Funds Quarterly Legal and Regulatory Update

Period covered:
1 April 2016 – 30 June 2016

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

UCITS

(i) ESMA publishes updated questions and answers paper on the application of the UCITS Directive

On 5 April 2016, the European Securities and Markets Authority ("**ESMA**") published an updated version of its questions and answers paper on the application of the UCITS Directive (the "**Q&A**") following the implementation of the UCITS V Directive. The purpose of the Q&A is to promote common supervisory approaches and practices in the application of the UCITS Directive and its implementing measures. The updated Q&A consolidates into a single document all Q&As relating to the UCITS Directive. All previous Q&As published by ESMA relating to the UCITS Directive have therefore been repealed and replaced by the updated Q&A.

A copy of the Q&A can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-181_qa_ucits_directive.pdf

(ii) ESMA publishes discussion paper on UCITS share classes

On 6 April 2016, ESMA published a discussion paper on UCITS share classes (the "**Discussion Paper**") following on from its earlier consultation in December 2014 on different share classes of UCITS.

ESMA is now proposing the development of a common framework throughout the EU for the operation of share classes within UCITS based on a series of high level principles to be followed when setting up different share classes together with a set of supporting operational principles.

The high level principles are:

- Common investment objective – share classes of the same fund should have a common investment objective reflected by a common pool of assets;
- Non-contagion – UCITS management companies should implement appropriate procedures to minimise the risk that features, which are specific to one share class, could potentially adversely impact on other share classes of the same fund;
- Predetermination – all features of the share class should be predetermined before it is set up; and
- Transparency – differences between share classes of the same fund should be disclosed to investors when they have a choice between two or more classes.

The full text of the Discussion Paper may be accessed via the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-570_discussion_paper_on_ucits_share_classes_2016_0.pdf

Dillon Eustace has prepared an article on the Discussion Paper, a copy of which may be accessed via the following link:

http://www.dilloneustace.ie/download/1/Publications/Financial%20Services/ESMA%20Discussion%20Paper%20on%20UCITS%20Share%20Classes.pdf

On 3 June 2016, Dillon Eustace filed its response to ESMA on the Discussion Paper (the "**Response**"). The Response focused exclusively on the subject of interest rate risk hedged share classes for UCITS funds, in respect of whom the firm advises.

The Response outlines:

- How interest rate hedged share classes are consistent with ESMA's views on the principle of share classes sharing a "common investment objective";
- How interest rate hedged share classes can operate within the traditional framework and parameters set out in the Discussion Paper which is designed to minimise cross-contagion risk and establish a level of operational segregation; and
- How interest rate hedged classes can comply with the principle of predetermination.

On 23 June 2016, ESMA published all responses it received on the Discussion Paper. In total, twenty-three responses were received and may be accessed via the following link:

https://www.esma.europa.eu/press-news/consultations/discussion-paper-ucits-share-classes

(iii) ESMA issues guidelines compliance table on exchange-traded funds ("ETFs") and other UCITS issues (the "Compliance Table")

On 12 April 2016, ESMA published a Compliance Table which provides details of the national competent authorities ("**NCAs**") who either comply or intend to comply with ESMA's guidelines on ETFs and other UCITS issues for NCAs and UCITS management companies (the "**Guidelines**").

All NCAs have stated that they either comply or intend to comply with the Guidelines. Additionally, the Financial Services Commission (Gibraltar), FMA (Liechtenstein) and Finanstilsynet (Norway) have also stated that they comply with the Guidelines.

The Compliance Table is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-602_compliance_table_-_guidelines_on_etfs_and_other_ucits_issues.pdf

(iv) Use of past performance data of a merging UCITS sub-fund in KIIDs of a receiving UCITS sub-fund

In March 2015, ESMA published an updated questions and answers paper in relation to the key investor information document ("**KIID**") for UCITS (the "**Q&A**").

Question 4g in the Q&A clarified that where a receiving UCITS is a newly established UCITS with no performance history, the UCITS should use the past performance of the merging UCITS in the KIID of the receiving UCITS provided the competent authority of the receiving UCITS reasonably assesses that the merger does not impact the UCITS' performance. The performance of the UCITS is deemed to be impacted, in circumstances where there is, *inter alia*, a change to the investment policy or to the entities involved in the investment management. It should also be made clear in the KIID of the receiving UCITS that the performance is that of the merging UCITS.

Where an Irish UCITS wishes to avail of this clarification provided by ESMA, an email should be sent to the Central Bank of Ireland (the "**Central Bank**") via ucitsmergers@centralbank.ie seeking a confirmation of no objection.

We are aware that the Central Bank has recently provided a confirmation of no objection to the use of past performance of a Luxembourg merging UCITS in the KIID of a newly established receiving Irish UCITS.

(v) Irish Funds UCITS Rulebook Working Group

Irish Funds have established a UCITS Rulebook Working Group (the "**Working Group**") which is responsible for looking at issues arising from the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 (the "**CBI UCITS Regulations**") and some other miscellaneous issues affecting Irish UCITS from an industry perspective. The CBI UCITS Regulations replaced the UCITS Notices with an aim to consolidate into one document all of the conditions imposed by the Central Bank on UCITS, their management companies and depositaries.

On 22 April 2016 the Working Group submitted a list of issues which have arisen since the implementation of the CBI UCITS Regulations to the Central Bank for its consideration and has advised that is shall be maintaining a "live" list of issues going forward, which takes into consideration any changes arising as a result of amendments to the CBI UCITS Regulations.

(vi) Central Bank publishes updated UCITS Q&A document

On 2 June 2016 the Central Bank published an updated UCITS Q&A document (the "**Q&A**"), setting out answers to queries likely to arise in relation to UCITS. Additions to the Q&A list, published on the Central Bank's website, include ID 1064, ID 1065 and ID 1066, respectively.

ID 1064 confirms that over-hedged positions arising as a result of share class hedging must be taken into account when calculating leverage (in the case of UCITS using VAR), counterparty risk and concentration exposures.

ID 1065 and 1066 relate to the conversion of certain regulated entities to a designated activity company ("**DAC**") under the Companies Act 2014 (the "**Companies Act**") and confirms that regulated entities other than credit institutions and insurance undertakings are not required to re-register as a DAC. Should any regulated entity re-register as a DAC, they are required to file a copy of the certificate of incorporation with the Central Bank.

A copy of the Q&A may be accessed via the following link:

https://www.centralbank.ie/regulation/industry-sectors/funds/ucits/Documents/160602_UCITS%20QA%20NO%2013%20Final%20.pdf

(vii) Central Bank publishes its final consultation paper on Fund Management Companies

In June 2015, the Central Bank published its feedback statement on Consultation Paper CP 86: Consultation on Fund Management Company Effectiveness – Delegate Oversight ("**CP 86**").

In the 'Next Steps' section of the statement the Central Bank outlined its plans to publish additional publications to provide guidance to fund management companies on matters including:

- Delegate Oversight;
- Organisational Effectiveness;
- Directors' Time Commitments;
- Managerial Functions;
- Operational; and
- Procedures

On 4 November 2015, the Central Bank published its first publication setting out guidance for fund management companies which covers the first three areas listed above.

On 2 June 2016, the Central Bank published its third and final consultation on fund management company effectiveness which deals with the areas listed at 4-6 above. The paper is entitled "*Consultation on Fund Management Company Effectiveness – Managerial Functions, Operational Issues and Procedural Matters*" (the "**Consultation Paper**").

As was the case for CP 86 and the feedback statement, the term "fund management company" includes a UCITS management company, an authorised alternative investment

fund manager ("**AIFM**"), a self-managed UCITS investment company and an internally managed authorised alternative investment fund ("**AIF**").

The Consultation Paper focuses on the following areas:

- Governance – the manner in which the directors of fund management companies should perform their roles and guide the company;

- Compliance – the manner in which designated persons carry out their managerial functions for the fund management company; and

- Supervisability – the capacity of the Central Bank to engage with the fund management company (including access to its records, directors and designated persons).

The Central Bank is of the view that a fund management company which has good structures and procedures in place around these three areas has a level of substance which can enhance investor protection.

Some of the commentary and draft guidance contained within the Consultation Paper would be in line with what may have been expected, based upon the consultations and guidance issued by the Central Bank to date. However, it also confirms a number of important points, some of which have not been addressed previously, namely:

- Organisational effectiveness – the Central Bank had confirmed that fund management companies authorised on or after 1 November 2015 should not delay implementing the requirements in relation to the organisational effectiveness role as outlined in Part II of its Fund Management Companies Guidance of November 2015;

- Location of directors and designated persons – the Central Bank is proposing the following new rules around the location of directors and designated persons:

  A fund management company which has a PRISM impact rating of "Medium Low" or above will be required to have at least:

  1. Three Irish resident directors or at least two Irish resident directors and one designated person based in Ireland;

  2. Two thirds of its directors based in the EEA; and

  3. Two thirds of its designated persons based in the EEA.

  A fund management company which has a PRISM impact rating of "Low" or above will be required to have at least:

  1. Two Irish resident directors;

  2. Two thirds of its directors based in the EEA; and

3. Two thirds of its designated persons based in the EEA.

Previously, the Central Bank had indicated that it would require designated persons to be located in Ireland. The proposal to allow designated persons to be located outside Ireland is to be welcomed to the extent that it brings greater flexibility and potential operational efficiency. However, we would suggest that designated persons should also be permitted in third countries outside the EEA.

- Transitional period – the Central Bank is expected to provide a transitional period of one year following completion of the consultation process for fund management companies to comply with the new rules and guidance .

The closing date for submissions on the Consultation Paper is Friday 26 August 2016.

A copy of the Consultation Paper may be accessed via the following link:

http://www.centralbank.ie/regulation/marketsupdate/Documents/160602_CONSULTATION%20PAPER%20-%20CP86_THIRD%20CONSUL_FINAL%20VERSION.pdf

Dillon Eustace has published an article on CP 86 which may be accessed via the following link:

http://www.dilloneustace.ie/download/1/Publications/Financial%20Services/Central%20Bank%20Publishes%20its%20Final%20Consultation%20Paper%20on%20Fund%20Management%20Company%20Effectiveness.pdf

(viii) Central Bank publishes consultation on amendments to the CBI UCITS Regulations

On 2 June 2016, the Central Bank issued a consultation paper on a second set of amendments to the CBI UCITS Regulations entitled "CP 105: Consultation on Amendments to the CBI UCITS Regulations" (the "**Consultation Paper**").

The Consultation Paper seeks feedback on proposed amendments to the CBI UCITS Regulations relating to the implementation of UCITS V into Irish law and certain other technical changes which have been identified by the Central Bank and the Irish funds industry following the introduction of the CBI UCITS Regulations. In addition, stakeholders are also encouraged to consider whether any amendments to the CBI UCITS Regulations other than those set out in the Consultation Paper may be required.

The closing date for submissions on the Consultation Paper is Friday 26 August 2016.

A copy of the Consultation Paper is available here:

http://www.centralbank.ie/regulation/marketsupdate/Documents/160602%20_Consultation%20Paper%20Final.pdf

(ix) Central Bank UCITS (Amendment) Regulations 2016

On 8 June 2016, the Central Bank issued the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2016 (the "**Amending Regulations**").

While the majority of the changes being made to the CBI UCITS Regulations via the Amending Regulations are to correct clerical errors which have been identified in the original legislation since implementation and to ensure consistency with other recently enacted UCITS legislation, the Amending Regulations also include the following:

- An obligation on UCITS management companies to ensure their remuneration policies and practices are consistent with the ESMA Guidelines on Sound Remuneration Policies under the UCITS Directive and AIFMD;

- Clarification that UCITS established as self-managed investment companies shall be required to put in place an organisation effectiveness role; and

- Clarification that UCITS management companies and self-managed investment companies shall be required to comply with (i) the new managerial functions set out in Schedule 10 of the CBI UCITS Regulations and (ii) the obligations to create an organisational effectiveness role by 30 June 2017 (rather than 30 June 2016 as provided in the original legislation) or such other date as may be specified by the Central Bank.

A copy of the Amending Regulations may be accessed via the following link:

http://www.centralbank.ie/regulation/industry-sectors/funds/ucits/Documents/CENTRAL%20BANK%20(SUPERVISION%20AND%20ENFORCEMENT)%20ACT%202013%20section%2048(1)(UCITS)(Amendment)%20Regulations%202016.pdf

AIFMD

(i) ESMA updates Q&A on application of AIFMD

On 5 April 2016 and 3 June 2016, ESMA published updated versions of its questions and answers paper on the application of the AIFMD (the "**Q&A**"). The aim of the Q&A is to promote common supervisory approaches and practices in the application of the AIFMD and its implementing measures. The responses to questions posed by the general public and competent authorities in relation to the practical application of the AIFMD are also intended to help AIFMs by providing clarity on the content of the AIFMD rules.

The Q&A has been updated to include the following new questions:

- **Section III: Notifications of AIFs**

The new Question 3 confirms that an AIFM is not required to submit a new notification to the national competent authority in accordance with Article 31(2) of AIFMD where the AIF decides to offer additional funds to investors and the offer is limited to investors already in the AIF.

The new Question 4 confirms that Article 31 of AIFMD (marketing of units or shares of EU AIFs in the home Member State of the AIFM) does not differentiate between the marketing of EU AIFs domiciled in the home Member State of the AIFM and EU AIFs domiciled in another Member State.

The new Question 5 confirms that the marketing an EU feeder AIF with a non-EU master AIF is subject to Article 36(1) of AIFMD and not Article 31 of AIFMD.

- **Section IX: Calculation of the total value of assets under management**

The new Question 3 states that committed capital should be taken into account in the calculation of total AUM of the AIF (pursuant to Article 3(2) of the AIFMD and Article 2 of Commission Regulation (EU) No 231/2013) where this is required by national valuation rules and provided it has not been drawn down by the AIFM.

- **Section X: Additional own funds**

The new Question 3 states that, as a general rule, when calculating the additional own funds requirement pursuant to Articles 9(3) and 9(7) of AIFMD and Article 14(2) of Commission Regulation (EU) No 231/2013, committed capital does not contribute to the actual assets of the AIF for which it was pledged, as long as it had not been drawn down by the AIFM.

A copy of the updated Q&A is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-909_qa_aifmd_0.pdf

(ii) ESMA issues guidelines compliance table on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD (the "Compliance Table")

On 7 April 2016, ESMA published details of the NCAs who either comply or intend to comply with ESMA's guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD (the "**Guidelines**").

All NCAs have stated that they either comply or intend to comply with the Guidelines. Additionally, the Financial Services Commission (Gibraltar) and the FMA (Liechtenstein) have also stated that they comply with the Guidelines.

As the AIFMD is not currently incorporated into the EEA Agreement and legislation transposing the AIFMD has not been adopted in Norway, Finanstilsynet (Norway) has confirmed they are not in a position to confirm compliance with the Guidelines at present.

The Compliance Table is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-571_compliance_table_-_guidelines_on_reporting_obligations_aifmd.pdf

(iii) ESMA issues guidelines compliance table on sound remuneration policies under the AIFMD (the "Compliance Table")

On 7 April 2016, ESMA published details of the national competent authorities ("**NCAs**") who either comply or intend to comply with ESMA's guidelines on sound remuneration policies under the AIFMD (the "**Guidelines**").

All NCAs (including the Financial Services Commission (Gibraltar) and the FMA (Liechtenstein)) have stated that they either comply or intend to comply with the Guidelines with the exception of the MFSA (Malta).

The MFSA have informed ESMA that they intend to implement the Guidelines, without incorporating paragraph 18 and the reference to staff of delegates in the definition of "Identified Staff". The MFSA have argued, firstly that there is no express provision in the AIFMD which grants ESMA the power to include delegated managers within the scope of the Guidelines and secondly, that Article 20 of the AIFMD offers sufficient protection to ensure there is no circumvention of the Guidelines by the AIFM.

A copy of the Compliance Table is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-675_compliance_table_-_guidelines_sound_remuneration_policies_aifmd.pdf

(iv) ESMA speech on AIFMD work

On 26 May 2016, ESMA published a speech given by their Executive Director, Verena Ross, on the capital markets union's ("**CMU**") supervisory convergence and asset management.

In the speech, Ms. Ross sets out details of the ESMA initiatives relating to the AIFMD which can be divided into the following headings:

- Asset Segregation – in December 2014, ESMA consulted on guidelines on asset segregation under the AIFMD. ESMA is now currently assessing the merits of the different segregation models, paying close attention to the extent to which the AIFMD permits the use of omnibus accounts and the rules on segregation in other legislation, such as the Central Securities Depositories Regulation;

- Leverage – ESMA is also working to develop more detailed guidance on powers to limit leverage under the AIFMD, with a focus at this stage on ensuring the quality and consistency of the data. They encourage all entities to flag problems or issues via the Alternative Investment Management Association ("**AIMA**") so that they may be considered in that context. Upon the conclusion of this data gathering, ESMA's priority

will become the analysis of the data with a view to identifying possible trends and risks in the alternative investment fund sector; and

- Passporting – in developing the guidelines ESMA works to balance the need to align the guidelines with those under the AIFMD and the need to co-operate closely with the European Banking Authority on their equivalent guidelines under the Capital Requirements Directive with a view to ensuring consistency of rules across the financial sector. As part of its work on the application of the AIFMD passport to non-EU AIFMs and AIFs, ESMA is currently assessing Australia, Japan, Canada, Cayman Islands, Bermuda and the Isle of Man, as well as the three countries covered in ESMA's first advice for which definitive assessments were not provided for, namely Hong Kong, Singapore and the US.

A copy of the full speech can be accessed via the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-735_speech_aima_forum.pdf

(v) Central Bank publishes final feedback statement on CP 99

On 2 June 2016, the Central Bank published its final feedback statement (the "**Feedback Statement**") on the consultation on amendments to the AIF Rulebook ("**CP 99**").

CP 99 outlined certain technical and policy changes proposed to be made to the AIF Rulebook. Stakeholders were required to provide responses by 24 February 2016. In total, 4 responses were received.

In the Feedback Statement, the Central Bank confirmed that the AIF Rulebook will be converted into regulations to be published by the Central Bank under section 48(1) of the Central Bank (Supervision and Enforcement) Act 2013 (the "**CBI AIF Regulations**") and that draft CBI AIF Regulations will be published for consultation.

A copy of the Feedback Statement is available via the following link:

http://www.centralbank.ie/regulation/marketsupdate/Documents/160602_FINAL%20FEEDBACK%20STATEMENT%20CP99_CD.pdf

Irish Collective Asset – Management Vehicles ("ICAV")

(i) Central Bank publishes forms and guidance note relating to the voluntary strike-off of ICAVs

In May 2016, the Central Bank published additional forms on its website relating to the voluntary strike-off procedure for registered ICAVs (the "**Forms**"), namely:

- Form VS1 – Voluntary Strike-Off;
- Form VS2 – Objection to Voluntary Strike-Off; and

- Form VS3 – Cancel the Strike-Off Process.

All forms pertaining to the voluntary strike-off procedure should be completed and submitted together with the relevant documentation by email to the Central Bank post registration mailbox.

Pursuant to Section 161(1)(e) of the Irish Collective Asset Management Vehicle Act 2015 (the "**ICAV Act**"), the ICAV must publish an advertisement of its intention to apply to be struck off within 30 days before the date of the application in at least one daily newspaper circulating in the State.

The Central Bank has also published additional information under section 5 of the "ICAV post-registration" section of its website, which may be accessed via the following link:

http://www.centralbank.ie/regulation/industry-sectors/funds/ICAV%20Registration%20and%20Post-Registration/Pages/Post-Registration.aspx

The new Forms may be accessed via the link below:

http://www.centralbank.ie/regulation/industry-sectors/funds/ICAV%20Registration%20and%20Post-Registration/Pages/Forms.aspx

European Venture Capital Funds ("EuVECA") & European Social Entrepreneurship Funds ("EuSEF")

(i) ESMA updates Q&A on application of EuSEF and EuVECA Regulations

On 31 May 2016, ESMA published an updated version of its questions and answers paper on the application of the EuSEF Regulation and the EuVECA Regulation (the "**Q&A**"), last updated in November 2014.

The Q&A includes a new question and answer on the use of the designations of EuSEF and EuVECA funds when marketed only in their home Member State. ESMA states in the Q&A that the conditions for the use of the designations EuSEF and EuVECA are linked to the compliance by managers with qualitative requirements, rather than any requirement to market the respective fund in more than one Member State.

To view the full and updated Q&A on the application of EuSEF and EuVECA Regulations see:

https://www.esma.europa.eu/sites/default/files/library/2016-774_qa_eusef-euveca.pdf

Securities Financing Transactions Regulation ("SFTR")

(i) Association for Financial Markets ("AFME"), Futures Industry Association ("FIA"), the International Capital Market Association ("ICMA"), International Swaps and Derivatives Association ("ISDA") and the International Securities Lending Association ("ISLA") publish right of use risk statement for securities financing transactions ("SFTs")

On 13 April 2016, AFME, FIA, ICMA, ISDA and ISLA published an information statement that can be used by market participants to inform their counterparties of the general risks and consequences that may be involved if the counterparty consents to a right of use of collateral in a security collateral arrangement or concludes a title transfer collateral arrangement (the **"Information Statement**").

The document has been drawn up in response to the SFTR rules, which comes into force on 13 July 2016 and will affect all existing and future title transfer and security collateral arrangements under a variety of financial agreements.

On 13 May 2016, the Information Statement was updated to include a new Appendix 3, which sets out the risks and consequences that may arise in connection with the re-use of financial instruments by a U.S. broker-dealer, U.S. futures commission merchant, or U.S. bank or U.S. branch or agency office of a non-U.S. bank. The updated Information Statement is intended for use when a transaction involves any such entities and includes alternative disclosures that are applicable in that case. The original Information Statement that was published in April can still be used in respect of all other types of transactions that do not involve any such entities.

The Information Statement may be accessed via the following link:

http://www2.isda.org/news

(ii) AIMA responds to ESMA discussion paper on RTS and ITS under SFTR

On 22 April 2016, AIMA submitted its response (the "**Response**") to ESMA's discussion paper on regulatory technical standards ("**RTS**") and implementing technical standards ("**ITS**") under SFTR (the "**Discussion Paper**").

The Response reiterated AIMA's concerns regarding dual-sided reporting under SFTs representing the largest unnecessary cost of SFT reporting under the SFTR. The Response also noted that AIMA members will fall outside of SFT reporting and recordkeeping if they manage a fund or account entering SFTs that is established outside of the EU.

The Response also makes certain technical points regarding ESMA's proposals for the content and form of SFT reports, including:

- AIMA disagrees with the need to report both transactions and positions for CCP cleared SFTs;

- AIMA notes the inability for margin borrowers to report collateral for specific loans in a prime brokerage relationship when these loans are collateralised on a portfolio basis; and

- AIMA highlights disproportionality of requiring borrowers to report the particular collateral assets for a loan that have been reused.

AIMA did praise ESMA's decision not to build Level 2 measures at this stage for investor disclosure obligations on authorised AIFMs and UCITS managers.

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

https://www.esma.europa.eu/press-news/consultations/discussion-paper-draft-rts-and-its-under-securities-financing-transaction

(iii) Impact of SFTR on special purpose vehicles ("SPVs") and financial vehicle corporations ("FVCs")

For the purposes of the SFTR, counterparties to SFTs are classified as either "financial counterparties" or "non-financial counterparties". SPVs established in the EU or in a third country fall within the definition of "non-financial counterparties", therefore the SFTR applies to Irish SPVs which have entered into SFTs on or after the commencement date (12 January 2016) and also to any SFTs entered into prior to the commencement date which are still outstanding as at 13 July 2016.

The SFTR imposes the following obligations on SPVs:

- Mandatory record keeping of SFTs;

- Requirements relating to the re-use of collateral in collateral arrangements; and

- Reporting obligations in respect of SFTs.

Record keeping – there is an obligation on SPVs to retain records of all SFTs that have been terminated, modified or concluded for a period of at least 5 years following the termination of the transaction.

Reuse of collateral – the requirements relating to the re-use of collateral shall apply from 13 July 2016 and will apply to any SFTs entered into on or after this date together with any SFTs which are outstanding on this date. The requirements may be broken down into four categories:

(a) Disclosure of risk – a counterparty receiving the right to reuse the collateral is required to inform the providing counterparty in writing of the risks and consequences that may arise from granting consent to such right to reuse. Where a collateral arrangement

involves both parties having a right to reuse collateral received from the other party, both the SPV and its counterparty will be required to provide such disclosure to the other party.

(b) Prior written consent – the counterparty providing the collateral must grant its prior written consent to the reuse of that collateral.

(c) Compliance with the terms of the written consent – in order to exercise the right of reuse, the counterparty must only reuse the collateral in accordance with the terms specified in the collateral arrangement to which the providing counterparty granted its consent.

(d) Securities account requirement – the collateral provided must be transferred from the account of the providing counterparty to the account of the receiving counterparty.

Reporting obligations – the SFTR imposes an obligation on counterparties to SFTs to report certain details of the transaction to a trade repository within one working day of the conclusion, modification or termination of the SFT. The full details of the reporting obligations have not been finalised. ESMA is expected to issue a consultation paper on this matter in Quarter 3 2016 with draft RTS and ITS to be submitted no later than 13 January 2017.

The obligation on FVCs to report quarterly balance sheet and annual profit and loss data to the Central Bank was extended to SPVs in July 2015. The extension of the reporting requirements was to address data gaps in the Irish financial system and to enhance statistical analysis and regulatory oversight of the sector.

All companies availing of the section 110 tax status are required to submit the SPV return to the Central Bank, subject to the following exceptions:

- Companies already submitting reports to the Central Bank as FVCs;
- Non-Irish domiciled companies;
- Companies which have been liquidated; or
- Companies which have disposed of all assets (provided they have no future intentions to acquire further assets).

In June 2016, the Central Bank published a FVC FAQ document relating to the quarterly reporting obligations together with a FVC Registration Form Guidance Note, copies of which may be accessed via the links below:

http://www.centralbank.ie/polstats/stats/reporting/Documents/FVC_faq_document.pdf

http://www.centralbank.ie/polstats/stats/reporting/Documents/FVC_registration_form_guidance_notes.pdf

In June 2016, the Central Bank also published a SPV FAQ document relating to the quarterly reporting obligations together with a SPV Registration Form Guidance Note, copies of which may be accessed via the links below:

http://www.centralbank.ie/polstats/stats/reporting/Documents/SPV_faq_document.pdf

http://www.centralbank.ie/polstats/stats/reporting/Documents/SPV_registration_form_guidance_notes.pdf

European Long Term Investment Funds ("ELTIF")

(i) ESMA final report on draft RTS under ELTIF Regulation

On 8 June 2016, ESMA published its final report on the draft RTS under the ELTIF Regulation (the "**Final Report**"). The ELTIF Regulation allows investors to put money into companies and infrastructure projects for the long term and aims to increase the amount of non-bank finance available for companies investing in the EU's real economy.

The Final Report includes the following:

- A summary of the feedback received from the 2015 consultation on the draft RTS (section 2);
- A legislative mandate to develop the draft RTS (Annex I);
- A cost benefit analysis related to the draft RTS (Annex II); and
- A copy of the full text of the draft RTS (Annex III).

Following discussions with the European Commission, ESMA also published a press release on 8 June 2016 announcing that it was postponing the publication of the ELTIF RTS. The ELTIF RTS centre on the cost disclosure information that must be included in the ELTIF's prospectus. The postponement is to allow for the work being undertaken on cost disclosures for the Regulation (EU) 1286/2014 on Key Information Documents ("**KIDs**") for Packaged Retail and Insurance-based Investment Products (the "**PRIIPs Regulation**") to be taken into account.

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

https://www.esma.europa.eu/sites/default/files/library/2016-935_final_report_on_eltif_rts.pdf

Money Market Funds Regulation

(i) Council of the EU compromise proposal on MMF Regulation

On 10 June 2016, the Council agreed its position on the Money Market Fund Regulation ("**MMFR**"). The text combines both the Commission's original proposal and the European

Parliament's position, with some substantial changes in an effort to advance a workable compromise package of measures. In addition to providing for variable net asset value ("**VNAV**") MMFs, the Council text proposes that MMFs may be established as low volatility NAV ("**LVNAV**") MMFs or "Government constant net asset value ("**CNAV**") MMFs", but with different parameters to the Parliament's version of the LVNAV and the "Public Debt CNAV" MMF.

The Council text does not take forward the proposal of a capital buffer for CNAV MMFs as proposed by the Commission. In addition the Council includes an outright ban on sponsor support and permits MMFs to have external credit ratings, which the Commission had prohibited. The Council text also includes changes in relation to other aspects such as eligible asset and exposure rules, valuation and "know your customer" rules. The Council text provides for a 24 month transition in respect of existing UCITS and AIF MMFs.

On 20 June 2016, EFAMA published a press release (the "**Press Release**") stating they are of the view that a well-functioning European market for MMFs has an important part to play in the European Commission's flagship CMU initiative. EFAMA maintains that a proportionate and balanced regulation which ensures the viability of both CNAV and VNAV MMFs, can contribute to supporting alternative sources of financing to the real economy and financing European growth.

Additionally, on 20 June 2016, Irish Funds commented that further important technical adjustments would be required in order to ensure the viability of MMF products in the future. Irish Funds also stated that it shall continue working with policy makers with a view to ensuring the MMFR provides investors with a range of viable product choices and ensures the continuation of the essential funding and liquidity which MMFs provide to the economy.

The Council text on the MMFR is available here:

http://data.consilium.europa.eu/doc/document/ST-9874-2016-INIT/en/pdf

A copy of the Press Release is available at the following link:

http://www.efama.org/Pages/MMF-Reform---EFAMA-believes-final-agreement-should-find-right-balance-between-financial-stability-and-economic-growth.aspx

A copy of the Irish Funds press release is available at the following link:

http://www.irishfunds.ie/news-knowledge/news/irish-funds-comment-on-the-agreement-by-the-council-of-the-eu-of-its-position-on-mmfr

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

(i) European Commission adopts a Delegated Regulation on RTS on a key information document for PRIIPs

Further to Joint Committee's submission in April 2016 of its final draft RTS on KIDs for PRIIPs, the European Commission adopted a Delegated Regulation on 30 June 2016 with regard to RTS on the presentation, content, review and revision of KIDs and conditions for fulfilling the requirements to provide such documents.

The RTS address the content and presentation of the KIDs and include:

- A mandatory template for the KID, covering the texts and layout to be used;
- A methodology for the assignment of each PRIIP to one of the seven classes in the summary risk indicator and narrative explanations to be included;
- Details on performance scenarios and a format for their presentation, including possible performance for different time periods;
- A methodology for the calculation of costs and the requirements relating to the presentation of costs;
- Rules on revision and republication of the KID; and
- Rules regarding the timeframe for providing the KID to a retail investor to ensure they have sufficient time to consider its contents when making an investment decision.

The Delegated Regulation is subject to scrutiny by the European Parliament and the Council of the EU (the "**Council**"). Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication and will apply from 31 December 2016 being the application date specified in the Regulation (EU) 1286/2014 on Key Information Documents ("**KIDs**") for Packaged Retail and Insurance-based Investment Products (the "**PRIIPs Regulation**").

On 27 April 2016, the European Banking Federation, Insurance Europe, the European Fund and Asset Management Association ("**EFAMA**") and the European Structured Investment Products Association (together the "**Financial Associations**") wrote to the European Commission requesting a one-year delay of the entry of application of the PRIIPs Regulation.

However, on 18 May 2016, the European Commission issued a letter to the European Banking Federation acknowledging the challenges with the timeline of the RTS and stating that actions have been put in place to ensure that the final draft RTS are adopted before the summer to provide legal certainty over the final format of the PRIIPs KID.

The European Commission also outlined its position on the following:

- There are no transitional provisions for existing PRIIPs (i.e. both new and existing products offered to retail investors must be accompanied by a KID from 1 January 2017).

- Insurers offering multi-option insurance products (as in the case of unit-linked products) will need to disclose information required under the PRIIPs Regulation;

- A derivative would generally fulfil the definition of a PRIIP and therefore, a KID is required. The RTS will provide a simplified KID for certain derivatives;

- The obligations imposed by the PRIIPS Regulation on PRIIPs Manufacturers and those persons advising on and/or selling PRIIPs are triggered when a PRIIP is offered or sold to retail investors within the EU.

The European Commission will host, together with the ESAs, a workshop open to all stakeholders, which will allow questions about the new rules to be posed. The workshop will take place in Brussels on 11 July 2016 and aims to provide further clarification on the technical standards developed by the ESAs.

A copy of the Delegated Regulation adopted by the European Commission on 30 June 2016 is available at the following link:

http://ec.europa.eu/finance/finservices-retail/docs/investment_products/20160630-delegated_regulation_en.pdf

European Markets Infrastructure Regulation ("EMIR")

(i) Interest Rate Swap Clearing came into effect for certain market participants on 21 June 2016

On 1 December 2015, Commission Delegated Regulation (EU) 2015/2205 (the "**Delegated Regulation**") for the regulatory technical standards in respect of central clearing for the first classes of interest rate derivatives under EMIR was published in the Official Journal of the EU. The Delegated Regulation came into force on 21 December 2015.

The clearing obligation in the Delegated Regulation covers the following class of OTC interest rate derivatives denominated in the following currencies:

- Fixed-to-float interest rate swaps ("**IRS**") (also known as plain vanilla interest rate derivatives) for EUR, GBP, JPY, USD;

- Float-to-float swaps (also known as basis swaps) for EUR, GBP, JPY, USD;

- Forward rate agreements for EUR, GBP, JPY, USD; and

- Overnight index swaps for EUR, GBP, USD.

The Delegated Regulation sets out five different categories of counterparties to which the clearing obligation applies and specifies the phase-in periods for each. The different categories and the phase-in periods are as follows:

Category	Counterparty Type	Clearing Obligation Commencement
1	Clearing members of a recognised or authorised CCP for at least one of the classes of interest rate swaps covered by the Delegated Regulation	21 June 2016
2	Financial Counterparties ("**FCs**") and certain AIFs belonging to a group whose group aggregate month-end average of outstanding notional amount of non-centrally cleared derivatives is in excess of €8 billion using the month end average for January, February and March 2016	21 December 2016
3	FCs and AIFs not in either category 1 or 2 above	21 December 2018
4	Non-Financial Counterparties that exceed the clearing threshold ("**NFC+**") not falling within another category	21 December 2018
5	Category 1, 2 or 3 involving an intra-group transaction with a non-EU counterparty	21 December 2018 or, if by such date an equivalence decision has been adopted regarding a relevant third country, a specified date following such decision

A contract between two counterparties in different categories would be subject to the clearing obligation from the later date.

The obligation to clear the above referenced OTC derivative instruments will apply not only to transactions entered after the effective date applicable to the relevant category of counterparty but also to transactions concluded between the first authorisation of a CCP under EMIR (which took place on 18 March 2014) and the later date on which the clearing obligation actually takes effect for the relevant category of counterparty, unless the OTC derivative entered into has a remaining maturity lower than the minimum remaining maturities which are laid down in the Delegated Regulation and which are based on the category of counterparty and type of OTC derivative.

The text of the Delegated Regulation is available at this link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2205&from=EN

(ii) Clearing Obligation for two iTraxx Index Credit Default Swaps ("CDS")

Commission Delegated Regulation (EU) 2016/592 (the "**Second Delegated Regulation**") supplementing EMIR was published in the Official Journal of the EU on 19 April 2016 and came into effect twenty days later on 9 May 2016. The Second Delegated Regulation applies the clearing obligation to to iTraxx Europe Main and iTRaxx Europe Crossover (5 years Euro denominated). The Second Delegated Regulation follows a very similar phase-in to the phase-in of interest rate swaps (see (i) above).

The Second Delegated Regulation sets out five different categories of counterparties to which the clearing obligation applies and specifies the phase-in periods for each. The different categories and the phase-in periods are as follows:

Category	Counterparty Type	Clearing Obligation Commencement
1	Clearing members of a recognised or authorised CCP for at least one of the classes of CDS covered by the Second Delegated Regulation	9 February 2017
2	Financial Counterparties ("**FCs**") and certain AIFs belonging to a group whose group aggregate month-end average of outstanding notional amount of non-centrally cleared derivatives is in excess of €8 billion using the month end average for January, February and March 2016	9 August 2017
3	FCs and AIFs not in either category 1 or 2 above	9 February 2018
4	Non-Financial Counterparties that exceed the clearing threshold ("**NFC+**") not falling within another category	9 May 2019
5	Category 1, 2 or 3 involving an intra-group transaction with a non-EU counterparty	9 May 2019 or, if by such date an equivalence decision has been adopted regarding a relevant third country, a specified date following such decision

(iii) Proposed Clearing obligation for IRS in Norwegian Krone ("NOK"), Polish Zloty ("PLN"), and Swedish Krona ("SEK")

On 10 June 2016, the European Commission published a proposed delegated regulation (the "**Draft Regulation**") which would impose mandatory clearing obligations to IRS denominated in NOK, PLN and SEK. The Draft Regulation is subject to scrutiny by the European Parliament and the Council.

The Draft Regulation can be found at the following link:

http://ec.europa.eu/finance/financial-markets/docs/derivatives/160610-delegated-regulation_en.pdf

(iv) Margin Requirements of EMIR delayed

On 8 March 2016, the European Supervisory Authorities (the European Banking Authority ("**EBA**"), ESMA and the European Insurance and Occupational Pensions Authority ("**EIOPA**") (the "**ESAs**") submitted to the European Commission their final draft RTS on risk-mitigation techniques for OTC derivative contracts not cleared by a CCP under Article 11 of EMIR. The RTS detail the requirements for firms to exchange margins on non-centrally cleared OTC derivatives as well as specify the criteria regarding intragroup exemptions. The RTS also outline the list of eligible collateral for the exchange of margins, the criteria to ensure the collateral is sufficiently diversified and not subject to wrong-way risk, as well as the methods to determine appropriate collateral haircuts

The RTS reflect the minimum global standards for margin requirements for non-centrally cleared OTC derivatives introduced by the Basel Committee on Banking Supervision and the International Organisation of Securities Commissions in September 2013 (and then revised in March 2015).

The RTS are stated to enter into force on 1 September 2016. However, the RTS must be endorsed by the European Commission and then accepted by the European Parliament and the Council and published in the Official Journal of the EU before they can take effect. With this in mind a spokeswoman for the European Commission has recently stated that this deadline (i.e. 1 September 2016) will not be met and that the deadline has been pushed out to the end of the year.

The RTS can be found at the following link:

https://www.esma.europa.eu/press-news/esma-news/esas-publish-final-draft-technical-standards-margin-requirements-non-centrally

(v) ESMA publishes updated Q&A on the implementation of EMIR

On 6 June 2016, ESMA updated its questions and answers paper (the "**Q&A**") on practical questions regarding EMIR. The updated Q&A includes new answers in relation to the clearing obligation, specifically about the self-categorisation that is necessary in order to establish which counterparties belong to which categories for the purpose of interest rate

clearing. The Q&A also provide clarifications on how counterparties should handle the situation where some of their counterparties have not provided the information on the category they belong to.

A copy of the updated Q&A is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-898_qa_xviii_emir.pdf

(vi) ESMA final report on draft RTS on indirect clearing arrangements under EMIR and MiFIR

On 26 May 2016, ESMA issued two final draft RTS on indirect clearing under MiFIR and EMIR respectively (the "**Draft Regulatory Technical Standards**"). The Draft Regulatory Technical Standards clarify provisions of indirect clearing arrangements for OTC and exchange-traded derivatives and help to ensure consistency and that an appropriate level of protection for indirect clients exists.

The Draft Regulatory Technical Standards include provisions on the following key points:

- Default management – in order to take into account that there can be a conflict of law between EU regulation and certain national insolvency regimes, the Draft Regulatory Technical Standards propose an obligation of means, i.e. relying on having appropriate default procedures and committing to trigger them;

- Choice of account structures to be offered to indirect clients – the Draft Regulatory Technical Standards provide a choice of possible account structures that reflect the current practice in the OTC derivative and the exchange traded derivative markets in terms of level of segregation. Furthermore, the number of accounts required has been simplified to minimise the operational burden for market participants; and

- Long chains – the Draft Regulatory Technical Standards, under certain conditions, allow indirect clearing chains that are longer than the standard chains of four entities.

ESMA has sent its Draft Regulatory Technical Standards on indirect clients for endorsement to the European Commission which has three month to accept or reject them. This is followed by a non-objection period by the European Parliament and Council.

The Draft Regulatory Technical Standards can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-725.pdf

Benchmark Regulation

(i) ESMA consults on draft implementing measures under Benchmark Regulation

On 27 May 2016, ESMA published a consultation paper on the technical implementation of the proposed Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending

Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (the **"Benchmark Regulation"**) (the "**Consultation Paper**").

The Consultation Paper follows ESMA's February 2016 discussion paper in which ESMA set out its policy orientations and initial proposals both for the technical advice ESMA has been required to provide to the European Commission and the draft technical standards it is required to provide under the Benchmark Regulation.

The Consultation Paper sets out the relevant provisions and their objectives in each of the five areas in which the European Commission requested ESMA's advice, including an explanation of the related policy issues and references to the relevant responses to the discussion paper. The five areas are broken down as:

- Some elements of the definitions;
- Measurement of the use of critical and significant benchmarks;
- Criteria for the identification of critical benchmarks;
- Endorsement of a benchmark or family of benchmarks provided in a third country; and
- Transitional provisions.

Annex III of the Consultation Paper also includes the text of draft technical advice for comment. The deadline for comments on the consultation paper was 30 June 2016. ESMA is required to provide technical advice to the European Commission by 31 October 2016. The feedback received will help ESMA to finalise the technical advice. A second consultation paper on the draft technical standards under the Benchmark Regulation is expected by ESMA in the second half of 2016.

A copy of the Consultation Paper may be accessed via the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-723_cp_benchmarks_regulation.pdf

(ii) Benchmark Regulation published in the Official Journal of the EU

On 29 June 2016, the Benchmark Regulation was published in the Official Journal of the EU. The Benchmark Regulation introduces a common framework to ensure the accuracy and integrity of benchmarks used in financial instruments and financial contracts, and to measure the performance of investment funds in the EU.

The Regulation creates three categories of benchmark namely critical, significant and non-significant with differing standards of regulatory requirements applying to each category.

The Regulation entered into force on 30 June 2016 and will apply from 1 January 2018 with the exception of:

- Certain provisions specified in Article 59 which applied from 30 June 2016; and
- Article 56 which amends Articles 19, 35 and 38 of the Market Abuse Regulation will enter into force on 3 July 2016.

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

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN

Credit Rating Agencies ("CRAs")

(i) SMSG advice to ESMA on Discussion Paper on the validation and review of CRAs methodologies

On 22 April 2016 the Securities and Markets Stakeholder Group ("**SMSG**") published advice to ESMA in response (the "**Response**") to its discussion paper on the validation and review of CRAs methodologies dated 17 November 2015 (the "**Consultation**"). The SMSG is an advisory group and, while not answering the Consultation in detail, advised ESMA of the importance of keeping to mind the wider context of maintaining market integrity and protecting investors when considering consultation responses.

SMSG stresses in the Response that the validation of credit ratings cannot be considered in isolation. Any assessment must be set in context of the circumstances under which it was applied and take on board any influence and/or bias which may have occurred as a result of the fees paid to the ratings agency for the specific rating or indeed ancillary services.

SMSG also commented that the arrival of the European Ratings Platform ("**ERP**") would greatly assist not only EMSA but interested third parties including academics and journalists in identifying possible anomalies in methodologies as well as in their application.

In addition, the transparency provided by the ERP on both the performance of individual ratings and on fee arrangements will help highlight where and when there are problems with the application of any specific methodology.

A copy of the Response can be found here:

https://www.esma.europa.eu/sites/default/files/library/2016-smsg-011_smsg_advice_on_validation_of_cras_methodologies.pdf

(ii) ESMA update on reporting structured finance instruments information under CRA Regulation

On 27 April 2016, ESMA published a press release providing an update in relation to the requirement under the CRA Regulation for issuers, originators and sponsor entities to report information in respect of structured finance instruments ("**SFIs**") to ESMA.

Under Article 8b of the CRA Regulation, ESMA is responsible for setting up an SFI website on which information concerning SFIs will be published.

The European Commission's Delegated Regulation 2015/3 requires that, to implement Article 8b, the reporting entities must submit data files in accordance with the reporting system of the SFI website and the technical instructions to be provided by ESMA on its website.

The reporting obligations will apply from 1 January 2017. ESMA is required to issue these technical instructions by 1 July 2016. However, due to several issues encountered by ESMA in preparing to set up the SFI website, including the absence of a legal basis for the funding of the website it is unlikely that the SFI website will be available to reporting entities by 1 January 2017. Similarly, it is unlikely that ESMA will be in a position to publish the technical instructions by 1 July 2016.

Given these issues, ESMA does not expect to be in a position to receive the information related to SFI from reporting entities from 1 January 2017. ESMA expects that proposed Securitisation Regulation, which is currently being considered by the European Parliament and the Council, will provide clarity on the future obligation regarding reporting on SFIs.

(iii) Council of EU responds to European Court of Auditors' report on ESMA supervision of CRAs

On 26 May 2016, the Council, acting as the European Economic and Financial Affairs Council ("**ECOFIN**"), published a press release reporting on the outcome of its meeting held on 25 May 2016.

At the meeting, the Council adopted its conclusions to the European Court of Auditors' ("**ECA**") February 2016 report on ESMA's supervision of CRAs. The Council called on the ESMA to implement the ECA's recommendations on:

- Examining certain aspects of the design and implementation of CRAs' methodologies to promote a more consistent and objective approach by CRAs in reviewing their own methodologies;
- Considering developing additional guidance on disclosure requirements;
- Examining, as a priority, in a structured manner the systems put in place by the CRAs for dealing with conflicts of interest; and
- Enhancing its work on documentation and traceability (that is, the traceability of the risk identification process).

The Council invited ESMA to report back on the implementation these recommendations via the Financial Services Committee ("**FSC**") by the end of 2016.

ESMA

(i) ESMA publishes final guidelines on Alternative Performance Measures

On 5 October 2015, ESMA published its final guidelines on Alternative Performance Measures ("**APM's**") for listed issuers (the "**Guidelines**").

The Guidelines will apply to APMs disclosed on or after 3 July 2016.

An APM is "*a financial measure of historical or future financial performance, financial position, or cash flows, other than a financial measure defined or specified in the applicable financial reporting framework".* The Guidelines are aimed at promoting the usefulness and transparency of APMs included in prospectuses or regulated information. Adherence to the Guidelines will improve the comparability, reliability and/or comprehensibility of APMs.

The Guidelines are not applicable to:

- Measures defined or specified by the applicable financial reporting framework such as revenue, profit or loss or earnings per share;
- Physical or non-financial measures such as number of employees, number of subscribers, sales per square meter (when sales figures are extracted directly from financial statements) or social and environmental measures such as breakdown of workforce by type of contract or by geographic location;
- Information on major shareholdings, acquisition or disposal of own shares and total number of voting rights; and
- Information to explain the compliance with the terms of an agreement or legislative requirement such as lending covenants or the basis of calculating the director or executive remuneration.

According to the Guidelines, issuers or persons responsible for the prospectus should define the APMs used and their components as well as the basis of calculation adopted, including details of any material hypotheses or assumptions used. The prospectus should also indicate whether the APM or any of its components relate to the (expected) performance of the past or future reporting period.

The Guidelines are available at the link below:

https://www.esma.europa.eu/sites/default/files/library/2015/10/2015-esma-1415en.pdf

(ii) ESMA opinion on EU Framework for loan origination by investment funds

On 12 of April 2016, ESMA published an opinion regarding the necessary elements for a common EU framework for loan origination by investment funds, to be considered in the broader context of ESMA's response to the CMU Green Paper (the "**Opinion**"). The Opinion, addressed to the European Parliament, the Council and the European

Commission sets out ESMA's views on components such as the authorisation of loan-originating funds and their AIFMs, eligible investors, organisational requirements and leverage.

Loan origination is the process by which an investment fund provides credit or originates a loan, acting as a sole/primary lender, to borrowers such as small or medium enterprises ("**SMEs**"). The activity is an alternative form of market-based financing.

A unified EU approach to loan origination by funds will be considered by the European Commission in the second quarter of 2016. ESMA were asked to give their opinion on the key issues on which the consultation could focus. The Opinion takes into account the different stipulated frameworks currently in place in several Member States, which mean that funds operating cross-border must comply with different requirements. The Annex to the Opinion illustrates national practices in this area.

Regulatory arbitrage is set to decrease with a unified framework, and in turn the take-up of loan origination by investment funds should be promoted, in line with the objectives of the CMU.

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

https://www.esma.europa.eu/sites/default/files/library/2016-596_opinion_on_loan_origination.pdf

(iii) ESMA publish Risk Dashboard for Q1 2016

The ESMA Risk Dashboard for Quarter 1, 2016 sets out that the overall risk assessment remains materially unchanged from previous quarters. Systematic stress remained high driven by the materialisation of key risks in emerging markets, in particular China.

The low interest rate environment persisted in the EU as did the downward trend in commodity market prices. Funding issuance remained stable and was higher over the reporting period compared to Quarter 4, 2014. Resilience in systems remained a key concern following market disturbances in the US after the Chinese market crash, notably the mispricing of several ETFs.

A copy of the Risk Dashboard is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-349_risk_dashboard_1-2016_0.pdf

(iv) ESMA economic report on order duplication and liquidity measurement in EU equity markets

On 6 June 2016, ESMA published an economic report on order duplication (i.e. where traders replicate the same order on multiple trading venues at the same time) and liquidity measurement in EU equity markets (the "**Report**"). It forms the second part of ESMA's

high-frequency trading ("**HFT**") research, focussing on liquidity measurement where equity trading is fragmented. A previous HFT report was published by ESMA in December 2014.

ESMA considered a sample of 100 stocks across twelve European trading venues in 9 EU countries for May 2013.

Taking into account HFT the Report finds that overall, multi-venue trading has increased the liquidity in EU equity markets. It was also found, however, that 20% of orders across European venues are duplicated and 24% of duplicated trades are immediately cancelled if unmatched.

The report found that order duplication and immediate cancellation is used by traders to ensure execution across multiple trading venues. This strategy is often used for market makers' activities and by institutional investors seeking liquidity.

While the strategy contributes positively to liquidity, the Report found that duplicated orders and immediate cancellation can lead to an overestimation of available liquidity in fragmented markets.

The duplication of orders varies between the type of trades, the market capitalisation of the underlying stock and the trading fragmentation in a stock. However, order duplication is more recurrent for HFT.

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

https://www.esma.europa.eu/sites/default/files/library/2016-907_economic_report_on_duplicated_orders.pdf

(v) Memorandum of Understanding Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Derivatives Clearing Organisations Established in the United States

On 6 June 2016 the Commodity Futures Trading Commission ("**CFTC**") and ESMA reached a Memorandum of Understanding ("**MoU**") with respect to the covered CCPs pursuant to Article 25 of EMIR.

The MoU sets out arrangements for cooperation regarding ESMA's assessment of compliance and monitoring of the ongoing compliance by the Covered CCPs with the recognition conditions set out in Article 25 of EMIR and with the specific conditions set out in the European Commission Implementing Decision (EU) 2016/377 on 15 March 2016.

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

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

(vi) SMSG Advice to ESMA – Position Paper on Supervisory Convergence

On 13 June 2016 SMSG published its position paper providing advice to ESMA on supervisory convergence as one of the key strategies to be pursued by ESMA from 2016 until 2020 and clarifies the role SMSG may play in supporting ESMA in its task to ensure consistent supervisory practices across the EU (the "**Position Paper**").

The focus of the Position Paper is on the tools and instruments which ESMA may use for fostering consistency within the network of financial supervisors and developing high-quality and uniform supervisory standards. In particular, the Position Paper looks at ways how ESMA may, to a greater extent, benefit from the experiences of stakeholders.

The SMSG considers guidelines and recommendations to be an important instrument in ensuring a uniform application of EU law, although a disadvantage of these instruments is that they can increase the complexity of the regimes for financial markets. Consequently, it is not desirable to clarify every technical aspect by way of guidelines hence the use of questions and answers is a more informed and practical approach.

A copy of the Position Paper in full can be found at:

https://www.esma.europa.eu/sites/default/files/library/2016-smsg-014_position_paper_sc.pdf

(vii) ESMA publishes 2015 Annual Report

On 15 June 2016, ESMA published its Annual Report for 2015 (the **"Annual Report"**).

In 2015 ESMA has made significant steps in realising the mission of enhancing investor protection and promoting stable and orderly financial markets by:

- Assessing risks to investors, markets and financial stability;
- Creating a single rulebook;
- Promoting supervisory convergence; and
- Supervising CRAs and TRs.

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

https://www.esma.europa.eu/press-news/esma-news/esma-publishes-annual-report-2015

The Joint Committee (ESMA, EIOPA and EBA)

(i) Responses to Joint Committee discussion paper on automation in financial advice

On 4 April 2016, the EBA published a list of responses to the December 2015 discussion paper of the Joint Committee of the ESAs on automation in financial advice.

The respondents included, but are not limited to, the Association of British Insurers, the European Banking Federation, EFAMA and Insurance Europe.

In the discussion paper, the Joint Committee stated that it would consider the feedback it received to better understand the phenomenon of the continued increase in the digitalisation of financial services and decide what, if any, regulatory or supervisory action is required.

A copy of the responses to the Joint Committee Discussion Paper can be found here:

https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/discussion-paper-on-automation-in-financial-advice/-/regulatory-activity/discussion-paper/1299860#responses_1299860

(ii) New website launched by Joint Committee

On 31 May 2016, the Joint Committee of ESAs launched a new website, to present information regarding the work of the Joint Committee, which centres particularly around the areas of micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability, retail investment products, supervision of financial conglomerates, accounting and auditing, and measures combating money laundering.

In a press release published on 1 June 2016, ESMA explained that the new website presents information and news about the cross-sectoral work of the three ESAs, who cooperate regularly and closely to ensure consistency in their practices through the Joint Committee.

The new website can be located at:

https://esas-joint-committee.europa.eu/

The European Commission

(i) Commission supports crowdfunding in the EU

On 3 May 2016 the European Commission published its report on the EU crowdfunding sector as part of the Capital Markets Union Action Plan (the "**Report**").

The Report states the European Commission's support of crowdfunding as alternative source of finance for Europe's start-ups. Crowdfunding is an open call to the public to raise funds for a project. Crowdfunding platforms are websites that enable fundraisers, be they individuals or businesses, to interact with investors and donors. Financial pledges can be made and collected through the platform.

Crowdfunding is still small but growing fast in Europe. The Report highlights (based on available data) that approximately €4.2 billion was successfully raised through crowdfunding platforms in 2015 in the EU, compared with €1.6 billion in 2014. In 2015, €4.1

billion was raised through crowdfunding models that entail a possible financial return for those contributing to the funds.

A copy of the Report is available here:

http://ec.europa.eu/finance/general-policy/docs/crowdfunding/160428-crowdfunding-study_en.pdf

(ii) European Commission Green Paper on retail financial services

On 10 December 2015, the European Commission published a Green Paper on retail financial services (the "**Green Paper**") that aimed to provide more choices and greater opportunities for consumers and businesses, consulting on a number of questions aimed at improving products, product choice, transparency and competition in retail financial services. It also explored how to facilitate cross-border supply of financial services to ensure greater portability across Member States as well as the digitalisation on retail financial services.

On 21 April 2016, ESMA published its response to the Green Paper (the **"Response"**) in which it conveyed its views on a number of topics covered in the Green Paper which are considered relevant to ESMA's activities and its objective of ensuring providers and customers of retail financial products make better use of the Single Market. EMSA support the objective of achieving a deeper and fairer Single Market and suggest that the European Commission's main focus should be on ensuring the effective and uniform implementation of regulations to establishing a Single Market in financial services. ESMA expressed its views on a number of issues raised within the Green Paper, including accessing financial services across Europe through more harmonised EU-wide regimes, the encouragement of comparability and portability of products and the impact of digital technologies on the retail financial markets.

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

https://www.esma.europa.eu/sites/default/files/library/2016-648_esma_response_to_ec_green_paper_on_retail_financial_services.pdf

On 26 May 2016, the European Parliament's Committee on Economic and Monetary Affairs published a draft report on the Green Paper (the "**Report**").

The Report contains a motion for a European Parliament resolution on the Green Paper.

The motion notes the increasing complexity of retail financial products, and insists on the need to develop initiatives and instruments that allow consumers to identify safe and simple products.

It calls on the European Commission to intensify its work against discrimination on grounds of residence in the EU retail financial services market and emphasises that the enforcement of EU and national financial and consumer legislation needs to be strengthened. It stresses that the ESAs should step up their activities on consumer issues,

and that the responsible agencies in a number of Member States should start to work more actively and competently in this area.

It also asks the European Commission to further study the costs and benefits of guaranteeing domestic and cross-border portability in various parts of the retail financial services market, and encourages the European Commission to move forward in creating a stronger single market for mortgages and consumer credit carefully, balancing privacy and data protection concerns with improved cross-border access to better co-ordinated credit databases.

A copy of the Report can be found here:

http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-583.922&format=PDF&language=EN&secondRef=01

(iii) Commission proposes new e-commerce rules to help consumers and companies reap full benefit of Single Market

On 25 May 2016, the European Commission published a proposal of measures to allow consumers and companies to buy and sell products and services online more easily and confidently across the EU (the "**Proposal**"). Based on its Digital Single Market and Single Market strategies, the European Commission presented a three-pronged plan to boost e-commerce. The three main aims of the rules are:

- To prevent geoblocking and other forms of discrimination based on nationality or place of residence;
- Make cross-border parcel delivery more affordable and efficient; and
- To increase consumer trust in e-commerce.

A copy of the Proposal may be accessed via the following link:

http://europa.eu/rapid/press-release_IP-16-1887_en.pdf

(iv) European Commission consults on cross-border distribution of investment funds

On 2 June 2016, the European Commission published a consultation paper on the main barriers to cross-border distribution of investment funds (the "**Consultation**").

Funds relevant to the consultation are UCITS, AIFs, European long-term investment funds ("**ELTIFs**"), EuVECA and EuSEF funds.

The European Commission's overall aim is to increase the proportion of funds marketed and sold across the EU, allowing capital to be more effectively allocated across the EU and delivering better value and greater innovation.

The Consultation acts as a further part of the European Commission's action plan for CMU, of which a key aim is to foster retail and institutional investment in investment funds. The

European Commission will use the information gathered from the Consultation as a basis for taking action to address the cross-border barriers to distribution.

The Consultation closes on 2 October 2016.

A copy of the Consultation may be accessed via the following link:

http://ec.europa.eu/finance/consultations/2016/cross-borders-investment-funds/docs/consultation-document_en.pdf

The European Fund and Asset Management Association ("EFAMA")

(i) Significant drop of net sales in investment funds worldwide during Quarter 1, 2016

On 28 June 2016, EFAMA released its latest international statistical release containing the worldwide investment fund industry results for the first quarter of 2016.

The main developments for the first quarter of 2016 are as follows:

- Investment fund assets worldwide decreased by 2.5% during Quarter 1, 2016;
- Worldwide net inflows decreased to €154 billion, down from €583 billion in Quarter 4, 2015;
- Long-term funds (all funds excluding money market funds) recorded net inflows of €192 billion, compared to €367 billion in the Quarter 4, 2015; and
- Money market funds registered net outflows of €38 billion, compared to net inflows of €216 billion in Quarter 4, 2015.

A copy of the EFAMA statistical release is available here:

http://www.efama.org/Publications/Statistics/International/Quarterly%20%20International/160628_International_Statistical_Release_2016_Q1_final.pdf

International Swaps and Derivatives Association ("ISDA")

(i) ISDA Launches Resolution Stay Jurisdictional Modular Protocol

On 3 May 2016, ISDA published the ISDA Resolution Stay Jurisdictional Modular Protocol (the "**ISDA JMP**"). The ISDA JMP will enable parties to amend the terms of protocol covered agreements to aid compliance with certain regulatory requirements in various jurisdictions which, in general, require entities subject to those regulatory requirements to obtain from their counterparties a contractual recognition of the application of stays on or overrides of certain termination rights under the home-country special resolution regime ("**SRR**") of such regulated entity ("**Stay Regulations").** The ISDA JMP was developed specifically to provide a means for the broader market to comply with the requirements of

Stay Regulations. The ISDA JMP is composed of boilerplate provisions and jurisdictional modules with respect to particular Stay Regulations in particular jurisdictions ("**Jurisdictional Modules**"). Parties may choose to adhere to one or more Jurisdictional Modules to the ISDA JMP.

In November 2015, ISDA published the ISDA 2015 Universal Resolution Stay Protocol ("**ISDA 2015 Universal Protocol**"). The ISDA JMP is aimed at achieving the same policy goals as the ISDA 2015 Universal Protocol with respect to the orderly resolution of systemically important financial institutions. While the ISDA 2015 Universal Protocol was developed in advance of Stay Regulations, the operative provisions of the ISDA JMP are being developed to facilitate compliance with Stay Regulations in different jurisdictions. Therefore, the ISDA JMP is a standalone protocol. Nevertheless, the operative provisions of the ISDA JMP are aimed at achieving an outcome substantially similar to the outcome under Section 1 of the ISDA 2015 Universal Protocol, which results in counterparties to financial institutions consenting to be subject to stays on or overrides of certain termination rights under SRRs, notwithstanding the governing law of their agreements. The ISDA JMP is open to ISDA members and non-members.

The ISDA JMP can be found at the Protocol Management section of the ISDA website:

http://www2.isda.org/functional-areas/protocol-management/protocol/24

(ii) Clearing Members Analyse the Resolution of Central Counterparties in New White Paper

On 24 May 2016, The Clearing House and ISDA (the "**Clearing Members**") have issued a white paper titled "Considerations for CCP Resolution" (the "**Paper**"). CCPs maintain an increasingly important role in the global financial system, and the Paper seeks to identify key issues that regulators should consider as they develop a comprehensive resolution framework for systemically important CCPs.

The Paper also identifies potentially significant resolution tools or approaches for further discussion and evaluation by the official sector and industry. The Paper makes reference to and endorses the Financial Stability Board's ("**FSB**") Key Attributes of Effective Resolution Regimes for Financial Institutions and documents important, related considerations that must be addressed in developing a 'workable and comprehensive resolution framework for systemically important CCPs'.

A copy of the Paper may be accessed via the following link:

http://www2.isda.org/attachment/ODQwNg==/20160523_TCH_ISDA_White_Paper_Considerations_for_CCP_Resolution1.pdf

Market Abuse Regulation

(i) Changes in the Market Abuse regime

Regulation 596/2014 on market abuse ("**MAR**"), and Directive 2014/57/EU on criminal sanctions for market abuse ("**CS MAD**") were published in the Official Journal of the EU on 12 June 2014 and will apply from 3 July 2016. MAR and CS MAD are collectively referred to as "**MAD II**". The existing Market Abuse Directive is repealed as of 3 July 2016.

MAR has direct effect in all Member States and does not require any further legislation for it to have effect in national laws.

CS MAD has been transposed by the European Union (Market Abuse) Regulations 2016 (the **"Regulations"**).

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

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

Dillon Eustace has published an article on the impact of MAD II for listed investment funds. A copy of the article is available at the following link:

http://www.dilloneustace.ie/download/1/Publications/Financial%20Services/Market%20Abuse%20A%20New%20Regime%20for%20Investment%20Funds.pdf

The text of the Regulations is available here:

http://www.finance.gov.ie/sites/default/files/SI%20349%20of%202016.pdf

(ii) ESMA publishes updated Q&A on common operation of the Market Abuse Directive

On 1 April 2016, ESMA published a revised questions & answers paper (the "**Q&A**") on the common operation of the Market Abuse Directive.

The updated Q&A concerns information relating to the disclosure of inside information related to dividend policy, disclosure of inside information related to Pillar II requirements and a new question on investment recommendation, specifically on the definition of recommendation in Article 1(3) of the Commission Directive 2003/125/EC on the fair presentation of investment recommendations and the disclosure of conflicts of interest (Investment Recommendations Directive).

The purpose of the Q&A is to promote convergent implementation and application of the market abuse regime by providing responses to specific issues raised by the general public, market participants or competent authorities. The information found in the document is directed at competent authorities to ensure that in their supervisory activities their actions are converging along the lines of the response adopted by ESMA and at helping issuers, investors and other market participants by providing clarity on the existing market abuse requirements, rather than creating an extra layer of requirements.

The updated Q&A may be accessed via the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-419_qa_market_abuse_directive.pdf

(iii) Delegated Regulation under MAR covering indicators of market manipulation, disclosure thresholds, trading during closed periods and notifiable managers' transactions published in the Official Journal of the EU

On 5 April 2016, the European Commission published Delegated Regulation (EU) 2016/522 (the "**Delegated Regulation**") supplementing MAR in the Official Journal of the EU along with Commission Implementing Regulation (EU) 2016/523 which sets out ITS (the "**Implementing Regulation**").

The Delegated Regulation sets out the following:

- The extension of the exemption from the obligations and prohibitions set out in MAR to certain public bodies and central banks of third countries in carrying out monetary, exchange rate or public debt management policy;
- The indicators of market manipulation (Annex I);
- The thresholds for disclosure by emission allowance market participants of inside information;
- The competent authority for the notifications of delays of public disclosure of inside information;
- Permission for trading during closed periods; and
- Types of transactions triggering the duty to notify managers' transactions.

The Implementing Regulation sets out the ITS on the format and template for the notification and public disclosure of managers' transactions.

The Delegated Regulation and Implementing Regulation entered into force on 25 April 2016 and 6 April 2016 respectively and will apply from 3 July 2016.

A copy of the Delegated Regulation can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0522&from=EN

A copy of the Implementing Regulation can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0523&from=EN

(iv) Responses to ESMA consultation on MAR guidelines on market soundings and delayed disclosure of inside information

On 27 April 2016, ESMA published the responses it has received to its January 2016 consultation on draft guidelines under MAR (the "**Consultation Paper**").

Article 17(11) of MAR provides that ESMA shall issue guidelines on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public.

In total 40 responses (the "**Responses**") were received to the Consultation Paper. ESMA will consider the feedback it has received to this consultation with a view to finalising two sets of guidelines and publishing a final report by early Quarter 3, 2016.

A copy of the Consultation Paper can be found at the following link:

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

A full list of the Responses can be accessed via the following link:

https://www.esma.europa.eu/press-news/consultations/consultation-draft-guidelines-market-abuse-regulation

(v) Reference data submission under Article 4(1) of MAR

On 25 May 2016, the EU co-legislators concluded negotiations, agreeing on the postponement of the application date of Directive 2014/65/ EU ("**MiFID II**") and Regulation (EU) No 600/2014 ("**MiFIR**") until 3 January 2018.

Following the agreed later implementation of MiFID II and MiFIR, some of the MAR provisions will be aligned to the new MiFID II timelines. Specifically, the requirements set out under Articles 4(2) and 4(3) which relate to the notification requirements of competent authorities of trading venues shall apply from 3 January 2018. However, the requirements of Article 4(1) which relate to notification requirements of market operators of regulated markets, investment firms and market operators operating an MTF or OTF shall apply from 3 July 2016.

ESMA have released a publication on reference data submission under Article 4 or MAR, which is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-724_requirements.pdf

(vi) ESMA publish new Q&A on MAR

On 30 May 2016, ESMA published a new Q&A on MAR (the "**Q&A**"). The Q&A is aimed at competent authorities supervising MAR as well as market participants to whom MAR applies.

Currently the Q&A contains only one question covering the scope of the obligation to detect and report market abuse under Article 16(2) of MAR. The Q&A clarifies that ESMA considers that the obligation under Article 16(2) of MAR applies broadly and "persons professionally arranging or executing transactions" include "buy side" firms such as investment management firms (AIFs and UCITS managers) as well as firms professionally engaged in trading on own account (proprietary trades).

The Q&A will be updated where relevant as and when new questions or issues arise. It will also be under continuous review for the possibility of converting some of the material into ESMA guidelines and recommendations.

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

https://www.esma.europa.eu/sites/default/files/library/2016-738_mar_qa.pdf

(vii) ESMA publish responses to consultation on MAR guidelines on disclosure of information on commodity derivatives markets or related spot markets

On 1 June 2016, ESMA published the responses (the "**Responses**") it received to its consultation on draft guidelines relating to information expected, or required, to be disclosed on commodity derivatives markets or related spot markets under MAR (the "**Consultation**").

The purpose of the draft guidelines is to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions on the relevant commodity derivative markets or spot markets as referred to in Article 7(1)(b) of MAR

Respondents to the consultation include the Futures Industry Association, ISDA, the London Metal Exchange and the Federation of European Securities Exchanges.

ESMA will consider the feedback it has received to this Consultation with a view to finalising the guidelines and publishing a final report by later Quarter 3, 2016.

A copy of the Consultation may be accessed via the following link:

https://www.esma.europa.eu/press-news/esma-news/esma-consults-future-mar-list-information-regarding-commodity-and-spot-markets

The Responses may be accessed via the following link:

https://www.esma.europa.eu/press-news/consultations/consultation-future-mar-list-information-regarding-commodity-and-spot#TODO

(viii) ESMA rejects European Commission amendments to ITS on public disclosure of inside information under MAR

On 17 June 2016, ESMA published an opinion on draft ITS on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information required under MAR (the "**Opinion**").

The Opinion responds to a letter sent in May 2016 by the European Commission relating to ESMA's proposed ITS on public disclosure of inside information required under Article 17(10) of MAR. The European Commission requested amendments to the ITS because it considered that ESMA was imposing an undue double disclosure of inside information on those emission allowance market participants that would be subject to disclosure requirements under both MAR and Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency ("**REMIT**").

ESMA states that it disagrees with the European Commission's views and, consequently, it does not intend to propose a revised draft ITS to take account of the European Commission's amendments. In the opinion it insists that the proposed amendments would remove two essential features of the system:

- The active dissemination of inside information; and
- The marking of that information as inside information under MAR.

ESMA ultimately believes this would damage the disclosure regime under MAR and expose investors in emission allowances and financial instruments related to them to more risks.

A copy of the Opinion may be accessed via the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-982_opinion_on_mar_its_on_public_disclosure.pdf

On 30 June 2016, the Commission Implementing Regulation (EU) 2016/1055 supplementing MAR with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information was published in the Official Journal of the EU.

The ITS as set out in the Implementing Regulation have been adopted in substantially the same form as set out in ESMA's draft ITS, which were submitted to the European Commission on 28 September 2016.

The Implementing Regulation will come into force on 1 July 2016 and shall apply from 3 July 2016.

(ix) Delegated Regulations and Implementing Regulation supplementing MAR published in the Official Journal of the EU.

On 10 June 2016, the following Commission Delegated Regulations supplementing MAR were published in the Official Journal of the EU:

- Commission Delegated Regulation (EU) 2016/908 supplementing MAR laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for terminating it or modifying the conditions for its acceptance; and

- Commission Delegated Regulation (EU) 2016/909 supplementing MAR with regard to regulatory technical standards for the content of notifications to be submitted to competent authorities and the compilation, publication and maintenance of the list of notifications.

On 17 June 2016, the following Commission Delegated Regulations and Commission Implementing Regulations supplementing MAR were published in the Official Journal of the EU:

- Commission Delegated Regulation (EU) 2016/957 supplementing MAR with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions;

- Commission Delegated Regulation (EU) 2016/958 supplementing MAR with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest;

- Commission Implementing Regulation (EU) 2016/959 supplementing MAR laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with MAR; and

- Commission Delegated Regulation (EU) 2016/960 supplementing MAR with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings.

On 30 June 2016, the Commission Delegated Regulation (EU) 2016/1052 supplementing MAR with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures was published in the Official Journal of the EU.

All of the above Delegated Regulations and Implementing Regulations shall apply from 3 July 2016.

Prospectus Directive

(i) ESMA updates its Questions and Answers document on the Prospectus Directive

On 6 April 2016, ESMA published an updated questions and answers paper on the Prospectus Directive (the "**Q&A**"). The purpose of this document is to promote common supervisory approaches and practices in the application of the Prospectus Directive and its implementing measures. It does this by providing responses to questions posed by the general public and competent authorities in relation to the practical application of the Prospectus Directive.

The content of this document is aimed at competent authorities under the Prospectus Directive to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. However, these responses are also meant to provide market participants with an indication of what constitutes proper implementation of the Prospectus Directive rules. The answers are intended to help issuers of securities by providing clarity as to the content of the Prospectus Directive requirements without necessarily imposing an extra layer of requirements.

The Q&A contains the following:

- New Question 97 – Considers that where a recent change has triggered the requirement to disclose pro forma financial information, an additional column illustrating pro forma capitalisation and indebtedness can be presented. It should be consistent with the pro forma financial information presented elsewhere in the prospectus. Adjustments may be explained by referring to pro forma financial information elsewhere in the prospectus.

- New Question 98(a) – Provides that it is possible for an issuer to continue an offer beyond the validity of a base prospectus, however ESMA considers that the offer must have a start date and expected end date when a base prospectus is used for an offering of non-equity securities.

- New Question 98(b) – Provides that specific conditions should be fulfilled in order for the issuer to continue the offer beyond the validity of the initial base prospectus. The new base prospectus should be approved and published no later than on the last day of validity of the initial base prospectus.

The Q&A can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-576_24th_version_qa_prospectus_related_issues.pdf

(ii) ESMA publishes peer review report on the Prospectus approval process

On 30 June 2016 ESMA published a peer review on the efficiency and effectiveness of EU national securities markets regulators' approval of prospectuses (the "**Peer Review**"), being the disclosure documents prepared by issuers when they want to market their securities to EU investors.

Overall, ESMA found that, while national regulators were in general sufficiently resourced and approved prospectuses within legal deadlines, there were differences in national practices which would benefit from greater convergence.

The Peer Review covered a two-year period from January 2013 to December 2014. The main findings were as follows:

- Prospectuses are often complex and may therefore be difficult for investors to understand, according to external stakeholders interviewed by ESMA. Main concerns include their length, the format of the summary section, and the amount and manner in which information is incorporated by reference;

- National regulators have different interpretations of certain disclosure requirements which would benefit from further harmonisation, as would the way in which national regulators look at risk factors associated with issuers and their securities;

- Approval times vary substantially among national regulators, however, the driving factors largely fall outside national regulators' responsibilities and include:

  - Quality of the first draft they receive;

  - Issuers' response times to queries;

  - The quality of those responses; and

  - The complexity of issuers' circumstances.

Nevertheless, ESMA also identified scope for further improving the efficiency of regulators' approval procedures and the seasonal nature of prospectus approvals raised some concerns that national regulators could struggle to handle high volumes of documents while maintaining rigorous scrutiny during peak periods.

The findings of this peer review will feed into ESMA's supervisory convergence work which is one of its main priorities for 2016-2020. ESMA intends to take a closer look, among other things, at the intelligibility of prospectuses, the disclosure of risk factors and the interpretation of certain requirements.

The EU's Prospectus Directive and Regulation is currently being revised as part of the European Commission's Capital Markets Union and may address some of the legislative clarifications identified during the peer review as appropriate.

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

https://www.esma.europa.eu/sites/default/files/library/2016-1055_peer_review_report.pdf

Statutory Audit Directive

(i) Statutory Audit Directive transposed into Irish law

The requirements of the Statutory Audit Directive 2014/56/EU ("**SAD**") became applicable on 17 June 2016. SAD provides that Public Interest Entities will be required to rotate their auditors every 10 years and also restricts those auditors from providing certain non-audit services to the relevant Public Interest Entity.

The definition of Public Interest Entities includes those entities, which are governed by the law of a Member State, whose transferable securities are admitted to trading on a regulated market such as the Main Securities Market of the ISE.

The restriction on the provision of non-audit services will have immediate effect for all Public Interest Entities for financial years commencing on or after 17 June 2016.

In Ireland SAD has been transposed by the European Union (Statutory Audits) (Directive 2006/43/EC, as amended by Directive 2014/56/EU and Regulation (EU) No 537/2014) Regulations 2016 (S.I. No. 312/2016) (the "**Regulations**"), which replace the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220/2010). The Regulations came into operation on 17 June 2016.

Consequential amendments to the Companies Act are included in the Regulations.

On 17 June 2016, the European Commission published an updated frequently asked questions document (the "**FAQ**") relating to the new statutory audit rules in the EU.

A copy of the Regulations is available here:

http://www.irishstatutebook.ie/eli/2016/si/312/made/en/pdf

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

http://europa.eu/rapid/press-release_MEMO-14-256_en.htm

Consumer Rights Directive

(i) Commission publishes roadmap for evaluation of Consumer Rights Directive

On 25 April 2016, the European Commission published a roadmap for its evaluation of the Consumer Rights Directive ("the **Directive**"). The Directive aims to achieve a high level of consumer protection across the EU. More specifically, it regulates some aspects of distance, off-premises and on-premises contracts between consumers and business.

The evaluation will cover the Directive in its entirety and aims to assess its overall impact on the internal market by assessing its relevance, efficiency, coherence, effectiveness and added value. The assessment should take into account the impact of the Directive on businesses, consumers, cross-border trade and on national trade. The evaluation will cover the period since the Directive entered into application (2014) and will cover all EU Member States.

The results and conclusions from the evaluation will allow policy-makers to decide whether the Directive has fulfilled its objectives.

The evaluation report on the Directive is planned for adoption in the first quarter of 2017. The outcome of the evaluation of the Directive will feed into the conclusions of the fitness checks carried out in parallel of other key EU Directives in the area of consumer and marketing law.

For the full roadmap for evaluation of Consumer Rights Directive see:

http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_just_001_crd_evaluation_en.pdf

On 10 May 2016, the Consultation Strategy on the evaluation of the Directive (the **"Consultation Strategy"**) was published. This outlines the objectives of the consultation which include, amongst others, identifying provisions which add value, identifying problems, detecting effects of the national divergences in transposition, and collecting view on potential options for future actions.

The Consultation Strategy outlines the relevant stakeholders and key aspects of the consultation for each of the relevant stakeholders. It also lists the types of consultations that will be carried out during the evaluation of the Directive which include the following:

- Online public consultation of 12 weeks for the general public to participate in the evaluation;
- Targeted consultation of organisations (i.e. Member states authorities, consumer, businesses and associations) – by online surveys and interviews;
- The preliminary findings will be presented at the 2016 European Consumer Summit, which will give all relevant stakeholders the opportunity to comment and provide the Commission with further inputs.

The Consultation Strategy can be accessed via the following link:

http://ec.europa.eu/consumers/documents/consultation_strategy_on_the_evaluation_of_the_crd.pdf

(ii) European Commission Public consultation for the Fitness Check of EU consumer and marketing law

On 12 May 2016, the European Commission launched a public consultation for the Fitness Check of the following key EU consumer and marketing law directives (the "**Public Consultation**"):

- The Misleading and Comparative Advertising Directive (2006/114/EC);
- The Unfair Contract Terms Directive (93/13/EC)
- The Price Indication Directive (98/6/EC);
- The Unfair Commercial Practices Directive (2005/29/EC);
- The Sales and Guarantee Directive (1999/44/EC); and
- The Injunctions Directive (2009/22/EC);

The Public Consultation also covers the Consumer Rights Directive 2011/83/EU, which is subject to a separate evaluation (see section (i) above).

This Fitness Check involves a comprehensive policy evaluation aimed at assessing whether the regulatory framework for consumer and marketing law is 'fit for purpose' and is part of the European Commission's Regulatory Fitness and Performance Programme.

The Public Consultation includes questions on how EU consumer and marketing rules could be modernised and the results will be relevant in the context of the European Commission's proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods.

The consultation closes on 2 September 2016. The European Commission intends to assess and summarise the responses and publish the summary on the webpage of the Fitness Check.

The Public Consultation can be accessed at the following:

https://ec.europa.eu/eusurvey/runner/ConsumerLawFitnessCheck

More information on the Fitness Check can be found at the following link:

http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm

Investor Money Regulation

(i) Central Bank publish guidelines on Investor Money Regulations reporting obligations for fund service providers

From 1 July 2016, the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Investor Money Regulations 2015 for Fund Service Providers (the "**Investor Money Regulations**") will apply to fund service providers ("**FSPs**") holding investor money in collection accounts.

In March 2016, the Central Bank published a guidance note for FSPs to assist in complying with the Investor Money Regulations (the "**Guidance Note**").

The Investor Money Regulations also introduce a number of reporting obligations for FSPs falling within the scope of the new regime. In order to assist FSPs with their reporting obligations, the Central Bank published a set of guidelines titled "Guidelines on IMR Reporting Obligations for Fund Service Providers" (the "**Guidelines**") on 16 June 2016.

The Central Bank has also developed the investor money reporting form (the **"Form"**) to facilitate breach and incident reporting by FSPs. The Form is outlined at Appendix A of the Guidelines.

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

http://www.centralbank.ie/regulation/ClientAssetsandInvestorMoney/InvestorMoneyRegulations/Documents/Guidance%20on%20Investor%20Money%20Regulations%20for%20Fund%20Service%20Providers%20March%202016.pdf

A copy of the Guidelines is available here:

http://www.centralbank.ie/regulation/ClientAssetsandInvestorMoney/InvestorMoneyRegulations/Documents/June%202016%20-%20IMR%20Reporting%20Guidance%20Note.pdf

Central Bank of Ireland

(i) Central Bank publishes research on consumer perceptions of complaints handling in regulated firms

On 11 May 2016, the Central Bank published the findings of commissioned research undertaken by PWC on a panel of over 1000 customers to understand customers' perception of complaints handling process in regulated firms (the "**Paper**"). The Consumer Protection Code 2012 introduced a strong framework for complaints handling, and the purpose of the research was to assess customer's experiences and perceptions of how firms are applying this framework.

The research found only 41% of respondents felt they were treated fairly and only 39% of respondents felt satisfied with how the complaint was handled. It was also found that 52% of respondents who were given a named contact during the process were satisfied with how their complaint was handled as opposed to 29% of those not given a named contact. The timely resolution of the complaint was regarded as an important aspect of the complaint process by 50% of those respondents who made a complaint.

The Central Bank will use the results of this research to contribute to wider discussions with industry and policy makers both domestically and internationally in the area of complaints handling.

A full copy of the Paper can be found here:

http://www.centralbank.ie/regulation/processes/consumer-protection-code/compliance-monitoring/Documents/Complaints%20Handling%20within%20Regulated%20Financial%20Services%20Firms-%20Consumer%20Research.pdf

(ii) Regulatory reporting requirements of Irish authorised investment funds

On 17 May 2016, the Central Bank published a guidance note on the regulatory reporting requirements of Irish authorised investment funds (the "**Guidance Note**"). The purpose of the Guidance Note is to provide information and direction to investment funds and their service providers regarding the extension of the CBI's Online Reporting System ("**ONR System**"). This includes the board of directors, management companies/AIF management companies and general partners of an investment fund.

The Guidance Note sets out the conditions for returns to be carried out by named parties in both UCITS and non-UCITS. The Guidance Note is also applicable to depositaries and independent statutory auditors reporting on behalf of investment funds. A return generally involves the user completing a Return Form (questionnaire) and attaching supporting document(s). The specifics of each Return Form and required supporting document(s) are outlined within the Guidance Note.

A full copy of the Guidance Note can be found at:

http://www.centralbank.ie/regulation/industry-sectors/funds/Documents/Guidance%20Note%20Regulatory%20Report%20ing%20Vol%201.5%20April%20%2013.pdf

Financial Services Ombudsman

(i) Financial Services Ombudsman ("FSO") publishes Annual Review 2015

On 31 March 2016, the FSO published its annual review for the year January to December 2015 (the "**Annual Review**"). The Annual Review sets out that 4872 complaints were received in 2015 compared to 4477 in 2014. In total the office had almost 2000 active

complaints at the end of 2015, in part due to the legacy of an increased number of complaints in recent years.

The type of investment related complaints received in 2015 were broadly similar to 2014 with 36% of investment complaints related to pension and endowment products. The main product complained about in insurance was motor insurance which accounted for 20% of insurance complaints, with life assurance complaints representing 14% of insurance complaints.

In addition, the office dealt with over 14,600 telephone queries and received 92,000 website hits in 2015.

Despite the reluctance to engage in formal mediation it continued to be the case throughout 2015 that many complaints were resolved by agreement between the parties as they progressed through the office. A total of 822 complaints were settled without the need for an adjudication or formal finding. A total of 1,206 complaints were closed by way of formal adjudication and finding. Of the findings issued, 12% of complaints were upheld, 23% were partly upheld and 65% were not upheld.

A link to the Annual Review is available here:

https://financialombudsman.ie/documents/2015%20Annual%20Review.pdf

Companies Act 2014

(i) Conversion under the Companies Act

Under the Companies Act, all existing private companies limited by shares have the option of converting to one of the new company types (LTD or DAC) during a transition period which ends on 30 November 2016. Companies that have not applied to the CRO to be converted either to a DAC or a LTD during the transition period will be automatically converted to an LTD by the CRO after 1 December 2016.

Companies wishing to be converted to a DAC must, under the Companies Act, pass an ordinary resolution to convert by 31 August 2016 and should follow up by filing a Form N2 and amended Constitution with the CRO as soon as possible thereafter. Companies wishing to convert to an LTD and adopt a new Constitution should do so as soon as possible, as the CRO cannot guarantee that applications received at the very end of the transition period will be processed before 30 November 2016.

Directors of companies wishing to be converted to a new company type are therefore requested to consider this matter at the earliest opportunity and to file your conversion applications with the CRO in good time.

(ii) Directors' Compliance Statement under the Companies Act – Impact on a UCITS plc and Fund Service Providers

The Companies Act which consolidated existing company law re-introduced the company law obligation on directors to make an annual compliance statement in their directors' report. The statement must acknowledge that the directors are responsible for securing the company's compliance with its 'relevant obligations' and confirm that certain things have been done, or if they have not been done, provide a reason why.

This directors' compliance statement requirement under the Companies Act will apply to PLCs and 'large' private companies limited by shares, designated activity companies and guarantee companies which have a balance sheet total exceeding €12.5 million and a turnover exceeding €25 million. These prescribed thresholds are applied on an individual company basis.

Currently the Companies Act also does not exempt a UCITS plc from the requirement to prepare a Directors' Compliance Statement. It remains unsure whether the Minister for Jobs, Enterprise and Innovation (the "**Minister**") will exempt corporate UCITS from the requirement under his powers pursuant to section 943(1) (g) of the Companies Act.

Directors of the following companies will be obliged to sign a compliance statement and include this in their directors' report for years ending on or after 31 May 2016:

- Public limited companies (**"plc"**); and
- 'Large' private companies limited by shares, designated activity companies and guarantee companies which have a balance sheet total exceeding €12.5 million and a turnover exceeding €25 million. The prescribed thresholds are applied on an individual company basis as opposed to a group basis.

While section 1387(3) of the Act serves to exempt funds structured as investment companies that are incorporated under Part 24 of the Companies Act from the requirement to provide a directors' compliance statement, it should be noted that the expression investment company is defined in Part 24 as meaning inter alia a plc not being a company to which the UCITS Regulations apply.

Consequently the Companies Act does not exempt a UCITS plc from the requirement to prepare a directors' compliance statement. Initially it had been anticipated that the Minister would exempt corporate UCITS from the requirement by virtue of the powers entrusted in him pursuant to section 943(1)(g) of the Companies Act. However, notwithstanding ongoing discussions with the Department for Jobs, Enterprise and Innovation, it is not certain at this time whether the Minister will grant such an exemption.

Separately it should be noted that where a corporate fund has established a wholly owned Irish subsidiary that is a qualifying company within the meaning of Section 110 of the Taxes Consolidation Act 1997 (as amended) ("**SPV**"), the SPV may be obliged to prepare a directors' compliance statement where it meets the threshold of a 'large private company'. Although the Minister also has the power under Section 943(1)(g) of the Companies Act to

exempt an SPV from the requirement to produce a directors' compliance statement, no exemption has been granted to date.

In light of the fact that the requirement to prepare a directors' compliance statement will apply to years ending on or after 31 May 2016, we recommend that the directors of a UCITS plc and an SPV (where such an SPV meets the threshold of a 'large private company') take the necessary steps to comply with the requirement to produce a directors' compliance statement.

Directors of an Irish fund service provider company, such as an administrator, a depositary, an alternative fund manager or a fund management company, which meets the threshold of a 'large private company' will also be required to prepare a directors' compliance statement in accordance with the Companies Act.

It is recommended that the directors of an UCITS plc and a SPV, where the threshold of a 'large private company' is met, take the necessary steps to comply with the requirement to produce a directors' compliance statement.

Dillon Eustace has issued a publication relating to directors' compliance statements under the Companies Act, a copy of which is available at the following link:

http://www.dilloneustace.ie/download/1/Publications/Regulatory%20and%20Compliance/Directors%20Compliance%20Statement%20under%20the%20Companies%20Act%202014%20Impact%20on%20a%20UCITS%20plc%20and%20Fund%20Service%20Providers.pdf

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

(i) European Commission publish roadmap relating to its proposal for a Directive to amend MLD4

On 7 April 2016, the European Commission published a roadmap (or inception impact assessment) relating to its proposal for a Directive to amend MLD4 (the "**Roadmap**"). Points of interest in the Roadmap include the following:

- The Financial Action Task Force (FATF) is currently examining what further actions can be taken to strengthen the fight against terrorist financing. However, this work will take time, and even if it leads to a change in the FATF standards (which is not certain) the standards would not be legally binding;

- A targeted data collection is currently being conducted to fill a limited number of information gaps that the European Commission has identified. Initial desk research has been based on MLD4 preparatory work. The European Commission already has some data from card schemes, but reliable data on virtual currencies, both at the EU and national levels, remains a challenge. The Roadmap lists the areas relating to which the European Commission needs further information and data;

- To collect the additional data, the European Commission launched a survey, in December 2015, asking financial intelligence units (FIUs) and public authorities for policy views and data about the agreed problem areas relating to terrorism finance. Also in December 2015, the European Commission launched a consultation asking affected stakeholders (including the payment industry, virtual currencies market players, and the financial services sector) about terrorist financing challenges and potential solutions. Due to "political urgencies" and against the background that the envisaged amendments are targeted, the European Commission believes that a comprehensive public consultation is not needed;

- The relevant issues will be covered, as appropriate, by extending or building on the already existing implementation plan that seeks to ensure that MLD4 is transposed into national legislation no later than 26 June 2017;

- The five targeted amendments concern issues that were already envisaged or discussed during the EU-level negotiations on MLD4; and

- Section E of the Roadmap sets out the European Commission's preliminary assessment of the expected impacts of the envisaged amendments. The assessment is based on the consultations already carried out or currently ongoing. Among other things, taking into account the fact that this initiative is limited and targeted, the European Commission considers that negative economic impacts should be small and that the administrative burden will be limited.

The proposed Directive forms part of the European Commission's February 2016 action plan to strengthen the fight against terrorism. There is no mention in the Roadmap of the Commission's call on Member States to bring forward the date for effective transition and entry into application of MLD4 to the fourth quarter of 2016 at the latest, which was set out in the action plan. The European Commission is expected to publish the proposed Directive to amend MLD4 by the second quarter of 2016 at the latest.

A copy of the Roadmap is available at the link below:

http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_054_amld_en.pdf

(ii) Cayman Beneficial Ownership – business as usual, but faster

The Cayman Government announced on 12 April 2016 that it has signed an agreement with the United Kingdom to make enhancements to its beneficial ownership system.

The agreement confirms a commitment to establish a central technical platform to ensure that:

- Law enforcement and tax authorities in the UK and Cayman can access company beneficial ownership information subject to relevant safeguards;

- Law enforcement and tax authorities in the UK and Cayman can quickly identify all companies that a particular beneficial owner has a stake in; and

- Companies and their beneficial owners are not alerted to the investigation of their information.

No public access will be given to information on the beneficial ownership of Cayman companies. The mechanism will build on the existing regime in Cayman which prevents the incorporation of companies without the use of a Cayman licensed entity which is required to verify and record the identity of each company's beneficial owners. That information is currently available to local regulatory and law enforcement authorities on lawful request and can be disclosed to the law enforcement, tax and regulatory authorities of other jurisdictions, including the UK, through international co-operation arrangements. The Cayman beneficial ownership system is already more wide ranging and effective than that operated in the UK and many other international financial centres.

Jude Scott, the CEO of Cayman Finance, has commented that:

> "*We are pleased the UK Government has recognised that our licensed corporate services provider verified beneficial ownership system is a world class system that provides for due diligence know-your-customer checks that are critical to proper law enforcement authorities conducting legitimate investigations and is superior to other proposed systems. Whilst there are already agreements in place that allow UK law enforcement agencies to request and obtain beneficial ownership information for the Cayman Islands, we have agreed to an enhancement to that system which will help the UK law enforcement agencies access that information with the utmost urgency, but in a way that is also appropriate for our jurisdiction. This is not a public central register.*"

It is anticipated that amendments will be made to a number of existing Cayman laws to provide for the implementation of these commitments.

Data Protection

(i) High Court Judgment on Dawn Raids addresses Data Protection issues

On 5 April 2016, the High Court (Barrett J) delivered its judgment in the CRH plc, Irish Cement Limited and Seamus Lynch v The Competition and Consumer Protection Commission (the "**CCPC**") [2016] IEHC 162.

This judgment relates to a dawn raid carried out by the CCPC at the premises of Irish Cement Limited ("**Irish Cement**"), pursuant to a search warrant, in relation to an investigation into alleged contravention of competition law by Irish Cement. During the course of the raid, the CCPC took a copy of the entire e-mail box of Mr Lynch, a senior executive within the CRH Group, of which Irish Cement is part. The High Court was satisfied, that on the balance of probabilities, that some of the emails and attachments in Mr Lynch's email box were not caught by the terms of the search warrant. The central issue before the High Court was what should be done with the emails and attachments which it was claimed the CCPC did not lawfully have in its possession.

Amongst the declarations sought, the plaintiffs sought a declaration that the CCPC had acted in breach of the Data Protection Acts 1988 and 2003. The High Court was not satisfied to grant this declaration as it noted in its judgment that, in respect of personal data to which the CCPC was not entitled, it was open to the persons present at the time of the dawn raid to refuse to release some or all of the personal data being sought. Barrett J went on to state:

> *"But, perhaps in the general spirit of cooperation that informed Irish Cement's actions vis-à-vis the Commission officials on the day of the 'dawn raid', Irish Cement elected to release the data sought. This being so, it cannot now 'off-load' all the consequences of any such election onto the Commission."* (para. 69 of the Judgment)

The High Court further stated (at para. 70) the following:

> *"The long and the short of the foregoing is that: (1) Irish Cement allowed (a) the release of certain personal data to the Commission which is covered by s.8(e) – in which case no liability of any nature arises for either Irish Cement or the Commission, and/or (b) the release of certain personal data to the Commission, to which the Commission has no entitlement – in which case Irish Cement is liable as data controller for its breach of the Data Protection Acts in this regard; and*
> *(2) the Commission may have in its possession some personal data that was released to it without the relevant data subject consenting to such release and without there being a s.8 exemption applicable to such release."*

This judgment highlights the issues that can arise for data controllers in respect of regulatory investigations and inspections where an authority seeks or obtains personal data which is not necessary for the investigation or inspection.

A full copy of the High Court judgment can be found here:

http://www.courts.ie/Judgments.nsf/0/9E7ECF2C5B64FCA380257FA400365CCC

(ii) EU Parliament approves data protection reform package

On 14 April 2016, the European Parliament formally approved the EU's general data protection reform package after more than 4 years of negotiation and roughly 4,000 amendments overhauling the EU's data protection rules.

The package comprises the General Data Protection Regulation ("**GDPR**") which will replace the Data Protection Directive (95/46/EC) and a Data Protection Directive for the police and criminal justice sector which will replace the Framework Decision for the police and criminal justice sector.

On 4 May 2016, the official text of the GDPR and the Directive were published in the Official Journal of the EU. The GDPR will be directly applicable in all Member States and shall apply from 25 May 2018. The Directive entered into force on 5 May 2016 and EU Member States are required to transpose it into national law by 6 May 2018.

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

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN

A copy of the Directive may be accessed via the link below:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0680&from=EN

(iii) Statement of the Article 29 Working Party on the Opinion on the EU-U.S. Privacy Shield

The Article 29 Working Party ("**WP29**") has published its opinion on the EU-U.S. Privacy Shield (the "**Privacy Shield**") and has concluded that although the proposed new arrangement is an improvement on Safe Harbour, it requires further work. The Privacy Shield was developed jointly by the European Commission and the US Department of Commerce to replace the Safe Harbour framework, which was declared invalid by the Court of Justice in the 2014 Schrems case.

The WP29, an advisory group composed of representatives of the national data protection authorities, the European Data Protection Supervisor and the European Commission, adopted an opinion on the Privacy Shield draft adequacy decision on 13 April 2016.

The WP29 welcomed the "major improvements" the Privacy Shield offers compared to the Safe Harbour decision, stated that it still had "strong concerns" on both the commercial aspects of the Privacy Shield and the potential access by US public authorities to personal data transferred from the EU to the US under the Privacy Shield. The WP29 states in there is an overall lack of clarity and that the Privacy Shield needs to be consistent with the EU data protection framework. WP29 urges the Commission to resolve their noted concerns and provide the requested clarifications in order to ensure the proper equivalency of the Privacy Shield to that of the EU.

A full copy of the WP29 Opinion on the Privacy Shield can be found here:

http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238_en.pdf

(iv) Executive Summary of Preliminary Opinion of the European Data Protection Supervisor on the US-EU agreement on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences

On 25 May 2016, the Executive Summary of the Preliminary Opinion (the "**Opinion**") of the European Data Protection Supervisor ("**EDPS**") on the agreement between the United States of America ("**US**") and the European Union ("**EU**") on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences (the "**Agreement**") was published in the Official Journal of the EU (Notice 2016/C 186/04).

The Agreement is an international law enforcement agreement aimed at ensuring a high level of data protection for the personal data transferred between the US and the EU for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism.

After negotiations between the European Commission and the US, the Agreement was initialled on 8 September 2015. The European Parliament must consent to the initialled text of the Agreement and the Council must sign it. Until this consent has been given and the Agreement has been formally signed, negotiations can be reopened on specific points and it is in this context that the EDPS issued the Opinion.

In the Opinion, the EDPS notes his support for the European Commission's efforts to conclude the Agreement with the US but also notes that safeguards for individuals must be clear and effective in order to fully comply with EU primary law.

The Opinion aims to provide constructive and objective advice to EU institutions given that when the European Commission finalise this Agreement it will have broad ramifications, not only for EU-US law enforcement cooperation but also for future international accords.

In the Opinion, the EDPS recommends the following three essential improvements to the text of the Agreement to ensure compliance with EU law:

- Clarification that all the safeguards apply to all individuals, not only to EU nationals;
- Ensuring judicial redress provisions are effective within the meaning of the Charter of Fundamental Rights; and
- Clarification that transfers of sensitive data in bulk are not authorised.

The EDPS also highlights other aspects where important clarifications are recommended.

The Agreement is separate from but must be considered in conjunction with the EU-US Privacy Shield on the transfer of personal information in the commercial environment.

The Executive Summary of the Opinion can be found here:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XX0525(01)&from=EN

(v) European Commission Consultation of e-Privacy Directive

The European Commission has launched a public consultation on the current text of the e-Privacy Directive 2002/58/EC coupled with possible changes to the existing legal framework to make sure it is up to date with the advancements of the digital age. The e-Privacy Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality.

Interested parties, who wish to participate in the consultation process, have until 5 July 2016 to submit responses to the European Commission's online questionnaire who will then begin the process of consolidating all feedback received in preparation for a new legislative proposal on e-Privacy by the end of 2016.

The European Commission has already identified several issues as needing to be addressed in the review of the e-Privacy Directive including: ensuring consistency of ePrivacy rules with the provisions of the GDPR; enhancing security and confidentiality of communications and simplifying the electronic marketing rules to avoid inconsistencies between Member States.

The public consultation can be responded to at the following:

https://ec.europa.eu/eusurvey/runner/EPRIVACYReview2016

Irish Stock Exchange

(i) Global Exchange Market – Investment Funds

From 4 April 2016, the Global Exchange Market ("**GEM**") of the Irish Stock Exchange has been available for investment funds seeking to list their securities on GEM or for any investment funds wishing to transfer an existing listing from the Main Securities Market of the Irish Stock Exchange ("**MSM**") to GEM.

The GEM is an exchange regulated market and Multi-Lateral Trading Facility as defined in MiFID. European directives such as the Prospectus Directive, the Transparency Directive and the Statutory Audit Directive will not apply to issuers by virtue of their listing on GEM. The European market abuse regime is, however, to be extended to cover Multi-Lateral Trading Facilities and thus will apply to GEM listed issuers from 3 July, 2016. The GEM Investment Funds Rulebook (the "**Rulebook**") is available on the Irish Stock Exchange website.

Investment funds, wishing to retain the benefits of listing on the Irish Stock Exchange but with a greater degree of flexibility than can be afforded to investment funds listed on the MSM, may elect to transfer their existing MSM listing to GEM.

A transfer of an investment fund's listing from the MSM to the GEM may be done by way of announcement which is subject to prior approval and can be submitted using the normal channels.

The Rulebook is available at the following link:

http://www.ise.ie/Products-Services/Sponsors-and-Advisors/GEM-Rules-for-Investment-Funds.pdf

(ii) ISE Q1 2016 statistics show 34,382 securities listed on ISE markets

On 15 April 2016, quarterly statistics published by the Irish Stock Exchange ("**ISE**") showed that listings on ISE markets have grown to almost 34,400 securities from over 4,000 issuers in 80 countries around the globe at the end of March 2016.

Also noted in the ISE Q1 2016 statistical report was that equity trades had reached record levels and turnover had risen by 26% as ISE extends its strategic partnership with Deutsche Börse. NTMA had listed its first ever 100-year Irish Government security as bond market activity remains strong and the ISE Fund Hub has expanded its services to Irish domiciled funds.

A full copy of the ISE Q1 2016 Statistics can be found here:

http://www.ise.ie/market-data-announcements/statistical-reports/q1-2016-quarterly-statistics-for-the-irish-stock-exchange-ise-.pdf

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