Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 April – 30 June 2019

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO

Table of Contents

INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

MiFID II - European Developments

(i) Commission Implementing Decision recognising certain Singapore derivatives trading venues under MiFIR published in the Official Journal of the European Union

On 2 April 2019, the Commission Implementing Decision (EU) 2019/541 (the "**Implementing Decision**") on the equivalence of the legal and supervisory framework applicable to approved exchanges and recognised market operators in Singapore under the Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014) ("**MiFIR**") was published in the Official Journal of the European Union ("**EU**").

The Implementing Decision recognises the approved exchanges and recognised market operators that are authorised by the Monetary Authority of Singapore as eligible for compliance with the EU's trading obligation for derivatives.

This decision will allow EU counterparties to comply with their EU trading obligation under MiFIR and to be compliant with the G20 reforms for standardised derivatives when executing derivatives transactions with counterparties in Singapore.

The Implementing Decision will come into force on the day after its publication in the Official Journal of the EU.

A copy of the Implementing Decision can be accessed here.

(ii) ESMA updates Q&A on Market Structures Topics

On 2 April 2019, the European Securities and Markets Authority ("**ESMA**") published an updated version of its questions and answers publication "On MiFID II and MiFIR market structures topics" (the "**Q&As on Market Structures Topics**"). The updated questions are listed below:

- **Question ID: Part 5 Multilateral and bilateral systems – Question 30** (as inserted on 1 April 2019) asks can an EU branch of a third-country firm operate as a systematic internaliser ("**SI**");

- **Question ID: Part 5 Multilateral and bilateral systems – Question 31** (as inserted on 1 April 2019) asks how does the concept of "risk-facing activity" apply to an EU branch of a third-country firm that operates as an SI in the EU; and

- **Question ID: Part 6 Access to CCPs and trading venues – Question 7** (as updated on 2 April 2019) asks can a third country trading venue request access to an EU central counterparty under Article 38 of MiFIR in the absence of an equivalence decision under Article 28(4) of MiFIR.

A copy of the Q&As on Market Structures Topics can be accessed here.

(iii) ESMA publishes MiFID II supervisory briefing on appropriateness and execution-only requirements

On 4 April 2019, ESMA published an updated version of its supervisory briefing on MiFID II appropriateness and execution only requirements (the "**Supervisory Briefing**").

The Supervisory Briefing is an updated version of ESMA's 2012 supervisory briefing on the same topic and takes into account the new version of ESMA's guidelines on suitability published on 28 May 2018 with respect to aspects also relevant to the appropriateness rules. Some of the topics discussed in the Supervisory Briefing are listed below:

- Determining situations where the appropriateness assessment is required;
- Obtaining information from clients;
- Assessment of appropriateness;
- Warnings to clients;
- Qualifications of a firm's staff; and
- Record-keeping.

The Supervisory Briefing is aimed at regulatory authorities with the aim of promoting common supervisory approaches and practices in the application of the MiFID II appropriateness rules.

A copy of the Supervisory Briefing can be found here.

(iv) ESMA updates Q&A on Transparency Topics

During the period 1 April 2019 to 30 June 2019, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR transparency topics" ("**Q&As on Transparency Topics**"). The updated questions are listed below:

- **Question ID: Part 2 General Q&As on transparency topics – Question 13** (as modified on 3 June 2019) which asks in the case of a corporate action where a traded International Securities Identification Number ("**ISIN**") is replaced with a new ISIN, how should the new ISIN be reported to Financial Instruments Reference Data System ("**FIRDS**") and the Financial Instruments Transparency System ("**FITRS**");
- **Question ID: Part 3 Equity transparency – Question 5** (as updated on 2 April 2019) asks which Large in Scale ("**LIS**") threshold should be used to exclude post-trade LIS

transactions when calculating the turnover to be used for the average value of transactions calculation, which determines the standard market size ("**SMS**");

- **Question ID: Part 4 Non-equity transparency - Question 16** (as updated on 2 April 2019) asks are reverse convertible bonds considered to be money market instruments ("**MMIs**") as per Article 11 of the Commission Delegated Regulation (EU) 2017/565 (the "**MiFID II Delegated Regulation**");

- **Question ID: Part 4 Non-equity transparency - Question 17** (as updated on 2 April 2019) relates to a non-equity transaction concluded outside the rules of a trading venue pursuant to a customary prime brokerage arrangements;

- **Question ID: Part 5 Pre-trade transparency waivers – Question 1** (as modified on 3 June 2019) asks does paragraph 7 of Article 4 of MiFIR allow competent authorities to grandfather waivers granted under MiFID I for a period of two years after the application of MiFIR on 3 January 2018;

- **Question ID: Part 6 The double volume cap mechanism – Question 1** (as updated on 3 June 2019) this question which related to the adjustments to data on MiFID I waivers was deleted;

- **Question ID: Part 6 The double volume cap mechanism – Question 2** (as updated on 3 June 2019) this question which related to the double volume cap ("**DVC**") to be applied from January 2018 in relation to financial instruments was deleted;

- **Question ID: Part 7 The systematic internaliser regime - Question 6** (as modified on 3 June 2019) there are three questions set out in this question all relating to SI status;

- **Question ID: Part 7 The systematic internaliser regime - Question 11** (as modified on 3 June 2019) asks if it is possible for investment firms to qualify as a SI under the mandatory regime in instruments that are not traded on a trading venue;

- **Question ID: Part 7 The systematic internaliser regime - Question 11a** (as inserted on 3 June 2019) asks can an investment firm which decides to opt-in to the SI regime determine the instruments on which it will be an SI;

- **Question ID: Part 7 The systematic internaliser regime - Question 11b** (as inserted on 3 June 2019) asks are SIs not traded on a trading venue ("**non-TOTV**") instruments subject to the quoting obligations under Articles 14-18 of MiFIR;

- **Question ID: Part 7 The systematic internaliser regime – Question 12** (as updated on 2 April 2019) asks does a SI in non-equity financial instruments comply with its obligations under Article 18 of MiFIR by clarifying publicly that, for certain financial instruments, it will never agree to provide a quote when prompted to do so by a client; and

- **Question ID: Part 7 The systematic internaliser regime – Question 13** (as updated on 2 April 2019) asks is a SI in a financial instrument for which the liquidity status changes required to adapt its quoting arrangements accordingly.

A copy of the Q&As on Transparency Topics can be accessed here.

(v) ESMA adds new venues to register of derivatives to be traded under MiFIR

During the period 1 April to 30 June 2019, ESMA has on two occasions updated the public register of those derivative contracts that are subject to the trading obligation under MiFIR.

The updates made follow the authorisation of additional entities where the classes of derivatives subject to the trading obligation are available for trading. The register provides clarity to market participants on the application of the trading obligation under MiFIR and in particular on:

- The classes of derivatives subject to the trading obligation;
- The trading venues on which those derivatives can be traded; and
- The dates on which the obligation takes effect per category of counterparties.

A link to the public register can be accessed here.

(vi) ESMA updates Q&A on MiFIR Data Reporting

On 9 April 2019, ESMA published an updated version of its questions and answers publication "On MiFIR Data Reporting" (the "**Q&As on MiFIR Data Reporting**"). Any update made to the Q&As on MiFIR Data Reporting is listed below:

- **Section 19 Defined List of Instruments – Question 1** (as updated on 8 April 2019) provides information on how operators of trading venues should report instrument reference data in cases where they operate on the basis of a defined list of instruments.

A copy of the Q&As on MiFIR Data Reporting can be accessed here.

(vii) Proposed Directive for Investment Firms adopted at first reading

On 16 April 2019, the European Parliament published the text that it had adopted at first reading on a legislative resolution in relation to a proposed Directive which seeks to amend the MiFID II Directive 2014/65/EU (the "**MiFID II Directive**") and the Solvency II Directive 2009/138/EC (the "**Solvency II Directive**").

The proposed Directive seeks to transfer the powers to authorise and supervise Data Reporting Services Providers ("**DRSPs**") from national competent authorities ("**NCAs**") to

ESMA by inserting those powers in MiFIR without bringing any further changes to the substantive rules applicable to DRSPs including the conditions for authorisation and organisation requirements initially established in MiFID II. In addition, the proposed Directive also concerns the role of the European Insurance and Occupational Pensions Authority ("**EIOPA**") in the approval processes for internal models.

On 2 May 2019, the Council of the EU issued an 'Information Note' that a number of informal contacts have taken place between the Council of the EU, the European Parliament and the Commission with a view to reaching an agreement on the proposed Directive at first reading and avoiding the need for second reading and conciliation. Once legal experts have scrutinised the texts and the European Parliament plenary adopts the corresponding corrigenda the Council of the EU should be able to approve the position of the European Parliament on that basis.

A copy of the legislative resolution can be accessed here and the Information Note can be accessed here.

(viii) ESMA Renews Intervention Measures which restrict the sale of CFDs

On 17 April 2019, ESMA adopted a decision under Article 40 of MiFIR to restrict the marketing, distribution or sale of contracts for differences ("**CFDs**") to retail clients (the "**Decision**"). The Decision renews and amends the ESMA Decision (EU) 2018/796 on the same terms as the previous renewal decision, ESMA Decision (EU) 2018/1636.

Under MiFIR, ESMA can introduce temporary prohibitions or restrictions concerning certain financial instruments, financial activities or practices to address consumer protection measures in the EU.

The Decision was published in the Official Journal of the EU on 30 April 2019 and will apply from 1 May 2019 for a period of 3 months.

A copy of the Decision can be accessed here.

(ix) ESMA updates publication schedule for transparency calculations in May and June 2019

On 26 April 2019, ESMA issued a press release to provide clarity to stakeholders on the publication schedule for transparency calculations in May and June 2019 as well as in the forthcoming months, following the extension of Article 50(3) of the Treaty of the EU in relation to the United Kingdom's withdrawal from the EU.

ESMA intends to perform and publish the calculations for:

- Quarterly SIs determination for equity instruments and bonds and for the quarterly liquidity determination for bonds on 30 April 2019; and

- DVC on 8 May 2019.

ESMA has stated that it will not perform the annual calculations for non-equity instruments other than bonds in 2019 due to continued concerns about the quality and completeness of data and that in relation to the results of the transitional transparency calculations, ESMA also stated that it will continue to apply for one more year. The first regular annual calculations for non-equity instruments will be published by 30 April 2020.

A copy of the press release can be accessed here.

(x) ESMA makes new bond liquidity data available

On 1 May 2019, ESMA published updated liquidity assessment data on its data register in respect of bonds which are subject to pre-trade and post trade requirements under the MiFID II Directive and MiFIR. The first communication was published on 27 September 2018.

ESMA's liquidity assessment for bonds is based on a quarterly assessment of quantitative liquidity criteria, which include the daily average trading activity (trades and notional amount) and percentage of days traded per quarter. ESMA is set to update its bond market liquidity assessments quarterly.

The transparency requirements for bonds deemed liquid will apply from 16 May 2019 until 15 August 2019.

The list of bonds assessed for liquidity are available through the register system which can be found here.

(xi) ESMA submits technical advice on Sustainable Finance to the European Commission

On 3 May 2019, ESMA published its technical advice to the European Commission (the "**Commission**") on Sustainable Finance initiatives to support the Commission's Sustainability Action Plan in the areas of investment services and investment funds.

The final report contains technical advice to the Commission on the integration of sustainability risks and factors, relating to environmental, social and good governance considerations under the MiFID II Directive and MiFIR.

In December 2018, ESMA ran a public consultation on its technical proposal and conducted a cost-benefit-analysis and took into account the opinion of the Securities Markets Stakeholder Group ("**SMSG**"). ESMA developed its final report in co-operation with EIOPA, which has received a similar mandate regarding the Solvency II Directive and the Insurance Distribution Directive 2016/97/EU ("**IDD**"). ESMA has provided that it will now co-operate with the Commission to transform the technical advice into formal delegated acts.

A copy of the final report can be accessed here.

(xii) ESMA publishes latest Double Volume Cap Data

ESMA published the updates of the latest set of data regarding the DVC under the MiFID II Directive in the second quarter of 2019, specifically on the 8 May and 7 June.

The MiFID II Directive introduced the DVC to limit the amount of dark trading in equities allowed under the reference price waiver and the negotiated transaction waiver. The DVC mechanism is set out in Article 5 of MiFIR with the aim of limiting the trading under the reference price waiver (Article 4(1)(a) of MiFIR) and the negotiated transaction waiver for liquid instruments (Article 4(1)(b)(i) of MiFIR) in an equity instrument.

The data files published by ESMA provide the information needed for the implementation of the DVC mechanism. This includes the identifiers of the instruments and trading venues associated with a suspension of the relevant waivers, and the period in which the DVC will be applicable.

In the updates published on the 8 May and 7 June, ESMA amended the suspension files relating to the DVC data which it had originally published on 7 August 2018. The suspension file, which is required under MiFIR, contains a list of ISIN, which are suspended from trading. Furthermore, as of 7 June, there was a total of 315 instruments suspended.

The data files and the suspension files can be found here.

(xiii) European Court of Justice ruled that prohibition on activities of tied agent fall outside scope of MiFID

On 8 May 2019, the European Court of Justice (the "**ECJ**") has ruled that a temporary prohibition on the activities of a tied agent fell outside the scope of the MiFID Directive 2004/39/EC (the "**MiFID I Directive**").

A request for a preliminary ruling from the ECJ was made in proceedings between Mr. Antonio Pasquale Mastromartino and the Commissione Nazionale per le Società e la Borsa ("**Consob**") (National Companies and Stock Exchange Commission, Italy).

Mr. Mastromartino provided services as a financial adviser and was authorised to provide offsite services. The Consob imposed a temporary prohibition on Mr. Mastromartino from exercising that activity because of criminal proceedings against him. Mr. Mastromartino claimed that the legal basis of the prohibition was incompatible with MiFID. Accordingly, the Italian court made a referral to the ECJ for a ruling on whether a tied agent was covered by relevant provisions in the MiFID I Directive that might preclude such a prohibition.

In its ruling, the ECJ confirmed that a financial adviser authorised to provide offsite services exclusively in the interest of a single investment firm must be regarded as a tied agent for the purposes of the MiFID I Directive and ruled that Articles 8, 23, 50 and 51 of the MiFID I Directive, which relates to the authorisation of investment firms, the registration of tied agents, the temporary prohibition of professional activity and administrative sanctions, govern the activities of investment firms, but not tied agents and on that basis, a temporary prohibition on exercising the activity of a financial adviser such as Mr. Mastromartino would not fall within the scope of MiFID.

A copy of the judgment can be accessed here.

(xiv) ESMA publishes data for the SI calculations for equity, equity-like instruments and bonds

On 10 May 2019, ESMA published the SI regime data for equity, equity-like instruments and bonds under the MiFID II Directive and MiFIR. ESMA published the total number of trades and total volume over the period October 2018 through to March 2019 for the purpose of the SI calculations for 24,909 equity and equity-like instruments and for 315,615 bonds.

The results are published only for instruments for which trading venues submitted data for at least 95% of all trading days over the 6 month observation period. The data publications also incorporate over the counter ("**OTC**") trading to the extent it has been reported to ESMA. The publication includes data also for instruments which are no longer available for trading on EU trading venues from the end of March. The date by when the assessment has to be performed and the investment firm has to comply with the SI obligations will be 24 May 2019.

The publication of the data for the SI calculations for derivatives and other instruments has been delayed until 2020 at the latest while the SI assessment for those asset classes does not need to be performed until 2020.

Under Article 4(1)(20) of the MiFID II Directive, investment firms dealing on own account when executing client orders OTC on an organised, frequent systematic and substantial basis are subject to the rules applicable to a SI. The MiFID II Delegated Regulation specifies thresholds determining what constitutes frequent, systematic and substantial OTC trading. An investment firm must assess whether they are a SI in a specific instrument (such as equity and equity-like instruments or bonds) or for a class of instruments (derivatives, securitised derivatives and emission allowances) on a quarterly basis based on data provided relating to the previous six months.

For each specific instrument or class, an investment firm must compare the trading it undertakes on its own account to the total volume and number of transactions executed in the EU. If the investment firm exceeds the relevant thresholds it will be deemed a SI. ESMA has computed the total volume and number of transactions executed in the EU to help market participants carry out the test.

A copy of the press release and the relevant data can be accessed here.

(xv) ESMA launches call for evidence on position limits in commodity derivatives

On 24 May 2019, ESMA launched a call for evidence on position limits and position management in commodity derivatives.

The call for evidence by ESMA is in the context of the reviews it must perform under the MiFID II Directive. ESMA is seeking stakeholders' input on the impact of position limits on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets.

Stakeholders are invited to provide feedback and have until 5 July 2019. ESMA has provided that it will consider the feedback in drafting its advice for its report to the Commission on the impact of position limits and position management controls on commodity derivatives markets.

ESMA intends to consult on its draft report to the Commission in the fourth quarter of 2019 with a view to finalising the report by the end of March 2020.

A copy of the press release and the call for evidence can be accessed here.

(xvi) ESMA publish opinion on calculating market size of ancillary activity under MiFID II

On 27 May 2019, ESMA published an updated opinion on ancillary activity calculations (the "**Opinion**"). The updated Opinion provides the estimation of the market size of commodity derivatives and emission allowances for 2018.

Article 2(1)(j) of the MiFID II Directive provides an exemption from persons dealing on own account or providing investment services in specific areas, provided that their activity is an ancillary activity to their main business.

The Commission Delegated Regulation (EU) 2017/592 specifies the criteria for establishing when an activity is to be considered as ancillary for this purpose and lays down rules for calculating the overall market trading activity, which determines whether an activity is ancillary.

The Opinion, provides the estimation of the market size of various commodity derivatives and estimations based on data collected from trading venues and data reported to trade repositories under the EMIR Regulation No 648/2012 ("**EMIR**").

A copy of the Opinion can be accessed here.

(xvii) ESMA updates Q&A on Investor Protection and Intermediaries Topics

During the period 1 April 2019 to 30 June 2019, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR investor protection and intermediaries topics" ("**Q&As on Investor Protection and Intermediaries Topics**"). The updates to the Q&As on Investor Protection and Intermediaries Topics are as follows:

- **Question ID: Part 1 Best execution – Question 21** (as updated on 29 May 2019) which asks how should the information on the 'trading mode' be inserted by an execution venue, which conducts continuous trading;

- **Question ID: Part 1 Best execution – Question 22** (as updated on 29 May 2019) which asks what information should execution venues and investment firms report in the template fields of regulatory technical standards ("**RTS**") 27 and 28, if the required content is not applicable to their activities;

- **Question ID: Part 1 Best execution – Question 23** (as updated on 29 May 2019) which asks does the categorisation of 'passive' and 'aggressive' orders apply to investment firms which use quote-driven trading systems to have client orders executed;

- **Question ID: Part 1 Best execution – Question 24** (as updated on 29 May 2019) which asks does the RTS 28 reporting requirements of investment firms related to the execution of client orders through third-country execution venues only apply to third-country venues qualified as equivalent by the Commission;

- **Question ID: Part 9 Information on costs and charges – Question 27** (as updated on 29 May 2019) which asks is it necessary to provide ex-ante information about costs and charges in case of clients' sell orders;

- **Question ID: Part 9 Information on costs and charges – Question 28** (as updated on 29 May 2019) which asks how to disclose cost information (in good time) to a client who places an order via telephone;

- **Question ID: Part 9 Information on costs and charges – Question 29** (as updated on 29 May 2019) which asks are firms allowed to use an assumed investment amount for ex-ante costs and charges disclosures in relation to investment services and/or products with non-linear charging structures; and

- **Question ID: Part 9 Information on costs and charges – Question 30** (as updated on 29 May 2019) which asks are firms allowed to disclose the relevant costs and charges that would be incurred by a client by way of a range (between X€ and Y€ and between X% and Y%) or as a maximum amount/percentage for ex-ante costs and charges disclosures.

A copy of the Q&As on Investor Protection and Intermediaries Topics can be accessed here.

(xviii) Common supervisory action on MiFID II appropriateness rules launched by ESMA

On 3 June 2019, ESMA issued a press release announcing that it is launching a common supervisory action with participant NCAs and that it will be carried out, in the second half of 2019.

The NCAs that participate in the common supervisory action will assess the application of the appropriateness requirements by a sample of investment firms under their supervision. As when the MiFID II requirement concerning the assessment of appropriateness is correctly applied, the assessment seeks to ensure the protection of investors in transactions that are not accompanied by investment advice.

ESMA has provided that the initiative and the sharing of practices across NCAs, will help to ensure the consistent implementation and application of EU rules and enhance the protection of investors as well as improving the mutual understanding of supervisory approaches by NCAs.

A copy of the press release can be accessed here.

(xix) ESMA publishes a supervisory briefing on pre-trade transparency requirements in commodity derivatives

On 3 June 2019, ESMA published a supervisory briefing to ensure compliance with the MiFIR pre-trade transparency requirements in commodity derivatives (the "**Supervisory Briefing**").

The Supervisory Briefing was developed after ESMA became aware that the relevant provisions were not being implemented in a consistent manner across the EU. The aim of the Supervisory Briefing is to increase supervisory convergence among NCAs, in their implementation of the requirements and to provide a common timetable for the enforcement of the commodity derivatives pre-trade transparency regime across EU trading venues.

It clarifies that NCAs should ensure that trading venues do not operate trading functionalities which allow the formalisation of negotiated trades in the absence of a compliant waiver. The Supervisory Briefing sets the following common three-step timetable for NCAs:

1. Gather information on the plans of each relevant trading venue to comply with the pre-trade transparency requirements with ESMA assessing those plans (this phase has already been completed);

2. Ensure that all the relevant trading venues either operate under a compliant pre-trade waiver or are pre-trade transparent (this phase should be completed by the end of fourth quarter 2019); and

3. Take supervisory measures in case of non-compliance (this phase starts from first quarter 2020).

ESMA notes in the Supervisory Briefing that it will review the progress and measures undertaken six months after the beginning of the third step.

A copy of the Supervisory Briefing can be accessed here.

(xx) ESMA publishes translations for Guidelines on the application of C6 and C7 of Annex 1 of MiFID II

On 5 June 2019, ESMA issued the official translations of its Guidelines on the application of C6 and C7 of Annex 1 of MiFID II (the "**Guidelines**").

The Guidelines will apply from the 5 August 2019, to NCAs and investment firms as defined in Article 4(1)(1) of the MiFID II Directive and amend the ESMA C6/C7 guidelines (ESMA/2015/1341) that were issued to clarify points (6) and (7) of Section C, Annex I of the MiFID II Directive.

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

The Guidelines can be accessed here.

(xxi) ESMA published its final report on Call for Evidence on Periodic Auctions

On 11 June 2019, ESMA published the final report 'Call for Evidence on Periodic Auctions' (the "**Report**") following a call for evidence on frequent batch auctions.

ESMA identified that frequent batch auctions, a new type of periodic auction trading systems were rapidly gaining market share and to better understand the auctions and to assess whether these systems are used to circumvent the DVC, published a call for evidence in November 2018.

The Report summarises the feedback received to the call for evidence on frequent batch auctions, the Report sets out ESMA's analysis of developments in equity trading and highlights its next steps:

- **Section 3** - covers the definition of frequent batch auctions and the development of frequent batch auctions trading;

- **Section 4** - assesses in more detail the four key characteristics of frequent batch auctions currently operated and presents the way forward;

- **Section 5** - covers broader market developments in equity trading following the application of MiFID II; and

- **The Annex** - provides a summary of the feedback received to the questions in the call for evidence.

ESMA notes it will work on further guidance along the lines recommended in the Report, covering in particular the areas of price determination and pre-trade transparency and look at the broader effects of the MiFID II transparency regime, including the general development of the market structure in the upcoming MiFID II review reports.

A copy of the Report can be accessed here.

(xxii) Delegated Regulation extending MiFID II trade transparency exemption to People's Bank of China published in the Official Journal of the EU

On 20 June 2019, the Delegated Regulation (EU) 2019/1000 amending Commission Delegated Regulation (EU) 2017/1799 as regards the exemption of the People's Bank of China from the pre- and post-trade transparency requirements under MiFIR (the "**Delegated Regulation**") was published in the Official Journal of the EU.

Under Article 1(9) of MiFIR the Commission can adopt delegated acts to exempt certain third-country central banks from MiFID II pre- and post-trade transparency requirements.

The Delegated Regulation adds the People's Bank of China to the list of exempted institutions.

A copy of the Delegated Regulation can be accessed here.

(xxiii) ESMA publishes guidelines compliance table in respect of MiFID II suitability requirements

On 20 June 2019, ESMA published a guidelines compliance table (the "**Table**") which indicates the countries that comply or have expressed the intention to comply with the ESMA guidelines on MiFID II suitability requirements (the "**Guidelines**").

As per the Table, the Central Bank of Ireland (the "**Central Bank**") complies with the Guidelines and a copy of the Table can be accessed here.

(xxiv) ESMA publishes opinions on position limits under MiFID II

On 20 June 2019, ESMA published three opinions on position limits regarding certain commodity derivatives under the MiFID II Directive and MiFIR.

ESMA agreed with the proposed position limits regarding the commodity derivatives, noting that the limits were consistent with the objectives established under the MiFID II rules and the accompanying methodology developed for setting those limits.

The MiFID II Directive provides for all commodity derivatives traded on trading venues and economically equivalent OTC contracts to be subject to position limits. ESMA publishes a list of liquid commodity derivatives currently identified by the relevant NCAs in order to further assist market participants with the implementation of the MiFID II position limit framework.

The three opinions can be accessed here.

(xxv) Delegated Regulation amending MiFID II to promote the use of SME growth markets published in the Official Journal

On 21 June 2019, the Delegated Regulation (EU) 2019/1011 (the "**Delegated Regulation**") amending the Delegated Regulation (EU) 2017/565 as regards certain registration conditions to promote the use of small and medium-sized enterprise ("**SME**") growth markets was published in the Official Journal of the EU.

The Delegated Regulation supplements the MiFID II Directive and includes requirements an SME issuer must meet to qualify as an SME and for its securities to be traded on an SME growth market. The Delegated Regulation amends Articles 77 and 78 of the MiFID II Delegated Regulation to address this.

The Delegated Regulation enters into force on 22 June 2019 and will apply from 11 October 2019.

A copy of the Delegated Regulation can be accessed here.

(xxvi) ESMA issues updated results of the annual transparency calculations for equity and equity-like instruments

On 21 June 2019, ESMA issued a press release setting out that it had updated the results of the annual transparency calculations for equity and equity-like instruments.

The updated results provided that there are 1,379 liquid shares and 370 liquid equity-like instruments other than shares, subject to MiFID II/MiFIR transparency requirements. The full list of assessed equity and equity-like instruments is available through ESMA's FITRS from 21 June 2019 and through the register web interface. The updated results of the annual

transparency calculations for equity and equity-like instruments apply from 8 July 2019 until 31 March 2020.

The next annual transparency calculations are due to be published by 1 March 2020 and will become applicable from 1 April 2020.

A copy of the press release and the full list of assessed equity and equity-like instruments can be accessed here.

(xxvii) ESMA letter to the Commission on delaying the review of certain MiFID II transparency requirements

On 25 June 2019, ESMA issued a letter to Olivier Guersent, the Commission Director General for Financial Stability, Financial Services and Capital Markets Union ("**CMU**"), on the annual review required by Article 17 of the Commission Delegated Regulation (EU) 2017/583 on transparency requirements for non-equity instruments ("**RTS 2**").

The letter follows up on a previous letter (dated 16 January 2019) sent to the Commission relating to the review reports on the MiFID II Directive and MiFIR. In that letter, ESMA raised the issue of carrying out the annual review of the operation of certain transparency requirements for bonds and derivatives, as required by Article 17 of RTS 2.

In the letter, ESMA notes that the outstanding uncertainties of Brexit does not allow for an adequate assessment at this time and that including or excluding United Kingdom data from the assessment would have a fundamental impact on the results. In addition, ESMA provided that Brexit will likely affect liquidity in bond and derivative markets and the value of the assessment will be limited and as a result ESMA does not consider that it is the right time to perform the assessment, or to potentially tighten the transparency requirements in RTS 2.

A copy of the letter can be accessed here.

Capital Requirements Directive IV / V / CRR / CRR II

(i) EBA releases a revised version of the Single Rulebook Q&As – CRR

During the period 1 April 2019 to 30 June 2019, the European Banking Authority ("**EBA**") updated its Single Rulebook Q&As – Regulation (EU) No. 575/2013 (the "**CRR Regulation**") (the "**CRR Q&As**"). We have set out below the updates made to the CRR Q&As in the last quarter:

Topic - Supervisory reporting

- **Question ID: 2018 3898** (as updated on 12 April 2019): this question asks if validation rules v5434_m to v5447_m are correct;

- **Question ID: 2018 3941** (as updated on 12 April 2019): this question asks should Pillar III templates be aligned with the new supervisory reporting package DPM 2.7;

- **Question ID: 2018 3975** (as updated on 12 April 2019): this question asks if validation rule v5510_m is correct;

- **Question ID: 2018 4258** (as updated on 12 April 2019): this question asks if the validation rule on C_05.01 template - v4889_m is correct;

- **Question ID: 2018 4259** (as updated on 12 April 2019): this question asks if validation rule v5839_m is correct;

- **Question ID: 2018 4346** (as updated on 12 April 2019): this question asks is a gradual reduction of the overdraft facility with a current account a forborne measure;

- **Question ID: 2018 4164** (as updated on 10 May 2019): this question provides guidance on the breakdown of exposures by residual maturity and whether without such guidance, exposures will be reported differently by every institution;

- **Question ID: 2018 3992** (as updated on 10 May 2019): this question asks if validation rule v0682_m is correct;

- **Question ID: 2016 2936** (as updated on 28 May 2019): this question provides clarification on the treatment of non-working days in report C70;

- **Question ID: 2018 4408** (as updated on 7 June 2019): this question asks how should the securitisations under the new framework be reported in template C 09.04 in v 2.8;

- **Question ID: 2018 4116** (as updated on 7 June 2019): this question asks about the accumulated other comprehensive income in template C.01.00;

- **Question ID: 2017 3594** (as updated on 7 June 2019): this question concerns the Low Credit Risk Template 4.4.1 and 4.3.1;

- **Question ID: 2018 4335** (as updated on 7 June 2019): this question asks if validation rules from v5476_m until v5489_m is missing the accumulated negative value adjustment column;

- **Question ID: 2019 4464** (as updated on 7 June 2019): this question concerns validation rule v1088_m;

- **Question ID: 2017 3574** (as updated on 7 June 2019): this question concerns reporting of fees and levies in FINREP template F 02;

- **Question ID: 2018 4355** (as updated on 7 June 2019): this question concerns validation rule v0853_m framework release 2.8;

- **Question ID: 2018 4372** (as updated on 7 June 2019): this question concerns reverse repos (Reverse Repurchase Agreements) in AE-Assets Encumbrance;

- **Question ID: 2018 4217** (as updated on 7 June 2019): this question concerns the difference in reporting requirements for C71 as per the EBA Annotated Reports and ITS Monitoring Metrics; and

- **Question ID: 2018 3943** (as updated on 7 June 2019): this question concerns reporting gross or netted cash flows in the row 360 of C66 (maturity ladder) of non-forex and non-option-like derivatives under a valid netting agreement but without collateral agreement.

Topic – Other Topics

- **Question ID: 2018 3762** (as updated on 3 May 2019): concerns the definition of a qualifying holding.

Topic – Liquidity Risk

- **Question ID: 2018 3762** (as updated on 3 May 2019): concerns deposits regarding Deposit Guarantee Scheme.

A copy of the CRR Q&A can be accessed here.

(ii) EBA releases a revised version of the Single Rulebook Q&As – CRD

During the period 1 April 2019 to 30 June 2019, the EBA updated its Single Rulebook Q&As – Directive 2013/36/EU ("**CRD IV**") (the "**CRD Q&As**"). We have set out below the updates made to the CRD Q&As in the last quarter:

Topic – Internal Governance

- **Question ID: 2018 4158** (as updated on 12 April 2019): this question relates to the calculation of the number of directorships held (privileged counting of mandates); and

- **Question ID: 2018 4286** (as updated on 26 April 2019): this question relates to the interpretation of the concept of senior management laid down in Article 3(1)(9) of CRD IV.

Topic – Supervisory Reporting

- **Question ID: 2018 4336** (as updated on 7 June 2019): this question relates to validation rules 5319_m until v5331_m not being correct for LOCOM valuated debt instruments.

Topic – Other Topics

- **Question ID: 2018 4220** (as updated 21 June 2019): this question relates to calculation of institution-specific countercyclical capital buffer rates.

The CRD Q&As can be accessed here.

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

(i) Joint Committee of ESAs updates Q&As on PRIIPs KID

On 4 April 2019, the Joint Committee of the European Supervisory Authorities (the "**ESAs**") published an updated version of its Q&As on the key information document ("**KID**") requirements for packaged retail insurance-based investment products ("**PRIIPs**").

The updated Q&As include new Q&As in the following sections of the document:

- **General topics**: this contains a new Q&A on what aspects should be considered by the manufacturer when determining the recommended holding period ("**RHP**") of a PRIIP; and

- **Multi-option products** ("**MOPs**"): this contains a new Q&A on the form and name that "specific information on each underlying investment option" should take.

The updated version of the Q&As can be accessed here.

(ii) ESAs publish letter concerning PRIIPs KID Level 2 Review

On 23 May 2019, the ESAs published a letter sent to the Commission (the "**Letter**") on their proposed options for presenting information on performance scenarios to be tested during the upcoming consumer testing exercise under Level 2 Review of Regulation (EU) No 1286/2014 (the "**PRIIPs KID Regulation**").

The ESAs believe there is merit in testing options involving only illustrative scenarios as such illustrative scenarios may provide more meaningful information for structured products. The ESAs believe that it is very challenging to define a revised methodology that adequately fits structured products without risking inappropriate results.

Further the ESAs believe that it would prove useful to gather evidence on how this type of approach is understood by consumers in view of its current use (in similar forms) for structured UCITS.

The Letter can be accessed here.

(iii) Commission publishes letter to the ESAs providing guidance on the treatment of bonds under the PRIIPs Regulation

On 28 May 2019, the Commission published a letter (dated 14 May 2019 but signed on 13 May 2019) (the "**Letter**"), sent to the ESAs, providing guidance on the treatment of bonds under the PRIIPs Regulation. The Letter is a response to a letter dated 19 July 2018 from the ESAs.

The Commission noted that only the Court of Justice of the EU can provide binding interpretations of EU law. However, the Commission made comments to provide guidance for assessing whether a particular bond is a packaged retail investment product ("**PRIP**").

The Letter can be accessed here.

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

(i) Delegated Regulation amending RTS on clearing obligation under EMIR published in Official Journal

On 29 April 2019, Delegated Regulation 2019/667 (the "**amending Delegated Regulation**") was published in the Official Journal of the EU. The amending Delegated Regulation amends three Commission Delegated Regulations to extend the dates of deferred application of the clearing obligation for certain OTC derivatives contracts.

Commission Delegated Regulations 2015/2205, 2016/1178 and 2016/592, which supplement EMIR, have been amended. They contain RTS with temporary exemptions from the clearing obligation for certain intragroup transactions where one of the counterparties is in a third country. The provisions provide for a deferred date of application of the clearing obligation of up to three years for these transactions, in the absence of a relevant equivalence decision in respect of the third country.

The amending Delegated Regulation amends the three Delegated Regulations to extend the temporary exemptions until 21 December 2020.

The amending Delegated Regulation entered into force on 30 April 2019.

The amending Delegated Regulation can be accessed here.

(ii) Commission Implementing Decision published on supervision of derivative transactions in Japan

On 2 May 2019 Commission Implementing Decision (EU) 2019/684 of 25 April 2019 (the "**Decision**") was published in the Official Journal of the EU. The Decision is a recognition of the legal, supervisory and enforcement arrangements of Japan for derivatives transactions supervised by the Japan Financial Services Agency as equivalent to the valuation, dispute resolution and margin requirements of Article 11 of EMIR.

The Decision entered into force on 22 May 2019.

The Decision can be accessed here.

(iii) ISDA publishes paper concerning compliance with initial margin regulatory requirements following BCBS/IOSCO Guidance Statement

On 13 May 2019, ISDA published a paper concerning compliance with initial margin regulatory requirements (the "**Paper**") following the Basel Committee on Banking Supervision ("**BCBS**") and the International Organization of Securities Commissions ("**IOSCO**") Guidance Statement.

The Paper aims at clarifying what steps should be taken if an aggregate average notional amount ("**AANA**") is above the relevant phase-in amount but one or more of my relationships does not exceed the initial margin ("**IM**") exchange threshold.

On March 5, 2019, the BCBS and IOSCO published a statement highlighting that where a counterparty relationship is in scope of the initial margin requirements but the amount of IM to be exchanged falls below the €50 IM exchange threshold specified in the BCBS/IOSCO WGMR margin framework, the documentation, custodial or operational requirements will not apply to that relationship.

The Paper sets out that the first step is to identify in-scope entities for regulatory IM requirements, then determine if there must be self-disclosure to counterparties and finally assess whether they are under the threshold as explained in the BCBS/IOSCO guidance statement.

All counterparties (including Irish UCITS/AIFS) will become subject to the IM requirements under EMIR or equivalent international standards either: (i) as of 1 September 2019 ("**Phase IV**" counterparties) or; (ii) as of 1 September 2020 ("**Phase V**" counterparties) depending on their AANA amount.

The Paper can be accessed here.

(iv) ISDA announces voluntary disclosure exercise for Phase 5 IM counterparties

On 23 May 2019, ISDA announced that they would facilitate a voluntary early disclosure exercise for parties which expect they may exceed the Phase V IM threshold in one or more jurisdictions. The aim of this exercise to aid the industry in preparation for the IM requirements under Phase V that are due to come into force on 1 September 2020. ISDA noted that they are welcoming participation from potential Phase V firms as well as new or updated disclosures from Phase IV firms.

The press release can be accessed here.

(v) EMIR Refit Regulation enters into force

On 28 May 2019, Regulation (EU) 2019/834 (the "**EMIR Refit Regulation**") was published in the Official Journal of the EU. The EMIR Refit Regulation aims to simplify the rules for OTC derivatives and make them more proportionate, with a view to reducing regulatory costs and burdens on market participants. The EMIR Refit Regulation entered into force on 17 June 2019.

The EMIR Refit Regulation makes a number of key changes for AIFs and UCITS including:

- **Financial counterparty** ("**FC**"): The EMIR Refit Regulation will broaden the definition of FC to capture all AIFs which are established in the EU, as well as AIFs which are managed by AIFMs authorised or registered in accordance with AIFMD. This is a change to the position currently under EMIR, as EMIR only captures AIFs which are managed by AIFMs authorised or registered in accordance with AIFMD as FCs. UCITS and UCITS management companies remain captured as FCs under both EMIR and the EMIR Refit. AIFs which are securitisation special purpose entities, and AIFs/ UCITS which are established solely for employee share purchase plans, will be specifically excluded from the definition of an FC under the EMIR Refit Regulation;

- **Small financial counterparty** ("**SFC**"): The EMIR Refit Regulation introduces a new sub-category of FC which will be exempt from the EMIR clearing obligations termed an SFC. An FC will be deemed to be an SFC if its OTC derivative positions do not exceed any of the EMIR clearing thresholds. An SFC will remain subject to EMIR's risk mitigation requirements, including margin exchange requirements;

- **Determination of clearing threshold – FCs**: The EMIR Refit Regulation provides that an FC has the option to perform a calculation: (i) on the date of its entry into force (i.e. 17 June 2019); and (ii) on a date every 12 months thereafter to determine whether its aggregate month-end average position at group level (for the previous 12 months) exceeds the clearing thresholds. An FC that exceeds the clearing threshold for at least one asset class or does not calculate its positions, will become subject to a clearing obligation for all asset classes. Whilst the calculations are normally performed at group level, the EMIR Refit specifically provides that for UCITS and AIFs, these calculations are performed at the fund level;

- **Determination of clearing threshold - non-financial counterparties** ("**NFCs**"): The EMIR Refit Regulation replaces the 30 day rolling average determination of positions, as set out under EMIR, with an annual determination. The EMIR Refit Regulation provides that an NFC has the option to perform a calculation: (i) on the date of its entry into force (i.e. 17 June 2019); and (ii) on a date every 12 months thereafter to determine whether its aggregate month-end average position at group level (for the previous 12 months) exceeds the clearing thresholds. If the calculation is performed and none of the clearing thresholds are exceeded, the NFC will be deemed to be an NFC- and will be exempt from the EMIR clearing obligations. In addition, under the EMIR Refit Regulation, an NFC will only be required to clear those OTC derivative

contracts which relate to the particular asset class for which the clearing threshold is exceeded;

- **Notifications to Central Bank and ESMA**: All FCs or NFCs which do not calculate their aggregate month-end average position for the previous 12 months, or where the result of that calculation exceeds any of the clearing thresholds, whether previously subject to the clearing obligation or not, are required to immediately notify ESMA and their relevant competent authority on the date of its entry into force (i.e. 17 June 2019). Such an entity has four months from making that notification to implement the clearing arrangements, as applicable (i.e. by 18 October 2019); and

- **Removal of the frontloading requirements**: The EMIR Refit Regulation removes the clearing frontloading obligation. The frontloading obligation is the obligation to clear OTC derivative contracts entered into, or novated, before the clearing obligation for those classes of derivatives takes effect.

The EMIR Refit Regulation can be accessed here.

(vi) ESMA updates EMIR Q&As

On 28 May 2019, ESMA updated its questions and answers ("**Q&As**") on EMIR. The updated Q&As provide clarifications arising from the introduction of the EMIR Refit Regulation and amends an existing Q&A on novation. The update to the Q&As on EMIR relate to the following:

- **Question 2 on OTC**: This Q&A clarifies the procedure for FCs and NFCs to notify that they exceed/cease to exceed the clearing thresholds;

- **Question 4 on OTC**: This Q&A clarifies whether a counterparty is responsible for assessing whether its counterparty is above or below the clearing thresholds;

- **Question 20 on OTC**: This Q&A clarifies that for the purpose of applying the clearing obligation, all types of novations of derivative contracts are covered;

- **Question 25 on OTC**: This is a new Q&A which clarifies the start date for counterparties who are in Category 3 and 4 under Article 2 of Commission Delegated Regulation (EU) 2015/2205;

- **Question 36 on Trade Repositories**: This Q&A clarifies how counterparties should report OTC derivatives novations; and

- **Question 42 on Trade Repositories**: This Q&A clarifies how the field should be populated for (c1) transactions executed on a regulated market and (c2) cleared trades.

On 14 June 2019, ESMA updated its Q&As to provide further clarity on data reporting as introduced by the EMIR Refit Regulation. The update to the Q&As on EMIR relate to the following:

- **Question 3 on OTC**: This Q&A clarifies the process for calculating of positions for clearing thresholds; and

- **Question 51 on Trade Repositories**: This is a new Q&A which clarifies the reporting obligations under Article 9(1) of EMIR. The Q&A identifies which notifications are necessary to apply an intragroup exemption from reporting

The updated Q&As can be accessed here.

(vii) ISDA issues letter to U.S. Regulators on IM requirements

On 3 June 2019, ISDA published a letter to the Commodity Futures Trading Commission ("**CFTC**") and other US regulatory bodies (the "**Letter**").

In the Letter, ISDA indicates its support for the call made by the CFTC on 29 April 2019 for US regulators to issue guidance clarifying that a US regulated entity need not have in place systems and documentation to exchange initial margin on uncleared swaps with a given counterparty if its calculated bilateral initial margin amount with that counterparty is less than $50 million.

The Letter can be accessed here.

(viii) ESMA publishes letter to Commission concerning the EMIR Refit Regulation

On 7 June 2019, ESMA published a letter to the Commission concerning the hedging exemption in the calculation of the clearing threshold for non-financial groups under the EMIR Refit Regulation (the "**Letter**").

ESMA are concerned that FCs and NFCs will face different obligations when calculating the month-end average positions in non-financial groups. FCs will need to take into account all OTC contracts entered into by that FC or entered into by other entities within the group to which that FC belongs while NFCs will only have to take account those that are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity, namely hedging, of the NFC or of that group.

ESMA understands that the purpose of the hedging exemption is to avoid impediments for NFCs to appropriately mitigate their commercial risks. However ESMA notes that this could have some unintended consequences on nonfinancial groups' behavior. For this reason ESMA has asked if the Commission could clarify what is the correct interpretation of the applicable provision for FCs with NFCs in their group.

The Letter can be accessed here.

(ix) ISDA publishes paper on the implementation of margin requirements and market fragmentation across jurisdictions

On 17 June 2019, ISDA published a paper on the implementation of margin requirements and market fragmentation for non-cleared derivatives (the "**Paper**"). The Paper aims at highlighting the main areas of difference in the implementation of margin requirements for non-cleared derivatives across jurisdictions. ISDA notes that while most jurisdictions have implemented standards in line with the BCBS/IOSCO phase in schedule, differences continue to exist. The Paper makes recommendations on how to resolve these differences.

The Paper can be accessed here.

Securitisation Regulation

(i) ESMA updates Securitisation Regulation Q&A

On 27 May 2019, ESMA published an updated set of questions and answers ("**Q&As**") on Regulation 2017/2402 (the "**Securitisation Regulation**").

The updated Q&As has amended a number of Q&As and introduced new ones in advance of the possible adoption of the disclosure RTS and ITS by the Commission and may be subject to possible changes as a result.

The updated Q&A can be accessed here.

European Venture Capital Funds ("**EuVECA**") Regulation and European Social Entrepreneurship Funds ("**EuSEF**") Regulation

(i) Delegated Regulation supplementing EuSEF Regulation published in Official Journal

On 22 May 2019, Commission Delegated Regulation (EU) 2019/819 (the "**Delegated Regulation**") supplementing the European Social Entrepreneurship Funds Regulation (EU) 346/2013 (the "**EuSEF Regulation**") with regard to conflicts of interest, social impact measurement and information to investors was published in the Official Journal of the EU.

The Delegated Regulation sets out:

- The types of conflicts of interest for the purposes of Article 9(2) of the EuSEF Regulation;
- Disclosure of conflict of interests;
- Conflicts of interest policy requirements;
- Information on positive social impact;

- Description of the investment strategy and objectives;
- Information on methodologies used to measure social impact;
- Management of the consequences of conflicts of interest;
- Strategies for exercising voting rights to prevent conflicts of interest;
- Information about support services;
- Procedures and measures to prevent, manage and monitor conflicts of interest;
- Procedures to assess positive social impact; and
- Description of non-qualifying assets.

The Delegated Regulation came into force on 11 June 2019 (that is, 20 days after publication in the Official Journal of the EU). It applies from 11 December 2019.

The Delegated Regulation can be accessed here.

(ii) Delegated Regulation supplementing EuVECA Regulation and published in the Official Journal

On 22 May 2019, Commission Delegated Regulation (EU) 2019/820 (the "**Delegated Regulation**") supplementing the European Venture Capital Funds Regulation (EU) 345/2013 (the "**EuVECA Regulation**") with regard to conflicts of interest was published in the Official Journal of the EU.

The Delegated Regulation sets out:

- Disclosures of conflict of interests;
- Strategies for exercising voting rights to prevent conflicts of interest;
- Procedures and measures to monitor, prevent and manage conflicts of interest;
- Management of consequences of conflicts of interest;
- The types of conflict of interest for the purposes of Article 9(2) of the EuVECA Regulation; and
- Conflicts of interest policy requirements;

The Delegated Regulation came into force on 11 June 2019 (that is, 20 days after publication in the Official Journal of the EU). It applies from 11 December 2019.

The Delegated Regulation can be accessed here.

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

(i) Commission Implementing Regulation for reporting obligations under SFTR comes into effect

On 11 April 2019, the Commission Implementing Regulation (EU) 2019/365 of 13 December 2018 laying down ITS with regard to the procedures and forms for exchange of information on sanctions, measures and investigations (the "**Implementing Regulation**"), entered into force. The Implementing Regulation provides welcome certainty around the dates on which the reporting obligations that arise under Article 4 of Regulation (EU) 2015/2365 ("**SFTR**") will begin to apply to various categories of counterparties to securities financing transactions ("**SFT**").

The below sets out the date on which counterparties must begin to report SFT to a trade repository:

- UCITS funds, AIF funds, AIFM and UCITS Management Companies - 11 October 2020;
- Credit Institutions - 11 April 2020;
- Investment Firms - 11 April 2020;
- Insurance and reinsurance entities - 11 October 2020; and
- Central Counterparties and Central Securities Depositary - 11 July 2020.

It is worth noting that the reporting obligations (and applicable timeframes) shall also apply to third country entities that would require authorisation or registration if they were established in the EU.

The SFTR also confirms that in the case of externally managed UCITS and externally managed AIFs, the reporting obligations are imposed on the UCITS Management Company and the AIFM respectively. It also confirms that the reporting obligation may be delegated.

The Implementing Regulation can be accessed here.

(ii) ESMA opens public consultation on reporting obligations under SFTR

On 27 May 2019, ESMA opened a public consultation on draft guidelines on how to report SFT. This consultation paper seeks stakeholders' opinions on any future developments of ESMA guidelines on reporting under SFTR. These guidelines will complement the SFTR technical standards and ensure the consistent implementation of the recently introduced Commission Implementing Regulation (EU) 2019/365.

The guidelines include general principles that apply to SFT reporting, including where the reports should be sent and how the reports should be constructed.

The deadline for feedback is 29 July 2019. ESMA is due to consider the feedback it receives in the third quarter of this year and publish a final report in the fourth quarter on the guidelines on reporting under SFTR.

The public consultation can be accessed here.

Benchmarks Regulation

(i) ESMA updates its Q&As on the Benchmarks Regulation

On 23 May 2019, ESMA published an updated version of the "Q&As – on the Benchmarks Regulation". The update can be summarised as follows:

- **Question 7.4**: This addresses the relevant time to determine the Member State of reference in an application for recognition of a third country administrator;
- **Question 7.5**: This addresses the information on which NCAs may rely upon in an external audit report of compliance to IOSCO principles for financial benchmarks; and
- **Question 8.5**: This addresses the type of information that should be included in the field "contact info" of ESMA's register of benchmark administrators.

The Q&As can be accessed here.

Global Legal Entity Identifier System ("**GLEIS**")

(i) Legal Entity Identifier Regulatory Oversight Committee report on fund relationships in GLEIS

On 20 May 2019, the Legal Entity Identifier Regulatory Oversight Committee ("**LEI ROC**") published its report on the policy on fund relationships in the global legal entity identifier system (the "**Report**").

The Report requests the Global LEI Foundation ("**GLEIF**") to replace the current optional reporting of a single "fund family" relationship with either fund management entity relationships, umbrella structures and master-feeder relationships.

The update aims to ensure that the implementation of relationship data is consistent throughout the GLEIS, and provide a means to facilitate a standardised collection of fund relationship information at the global level. Collection of these relationships in the GLEIS will be optional, except if the relationship is mandated to be reported and for relationships between an umbrella structure and a sub-fund or compartment.

Annex 1 to the Report contains guidelines for the registration of investment funds in the GLEIS.

The LEI is a 20-character reference code to uniquely identify legally distinct entities that engage in financial transactions. Each LEI is associated with reference data, including the name and legal address of the entity. LEIs are issued and managed by a network of independent operators federated by the GLEIF, applying the rules of the GLEIS under oversight of LEI ROC.

The Policy can be accessed here.

Shareholder's Rights Directive ("**SRD II**")

(i) Shareholders Rights Directive II

The second Shareholders Rights Directive (Directive (EU) 2017/828) ("**SRD II**") extends the scope of SRD I (Directive 2007/36/EC) to impose certain obligations on asset managers (which include MiFID firms providing portfolio management services to investors, AIFMs, UCITS management companies and UCITS SMIC) ("**Asset Managers**") when they invest in "EEA listed companies". In order to constitute an "EEA listed company" within the meaning of SRD II, the company must have a registered office in an EEA member state and its shares must be admitted to trading on a regulated market situated or operating within an EEA member state.

Asset Managers will also be required to make certain public disclosures outlining how they engage with investee companies.

SRD II has not yet been transposed into Irish law.

The SRD II can be accessed here.

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

(i) EFAMA submits its responses to ESMA's consultations paper on the guidelines on liquidity stress testing in UCITS and AIFs

On 2 April 2019, EFAMA issued a response (dated 22 March 2019) to ESMA's consultations paper on the guidelines on liquidity stress testing in UCITS and AIFs.

In its response, EFAMA acknowledged that the regulatory setup of requiring stress testing has consistently proven efficient and robust, including during challenging market events, such as the euro crisis and post-Brexit referendum. However they note that it cannot be used as a standalone tool to be relied upon as a way of predicting future liquidity crises and must be used in conjunction with other determinants.

EFAMA also voiced their concern that part of the guidelines and in particular the explanatory statements are taking a more prescriptive approach which is not appropriate. With regards the scope of the guidelines, EFAMA agreed with covering both AIFs and UCITS but believe money market funds ("**MMFs**") should be exempted as they are already covered by a specific regulatory framework.

A copy of EFAMAs response can be accessed here.

(ii) EFAMA publishes comments on ESMA's consultation paper on draft RTS under the ELTIF Regulation

On 25 June 2019, EFAMA published comments on ESMA's consultation paper on draft RTS under Article 25 of Regulation (EU) 2015/760 (the "**European Long-Term Investment Funds Regulation**" or the "**ELTIF Regulation**"). EFAMA is of the view that the current methodology prescribed to calculate PRIIPs (arrival price) transaction cost is not effective for ELTIFs that are invested in illiquid assets. EFAMA believes ESMA should align the adoption of the RTS on the ELTIF cost disclosures with the conclusion of the currently ongoing PRIIPs review. This would ensure parties do not have to implement rules that would be revised shortly afterwards.

The comments can be accessed here.

European Commission

(i) Commission seeks consultation on Distance Marketing Directive

On 9 April 2019, the Commission announced a consultation relating to its evaluation of Directive 2002/65/EC, namely the Distance Marketing of Financial Services Directive ("**DMD**").

The Commission explains that, since the DMD came into force, the retail financial sector has become increasingly digital, with new products and actors available on the market, and new sales channels being used.

The aim of the consultation is to ensure that all relevant stakeholders have the opportunity to express their views on the relevance, effectiveness, pertinence and coherence of the DMD to assess whether it is still fit for purpose.

Responses to the consultation can be made by completing an online questionnaire, which is linked to from the consultation webpage. Comments can be made on the consultation until 2 July 2019. The Commission expects to publish the conclusions of the evaluation exercise by the end of 2019.

The new webpage can be accessed here.

European Parliament

(i) Proposed New Regulatory Framework for Investment Firms adopted at first reading

On 26 February 2019, the Council of the EU and the European Parliament published a press release announcing that they have reached a political agreement on the proposed Investment Firms Regulation ("**IFR**") and the proposed Investment Firms Directive ("**IFD**"). The IFR and the IFD will, for most existing investment firms, replace the existing prudential requirements for investment firms set out in the CRR Regulation and the CRD IV Directive 2013/36/EU and will also amend the MiFID II Directive and MiFIR.

Furthermore, on 19 March 2019, the Council of the EU published an 'I' item note with accompanying addenda setting out the final compromise texts of the proposed IFR and the proposed IFD.

On 16 April 2019, the European Parliament published texts that it has adopted at first reading relating to the proposed reforms to investment firms' prudential requirements.

On 2 May 2019, the Council of the EU issued an 'Information Note' that a number of informal contacts have taken place between the Council of the EU, the European Parliament and the Commission with a view to reaching an agreement on the proposed IFR and the proposed IFD at first reading with the intention of avoiding the need for second reading and conciliation. Once legal experts have scrutinised the texts and the European Parliament plenary adopts the corresponding corrigenda the Council of the EU should be able to approve the position of the European Parliament on that basis.

A copy of the press releases from the Council of the EU and the European Parliament can be accessed here and here.

A copy of the 'I' item note can be accessed here and a copy of the texts adopted can be accessed here and here.

A copy of the 'Information Note' can be accessed here.

(ii) European Parliament adopts proposals on ESFS reforms

On 16 April 2019, the European Parliament published its adopted texts on the proposed reforms to the European System of Financial Supervision ("**ESFS**") comprising:

- The proposed Omnibus Regulation relating to the powers, governance and funding of the ESAs, the adopted text can be accessed here;
- The proposed Regulation amending the European Systemic Risk Board ("**ESRB**") Regulation (1092/2010), the adopted text can be accessed here; and

- The proposed Omnibus Directive amending the MiFID II Directive and the Solvency II Directive, the adopted text can be accessed here.

The Parliament announced its adoption of these texts earlier on 16 April 2019.

The reforms intend to give additional powers and responsibilities to the ESAs and the ESRB through amendments to two Directives and nine Regulations. In particular, the amended proposal for the Omnibus Regulation contains:

- Amendments to the ESAs Regulations (that is, the EBA Regulation, the EIOPA Regulation and the ESMA Regulation) that are intended to enhance the role and powers of the three ESAs; and

- Amendments to various pieces of sectoral financial legislation giving additional powers to ESMA, such as direct supervisory powers over prospectuses, harmonised collective investment funds (that is, EuVECAs, EuSEFs and ELTIFs), data reporting services providers and benchmarks.

The next step is for the Council of the EU to adopt the proposals.

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

ESMA, EBA and ESAs

(i) Joint Committee of ESAs updates Q&As on PRIIPs KID

On 4 April 2019, the Joint Committee of the ESAs published an updated version of its Q&As on the KID requirements for PRIIPs, as laid down in Commission Delegated Regulation (EU) 2017/653 (the "**PRIIPs Regulation**").

The updated Q&As includes new Q&As in the following sections of the document:

- **General topics:** this contains a new Q&A on what aspects should be considered by the manufacturer when determining the recommended holding period ("**RHP**") of a PRIIP.

- **Multi-option products** ("**MOPs**")**:** this contains a new Q&A on the form and name that "specific information on each underlying investment option", referred to in Article 14(1) of the PRIIPs Regulation, should take.

The updated version of the Q&A can be accessed here.

(ii) ESMA publishes speech on current priorities

On 13 May 2019, ESMA published a speech, given by Evert van Walsum, Head of the Investors and Issuers Department, on its current priorities. The points of note include:

- The ESAs are commencing work on the mandated technical standards on disclosures relating to sustainable investments and sustainability risks;
- ESMA is currently working on some common principles that could help harmonise the way EU regulators approach performance fees and the way they allow asset managers to structure them while creating funds; and
- ESMA has begun work on a broad review of the PRIIPs Delegated Regulation ((EU) 2017/653). It expects to consult publicly in the third quarter of 2019. The review will include proposals to review the performance scenarios section of the PRIIPs KID and will also cover cost-related issues, such as the presentation and calculation of costs.

A copy of the speech can be accessed here.

Financial Stability Board ("**FSB**")

(i) FSB and IOSCO Reports on market fragmentation

On 4 June 2019, the Financial Stability Board ("**FSB**") published a report on market fragmentation across jurisdictions that may arise from financial regulation and supervision (the "**Report**").

The Report focuses on instances where reducing market fragmentation might have a positive impact on financial stability, or improve market efficiency without any detrimental effect on financial stability and discusses the relationship between cross-border market fragmentation and financial stability.

- **Section 2** - defines market fragmentation and discusses the drivers and the manner in which it can impact financial stability and market efficiency;
- **Section 3** – discusses supervisory and regulatory policies that may give rise to market fragmentation, and actions taken by authorities;
- **Section 4** - discusses mechanisms and approaches to reduce market fragmentation that either improves financial stability, or increases market efficiency without impairing financial stability with an aim to enhance the effectiveness of regulatory and supervisory resources and co-operation; and
- **Section 5** - sets out areas for further work by the FSB that aim to address market fragmentation through enhanced cross-border cooperation.

Separately IOSCO published a report on market fragmentation, which sets out what it considers to be the potential key drivers for market fragmentation, including differences in jurisdictions' implementation of international financial sector reforms, differences in the timing of implementation and lack of international standards and harmonisation.

The IOSCO report, identifies instances of potentially harmful fragmentation relating to the trading and clearing of derivatives, trade reporting and data privacy and location requirements. The IOSCO report also identifies possible future instances of fragmentation, including Brexit, the discontinuation of IBOR benchmarks and derivatives and market infrastructure.

The IOSCO report suggests that relevant authorities could address fragmentation by focusing on fostering mutual understanding and collaboration between regulators by the use of deference and associated tools (such as passporting, substituted compliance and equivalence) which could mitigate the risks of fragmentation.

A copy of the Report can be accessed here and the IOSCO report can be accessed here.

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

(i) SMSG issue advice to ESMA for peer review into the collection and use of suspicious transaction and order reports under the MAR

On 1 April 2019, the SMSG issued advice to ESMA for the peer review into the collection and use of suspicious transaction and order reports under Regulation (EU) No 596/2014, namely the Market Abuse Regulation ("**MAR**") as a source of information in the context of market abuse investigations. The SMSG confirms their support of the review regarding the collection and use of suspicious transaction and order reports ("**STORs**") under the MAR and believes STORs are key in mitigating market abuse and uphold market integrity.

The advice can be accessed here.

(ii) European Parliament adopts a proposed Regulation to amend MAR

On 18 April 2019, the European Parliament adopted, with amendments, the Commission's proposed regulation to amend the Market Abuse Regulation in relation to the promotion of the use of SME growth markets (the "**Proposed Regulation**"). These amendments:

- Clarify that the obligation to establish insider lists rests with both issuers and persons acting on their behalf or on their account;
- Give Member States the option to require SME growth market issuers to provide more extensive insider lists of all persons with access to information; and

- Allow all issuers to have two business days from receipt of a notification to make the information in that notice public from a person discharging managerial responsibilities ("**PDMR**"), or person closely associated with a PDMR ("**PCA**").

The European Parliament's position will now be forwarded to the Council of the EU.

The Proposed Regulation can be accessed here.

(iii) ESMA publishes formal request letter of the Commission on technical advice for report under Article 38 of MAR

On 14 May 2019, ESMA published a letter (dated 20 March 2019) (the "**Letter**") setting out the Commission's formal request to ESMA for technical advice on the report under Article 38 of the Market Abuse Regulation.

Under Article 38 of MAR, the Commission is required to submit a report to the European Parliament and the Council of the EU on both the application of MAR and the level of thresholds, with a view to assessing whether that level is appropriate or should be adjusted.

The Commission has requested that ESMA provides its advice by no later than 31 December 2019.

The Letter can be accessed here.

Transparency Directive

(i) Commission Delegated Regulation on the specification of a single electronic reporting format published in Official Journal

On 29 May 2019, Commission Delegated Regulation (EU) 2018/815 (the "**Delegated Regulation**") supplementing Directive 2004/109/EC (the "**Transparency Directive**") with regard to regulatory technical standards on the specification of a single electronic reporting format was published in the Official Journal of the EU.

The Delegated Regulation enters into force on 18 June 2019 and will apply to annual financial reports containing financial statements for financial years beginning on or after 1 January 2020.

The Delegated Regulation can be accessed here.

Prospectus Regulation

(i) ESMA publishes updated Q&As on Prospectuses

On 8 April 2019, ESMA published the thirtieth Edition of the updated version of its Q&As on Directive 2003/71/EC (the "**Prospectus Directive**"). The Q&As have been modified to remove references to 29 March 2019 as being the date on which the UK leaves the EU. The question therefore applies if the UK leaves the EU without a withdrawal agreement regardless of the actual date.

- **Q&A 103**: This question considers how issuers who have chosen the UK as their home member state should choose a new home member state; and

- **Q&A 104**: This question clarifies the status within the EU / EEA EFTA of prospectuses approved by the United Kingdom's Financial Conduct Authority ("**FCA**") while the United Kingdom was a Member State.

The Q&As can be accessed here.

(ii) European Parliament adopts a proposed regulation to amend Prospectus Regulation

On 18 April 2019, the European Parliament adopted, with amendments, the Commission's proposed regulation to amend the Prospectus Regulation in relation to the promotion of the use of SME growth markets (the "**Proposed Regulation**"). These amendments

- Introduce a requirement to draft a prospectus for a non-listed issuer which seeks admission to trading following an exchange offer, merger or division removing an unintended consequence of the existing exemptions;

- Extend the simplified prospectus regime to an issuer whose securities have been offered to the public and admitted to trading on an SME growth market continuously for at least two years with full compliance and which seeks admission to a regulated market of securities fungible with previously issued securities; and

- Add a new category to those who may opt to draw up an EU growth prospectus of issuers (other than SMEs) offering shares to the public at the same time as seeking the admission of those shares to an SME growth market.

The European Parliament's position will now be forwarded to the Council of the EU under the ordinary legislative procedure.

The Proposed Regulation can be accessed here.

(iii) Commission Delegated Regulations supplementing the Prospectus Regulation published in the Official Journal

On 21 June 2019, Commission Delegated Regulation (EU) 2019/979 and Commission Delegated Regulation (EU) 2019/980 (the "**Delegated Regulations**") were published in the Official Journal of the EU. The Delegated Regulations supplement the Prospectus Regulation and were both adopted by the Commission on 14 March 2019.

Commission Delegated Regulation (EU) 2019/979 deals with the regulatory technical standards on key information in the summary of prospectuses while Commission Delegated Regulation (EU) 2019/980 deals with the content, approval, format and scrutiny of prospectuses. The Delegated Regulations will enter into force on 11 July 2019 and apply from 21 July 2019.

Commission Delegated Regulation (EU) 2019/979 can be accessed here and Commission Delegated Regulation (EU) 2019/980 can be accessed here.

Central Bank of Ireland

(i) The Central Bank publishes its first edition of its Approach to Resolution for Banks and Investment Firms

On 3 April 2019, the Central Bank published the first edition of its 'Approach to Resolution for Banks and Investment Firms'. This publication outlines the Central Bank's resolution mandates, powers and intended approaches under the EU (Bank Recovery and Resolution) Regulations 2015 (the "**BRR Regulations**") and the Single Resolution Mechanism Regulation ("**SRMR**") for credit institutions and investment firms.

This document outlines the Central Bank's resolution mandates, powers and intended approaches under the BRR Regulations and SRMR for:

a) Banks and building societies that are less significant institutions and do not have a subsidiary within a participating Member State of the Banking Union Area nor parent entities subject to consolidated supervision by the European Central Bank; and

b) Investment firms subject to the €730,000 initial capital requirement in Regulation 26(2) of the EU (Capital Requirements) Regulations 2014.

The document contains:

- An overview of the resolution framework;
- Outlines the Central Bank's general perspectives on resolution planning;
- Details the Central Bank's approaches to setting the minimum requirement for own funds and eligible liabilities ("**MREL**"); and

- Clarifies how the Central Bank would exercise its resolution and liquidation powers in a failure event.

A copy of the 'Approach to Resolution for Banks and Investment Firms' document can be accessed here.

(ii) Central Bank issues letter to Regulated Financial Service Providers regarding their obligations under the Fitness and Probity Regime

On 8 April 2019, the Central Bank issued a "Dear CEO" letter (the "**Letter**") to all Regulated Financial Service Providers (the "**Firms**") regarding their obligations under the Central Bank's Fitness and Probity Regime. The focus of the Letter is to remind Firms of the significant obligations placed on them under the Central Bank's Fitness and Probity Regime and to highlight some of the main areas of compliance which the Central Bank have found to be deficient.

The Central Bank highlights in its Letter the shortcomings with regard to Firms ensuring that they do not allow persons to perform controlled function roles ("**CF**" roles) unless they are "satisfied on reasonable grounds" that the person complies with Fitness and Probity Standards (the "**Standards**").

The Central Bank notes that (i) Firms are required to conduct due diligence on an on-going basis to ensure employees performing CF roles comply with the Standards and (ii) where Firms have taken steps to address any fitness and probity concerns they have about an individual, that they should report those concerns to the Central Bank.

The Central Bank also observed that there were individuals acting in senior roles known as pre-approved controlled functions ("**PCFs**") without the Firm having first sought the Central Bank's approval. The Central Bank operates a "gatekeeper" regime under the Central Bank Reform Act 2010 which allows the Central Bank to assess if individuals being appointed to PCF roles are fit and proper.

The Letter reminds Firms that when a PCF applicant is completing their individual questionnaire they are to be candid, truthful and provide a full, fair and accurate response to all questions. Where applicants are uncertain on how to respond or uncertain as to the level of detail that are expected to provide, they should endeavour to provide as much information as possible noting that it is for the Central Bank to determine whether a fact is material to a PCF application. Separately, the Central Bank noted that individuals applying for PCF roles in low and medium impact Firms, may, at the discretion of the Central Bank, be subject to interview in order for the Central Bank to assess their suitability for the role.

The Central Bank lists a number of recommended steps that Firms should take which focus on Firms being aware of the quality and integrity of those in PCF/CF roles. These steps include:

- Requiring those persons performing CF roles to undertake to notify them of any changes in their circumstances which might be material to their fitness or probity;

- Properly assessing if an individual still satisfies their obligations under the Standards;

- Requesting persons performing CF roles to certify, at least on an annual basis, that they are aware of the Standards and that they agree to abide by them (already required of PCF roles); and

- Notifying the Central Bank of any fitness and probity concerns regarding a person performing a CF role, and take action on foot of those concerns.

The Letter can be accessed here.

(iii) Central Bank speech - MiFID II a year in review

On 10 April 2019, the Central Bank published the Director of Securities and Markets Supervision, Colm Kincaid's (the "**Director**") remarks at the Irish MiFID Industry Association ("**IMIA**") event entitled 'MiFID II – A year in review'.

In his speech, the Director discussed the journey to MiFID II and provided that the previous regime (i.e. MiFID I) when enacted represented a significant expansion of EU regulation of financial markets and that the subsequent years which followed exposed a number of weaknesses in the legislation. He stated that MiFID II had brought new activities into scope, removed or narrowed exemptions and extended MiFID II's coverage to new financial instruments and products such as emission allowances, commodity derivatives and structured deposits.

In his speech the Director provided that at its core, consumer/investor protection and transparency requirements underpins the majority of the changes brought into effect by MiFID II and that investment firms must ensure that the products provided serve the client's needs, that the risk level is appropriate to each client and that the client is aware and understands the risk associated with their investment. He also stated that investment firms also have had to meet strengthened requirements on disclosing information about costs and charges to clients.

The speech set out that MiFID II has changed market infrastructures with the elimination of broker crossing networks with limitations on dark pool trading. Furthermore, that the trading obligation was designed to bring the majority of trading across Europe to either an existing regulated market or multilateral trading facility or alternatively an organised trading facility.

The Director provided that a key challenge for investment firms and regulators under MiFID II, is market surveillance as the volume of data to be collected and reported has risen which in turn has increased the need for technology to assess compliance.

He provided that data-lead supervisory approaches, the traditional firm-specific and thematic supervisory reviews will continue with further work under the MiFID II headings of transparency and client protection in 2019.

The Director stated that the Central Bank is currently carrying out a review across asset management and stockbroking firms with the objective of assessing how firms are treating investment research under MiFID II and whether it is in compliance with the relevant MiFID II rules.

The full speech can be accessed here.

(iv) Central Bank speech - Our Strategic Workplan in Securities and Markets Supervision

On 25 April 2019, the Central Bank published the Director of Securities & Markets Supervision, Colm Kincaid's (the "**Director**") remarks entitled 'Our Strategic Workplan in Securities and Markets Supervision'.

In his speech, the Director discussed a number of topics that outlined the strategic initiatives the Central Bank have prioritised, amongst the topics discussed were:

- **The Securities and Markets Supervision's 5 Principles -** the Central Bank consider that a proper and effectively supervised securities market is one that:

  (i) Provides a high level of protection for investors and market participants;
  (ii) Is transparent as to the features of products and their market price;
  (iii) Is well governed (and comprises firms that are well governed);
  (iv) Is trusted, by both those using the market to raise funds and those seeking to invest; and
  (v) Is resilient enough to continue to operate its core functions in stressed conditions and to innovate appropriately as markets evolve.

- **Securities and Markets Supervision – Strategic Initiatives 2019 to 2021 –** the Director provided that having identified the key current themes in securities markets and regulation and the principles of a proper and effectively supervised securities market the Central Bank will focus on:

  (i) Establishing a systematic, risk-based approach to how the Central Bank supervise activity in wholesale securities markets across all of our various statutory mandates;
  (ii) Assertive risk-based supervision of the funds sector;
  (iii) Being an ever more effective gatekeeper;
  (iv) Continuing to improve how the Central Bank harness data;
  (v) Operationalising new legislation; and
  (vi) The enforcement of securities market legislation.

The full speech can be accessed here.

(v) Speech by Mr. Michael Hodson, Director of Asset Management and Investment Banking, Central Bank of Ireland on 14 May 2019

On 14 May 2019, Mr. Michael Hodson, Director of Asset Management and Investment Banking of the Central Bank gave a speech concerning reflections on Brexit, insights on supervision and enhancing diversity. The following was discussed in the speech which is of relevance to investment firms:

- **Outsourcing:** Mr. Hodson confirmed that outsourcing remains a focus of the Central Bank who will continue to monitor outsourcing arrangements put in place by regulated firms.

- **Revised regime for investment firms:** Mr. Hodson highlighted that the new prudential regime for investment firms (which is due to be published in the Official Journal shortly and which will apply 18 months after publication) will change capital requirements, liquidity requirements, reporting and remuneration applicable to investment firms and will introduce a new categorisation of investment firms. The categorisation of each investment firm will then determine the regimes and requirements applicable to the relevant investment firm. Mr. Hodson advises that investment firms should begin planning at "an early date".

- **Diversity:** He referenced research undertaken by IOSCO which concluded that economies would be more resilient and economic growth would be higher if women participated in the work force equally with men. Mr. Hodson stated that firms needed to tackle the issue of diversity at senior management level and that the Central Bank intends to keep pressure on regulated firms to ensure diversity in senior roles.

The full speech can be accessed here.

(vi) Central Bank uses its product intervention powers for first time to ban sales of binary options to retail investors and restrict the sale of CFDs

On 12 June 2019, the Central Bank of Ireland announced measures to ban the sale of binary options to retail investors and restrict the sale of CFDs. This marks the first time that the Central Bank has used its product intervention powers, introduced in 2018, which allow the Central Bank to restrict or prohibit the sale of certain types of products. The Central Bank had issued a warning to investors on CFDs and binary options in March 2018.

The Central Bank's product intervention powers were introduced in Article 42 of MiFIR which came into effect on 3 January 2018. These powers allow the Central Bank to prohibit or restrict the marketing, distribution or sale of a financial instrument, structured deposit or a type of financial activity or practice.

The Central Bank must be satisfied on reasonable grounds that the financial instrument, structured deposit, financial activity or practice gives rise to significant investor protection concerns, poses a threat to the orderly functioning and integrity of financial markets or has a

detrimental effect on the price formation mechanism in the underlying market. The measure must be proportionate and not have a discriminatory effect on services or activities provided from another EU Member State.

The product intervention measures will prohibit the marketing, distribution or sale of binary options to retail investors. In respect of CFDs, the relevant measure will restrict the distribution, marketing or sale of CFDs in respect of retail investors. The restrictions will: (i) require that retail investors cannot lose more money than they put into their CFD account; (ii) prohibit the use of incentives by a CFD provider; (iii) place limits on leverage; (iv) introduce a margin close requirement; and (v) impose a standardised risk warning.

ESMA has imposed temporary product intervention measures in relation to binary options and CFDs since 2018. These ESMA measures have been issued on a rolling three months basis, with the current ESMA temporary measures due to expire on 2 July 2019 for binary options and 1 August 2019 for CFDs. The Central Bank's measures will enter into force on these dates.

On 18 June 2019 ESMA issued a press release concerning the Central Bank's measures. ESMA found the measures to be justified and proportionate. The Central Bank has carried out these measures at the same as a number of other Member States and ESMA has approved all other Member State measures as they closely mirror the previous ESMA temporary measures.

The measures for binary options can be accessed here, the measures for CFDs can be accessed here and ESMA's press release can be accessed here.

(vii) Government announce individual accountability framework legislation to be drafted

On 18 June 2019, the Government announced that new legislation is to be drafted so that the Central Bank's proposals for an Individual Accountability Framework can be introduced. These proposals will be included in the Central Bank (Amendment) Bill 2019.

According to the Government, the Heads of Bill of this new legislation will provide for the following:

- Senior Executive Accountability Regime which will place obligations on firms and their senior management to set out where responsibility for decision-making lies. If the Government adopts the Central Bank's proposals as set out in its report on "Behaviour and Culture of the Irish Retail Banks" (the "**Report**"), regulated entities will be required to prepare "Statements of Responsibilities" for each senior staff member falling within the regime's scope and to produce a "Responsibility Map" documenting key management and government arrangements;

- Conduct Standards for firms and individuals which will be imposed on regulated entities and on their staff and be enforceable if they are breached;

- Enhanced Fitness and Probity Regime which, if the Central Bank's proposals as per the Report are adopted, will result in regulated firms being required to annually certify that all individuals who are performing controlled functions are fit and proper;

- Breaking the "participation link" which currently requires the Central Bank to show that an individual "participated" in a breach by a regulated entity in order to pursue an individual under its Administrative Sanctions Procedure, so that individuals can be subject to the process without any requirement to link their behaviour back to some wrong-doing by the regulated firm; and

- Technical amendments to improve existing legislation and clarify certain statutory processes.

(viii) Central Bank publishes report on protected disclosures

On 28 June 2019, the Central Bank published its report on protected disclosures (the "**Report**"). The Report provides details of whistleblowing to the Central Bank in a 12 month period. The Central Bank is required to publish an annual report relating to the number of protected disclosures made to the Central Bank in the preceding year in addition to detailing the action taken in response to the disclosures made. The Central Bank received 150 protected disclosures between 1 July 2018 and 30 June 2019. There was an assessment of each disclosure and action was taken where appropriate.

The Report can be accessed here.

Euronext (formerly the Irish Stock Exchange ("**ISE**"))

(i) Euronext registered as a EU benchmark Administrator

On 17 April 2019, Euronext announced that four of its market operators have been registered by ESMA as Benchmark Administrators under the new EU Benchmark Regulation (Regulation (EU) 2016/1011). These newly registered market operators include:

- AFM in the Netherlands;

- AMF in France;

- CMVM in Portugal; and

- FSMA in Belgium.

An application for the authorisation of Euronext Dublin as a Benchmark Administrator is expected to be made later this year.

The press release can be accessed here.

(ii) Euronext Dublin publishes a code of listing requirements and procedures for investment funds

On 28 May 2019, Euronext Dublin published a code of listing requirements and procedures for investment funds (the "**Code**"). The Code will apply to any Fund or Sub-Fund which is proposing to apply or is listed to trade on the regulated market of Euronext Dublin.

The Code can be accessed here.

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

(i) FATF publishes new consolidated assessment ratings

For the period 1 April 2019 to 30 June 2019, the Financial Action Task Force ("**FATF**") updated the consolidated assessment ratings which provide a summary of:

(1) the technical compliance; and

(2) the effectiveness of the compliance, of the assessed parties against the 2012 FATF Recommendations on combating money laundering and the financing of terrorism & proliferation. FATF also released new mutual evaluations for the same period.

The updated consolidated rating table can be accessed here and the full set of reports for each country can be accessed here.

(ii) EBA centralises information on administrative sanctions or measures under MLD4

On 3 April 2019, the EBA has updated its website to provide links to NCAs websites. On the NCAs website users will be able to access information on sanctions and administrative measures NCAs have imposed for breaches of AML and CTF obligations under Directive (EU) 2015/849 (the "**Fourth Money Laundering Directive**" or "**MLD4**").

The EBA website with the links to NCAs websites can be accessed here.

(iii) Council of the EU adopts Directive to fight non-cash payment fraud and is published in Official Journal

On 9 April 2019, the Council of the EU formally adopted the directive on combating fraud and counterfeiting of non-cash means of payment (Directive (EU) 2017/0226) (the "**Directive**"). The Directive updates the existing rules to ensure that a clear, robust and technology-neutral legal framework is in place.

The Directive encompasses traditional non-cash payments such as bank cards or cheques and also new ways of making payment which have appeared over recent years, such as electronic wallets, mobile payments and virtual currencies.

On 10 May 2019, the Directive was published in the Official Journal of the EU. Member states will have two years from the publication in the Official Journal of the EU to implement the new provisions.

The Directive can be accessed here and the Council of the EU press release can be found here.

(iv) FATF Ministers give FATF an open-ended Mandate

On 12 April 2019, the FATF adopted an open-ended mandate. The FATF members agreed to greater ministerial engagement and support for the FATF through regular and more frequent ministerial-level meetings, and by extending the term of the FATF Presidency, and by agreeing to a new funding model for the organization.

The FATF's new mandate recognises the need for the FATF to continue to lead global action to counter the threats of the abuse of the financial system by criminals and terrorists, and strengthens its capacity to respond to these threats.

The FATF mandate can be accessed here.

(v) European Parliament increases oversight powers of EBA and ESMA

On 16 April 2019, the European Parliament adopted the amended proposal for a Regulation which aims at preventing and combating money laundering and terrorist financing (the "**Proposed Regulation**"). The most notable changes include:

- **Helping consumers and sustainable finance** – ESMA has been entrusted with direct supervisory power in specific financial sectors, such as markets in financial instruments or benchmarks. ESMA will also coordinate national actions in the areas of Financial Technologies and promote sustainable finance, including when conducting EU-wide stress tests to identify which activities could have a negative effect on the environment; and

- **New powers to improve fight against money laundering** - The Proposed Regulation strengthens the EBA mandate, tasking it with preventing the financial system from being used for money-laundering and terrorist financing. Specifically, the EBA will now have the power to adopt measures to prevent and counter money laundering and terrorist financing. National authorities will be obliged to provide the EBA with information necessary to identify weaknesses in the EU financial system regarding money laundering.

EU ministers will now have to formally confirm the Proposed Regulation before the reforms enter into force.

The press release for the new rules can be found here and the Proposed Regulation can be accessed here.

(vi) European Parliament and Council of EU adopt texts on Directive laying down rules facilitating the use of financial and other information for the prevention of crime

On 17 April 2019, the European Parliament adopted the texts for a Proposed Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences (the "**Proposed Directive**").

The Proposed Directive aims at allowing law enforcement authorities to quickly access crucial financial information for criminal investigations and improving cooperation between national authorities, Europol and the Financial Intelligence Units ("**FIUs**").

On 7 June 2019, the Commission adopted the proposal. On this date Italy and Germany also released statements on the Proposed Directive. While they both broadly supported the purpose of the Proposed Directive, Italy had stressed the need for greater flexibility for its implementation while Germany had some issues with the legitimacy of national bodies accessing data as currently drafted.

On 14 June 2019 the Council of the EU adopted the texts of the Proposed Directive. The Proposed Directive will enter into force 20 days after being published in the Official Journal of the EU.

The Proposed Directive can be accessed here.

(vii) Commission Delegated Regulation with AML requirements applying to financial institutions with branches or subsidiaries in certain non-EU countries published in Official Journal

On 14 May 2019, the Commission Delegated Regulation (EU) 2019/758 (the "**Regulation**") was published in the Official Journal of the EU. The Regulation supplements MLD4. The Regulation sets out the RTS which are required to be taken into account where the local law of a third country does not permit the implementation of group-wide AML/CTF policies and procedures.

The Regulation imposes general obligations on every credit or financial institution that has an established branch or subsidiary in a third country. These obligations include:

- assess AML/CTF risk, record it and keep it up-to-date;
- reflect that risk assessment in its group-wide AML/CTF policies and procedures;
- obtain senior management approval at group level for the risk assessment and updated policies and procedures; and
- provide targeted, effective AML/CTF training to relevant staff in the third country.

The Regulation also requires credit or financial institutions that have an established branch or subsidiary in a third country to inform the NCA when there is a restriction or prohibition, consider whether customer consent is appropriate to overcome the restriction and where necessary to take additional measures.

The Regulation sets out a number of additional measures which a credit or financial institution that has an established branch or subsidiary in a third country could take. These measures include:

- restricting the nature and type of financial products provided by the branch/subsidiary;
- ensuring other entities in the same group do not rely on customer due diligence carried out by the branch/subsidiary;
- carrying out enhanced reviews, including onsite checks and independent audits;
- ensuring approval from group senior management is sought for higher risk transactions;
- ensuring the branch/subsidiary determines the source and destination of funds;
- ensuring the branch/subsidiary carries out enhanced ongoing AML/CTF monitoring;
- ensuring the branch/subsidiary shares underlying suspicious transaction report information with the group including the facts and documents giving rise to the suspicion;
- carrying out enhanced ongoing monitoring of any customer of the branch/subsidiary or the customer's beneficial owner who has been the subject of suspicious transaction reports made by other group entities;
- ensuring the branch/subsidiary has effective systems and controls are in place for identifying and reporting suspicious transactions; and
- ensuring the branch/subsidiary keeps customer risk profiles and due diligence information up to date and secure as long as legally possible.

Where additional measures under the Regulation are required to be taken then the extent of such measures needs to be determined upon a risk-sensitive basis and the group needs to be able to demonstrate to its competent authority that the extent of the measures is appropriate. If the AML/CTF risk cannot be effectively managed by applying the additional measures then some or all of the operations of the branch or subsidiary are required to be closed down.

It should be noted that most third countries' legal systems will not prevent groups from implementing group-wide AML/CTF policies and procedures, in which case the additional

measures set out in the Regulation will not be required. However, unless or until the ESA produce a list of relevant third countries, then it will be up to each individual group to make its own determination.

The Regulation will apply from 3 September 2019.

The Regulation can be accessed here.

(vii) Central Bank publishes Guidance for Completion of the Schedule 2 Anti-Money Laundering Registration Form

On 20 May 2019, the Central Bank of Ireland published Guidance for the Completion of the Schedule 2 Anti-Money Laundering Registration Form (the "**Guidance**"). The purpose of the Guidance is to provide information to firms who are required to register with the Central Bank as a Schedule 2 firm.

The Guidance sets out:

- When the obligation to register as a Schedule 2 firm arises;
- Exemptions from Obligation to Register;
- How to register as a Schedule 2 firm; and
- Guidance on completing the registration form.

The Guidance also provides completion notes setting out any definitions that may be involved in the process.

The Guidance can be accessed here.

(viii) Commission publishes report on the Regulation concerning the information accompanying the transfers of funds

On 19 June 2019, the Commission published a report (the "**Report**") on the application of Chapter IV of Regulation (EU) 2015/847 on information accompanying transfers of funds (the "**Regulation**"). Chapter IV of the Regulation requires Member States to set up a regime of administrative sanctions and measures applicable to breaches of the Regulation allowing the transfer of funds to be more transparent. The Commission is required to prepare this Report under Article 22(2) of the Regulation as the Member States have notified these sanctions and measures to the ESAs.

The Report details the state of play of the implementation by Member States of Chapter IV of the Regulation with particular focus on important horizontal implementation issues which the Commission believes to be common to several Member States. The Report also

provides a brief overview of the sanctioning activities of different national supervisory authorities.

The Report can be accessed here.

(ix) FATF notes jurisdictions with AML/CTF deficiencies at third plenary meeting

On 21 June 2019, the FATF held its third plenary meeting. The FATF identified jurisdictions that they believe have AML/CTF deficiencies. The FATF notes the particular deficiencies of each jurisdiction and the strategic improvements that they must make to meet the necessary standards. The jurisdictions with deficiencies include the Bahamas, Cambodia and Pakistan among others.

The press release can be accessed here.

(x) CRO announces that Central Register of Beneficial Ownership will be delayed

On 24 June 2019, the Companies Registration Office announced that the opening of the central register of beneficial ownership of companies (the "**RBO**") has been postponed temporarily. The RBO was due to accept filings commencing on 22 June 2019 which aimed at setting out details of the beneficial ownership of companies in Ireland. Companies are required to submit information in relation to their beneficial owners to the RBO before 22 November 2019.

The press release can be accessed here.

(xi) FATF publishes reports to G20 on current and future focus of work

On 27 June 2019, the FATF published its report to the G20 for the G20 leaders' summit in Osaka, Japan (the "**Report**"). The Report provides an overview of FATF current and future AML/CTF work. The Report notes that the FATF has is focusing on the following:

- Strengthening the institutional basis, governance and capacity of the FATF;
- The FATF's Work Programme on Virtual Assets;
- Countering the financing of terrorism;
- Countering the Financing of Proliferation of Weapons of Mass Destruction;
- Improving Transparency and the Availability of Beneficial Ownership Information;
- Financial Technologies, Regulatory Technologies: Digital Identity; and
- De-risking by Banks.

The Report can be accessed here.

Anti-Corruption Legislation & Law Reform

(i) European Parliament adopts proposed Directive to protect whistleblowers reporting on breaches of EU Law

On 16 April 2019, the European Parliament formally adopted a proposed Directive on the protection of persons reporting on breaches of EU law (the "**Proposed Directive**").

The proposal is part of a package of measures adopted by the Commission on 23 April 2018. The package also includes: a 'Communication on strengthening whistleblower protection at EU level' and two staff working documents setting out the Commission's Impact Assessment on the proposal and an Executive Summary of the Impact Assessment.

It is expected that the Council of the EU will formally adopt the proposed Directive at one of its next meetings, after which it will be published in the Official Journal of the EU.

The Proposed Directive can be accessed here.

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

(i) Joint Committee of ESAs provide advice on risk management requirements and cyber resilience to Commission

On 10 April 2019, the Joint Committee of the ESAs published two advices to the Commission on the need for legislative improvements on information and communication technology ("**ICT**") risk-management requirements in the EU financial sector and on the costs and benefits of a coherent cyber-resilience testing framework for significant market participants and infrastructures.

The advice regarding risk management requirements can be accessed here and the advice regarding cyber-resilience can be accessed here.

(ii) EDPB seeks public consultation on processing of personal data under GDPR

On 12 April 2019, the European Data Protection Board ("**EDPB**") announced that they are seeking public consultation on guidelines of Article 6(1)(b) of the General Data Protection Regulation, namely Regulation (EU) 2016/679 ("**GDPR**"). This article concerns the processing of personal data in the context of contracts for online services, irrespective of how the services are financed.

The guidelines will outline the elements of lawful processing under Article 6(1)(b) GDPR and consider the concept of 'necessity' for the performance of a contract and whether a requested service can be provided without the specific processing taking place.

The public consultation finished on 24 May 2019.

The guidelines for public consultation can be found here and the press release can be found here.

(iii) DPC examines right of rectification concerning diacritical marks

On 30 April 2019, the Data Protection Commissioner ("**DPC**") issued a note examining the right to rectification in the context of diacritical marks. The right of rectification allows individuals to have inaccurate personal data rectified, or completed if it is incomplete. In particular, this note examined the case of recording of names of individuals that contain diacritical marks (for example, fadas in the Irish language).

The DPC determined that there must be a balancing of the purpose for processing with the data subject's fundamental rights. It should be noted that this guidance is not binding and the DPC emphasized that any complaint would be judged on its individual merits.

The note can be accessed here.

(iv) Commission publishes guidance on the interaction of free flow of non-personal data with the EU data protection rules

On 29 May 2019, the Commission published guidance on the interaction of free flow of non-personal data with the EU data protection rules. The Regulation on the free flow of non-personal data (Regulation (EU) 2018/1807) (the "**Regulation**") has come into effect in Member States. This guidance aims to help users, in particular SMEs, understand the interaction between this new regulation and the GDPR.

The Regulation prevents EU Member States from putting laws in place that unjustifiably force data to be held solely inside national territory. The guidance gives examples on how the regulation and the GDPR should be applied when a business is processing datasets composed of both personal and non-personal data.

The press release can be accessed here.

(v) EPDS summary opinion on the negotiating mandate of an EU-US agreement on cross-border access to electronic evidence published in Official Journal

On 3 June 2019, a summary of the opinion of the European Data Protection Supervisor ("**EDPS**") on the negotiating mandate of an EU-United States agreement on cross-border access to electronic evidence (the "**Opinion**") was published in the Official Journal of the EU. The Opinion arises as a result of the Commission recently issuing a recommendation for a Council Decision authorising the opening of negotiations to conclude an international agreement with the United States on cross-border access to electronic evidence.

The Opinion aims at solving the issue of access to content and non-content data held by service providers in the EU and the United States. The EDPS made the following conclusions:

- The EDPS supports the efforts to identify innovative approaches to obtain cross-border access to electronic evidence quickly and effectively;

- The EDPS agrees that the envisaged agreement should be conditional on strong protection mechanisms for fundamental rights;

- The EDPS believes that further safeguards are needed to ensure that the final agreement meets the proportionality condition. The involvement of judicial authorities designated by the United States is recommended to review compliance of the orders with fundamental rights and raise grounds for refusal; and

- The EDPS also lists more specific recommendations including the definition and types of data covered by the envisaged agreement and the categories of data subjects concerned.

The Opinion of the EDPS can be accessed here.

(vi) EDPB holds eleventh plenary session

On 5 June 2019, the EDPB issued a press release detailing its eleventh plenary session held on 4 June 2019. During this session the following was discussed:

- **Guidelines on Codes of Conduct**: The EDPB adopted a final version of the Guidelines on Codes of Conduct. The aim of these guidelines is to provide interpretative assistance and practical guidance when applying Articles 40 and 41 GDPR which deal with the issuing and monitoring of codes of conduct. The EDPB intends for the guidelines to help clarify the rules and procedures involved in the submission, approval and publication of codes of conduct at both national and EU level;

- **Annex to the Guidelines on Certification**: The EDPB adopted a final version of annex 2 to the Guidelines on Certification which gives extra detail to certain sections in the guidelines such as the obligation to keep records of the processing activities. The primary aim of these guidelines is to identify overarching criteria which may be relevant to all types of certification mechanisms issued in accordance with Articles. 42 and 43 GDPR which deal with certification and the relevant bodies. The annex contains a non-exhaustive list of criteria used to determine certification; and

- **Annex to the Guidelines on Accreditation**: The EDPB adopted a final version of the annex to the Guidelines on Accreditation. The aim of these guidelines is to assist Member States, supervisory authorities and national accreditation bodies to establish a harmonised and consistent baseline for the accreditation of certification bodies that issue certification in accordance with Article 43 GDPR. The annex provides guidance

on the additional requirements for the accreditation of certification bodies to be established by the supervisory authorities.

The press release can be accessed here.

(vii) DPC provides guidance on the transfer of personal data to third countries or international organisations

On 24 June 2019, the Data Protection Commission issued a note providing guidance on the transfer of personal data to third countries or international organisations (the "**Note**"). The Note focuses on providing summary guidance on the provisions of Chapter V of the GDPR which deals with the transfer of personal data to third countries or international organisations.

The Note provides guidance on:

- Transfers on the basis of an adequacy decision;
- The types of agreements that will satisfy transfers subject to appropriate safeguards; and
- Derogations for specific situations.

The Note can be accessed here.

(viii) DPC provides guidance on data processing contracts

On 24 June 2019, the Data Protection Commission issued a note (the "**Note**") providing guidance on contracts governing the processing of personal data when a data processor is engaged to process personal data on the instruction of a data controller (a "**Data Processing Contract**"). The Note provides guidance on:

- The context of the obligation on controllers and processors to enter into a data processing contract under the GDPR;
- When data controllers and data processors need to enter into a data processing contract; and
- The minimum provisions which should be included in a data processing contract.

The Note can be accessed here.

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

(i) ISDA publishes Master Regulatory Disclosure Letter

On 7 June 2019, ISDA published a Master Regulatory Disclosure Letter (the "**Letter**"). The Letter consolidates content previously published by ISDA and inserts new questions. The Letter enables counterparties to notify each other of their status for clearing and other regulatory requirements under EMIR (as amended by EMIR Refit). The Letter is used as a method of communicating classification status between counterparties and is used to determine what regulatory requirements are applicable.

The Letter can be accessed here.

Brexit

(i) ISDA publishes letter to UK HM Treasury on the impact of Brexit on EEA derivatives trading venues under EMIR and MiFIR

On 9 April 2019, ISDA published a letter to the HM Treasury in the United Kingdom on behalf of a number of groups including the Alternative Investment Management Association ("**AIMA**") concerning the recognition of EEA derivatives trading venues under EMIR and MiFIR as they apply in the United Kingdom after Brexit (the "**Letter**").

The Letter details their concern of the potential impact on United Kingdom market participants and European derivatives markets if HM Treasury does not take urgent action with respect to the recognition of EEA derivatives trading venues under EMIR and MiFIR as they apply in the United Kingdom in a 'no-deal' scenario.

The Letter also outlines the potential negative implications if the FCA does not grant transitional relief using its proposed temporary transitional powers.

The Letter can be accessed here.

(ii) FCA extends notification window for temporary permissions regime to 30 October 2019

On 28 May 2019, the FCA updated its webpage on the temporary permissions regime ("**TPR**") to announce an extension to the notification window for firms and funds wishing to enter into the TPR until the end of 30 October 2019. The extension to the previous deadlines for firms and funds who wish to enter the TPR regime comes in light of the European Council and United Kingdom Government's agreement to an extension of the Article 50 process.

Any fund managers that, as a result of this extension, wish to update their notification should email recognisedcis@fca.org.uk by the end of 16th October 2019 at the latest confirming this and including their FRN.

Further information on the TPR and how to register is provided on the updated FCA website which can be accessed here.

While the FCA will acknowledge the request to update a notification, it will not be possible to submit a revised notification until after 16th October 2019 at which stage the FCA will advise what steps should be taken. Fund managers should continue to follow the current process via their home member state regulator for registering new funds.

The FCA has also updated the guide to making notifications of an intention to use the TPR which can be accessed here.

(iii) Statements on trading obligation for shares under Article 23 of MiFIR after Brexit

On 29 May 2019, ESMA published a revised statement outlining its approach, in the event of a no-deal Brexit, and to clarify the application of the trading obligation for shares under Article 23 of MiFIR in the absence of an equivalence decision being made in relation to the United Kingdom (the "**Revised Statement**").

Article 23 of MiFIR requires investment firms to conclude certain transactions in specified shares admitted to trading on a regulated market or traded on an EU trading venue on regulated markets, multilateral trading facilities ("**MTFs**"), SIs, or third-country trading venues assessed as equivalent by the Commission.

The Revised Statement is intended to further mitigate potential adverse effects of the application of the trading obligation for shares and to reflect concerns raised by some stakeholders about its earlier guidance on 19 March 2019.

On 29 May 2019, the FCA published a statement responding to the ESMA Revised Statement on share trading obligations under MiFID II (the "**Statement**").

The FCA, in the Statement set out their encouragement to ESMA's revised approach, which would mean that EU banks and investment firms will be able to trade all UK shares in the UK, however, the FCA believes that applying the EU trading obligation for shares to all shares issued by firms incorporated in the EU would still cause market disruption, leading to a fragmented and reduced liquidity in both the EU and UK.

The FCA believes that reciprocal equivalence remains the best way of dealing with overlapping share trading obligations and that in the absence of reciprocal equivalence, it suggests that both UK and EU trading obligation for shares should be applied in a way that maintains the status quo for a limited period of time after the UK exit the EU while longer term solutions are found.

The FCA adds in the Statement that, if there is no equivalence determination, it will engage with market participants and trading venues to protect the integrity of UK markets and to ensure that participants in the UK can continue to achieve high standards of execution for their clients, including when trading in the EU 27.

A copy of ESMA's Revised Statement can be accessed here and the FCA's Statement can be accessed here.

(iv) Central Bank issues updated Brexit FAQ for consumers

During the period 1 April 2019 to 30 June 2019, the Central Bank issued an updated Brexit related FAQ document providing general information to consumers on the potential implications of Brexit. The Central Bank's FAQ for consumers discusses a variety of topics including:

- The Central Bank's work in preparation for Brexit;
- The impact of Brexit on financial services firms providing services to Irish customers;
- The Central Bank's proposed approach to issues concerning Irish consumers who have insurance policies with UK insurers or brokers;
- The effects of Brexit on Irish banks; and
- The effects of Brexit on the Irish economy.

A copy of the Central Bank's updated FAQ for consumers can be found here.

(v) Central Bank issues updated Brexit FAQ for financial services firms

During the period 1 April 2019 to 30 June 2019, the Central Bank issued an updated Brexit related FAQ document providing general information to financial services firms considering relocating their operations from the UK to Ireland. The Central Bank's FAQ for financial services firms addresses a number of topics including:

- The Central Bank's approach to authorisation, its timelines and requirements;
- The impact of Brexit on existing Irish authorised firms;
- The Central Bank's proposed approach to issues concerning a firm's substance in Ireland; and
- The Central Bank's approach to outsourcing to the UK firms.

It also deals with other questions such as whether Ireland has a similar regime to the UK's Senior Managers Regime and Certification Regimes. In addition, the document addresses the Central Bank's views on centralised risk management in the UK or elsewhere and whether a firm's key employees can hold more than one position before the entity goes live.

The FAQ provides links to the Central Bank's relevant web-site application documentation as well as explanatory material on the authorisation processes for the different regulatory regimes.

A copy of the Central Bank's updated FAQ for financial services firms can be found here.

Sustainable Finance

(i) Council of the EU announces amendments to proposed regulation for a taxonomy framework to facilitate sustainable investment

On 4 April 2019, the Council of the EU announced that it had made a significant number of amendments to the proposed regulation for a framework to facilitate sustainable investment (the "**Proposed Regulation**") as adopted by the European Parliament on 28 March 2019.

The Proposed Regulation seeks to establish a EU-wide taxonomy with the objective of providing businesses and investors with uniform language to determine what degree economic activities can be considered environmentally-sustainable. The amendments change the focus of the Proposed Regulation from mostly focusing on preventing carbon exposures to putting in safeguards for other environmental objectives, such as biodiversity and energy efficiency.

On 24 June 2019, the Council of the EU published a progress report on the Proposed Regulation. The Council of the EU is continuing to work towards a final text as there is still some debate over what economic activities should be captured.

The Proposed Regulation can be accessed here and the progress report can be accessed here.

(ii) The European Parliament adopts proposed Regulation on disclosures relating to sustainable investments and sustainability risks

On 18 April 2019, the European Parliament published the provisional edition of the proposed regulation on disclosures relating to sustainable investments and sustainability risks (the "**Proposed Regulation**").

The Proposed Regulation aims to integrate environmental, social and governance ("**ESG**") considerations when taking decisions on investments in order to make investments more sustainable. Under the Proposed Regulation, UCITS, AIFMs, EuSEF managers and EuVECA managers that receive a mandate from their clients or beneficiaries to take investment decisions on their behalf would integrate ESG into their internal processes and inform their clients in this respect.

The Council of the EU is due to consider the Proposed Regulation, if not objected then the Regulation will enter into force twenty days after it is published in the Official Journal of the EU.

The provisional edition of the text can be accessed here.

(iv) ESMA establishes new co-ordination network on sustainability

On 23 May 2019, ESMA published a press release announcing it has established a new co-ordination network on sustainability ("**CNS**").

The CNS aims to:

- Co-ordinate with NCAs to work on sustainability; and
- Be responsible for the development of policy in this area, with a strategic view on issues related to integrating sustainability considerations into financial regulation.

In the press release, ESMA noted that the EU envisages a shift towards a more sustainable financial system in the medium and long term. ESMA and the EU securities regulators must therefore make sustainable finance an integral part of their supervisory and enforcement activities. For this reason, ESMA's work on sustainable finance supports the Commission's sustainability action plan in the areas of investment services and investment funds.

The press release can be accessed here.

Irish Property Funds

(i) Potential Tax Changes for Irish Property Funds

On 21 May 2019, the Taoiseach Leo Varadkar commented that Irish property funds may face further tax changes later this year. The Taoiseach confirmed that Finance Minister Paschal Donohoe is to carry out a review of their tax treatment in advance of the budget in October. The Taoiseach noted that the tax incentives involved with such funds were brought in to achieve a particular purpose and they should be removed when they are no longer necessary. The announcement that the tax treatment of Irish funds will be reviewed again is likely to be of interest to managers, investors and the Irish real estate sector.

Irish Investment Limited Partnerships (Amendment) Bill 2019

(i) Investment Limited Partnerships (Amendment) Bill 2019

On 18 June 2019, the Investment Limited Partnerships (Amendment) Bill 2019 (the "**Bill**") completed Dáil Éireann, First Stage (whereby the Bill is initiated or presented to the House). The Bill is set to amend the Investment Limited Partnerships Act, 1994, which governs the establishment and operation of regulated investment limited partnerships in Ireland.

The Bill, when enacted, is expected to provide for general updates and enhancements to the existing partnership legislation, to make certain technical amendments to the Irish Collective Asset-management Vehicles Act, 2015 and to provide for related matters.

The Bills progress can be tracked through a number of stages in both Houses of the Irish Parliament here.

Dillon Eustace
30 June 2019

Our Offices

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

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

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

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

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

Contact Points

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

Andrew Bates
E-mail: **andrew.bates@dilloneustace.ie**
Tel : + 353 1 673 1704
Fax: + 353 1 667 0042

Keith Waine
E-mail: Keith.Waine@dilloneustace.ie
Tel : + 353 1 673 1822
Fax: + 353 1 667 0042

Enda McGeever
E-mail: enda.mcgeever@dilloneustace.ie
Tel: + 353 1 673 2051
Fax: + 353 1 667 0042

This Investment Firms Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 30 June 2019 and accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS NEW YORK TOKYO