

Asset Management & Investment Funds

QL Quarterly Legal &
RD Regulatory Developments

July 2022 to September 2022

Global Legal and Professional Services

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

1. UCITS DEVELOPMENTS

1.1 ESMA UCITS Q&A updates

On 20 July 2022, ESMA published an updated version of its UCITS [Q&As](#) with the following new Q&As:

- Section X: Depository – new Q&As 7 and 8 on reconciliations; and
- Section XIII: Delegation - new Q&A 1 on the responsibility to ensure compliance with the rules governing marketing communications.

1.2 European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) (No.2) Regulations 2022

On 9 September 2022, S.I. No. [442/2022](#) European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) (No.2) Regulations 2022 (the "**Regulations**") were published in Iris Oifigiúil. The Regulations further amend the UCITS Regulations 2011 (S.I. No. 352 of 2011) to give effect to the Commission Delegated Directive (EU) 2021/1270 of 21 April 2021 as regards the sustainability risks and sustainability factors to be taken into account for UCITS.

The Regulations came into operation on 12 September 2022.

2. AIFMD UPDATES

2.1 ESMA AIFMD Q&A updates

On 20 July 2022, ESMA published an updated version of its AIFMD [Q&As](#) with the following new Q&As:

- Section VI: Depositories – new Q&As 15 and 16 on reconciliations; and
- Section VIII: Delegation – new Q&A 4 on the responsibility for compliance with requirements for marketing communications.

2.2 Updates to Central Bank's pre-submission process for certain QIAIFs

On 1 July 2022, the Central Bank of Ireland ("**Central Bank**") provided an update relating to the pre-submission process it has in place for certain QIAIFs. Going forward this process is only required where it is proposed that a QIAIF will invest in: (i) Irish property assets; or (ii) crypto assets. However the Central Bank has made it clear that it may update the list of QIAIFs which are required to make a pre-submission in the future by amending the [webpage](#) setting out details of the pre-submission process for QIAIFs.

Our [advisory](#) provides an overview of these updates.

2.3 Updates to Central Bank's authorisation requirements for QIAIFs

On 1 July 2022, the Central Bank updated its Authorisation Process for AIFs [webpage](#) to include a link to the pre-submission requirements detailed in section 2.2 and additional information under the heading "Quality assurance checks of Qualifying Investor AIFs". This section states "The Central Bank carries out quality assurance reviews post authorisation on a sample of QIAIFs. These QIAIFs are selected at the discretion of the Central Bank. These reviews focus on the QIAIF's compliance with the Central Bank's AIF Rulebook (and other regulatory / legislative obligations as applicable). Where selected for a quality assurance review, the QIAIF or their representative is expected to respond to any comments raised by the Central Bank in a timely manner".

2.4 European Central Bank ("**ECB**") publishes an Opinion on the AIFMD II Proposal (*This is a further update to section 1.1 of the report covering the fourth quarter of 2021*)

On 9 August 2022, the ECB published its own initiative [opinion](#) on the proposal with regards to delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds ("**AIFMD II**"). The ECB welcomes the proposed directive's principal aim to fill certain regulatory gaps in the functioning of AIFMD.

A number of specific observations and proposals are made by the ECB on the operationalisation and development of ex ante macroprudential tools to reduce risks posed by alternative investment funds ("**AIFs**") to the financial system, as well as ensuring that detailed data on individual AIFs are made available to the ECB and the European System of Central Banks ("**ESCB**").

The ECB also sets out a technical working document with its proposed amendments to the Commission's draft text, in the following areas:

- Liquidity management and macroprudential tools.

The Commission's review of the functioning of the rules laid down in AIFMD should include a review of the available macroprudential tools for AIFs. For this purpose, the Commission's review, as detailed in the proposed new Article 69b of AIFMD, should be expanded to include an ex ante review of developments in the use of macroprudential tools to manage AIF liquidity risks. This expansion would facilitate an assessment of whether the availability of certain instruments, not only the suspension of redemptions, should be harmonised and/or expanded upon. The review should also specifically cover how Alternative Investment Fund Managers ("**AIFMs**") of leveraged, open-ended AIFs set leverage limits and how supervisors exercise the powers to impose leverage limits. In conducting this review, the Commission should take into consideration developments in relevant international standards.

While the proposed directive specifies a common set of optional liquidity management tools which AIFMs of open-ended AIFs may use, the ECB recommends that the ability of such AIFs to withstand liquidity risks would be strengthened if AIFMs were required, as a minimum, to select several, and not merely one, of the listed tools.

- Reporting.

The proposed directive aims to eliminate duplicative reporting requirements existing under Union and national legislation, including, in particular, certain statistical regulations adopted by the ECB. The ECB stresses, however, that the integration of the underlying reporting infrastructure must not interfere with or prejudice the ECB's competence to adopt statistical regulations for its own purposes or to include the full set of relevant statistical reporting requirements in relevant ECB regulations, such as those on the collection of statistics on holdings of securities and on the assets and liabilities of investment funds.

- ESCB access to detailed data on the AIF sector.

The ECB proposes that the proposed directive should require that the detailed information that the competent authorities of the home Member State of an AIFM are required to make available to ESMA (amongst other authorities) pursuant to Article 25(2) of the AIFMD is made available by ESMA to the ECB and other relevant ESCB central banks. ESCB central banks should have access to detailed data on the AIF sector to be able to fulfil their tasks of defining and implementing monetary policy and contributing to the stability of the financial system.

The opinion notes that certain AIFs' investment strategies involve them in taking positions, which are often leveraged, in the securities market, in particular in fixed income products such as sovereign bonds. By having access to detailed individual AIF data, the ESCB will be able to follow how such AIF activities in the securities market, in particular for sovereign bonds, affect the monetary policy transmission mechanism. With access to such data, ESCB central banks will also be able to better assess individual AIFs and their heterogeneity and hence more effectively contribute to managing the extent to which

systemic risks may build up in the AIF sector. As one of the underlying aims of the proposed directive is to avoid duplication of reporting requirements, the ECB notes it is not feasible for it to impose additional data reporting on AIFMs when the required data from the competent authorities is already held by ESMA and the European Systemic Risk Board (the "ESRB").

3. CENTRAL BANK UPDATES

3.1 Beneficial Ownership Register updates

On 25 July 2022, the Central Bank published an [update](#) dated 22 July 2022 relating to the beneficial ownership register for certain financial vehicles including Irish Collective Asset-Management Vehicles ("ICAVs"), Common Contractual Funds ("CCFs"), unit trusts and Investment Limited Partnerships ("ILPs"), detailing certain changes being introduced. The update specifically relates to the process for beneficial owners who do not currently hold a PPS number or a Central Bank of Ireland reference number. A verification of identity process will be in operation from 8 August 2022, in advance of the new beneficial ownership information return template being made available. Just to note that for beneficial owners who do not hold a PPS number, but who have previously been approved in a PCF role, the unique Central Bank reference number provided to the person under this process may be entered on the beneficial ownership information return.

On 18 August 2022, the Central Bank published a subsequent [update](#) on its website confirming that the new beneficial ownership information return template to be used for the collection of PPS numbers that had been delayed. The update states that a new template will be made available in Q4 2022 and the precise date will be communicated by the Central Bank at the earliest opportunity. All relevant Central Bank guidance and supporting documentation will be updated in advance to support these changes.

In the meantime certain financial vehicles, including in scope investment funds (that is, ICAVs, unit trusts, ILPs and CCFs), are reminded to continue to engage with the verification of identity process as previously outlined and are required to ensure a Central Bank reference number is available, where required, for beneficial owners who do not hold a PPS number, and do not currently hold a Central Bank reference number (where they have previously been approved in a PCF role).

The declaration as to verification of identify form is available [here](#).

3.2 Central Bank Act 1942 (Section 32D) (Certain Financial Vehicles Dedicated Levy) (Amendment) Regulations 2022

The [Central Bank Act 1942 \(Section 32D\) \(Certain Financial Vehicles Dedicated Levy\) \(Amendment\) Regulations 2022](#) came into effect on 8 July 2022. The regulations update the 2021 regulations (Central Bank Act 1942 (Section 32D) (Certain Financial Vehicles Dedicated Levy) Regulations 2021) to replace the schedule which sets out the amount of the beneficial ownership levy payable in respect of ICAVs, ILPs, unit trusts, CCF and credit unions. The levy amount has been increased to €811 and the Central Bank issued a notice to relevant entities requesting payment of this levy.

3.3 Central Bank's quarterly bulletin

On 7 July 2022, the Central Bank published its third quarterly [bulletin](#) of 2022. While the bulletin provides updates on the Irish economy including recent developments and information on domestic demand; exports, imports and balance of payments, the labour market; prices and costs; and the public finances, there is nothing specifically relating to funds or the asset management industry in this bulletin. Central Bank's markets update

On 4 July 2022, the Central Bank published its seventh markets [update](#). The only policy development contained in this update is dealt with in section 3.4.

3.4 Money Market Funds – Notice of Intention *(This is a further update to section 4.12(b) of the report covering the first quarter of 2022)*

On 4 July 2022, the Central Bank published a [notice of intention](#) in relation to the application of the ESMA Guidelines on stress test scenarios under the MMF Regulation (the "**Guidelines**"). These Guidelines apply from 4 July 2022 and the Central Bank advised that it will in due course consult on the incorporation of a provision in the Central Bank UCITS Regulations and AIF Rulebook that all managers of MMFs adhere to the Guidelines. In the interim, the Central Bank of Ireland expects full compliance with the Guidelines from 4 July 2022.

3.5 Central Bank (Individual Accountability Framework) Bill (the "**Bill**")

(a) *Publication of the Bill (This is a further update to section 4.10 of the report covering the third quarter of 2021)*

On 28 July 2022, the draft [Central Bank \(Individual Accountability Framework\) Bill 2022](#) was initiated in Dáil Éireann, effectively commencing the passage of this bill through the Irish legislative process.

The four key features set out in the general scheme of this bill published in July 2021 remain the same and are:

1. the introduction of a senior executive accountability regime;
2. three separate sets of conduct standards;
3. enhancements to the Central Bank's fitness and probity regime; and
4. updates to the Central Bank's administrative sanctions procedure.

Additional amendments to the fitness and probity regime and the administrative sanctions procedure are included in the draft bill.

The Central Bank released a [statement](#) that it will continue to work with the Department of Finance throughout subsequent stages as the legislation progresses through the Oireachtas to enactment.

(b) *Opinion of the ECB on the Bill*

On 13 September 2022, the ECB published an [Opinion](#) on the Central Bank (Individual Accountability Framework) Bill 2022. The ECB strongly welcomes the measures envisaged by the Bill regarding the individual responsibilities of senior persons, including management board members and key function holders.

The ECB reminds the Central Bank to refrain from conferring regulatory authority and tasks on the Central Bank under Irish law which may impinge upon the exclusive competence of the ECB, its underpinning supervisory functions and the jurisdiction of the ECJ as it relates to significant institutions within the meaning of Regulation (EU) No 1024/2013.

In our [advisory](#), the Walkers' Individual Accountability Framework team comprising members of our Regulatory, Asset Management & Investment Funds and Employment groups, provide an overview of the Bill including timing and key actions for in-scope regulated financial services providers and holding companies.

3.6 Central Bank publishes Outsourcing Registers *(This is a further update to section 2.1 of the report covering the second quarter of 2022)*

On 9 August 2022, the Central Bank published its [outsourcing register and submission requirements](#) on a new "Outsourcing Registers" section of its website, as well as specific guidance notes, which include instructions for completion and submission of the register for each sector. The template of relevance for fund management companies is the investment outsourcing template and the accompanying Markets Firms or regulated financial service providers ("**RFSPs**") guidance notes.

As set out in the [Cross-Industry Guidance on Outsourcing](#) (the "**Outsourcing Guidance**") and associated [Feedback Statement](#) published in December 2021, the Central Bank expects that each RFSP will establish and maintain an outsourcing register. By way of reminder, only RFSPs with a PRISM rating of medium low or above are required to file the outsourcing reporting template with the Central Bank. All other RFSPs should use the template as a guide to completing their internal register and these entities should be in a position to provide a copy of this register to the Central Bank on request. The Central Bank has advised that copies of such internal registers may also be requested as part of a subsequent collection of registers by the Central Bank.

The guidance notes contain information on how to complete each section of the template register, noting that RFSPs must assess all existing arrangements against the Central Bank's requirements. The guidance notes also detail the practical steps for submitting this return on the Central Bank's online reporting system ("**ONR**") to ensure it is successfully completed. The general content of the template register had been outlined in Appendix 3 of the Outsourcing Guidance in order to give RFSPs forewarning of the need to store this data in their registers. The template register requires information to be reported for all outsourcing arrangements on a contract-by-contract (or written agreement) basis and additional sections are to be completed in respect of those critical or important outsourcing arrangements, including details relating to any sub-outsourcing of critical or important outsourcing arrangements. The reporting template should include all outsourcing arrangements that group entities supervised by the Central Bank make use of, irrespective of whether the entities signed contractual arrangements themselves or if they were signed on their behalf, e.g. by a non-supervised entity outside of the Central Bank's jurisdiction. All intragroup outsourcing arrangements where the Central Bank is the supervisory authority should be reported.

The Central Bank has confirmed that the deadline for submission of the return via the ONR has been extended from 7 October 2022 to the close of business on 19 October 2022. Firms should have received communication of same from the Central Bank. For any entities that are required to submit the register to the Central Bank, the reference date for the submission of data is 31 December 2021, meaning that the register should include all outsourcing arrangements in place as of 31 December 2021 and only details of contracts with a start date before 31 December 2021 should be included in the register.

It is proposed that the submission deadline from 2023 onwards will be at the end of February of each year, with the reference date of 31 December of the previous year. The submission deadline for 2023 will be confirmed in due course.

The Central Bank has provided contact details that can be used for specific queries.

Our recent [advisory](#) explains the scope of the rules, reviews the guidance notes and sets out the key deadlines.

3.7 Central Bank publishes updated versions of the Financial Vehicle Corporations ("**FVCs**") registration forms

On 5 August 2022 the Central Bank published on its [website](#) updated versions of the registration form and the accompanying [guidance](#) to be completed where registering financial vehicle corporations ("**FVCs**") and other non-securitisation special purpose vehicles ("**SPVs**").

The updated registration forms and guidance will be relevant to investment fund structures with SPVs or FVCs to comply with the obligations to the Central Bank pursuant to Regulation ECB/2013/40 and the Central Bank Acts.

3.8 Central Bank's Financial Stability Note on climate risks

On 7 September 2022, the Central Bank published a [Financial Stability Note](#) entitled 'Climate Risks in the Financial System: An Overview of Channels, Impact and Heterogeneity'. The Note outlines key climate risk channels for the economy looking at how physical and transition risks might translate to the real economy and impact households, businesses and the financial sector, and outlines how:

- climate change risks to households and businesses will vary considerably, depending on factors including the location of physical assets, energy efficiency, and individual behaviours.
- the financial sector will be impacted through changes in financial asset values and the effects on businesses and households.
- long-run physical risks can only be reduced through policies that support a rapid and deep decarbonisation of production and consumption.

3.9 Central Bank enforcement action

On 13 September 2022, the Central Bank published a [public statement](#) on its recent enforcement action against the Irish branch of a credit institution operated in Ireland on a freedom of establishment basis. The Central Bank issued a fine totalling €1.82m for three breaches of the Criminal Justice (Money Laundering & Terrorist Financing) Act 2010, as amended.

The three breaches are concerned with transaction monitoring, enhanced customer due diligence and policies, procedures and controls and the breaches stem from failures to ensure that automated transaction monitoring systems monitored the transactions of certain categories of customers of the Irish branch for money laundering and terrorist financing risk. This is the first penalty that the Central Bank has imposed on a financial institution which is incorporated and supervised outside of Ireland but which operates in Ireland as a branch on a passport basis.

The public statement notes that 'this case highlights the requirement for firms, including those operating in Ireland on a branch basis, to ensure that group systems, controls, policies and procedures are compatible with Irish legal requirements and to ensure that their governance framework and risk management measures operate effectively. These should be risk-based and proportionate, informed by firms' business risk assessment of their money laundering and terrorist financing risk exposure'.

4. OTHER LEGAL AND REGULATORY DEVELOPMENTS

4.1 *Autumn 2022 Legislative Programme*

On 14 September 2022, the Irish government published its autumn legislative [programme](#).

The Central Bank (Individual Accountability Framework) Bill has been included in the priority legislation list and is at the second stage (debate on the general principles of the bill).

The Limited Partnership Bill to modernise the Limited Partnership Act 1907, which is concerned with the registration of limited partnerships, remains listed in the other legislation (non-priority) list with heads of the bill listed as in preparation.

4.2 Benchmarks Regulation updates

(a) *ESMA Consultation on Regulatory Technical Standards*

On 8 July 2022, ESMA launched a [consultation](#) on amendments to the regulatory technical standards under the Benchmarks Regulation. The proposed amendments relate to the form and content of an application for recognition by third country benchmark administrators.

The closing date for responses is 9 September 2022.

- (b) *European Commission targeted consultation on the Benchmarks Regulation (This is a further update to section 3.3(b) of the report covering the second quarter of 2022)*

On 19 August 2022, ESMA published its [response](#) to the European Commission's targeted consultation on the Benchmarks Regulation ("**BMR**") to assist the Commission in preparing its proposals to review the rules for financial benchmarks administered outside the EU.

In its response, ESMA comments on the functioning of the current regime and proposes improvements to the regulatory and supervisory framework as well as the EU benchmark labels. ESMA emphasises that while the BMR covers a wide range of benchmarks used in the EU, so far very few jurisdictions have followed a similar regulatory approach regarding the provision and use of benchmarks. Therefore, the wide scope of the BMR would lead to the undesirable outcome of limited availability of third country benchmarks to EU investors as opposed to their non-EU peers.

The key highlights are:

- the restrictions on the use of third country benchmarks should be removed following a risk-based approach while ensuring a level playing field between EU and third country administrators;
- the proposal to create a new category of 'strategic' benchmarks is supported by ESMA. This category would be the only category of benchmarks subject to mandatory restrictions of use, similar to the current rules; and
- the introduction of an EU ESG benchmark label would be an extra supporting tool against greenwashing.

In addition, ISDA joined with other market associations in updating its recommendations for changes to the BMR that are designed to reduce the potential disruption for users of benchmarks within the EU, in its [Briefing Paper](#) on "The Importance of Reforming the EU Benchmarks Regulation (updated August 2022)" and the accompanying informal [commentary](#).

These updated recommendations, which are designed to coincide with the close of the Commission's consultation on the review of the BMR, would narrow the scope of the regulation to focus on those benchmarks, which would have the biggest systemic impact if they were to fail.

The Commission will now prepare a report with recommendations on the effectiveness of the BMR to the European Parliament and Council, to be published in Q4 of 2022.

4.3 EMIR

- (a) *ESMA feedback report on review of EMIR clearing thresholds*

On 28 September 2022, ESMA published a [feedback report](#) on the review of the clearing thresholds ("**CTs**") under EMIR.

This feedback report follows ESMA's final report in June 2022 proposing a change in the CT for commodity derivatives from EUR3 billion to EUR4 billion and setting out draft regulatory technical standards amending the RTS laid down in Delegated Regulation (EU) 149/2013 to reflect this proposed change.

The feedback report considers the consultation feedback received from market participants not previously addressed in its final report in June 2022. The feedback report also includes updated statistics on the coverage of the CTs and outlines the different initiatives undertaken by ESMA and national competent authorities in relation to the application of the CTs.

(b) Peer review report on supervision of EU CCPs

On 19 July 2022, ESMA published its annual peer review [report](#) on the supervision of EU central counterparties ("**CCPs**") by the national competent authorities. A summary of the findings is set out in ESMA's [press release](#).

(c) Updates to third country CCP applications for recognition

On 8 July 2022, ESMA provided an [update](#) on the way forward for third-country CCPs whose applications for recognition under EMIR were suspended until 28 June 2022.

(d) Results of CCP stress test exercise published

On 5 July 2022, ESMA published the [results](#) of its fourth stress test exercise of CCPs. The results confirm the overall resilience of EU CCPs, as well as third-country Tier 2 CCPs, to credit, concentration and operational risks under the tested scenarios and implemented framework. However, the stress test also identified areas where some CCPs may need to strengthen their risk management frameworks, or where further supervisory work should be prioritised, including on concentration and operational risks.

The [press release](#) accompanying the results provides a helpful overview of the key findings.

4.4 ESMA

(a) Call for evidence on pre-hedging

On 29 July 2022, ESMA issued a [call for evidence](#) on pre-hedging. As set out in the call for evidence, the practice of pre-hedging is not defined in EU law, however there is a general understanding among market participants of pre-hedging as a practice which takes place in financial markets, when liquidity providers aim to hedge inventory risk in an anticipatory manner. In practice, a dealer (liquidity provider) expecting to receive an order from a client, may want to hedge its expected future risk arising from that order.

In the context of the Market Abuse Regulation review, ESMA undertook an analysis of pre-hedging practices and in its final report on this review ESMA acknowledged, based on stakeholders' feedback, that there are fundamentally diverging opinions on pre-hedging. In that report, ESMA expressed the view that in order to provide guidance to market participants it is necessary to further analyse this practice to avoid adopting interpretations or recommending practices which might have unintended consequences or even provide legitimacy to harmful behaviours. This call for evidence has been published for the purpose of gathering additional evidence on the practice of pre-hedging.

Responses were requested by 30 September 2022.

(b) Development of key retail risk indicators

On 20 July 2022, ESMA published an [article](#) on the development of key retail risk indicators ("**RRIs**") for the EU single market. The proposed RRIs highlight risks around (i) inexperienced investors; (ii) use of digital tools by younger investors; and (iii) spikes in overall trading during periods of market stress.

(c) Updates to SFTR data reporting Q&As

On 19 July 2022, ESMA published an updated version of its [Q&As](#) on SFTR data reporting with new Q&As 13 and 14 on the construction of a trade state report (Q&A 13) and reporting of valuation and collateral on the last day of a securities financing transaction (Q&A 14).

(d) Consultation on clearing and derivatives trading obligations

On 11 July 2022, ESMA has launched a [consultation](#) exploring the extension of the scope of both the clearing obligation and the derivatives trading obligation. Responses were required by 30 September 2022.

(e) *Consultation on cash penalty process for cleared transactions*

On 11 July 2022, ESMA launched a [consultation](#) on a possible amendment to the Central Securities Depositories Regulation cash penalty process for cleared transactions. Responses were required by 9 September 2022.

(f) *Third statement on the implementation of LEI requirements*

On 7 July 2022, ESMA issued a third [statement](#) on the implementation of LEI requirements for third country issuers under SFTR.

(g) *ESMA Opinion on Accepted Market Practice by the Portuguese Regulator (This is a further update to section 4.9(q) and (r) of the report covering the first quarter of 2022)*

On 9 August 2022, ESMA published an [opinion](#) supporting a revised Accepted Market Practice on liquidity contracts notified by the Portuguese market regulator, the Comissão do mercado de valores mobiliários ("CMVM"). This opinion is issued in accordance with the provisions of the Market Abuse Regulation.

(h) *ESMA spreadsheet of fund management Q&As under development*

During the period, ESMA has [published](#) a series of new questions under development, which will be of interest to fund management companies engaging in cross-border marketing activities. These questions have been forwarded to the EU Commission for further consideration:

The questions are as follows:

"Pre-marketing and white label business. Are the obligations set out in Article 30a [i.e. the requirements relating to pre-marketing] of the AIFMD applicable to "White Label Business" whereby an investment strategy or idea is developed by a third party (the fund initiator) to which the portfolio management will be delegated once the AIFM is appointed?

Pre-marketing carried out by registered AIFMs. Are registered AIFMs referred to in Article 3(2) of the AIFMD, which do not qualify as EuSEF manager or EuVECA manager, subject to the obligation to notify pre-marketing pursuant to Article 30a(1) of the AIFMD?

Scope of de-notification obligations. In case there are no investors in a host Member State, do UCITS wishing to de-notify the arrangements previously made for marketing their units have to comply with the obligations set out in Article 93a(1) of the UCITS Directive (conditions for de-notification)?

Scope of de-notification obligations. In case there are no investors in a host Member State, do AIFMs wishing to de-notify the arrangements previously made for marketing the units or shares of the EU AIFs they manage have to comply with the obligations set out in Article 32a(1) of the AIFMD (conditions for de-notification)?

Scope of activities that a management company may passport. When notifying its intention to pursue the activities for which it has been authorised in a host Member State, either directly or through a branch, may a management company passport in that host Member State only the administration or marketing functions referred to in Annex II of the UCITS Directive, without also passporting investment management functions?

Scope of activities that an AIFM may passport. When notifying its intention to provide the activities and services for which it has been authorised in a host Member State, either directly or through a branch,

may an AIFM passport in that host Member State only the other functions that an AIFM may additionally perform in the course of the collective management of an AIF, which are referred to in point (2) of Annex I of AIFMD, without also passporting investment management functions?"

The spreadsheet contains an indicative list of draft questions that ESMA is currently developing into Q&As and expects to finalise and publish in the upcoming months. ESMA notes that the inclusion of a question in this file does not imply a commitment from ESMA to publish a final Q&A on the topic.

(i) *ESMA's second Trends, Risks and Vulnerabilities Report of 2022*

On 1 September 2022, ESMA's released its second "Trends, Risks and Vulnerabilities [Report](#) of 2022". The report highlights the Russian war on Ukraine against a backdrop of already-increasing inflation has profoundly impacted the risk environment of EU financial markets, with overall risks to ESMA's remit remaining at its highest level. It notes asset managers in Europe are facing considerable medium-term risks in connection with increasing inflation and interest rate rises, and a period of over 10 years of low inflation and low interest is coming to an abrupt end.

The main findings of the report are set out as follows.

- Risk Outlook: Contagion and operational risks are now considered very high, like liquidity and market risks. Credit risk stays high but is expected to rise. Risks remain very high in securities markets and for asset management. Risks to infrastructures and to consumers both remain high, though now with a worsening outlook, while environmental risks remain elevated. Looking ahead, the confluence of risk sources continues to provide a highly fragile market environment, and investors should be prepared for further market corrections.
- Market environment: The Russian aggression drove a commodities-supply shock which added to pre-existing pandemic-related inflation pressures. Monetary policy tightening also gathered pace globally, with markets adjusting to the end of the low interest rates period.
- Securities markets: Market volatility, bond yields and spreads jumped as inflation drove expectations of higher rates, equity price falls halted the recovery that had started in 2020, and invasion-sensitive commodity values surged, particularly energy, impacting natural gas derivatives and highlighting liquidity risks for exposed counterparties.
- Asset management: Direct impacts of the invasion were limited but the deteriorating macroeconomic conditions amplified vulnerabilities and interest rate risk has grown with expectations of higher inflation. Exiting the low-rate environment presents a medium-term challenge for the sector.
- Consumers: Sentiment worsened in response to growing uncertainty and geopolitical risks. The growing volatility and inflation could negatively impact many consumers, with effects potentially exacerbated by behavioural biases. Household savings fell from the record highs of the pandemic lockdowns.
- Sustainable finance: The invasion presented a new major challenge to EU climate objectives as several member states turned to coal to compensate for lower Russian fossil fuel imports. Although EU ESG bond issuance fell and EU ESG equity funds experiencing net outflows for the first time in two years, funds with an ESG impact objective were largely spared and the pricing of long-term green bonds proved resilient.
- Financial innovation: Crypto-asset markets fell over 60% in value in the first half of 2022 from an all-time-high, amid rising inflation and a deteriorating outlook. The sharp sell-off added to investor mistrust and confirmed the speculative nature of many business models in this sector.

- (j) *ESMA Consultation Paper on Notifications for Cross-Border Marketing and Management of AIFs and UCITS (This is a further update to section 3.9(b) of the report covering the second quarter of 2021)*

On 12 September 2022, the Alternative Investment Management Association ("**AIMA**") published its response to ESMA's [Consultation Paper](#) earlier this year on Notifications for Cross-Border Marketing and Management of AIFs and UCITS. In responding to the consultation, AIMA makes a number of suggestions in order to provide additional clarity and to avoid an inadvertent introduction of additional costs and burdens, which could amount to creating new barriers to the cross-border distribution of funds and resultant higher fees for investors.

On 14 September 2022, EFAMA published its [response](#) where it has made a number of observations and suggestions to ESMA aimed at simplifying and streamlining the notification process and avoiding unnecessary reporting efforts and duplication.

- (k) *ESAs Work Programme for 2023*

On 30 September 2022, the Joint Committee of the European Supervisory Authorities (the "**ESAs**") (EBA, EIOPA and ESMA) published its [work programme](#) for 2023 (dated 5 September 2022).

The Joint Committee's priorities for 2023 relate to matters including:

- Sustainable finance: The ESAs intend to submit amendments to the SFDR Level 2 Regulation (see section 4.10(a)), following the requests of the Commission in April 2022. The ESAs will also monitor the application of Regulation (EU) 2019/2088 ("**SFDR**") to determine whether the optional implementing technical standards (ITS) on marketing communications are required, as well as Q&As or other level 3 tools to promote supervisory convergence on the practical application of the SFDR. Furthermore, the ESAs will continue to coordinate and exchange on disclosure standards for non-financial information in the context of the Non-Financial Reporting Directive, and of its successor Corporate Sustainability Reporting Directive (CSRD), once in force.
- Digital operational resilience: The ESAs intend to develop technical standards on information and communication technology ("**ICT**") risk management framework and guidelines on the methodology for calculating costs, and quantifying losses for response and recovery, as mandated under the proposed Regulation on digital operational resilience for the financial sector (2020/0266(COD)). It also intends to produce standards and reports on reporting of ICT-related incidents.
- Exchange of information on fit and proper assessments: The ESAs will continue work on joint guidelines and other policy work facilitating the use of IT solution concerning the exchange of information on fit and proper assessments. The ESAs will also work on an IT solution for the information exchange, consisting of a cross-sectoral common searchable database and competent authorities contacts list. The aim is to finalise the joint guidelines and the IT solution by the end of 2023.

- (l) *ESMA statement on impact of inflation when providing investment services to retail clients*

On 27 September 2022, ESMA published a [statement](#) reminding investment firms of the impact of inflation in the context of providing investment services to retail clients.

ESMA notes that from an investor protection perspective, the recent upward trend in inflation rates poses a risk for retail investors, as some of them will not fully appreciate the link between inflation and financial markets and may not fully understand how considerations on inflation should be factored in their saving and investment decisions.

ESMA has therefore published the statement to remind investment firms to considering inflation and inflation risk, as appropriate, when manufacturing and distributing investment products and when providing investment services to retail clients. It highlights requirements relating to the following:

- providing fair, clear and not misleading information to clients.
- assessing the suitability of products for clients.
- product governance. In particular, ESMA expects manufacturers and distributors to consider the effect of expected inflation in their product governance processes.

(m) ESMA consults on guidance on market outages

On 26 September 2022, ESMA published a [consultation paper](#) on market outages, in particular focusing on ensuring trading venues have appropriate communication protocols in place to ensure communication to members, participants and the public during a market outage.

The consultation will close on 16 December 2022. The guidance, that ESMA intends to issue in the form of an opinion, will apply to equity markets and, where applicable, to non-equity instruments.

(n) ESMA response to the EU Commission on the current level of margins and of excessive volatility in energy derivatives markets

On 22 September 2022, ESMA published its [response](#) to the EU Commission's formal letter of [Letter of Response](#) request dated 13 September 2022 regarding the current level of margins and of excessive volatility in energy derivatives markets.

In its response ESMA sets out its high-level assessment concerning the areas where the EU Commission had requested input namely measures to limit excessive volatility (circuit breakers), CCP margins and collateral.

ESMA also makes a number of further suggestions in the following areas:

- commodity clearing thresholds;
- improving regulatory reporting on commodity derivatives; and
- regulating and supervising commodity traders.

4.5 European Commission's Retail Investors Report

On 2 August 2022, the European Commission published a [report](#) setting out the findings from a study relating to disclosure, inducements and suitability rules for retail investors.

The key sections of the report provide findings on the mapping of product distribution, disclosure, inducements, investment advice and suitability assessment and needs and demands test.

The Commission notes that the diversity of financial products and the way they are presented makes it challenging for many consumers to perform a thorough and rational screening of information and make an informed decision process by weighing up the (absolute and relative) risks and costs of different investment offers against their (potential) returns. There is therefore a risk that new investment decisions are being driven by factors other than rational choice. EU legislation in the area of retail investor protection aims to address, at least partly, challenges stemming from the information asymmetry and lack of product transparency. It aims to make the supply of financial products more easily “navigable” for consumers through pre-contractual disclosure and to ensure that advisors act in

the client's best interests and are able to offer impartial advice based on a clear assessment of the client's needs, objectives and financial situation.

Some takeaways from the findings of the report are as follows:

Disclosures

- the requirements for format, readability, clarity, conciseness, language use and comprehensive coverage are coherent, however, existing rules do not focus on making documents engaging.
- the understanding of "in good time" poses practical challenges for the timing of disclosure. It would be advisable with regard to the means of communication, to future proof the relevant legal provisions and place greater emphasis on the digital environment. Inconsistent cost disclosure has limited added value when it comes to facilitating cost comparisons for consumers.
- documents are not systematically handed out during first contact and reading of the document is encouraged in only half the cases studied. Disclosure does not overcome complexity and is not focussed on encouraging choice.
- for complex products, even when using simplified information documents disclosure documents do not make it easier to identify the most financially advantageous product.

Inducements and Advice

- disclosure of inducements is not directly relevant for consumers' choice and the extent to which they question or not advice received.
- cross-border standardisation diminishes the burdens on distributors and allows consistent consumer protection in the EU.
- information on inducements is hard to locate in the information documents and is not systematically provided to potential clients at a sufficiently early stage in the process.

Suitability Assessments, Demands and Needs

- investor screening alone is not sufficient to provide good quality advice, and therefore, to be cost-effective this process relies on the high quality of the result. Providing the consumer the information documents, information about inducements or the suitability records at a late stage diminishes its relevance.
- the quality of screening and questioning of customer's profiles at an early stage varies greatly.
- the standards on the application of the suitability and the appropriateness assessment are largely identical. While there are certain differences in national frameworks, the differences are unlikely to have impacts on the financial decisions of retail investors.

The findings from the report will assist with the development of the retail investment strategy, which is one of the actions planned under the Capital Markets Union's Action Plan. The aim of the retail investment strategy is to respond to new challenges in the market, such as increasing digitalisation of investment advice and the use of digital distribution channels.

4.6 Financial Conduct Authority ("**FCA**")

(a) *Temporary Permissions Regime*

On 14 July 2022, the FCA updated its [webpage](#) that summarises the rules that apply to firms in the temporary permissions regime ("TPR") and fund operators in the temporary marketing permissions regime ("TMPR").

The FCA has added a new section on disclosure requirements for EEA UCITS in which it advises that:

- in the UK, the exemption from the requirement for EEA UCITS to produce a PRIIPs key information document ("KID") lasts until 31 December 2026. The FCA can confirm that this exemption applies to both EEA UCITS recognised under section 272 of the Financial Services and Markets Act 2000 ("FSMA") and those recognised under the TMPR. This means that, when being marketed to retail investors in the UK, EEA UCITS that are recognised under either section 272 of FSMA or the TMPR must produce a UCITS key investor information document ("KIID").
- the TMPR is due to end on 31 December 2025. The FCA is engaging with HM Treasury on the disclosure requirements that would apply in the event of an equivalence decision under the UK overseas funds regime ("OFR").

(b) FCA statement on LIBOR-linked bonds

On August 16 2022, the FCA issued a [statement](#) encouraging market participants to continue transition of LIBOR-linked bonds. In its statement, the FCA encourages all issuers and bondholders of outstanding LIBOR-linked bonds to take the necessary action to transition outstanding LIBOR-linked bonds to fair alternative rates.

4.7 International Monetary Fund ("IMF")

(a) IMF Recommendations to the Central Bank under the Financial Sector Assessment Program ("FSAP")

Following its periodic FSAP of Ireland completed on 28 June 2022, the IMF has [published](#) a range of regulatory policy recommendations to the Central Bank. FSAP review of the Irish market-based finance sector (investment funds and SPEs), one of several financial sectors reviewed by the IMF resulted in the issuance of recommendations in the form of a paper entitled "Financial Sector Assessment Program – Technical Note on Oversight of Market-Based Finance: Investment Funds and Special Purpose Entities".

Several of the IMF recommendations relate to planned regulatory actions of which industry is already aware such as finalisation of the framework for the treatment of pricing errors and prioritisation of the new individual accountability framework.

The IMF's recommendations include that the Central Bank should:

- prioritise guidance to the funds sector in the form of a discussion paper on the use of a full range of liquidity management tools, including encouraging adoption of tools such as swing pricing which result in subscribing or redeeming investors bearing the associated transaction costs.
- proceed with the updates to the Central Bank's Senior Executive Accountability Regime, finalise the Central Bank's internal framework to operationalise execution of the upgraded accountability regime, ensure that Central Bank's powers provide a sound basis for direct enforcement action against individuals.
- engage with ETF providers to ensure their arrangements with authorised participants and market makers are robust and promote the smooth functioning of the sector, including in times of market stress.

- expand data coverage of the investment funds sector including on delegation arrangements, credit lines and UCITS leverage:
 - the IMF recommends that the Central Bank consider introducing national measures if revised EU rules fail to close the data gap on Irish fund managers' delegation arrangements.
 - the IMF recommends expanding data collection on investment funds' credit lines to give a clearer picture of how Irish funds would cope with unusually high levels of redemptions and/or unexpected portfolio illiquidity.
 - the IMF also recommends that the Central Bank not wait for EU-driven amendments to the UCITS regulatory reporting regime, which are envisaged as part of the Commission's AIFMD review, noting that it would be "preferable for the Central Bank to take the initiative" to ensure it has a "more comprehensive and up-to-date picture of leverage within the UCITS sector."
- continue efforts to improve visibility on underlying investment fund investors.
- proceed to finalise its new approach to Irish Fund pricing errors, including on the categorisation of errors and how they should be resolved.
- work with ESMA, ESRB and the European Commission, as part of the Commission's review of the EU Money Market Fund ("**MMF**") Regulation, to promote MMF resilience. Suggested reforms are listed.
- push for the adoption of common approaches at EU level to UCITS eligible assets requirements (referencing bank loans, delta-one securities and digital assets).
- strengthen oversight of governance of special purpose entities and introduce rules on directors' time commitments, making legislative changes where necessary.
- fill gaps in the legislative framework (working with the Department of Finance) for the winding-up of Irish Funds, including by clarifying the approach when fund investors cannot be contacted.

In addition, the IMF notes the Central Bank's acknowledgement of the disparity in CP86 compliance standards of fund managers which relocated to Ireland as a result of Brexit and those established prior to the publication of its fund management company guidance arising from CP86. The IMF recommends the Central Bank continue efforts to bring all market participants to the same level, including through the follow-up of the Central Bank's December 2020 'Dear CEO' letter on the "Thematic review of fund management companies' governance, management and effectiveness".

The note also references that the Central Bank is currently reviewing its supervisory impact model (or PRISM) for funds, including the merits of using different quantitative metrics.

The IMF's recommendations will be a useful resource for fund management companies seeking to gauge regulatory priorities and likely areas of Central Bank focus in the near to medium-term.

Progress on the IMF's recommendations to the Central Bank will form part of the next periodic FSAP of Ireland.

(b) IMF Technical Note on macroprudential policy

On 20 September 2022, the IMF published a [Technical Note](#) on Macroprudential Policy Framework and Tools as part of its Financial Sector Assessment Program on Ireland.

The IMF makes a number of recommendations on areas where the institutional framework of the Central Bank can be strengthened. The recommendations include that the Central Bank should finalise the details of the proposed introduction of a macroprudential leverage limit and liquidity management guidelines for property funds, while adjusting the leverage limit countercyclically.

4.8 IOSCO updates

(a) Guidance on stablecoin arrangements

On 13 July 2022, IOSCO published final [guidance](#) jointly with the Committee on Payments and Market Infrastructures on stablecoin arrangements.

(b) Report on operational resilience of trading venues and market intermediaries

On 11 July 2022, IOSCO published a [report](#) on the operational resilience of trading venues and market intermediaries during the COVID-19 pandemic and lessons for future disruptions.

(c) IOSCO publishes discussion paper on central counterparty practices ("CCP") practices to address non-default losses ("NDL")

On 4 August 2022, IOSCO and the Committee on Payments and Market Infrastructures ("CPMI") published for public comment a [discussion paper](#) on CCP to address NDLS such as losses from cyber attacks.

The paper outlines current practices at various CCPs to address NDLS in business as usual, recovery and orderly wind-down scenarios. The paper is accompanied by a [cover note](#), which lists some of the specific issues on which the CPMI and IOSCO are soliciting input from industry and the broader public.

Feedback is sought by 4 October 2022.

(d) IOSCO and CPMI report on access to central clearing and portability

On 8 September 2022, the Bank for International Settlements' Committee on Payments and Market Infrastructures (CPMI) and IOSCO published a [report](#) entitled "Client clearing: access and portability", which aims to increase common understanding of new access models that enable clients to directly access central counterparty ("CCP") services, and of effective porting, or transferring, practices for their positions.

The report considers the potential benefits and challenges – particularly risk management – of the new access models developed by CCPs, taking into account industry feedback.

The report encourages industry efforts to engage in further work to:

- enhance transparency and disclosure regarding direct and sponsored access model participation; and
- develop further effective practices to facilitate porting, thereby ensuring clients' continued access to clearing in the event of an intermediary default.

CPMI-IOSCO will monitor market developments in this area (including other potential emerging new access models) and intend to engage further as needed.

(e) IOSCO statement on sustainability-related corporate reporting

On 15 September 2022 as part of engagement on the development of the first reporting standards of sustainability disclosures for capital markets, IOSCO published a [statement](#) encourages standard-setters' work on assurance of sustainability-related corporate reporting.

4.9 Securitisation Regulation report

On 1 July 2022, the European Systemic Risk Board ("**ESRB**") published a [report](#) entitled "Monitoring systemic risks in the EU securitisation market". This is the first edition of a report required to be produced at least every three years under Article 31 of the Securitisation Regulation (2017/2402). While this first edition focuses on traditional (i.e. off-balance sheet) securitisations, by the end of 2022 the ESRB, in collaboration with the ESAs, will publish another report assessing the impact on financial stability of the introduction of simple, transparent and standardised ("**STS**") on-balance-sheet (i.e. synthetic) securitisations.

4.10 Sustainable Finance

(a) *SFDR Level 2 Regulation published*

On 25 July 2022, [Commission Delegated Regulation \(EU\) 2022/1288](#) of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports ("**SFDR Level 2 Regulation**"), was published in the Official Journal of the European Union.

The SFDR Level 2 Regulation applies from 1 January 2023.

(b) *Central Bank confirms stream-lined filing process for UCITS and AIFs pre-contractual documentation in relation to SFDR Level 2 Regulation*

At a meeting on 13 September 2022 attended by representatives of Irish Funds and the Central Bank, the Central Bank confirmed its intention to apply a stream-lined review process or 'fast-track' to SFDR Level 2 filings.

Our [advisory](#) provides an overview of the [notice of intention](#) subsequently published by the Central Bank in which it set down the parameters of this process.

(c) *Taxonomy Complementary Climate Delegated Act*

On 6 July 2022, the European Commission rejected a motion to oppose the inclusion of nuclear and gas as environmentally sustainable economic activities in the EU Taxonomy.

On 15 July 2022, [Commission Delegated Regulation \(EU\) 2022/1214](#) of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities ("**Taxonomy Complementary Climate Delegated Act**") was published in the Official Journal of the European Union.

The Taxonomy Complementary Climate Delegated Act sets out the conditions under which nuclear and natural gas energy activities can be included in the list of economic activities covered by the EU Taxonomy Regulation ((EU) 2020/852) (the "**Taxonomy Regulation**"). The Taxonomy Regulation introduces an EU-wide taxonomy of environmentally sustainable activities, as well as disclosure requirements for certain financial services firms and large public interest entities. The conditions for inclusion of natural gas and nuclear activities include:

- that they contribute to the transition to climate neutrality.
- for nuclear, that it fulfils nuclear and environmental safety requirements.
- for natural gas, that it contributes to the transition from coal to renewables.

The Regulation also amends Commission Delegated Regulation (EU) 2021/2178 supplementing Article 8 of the Taxonomy Regulation to require large listed non-financial and financial companies to disclose the proportion of their activities linked to natural gas and nuclear energy.

The Taxonomy Complementary Climate Delegated Act applies from 1 January 2023.

(d) *ESAs produce RTS on the exposure of financial products to investments in fossil gas and nuclear energy activities*

On 30 September 2022, the ESAs published a [joint final report](#) on draft regulatory technical standards (RTS) on information to be provided in pre-contractual documents, on websites, and in periodic reports about the exposure of financial products to investments in fossil gas and nuclear energy activities following their inclusion in the Taxonomy Complementary Climate Delegated Act. The draft RTS amend the RTS laid down in SFDR Level 2 Regulation.

The aim of the amendments is to ensure that disclosures about the degree to which investments are in taxonomy-aligned activities provide for full transparency about investments in fossil gas and nuclear energy activities, in particular on the proportion those investments represent within all investments and in environmentally sustainable economic activities. In particular, the ESAs suggest adding a "yes/no question" to the templates for financial products, so as to identify whether they intend to invest in gas and nuclear. If the answer to that question is "yes", a "graphical representation of the proportion of investments in such activities would be required".

The ESAs have also proposed some additional minor technical corrections to the SFDR RTS. The ESAs confirm in an accompanying [press release](#) that the disclosures in the proposed RTS are in line with the Taxonomy Complementary Climate Delegated Act.

The EU Commission will scrutinise the draft RTS and endorse them within three months of their publication. Due to the urgency of the matter and the application timeline of the Taxonomy Complementary Climate Delegated Act, the ESAs have left it to the EU Commission to insert an expected application date when they endorse the draft RTS.

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

On 28 July 2022, ESMA published the ESAs' first joint annual [report](#) on the extent of voluntary disclosure of principal adverse impact under the SFDR.

Based on a survey of national competent authorities, the ESAs have developed a preliminary, indicative and non-exhaustive overview of good examples of best practices, and less good examples of voluntary disclosures.

(f) *Feedback on Platform on Sustainable Finance's draft report on minimum safeguards*

On 11 July 2022, the Platform on Sustainable Finance published its draft [report](#) on the minimum safeguards set out in Article 18 of the Taxonomy Regulation. The purpose of the report is to provide advice on how compliance with minimum safeguards could be assessed. This work also feeds in to the European Commission's work on the usability of the EU taxonomy.

Feedback was originally sought before 22 August 2022 but the deadline for submission has been extended to 6 September 2022.

By way of reminder, Article 18 of the Taxonomy Regulation states:

"1. The minimum safeguards referred to in point (c) of Article 3 shall be procedures implemented by an undertaking that is carrying out an economic activity to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

2. When implementing the procedures referred to in paragraph 1 of this Article, undertakings shall adhere to the principle of 'do no significant harm' referred to in point (17) of Article 2 of Regulation (EU) 2019/2088."

(g) ESRB/ECB joint report on climate shocks

On 26 July 2022, the ESRB and the European Central Bank ("**ECB**") published a joint [report](#) on how climate shocks can affect the European financial system. The findings show that climate risks can quickly spread and harm companies and banks alike.

The report identifies several amplifiers of climate risk across the financial system. Transition risks may be magnified because of economic and financial linkages between and across banks and companies. For example, a surge in carbon prices could increase the likelihood that the default of one company leads to the default of another. Interdependent natural hazards – such as water stress, heat stress and wildfires – can amplify physical climate risk, as they can cluster together and exacerbate each other. Market dynamics can also magnify the financial impact of physical risks. For example, a climate shock could lead to a sudden reassessment of climate risk pricing, thereby causing fire sales, where financial institutions – especially those with overlapping portfolios – quickly sell a large number of exposed assets at the same time at distressed prices.

The report assesses the scope for macroprudential policies as part of a broader policy response to address the financial impact of climate change. It presents the case for adapting existing instruments, notably systemic risk buffers or concentration thresholds.

(h) FSB climate risk updates

On 14 July 2022, the FSB published its 2022 progress [report](#) on the roadmap for addressing financial risks from climate change.

On 22 July 2022, the FSB published the public [responses](#) it received in respect of its interim report on supervisory and regulatory approaches to climate related risks. The final report is expected to be published in October 2022.

(i) European Commission publishes summary report on its consultation on ESG data ratings

On 4 August 2022, the European Commission published a [summary report](#) following its targeted consultation on the functioning of the ESG ratings market in the EU and on the consideration of ESG factors in credit ratings.

The consultation, which was carried out between 4 April and 10 June 2022, received 168 responses. Most of these came from users of ESG ratings, whose view was that the market does not currently function well. The key takeaway is that most respondents considered that legislative intervention is

necessary and believe that ESG rating providers should be subject to some form of authorisation or registration regime in order to offer their services in the EU.

The report notes that the results of the consultation will be reflected in the preparation of any further European Commission initiatives in this area.

- (j) *ESMA responds to European Financial Reporting Advisory Group ("EFRAG") consultation on Corporate Sustainability Reporting Standards (This is a further update to section 4.18(d) of the report covering the first quarter of 2022)*

By way of reminder, the European Commission's proposal for a Corporate Sustainability Reporting Directive ([CSRD](#)) envisages the adoption of EU Sustainability Reporting Standards ("**ESRS**").

On 8 August 2022, ESMA published its [response](#) to EFRAG's public consultation on the first set of draft ESRS with a summary of the key points detailed in its [cover letter](#).

EFRAG is expected to deliver its final draft ESRS to the European Commission in November 2022.

- (k) *IOSCO has published a report on retail investor education in the context of sustainable finance markets and products*

On 31 August 2022, IOSCO published a [report](#) entitled "Retail Investor Education in the Context of Sustainable Finance Markets and Products".

The report identifies some of the main challenges and sound practices for providing investor education on sustainable finance for retail investors. The report describes educational activities that regulators should consider, taking into account the level of sustainable finance and retail investor participation in their markets.

This includes, for example:

- explaining to retail investors how to obtain sustainability-related information and to search and understand whether the offered product(s) matches their sustainability related preferences; and
- supporting initiatives of market participants to help retail investors understand ESG certifications, labels and scores regarding the financial products offered to individuals and encouraging and/or facilitating training that helps financial advisors better understand greenwashing and how to protect investors against unsubstantiated or misleading sustainability claims.

- (l) *ESAs SFDR queries to the European Commission*

On 9 September 2022, ESMA published further [queries](#) submitted by the ESAs to the European Commission relating to the interpretation of SFDR.

The questions posed by the ESAs concern the interpretation of key aspects of the regulation, including how the definition of "sustainable investments" under Article 2(17) will be applied to investments in funding instruments that do not specify the use of proceeds. The ESAs asked whether a company that reports 20% of its economic activities as contributing to environmental or social objectives would be categorised as a sustainable investment under SFDR.

The Commission was asked to clarify how it interpreted carbon emissions reductions and other benchmark questions in Article 9(3) as well as the definition of "consider" in Article 7(1)(a) – which requires an explanation of whether and how a financial product "considers principal adverse impacts" on sustainability factors. The ESAs also sought further information on the application of the 500-

employee principal adverse impacts threshold and the frequency of periodic disclosure for portfolio management services.

A response from the Commission with answers providing clarity to these ESA queries is awaited.

(m) *ESMA Guidelines on aspects of the MiFID II sustainability requirements.*

On 23 September 2022, ESMA published its [final report](#) on guidelines on aspects of the MiFID II sustainability requirements (the "**Guidelines**").

This final report updates the text of the original version of the Guidelines published in 2018, which have been reviewed to consider:

- the adoption by the European Commission of the amendments to the MiFID II Delegated Regulation to integrate sustainability factors, risk and preferences into investment firms' organisational requirements and operating conditions. These changes came into effect on 2 August 2022;
- the good and poor practices identified in ESMA's 2020 Common Supervisory Action (CSA) on suitability. These good and poor practices will give practical guidance to firms in some areas where lack of convergence was identified; and
- the amendments introduced through the Capital Markets Recovery Package to Article 25(2) of MiFID II.

The main amendments introduced to the MiFID II Delegated Regulation and reflected in the Guidelines on the topic of sustainability are:

- Information to clients on the sustainability preferences. Investment firms will need to help clients understand the concept of sustainability preferences and explain the difference between products with and without sustainability features in a clear manner and avoiding technical language;
- Collection of information from clients on sustainability preferences. Firms will need to collect information from clients on their preferences in relation to the different types of sustainable investment products and to what extent they want to invest in these products;
- Assessment of sustainability preferences. Once the firm has identified a range of suitable products for client, in accordance with the criteria of knowledge and experience, financial situation and other investment objectives, the firm shall identify the product(s) that fulfil the client's sustainability preferences; and
- Organisational requirements. Firms will need to give staff appropriate training on sustainability topics and keep appropriate records of the sustainability preferences of the client (if any) and of any updates of these preferences.

The Guidelines will now be translated into the EU's official languages and published on ESMA's website. The publication of the translations will trigger a two-month period during which national competent authorities must notify ESMA whether they comply or intend to comply with the Guidelines.

ESMA's consultation had originally proposed an implementation deadline of two months. However, the final report now states that the Guidelines will apply six months after the date of the publication on ESMA's website in the official languages.



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