

Asset management and investment funds

Legal and regulatory developments

Covering the period
1 July to 30 September 2023



| Key Dates | |
|-------------------|--|
| 2023 | |
| 30 September 2023 | Deadline for fund management companies to put a plan in place to address any gaps in their arrangements as against the Central Bank's expectations on fund fees and costs. |
| 3 October 2023 | ESMA Guidelines under MiFID II applying from this date include those on (i) certain aspects of the suitability requirements, (ii) certain aspects of remuneration requirements and (iii) product governance guidelines. |
| 14 November 2023 | Revised technical guidance for AIFMD reporting returns containing new rule validations come into effect. |
| Q4 2023 (TBC) | Outsourcing Register filing via the ONR (reference date 31 December 2022) for in-scope fund management companies (exact timing remains to be confirmed by the Central Bank). |
| 1 December 2023 | Operational resilience action plans taking account of the Central Bank's operational resilience guidance to be in place. |
| 29 December 2023 | Effective date for compliance with the common and additional conduct standards and changes to the fitness and probity regime pursuant to the Individual Accountability Framework. |
| 2024 | |
| 10 January 2024 | Application date of the revised ELTIF Regulation. |
| 29 April 2024 | EMIR REFIT revised guidelines and technical documentation come into effect necessitating updates to EMIR reporting. |
| 24 May 2024 | In-scope funds investing over 50% of their portfolio in directly or indirectly held Irish property assets ("Property Funds") to take action to ensure their liquidity timeframes comply with the Central Bank's guidance on redemption terms for Property Funds. |

This is a condensed version of our Asset Management and Investment Funds Legal and Regulatory Report setting out key developments during the quarter.

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Third Quarter Highlights

In this quarter's edition of the legal and regulatory report, we highlight a number of key outputs as follows:

Irish Funds communicated a very significant and welcome development to member firms during August concerning progress with the Central Bank of Ireland (the "Central Bank") on implementation of the European long-term investment fund ("ELTIF") 2.0 product in the Irish regulatory regime (outlined at section 2.2 of the report). The Irish ELTIF will be a standalone product and therefore, it will not need to be separately authorised as a retail investor alternative investment fund ("RIAIF") or as a qualifying investor alternative investment fund ("QIAIF"). Accordingly, the existing range of investment fund structures, including the ICAV and ILP, will be available to establish ELTIFs.

Political agreement has been reached during July between the Council of Europe and the European Parliament on a provisional text of the directive amending AIFMD and the UCITS Directive, (commonly referred to as "AIFMD II") (outlined at section 1.1).

The transition of functions from the ONR to the Central Bank's Portal was completed with the disabling of the ONR functionality from 18 September 2023 (section 2.15). The Central Bank published a revised version of its outsourcing register template which should be completed and submitted by in-scope fund management companies during Q4 2023 (section 2.3).

Industry bodies have submitted detailed responses to the Department of Finance wide-ranging consultation on its review of the funds sector which closed during the period (section 3.3).

The FCA announced that, in the coming months, it will be contacting fund operators with respect to "landing slots" for UCITS exiting the UK's temporary marketing permissions regime (section 3.8). The Financial Stability Board ("FSB") and IOSCO launched their respective consultations on liquidity risk and its management in open-ended funds (sections 3.9(e) and 3.11(a) of the report). The consultative work of the FSB continues apace as it probes the build-up of debt and systemic risk outside traditional banks. For its part, the Central Bank published its discussion paper (outlined at section 2.1) to advance the debate on the development and operationalisation of a macroprudential framework for the investment funds sector.

On sustainability matters, the Central Bank has engaged with certain management companies selected for participation in the common supervisory action ("CSA") questionnaire on sustainability-related disclosures and the integration of sustainability risks (section 3.12(f)). The focuses of the questionnaire will be of interest to all fund management companies ("FMCs") seeking to ensure alignment with regulatory expectations. The Central Bank communicated to industry in its recent speech (section 3.12(b)) a number of practical, live, disclosure issues arising from a spot-check review of investment fund submissions under Sustainable Finance Disclosure Regulation ("SFDR").

The European Commission's paper on the implementation of the SFDR (section 3.12(a)) consults on two potential product categorisation systems due to persistent concerns that the current market use of SFDR as a labelling scheme leads to risks of greenwashing. Some of the Commission's proposals on labelling, if adopted, would see the SFDR move to more closely mirror the UK's forthcoming Sustainability Disclosure Requirements regime. This consultation signals a crossroads for Article eight and nine funds and whether those Articles can be reformed or will disappear altogether from SFDR.

The launch of the TNFD framework at Climate Week NYC sees nature considerations and biodiversity loss ascend the global sustainable finance agenda (section 3.12(d)). Furthermore, as international bodies continue their work to develop corporate sustainability reporting standards, the Commission has adopted its first set of EU sustainability reporting standards ("ESRS") (section 3.12(g)).

1. UCITS and AIFMD Developments

1.1 Political agreement reached on directive amending AIFMD and the UCITS Directive (*This is a further update to section 3.5(h) of the quarterly report covering the fourth quarter of 2022*)

On 20 July 2023, the Council of the European Union (the "**Council**") [announced](#) that a provisional agreement has been reached with the EU Parliament on a proposed directive amending the Alternative Investment Fund Managers Directive (2011/61/EU) ("**AIFMD**") and the UCITS Directive (2009/65/EC) relating to delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services, and loan origination by alternative investment funds (referred to as "**AIFMD II**").

The proposal is aimed at enhancing the integration of asset management markets in the EU and modernising the framework for key regulatory aspects. Under the provisional agreement, negotiators have agreed to enhance the availability of liquidity management tools, with new requirements for managers to provide for the activation of these instruments. The press release outlines how these measures will help ensure that fund managers are well equipped to deal with significant outflows in times of financial turbulence.

In addition, the press release details that agreement has been reached on the following:

- enhancing the availability of liquidity management tools, with new requirements for managers to provide for the activation of these instruments;
- enhancing the rules for delegation by investment managers to third parties to enable them to better access the best resources from market specialists, subject to reinforced supervision and preserving market integrity;
- an EU framework for funds originating loans;
- new measures to identify undue costs that could be charged to funds and passed on to their investors and rules to prevent potentially misleading names; and
- data sharing and co-operation between authorities.

The European Commission (the "**Commission**") has published a [press release](#) welcoming the political agreement, describing it as another important step towards delivering on the capital markets union.

Next steps

The political agreement reached is provisional and is subject to the approval of the Council and Parliament before the formal adoption procedure. Accordingly, the agreed revised text of the legislative proposal has not yet been published, pending technical dialogue meetings. The EU Parliament has indicated it has scheduled its plenary session from 5 to 8 February 2024 to consider AIFMD II.

Following publication of the final legal text in the official journal of the EU (the "OJ") member states and the Commission will then transpose the revised directive into national law and detailed technical rules implementing the legislation will be finalised.

2. Central Bank Updates

2.1 Macroprudential framework discussion paper *(This is a further update to section 3.1 of the quarterly report covering the second quarter of 2023)*

On 18 July 2023, the Central Bank published a [discussion paper](#) with the aim of advancing the debate on a potential approach to the development and operationalisation of a macroprudential framework for the investment funds sector. The discussion paper aims to inform and aid the ongoing international regulatory debate on macroprudential policy for the funds sector. The Central Bank is inviting feedback from stakeholders on a number of issues raised in the discussion paper to inform further analysis and policy work in this area.

The discussion paper sets out a number of reasons for the need for a macroprudential framework including the fact that the global non-bank financial intermediaries sector, and particularly the investment fund component of it, has grown significantly since the global financial crisis. The discussion paper highlights two main underlying potential sources of vulnerabilities for investment funds as being liquidity mismatches and high levels of leverage.

Whilst the paper is careful not to propose specific policy measures at this juncture, it does outline a number of high-level objectives and principles to be considered when developing such a framework, as well as posing key questions throughout for consideration by stakeholders. Feedback to the paper can be provided [via a survey](#) until 15 November 2023. The Central Bank will consider the feedback received and intends to publish a feedback statement in 2024.

Walkers have published an advisory entitled '[Central Bank discussion paper on a macroprudential policy for investment funds](#)' outlining the key points of interest contained in the paper.

2.2 Progress on implementation of the Irish ELTIF 2.0 offering *(This is a further update to section 4.6(a) of the quarterly report covering the second quarter of 2023)*

On 16 August 2023, Irish Funds confirmed in a communication to member firms that following constructive engagement with the Central Bank on the implementation and application of an Irish ELTIF offering, the Central Bank has developed a standalone ELTIF chapter for inclusion in its AIF Rulebook reflecting the specific requirements for ELTIFs as a regulated AIF and will launch a consultation shortly.

The revised European Long-Term Investment Funds Regulation (EU) 2023/606 (the **"2023 Regulation"**) will apply across the European Union from 10 January 2024. The asset management industry in Ireland has been focused on maximising the opportunities presented by the enhancements to the ELTIF framework contained in the 2023 Regulation and to ensure that Ireland will have an ELTIF 2.0 offering from 10 January 2024 when the 2023 Regulation comes into effect.

Irish Funds has confirmed that the Central Bank proposes to create a standalone ELTIF chapter of the AIF Rulebook which will set out rules for Irish ELTIFs which complement the requirements contained in the 2023 Regulation. The Irish ELTIF will be a standalone product and therefore, it will not need to be separately authorised as a RIAIF or a QIAIF. Accordingly the existing range of investment fund structures, including the ICAV and ILP, would be available to establish ELTIFs as a standalone category of regulated AIF.

It is understood that the Central Bank intends to consult on the amendments to the AIF Rulebook reflecting the specific requirements for ELTIFs as a regulated AIF which will facilitate the authorisation of ELTIFs under the 2023 Regulation as soon as possible.

Walkers have published an [update](#) on this significant announcement.

2.3 Outsourcing register template and guidance notes

On 24 July 2023, the Central Bank [published](#) a revised version of its outsourcing register template and accompanying guidance note for markets firms.

The key updates to the outsourcing register template include additional worksheets on 'Function Information', 'Sub-Contractors' and 'Alternative Provider'. The revised guidance note also exhibits a revised (non-exhaustive) tool for mapping the outsourced functions, wherein these categorisations have been revised and consolidated.

The reference data for completion of the register remains as of 31 December 2022 (only including contracts / written agreements with a start date before that date). The deadline for submission by firms of the template via the online portal will be during Q4 2023 with an exact deadline date remaining to be confirmed by the Central Bank.

2.4 Central Bank markets updates

(a) Issue 6 of 2023

On 4 July 2023, the Central Bank published its [markets update \(6 of 2023\)](#).

- *Update to the confirmation required within the Central Bank's qualifying investor alternative investment funds ("QIAIF") application form and post authorisation application forms*

On 3 July 2023, the Central Bank published on its website updates for the "Confirmation from applicants" in its QIAIF application form and QIAIF post-authorisation application forms.

The substantive change to the application forms being the expansion of the applicant confirmation to refer to the "compliance with the authorisation requirements set out in the AIF Rulebook, the AIFMD Regulations, the Irish AIFM Regulations (where relevant) and the Central Bank's published Guidance (including Questions and Answers on AIFMD) in relation to QIAIFs".

The Central Bank requires these updated versions of the forms to be used in respect of QIAIF filings going forward.

- *Dear Chair letter on targeted reviews on control frameworks and risk appetite statements in MiFID investment firms & market operators*

On 26 July 2023, the Central Bank published a 'Dear Chairperson' [letter](#) following its themed inspection to examine how effective trading venue operators ("**Trading Venues**") are in the area of market surveillance and ensuring their compliance with the Market Abuse Regulation ("**MAR**") Article 16(1).

The letter outlines how the inspection identified a number of failings around the effectiveness of market surveillance arrangements including a significant lack of board awareness and accountability, weak quality. According to the Central Bank the findings of the recent inspection demonstrate that market surveillance is not a high priority for CEOs and their boards.

The letter follows previous Central Bank communications of its expectations of firms and their legal obligations in relation to market abuse monitoring and prevention through, (i) the 2021 Dear CEO Letter; and (ii) the Securities Market Risk Outlook Report in 2021 and 2022.

The Central Bank requires that chairpersons of Trading Venues take responsibility for the findings in this letter ensuring that it is discussed, minuted and actioned. Furthermore the Central Bank requires that Trading Venues immediately commence a review of their trade surveillance arrangements taking into account this and other communications from the Central Bank and all legal obligations under MAR.

- *Compliance with ESMA guidelines on MiFID II suitability requirements (This is a further update to section 4.13 (k) of the quarterly report covering the second quarter of 2023)*

The Central Bank has notified ESMA that it intends to comply with the [Guidelines](#) on certain aspects of the MiFID II Directive (2004/65/EU) ("MiFID II") suitability requirements which are published on the following Central Bank of Ireland [webpage](#). The Guidelines will apply from 3 October 2023.

Remaining updates of relevance are covered elsewhere in this report and in our previous reports.

(b) Issue 7 of 2023

On 18 July 2023, the Central Bank published its [market update \(7 of 2023\)](#).

The key update from the Central Bank is the publication of the [Discussion Paper: An approach to macroprudential policy for investment funds](#) (outlined in the report above at section 2.1).

The remaining updates of relevance in this issue are covered elsewhere in this report.

2.5 Investment advisors thematic review

On 4 July 2023, the Central Bank launched a review of FMCs that engage investment advisors which may directly or indirectly provide services to the FMCs' funds. FMCs were required to complete a short questionnaire and submit it to the Central Bank by close of business on 18 July 2023. The thematic review follows on from ESMA's CSA report on fund costs and fees published in 2021.

The Central Bank clarified that the questionnaire is only required to be completed by those firms who have 'non-discretionary' investment advisors appointed in relation to their funds. Investment advisors that have discretion are treated like discretionary investment managers as noted under "[Clearance of Investment Advisors](#)" on the Central Bank's website. Accordingly, FMCs that received the questionnaire and subsequently respond to confirm that they do not have such investment advisors, will have had the return removed from the relevant ONR profile.

After submission the Central Bank may, if required, request further information and / or schedule direct engagements with firms.

2.6 Guidance on client asset requirements ("**CAR**") and investor money requirements ("**IMR**") *(This is a further update to section 3.9(a) of the quarterly report covering the first quarter of 2023)*

On 3 July 2023, the Central Bank published [updated guidance](#) for Irish investment firms on CAR and IMR along with a revised [template Monthly Client Assets Report](#) to coincide with the revised Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firm) Regulations 2023 ("**2023 Regulations**"). The revised CAR set out in Part 6 of the 2023 Regulations became applicable on 1 July 2023.

The enhancements to the CAR aim to ensure client assets that investment firms and credit institutions (authorised by the Central Bank) hold remain appropriately safeguarded and are a key priority for the Central Bank.

The updated guidance is intended to be read in conjunction with CAR and IMR.

2.7 Research on domestic exposure from investment funds in Irish-resident special purpose entities ("**SPEs**")

On 26 July 2023, the Central Bank published [research](#) on domestic exposures from investment funds in SPEs. The research article examines Central Bank data showing €82bn of portfolio investment by investment funds was through SPEs as at Q3 2022 and focuses on why such investment funds are likely to employ SPEs to undertake all or part of their portfolio investment (key motivation is tax efficiency), identifying which Irish funds do so (alternative investment funds ("**AIFs**"), predominantly in the "other" category), the level of Irish-resident exposures and what portion of these are linked to the domestic economy.

The aim of the paper reflects concerns around SPEs being a channel for transmission within the domestic economy of external shocks within an increasingly fragile macro-financial environment and fulfils part of a recommendation from the International Monetary Funds' Financial Stability Assessment Programme on Ireland in 2022. The research shows only a small minority of funds (4% based on assets under management ("**AUM**") of the Irish funds population) choose to employ SPEs to hold part of their portfolios. Furthermore, the research shows that much of the SPE investment takes place in sectors largely unrelated to the domestic economy.

The analysis suggest domestic links are far smaller than the headline figures suggest while risks are much the same as if positions were held directly. While this extra layer of complexity within fund structures with SPEs can reduce transparency as to the exposures that investment funds are undertaking, the research shows that AUM links between Irish-resident funds and SPEs does not imply substantial indirect links between investment funds and the domestic Irish economy. Opacity risk reduces as a result while the risk from tax changes to SPE-held portfolios do not carry significant domestic implications, bridging a gap in knowledge. With fees, commissions and taxes paid by investment fund-linked SPEs being quite small, the paper concludes the overall domestic exposure is limited.

2.8 Financial Stability Note - Irish resident Liability Driven Investment ("**LDI**") funds *(This is a further update to section 3.10 of the quarterly report covering the first quarter of 2023)*

On 5 September 2023, the Central Bank published a [Financial Stability Note](#) which provides a summary of the experience and role of Irish resident LDI funds and the 2022 gilt markets crisis.

The paper details how GBP denominated Irish-resident LDI funds, - a product designed to manage interest rate and inflation risk for defined benefit UK pension funds, which have a significant footprint in the gilt market, were affected by, and contributed to, gilt market disruption during the September-October 2022 UK Gilt Market Crisis. Funds saw substantial declines in the value of their assets, which – in the presence of substantial leverage – posed a significant risk to funds’ survival. Due to their use of leverage, funds faced modest demands for cash from margin calls, while collateral calls that could be met with securities were more substantial. Gilt sales by Irish-resident funds accounted for 30 per cent (£11 billion) of net sales by all LDI entities over the crisis period, but these funds raised more cash from investor subscriptions than gilt sales.

The paper notes that the leverage of Irish-resident LDI funds has improved, returning below its pre-crisis level, and in line with its long term average. This suggests that if similar shocks were to reoccur, LDI funds would be better able to withstand them (resilience), following the supervisory interventions by the Central Bank on maintaining a yield buffer of 300-400 bps, announced in November 2022 and [reaffirmed in March 2023](#), as well as interventions by other European authorities.

2.9 Central Bank speeches during the period

(a) Funds regulatory and supervisory update

The Central Bank [published](#) remarks delivered by James O’Sullivan, Head of Function – Fund & Firm Authorisations, at the Certified Institute of Fund Directors annual conference on 29 September 2023 entitled 'Funds Regulatory & Supervisory Update' where he provided an outline of the present regulatory agenda for funds including the Central Bank’s renewed emphasis on thematic supervision for the funds sector.

Some notable takeaways from the speech include:

- The increasing steps taken to encourage more private funds to establish in Ireland. That includes funds focused on private equity, private credit, real estate and infrastructure investments.
- Confirmation that the Central Bank is in the process of developing a standalone ELTIF chapter for inclusion in the AIF Rulebook. The ELTIF will be a standalone product which will be authorised under domestic funds legislation, which is anticipated to bring all of the benefits otherwise applicable to an authorised AIF in Ireland. Mr. O’Sullivan noted this as a "hugely positive development".
- On the ELTIF Level 2 consultation focusing on the level of standardisation in key characteristics of ELTIFs, including the minimum holding periods and redemption frequency, Mr. O’Sullivan noted his view that the good work in Level 1 text should not be undone now at the Level 2 stage. He expressed support for the regulatory technical standards to provide the right mix of tools and options for managers to draw on when designing their products to ensure that the investment strategy, portfolio composition, maturity and liquidity profiles are appropriate at the product design phase.
- On the increasing focus on potential systemic risk from the non-bank sector, he referred to the emphasis placed globally on the non-bank sector, and the funds and asset management industry in particular. The recent FSB and IOSCO consultations on updates to the international regulatory

framework focusing on liquidity mismatches in open-ended funds (outlined at section 3.9(e) and 3.11(a) of this report) are a sign of regulatory developments to come into 2024.

- In terms of the CSAs currently underway at a European level – there are currently two active CSAs. The first relates to asset valuation and the second relates to sustainability and disclosure risk (as outlined at section 3.12 of the report). The asset valuation CSA is largely complete and firms that were subject to inspection have received risk mitigation programmes where that was required. The first phase of the sustainability and disclosure risk CSA is due to conclude by January 2024 and is focusing on greenwashing risks. The second phase will conclude by September 2024 and is focused on sustainability and disclosure issues generally.
- Regarding the Central Bank's local supervisory initiatives, he highlighted:
 - a) a thematic review which commenced earlier this year and focused on exchange traded funds; as well as:
 - b) a number of 'mini thematic reviews' where the Central Bank is focused on areas including:
 - (i) the role of non-discretionary investment advisors,
 - (ii) examining conflicts of interest for third party management companies; and
 - (iii) investigating the use of the fixed operating expense model in some investment funds.

Mr. O'Sullivan observed that there are clearly a wide range of issues under consideration and the use of such mini-thematic reviews will likely be a feature of the regulatory toolkit going forward. As a result, industry can expect to see more frequent targeted questionnaires focussed on specific areas of risk. In future, the outcome of these reviews may be communicated in the form of an annual bulletin capturing a range of reviews at once.

- (b) *Enhancements to the administrative sanctions procedure ("ASP") (This is a further update to section 3.4 of the quarterly report covering the second quarter of 2023)*

On 5 July 2023, the Central Bank's Director of Enforcement & Anti-Money Laundering, Seána Cunningham delivered a [speech](#) on the Central Bank's recently launched consultation on enhancements to its ASP.

Ms. Cunningham outlined that the Central Bank have sought to enhance the process of implementing the Individual Accountability Framework ("IAF") by publishing revised regulations and guidance on enhancements to fitness & probity investigations, suspensions and prohibitions and publishing the main IAF consultation on the senior executive accountability regime.

Her remarks focused on how enhancements will be made to the ASP through the introduction of amendments and policy changes in the ASP guidelines that the Central Bank believes will:

- support efficient and effective operation of the ASP;
 - provide greater clarity for firms and individuals involved in investigations and inquiries; and
 - provide further guidance for decision-makers on procedural issues.
- (c) *Dynamic change in uncertain times: balancing opportunity and risk*

On 28 September 2023, Derville Rowland, Deputy Governor Consumer and Investor Protection delivered [remarks](#) at the Association for Financial Markets in Europe (AFME) 7th Annual European Compliance and Legal Conference entitled 'Dynamic change in uncertain times: Balancing opportunity and risk'.

Her remarks focused on the Central Bank's view of how firms should handle such change across a number of related areas – investor protection, governance and accountability, and countering the risk of financial crime. Ms Rowland noted that the Central Bank wishes to see that the potential benefits of innovation for consumers, investors, businesses and society are realised, while the risks are effectively managed.

On fostering good culture, she expressed the view that effective culture is essential for any organisation seeking to navigate change efficiently and well. Ms Rowland noted that while definitions vary she sees culture as the shared values and norms that shape behaviours and mind-sets within a firm – the “unwritten rules” or the “way things are done around here”. One indicator of an effective culture is demonstrated by a commitment to diversity and inclusion throughout a firm's organisation, including at board level. By “diversity” she noted not just gender diversity but also other factors like ethnicity, socio-economic status and also diversity of thought. Such diversity is desirable for a number of reasons - to prevent group-think, to guard against overconfidence and to promote internal challenge

On the successful implementation of the IAF – she emphasised as being of central importance the need for firms to take real ownership of the framework. If firms embed the framework properly, it should ideally result in fewer serious issues in the sector over time – and, from less need for enforcement actions by the Central Bank.

2.10 ORION guidance updates

On 31 July 2023, the Central Bank published the following updated [materials](#) to assist applicant firms in submission and viewing applications via the ORION system.

- ORION general user guide (replacing the previous ORION QIAIF user manual)

This guide provides instructional support and guidance to applicant firms that use ORION for the purpose of submitting or viewing their fund and/or fund service provider applications. The revised ORION manual now reflects that the following fund and fund service provider applications should be submitted via ORION:

Funds:

- QIAIFs – application for authorisation - *including umbrella QIAIFs, standalone QIAIFs and QIAIF sub-funds*; and
- UCITS/RAIF standalone funds and UCITS/RAIF sub-funds – application for authorisation. Note: *UCITS umbrella funds may not be submitted via ORION.*

Fund Service Providers:

- AIF management company – application for approval;
- AIF manager – application for authorisation;

- AIF manager – application for registration;
- Non-EU investment manager / Non-EU AIFM – application for clearance;
- UCITS management company – application for authorisation; and
- UCITS self-managed investment company (SMIC) – application for authorisation.

For UCITS and RIAIF applications (both initial and subsequent submissions), users should note the document naming convention requirements outlined in Appendix 2 of the guide which must be followed.

- ORION common troubleshooting

This document provides answers to some of the most common ORION queries that the Central Bank receives from applicant firms.

- ORION comment's user guide

This guide provides instructional support to applicants when using the comments functionality on ORION. It outlines how to receive and respond to comments issued by the Central Bank via ORION during the application review process.

2.11 Central Bank stakeholder launch event with the FSB and IOSCO on open-ended funds ("OEF") consultations

On 12 July 2023, the Central Bank hosted the FSB and IOSCO stakeholder OEF consultations outreach event to launch their respective consultations on liquidity risk and its management in OEFs, as outlined later in the report.

The FSB's revised recommendations, combined with the new IOSCO guidance on anti-dilution liquidity management tools ("LMTs"), aim to achieve a significant strengthening of liquidity management by OEF managers compared to current practices. The consultations are outlined at sections 3.8(e) and 3.10(a) of this report.

The event included an overview by the FSB and IOSCO of the main proposals in their respective consultations and for participants with opportunity to provide their early feedback on the proposals.

2.12 Regulatory Service Standards Report (H1 2023)

On 28 August 2023, the Central Bank published its latest half-yearly regulatory service standards [report](#) covering the period January – June 2023 (the "**Report**"). The Report sets out the Central Bank's performance against the service standards it has committed to in respect of various supervisory activities, including on:

- authorisation of investment funds and financial service providers ("**FSPs**") (see sections 1 & 2 of the Report); and
- assessment of pre-approval controlled function ("**PCF**") individual questionnaire ("**IQ**") applications (section 12 and Appendix C).

Report Summary

In H1 2023, the Central Bank authorised 248 investment funds (157 UCITS, 1 RIAIF and 90 QIAIFs).

The ICAV structure was the preferred legal structure for 63% of QIAIFs authorised in H1 2023, followed by the investment company legal structure for 17% of QIAIFs. 10% were for unit trusts, 8% for investment limited partnerships and 2% were for common contractual funds.

- *QIAIFs*

The number of QIAIF applications returned on the day of proposed authorisation during H1 2023 was 5. The main reasons for the returns were:

- there was no alternative investment fund manager ("**AIFM**") passport in place prior to the QIAIF seeking authorisation and the investment manager was not cleared to act as investment manager,
- not all directors were cleared in advance, and
- two applications were incorrectly submitted on Orion rather than via the Portal.

- *Retail funds*

In some cases challenges arose in meeting the service standards for retail funds. This was typically because the submission was very complex, innovative, or had features which had not previously been considered by the Central Bank. For example, in some instances applications proposed material levels of exposure to complex asset classes including digital assets or novel features not previously considered, such as unusual fee structures. The number of UCITS authorised in H1 was 28% lower than the equivalent H1 figure for 2022 (217 UCITS authorised). The increase in the level of disclosure to be reviewed following the SFDR and the Taxonomy Regulation (EU) 2020/852) (the "**Taxonomy**") coming into force also resulted in challenges arising in meeting the Service Standards, in particular for fast track related submissions

In some instances, a retail fund application may be judged incomplete and returned to the applicant. The common reasons for this include:

- disclosure which is not sufficiently informative or could be considered unclear to retail investors;
- relevant service providers/parties not being cleared by the Central Bank to act for an Irish authorised fund; and
- the absence of disclosure in relation to specific requirements that apply to a fund from a legislative or regulatory perspective.

- *FSPs*

Three FSPs withdrew their application for authorisation during the review process.

Reasons for withdrawal included:

- lack of adequate number of personnel identified for key PCF roles and therefore application lacked substance to proceed; and
- others withdrew for their own operational reasons / requirements, whereby the applicant firm felt it was not in its best interests to proceed with the application.

The approach to reviewing an application which has been resubmitted is dependent on the time elapsed and the extent of changes that the applicant has made to the original application.

In addition to withdrawn applications, 5 applications also went to “dormant” phase. All 5 of these applications were not yet deemed formal/complete applications and were still at a pre-application stage. Reasons for dormancy, can include a change in the commercial environment which may result in the applicant choosing to pause or slow down progress of its application.

The Central Bank also held pre-application meetings with two firms (seeking AIFM authorisation) which advised that they will be focussing on renewables as the main area of their business – these are the first FMCs we have seen that are specifically focussed on this area. There has been a continuing trend for FMCs to seek permission to carry out ancillary MiFID activity. Such applications are more complex and, as a result, are subject to an increased level of scrutiny during the authorisation review process, which may take longer to complete.

- *IQs*

On IQ applications 10.9% (169) of applications were returned as incomplete. These related to errors in the initial submission, for example:

- failure to upload necessary documentation;
- where insufficient due diligence has been performed by the proposer;
- the applicant did not disclose a probity matter in the reputation section of the IQ; or
- the applicant applied for the wrong PCF role or was unable to answer queries regarding key aspects of the applicant’s fitness & probity.

Appendix C of the Report details a list of reasons IQ applications are returned as incomplete.

2.13 Fitness and probity interview guide *(This is a further update to section 3.5 of the quarterly report covering the first quarter of 2023)*

On 9 August 2023, the Central Bank published an updated version of its [interview guide](#) for PCF applicants that are called for interview as part of the PCF approval process.

The revisions take account of the Central Bank’s latest Fitness and Probity IQ, the Applications and PCF Roles Guidance published in April 2023 as well as reflecting the expiration on their own terms of the prior regulatory flexibility in light of Covid-19.

2.14 Beneficial ownership register frequently asked questions ("FAQ") update *(This is a further update to section 4.1 of the quarterly report covering the second quarter of 2023)*

On 5 September 2023, the Central Bank published an updated version of its Beneficial Ownership Register [FAQ \(updated September 2023\)](#). The key updates to the FAQ are to reflect that access requests by members of the public must meet a threshold of legitimate interest, as provided for in Regulation 4 of S.I. 308 of 2023.

2.15 Communication regarding disablement of ONR login *(This is a further update to section 3.5 of the quarterly report covering the first quarter of 2023)*

On 25 August 2023, the Central Bank wrote to administrators and users of the Central Bank's Portal (the "Portal") with a further update on the imminent changes to [the Portal](#). The Portal provides a secure mechanism for institutions and individuals to engage with the Central Bank on a range of regulatory and statistical services and will continue to be enhanced over time.

Urgent Action Required - Disabling of ONR login

The ONR login facility was disabled permanently on 18 September 2023. Firms must now login through the Portal in order to access and submit returns. Portal administrators are urged to ensure that those responsible for submitting returns in your firm have activated their Portal account and have the correct permissions. The easiest way to ensure that users retain their ONR permissions is to link their ONR and Portal accounts.

Enhanced Portal Returns Service

- Create return related requests

The submit returns functionality will remain largely unchanged following the switch over to the Portal. However, a number of additional features will be available on the returns screen, which will enable users to make certain return related requests via the Portal (where applicable). These include requests to: unlock a return; amend a reporting/submission date; or remove a return instance. Firms are requested to make such requests directly through the Portal as this is the most effective means of ensuring such return related requests are directed to the relevant Central Bank team to action.

- Portal messaging – returns service

Portal messaging is a secure and efficient means of correspondence between the Central Bank and the firm in relation to Portal services. Firms will now be able to utilise the existing Portal messaging functionality in relation to the Returns service by the new 'Create New Message' function. Firms are requested to submit queries in relation to a return type or return instance via Portal messaging. 'Messaging' permissions and 'create request' permissions must be enabled and portal administrators are reminded they currently have the ability to enable both permissions for users in their firm. The onlinereturns@centralbank.ie inbox will remain active for general Portal access queries.

- Enhanced filing notification

An enhanced filing notification service for returns will also be available. This service will allow Portal administrators to assign their firm's portal users as the contacts for specific (or all) returns. Users assigned as a contact will receive notifications advising them when a return is due or if the due date has passed without submission. These notifications can be viewed on the user's Portal home screen.

Further guidance material

The Portal support webpage will be updated with further support material in relation to the new features outlined above on the day of implementation.

Portal administrators are expected to keep all Portal and ONR users within their organisation informed of these developments. A summary of actions to be taken for different types of users is outlined as follows.

Key User Actions

Portal administrators: Portal administrators can link their own ONR and Portal accounts via the Portal. Once a Portal administrator has linked their own ONR and Portal accounts, they will be able to perform return related administration functions on the Portal.

Active ONR users with a Portal account (non-Portal Administrators): Users with active ONR and Portal accounts should link their ONR account to their Portal account via the Portal.

Active ONR users with no Portal account: Active ONR users that do not yet have a Portal account should [register](#) for the Portal. Once registered they can link their ONR account to their Portal account via the Portal.

New users: All new users that require access to returns must register for the Portal. Once registered they should contact their firm's Portal administrator who can grant the necessary returns access (new users do not require a separate ONR login).

2.16 Central Bank application forms and guidance (updated for portal)

On 12 September 2023, the Central Bank updated its change of service provider (COSP) application forms (September 2023) for use by [AIFs](#) (QIAIFs and RIAIFs) and [UCITS](#).

The updated COSP forms refer to re-assignment of returns to the new service provider via Portal (not ONR).

During the period the Central Bank also updated its Investment Fund Return (MMIF) [Online Validations document](#) which sets out validation rules that apply to uploading the MMIF return through the Central Bank's External Portal system

Similarly, the Central Bank's Resident MMIF [Notes on Compilation](#) amended the ONR references to refer to the external Portal.

2.17 Investment fund statistics Q2 2023

On 31 August 2023, the Central Bank published its investment fund [statistics](#) for Q2 2023, which show the net asset values of Irish resident funds continued to increase, by €79bn reaching €3,820bn, in Q2 2023, driven mainly by positive revaluations of €66bn, with net inflows accounting for approximately €10bn.

On 11 September 2023, EFAMA also published its European Quarterly Statistical [Release](#) for Q2 2023,

3. Other Legal and Regulatory Developments

3.1 Crypto Regulation

- (a) *Consultation paper on technical standards specifying certain requirements of the Markets in Crypto Assets Regulation ("MiCA") (This is a further update to section 4.2(d) of the quarterly report covering the second quarter of 2023)*

On 12 July 2023, ESMA published its first [consultation paper](#) under MiCA. In the first of three consultation packages, ESMA is seeking input on proposed technical standards for crypto-asset service providers ("CASPs"), in particular related to their authorisation, identification and management of conflicts of interests and complaints handling.

In its consultation paper, ESMA aims to gather more insight to respondents' current and planned activities, as a fact-finding exercise to better understand the EU crypto-asset markets and their future developments. Key questions in the consultation on CASPs which will serve to calibrate certain proposals to be inserted in the second and third consultation package, relate to factors such as:

- expected turnover of the respondents;
- the number of white papers they plan to publish; and
- the use of on-chain vs off-chain trading.

Verena Ross, Chair of ESMA has noted that the first consultation is an important milestone for ESMA in the implementation of the MiCA framework where ESMA aims to set high regulatory EU standards for crypto asset related activities. In parallel to this consultation, ESMA will continue working on its remaining mandates with the objectives to publish a second consultation package in October 2023.

ESMA invites comments from stakeholders by 20 September 2023 and expects to publish a final report and submit the draft technical standards to the Commission for endorsement by 30 June 2024 at the latest.

- (b) *FSB final recommendations for the regulation, supervision and oversight of crypto-asset activities and markets (This is a further update to section 4.3(b) of the quarterly report covering the fourth quarter of 2022)*

On 17 July 2023, the FSB published a [final report](#) on the high-level recommendations for the global regulation, supervision and oversight of crypto-asset activities and markets. The FSB is finalising its global regulatory framework for crypto-asset activities to promote the comprehensiveness and international consistency of regulatory and supervisory approaches.

Following an initial public consultation that ran until 15 December 2022 and a review of recent events in crypto-asset markets the framework consists of final versions of two distinct sets of recommendations:

- [high-level recommendations](#) for the regulation, supervision and oversight of crypto-asset activities and markets; and
- [revised high-level recommendations](#) for the regulation, supervision, and oversight of "global stablecoin" arrangements ("**GSC**" recommendations).

The report aims to ensure the global framework is based on the principle of "same activity, same risk, same regulation" and providing a strong basis for ensuring that crypto-asset activities and stablecoins are subject to consistent and comprehensive regulation, commensurate to the risks they pose, while supporting responsible innovations potentially brought by the technological change.

With regard to the FSB's next steps, it has outlined it intends to take appropriate action to:

- continue co-ordinating international regulatory, supervisory and oversight approaches for crypto-asset activities, including GSC arrangements, to ensure they are comprehensive,

consistent and complementary. By the end of 2024, it will consider the findings of the vulnerability analysis work including on CASPs that combine multiple functions and whether additional policy work is warranted; and

- conduct a review of the implementation of the recommendations by the end of 2025.

3.2 Data Protection

- (a) *EU-US Data Privacy Framework decision (This is a further update to section 4.1(c) of the quarterly report covering the fourth quarter of 2022)*

On 10 July 2023, the Commission adopted its [adequacy decision](#) for the EU-US Data Privacy Framework (the "**Framework**").

The decision concludes that the United States ensures an adequate level of protection – comparable to that of the EU – for personal data transferred from the EU to US companies under the new Framework. On the basis of the new adequacy decision, personal data can flow safely from the EU entities to US companies participating in the Framework, without a requirement to put in place additional data protection safeguards.

The Commission's [Q&A](#) on the Framework acknowledges that the Framework provides EU individuals whose data would be transferred to participating companies in the US with several new rights (e.g. to obtain access to their data, or obtain correction or deletion of incorrect or unlawfully handled data). In addition, it offers different redress avenues in case their data is wrongly handled, including before free of charge independent dispute resolution mechanisms and an arbitration panel.

US companies can certify their participation in the Framework by committing to comply with a detailed set of privacy obligations. This could include, for example, privacy principles such as purpose limitation, data minimisation and data retention, as well as specific obligations concerning data security and the sharing of data with third parties.

On 19 July 2023, the European Data Protection Board issued its [information note](#) on data transfers under Regulation (EU) 2016/679 ("**GDPR**") to the United States following the adoption of the adequacy decision.

Walkers have published an advisory entitled [Ireland Update – European Commission adopts new adequacy decision for safe and trusted EU-US data flows](#) outlining key points to note following the adoption of the adequacy decision.

- (b) *Proposal for a GDPR procedural regulation*

On 4 July 2023, the Commission [proposed](#) a new regulation, the GDPR Procedural Regulation (the "**Proposal**") to streamline cooperation between data protection authorities ("**DPAs**") when enforcing cross-border cases.

The proposed regulation aims to harmonise procedural rules in cross-border cases in respect of the rights of complainants, the Procedural rights of parties under investigation (controllers and processors) and streamlining DPA cooperation and dispute resolution.

On 21 September 2023, the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) adopted a [joint opinion](#) on the Commission's Proposal for a Regulation on additional procedural rules for the enforcement of the GDPR.

3.3 Department of Finance

(a) *Funds Sector 2030 review: A framework for open, resilient & developing markets*

On 15 September 2023, the Department of Finance [public consultation](#) on the *Funds Sector 2030 review* closed to submissions.

Irish Funds submitted a detailed response to the consultation following broad engagement across the membership. The submission reflected this feedback and strategic priorities of its members, as well as the incorporation of the key initiatives necessary to support the growth and development of the investment funds industry for the long term.

Walkers was involved in framing responses to the consultation across our Tax and Asset Management & Investment Funds practice groups as part of our membership of industry bodies. Walkers submitted letters supporting both Irish Funds and Irish Debt Securities Association submissions to the consultation.

The responses to the public consultation will form the basis for a series of targeted engagements by the Department's multi-disciplinary review team with respondents as well as national and international stakeholders in late 2023 and into 2024. Further consultations may be held at a later stage in the review.

A draft report will issue to the Minister for Finance in summer 2024.

3.4 EMIR Regulation (648/2012) ("EMIR")

(a) *Commission consultation on amending on Australian equivalence under EMIR*

On 17 July 2023, the Commission published a [consultation](#) on a draft implementing decision under EMIR which would amend Implementing Decision (EU) 2016/2272 on the equivalence of financial markets in Australia.

Since the adoption of Implementing Decision (EU) 2016/2272, an additional financial market established in Australia has obtained authorisation from the Australian Securities and Investments Commission to trade in derivatives. The Annex to the decision would be amended accordingly.

The consultation closed on 14 August 2023 and adoption by the Commission is pending.

(b) *Inclusion of South Africa on AML blacklist requires withdrawal of CCP recognition decision (This is a further update to section 4.4(d) of the quarterly report covering the second quarter of 2023)*

On 29 September 2023, ESMA [announced](#) the withdrawal under EMIR of the recognition decision of JSE Clear, a central counterparty ("CCP") established in South Africa. This withdrawal is required by EMIR due to the addition of South Africa to the list of high-risk third countries presenting strategic deficiencies in their national AML/CFT regime.

The withdrawal of recognition decision will therefore enter into effect on 29 December 2023. From that date, JSE Clear will no longer be permitted to provide clearing services to clearing members or trading venues established in the EU.

On 29 September 2023, ESMA also updated its [list of recognised third-country central counterparties](#).

- (c) *Inclusion of the United Arab Emirates on AML blacklist requires ESMA to withdraw the recognition of three CCPs*

On 25 July 2023, ESMA [announced](#) the withdrawal under EMIR of recognition decisions of the following three CCPs established in the United Arab Emirates (including the Dubai International Financial Centre):

- Dubai Commodities Clearing Corporation;
- Dubai Clear LLC; and
- Nasdaq Dubai Ltd.

This withdrawal follows the addition of the United Arab Emirates, by the Commission, to the list of high-risk third countries presenting strategic deficiencies in their national anti-money laundering and counter financing of terrorism ("AML/CFT") regime.

In order to minimise potential market disruption, ESMA has provided for an adaptation period of three months. The withdrawal of recognition decisions will therefore enter into effect on 25 October 2023. From that date, the three CCPs concerned will no longer be permitted to provide clearing services to clearing members or trading venues established in the EU.

3.5 ESMA & the European Supervisory Authorities (the "ESAs")

- (a) *Second Trends, Risks and Vulnerabilities Report of 2023*

On 31 August 2023, ESMA published its second Trends, Risks and Vulnerabilities [Report](#) of 2023. The following are the main findings relevant to funds and fund service providers.

Overall risk assessment:

Financial markets rebounded in the first half of 2023 against the background of lower energy prices and expectations of a slower pace of monetary tightening. However, this improvement remains fragile and risks remain high in ESMA's remit. Markets are set to remain very sensitive to potential deteriorations in economic fundamentals or risks in the financial sector.

- (i) *Asset management*

The EU fund sector partly recovered after the historical decline experienced in 2022, primarily due to valuation effects. Bond funds received inflows, which contrasts with the outflows in 2022. Fixed income funds which reduced their maturity and interest rate sensitivity during the monetary tightening are now positioned to benefit from higher yields. Fund risks remain high due to prevailing credit, valuation, liquidity and interest rate risks, especially for funds combining several vulnerabilities, such as in the real estate fund sector. Performance of retail investments remained subdued, reflecting sustained price pressures in the underlying asset markets.

(ii) *Sustainable finance*

The EU market for ESG products and sustainable investments has continued to grow at a robust pace. The demand for funds with a sustainable investment objective remained strong. The reclassifications of funds from SFDR Article nine to Article eight observed in 4Q22 continued during the first quarter of 2023, albeit at a slower pace.

(iii) *Market-based finance*

The ability of non-financial corporations to raise funds through capital markets slightly picked up in 1H23 from the lows observed in 2022.

(iv) *Crypto-assets and financial innovation*

Crypto-asset valuations rebounded in early 1H23 but remained far below their historical peak. Persistently elevated cyber risks remain an important source of concern for the EU financial sector. Financial markets have started exploring potential implications of Artificial Intelligence after the launches of various Generative AI tools in 1H23.

On 18 September 2023, the ESAs [published](#) their autumn 2023 Joint Committee report on risks and vulnerabilities in the EU financial system. It notes that interest rates have generated heterogeneous impacts on the financial sector, with increased net interest income for banks, reduced profitability for insurers and liquidity risks for the asset management sector.

The report underlines the continued high economic uncertainty and warns national supervisors of the financial stability risks stemming from the heightened uncertainty and calls for vigilance from all financial market participants.

(b) *Working paper on regulatory constraints and reforms for money market funds ("MMFs")*

On 4 September 2023, ESMA [published](#) its working paper (2 of 2023) entitled 'Bang for (breaking) the buck: Regulatory constraints and money market funds reforms'.

In the paper ESMA models how the interaction between regulatory requirements, asset liquidity and investor redemptions determine the resilience of MMFs. Second, it shows how to measure the resilience of MMFs and how the maximum level of redemption a fund can withstand can be heterogeneous across EU and US MMFs. The paper also provides a quantitative assessment of regulatory reforms on MMF resilience and shows how the use of amortised cost and liquidity requirements can create challenges for MMFs exposed to instruments with limited liquidity.

The framework outlined in this paper may be used by national competent authorities ("NCAs") when considering regulatory options for MMFs.

(c) *Guidelines on MiFID II product governance requirements (This is a further update to section 4.1(p) of the quarterly report covering the first quarter of 2023)*

On 3 August, 2023, ESMA published the translated versions of its [final guidelines](#) on product governance requirements under MiFID II.

The aim of the revised guidelines is to strengthen investor protection and ensure that firms act in their clients' best interests during all stages of a product's life cycle.

Following ESMA's review in 2022 of its original product governance guidelines, key amendments introduced in the revised guidelines concerned:

- the specification of any sustainability-related objectives a product is compatible with;
- the practice of identifying a target market per cluster of products instead of per individual product (known as the 'clustering approach');
- the determination of a compatible distribution strategy where a distributor considers that a more complex product can be distributed under non-advised sales; and
- the periodic review of products, including the application of the proportionality principle.

The updated guidelines will apply to national competent authorities and firms (including in-scope fund management companies when providing the investment services of individual portfolio management or non-core services - excluding where the financial instruments are marketed or distributed exclusively to eligible counterparties) - after a period of two months from publication of the translated versions (3 October 2023).

(d) *Results of the CSA and mystery shopping exercise on MiFID II requirements*

On 6 July 2023, ESMA published a [statement](#) setting out the results of the 2022 CSA and mystery shopping exercise on requirements for information on costs and charges under MiFID II.

ESMA concluded that, although the CSA exercise revealed an adequate level of compliance with most elements of the MiFID II requirements, there were certain shortcomings and a lack of convergence in certain areas including:

- costs were not always shown as a percentage;
- a variation in allocation of costs between service and product costs;
- differing practices and sometimes lack of disclosure of inducements; and
- implicit costs were not always shown.

Based on its findings, ESMA will focus its convergence efforts on:

- developing new Q&As (or reviewing existing Q&As); and
- possible standardised EU format for the provision of information about costs and charges to clients.

(e) *Supervisory briefing on understanding the definition of advice under MiFID II*

On 11 July 2023, ESMA published a [supervisory briefing](#) setting out supervisory expectations by ESMA and NCAs on understanding the definition of advice under MiFID II.

The briefing covers:

- the provision of personal recommendations and whether other forms of presenting information such as investment research, filtering, general recommendations, generic

advice, presenting multiple products or access to model investment portfolios, could constitute investment advice;

- the presentation of a recommendation as suitable for a client or based on the client's circumstances. This includes making recommendations to become a client of a particular firm, making recommendations which are clearly unsuitable in the light of knowledge about the client, definitions of a "person's circumstances" and when recommendations will be viewed as based on a view of a person's circumstances;
- perimeter issues around the definition of personal recommendation, including disclaimers to the client and failing to use known client information in an attempt to try avoiding the qualification as investment advice; and
- issues around the form of communication, including whether the internet or apps are always a "distribution channel", use of social media posts, messages to multiple clients, distinguishing corporate finance and investment advice and whether these are mutually exclusive.

This supervisory statement is an update to CESR (ESMA's predecessor) Q&A, on 'Understanding the definition of advice under MiFID' which was published in April 2010.

(f) *UCITS and AIFMD sanction reports*

On 18 July 2023, ESMA published its [2022 reports](#) on the use by NCAs of sanctions under the UCITS Directive and AIFMD.

The reports noted that the pattern evidenced throughout the years (since 2013 for AIFMD and 2016 for UCITS) shows that besides a limited number of NCAs issuing an increased number of sanctions, the level of sanctions issued at national level remains stable and generally low, in particular when it comes to penalties.

Highlights from the data contained in the reports include:

On UCITS sanctions:

- nine NCAs imposed a total of 30 penalties, the total aggregated value of financial amounted to over €97 million, with an amount of over €95 million imposed by a single NCA;
- seven NCAs imposed a total of 18 measures; and
- 16 NCAs did not impose any sanction (penalty or measure) during the reference period.

On AIFMD sanctions, in 2022, 10 NCAs issued a total amount of penalties of €2.5m compared to €42.9m in 2021.

As regards convergence of sanctioning practices, the reports also indicates that:

- the data gathered under the sanction reports published so far keeps evidencing that the sanctioning powers are not equally used among NCAs; and
- the pattern evidenced shows that, besides a limited number of NCAs issuing an increasing number/amount of sanctions, the level of sanctions issued at national level remains stable and generally low, in particular when it comes to penalties.

ESMA intends to continue to work to promote further convergence in the use of sanctioning powers by NCAs and enforcement culture across the EU and it will issue separate reports on an annual basis for future reporting periods.

(g) *Statement highlighting the risks of securities lending in relation to retail client financial instruments and clarifying certain MiFID II investor protection requirements*

On 12 July 2023, ESMA published a [statement](#) on securities lending and other securities financing transactions ("SFTs") in relation to retail clients under MiFID II.

The statement highlights ESMA's investor protection concerns related to securities lending and SFTs and outlines the regulatory obligations of firms that engage in this practice. ESMA notes that, although SFTs may generate extra returns on financial instruments, they are also risky and complex transactions that are difficult for the average retail client to understand. ESMA also outlined its expectations for firms' compliance with the practical application of the relevant MiFID II requirements including that revenues from securities lending should directly accrue to the retail client, net of a normal compensation for the firm's services.

Referring to Article 16(8) of MiFID II, where a firm is required to make adequate arrangements to safeguard the ownership rights of clients and to prevent the use of a client's financial instruments on own account, except with the client's express consent, ESMA notes that this consent should not be sought by way of the firm's general terms and conditions.

A client should give his or her prior express consent on the use of his or her financial instruments on specified terms, evidenced in writing, through signature or equivalent. In an online environment, a client's express prior consent could for instance be requested by adding an additional and distinct step in the client's onboarding process on requesting its prior express consent. For the avoidance of doubt, this express prior consent shall not take the form of a pre-ticked box or any other method of passive consent. In addition, to ensure that clients are aware of the risks of SFTs when providing their express prior consent, firms should, in good time before requesting this consent, provide clients with adequate information on the risks involved.

In an accompanying [press release](#), ESMA states that it will continue to monitor the practice of securities lending to retail clients and, if necessary, issue further technical advice to the Commission on the topic.

(h) *Feedback report on pre-hedging*

On 12 July 2023, ESMA published a [report](#) following its call for evidence ("CfE") on pre-hedging.

The report notes that while the practice of pre-hedging is not defined in EU law, nevertheless, financial market participants understand pre-hedging as a practice which takes place when liquidity providers aim to hedge their inventory risk (the risk market makers are exposed to when buying or selling a security, as prices of assets on their inventories could potentially move against them) in an anticipatory manner. In the report, ESMA provides an overview of the feedback received to the CfE both in favour and against pre-hedging and identifies elements that could be considered in any future guidance in this area.

ESMA notes that pre-hedging takes place at a global level and across asset classes. Overall, ESMA concludes that pre-hedging is a voluntary market practice that might give rise to conflicts of interest or abusive behaviours. These risks should be considered when issuing any future guidance.

ESMA agrees with stakeholders' requests for international co-ordination of any future ESMA action on pre-hedging to ensure a level playing field across EU and non-EU jurisdictions. It believes that global regulatory principles applicable to pre-hedging could help to foster a common regulatory approach to this practice. Those principles could serve as the basis for developing any future ESMA guidance.

(i) *Report on national rules governing the marketing of investment funds under Regulation (EU) 2019/1156 on the cross-border distribution of funds (the "Regulation")*

On 3 July 2023, ESMA issued its [second report](#) on national rules governing the marketing of investment funds under the Regulation.

The report outlines the marketing requirements across member states. It analyses the effects of national laws, regulations and administrative provisions governing the marketing communications for investment funds.

The key findings of the report highlight:

- the transposition of the directive on cross-border distribution of funds and the passing of the ESMA guidelines on funds' marketing communications has helped increase harmonisation where national divergences existed; and
- only a limited number of NCAs carried out any ex-ante verifications of marketing communication despite the powers held by the NCA under the Regulation. An increasing number of NCAs reported carrying out ex-post verifications.

ESMA will issue the next iteration of the report in 2025.

(j) *Report on implementation of certain Shareholder Rights Directive (the "SRD") provisions*

On 27 July 2023, ESMA and the EBA published a [report](#), which analyses the implementation of provisions on proxy advisors and the investment chain in the SRD (as amended by SRD II).

The report finds the SRD framework concerning proxy advisors has proved generally robust, it advises a number of improvements

- clarifying the definition of the term "proxy advisor" in Article 2(g) to improve certainty and ensure it captures those exercising a similar economic function;
- defining minimum standards for codes of conduct for proxy advisors;
- enhancing disclosure obligations by proxy advisors vis-à-vis their clients, in cases where they provide consultancy services to issuers and advise investors on those same entities; and

- introducing a basic registration mechanism for proxy advisers at EU level.

The report highlights the following in relation to the charges applied by intermediaries and the practices of third country intermediaries:

- the level of disclosure and comparability of costs charged by intermediaries remain limited across the EU, mainly due to a lack of harmonisation of the types of fees or services and of detailed disclosure requirements. On these aspects there is room for improvement to increase competition among players and reduce the negative impact of costs on investors' engagement
- differences in the practices followed by third-country intermediaries are identified compared to European intermediaries, mainly for small local third-country intermediaries, which may also be due to the lack of standardised processes among member states. The report notes that a higher standardisation would benefit non-EU and EU entities alike.

The advice will inform the reports the Commission must submit to the European Parliament and the Council in assessing the implementation and the potential review process of the SRD II.

(k) *ESMA work programme for 2024*

On 28 September 2023, ESMA published its [2024 work programme](#), which sets out ESMA's objectives and outputs for each of its strategic priorities. The accompanying [press release](#) outlines ESMA's intended focus on digital change and the green transition.

ESMA's strategic priorities for 2024 are:

- effective markets and financial stability;
- effective supervision;
- retail investor protection;
- sustainable finance (including its final report on greenwashing proposing actions to combat the practice);
- technological innovation; and
- effective use of data and information and communication technology ("ICT") technologies

Annex IV to the report sets out an overview of ESMA's 2024 deliverables by output type together with a brief description of each type which includes planned CSAs (including on MiFID II requirements on suitability/sustainability, on sustainability in investment management (continuing) and on ESG disclosures in benchmarks), along with its technical guidelines to be delivered during 2024.

(l) *ESAs technical advice on criteria for critical ICT third-party service providers and oversight fees under the Regulation on digital operational resilience for the financial sector ((EU) 2022/2554) ("DORA")*

On 29 September 2023, the ESAs published [technical advice](#) to the Commission relating to delegated acts to be adopted pursuant to DORA.

An ICT third-party provider ("TPP") that is considered to be critical to the stability and integrity of the EU financial system will be designated by the ESAs as a critical ICT TPP ("CTPP") and will be charged fees relating to the conduct of oversight tasks.

The technical advice relates to delegated acts on:

- **Criticality criteria.** The ESAs propose quantitative and qualitative indicators for each of the criticality criteria, together with the information necessary to build up and interpret these indicators. They also propose certain minimum relevance thresholds for the quantitative indicators, where possible and applicable, to be used as starting points in the assessment process to designate CTPPs.
- **Oversight fees.** The ESAs propose the necessary types of expenditure to be covered by oversight fees, the appropriate method, basis and available information for determining the applicable turnover of the CTPPs (which is the basis of fee calculation), as well as the method of fee calculation.

The Commission is mandated to adopt the delegated acts by 17 July 2024.

(m) *EU AIF exposure to commercial real estate*

On 13 July 2023, ESMA published [data](#) on AIFs exposures to commercial real estate ("CRE") markets in the EU as of 31 December 2021.

At the end of 2021, 2789 AIFs were pursuing a CRE strategy of which 2,480 were AIFs marketed and/or managed by authorised EU AIFMs (net asset value of EUR 543bn). Within this sample, 2002 AIFs were pursuing primarily a CRE strategy, and 478 AIFs were pursuing partially a CRE strategy.

(n) National thresholds below which the obligation to publish a prospectus does not apply

On 3 July 2023, ESMA published a table in respect of Prospectus Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") that sets out a number of instances where the Prospectus Regulation does not apply to an offer of securities to the public (e.g. Article 1(3) establishes that the Prospectus Regulation does not apply to an offer of securities to the public with a total consideration in the Union of less than €1 million calculated over a period of 12 months).

ESMA has published a table which sets out a short description of the national thresholds below which no prospectus is required, a summary of any national rules which apply to offers below such thresholds and hyperlinks to the relevant national legislation. In Ireland, the threshold below which no prospectus is required is set at €8 million.

ESMA highlighted that the information in the table is provided for overview purposes only and that the national legislation and rules of each member state should be reviewed to get a complete picture.

3.6 European Commission

(a) *Central Securities Depositories Regulation (EU) 909/2014 (This is a further update to section 4.4 of the quarterly report covering the fourth quarter of 2022)*

On 11 August 2023, Commission Delegated Regulation (EU) [2023/1626 of 19 April 2023](#) on amending the regulatory technical standards laid down in Delegated Regulation (EU) 2018/1229 as regards the penalty mechanism for settlement fails relating to cleared transactions submitted by CCPs for settlement was published in the OJ.

The Commission Delegated Regulation removes the separate process on settlement discipline for the collection and distribution of the cash penalties in relation to settlement fails relating to cleared transactions to put central securities depositories in charge of the entire process of collection and distribution of penalties. The Delegated Regulation also specifies that in case of imbalanced positions in respect of cleared transactions the CCPs may allocate the remaining penalties' amount, credit or debit, to their clearing members and should establish relevant mechanism in their rules to that effect.

The Delegated Regulation applies from 2 September 2024.

- (b) *Delegated Act relating to the Commission's list of high risk third countries for AML purposes (This is a further update to section 3.1 of the quarterly report covering the second quarter of 2023)*

On 18 August 2023, the Commission adopted a [Delegated Regulation](#) which proposes to add Cameroon and Vietnam to the list of high-risk third countries which have strategic deficiencies in their anti-money laundering and countering the financing of terrorism (AML/CTF) regimes that pose significant threats to the financial system of the EU under Article 9(2) of the Fourth Money Laundering Directive ((EU) 2015/849) (MLD4).

Article 18a of Directive (EU) 2015/849 obliges member states to require obliged entities to apply enhanced customer due diligence measures when establishing business relationships or carrying out transactions involving high-risk third countries identified by the Commission. Accordingly, the consequences of a specific country being included on this list is that enhanced customer due diligence will apply in respect of entities domiciled in a jurisdiction included on the list.

The update of the list of high-risk third-country jurisdictions takes the legal form of a delegated regulation, which will enter into force after scrutiny and non-objection of the European Parliament and the Council over a period of one month (which can be prolonged for an additional month).

The Delegated Regulation was [published](#) in the OJ on 28 September 2023 and will enter into force on 18 October 2023.

- (c) *Delegated Regulation extending transitional period for third-country benchmarks under Benchmarks Regulation ((EU) 2016/1011) ("BMR") (This is a further update to section 4.2(b) of the quarterly report covering the fourth quarter of 2022)*

On 14 July 2023, the Commission adopted a [Delegated Regulation](#) extending the transitional period laid down for third-country benchmarks under Article 51(5) of BMR by two years to 31 December 2025 for third-country benchmarks used by supervised entities. Without the extension which ensures continued access by market participants in the EU to most of the world's benchmarks, the Commission believes that the EU could be put at a major global competitive disadvantage with potential risks for stability in its financial markets.

The Council and the European Parliament will now scrutinise the Delegated Regulation.

(d) *Guidance on sanctions circumvention*

On 7 September 2023, the Commission published a cross-sectoral [guidance note](#) addressed to European operators to help them identify, assess, and understand the possible risks of sanctions circumvention – and how to avoid it.

The guidance outlines the essential components for a company's compliance program to prevent circumvention of the EU sanctions against Russia. For the European operators most exposed to this risk, it sets out guidelines for implementing enhanced due diligence, including by providing best practices with regard to the assessment of business partners, transactions and goods. The guidance also includes a list of circumvention red flags that EU operators should consider when entering into a commercial relationship.

The guidance is not meant to be an exhaustive instrument applicable to all sectors and operators. As new forms of circumvention emerge, the Commission notes that further approaches to due diligence should be implemented simultaneously.

(e) *Report on the function of the Money Market Funds Regulation ("MMFR") (This is a further update to section 4.8(a) of the quarterly report covering the first quarter of 2023)*

On 20 July 2023, the Commission adopted a [report](#) on the functioning of the MMFR from a prudential and economic point of view.

The report highlights that the MMFR has enhanced financial stability and overall successfully passed the test of the recent market stress episodes. It also identifies certain vulnerabilities in the market for MMFRs and areas which would merit further assessment. However the Commission concludes it is not proposing a revision of the MMFR at the present stage.

3.7 European Systemic Risk Board ("ESRB")

(a) *Policy note on mitigation of financial stability risks in EU regulatory framework for certain fund types*

On 4 September 2023, the ESRB published an [issues note](#) explaining how the EU regulatory framework for investment funds could enhance the prevention and mitigation of systemic risks. The provisional agreement on AIFMD II provides a basis to apply broader systemic risk considerations to investment fund regulation. In line with the ESRB's previous proposals, several new provisions will enhance the regulatory and supervisory framework for investment funds from a financial stability perspective. In particular, the ESRB welcomes that the provisional agreement foresees an increased availability and consistent use of LMTs for fund managers.

The ESRB's conclusions include the following:

- structural vulnerabilities in investment funds that invest in assets, which are either inherently illiquid or might become illiquid in times of stress, are not fully addressed in the current regulatory framework.
- as a first line of defence, certain policy tools already present in the regulatory framework could be enhanced to better serve financial stability purposes. These include closer alignment between fund redemption terms and investment strategy, the use of anti-dilution LMTs, and better

preparedness for cash needs stemming from margin and/or collateral calls in derivative and repo transactions.

- there is merit in analysing and exploring further avenues to enhance the policy toolkit for investment funds from a financial stability perspective.

The ESRB intends to refine the policy options set out in this issues note, taking into account the findings of the AIFMD II review and wider international efforts currently under way. Its work will progress in two steps:

- first, over the coming years, the ESRB will focus on adapting the tools available in the regulatory framework to better address risks in corporate debt and real estate investment funds. This will be beneficial both for the transposition of the revised AIFMD II directive into national law by the national authorities and for the development of the relevant Level 2 and Level 3 delegated EU acts.
- second, over the medium term the ESRB will assess the need for more tools to reduce systemic risk. This medium-term work would inform any future reviews of the regulatory framework for investment funds, with such reviews expected 60 months after the revised framework has entered into force.

The ESRB notes that the insights in the issues note will also inform the FSB's [recent consultation](#) on policies to address vulnerabilities from liquidity mismatch in OEFs. The note focused on investment funds with large exposures to corporate debt and real estate as a priority, however, the policy options presented might also be applicable to other fund types with vulnerabilities similar to those present in corporate debt funds and real estate funds.

- (b) *Compliance Report on recommendations liquidity and leverage risks (This is a further update to section 4.8(a) of the quarterly report covering the first quarter of 2023)*

On 4 July 2023, the ESRB published a [compliance report](#) on the implementation of its [recommendation](#) relating to liquidity and leverage risks in investment funds (ESRB/2017/6) (the "Recommendation").

The Recommendation addressed to the Commission and ESMA aimed to address systemic risks related to liquidity mismatches and the use of leverage in investment funds.

The Recommendation is made up of five recommendations:

- A. (Liquidity management tools for redemption);
- B. (Additional provisions to reduce the likelihood of excessive liquidity mismatches);
- C. (Stress testing);
- D. (UCITS reporting); and
- E. (Guidance on Article 25 of AIFMD).

Overall, the ESRB's assessment team observed a significant level of compliance with the Recommendation while carrying out its assessment. In particular, the overall assessment of compliance with the implementation of recommendations A, B and D for the Commission is largely compliant, and the overall assessment of compliance with the implementation of recommendations C and E for ESMA is fully compliant. Parts 3 and 4 of the report provide detailed feedback on the respective assessments of the Commission's and ESMA's compliance with the Recommendation.

The Commission and ESMA have previously delivered their own reports on the implementation of the Recommendation to the ESRB

3.8 Financial Conduct Authority ("FCA") TMR update

On 19 September 2023, the FCA published a webpage announcing that, in the coming months, it will be contacting fund operators with respect to "landing slots" for exiting the temporary marketing permissions regime ("TMR").

The FCA notes that to avoid any delays in future communications, operators of UCITS in the TMR should ensure that the regulator holds the correct contact email address (as shown on the FCA's register) as this will be used to contact such operators with details of the process and landing slot. This email address should be for the operator and not an external consultancy firm or other third-party.

The process of exiting the TMR and the notification of landing slots is still under review. The FCA is working on operationalising the overseas fund regime ("OFR") and intends consulting on various aspects of the Handbook rules to ensure OFR funds are appropriately captured.

3.9 Financial Stability Board ("FSB")

(a) *Consultation report on financial resources and tools for resolution of CCPs*

On 19 September 2023, the FSB published a [consultation report](#) on proposed financial resources and tools for the resolution of central counterparties (CCPs).

The consultation report sets out the FSB's qualitative analysis of a set of financial resources and tools for resolution and proposes a framework as a global standard for financial resources and tools to support CCP resolution. Its findings include that:

- resources and tools carry different strengths and weaknesses and may be more or less appropriate in specific resolution scenarios
- no resource or tool, by itself, would be able to satisfy all aspects of the resolution resource parameters without some negative effect on financial stability or other drawbacks.
- resources and tools are likely to vary in their effect on financial stability; and
- access by the resolution authority to a combination of complementary resources and tools may be advantageous in meeting the objective of achieving a successful resolution

The analysis also shows that, based on how they are designed, certain resources and tools have relative benefits and drawbacks when evaluated against the identified parameters and analytical dimensions.

Based on the analysis, the FSB has identified a toolbox approach comprising a set of resolution-specific resources as an effective means to support resolution objectives.

The report remains open for comment until 20 November 2023.

- (b) *Progress report on enhancing resilience of non-bank financial intermediation ("NBFI") (This is a further update to section 4.13) of the quarterly report covering the first quarter of 2023)*

On 6 September 2023, FSB published a [progress report](#) to the G20 on enhancing the resilience of NBFI. The report sets out the progress made over the past year and the work that is planned by the FSB, standard-setting bodies ("SSBs") and other international organisations to enhance the resilience of NBFI.

The FSB's main focus is to reduce excessive spikes in the demand for liquidity by addressing the vulnerabilities that drive them or by mitigating their financial stability impact. The report outlines the findings of analytical work on key amplifiers of liquidity stress, particularly those associated with non-bank leverage. The FSB is working with SSBs to develop two sets of policies to reduce excessive spikes in liquidity demand:

- **Revisions to the FSB recommendations on liquidity mismatch in OEFs.** The aim of these revisions, combined with new guidance on anti-dilution LMTs from IOSCO, is to achieve a significant strengthening of liquidity management by OEF managers compared to current practices. The FSB and IOSCO intend to publish final reports in late 2023.
- **Policies to enhance margining practices.** In 2024, the FSB intends to issue high-level, cross-sectoral policy recommendations on liquidity risk management and governance to enhance the liquidity preparedness of market participants for margin and collateral calls. It will also develop further guidance and effective practices to increase transparency and evaluate initial margin responsiveness in centrally cleared markets.

The FSB comments that recent market incidents have confirmed that many of the key amplifiers worked in tandem to transmit shocks across the financial system. It is therefore critical for it and SSBs to ensure that the various policies being developed fit together from a system-wide perspective

The FSB also notes that, to date, experience with the use of tools for systemic risk mitigation in NBFI is limited. It will discuss the experiences of, and lessons learned by, its member authorities on the design and use of these tools. In addition, it will work with SSBs to assess whether implemented reforms have sufficiently addressed systemic risk in NBFI and consider whether additional tools for use by authorities are needed.

- (c) *Report on financial stability implications of leverage in NBFI*

On 6 September 2023, the FSB published a [report](#) on the financial stability implications of leverage in NBFI.

The report provides an overview of aggregate NBFI leverage trends across FSB jurisdictions and the associated vulnerabilities. It concludes that there are pockets of high leverage in the NBFI sector, such as in hedge funds.

The FSB has identified a number of data gaps that make it difficult to fully assess the vulnerabilities associated with NBFI leverage. In the report, it outlines potential policy actions to address these vulnerabilities, including:

- addressing the most salient data gaps by considering the use of trade repository data, enhancing reporting requirements for non-banks with high levels of leverage and expanding disclosure requirements;
- containing excessive leverage behaviour by carrying out further work on haircuts and margins for derivatives and securities financing transactions; and
- mitigating the financial stability consequences of high NBFIs leverage, including by considering measures to enhance prime brokers' risk management and improve the liquidity preparedness of non-bank investors.

On 5 September 2023, the FSB published a [letter](#) from Klaas Knot, FSB Chair, to G20 finance leaders ahead of their summit in New Delhi on 9 and 10 September 2023. The letter outlines the FSB's work to address existing vulnerabilities in the financial system and enhance the system's resilience to structural change. It confirms that work to address the associated financial stability risks will be a major focus of FSB policy work in 2024.

(d) *Thematic peer review on MMF reforms*

On 16 August 2023, the FSB [published](#) its summary terms of reference ("TOR") and request for public feedback as part of its thematic peer review on MMF reforms.

The FSB is seeking feedback from stakeholders as part of its thematic peer review on MMF reforms. The objective of the review is to take stock of the progress made by FSB member jurisdictions in assessing and addressing MMF vulnerabilities in their domestic markets, including their evidence-based explanation of relevant MMF vulnerabilities and policy choices made. Addressing vulnerabilities in money market funds is a key element of the FSB's work programme to enhance the non-bank financial intermediation sector.

The summary TOR provide more details on the objectives, scope, and process for this review. The FSB has distributed a questionnaire to member jurisdictions to collect information. In addition, as part of this peer review, the FSB invites feedback from stakeholders on the following issues:

- how MMF vulnerabilities differ across jurisdictions depending on MMF structure, investor composition, asset profile, or other factors;
- progress made by FSB member jurisdictions in addressing MMF vulnerabilities; and
- operational and other challenges faced by the industry in implementing MMF reforms.

The deadline for feedback is 8 September 2023. The peer review report is expected to be published by the end of 2023.

(e) *FSB consultation on liquidity mismatch in Open Ended Funds*

On 5 July 2023, the FSB published a [consultation report](#) on addressing structural vulnerabilities from liquidity mismatches in OEFs.

In the report, the FSB proposes revisions to its 2017 policy recommendations to address structural vulnerabilities from asset management activities.

The proposed revisions are intended to enhance the resilience of NBFIs by addressing the vulnerabilities that drive excessive spikes in demand for liquidity during stress (for example, by

reducing liquidity mismatch) and by mitigating their impact on financial stability (for example, by ensuring that redeeming investors pay the cost of liquidity).

The recommendations in the consultation report relating to liquidity mismatch are aimed at:

- strengthening regulatory reporting and public disclosure to facilitate assessment of liquidity risk in OEFs;
- promoting liquidity management at the fund design phase and going forward;
- widening availability of liquidity management tools and the use of them in stressed market conditions; and
- promoting fund-level and system-wide stress testing.

The proposals form part of the FSB's programme of work on NBFIs and should be read in conjunction with the IOSCO consultation report providing guidance on anti-dilution LMTs.

The consultation will remain open for feedback until 4 September 2023. The FSB intends to publish its final report in late 2023.

3.10 Government legislation programme - autumn session 2023

On 26 September 2023, the Irish government published its autumn [legislative programme](#).

- The Miscellaneous Provisions (Transparency and Registration of Limited Partnerships and Business Names) Bill 2023 aimed at modernising the Limited Partnership Act 1907 and the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill both remain listed in the other legislation (non-priority) list with heads of the bill listed as in preparation.
- The Financial Services and Pensions Ombudsman (Amendment) Bill to amend the Financial Services and Pensions Ombudsman (FSPO) Act 2017, to take account of the 'Zalewski' ruling and update elements where the FSPO could be viewed as administering justice has been included in the priority legislation list with the heads of bill approved.
- The Screening of Third Country Transactions Bill 2022 to develop an investment screening mechanism to respond to threats to Ireland's security and public order posed by particular types of foreign investment, and to prevent or mitigate such threats is listed in the other legislation (non-priority) list at order for report stage.

3.11 IOSCO

- (a) *Guidance on anti-dilution LMTs (This is a further update to section 4.10(c) of the quarterly report covering the second quarter of 2023)*

On 5 July 2023, IOSCO published a [consultation report](#) on guidance on anti-dilution LMTs.

IOSCO sets out proposed guidance for effective implementation of its 2018 recommendations for liquidity risk management for collective investment schemes. The report provides guidance to support greater and more consistent use of LMTs by responsible entities for OEFs, in both normal and stressed market conditions. The guidance identifies the key LMTs and covers the design and use of their implementation.

The report outlines that anti-dilution LMTs form a critical component of an overall liquidity risk management framework for OEFs. Remaining OEF investors are disadvantaged, and transacting investors potentially benefit, if transacting investors do not bear the costs of liquidity associated with fund subscriptions and redemptions. The consistent use of well-calibrated anti-dilution LMTs by responsible entities addresses these investor protection concerns by passing on to transacting OEF investors the costs of liquidity otherwise borne by the portfolio. This is done by adjusting the price at which they transact to account for explicit and implicit costs of trading. In a stressed market scenario, the deployment of well-calibrated anti-dilution LMTs can also dampen the impact of OEF buying and selling activities in underlying asset markets (including those associated with a potential first mover advantage), and therefore support financial stability.

The consultation will remain open for feedback on the proposals until 4 September 2023. IOSCO plans to publish its final report in late 2023.

(b) *Statement on alternatives to USD Libor*

On 3 July 2023, IOSCO [published a statement](#) concluding its review of alternatives to USD Libor, which assessed the extent to which four benchmarks developed as potential substitutes for USD LIBOR – two credit sensitive rates ("CSRs") and two term secured overnight financing rates (SOFR) rates – have implemented IOSCO's 2013 Principles for Financial Benchmarks in the areas of benchmark design (principle 6), data sufficiency (principle 7) and transparency (principle 9).

Most significantly, the review confirmed regulatory authorities' concerns that certain CSRs currently in use exhibit some of the same inherent "inverted pyramid" weaknesses as LIBOR.

IOSCO has communicated its rate-specific findings and recommendations to the relevant administrators improve the transparency of their rates and to refrain from any representation that the CSRs reviewed are "IOSCO-compliant".

IOSCO notes that some market participants (primarily in the US markets) have referenced CSRs in contracts, particularly in certain lending products, and that CSRs may continue to be offered and used going forward, despite the conclusions of this Review. IOSCO emphasizes market participants should proceed with caution if they are considering using CSRs and take into account the risks identified in the Review.

3.12 Sustainable Finance - ESG developments

(a) *Commission consultation on SFDR*

On 14 September 2023, the Commission published its [targeted consultation](#) on the implementation of the SFDR.

The consultation takes the form of a questionnaire focusing on the experience of stakeholders with the implementation of the SFDR. The questionnaire is split into sections which cover four main topics:

- current requirements of the SFDR;
- interaction with other sustainable finance legislation;
- potential changes to the disclosure requirements for financial market participants; and
- potential establishment of a categorisation system for financial products.

The Commission is interested in understanding how the SFDR has been implemented and any potential shortcomings, including in its interaction with the other parts of the European framework for sustainable finance, and in exploring possible options to improve the framework and to address any potential shortcomings. The questionnaire seeks feedback on suggested adjustments and improvements to SFDR on a wide range of issues including:

- clarification of concepts such as “sustainable investment”;
- interaction of SFDR with other relevant pieces of EU regulation, such as the Taxonomy and MiFID II;
- entity-level disclosures, including limited mandatory PAI indicators; and
- product-level disclosures, including standardised product disclosure requirements across (a) all financial products offered in the EU, regardless of their sustainability-related claims or any other consideration; or alternatively (b) for financial products that would hit certain thresholds in terms of sustainability claims.

Notably the consultation acknowledges that the SFDR is being used as a labelling scheme (despite being designed as a disclosure regime). Accordingly, the questionnaire suggests that there may be a demand for establishing sustainability product categories. Options being examined include developing a more precise product categorisation system focused on the type of investment strategy, based on criteria that do not necessarily relate to existing SFDR concepts (i.e. whereby concepts such as environmental/social characteristics or sustainable investment and the distinction between current Articles eight and nine of SFDR could disappear altogether from the transparency framework).

Firms will be closely monitoring the consultation which has the potential to significantly shake up the current regime for sustainability products and their associated distribution strategies. The consultation will run for three months until 15 December and the Commission intends to adopt a report on the functioning of the SFDR by Q2 2024.

(b) *Central Bank speech on sustainable finance in practice for fund managers*

The Central Bank has published a speech by Patricia Dunne, Director of Securities and Markets Supervision delivered on 27 September 2023 entitled '[Sustainable Finance in Practice for Fund Managers](#)'.

The remarks include useful data on what the Irish funds landscape currently looks like, as of the 30 June:

- Article six funds comprised 4,690 funds with approximately €2.5 tn in AUM;
- there were 1,664 Article eight funds with approximately €1.2 tn in AUM; and
- finally, there were only 159 Article nine funds with approximately €30bn.

In terms of new funds being authorised, the split between Article six products or Article eight and Article nine funds is more balanced. Over the last 12 months, of the newly authorised funds, the Central Bank has approved 131 Article six funds, whereas there have been 134 Article eight or Article nine funds.

In relation to the ongoing CSA, the Central Bank's work will be split into two phases: Phase 1 (due to conclude by 31 January 2024) will specifically address greenwashing risks and phase 2 (due to finish by 30 September 2024) will focus more generally on sustainability and disclosure risks.

Following its review of a sample of the fast-track submissions, the remarks note that the Central Bank will in due course look to publish additional clarifications in terms of how funds should meet their disclosure obligations. The speech noted the Central Bank have seen interpretations of SFDR which, whilst there may be an argument that they comply with 'the letter' of the requirements, certainly do not in the Central Bank's opinion, meet the spirit of the rules.

The remarks noted a number of practical, live, disclosure issues arising from the review as follows:

Finding 1: 'What environmental and/or social characteristics are promoted by this financial product?'

This relates to Article eight products and focuses on the requirement that funds must address the disclosure requirement by positively indicating what characteristics the fund promotes.

The Central Bank notes the use of exclusion strategies by index funds. While the EC Q&A provides that exclusion strategies are permissible for Article eight products the Central Bank does not believe the intention was to 'water down' the Article eight designation to such an extent that funds with a list of limited investment exclusions should be deemed to be prompting an environmental or social characteristic.

Finding 2: Disclosure related to the minimum proportion in sustainable investments with an environmental / social objective or the minimum proportion of investments used to attain the environmental or social characteristics promoted by the fund

In a number of instances for Article nine products, the Central Bank has identified issues with disclosures of the minimum proportion of the portfolio to be allocated to sustainable investments with an environmental or social objective. The Central Bank's expectation is that the minimum proportions disclosed in the pre-contractual documentation to be accurate and not subject to change e.g. by way of website disclosure (unless by way of amendment to the prospectus or supplement).

The disclosure of a range for both the minimum proportion of sustainable investment with an environmental objective and a minimum proportion of sustainable investments with a social objective. In some instances, the ranges included were between 0%-100%. The Central Bank were of the view that this is not meaningful information for an investor assessing what the allocation to minimum investments with an environmental or social objective will be.

The Central Bank found identified a number of Article eight funds where the minimum proportion aligned with environmental or social characteristics was low or even zero. This raised questions as to the appropriateness of the fund being subject to Article eight of the SFDR given the low impact on the strategy and the composition of the fund's portfolio.

Finding 3: Disclosure related to index tracking funds which employ an exclusionary screening methodology

The majority of such funds have adopted an approach whereby they disclose that the assets of the funds are close to 100% aligned with the environmental or social characteristics promoted. These

disclosures appear to be based on the fact that the relevant index provider has determined that the constituents of the index are not inconsistent with the screening criteria employed. The Central Bank's concern is that there does not appear to be any additional assessment undertaken of the fund's assets to assess their environmental or social characteristics.

Ms. Dunne's remarks concluded by noting the Central Bank intends to expand its ESG analysis to incorporate machine learning practices in order to assess veracity of individual claims made within fund documentation.

The Central Bank intends to address a number of the issues which are of such significance for the Irish funds sector in a timely manner via domestic clarifications (without awaiting the review of the EU SFDR or clarifications on a pan European basis). The Central Bank also intends to host a workshop with key stakeholders to explain the findings in more detail and discuss how the issues can be resolved.

(c) *Proposal to amend accounting directive to adjust corporate thresholds for inflation*

On 13 September 2023, the Commission launched [a proposal](#) to amend Directive 2013/34/EU (the Accounting Directive) as regards the adjustments of the monetary criteria for micro, small, medium-sized and large undertakings or groups, which revisions will result in a reduced number of companies subject to sustainability reporting under Corporate Sustainability Reporting Directive (EU) (2022/2464) ("CSRD") and the Taxonomy.

This initiative will amend the thresholds in the directive for determining the size category of a company to account for the impact of inflation.

(d) *Launch of framework on Taskforce for Nature-related Financial Disclosures ("TNFD")*

On 18 September 2023, the [Taskforce for Nature-related Financial Disclosures](#) published its final [framework](#) of recommendations for nature-related risk management and disclosure designed to "inform better decision-making by companies and capital providers, and ultimately contribute to a shift in global financial flows toward nature-positive outcomes and the goals of the Montreal Global Biodiversity [Framework](#)".

TNFD contains 14 recommended disclosures and additional implementation [guidance](#) to help market participants get started with integrating assessment and corporate reporting related to nature in their own time, and subject to their own strategy, materiality, cost and capability considerations. The TNFD have been drawn up over the past two years following pilot testing by over 200 companies and financial institutions.

According to the TNFD, policymakers, regulators, asset owners, asset managers and global companies are all increasing their focus on nature-related risk management and the necessity of mobilising private sector engagement and finance to tackle nature loss and scale-up nature-based solutions. While there is currently no mandatory requirement for European entities to report against TNFD, Tony Goldner, executive director at the TNFD, said it is up to governments to decide within their own individual contexts whether policy or regulatory bodies plan to make the TNFD's recommendations a mandatory part of their disclosure framework.

“In Europe, for example, CSRD covers many of the aspects that we discuss within these recommendations, and over the past two years we have been working to align our approach so that it remains consistent with the CSRD’s requirements. Other governments have shown interest in what we are doing, but it is ultimately up to them to decide whether they want to consider it as a mandatory option.”

The TNFD recommends that companies disclose on the full set of nature-related dependencies, impacts, risks and opportunities, including climate, of their operations and across their value chain. This includes a consideration of the upstream (supply) and downstream (distribution and sale) value chains. For financial institutions, this includes lending, investment and/or insurance, as well as fee-based advisory activities. The TNFD defines nature-related risks as the potential threats posed to an organisation linked to its and other organisations’ dependencies on nature and nature impacts.

The 14 TNFD recommendations are incorporated within four conceptual pillars:

1. **Governance** – the organisation’s governance around nature-related dependencies, impacts, risks and opportunities;
2. **Strategy** – the actual and potential impacts of nature-related risks and opportunities for the organisation’s businesses, strategy and financial planning where such information is material;
3. **Risk & impact management** – how the organisation identifies, assesses and manages nature-related dependencies, impacts, risks and opportunities; and
4. **Metrics & targets** – the metrics and targets used to assess and manage relevant nature-related dependencies, impacts, risks and opportunities where such information is material.

The TNFD has been endorsed by G7 and various global political leaders have expressed support for businesses and financial institutions across sectors to engage with the TNFD’s recommendations.

Following the example of the Task Force on Climate-related Financial Disclosures, the TNFD initiative will track voluntary market adoption on an annual basis through an annual status update report beginning next year.

- (e) *ESMA launch CSA on sustainability-related disclosures and the integration of sustainability risks*

On 6 July 2023, ESMA announced on its [website](#) the launch of a CSA with NCAs on sustainability-related disclosures and the integration of sustainability risks. The goal of the CSA is to assess the compliance of supervised asset managers with the relevant provisions in the SFDR, the Taxonomy and relevant implementing measures, including the relevant provision in the UCITS and AIFMD implementing acts on the integration of sustainability risks.

Using a common methodology developed by ESMA, NCAs will share knowledge and experiences on how to foster convergence in how they supervise sustainability related disclosure. Among the main objectives are:

- to assess whether market participants adhere to applicable rules and standards in practice;
- to gather further information on greenwashing risks in the investment management sector; and
- to identify further relevant supervisory and regulatory intervention to address the issue.

Ensuring greater convergence in the supervision of risks stemming from incorrect and misleading disclosures is central to the effort to foster transparency and is identified as one of the [Union Strategic Supervisory Priorities](#). The CSA will promote this goal by improving the comprehensibility of ESG disclosures by asset managers across key segments of the sustainable finance value chain.

Next steps

In 2023 and until Q3 2024, NCAs will undertake their supervisory activities and share knowledge and experiences through ESMA to foster convergence in how they supervise sustainability-related disclosures and sustainability risk integration in asset managers. In addition the preliminary findings on the identification of greenwashing risks at entity and product level will provide input to ESMA's final report on greenwashing due in May 2024.

- (f) *Central Bank launches CSA on sustainability-related disclosures and the integration of sustainability risks*

On 15 August 2023, the Central Bank commenced its CSA engagement with the issuance of a detailed questionnaire to certain FMCs selected for participation in the CSA.

The CSA aims to establish whether market participants adhere to applicable rules and standards in practice; to gather further information on greenwashing risks in the investment management sector; and to identify further relevant supervisory and regulatory intervention necessary to address the issue.

The focuses of the questionnaire include:

- *Integration of sustainability risk and factors:* FMCs are required to provide policies, processes and procedures evidencing governance structures and operational systems in place for identifying, measuring, and managing the impact of environmental and social factors on investment returns, as well as how conflicts of interest which can give rise to these risks are managed. FMCs must also provide the time commitment of those responsible for managing sustainability risks, both as a percentage of their overall time commitment and of the fund manager's total number of full-time equivalents. Details must also be provided of those responsible for managing greenwashing risk, how it is defined and on the application of safeguard or mitigants to address any potential greenwashing risks.
- *Transparency of entity-level (principal adverse impacts ("PAI"), remuneration and website) disclosures:* For those FMCs which consider PAIs, either on a mandatory or voluntary basis, a link to the required PAI statement must be provided, along with evidence of translations of the summary section into relevant host member state languages and disclosure of the degree of alignment with the Paris Agreement objectives. A description of the guidelines/procedures in place to ensure that sustainability related information published on the website is up to date must also be included.
- *Transparency of product-level (ESG labels, net-zero strategies and investor engagement) disclosures:* For selected Article six, eight and nine funds' the questions focus on whether product credentials communicated, such as ESG labels, awards, ratings or certifications (as applicable), net-zero/carbon neutrality claims and engagement strategies as well as controls in place to substantiate such descriptions of ESG metrics and data.
- *Fund names, sustainable/Taxonomy aligned investments and methodologies:* The questionnaire requires details in respect of selected managed products including on the name of the fund (whether it reflects the sustainable characteristics/objectives); any sustainable investment methodology employed for the fund; compliance with website disclosure rules; and

explanations of any differences (threshold >5% than the minimum commitment as prescribed by ESMA) between pre-contractual minimum commitments to sustainable and/or Taxonomy aligned investments and actual levels of such investments along with any corrective measures taken.

While not all FMCs are in scope of the questionnaire it provides a strong indication of regulatory focus on compliance with SFDR website and periodic disclosure rules and sustainability risk management rules and likely target areas for CSA findings. FMCs should review the content of the CSA and consider how it might approach responding to the queries raised and with the aim of ensuring alignment with regulatory expectations which will likely issue to all FMCs in due course.

The Central Bank has directed that the selected FMCs in scope of the CSA questionnaire have been given a four-week deadline (ending on 12 September 2023) for responding to the questionnaire. While the ESMA CSA is scheduled to run until Q3 2024, the Central Bank notes the deadline is necessary to facilitate efficient implementation of the CSA which, given the timeline, is expected to comprise several phases.

- (g) *Commission adopts regulation on EU sustainability reporting standards (This is a further update to section 4.13(f) of the quarterly report covering the second quarter of 2023)*

The Commission has adopted its [Commission Delegated Regulation](#) (the "Delegated Regulation") setting out the first set of ESRS, together with publication of a [Q&A](#) on the ESRS. The CSRD introduces requirements for in-scope companies to report against the ESRS. The standards cover the full range of environmental, social, and governance issues, including climate change, biodiversity and human rights. In the Delegated Regulation the Commission has modified the European Financial Reporting Advisory Group's draft ESRS by phasing-in certain reporting requirements; giving companies more flexibility to decide exactly what information is material to their circumstances; and making some requirements voluntary.

Commissioner McGuinness commenting on the adoption of the Delegated Regulation [stated](#):

"The standards we have adopted today are ambitious and are an important tool underpinning the EU's sustainable finance agenda. They strike the right balance between limiting the burden on reporting companies while at the same time enabling companies to show the efforts they are making to meet the green deal agenda, and accordingly have access to sustainable finance."

The Parliament and the Council will now formally scrutinise the Delegated Regulation for two months, extendable by a further two months.

Walkers have published a recent [briefing](#) in relation to the Delegated Regulation.

- (h) *Joint ESAs' Report on the extent of voluntary disclosure of principal adverse impact under the SFDR*

On 28 September 2023, ESMA published its [second report](#) on the extent of voluntary disclosure of PAI under Article 18 SFDR.

ESMA followed a similar approach to the 2022 report surveying NCAs to gather information on the current state of entity-level voluntary PAI disclosures under the SFDR. The survey also sought NCAs'

feedback on the disclosures by financial market participants ("FMPs") choosing to explain why they do not consider adverse impacts of investment decisions on sustainability factors and addressed disclosures of PAI consideration for financial products for the first time since FMPs had to apply them by 30 December 2022.

The report notes while the extent of compliance with the disclosure requirements still varies significantly across both FMPs and jurisdictions, there was an overall improvement in the application of voluntary disclosures. Also, disclosures appear to be easier and more straightforward to find on websites. One area needing improvement relates to the explanation of non-consideration of PAIs, since explanations are still not fully complete and satisfactory. Also, when PAIs are considered, the disclosures on the degree of alignment with the Paris Agreement are still vaguely formulated.

Section 3.1 of the report provides some good and bad examples of disclosures under Article 4(1)(a) and (b) of the SFDR ('dos and don'ts' table).

Section 3.2 of the report also includes recommendations to the Commission and NCAs. Recommendations to the NCAs include:

- focusing on website supervision and use of web scraping (one NCA had announced the launch of an IT tool to help locate PAI disclosures on the websites);
- follow up with non-compliant FMPs and consider whether the use of enforcement tools could be appropriate;
- provide support to market participants and highlight common supervisory expectations; and
- the ESAs noted the use of incorrect references to specific disclosure obligations in the responses provided by NCAs (a) between the references to 'consider' and 'take into account' in connection with specific disclosures; and (b) widespread use from NCAs of the terms 'ESG criteria', 'ESG risks' and 'sustainable investments goals' but these terms are not related to the consideration of adverse impacts. The report noted there is still an improvement and build-up of expertise needed by the NCAs to enable thorough checking of compliance.

Future versions of the report will include an assessment of the PAI disclosure template and the disclosure of engagement policies.

- (i) *ESMA public statement on sustainability disclosure requirements under the Prospectus Regulation*

On 11 July 2023, ESMA issued a [public statement](#) on its expectations of how the specific disclosure requirements of the Prospectus Regulation in relation to sustainability-related matters in equity and non-equity prospectuses should be satisfied in terms of environmental, social and governance ("ESG") transitioning. The statement aims to encourage a co-ordinated approach to the scrutiny of sustainability-related disclosure in prospectuses and to support investors' ability to make an informed investment decision considering the importance of disclosure relating to sustainability-related matters.

Whilst typically relevant to Irish funds only in the context of certain closed-ended AIFs falling in scope of the Prospectus Regulation the statement is informative of ESMA's expectations relating to disclosure of sustainability-related matters.

ESMA emphasises the importance of an issuer's non-financial reporting under the Non-Financial Reporting Directive (Directive 2014/95/EU) and the future sustainability reporting under the CSRD,

especially because such disclosure may be material under the Prospectus Regulation and included in an issuer's prospectus. In addition, regarding non-equity securities advertised as taking into account a specific ESG component or pursuing ESG objectives, the statement clarifies the disclosure required in relation to 'use of proceeds' bonds and 'sustainability-linked' bonds.

ESMA's statement also notes that sustainability-related disclosure is sometimes included in advertisements but not in prospectuses themselves, and highlights that this disclosure should be included in prospectuses if it is material under the Prospectus Regulation.

ESMA and NCAs will continue to monitor the market to determine whether this guidance should be modified, for instance in cases where new products are introduced to the market or there are changes in the legislation.

- (j) *FSB progress report on climate related disclosures (This is a further update to section 4.9(e) of the quarterly report covering the fourth quarter of 2022)*

On 13 July 2023, the FSB published a [progress report](#) on promoting climate-related disclosures.

The FSB roadmap for addressing financial risk arising from climate change responded to the need for coordinated action between standard-setting bodies (SSBs) and other international organisations. It includes the following observations on areas which have been identified for further attention:

- *On firm-level disclosures:* The FSB will work with the ISSB, IOSCO and other relevant bodies to promote the timely and wide use of the standards.
- *On data:* There is a continuing need for enhancing climate data and improving its accuracy, consistency and quality, in order to support climate risk assessment and scenario analysis exercises.
- *On vulnerabilities analysis:* Further work is needed to embed climate scenarios into monitoring of financial vulnerabilities and to develop understanding of the cross-border and cross-sectoral transmission of climate shocks in order to obtain financial stability insights.
- *On regulatory and supervisory practices and tools:* As work on regulatory and supervisory approaches to climate-related risks is evolving, there is a growing interest in the role of transition plans of financial institutions and non-financial corporates not only in enabling an orderly transition, but also as a source of information for financial authorities to assess micro and macroprudential risks. The FSB is setting up a working group that will, as an initial task, develop a conceptual understanding on the relevance of transition plans and planning by financial and non-financial firms for financial stability.

Across all blocks of the roadmap, financial institutions' progress in addressing climate-related financial risks relies on the non-financial corporate sector making similar progress, including in the areas of firm-level disclosures, addressing data gaps and transition plans.

The report was delivered to the G20 finance ministers and central bank governors ahead of their meeting on 17-18 July 2023.

- (k) *IOSCO report on compliance carbon markets ("CCMs")*

On 17 July 2023, IOSCO published a [final report](#) on CCMs, which aims to support IOSCO members seeking to establish new or to enhance their existing CCMs.

The report examines the specific characteristics of CCMs compared to traditional financial markets and outlines a set of recommendations aimed at making these markets efficient and ensuring they function with integrity, learning from the experience of others.

The report includes twelve recommendations relating to primary market and secondary market functioning. The recommendations are addressed to relevant authorities to allow jurisdictions and regulatory authorities the flexibility they may require consistent with their legal mandates as CCMs are established in their jurisdictions.

At primary market level, the recommendations touch upon transparency and predictability of primary market decisions and market structures for primary markets, and, in doing so, cover allowance allocation mechanisms, market stability mechanisms and primary market access.

At secondary market level, the recommendations focus on market integrity, transparency and structure.

(l) *Commissioner speech on Taxonomy Delegated Acts*

On 6 July 2023, Commissioner McGuinness delivered [opening remarks](#) at the joint ECON/ENVI committee meeting on the recently adopted Taxonomy delegated acts.

The speech provides a helpful overview on where the Commission stands on sustainable finance, dealing specifically with the Taxonomy delegated acts, the work the Commission is undertaking on usability of the Taxonomy and then transition finance.

(m) *Commission recommendation on transition finance published in the OJ (This is a further update to section 4.13(a) of the quarterly report covering the second quarter of 2023)*

On 7 July 2023, the Commission recommendation of 27 June 2023 on facilitating finance for the transition to a sustainable economy was [published](#) in the OJ and entered into force.