann, First Stage (whereby the Bill is initiated or presented to the House). The purpose of the Bill is to establish, on a statutory basis, a cross-border crime agency.

The Bill, when enacted, will amend the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 in order to establish a statutory agency to investigate and report on criminal activity between Northern Ireland and this jurisdiction.

The Bill's progress can be tracked [here](#).

12.11 FATF publishes new consolidated assessment ratings

For the period 1 October 2019 to 31 December 2019, the FATF updated the consolidated assessment ratings which provide a summary of: (1) the technical compliance; and (2) the effectiveness of the compliance, of the assessed parties against the 2012 FATF Recommendations on combating money laundering and the financing of terrorism & proliferation. The FATF also released new mutual evaluations for the same period.

The updated consolidated rating table can be accessed [here](#) and the full set of reports for each country can be accessed [here](#).

13 DATA PROTECTION / GENERAL DATA PROTECTION REGULATION (“GDPR”) / CYBER SECURITY

13.1 Data Protection Commission publishes FAQs on Brexit

On 11 October 2019, the Data Protection Commission published Frequently Asked Questions (“**FAQs**”) on Brexit. The FAQs address the potential impact of Brexit, in the context of a “no-deal” scenario, on the data protection obligations of Irish controllers which transfer personal data to the UK.

The Frequently Asked Questions can be accessed [here](#).

13.2 Data Protection Commission publishes updated guidance note on personal data breach notifications under GDPR

On 21 October 2019, the Data Protection Commission published an updated guidance note on personal data breach notifications under the General Data Protection Regulation 2016/679 (“**GDPR**”). The guidance note aims to give practical advice to data controllers on how to handle data breaches and navigate the mandatory data breach notification regime, which was introduced by GDPR in May 2018.

The guidance note is designed to help controllers understand two primary obligations:

- The notification of any personal data breach to the Data Protection Commission (unless the controller can demonstrate that the breach is unlikely to result in a risk to data subjects); and
- The communication of that breach to data subjects, where the breach is likely to result in a high risk to data subjects.

The guidance note can be accessed [here](#).

13.3 Reports published by the European Commission and by the European Data Protection Board on third annual joint review of the EU-U.S. Privacy Shield

On 23 October 2019, the European Commission published its report on the third annual joint review of the functioning of the EU-U.S. Privacy Shield. The review addresses the practical implementation and day-to-day functionality of the Privacy Shield.

The report confirms that the U.S. continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the European Union to participating companies in the U.S. Since the second annual review, there have been a number of improvements in the functioning of the framework.

However, the Commission notes that certain steps should be taken to ensure the effective functioning of the Privacy Shield in practice. This includes further strengthening the (re)certification process for companies who want to participate by shortening the time of the (re)certification process; expanding compliance checks, including concerning false claims of participation in the framework; and developing additional guidance for companies related to human resources data.

On 12 November 2019, the European Data Protection Board (“**EDPB**”) published its report on the third annual joint review. The EDPB welcomes the efforts made by the U.S. authorities

to implement the Privacy Shield, but notes that substantial compliance checks with the substance of the Privacy Shield's principles remain concerning.

The Commission report can be accessed [here](#) and the EDPB report can be accessed [here](#).

13.4 Data Protection Commission publishes updated guidance note on Data Protection Impact Assessments

On 29 October 2019, the Data Protection Commission published an updated guidance note on Data Protection Impact Assessments (“**DPIAs**”). The guidance note is designed to assist data controllers and data processors whose business activities may require them to carry out a DPIA.

The guidance note discusses when a DPIA is required and the benefits of conducting a DPIA. It also provides an overview of the steps involved in carrying out a DPIA.

The guidance note can be accessed [here](#).

13.5 Data Protection Commission publishes FAQs on data subject access requests

On 30 October 2019, the Data Protection commission published Frequently Asked Questions (“**FAQs**”) on data subject access requests.

The FAQs address when an individual is entitled to make an access request; what information an individual is entitled to make when they make an access request; and the specific formalities required for a valid access request.

The FAQs can be accessed [here](#).

13.6 Data Protection Commission publishes note on the restrictions on the right to data protection

On 8 November 2019, the Data Protection Commission published a note on the restrictions on the right to data protection. The note explains that although data protection is a fundamental right set out in Article 8 of the EU Charter of Fundamental Rights, the right to data protection must always be balanced against other fundamental rights. The following are examples of limitations within the data protections rights as set out in the GDPR:

- The right to obtain a copy of your personal information under the rights of access or portability should not adversely affect the rights and freedoms of others.
- Certain data protection rights only apply in certain circumstances. For example, the right to “be forgotten” only applies under certain conditions, such as where the personal data is no longer required for the purpose it was originally collected.
- In certain very limited cases, the GDPR allows organisations to charge a reasonable fee for responding to a request, or even to refuse to act on a request, if the request is “manifestly unfounded or excessive”.

The note can be accessed [here](#).

13.7 EDPB adopts updated guidelines on the territorial scope of the GDPR

On 12 November 2019, the EDPB adopted updated guidelines on the territorial scope of the GDPR. The guidelines were initially adopted by the EDPB on 16 November 2018 and have been updated to reflect contributions and feedback received in response to a public consultation.

The guidelines can be access [here](#).

13.8 Data Protection Commission publishes guidance for organisations engaging cloud service providers

On 12 November 2019, the Data Protection Commission published guidance for organisations engaging cloud service providers.

The guidance addresses the obligations on data controllers under the GDPR to process personal data using “appropriate technical or organisational measures” and sets out the security considerations around cloud computing. It also provides information on the key points a cloud service contract should contain.

The guidance can be accessed [here](#).

13.9 EDPB publishes contribution to the consultation on an additional protocol to the Council of Europe Convention on Cybercrime

On 13 November 2019, the EDPB published a contribution to the consultation on a draft second additional protocol to the Council of Europe Convention on Cybercrime.

The EDPB contribution focuses on a preliminary assessment of the provisional texts published on 1 October 2019 and in particular the new provisions on direct disclosure of subscriber information and on the giving effect to the orders from another party for expedited production of data.

The contribution can be accessed [here](#).

13.10 EDPB adopts guidelines on data protection by design and by default

On 13 November 2019, the EDPB adopted guidelines on the obligation of data protection by design and by default as set out in Article 25 of the GDPR.

The guidelines cover elements that controllers must take into account when designing the means of processing data, along with how to ensure that only personal data which is necessary for each specific purpose of the processing is processed.

The guidelines can be accessed [here](#).

13.11 Data Protection Commission publishes guidance on the lawful bases for processing personal data

On 17 December 2019, the Data Protection Commission published guidance on the lawful bases for processing personal data. The guidance aims to assist organisations involved in processing personal data to identify the correct legal basis for such processing, and to

Please see the Dillon Eustace article entitled 'Data Protection Commission issues guidance on the lawful bases for processing personal data' (19 December 2019) for further information which can be accessed [here](#).

The guidance can be accessed [here](#).

13.12 Advocate General delivers opinion on validity of SCCs in Schrems II case

On 19 December 2019, the Advocate General of the Court of Justice of the European Union ("CJEU") delivered his opinion on a case brought against Facebook Ireland by Max Schrems concerning the transfer of personal data to the United States (case C-311/18) (the "**Schrems II case**"). He recommended that the CJEU uphold the validity of the standard contractual clauses ("**SCCs**") as a mechanism for transferring personal data outside the European Union.

The Advocate General's opinion, if followed by the CJEU, will be particularly important in the context of Brexit, with many organisations utilising the SCC's as part of their Brexit preparations. The CJEU is expected to make its decision within a few months of the Advocate General's opinion.

The opinion can be accessed [here](#).

14 BREXIT

14.1 Guidance note on transfers of Personal Data from Ireland to the UK in the event of a 'No-Deal' Brexit

In October 2019, the Data Protection Commission issued a guidance note on transfers of Personal Data from Ireland to the UK in the event of a 'No-Deal' Brexit (the "**Guidance Note**") to assist those who might transfer personal data to the UK to understand the impact of a 'No Deal' Brexit on their data protection obligations. The Guidance Note, includes:

- Steps to determine whether you are a controller that transfers personal data to the UK (including Northern Ireland; and
- The measures required to legally transfer personal data from Ireland to the UK in the event of a 'No Deal' Brexit.

A copy of the Guidance Note can be accessed [here](#).

14.2 Central Bank publishes updated Brexit FAQs for financial services firms

On 3 October 2019, the Central Bank published updated Brexit FAQs for financial services firms. The FAQs provide general information to financial services firms considering relocating their operations from the UK to Ireland. The FAQs are regularly updated as the Brexit negotiations progress.

The FAQs can be accessed [here](#).

14.3 Central Bank date for updated Brexit related fund documentation

The date for the submission of updated Brexit related fund documentation was 6 January 2020 in order to be in place for 31 January 2020.

14.4 FCA publishes update to the UK Temporary Permission Regime

On 30 October 2019, the UK's Financial Conduct Authority ("**FCA**") published an update to the UK Temporary Permissions Regime ("**TPR**"). The notification window for new registrations under the FCA's TPR has been extended to 30 January 2020. Any fund managers that, as a result of this extension, wish to update their notification (to include additional sub-funds or AIFs) should email recognisedcis@fca.org.uk by 15 January 2020.

Please see the Dillon Eustace briefing paper entitled 'Deadlines for Registrations and Updates for FCA Temporary Permissions Regime' (16 December 2019) which can be accessed [here](#) for further information.

14.5 IFIA publishes updated paper on Brexit Day: Planning and Practical Advice

On 11 November 2019, the Irish Funds Industry Association ("**IFIA**") published an updated paper on Brexit Day: Planning and Practical Advice.

A copy of the paper can be accessed [here](#).

14.6 Implementing Decision amending Commission Implementing Decision on temporary equivalence of UK CCPs published in Official Journal

On 19 December 2019, the European Commission adopted an Implementing Decision (the "**Amending Decision**") amending Commission Implementing Decision (EU) 2018/2031 (the "**Temporary Equivalence Decision**") concerning the temporary equivalence of the UK's regulatory framework for CCPs under EMIR.

The Amending Decision replaces the current provisions concerning expiry in the Temporary Equivalence decision and extends the temporary recognition for UK CCPs to 31 January 2021 in the case of a no-deal Brexit.

On 23 December 2019, the Amending Decision was published in the Official Journal of the European Union.

The Amending Decision can be accessed [here](#).

15 SUSTAINABLE FINANCE

15.1 European Commission publishes frequently asked questions on the IPSF

On 18 October 2019, the European Commission published frequently asked questions on the International Platform on Sustainable Finance ("**IPSF**"). The frequently asked questions set out the scope and objectives of the IPSF, along with addressing the reasons behind its establishment.

The frequently asked questions can be accessed [here](#).

15.2 Regulations on sustainability-related disclosures and low carbon benchmarks published in Official Journal

On 8 November 2019, the Council of the European Union adopted the following Regulations:

- Regulation on disclosures relating to sustainable investments and sustainability risks in the financial services sector (the “**Disclosure Regulation**”); and
- Regulation amending the Benchmarks Regulation as regards low carbon benchmarks and positive carbon impact benchmarks (the “**Low Carbon Benchmarks Regulation**”).

The Regulations were published in the Official Journal of the European Union on 9 December 2019 and entered into force the following day.

The Disclosure Regulation can be accessed [here](#) and the Low Carbon Benchmarks Regulation can be accessed [here](#).

15.3 The European Parliament and Council of the European Union reach political agreement on Taxonomy Regulation

On 17 December 2019, the European Parliament and the Council of the European Union reached political agreement on the proposed Regulation on the establishment of a framework to facilitate sustainable investment (the “**Taxonomy Regulation**”).

On 18 December 2019, the Council of the European Union published an “I” item note attaching the final compromise text of the proposed Taxonomy Regulation. In addition, on that date, the European Commission published Q&As on the Taxonomy Regulation.

The European Parliament’s announcement of the political agreement can be accessed [here](#), the final compromise text of the Taxonomy Regulation can be accessed [here](#) and the Q&As can be accessed [here](#).

16 INVESTMENT LIMITED PARTNERSHIPS (AMENDMENT) BILL 2019

16.1 Investment Limited Partnerships (Amendment) Bill 2019

On 17 December 2019, the Investment Limited Partnerships (Amendment) Bill 2019 (the “**Bill**”) completed Seanad Éireann - Second Stage (whereby the general principles of the Bill are debated). The Bill will modernise the Investment Limited Partnerships Act 1994, which governs the establishment and operation of regulated investment limited partnerships in Ireland.

The Bill, when enacted, is expected to provide for general updates and enhancements to the existing partnership legislation, to make certain technical amendments to the Irish Collective Asset-management Vehicles Act 2015 and to provide for related matters. The aim of the Bill is to make Ireland a more attractive domicile for private equity funds and in turn broaden the offering of Ireland’s investment funds sector.

The Bill’s progress can be tracked [here](#).

Dillon Eustace

31 December 2019

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