



# Funds & Investment Management Update – Ireland and Luxembourg

**Quarterly Update | October – December 2020**

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# 1 Legal & Regulatory

## 1.1 UCITS Update

There have been a number of developments over the quarter:

### Ireland

#### *Central Bank Q&A*

On 9 October 2020, the Central Bank of Ireland ("Central Bank") issued the 30th edition of the Central Bank [UCITS Q&A](#), which includes new a Q&A ID 1098 on liquidity stress testing in UCITS. It clarifies the Central Bank's expectations on liquidity stress testing in UCITS, particularly on the application of the European Securities and Markets Authority ("ESMA") guidelines on liquidity stress testing in UCITS and AIFs. The Q&A sets out the Central Bank's reporting expectations where a stress test reveals a material risk.

### Luxembourg

#### *CSSF FAQ*

On 24 November 2020, the Commission de Surveillance du Secteur Financier ("CSSF") published an updated [FAQ on the Luxembourg law of 17 December 2010](#) on undertakings for collective investment ("2010 Law") which includes a new FAQ 8.1 on data transfers by administrators and depositaries to other service providers. It sets out the conditions administrators and depositaries must comply with when they transfer data in the context of an outsourcing arrangement and confirms that these conditions apply independently of the General Data Protection Regulation [EU/2016/679](#) ("GDPR").

### EU

#### *Penalties and Measures*

On 12 November 2020, ESMA published its [third annual report](#) on penalties and measures issued under the UCITS Directive 2009/65/EC in 2019. ESMA provides an overview of the applicable legal framework and information on the sanctions imposed by national competent authorities ("NCAs") from 1 January 2019 to 31 December 2019. Overall, 11 NCAs imposed a total of 43 penalties. The total aggregated value of financial penalties imposed amounted to approximately €4,155,000.

#### *ESMA – Common Supervisory Action on Costs and Fees of UCITS*

On 6 January 2021, ESMA launched a [common supervisory action](#) ("CSA") with NCAs on the supervision of costs and fees of UCITS. It will be conducted during 2021.

The CSAs aim is to assess the compliance of supervised entities with the relevant cost-related provisions in the UCITS framework, and the obligation of not charging investors with undue costs. For this purpose, the NCAs will take into account the supervisory briefing on the supervision of costs published by ESMA in June 2020. The CSA will also cover entities employing efficient portfolio management techniques to assess whether they adhere to the requirements set out in the UCITS framework and ESMA Guidelines on ETFs and other UCITS issues.

## **1.2 AIFMD Update**

There have been a number of recent developments on the Alternative Investment Fund Managers Directive [2011/61/EU](#) ("AIFMD"):

### **Ireland**

#### *Central Bank Q&As and Consultation*

On 9 October 2020, the Central Bank issued the 35th edition of the Central Bank [AIFMD Q&A](#), which includes a new Q&A ID 1133 on liquidity stress testing in AIFs. The Q&A clarifies the Central Bank's expectations on liquidity stress testing in AIFs, particularly on the application of the ESMA "Guidelines on liquidity stress testing in UCITS and AIFs". The Q&A sets out the Central Bank's reporting expectations where a stress test reveals a material risk.

On 23 November 2020, the Central Bank issued the 36th edition of its [AIFMD Q&A](#), which includes new Q&As covering a discontinuation of the practice of requiring general partners of investment limited partnerships ("ILPs") to be approved by the Central Bank as AIF management companies – see "Investment Limited Partnerships Act Enacted" below.

On 22 December 2020 the [Central Bank Consultation CP132 - Guidance on Share Class Features of Closed Ended QIAIFs](#) closed (see "Investment Limited Partnerships Act Enacted" below for more detail).

### **Luxembourg**

#### *CSSF FAQ*

On 24 November 2020, the CSSF published an updated [FAQ](#) on the [Luxembourg law of 12 July 2013](#) on alternative investment fund managers, which includes a new FAQ 25 on data transfers by administrators and depositaries to other service providers. It sets out the conditions which administrators and depositaries must comply with when they transfer data in the context of an outsourcing arrangement and confirms that these conditions apply independently of GDPR.

### **EU**

#### *AIFMD Review of EU Rules on AIFMs*

The European Commission on 22 October 2020 launched a [public consultation](#) on how to make the EU's AIF market more efficient, effective and competitive, while maintaining the overall stability of the EU's financial system. It will gather feedback with a view to improving the overall functioning and competitiveness of the EU AIF industry. The consultation will close on 29 January 2021.

#### *Penalties and Measures*

On 12 November 2020, ESMA published its [first annual report](#) on penalties and measures issued under AIFMD in 2018 and 2019. In the report, ESMA provides information on the penalties and measures imposed by NCAs from 1 January 2018 to 31 December 2018 and from 1 January 2019 to 31 December 2019. During the 2018 reporting period, 11 NCAs imposed a total of 63 penalties. The total aggregated value of financial penalties imposed totaled approximately €4,459,000. Ten NCAs

imposed a total of 34 measures. During the 2019 reporting period, 13 NCAs imposed a total of 45 penalties. The total aggregated value of financial penalties imposed was approximately €9,000,000.

#### *ESMA Final Report on Guidelines Addressing Leverage Risks*

On 17 December 2020, ESMA published its [final report](#) containing guidelines under Article 25 of AIFMD. Article 25 provides for NCAs to identify the extent to which the use of leverage in the AIF sector contributes to the build-up of systemic risk in the financial system, risks of disorderly markets, or risks to the long-term growth of the economy.

The guidelines provide NCAs with indicators to consider when performing their risk assessment and principles that they should take into account when calibrating and imposing leverage limits. They follow the two-step approach introduced by the International Organization of Securities Commissions ("IOSCO") and translate this approach into the EU framework.

The guidelines will be translated into the official EU languages and will apply two months after the publication of the translations on ESMA's website.

### **1.3 ESMA Performance Fee Guidance for UCITS and Certain Types of Retail AIFs - Official Translation and Consultation**

On 5 November 2020, ESMA published a [webpage](#) with official translations, including the English version of its guidelines on performance fees in UCITS and certain types of AIFs. The guidelines apply from two months after their date of publication on ESMA's website in all EU official languages (that is, from 5 January 2021).

Managers of any new funds created after the date of application of the guidelines with a performance fee, or any funds existing before the date of application that introduce a performance fee for the first time after that date, should comply with the guidelines immediately in respect of those funds.

Managers of funds with a performance fee existing before the date of application of the guidelines should apply the guidelines in respect of those funds by the beginning of the financial year following six months from the application date of the guidelines. NCAs must notify ESMA whether they comply, or intend to comply, with the guidelines within this two-month period.

This Central Bank consultation [CP134](#) issued on 3 December 2020 seeks stakeholder's views on the establishment of regulatory guidance on performance fees for UCITS and certain types of retail AIFs to incorporate the ESMA guidelines on performance fees in UCITS and certain types of AIFs into the Central Bank's regulatory framework.

It closes for comments on 15 January 2021.

### **1.4 Central Bank Thematic Review of Fund Management Companies**

The Central Bank of Ireland on 20 October 2020 published the [outcome](#) of a thematic review of the implementation of its framework for governance, management and oversight in fund management companies ("FMCs") ("CP86").

Some of the key issues identified are as follows:

- A large number of FMCs authorised before the framework have not appropriately increased resources to ensure effective implementation of the framework.

- Shortcomings were identified on how some Designated Persons carried out their roles.
- Some firms were unable to evidence that they had carried out the appropriate level of due diligence on their delegates.
- Deficiencies were identified for a number of FMCs, with many firms not having an entity-specific risk management framework, no entity-specific risk register, and / or no defined risk appetite in place.
- Not all FMCs could evidence approval by the board of the launch of sub-funds.
- In many cases, the organisational effectiveness director could not evidence that meetings took place and no formal records were kept of meetings with Designated Persons.
- Gender Balance: Significant gender imbalance on the boards of FMC was found with only 16% of director roles held by women.

The Central Bank has commenced supervisory engagement with those FMCs where concerns have been identified. On 8 December 2020 it issued a [letter](#) to industry to address two queries raised on its resourcing expectations (FMCs being required to have a minimum of three full time equivalent employees; and having appoint locally based Designated Persons).

For more information see our client update, [\*CP86 2.0: Welcome Clarity on Corporate Governance Issues\*](#).

## **1.5 Investment Limited Partnerships Act Enacted**

The [Investment Limited Partnerships \(Amendment\) Act 2020](#) was signed into law on 23 December 2020 and is expected to come into force in February 2021. The ILP is a regulated common law partnership structure which is of significant interest to international managers marketing to EU investors and wider global markets.

The Act, once commenced, will introduce a number of important changes which aim to position the ILP as a leading EU fund vehicle for private equity and sustainable investments. It will also make technical amendments to the ICAV Act 2015 to align it with certain Companies Act 2014 provisions and extends the beneficial ownership requirements applicable to corporate and unit trust fund structures to ILPs and common contractual funds ("CCFs") (see "AML Update" below).

The Central Bank's 36th edition of its [AIFMD Q&A](#) issued on 23 November 2020 includes new Q&As stating a discontinuation of the practice of requiring general partners of ILPs to be approved by the Central Bank as AIF management companies. The general partner may appoint an AIFM, in which case the general partner will act in an oversight capacity. It also confirms that the general partner will be subject to Central Bank regulations on fitness and probity as part of the fund authorisation process.

The Central Bank's [consultation](#) setting out its proposed guidance on the establishment of differentiated share classes in a closed-ended QIAIF closed on 22 December 2020. The establishment of such share classes will be permissible to reflect:

- the issue of shares at a price other than net asset value;
- excuse and exclude provisions;
- stage investing; and
- management participation.

The guidance will provide clarity on the operation of ILPs under the Central Bank's regulatory framework.

See also our latest guide *The Irish Investment Limited Partnership - A Guide for Asset Managers*.

## 1.6 Brexit and TPR Update

### Ireland

The Central Bank in December 2020 issued post-Brexit requirements applicable to UK AIFMs and UK investment managers. It confirmed that UK investment managers acting for Irish entities will be required to notify the Central Bank on the change of their regulatory status following the end of the Brexit transition period on 31 December 2020. For new appointments, UK investment managers will be considered as non-EU investment managers and will be subject to the full review that applies to non-EU investment managers.

It also issued guidance for UK AIFMs currently marketing AIFs in Ireland which states that UK AIFMs (who will be non-EEA AIFMs post 31 December) must notify the Central Bank under Regulation 43 of the European Union (Alternative Investment Fund Managers) Regulations 2013. If the notification is submitted on or before 1 January 2021, it will be effective from that date.

With effect from midnight on 31 December 2020, the Brexit transition period between the UK and the EU ended and future trade in goods or services with the UK will be provided in accordance with the [EU-UK Trade and Cooperation Agreement](#).

The Central Bank issued a [statement](#) noting that while most financial services providers are well prepared for the end of the transition period, it means that UK authorised firms can no longer be able to provide financial services to Irish customers on a cross-border basis (passporting). Any customer who currently uses the services of a UK-based financial services provider, and has not yet been contacted by them, is advised to contact their provider to confirm whether they have obtained all necessary authorisations to allow them to continue to provide services to their Irish customers.

### Luxembourg

On 7 December 2020, the CSSF issued a [press release](#) to clarify and reiterate the actions that management entities located in the UK, including Gibraltar, and that manage and / or market Luxembourg funds on a cross-border basis needed to take prior to the end of the transition period. It also addressed certain other Brexit related issues including the delegation of portfolio management and / or risk management activities as well as secondments.

For more information see our client update, [Luxembourg CSSF: Final Brexit Preparations December 2020](#).

The CSSF published CSSF [Regulation N° 20-09](#) on third-country firms providing investment services or performing investment activities in Luxembourg on 24 December 2020. It amends CSSF [Regulation N° 20-02](#) and adds the UK to the list of third countries that the CSSF considers to have equivalent supervision and authorisation rules for the purposes of the third country regime under Article 32-1 of the [Law of 5 April 1993](#) on the financial sector.

For more information see our Q3 2020 quarterly update and our client update, [MiFID II – CSSF Issues New Circular on Third Country Firm Access](#).

## **Temporary Permissions Regime**

The UK temporary permissions regime ("TPR") enables relevant EEA firms and funds that were passporting into the UK when the transition period ended to continue operating temporarily in the UK now that the passporting regime has fallen away. The UK FCA's latest guidance on the TPR is available [here](#).

On 19 November 2020, the CSSF issued a press release on the TPR. It was issued following a request from the UK's FCA seeking the CSSF's assistance in reminding Luxembourg based funds and firms of their options in the context of the TPR.

For more information see our client update, *Luxembourg CSSF Communication on Temporary Permissions Regime*.

## **1.7 AML Developments**

### **Ireland**

On 6 October 2020, the Central Bank published its latest [AML Bulletin](#) which focused on transaction monitoring. It sets out the Central Bank's findings following supervisory engagements across multiple credit and financial institutions, and also sets out its expectations on the application of transaction monitoring controls.

For more information see our client update, *New Central Bank of Ireland Guidance on AML Transaction Monitoring*.

On 16 December 2020, it published a "[Dear CEO](#)" letter to Schedule 2 firms which outlines its expectations of firms on AML and counter-terrorist financing ("CTF") and Financial Sanctions ("FS") requirements and details follow-up actions to be taken by the board and senior management of Schedule 2 firms in response to its findings. The examination found an overall lack of compliance across all areas of the AML/CTF control framework. It was also noted that there is a poor understanding of the requirements from board and senior management levels, including at those firms who outsourced their AML/CTF and FS activities to third parties. It identified a number of failings in the areas of board oversight and governance; money laundering/terrorist financing risk assessment; and AML/CTF policies and procedures.

For more information see our client update, *AML Frameworks of Schedule 2 Firms under CBI Scrutiny*.

The [Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Bill 2020](#) which is progressing through the Irish Parliament will implement the criminal justice elements of the Fifth Money Laundering Directive [EU/2018/843](#) ("MLD5") in Ireland. The deadline for transposition into national law was 10 January 2020. It extends the categories of designated persons; prescribes actions for enhanced customer due diligence; improves the identification of politically exposed persons and gives expanded powers to EU financial intelligence units to request information from any firm.

The [Investment Limited Partnerships \(Amendment\) Act 2020](#) (see "Investment Limited Partnerships Act Enacted" above) introduces beneficial ownership register requirements for ILPs and CCFs as well as outlining the proper interaction with designated persons and the procedure for occasional transactions. It will require the ILP's general partner and a CCF's management company to maintain

a register of beneficial ownership of the ILP and to submit that information to the Central Bank for its central register of beneficial ownership of certain financial vehicles.

A beneficial owner in these circumstances is any individual who ultimately is entitled to or controls, whether the entitlement or control is direct or indirect, more than a 25% share of the capital or profits of the partnership / CCF or more than 25% of the voting rights in the partnership / CCF; or otherwise controls the partnership / CCF. It will also allow the Central Bank to verify PPSN information on its beneficial ownership registers.

Existing ICAVs and unit trusts had until 25 December 2020 under the European Union (Modifications of Statutory Instrument No. 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020 to submit their beneficial ownership information to the Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts in Ireland managed by the Central Bank.

## Luxembourg

The Luxembourg indirect tax authorities ("ITA") have published a [FAQ](#) on persons involved in AML / CTF for a Luxembourg reserved alternative investment fund ("RAIF") supervised by the ITA for AML / CTF purposes. It confirms that RAIFs are required to appoint two individuals responsible for AML / CTF: (i) a '*responsable du respect des obligations*' ("RR") and (ii) a '*responsable du contrôle du respect des obligations*' ("RC"). The ITA imposes the same principles and conditions as imposed by the CSSF in its [FAQ](#) on the subject but clarifies further the RC's role and designates the RC as the ITA's primary contact.

For more information see our client update, [\*Luxembourg Update: Important Clarification for RAIFs for RR and RC Appointments\*](#).

On 24 December 2020, the CSSF issued a [press release](#) on its 2020 online survey on the fight against money laundering and terrorist financing which will be launched on 15 February 2020. Its purpose is to collect standardised key information concerning: (i) the money laundering ("ML") / terrorist financing ("TF") risks to which professionals under the CSSF's AML / CTF supervision are exposed; and (ii) the implementation of measures to mitigate these risks. Answers must be submitted through the CSSF's eDesk by 15 March 2021.

On 16 December 2020, the CSSF issued a [press release](#) to highlight Luxembourg's updated National Risk Assessment of ML / TF ("NRA") by the Ministry of Finance. The NRA analyses Luxembourg's ML / TF threats and vulnerabilities to determine the overall level of ML / TF risk and identifies COVID-19 as potentially leading to an increase in the level of predicate crimes. It also identifies the investment sector as having an inherently high ML / TF risk. Financial firms with obligations under Luxembourg's AML Laws ("Obliged Entities") should have regard to the NRA, as well as any sub-sector risk assessment, in conducting their own ML / TF risk assessments to ensure that their ML / TF risk assessments effectively mitigate their ML / TF risks. Obliged Entities must ensure their risk assessments are kept-up-date, be approved at senior management level, and are available to supervisory authorities (such as the CSSF) on request.

On 20 November 2020, the CSSF released four [podcasts](#) designed to present the highlights from its 2020 AML / CTF conference webinar each focusing on a distinct area of AML / CTF compliance for financial firms in the collective investment sector and supervised for AML by the CSSF.

## **EU and International**

On 7 May 2020, the European Commission adopted a new Commission Delegated Regulation [EU/2020/855](#) on third countries which have strategic deficiencies in their AML / CFT regimes that pose significant threats to the financial system of the EU ('high-risk third countries'). The EU's revised list of high-risk third countries took effect on 1 October 2020.

The European Commission adopted its [work programme](#) for 2021 on 19 October 2020. Of the 44 new initiatives identified, one relates to an AML legislative package which is due in Q1 2021.

On 28 October 2020, the Financial Action Task Force ("FATF") has published an [updated version](#) of its AML and CTF standards. It has adopted amendments to recommendations 1 (Assessing risks and applying a risk-based approach) and 2 (National co-operation and co-ordination) and the related interpretative notes, with a view to strengthening counter-proliferation financing and expects all countries to take steps to ensure implementation of these new obligations at the national level.

On 16 December 2020, FATF published an updated [COVID-19-related Money Laundering and Terrorist Financing – Risks and Policy Responses](#) report which highlights the latest developments by using information from the FATF Global Network of over 200 countries. It also details how criminals continue to exploit the crisis and confirms FATF's concerns expressed in May 2020, including changing financial behaviours with more online purchases, increased financial volatility and economic contraction caused by company closures and a looming global economic crisis. To respond to these evolving risks, authorities and the private sector need to take a risk-based approach, as required by the FATF standards.

## **1.8 CSSF: Marketing Foreign UCIs to Retail Investors in Luxembourg**

On 23 December 2020 the CSSF published [Regulation No 20-10](#) on the marketing of non-Luxembourg undertakings for collective investment ("UCIs") other than the closed-ended type ("Foreign UCIs") to retail investors in Luxembourg. It enters into force on 1 January 2021 and sets out the rules for the application of Article 100(1) of the 2010 Law. These include obtaining CSSF approval and being registered on the CSSF's Foreign UCIs list on its website prior to commencing marketing activities in Luxembourg. In addition, Foreign UCIs are required to inform the CSSF of any substantial changes to its marketing materials submitted and notify the CSSF immediately on the termination of marketing activities.

## **1.9 Central Bank Enhancements to the Central Bank Client Asset Requirements Consultation**

The Central Bank issued consultation [CP133](#) on 3 December 2020 on Enhancements to the Central Bank Client Asset Requirements ("CAR"), in the Central Bank Investment Firms Regulations. This includes broadening the scope and application of the CAR to credit institutions, targeted enhancements to include investment firms and credit institutions holding client assets in the context of conducting wholesale activities as well as other amendments applicable to all investment firms currently in scope of the CAR.

It closes for comments on 10 March 2021.

## **1.10 EU Money Market Fund Regulation Update and IOSCO Report**

On 2 October 2020, ESMA [announced](#) that it has published updated reporting instructions under on the Money Market Fund Regulation [EU/2017/1131](#) ("MMFR"). The changes only add new warning type validations or provide clarifications on existing validation rules to fix inconsistencies or ease the understanding of the rules. As the updates in the validation rules have no effect on data processing, the deadline for reporting remains unchanged.

On 20 November 2020, IOSCO published a [final report](#) setting out its findings of a thematic review on consistency in the implementation of money market funds ("MMFs") reforms. The review is based on IOSCO's assessment of the legislative and regulatory frameworks of the nine largest MMF domiciles (representing 95% of the total net assets managed by MMFs worldwide) and their implementation of IOSCO's 2012 MMF recommendations. It found that the jurisdictions have generally implemented the MMF reforms in line with the recommendations. However, the report notes that the market turmoil caused by the COVID-19 pandemic impacted the functioning of the short-term funding markets and led to significant strains in the MMF sector.

On 4 December 2020, ESMA updated its [validation rules](#) on the MMFR. This relates to the provisions of Article 37 of MMFR that require MMF managers to submit data to NCAs who will then transmit this to ESMA.

Following feedback received after the publication of the validation rules, ESMA has decided to amend them. The proposed changes are not related to the published XML schemas. The changes only provide clarifications on existing validation rules in order to fix inconsistencies or ease the understanding of the rules. It also extends the Classification of Financial Instruments (CFI) codes for eligible assets.

On 16 December 2020, ESMA published a [final report](#) on guidelines on stress test scenarios. It contains the updated guidelines and the calibration of scenarios for 2020. ESMA notes that applying 2019 scenarios in the current market environment generally leads to absolute levels of stress (with some scenarios being exceeded because of extreme market movements). This is because the COVID-19 pandemic has increased risks for MMFs and the money market instruments in which they invest, and has led to significant liquidity and redemption issues. The risk parameters have therefore been modified to reflect market developments.

MMFs and their managers are expected to measure the impact of the common reference stress scenarios specified in the guidelines. On the basis of these, the reporting template in Article 37 of the MMF Regulation should be completed and sent with quarterly reports to the relevant NCA. The new 2020 parameters will have to be used for the purpose of the first reporting period following the start of the application of the updated guidelines.

The guidelines will now be translated. They will become applicable two months after the publication of the translations.

## **1.11 Companies (Miscellaneous Provisions) (Covid-19) Act 2020 - Extension of Interim Period**

The interim period of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 has been extended to 9 June 2021. Until that date, amongst other things, both general and creditors' meetings may be held virtually; and documents which are required to be executed under seal can be executed

in counterpart. However, this extension does not apply to 2020 annual general meetings, which have been held by 31 December 2020 under the terms of this Act.

For more information see our client update, [COVID-19 Ireland Update: Company Law Changes](#).

## 1.12 Sustainable Finance Update

### SFDR

The Central Bank intends to put in place a fast track process to deal with the volume of prospectus updates due to be filed under the Sustainable Finance Disclosure Regulation [EU/2019/2088](#) ("SFDR") by 10 March 2021.

This follows a [letter](#) by the European Commission to the European Supervisory Authorities ("ESAs") published on 30 October 2020 noting that while the application of the regulatory technical standards ("RTS") for SFDR will be delayed, all application dates in the Level 1 text are being maintained. In the absence of the RTS, financial market participants will need to comply with the SFDR on a high level and principled basis. In order to provide time for implementation, the RTS will apply at a later date that has not yet been clarified. The ESAs are working to deliver the final RTS by end-January 2021.

The Central Bank has also stated that it will focus in 2021 on the impact of proposed SFDR-related changes to the UCITS and AIFMD frameworks and its supervisory role in this regard.

The CSSF [launched](#) a fast track procedure to facilitate the submission of prospectus / offering document updates required under SFDR on 16 December 2020. Fast track submissions must be made by 28 February 2021 through one of the two transmission channels currently accepted by the CSSF, namely the communication platform [e-file](#) or the communication platform [SOFiE](#). Each submission must comprise: (i) a clean and redline version of the updated prospectus / offering document; (ii) a confirmation [letter](#) completed by the Luxembourg investment fund manager ("IFM"), the legal advisor or another representative; and (iii) where applicable, a notice to investors.

### Taxonomy Regulation

On 20 November 2020, the European Commission published for consultation the text of Commission Delegated Regulation supplementing the Taxonomy Regulation [EU/2020/852](#) on climate change mitigation and adaptation. It has also published a [press release](#) on the consultation and updated its webpage on the EU taxonomy for sustainable activities.

On 4 December 2020, ESMA's [consultation](#) setting out draft advice to the European Commission on Article 8 of the Taxonomy Regulation EU/2019/2088 specifying the content, methodology and presentation of the key performance indicators that non-financial undertakings and asset managers are required to disclose. ESMA must deliver a final report with its final advice and a summary of consultation responses to the Commission by 28 February 2021.

### Other Developments

On 1 October 2020, the European Commission published a set of [FAQs](#) on the setting-up and work of the platform on sustainable finance. On 3 November 2020 the European Banking Authority ("EBA") published a [discussion paper](#) on incorporating environmental, social and governance ("ESG") risks

into the governance, risk management and supervision of credit institutions and investment firms. Comments can be made until 3 February 2021.

## 1.13 Benchmarks Regulation and LIBOR Cessation

On 6 November 2020, ESMA updated its [Q&As](#) on the Benchmarks Regulation EU/2016/1011 ("BMR"). The updated Q&As clarify the transitional provisions relating to critical benchmarks.

On 30 November 2020, the European Commission published a [statement](#) welcoming the agreement of the European Parliament and European Council on the proposed Regulation amending the BMR as regards the exemption of certain third-country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation.

The amendments permit the Commission to designate a replacement benchmark that covers all references to a widely used reference rate that is phased out, such as LIBOR, when this is necessary to avoid disruption of the EU financial markets. The UK FCA, as supervisor of LIBOR, announced on 18 November 2020 its intention that the euro, sterling, Swiss franc and yen LIBOR panels would, subject to consultation, cease at the end of 2021.

The Commission explains that with regards to other interbank lending ("IBOR") rates, it is still in market participants' best interests to prepare for the transition to alternative reference rates. The Parliament and the Council have also agreed to postpone the entry into application of the rules on third-country benchmarks until 31 December 2023 which means that EU benchmark users will continue to have access to these benchmarks.

The Parliament and the Council will adopt the [amendments](#) without further discussion as soon as possible.

On 23 December 2020, the following delegated regulations supplementing the BMR on sustainable finance issues entered into force:

- Regulation EU/2020/1816 supplementing the BMR on the explanation in the benchmark statement of how ESG factors are reflected in each benchmark provided and published.
- Regulation EU/2020/1817 supplementing the BMR on the minimum content of the explanation on how ESG factors are reflected in the benchmark methodology.
- Regulation EU/2020/1818 supplementing the BMR on minimum standards for EU climate transition benchmarks and EU Paris-aligned benchmarks.

On 23 December 2020, ESMA published a [consultation](#) on procedural rules for penalties imposed on benchmark administrators under the BMR.

## 1.14 EMIR Update

The Regulation on over the counter ("OTC") derivative transactions, central counterparties ("CCPs") and trade repositories ("TRs") [EU/648/2012](#) ("EMIR") is relevant to all Irish and Luxembourg funds trading in financial derivative instruments whether on an exchange or otherwise. UCITS and AIFs are financial counterparties for EMIR purposes and subject to the full scope of EMIR obligations.

There have been a number of developments over the quarter:

On 19 October 2020, ESMA published a [consultation paper](#) on draft RTS on CCPs under EMIR 2.2 [EU/2019/2099](#).

On 26 October 2020, ESMA [announced](#) that it has postponed the application date of the updated validation rules for reporting derivatives trades under EMIR from 1 February 2021 to 8 March 2021 due to technical issues relating to their implementation in the light of Brexit. It also published a [consultation paper](#) on draft guidelines to clarify common procedures and methodologies for the supervisory review and evaluation process of CCPs by their NCAs.

On 10 November 2020, ESMA published a [report](#) on post-trade risk reduction ("PTRR") services under EMIR (as amended by the EMIR Refit Regulation [EU/2019/834](#)). ESMA concluded that the benefits of allowing certain PTRR transactions to be exempted from the clearing obligation would reduce risk in the market, allow for legacy trades to be compressed, increase participation in PTRR services and overall reduce complexity in the market.

On 16 November 2020, ESMA's October 2020 [consultation](#) on draft guidelines to clarify common procedures and methodologies for the supervisory review and evaluation process of CCPs by their NCAs closed.

On 23 November 2020, ESMA published a final [report](#) on RTS supplementing EMIR on the clearing obligation on intragroup transactions, and novations from UK to EU counterparties.

On 23 November 2020, the Joint Committee of the ESAs published a third version of its [final report](#) on RTS under EMIR on various amendments to the bilateral margin requirements in view of the international framework and novations from UK to EU counterparties.

On 7 December 2020, the European Commission published consultations on draft delegated regulations supplementing EMIR on procedure for penalties imposed on TRs; and on penalties imposed on third-country CCPs or related third parties by ESMA.

On 17 December 2020, ESMA published a [final report](#) on RTS and implementing technical standards ("ITS") on reporting requirements, procedures to reconcile and validate the data, and amendments to the technical standards on registration of and access to TRs by the relevant authorities under the EMIR Refit Regulation. They have been submitted to the European Commission for endorsement.

On 18 December 2020, Delegated Regulation [EU/2020/2145](#) which contains RTS supplementing EMIR on CCP colleges was published in the Official Journal of the EU. It will apply from 7 January 2021.

On 21 December 2020, ESMA published updated [Q&As](#) on the implementation of EMIR. Part I (OTC derivatives) clarifies the status, after Brexit, of legacy derivative transactions executed on UK markets. This is relevant for EU CCPs to determine applicable EMIR requirements, and for position calculations against clearing thresholds. Part IV (reporting to trade repositories (TRs): transaction scenarios) and Part V (reporting to TRs: exchange-traded derivative (ETD) contracts reporting) have also been amended to clarify the reporting technique for derivatives executed on a third-country venue and cleared on the same day.

On 21 December 2020, the European Commission adopted two Delegated Regulations made under EMIR on RTS as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral; and the date at which the clearing obligation takes effect

for certain types of contracts. The next step is for the Council and the European Parliament to consider them.

## **1.15 European Long-term Investment Funds Consultation**

The European Commission launched a [public consultation](#) on EU rules for long-term investment funds on 19 October 2020 which will close on 19 January 2021. Since the adoption of the Regulation on European long-term investment funds [EU/2015/760](#) ("ELTIF Regulation") in April 2015, only a few have been launched with a small amount of net assets under their management. There are currently about 27 ELTIFs in the EU, while a number of member states have no domestic ELTIFs. The consultation will gather feedback on how to improve the ELTIF regulatory framework and explore options to amend the ELTIF Regulation.

## **1.16 IFR AND IFD Update**

On 16 December 2020, the EBA published a [final report](#) setting out seven draft RTS on prudential requirements for investment firms under the Investment Firms Regulation [EU/2019/2033](#) (IFR") and the Investment Firms Directive [EU/2019/2034](#) ("IFD"). The first draft RTS included in the final report relates to the authorisation of certain credit institutions and the remaining six relate to capital requirements for investment firms at solo level. Each of the RTS will come into force on the twentieth day after its publication in the Official Journal of the EU

On 17 December 2020, the EBA published two consultations on [internal governance under Article 26\(4\) of the IFD](#), specifying the governance provisions that class 2 investment firms should comply with; and on its [new guidelines on remuneration policies](#) under the IFD.

In line with the proportionality principle and to take account of the specificities of investment firms, the first consultation specifies a number of governance provisions laid down in the IFD, including the tasks and responsibilities of the management body as well as the organisation of investment firms. In addition it provides details on the establishment of a risk culture, a code of conduct and the management of conflicts of interest, also on related parties' transactions, to ensure that firms have decision management and oversight processes for such transactions.

This second consultation specifies the remuneration provisions that class 2 investment firms should comply with while taking into account the proportionality principle. Sound remuneration policies ensure an alignment of the variable remuneration of identified staff with the risk profile of the investment firm and the assets it manages, and they must be gender neutral.

Both consultations close on 17 March 2021.

## **1.17 Compliance with Fitness & Probity Regime and New Pre-Approval Controlled Functions**

The [Central Bank Reform Act 2010 \(Sections 20 and 22\) \(Amendment\) Regulations 2020](#) prescribe new pre-approval controlled functions ("PCFs") from 5 October 2020. They add three new functions to the list of PCFs and split out PCF-39 Designated Person into six PCF roles aligned to specific managerial functions set out in the Central Bank's UCITS Regulations, AIF Rulebook requirements and Fund Management Companies Guidance. The new PCFs comprise PCF-49 Chief Information Officer, which is applicable to all regulated financial service providers ("firms") except credit unions, as well as PCF-50 Head of Material Business Line and PCF-51 Head of Market Risk which apply to credit institutions. The Central Bank also published updated [FAQs](#) on the new roles.

On 17 November 2020, the Central Bank issued a letter to the management of all firms setting out its expectations for firms to take appropriate action to address the significant issues identified by thematic inspections on their legal obligations under the fitness and probity ("F&P") regime.

Recent Central Bank inspections highlighted a number of common issues as well as a wide divergence of standards in the implementation of the regime. In many firms, the level of awareness by Board members of their obligations was poor. The area which was most consistently weak across most firms was due diligence. Issues identified included a lack of evidence of qualifications, reference checks and suitability searches.

Where PCF or controlled function ("CF") roles are outsourced to unregulated outsource service providers ("OSPs"), the majority of firms had not, as part of their due diligence in appointing CF role holders, obtained the required documentation nor made any inquiries as to the OSP's process for assessing F&P. Further many firms did not have proper processes in place to identify, escalate and notify the Central Bank of potential concerns on the F&P of a CF or PCF holder.

For more information see our client update, *Fitness and Probity – Central Bank of Ireland Expectations Not Being Met*.

## **1.18 CSSF Circulars on Central Administration, Internal Governance and Risk Management**

On 7 December 2020, the CSSF published three new circulars: (i) CSSF circular [20/757](#); (ii) CSSF circular [20/758](#); and (iii) CSSF circular [20/759](#) on central administration central, internal governance and risk management respectively. The circulars integrate the latest EBA and ESMA principles and guidelines and address (to a large extent) the same topics.

The most notable changes introduced include: (i) the inclusion of financial holding companies and mixed financial holding companies to the scope of application of the requirements; (ii) additional guidance on the concept of proportionality; (iii) enhanced risk management practices; and (iv) new requirements in terms of responsible ESG principles. CSSF circular 20/759 also introduced a new chapter dedicated to the risks arising from the activity of depositary bank.

The CSSF has also published a new [prudential procedure](#) for the appointment, resignation and dismissal of directors, members of the authorised management and key function holders in investment firms, which came into effect on 1 January 2021.

## **1.19 CSSF New eDesk Module and Email Address for Authorisation Application Submissions**

In October 2020, the CSSF confirmed in its [newsletter](#) that a new email address ([gfi@cssf.lu](mailto:gfi@cssf.lu)) must be used when corresponding with the CSSF for: (i) any applications for the authorisation of a Luxembourg IFM; (ii) any new request for the extension of investment strategy authorisations; (iii) all amendments subject to prior notifications or to notifications under points 1 and 2 of Annex II of the [CSSF Circular 18/698](#); and (iv) any other information relating to an IFM. The previous email address ([aifm\\_applications@cssf.lu](mailto:aifm_applications@cssf.lu)) is no longer valid.

On 8 December 2020, the CSSF announced the implementation of a new "eDesk / Generic Requests Management" module on the eDesk to facilitate the submission of various online requests, i.e. requests submitted at the initiative of the interested parties and requests submitted on a specific

CSSF instruction. It also advised that two further submissions must now exclusively be made through the eDesk: (i) information submitted on unregulated AIFs (established in Luxembourg, in another EU Member State or in a third country) and / or regulated AIFs established in a third country, in compliance with CSSF circular [15/612](#); and (ii) information submitted on an ad hoc basis related to AML supervisory measures.

## **1.20 CSSF FAQ on Luxembourg's Investor Compensation Scheme**

On 26 November 2020, the CSSF published its first edition [FAQ](#) on Luxembourg's Investor Compensation Scheme ("SIIL"). It outlines the CSSF's decision to interpret the term "other professional investors" as used in Article 195 (2) of the [Luxembourg law of 18 December 2015](#) on the resolution, reorganisation and winding up measures of credit institutions and certain investment firms and on deposit guarantee and investor compensation schemes as "professional clients" within the meaning of Annex II to MiFID II, i.e. clients who are considered to be professionals and clients who may be treated as professionals on request. Such professional clients are excluded from the SIIL's coverage.

## **1.21 ESMA Consults on Guidance for Funds' Marketing Communications**

On 9 November 2020, ESMA published a [consultation](#) on draft guidelines for funds' marketing communications under the Regulation [EU/2019/1156](#) on the cross-border distribution of collective investment undertakings.

The draft guidelines specify the requirements for marketing communications sent to investors to promote UCITS and AIFs, including European social entrepreneurship funds, European venture capital funds and European long-term investment funds.

The requirements are that the material must: be identifiable as marketing material; describe the risks and rewards of purchasing units or shares of an AIF, or units of a UCITS, in an equally prominent manner; and ensure the information is fair, clear and not misleading.

Comments are requested by 8 February 2021. ESMA will issue final guidelines by 2 August 2021.

Only fund managers will be subject to them although distributors, such as investment firms, may have to apply other rules governing the information issued to investors or potential investors.

## **1.22 COVID-19: ESMA Report on ESRB Recommendation on Liquidity Risk in Investment Funds**

On 12 November 2020, ESMA published a [report](#) in response to the European Systemic Risk Board's May 2020 recommendation on liquidity risks in investment funds. In the report, ESMA identifies five priority areas for action that would enhance the preparedness of these fund categories:

- Ongoing supervision of the alignment of the funds' investment strategy, liquidity profile and redemption policy.
- Ongoing supervision of liquidity risk assessment.
- The establishment and reporting of fund liquidity profiles.
- An increase of the availability and use of liquidity management tools.
- The supervision of valuation processes in a context of valuation uncertainty.

ESMA will follow up with NCAs on the first, second and fifth of these policy areas to foster supervisory convergence among NCAs in how they supervise firms' compliance with their obligations. However, ESMA considers that the increase of the availability of liquidity management tools in EU member states and further convergence in the establishment of liquidity profiles under AIFMD are fit to be taken forward in the context of the Commission's recent review of AIFMD.

### **1.23 Compliance by MiFID-Authorised Investment Firms with the "Best Execution" Requirements for Consumers**

On 10 November 2020, the Central Bank [published](#) the outcome of a thematic review of compliance by MiFID-authorised investment firms with the MiFID "best execution" requirements for consumers. These require investment firms to take steps to obtain the best possible outcome for consumers, taking into account factors such as price, costs, speed, likelihood of execution and settlement, size, nature and any other consideration relevant to the execution of the order.

The review found that some firms could not demonstrate effective oversight of how their best execution requirements were being fulfilled. The Central Bank is particularly concerned at the lack of evidence of Board and / or committee oversight and challenge in the process. It is also concerned that some staff had poor awareness of their firm's best execution policies.

### **1.24 Securitisation Regulation**

On 5 October 2020, ESMA published updated [Q&As](#) on the Securitisation Regulation [EU/2017/2402](#) and its [final report](#) on the Guidelines on portability of information between securitisation repositories under the Securitisation Regulation. These set out common provisions that a securitisation repository should follow when transferring securitisation information to another repository.

The Q&As updated certain questions and provide guidance on how to report certain underlying exposures which benefit from a COVID-19 related debt moratorium or payment holiday.

On 7 December 2020, the ESAs highlighted the change in status of simple, transparent and standardised ("STS") securitisations after the end of the Brexit transition period. The ESAs remind investors that, for a transaction to qualify as a European STS securitisation, the Securitisation Regulation requires that the originator, sponsor and the special purpose vehicle be established in the EU. This means that transactions currently labelled as EU STS securitisations will lose the STS status where one or more of the parties is established in the UK after the end of the transition period.

Commission Delegated Regulation [EU/2020/1732](#), which supplements the Securitisation Regulation on fees charged by ESMA to securitisation repositories came into force on 10 December 2020.

### **1.25 CSDR Update**

On 23 October 2020, the European Commission adopted a Delegated Regulation amending Delegated Regulation [EU/2018/1229](#) supplementing the Central Securities Depositories Regulation [EU/909/2014](#) ("CSDR") with regard to RTS on settlement discipline. Delegated Regulation EU/2018/1229 was due to enter into force on 1 February 2021, but in August 2020, ESMA submitted to the Commission a final report, containing draft RTS, proposing a postponement of this entry into force date due to COVID-19 pandemic. The next step will be for the European Council and the European Parliament to consider it.

On 5 November 2020, ESMA published a final [report](#) to the European Commission on internalised settlement under CSDR which concluded that no major risks have been identified. However, NCAs have identified some risks, the most common being operational risk and custody risk.

On 25 November 2020, the European Commission extended temporary equivalence to facilitate the continued operation of UK based central securities depositories ("CSDs") for EU entities until 30 June 2021. This was [welcomed](#) by the Irish government.

On 8 December 2020, the European Commission published a [consultation](#) on its review of the CSDR which closes on 2 February 2021. The Commission is seeking feedback on areas where targeted action may be necessary to ensure the CSDR's objectives are fulfilled more proportionately and effectively.

On 11 December 2020, ESMA [announced](#) that Euroclear UK & Ireland Limited ("EUI"), the CSD established in the UK, will be recognised as a third-country CSD (TC-CSD) for a limited period after the end of the Brexit transition period.

The announcement follows publication in the Official Journal of the EU in November 2020 of European Commission Implementing Decision [EU/2020/1766](#) on the temporary equivalence of the UK's regulatory framework for CSDs under CSDR. ESMA's decision to recognise EUI as a TC-CSD will allow EUI to continue providing the following services in the EU after the Brexit transition period:

- Notary and central maintenance services in respect of securities constituted under the law of Ireland; and
- Central maintenance services in respect of underlying securities constituted under the laws of Cyprus, Luxembourg and the Netherlands, which are represented in the EUI CREST system by means of depositary interests.

ESMA's recognition decision will apply from 1 January until 30 June 2021. This is to give EU issuers time to transfer their securities to EU CSDs.

On 22 December 2020, the European Central Securities Depositories Association published an [updated version](#) of its settlement fail penalties framework. The framework applies to all CSDs subject to CSDR or equivalent legislation.

## **1.26 SFTR Update**

On 5 November 2020, ESMA published a set of [Q&As](#) to provide clarity to market participants on how to comply with their reporting requirements under the Securities Financing Transactions Regulation [EU/2015/2365](#) ("SFTR"). The Q&As cover frequency of reports; reporting of settlement fails; reporting of repos initially collateralised on a per-transaction basis and subsequently on a net-exposure basis; reporting of trading venue for cleared and non-cleared SFTs; and reporting of cash collateral for margin lending.

On 21 December 2020, ESMA published an [updated version](#) of its guidelines on reporting under Articles 4 and 12 of SFTR.

## **1.27 MiFID II / MiFIR Update**

The Markets in Financial Instruments Directive 2014/65/EU ("MiFID II") and the Markets in Financial Instruments Regulation [EU/600/2014](#) ("MiFIR") apply from 3 January 2018.

On 27 October 2020, ESMA [announced](#) that it has updated the list of third-country venues, in the context of the opinions on post-trade transparency and position limits under MiFID II/MiFIR, to add UK venues.

On 6 November 2020, ESMA published an updated version of its [Q&As](#) on the implementation of investor protection topics under MiFID II/MiFIR which include three new Q&As on product governance and a [consultation](#) on draft guidelines on obligations relating to market data under MiFID II/MiFIR. It also published a [decision](#) on the delegation to the ESMA chair of the assessment of third country trading venues for the purposes of Articles 20 and 21 of MiFIR and updated [guidance](#) on the Annex to its opinion determining third-country trading venues for purpose of transparency under MiFIR on 9 November 2020.

On 25 November 2020, ESMA published a [statement](#) on the impact of the end of the Brexit transition period on the derivatives trading obligation ("DTO") under Article 28 of MiFIR. It clarifies the application of the DTO following the end of the period and explains that the DTO will continue applying without changes.

On 9 December 2020, the European Parliament's Economic and Monetary Affairs Committee and the European Council reached agreement on the proposed Directive amending the MiFID II. A number of changes were agreed including:

- Professional clients will no longer receive information on costs and charges. They will however still receive information on investment advice and portfolio management.
- Ex-post information on costs and charges should be supplied without delay and clients should be able to receive this information over the phone (or on paper if requested). Also, the client should be given a costs breakdown before concluding a transaction.
- Retail clients will be able receive information in digital format instead of on paper, but should be given at least eight weeks' notice and the choice to continue receiving paper or switch to a digital format.

On 15 December 2020, the European Commission adopted a Delegated Regulation amending Delegated Regulation EU/2017/565 on the thresholds for weekly position reporting under the MiFID II. The European Council and the European Parliament will now consider it.

On 16 December 2020, the Council of the EU [invited](#) its Committee of Permanent Representatives to approve the final compromise texts of the proposed Directive and Regulations that form part the package of capital markets reforms to help the recovery from the COVID-19 pandemic. In an accompanying press release, the European Council states that the amendments could be formally adopted in February 2021.

On 23 December 2020, ESMA published an [updated version](#) of its opinion on the assessment of pre-trade transparency waivers for equity and non-equity instruments under MiFIR.

Over the quarter ESMA updated its MiFID II/MiFIR Q&As on [MiFIR data reporting](#); and on [investor protection and intermediaries](#).

## 1.28 Irish Investment Funds Statistics: Q3 2020

The main points to note in the Central Bank's [Q3 2020](#) statistics issued in November 2020 are as follows:

- The net asset value of Irish-resident investment funds increased by €59 billion, or 2%, to €2,487 billion in Q3 2020. Bond, equity, hedge, and real estate fund types all saw net asset values increase.
- Irish-resident investment funds saw investor inflows of €38 billion and positive revaluations of €21 billion during the quarter.
- Equity fund assets saw the biggest increase during Q3 2020 of €41 billion to stand at €897 billion, driven mainly by valuation gains (€27 billion). However, bond funds experienced the largest investor inflows (€21 billion), which drove the increase in total assets, of €19 billion, to €820 billion.
- The total debt holdings of all Irish-resident investment funds amounted to €1,205 billion at end-September 2020, increasing by €11 billion, or 1% composed of €32 billion net purchases and €22 billion of negative revaluations.
- Euro denominated debt holdings experienced the largest rise, of €9 billion, across the quarter, of which €5 billion were net purchases. US dollar dominated debt holdings rose by €2 billion with purchases of €16 billion and, exchange rate driven, valuation losses of €14 billion.

## **1.29 Luxembourg Undertakings for Collective Investment Statistics**

The main points to note in the CSSF's [November 2020](#) update for regulated Luxembourg funds are as follows:

- Total assets held by Luxembourg UCITS, Part II UCIs, SIFs and SICARs ("Luxembourg Investment Funds") increased € 207,746 billion from € 4,674.665 billion as at 31 October 2020 to € 4,882.411 billion.
- The number of Luxembourg Investment Funds active in the market and regulated by the CSSF totals 3,627.
- Of the 3,627 active Luxembourg Investment Funds, 2,384 entities have adopted an umbrella structure and together have a total of 13,328 sub-funds. The remaining 1,243 Luxembourg Investment Funds are structured as stand-alone funds.
- As at November 2020 there were a total of 14,571 fund units.
- During November 2020 there were more subscriptions than redemptions in equity funds and more redemptions than subscriptions in fixed-income funds.

In addition the number of Luxembourg RIAFs reached 1,235 as of 4 January 2021.

# **2 Tax**

## **Ireland**

### **2.1 Finance Act 2020**

[Finance Act 2020](#) was signed into law by the Irish President on 19 December 2020. It contains few provisions focused on funds and the financial services industries. There have been some welcome changes to the anti-hybrid legislation. Section 835AL of the Taxes Consolidation Act 1997 was amended to provide that where payments to a hybrid entity arise in circumstances where there is a deduction without inclusion (D/NI) mismatch outcome, a mismatch shall not arise where the participant is an entity that is exempt from tax on profits or gains in that territory. This is an important clarification where Irish entities are making tax deductible payments to foreign entities, which may ultimately be owned by tax exempt entities. The legislation also clarifies the test of association which is material to the application of the anti-hybrid rules.

## **2.2 DAC6 and Brexit**

Funds and Irish entities which were intending to rely on the making of a DAC6 report by a UK intermediary to the UK HMRC in order to simplify their DAC6 reporting in Ireland should note certain changes to the UK DAC6 regime were introduced in the UK following the agreement of the UK/EU exit agreement and the completion of Brexit.

As highlighted previously, DAC6 (the EU wide mandatory disclosure regime) was transposed into Irish tax law in Finance Act 2019 and has retroactive application in respect of arrangements entered into after 25 June 2018. Under DAC6 intermediaries and / or taxpayers are required to make a DAC6 disclosure return to Irish Revenue in relation to reportable cross border arrangements. The first reports are due on 31 January 2020. The UK had also transposed DAC6 into its national law.

If an Irish fund or Irish intermediary is involved in a reportable cross-border arrangement, it is not required to file a report with Irish Revenue if another intermediary has filed a report on that arrangement with the relevant authority of another EU member state provided certain conditions are met. Some Irish funds and Irish intermediary service providers to such funds, may have been expecting to rely on a UK based intermediary, such as a UK investment manager or tax advisor making the DAC6 report to the UK HMRC. However, at the end of the Brexit transition period, the UK ceased to be an EU member state. In addition, the UK amended its DAC6 rules in late December 2020 to remove the vast majority of the reporting requirements under DAC6 hallmarks.

Practically the UK's divergence from the DAC6 standard may create additional administrative burdens for intermediaries and taxpayers with pan-European operations that had planned to coordinate and submit DAC6 reports in the UK. Irish Revenue has not yet published any materials on this point however it would be prudent for Irish entities and intermediaries with reporting obligations to ensure that returns are filed in Ireland or another EU Member State by the relevant deadline.

## **2.3 VAT Recovery and Brexit**

Many funds and service providers will seek to recover VAT based on their supplies of services to non-EU based customers. Following the UK's withdrawal from the EU, the UK is a non-EU country and, therefore, there may be additional scope for increased VAT recovery where an Irish fund holds UK assets, or makes supplies to UK customers. Where this is relevant the fund should consult with their tax advisor on whether it is possible to seek agreement in advance from Irish Revenue on the change in the recovery methodology for 2021, rather than waiting to adjust recovery at the end of the year (as this could have an immediate cash flow benefit for the fund).

### **EU**

## **2.4 Updated EU Annex I List: Cayman Islands Removed**

On 6 October 2020, the EU Finance Ministers comprising the Economic and Financial Affairs Council announced that the Cayman Islands has been removed from the EU Annex I list of non-cooperative jurisdictions for tax purposes. The updated EU Annex I List now includes the following jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, and Vanuatu.

For more information see our update, *Ireland and Luxembourg: the Updated EU Annex I List*.

## **Luxembourg**

### **2.5 Gibraltar's Exclusion from the Benefit of the EU Parent Subsidiary Directive**

The Luxembourg tax authorities have confirmed, via a new tax circular, the exclusion of Gibraltar companies from the benefits of the EU Parent Subsidiary Directive [EU/2011/96](#) ("PSD") under Luxembourg domestic law from 1 January 2021. The circular also confirmed the Luxembourg tax authorities' administrative tolerance which allowed Luxembourg companies with a Gibraltar company as a parent or subsidiary to benefit from the PSD for the remainder of 2020. The new position is in line with a recent European Court of Justice decision which ruled that the PSD concepts of "companies incorporated in accordance with the law of the UK" and of "corporation tax in the UK" do not apply to companies incorporated in Gibraltar and which are subject to Gibraltar corporation tax.

From 1 January 2021 the Luxembourg participation exemption for net worth tax, dividends received or capital gains from a company listed in Article 2 of PSD, i.e. EU tax resident subsidiaries will no longer apply to Gibraltar companies. However, they will remain eligible to the exemption applicable (under certain conditions) to capital companies subject to income tax comparable to Luxembourg corporate income tax. Similarly, dividends distributed by a Luxembourg company to its Gibraltar parent company will no longer benefit from the withholding tax exemption regime in 2021.

For more information see our client update, [\*Luxembourg Confirms Gibraltar Exclusion from the Benefit of the EU Parent Subsidiary Directive\*](#).

### **2.6 Filing Extensions for 2019 and 2020 Tax Returns**

In light of ongoing COVID-19 lockdowns, the Luxembourg Finance Ministry [announced](#) on 21 December 2020 an extension to the tax return filing deadlines for 2019 and 2020. It includes an extension for 2020 Luxembourg individual income tax returns and business tax returns until 30 June 2021 and an extension for 2019 Luxembourg individual tax returns and municipal business tax returns for individuals until 31 March 2021.

Also the Luxembourg tax administration has instructed all Luxembourg corporate tax offices not to impose any penalties for late filing of 2019 returns for Luxembourg corporate income tax and municipal business tax until 31 March 2021.

For more information see our client update, [\*Luxembourg Update: Filing Extensions for 2019 and 2020 Tax Returns\*](#).

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## About the Maples Group

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The Maples Group's Irish legal services team is independently ranked first among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Ireland Fund Report, as of 30 June 2019). Our sizeable and fast growing Luxembourg legal services team cover the whole range of funds & investment management services. For more information, please visit: [maples.com](http://maples.com).

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