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Maples and Calder Funds Update – Ireland

Quarterly Update | July – September 2018

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1.1 UCITS Update

There have been a number of developments over the quarter:

Central Bank UCITS performance fees review

On 4 September 2018 the Central Bank published the outcome of an inspection into UCITS performance fees in a letter to industry. Fund management companies are responsible for the effective oversight of performance fee charges and, in some instances, it found that performance fees were not calculated in accordance with the Central Bank's UCITS Performance Fees Guidance. It also highlights concerns that this guidance is not being applied consistently across industry. Following this all fund management companies whose UCITS funds charge performance fees are required to review their use of performance fees for compliance with the guidance by 30 November 2018.

Central Bank Q&A

On 5 July 2018 the Central Bank published the twenty third edition of its UCITS Q&A amending Question ID 1002 on UCITS investing in non-UCITS investment funds. The amendments clarify that where a UCITS invests in a non-UCITS fund, the constitutional document of the non-UCITS must include a prohibition on investing more than 10% in other investment funds; and that the non-UCITS must be subject to requirements in its jurisdiction of domicile which are equivalent to certain UCITS investor protections. If this is not the case the non-UCITS fund must have requirements of the same effect in its constitutional or offering document.

UCITS should be in compliance with this revised Q&A as soon as possible taking into account the best interests of the investors. In any event, compliance should be ensured no later than 5 October 2018.

ESMA Q&A

On 23 July 2018 ESMA updated its UCITS Q&As which include new questions and answers on:

(i) Whether a UCITS is permitted to invest in other UCITS or collective investment undertakings with different investment strategies or investment restrictions (new Question 6a);

(ii) Whether netting and hedging arrangements can be taken into account for the purposes of calculating issuer concentration limits under Article 52 of the UCITS Directive (new Question 5b);

(iii) Reuse of assets by a UCITS depositary under Article 22(7) of the UCITS Directive; (Section X, new Question 1); and

(iv) The supervisory responsibilities of competent authorities in host member states when a UCITS management company provides investment services through a branch established in the host member state (new Question 7a).

ESMA peer review on Guidelines on ETFs and UCITS Issues

On 30 July 2018 ESMA published a final report following its recent peer review on the guidelines on exchange traded funds ("**ETFs**") and other UCITS issues following on-site visits to six national competent authorities ("**NCAs**") (Germany, Estonia, France, Ireland, Luxembourg and the UK). It calls for NCAs to:

- Ensure a more systematic review of the required efficient portfolio management ("**EPM**") disclosures, allowing investors to better understand funds' EPM engagement, the risks involved and the cost and fee policy concerning EPM.
- Provide more comprehensive internal supervisory guidance on costs, fees and revenues regarding EPM.
- Ensure that all net revenues from EPM are returned to investors.
- Revise existing national exemptions to the guidelines on collateral requirements so that fund assets can only be used for EPM purposes where UCITS receive high quality and liquid collateral.

ESMA noted that the guidelines have been transposed into Irish law and that the Central Bank has issued supporting guidance and factored the requirements in the Guidelines into its UCITS application forms (these were highlighted as good practices).

See our client update, *ESMA highlights improvements needed in regulation of UCITS EPM practices*

Depositary safekeeping duties

Article 22a(3)(c) of the UCITS Directive 2009/65/EC requires that where a depositary delegates safe-keeping functions to third parties (custodians), the assets also need to be segregated at the level of the delegate. Delegated Regulation (EU) 2016/438 on safe keeping duties of depositaries details how this obligation is to be fulfilled. On 29 May 2018 the European Commission consulted on a draft delegated regulation which amends Delegated Regulation (EU) 2016/438 and sets out further requirements where custody of UCITS clients' assets is delegated to a third party. In response to industry requests, the Commission deferred the application date of the new delegated regulation for 18 months post finalisation and it published a further draft of it on 12 July 2018. The Council of the EU has confirmed that it will not to object to it and the next step is for it to be considered by the European Parliament.

UCITS – review process

On 9 October 2018 the Central Bank advised of its updated review processes for UCITS and RIAIFs which simplify authorisation procedures and, in some cases, eliminate a review period

of several weeks. For more information see our client update, Improvements to Central Bank of Ireland Review Process for UCITS and RIAIFs

1.2 AIFMD Update

There have been a few recent developments in relation to Directive 2011/61/EU ("**AIFMD**"):

Depositary safekeeping duties

Delegated Regulation (EU) 231/2013 on safe keeping duties of depositaries supplements AIFMD specifies depositaries' duties on the safe keeping of alternative investment fund ("**AIF**") clients' assets. In May 2018 the European Commission published a draft delegated regulation amending Delegated Regulation (EU) 231/2013 for consultation which set out further requirements where custody of AIF clients' assets is delegated to a third party. In response to industry requests, the Commission deferred the application date of the new draft delegated regulation for 18 months post finalisation and published a further draft of it on 12 July 2018.

The Council of the EU has confirmed that it will not to object to it and the next step is for it to be considered by the European Parliament.

ESMA Q&A

On 23 July 2018 ESMA updated its AIFMD Q&As to include a new question and answer on the supervisory responsibilities of competent authorities in host member states when an alternative investment fund manager ("**AIFM**") provides investment services through a branch established in the host member state (Section XIV, new Question 1). It states that responsibilities of home and host member states should be identified similarly to, and consistently with, the general framework established for the provision of activities pursued by AIFMs through branches as well as with the MiFID II framework regulating the supervision on the provision of investment services across the EU.

RIAIFs – review process

On 9 October 2018 the Central Bank advised of its updated review processes for UCITS and RIAIFs which simplify authorisation procedures and, in some cases, eliminate a review period of several weeks. For more information see our client update, Improvements to Central Bank of Ireland Review Process for UCITS and RIAIFs

1.3 Brexit: Draft EU Exit SIs for UK Investment Funds and their Managers

HM Treasury in the UK has published draft versions of the Alternative Investment Fund Managers (Amendment) (EU Exit) Regulations 2018 and the Investment Schemes (Amendment etc) (EU Exit) Regulations 2018 alongside explanatory policy notes. The purpose of both Regulations is to ensure that the regimes established under AIFMD and UCITS IV respectively continue effectively in a UK context post Brexit. These statutory instruments will make amendments to retained EU law related to investment funds and their managers to ensure this.

The draft Regulations relating to AIFMD:

- Amend the definition of an AIF. An AIF will be any investment fund that is not subject to the UK UCITS regime, which will be amended by the Collective Investment Schemes (Amendment) (EU Exit) Regulations 2018. All non-UK funds, including EEA UCITS, will therefore be defined as AIFs.
- Disapply the UK's National Private Placement Regime information and reporting requirements for funds recognised under the UK Financial Services and Markets Act 2000 for marketing to retail investors.
- Set out the structure of a "temporary permissions regime" for AIFs and AIFMs (including European Venture Capital Funds, European Social Entrepreneurship Funds, European Long-term Investment Funds and money market funds that use an AIF structure).
- Ensure that a UK AIFM will only be required to report on portfolio companies and comply with the restrictions on asset stripping when it acquires control of a UK company, as opposed to an EU company.

The draft Regulations relating to UCITS:

- Introduce a UK UCITS regime for funds established and authorised in the UK, which will be distinguished by the label "UK UCITS" and will maintain the existing investment rules for UK UCITS.
- Will continue to allow the cash of a UK UCITS to be booked in accounts opened with any EEA credit institution. This will enable UK UCITS to continue to use settlement accounts in other member states to give effect to their investment mandates, in line with maintaining the eligible investments of UK UCITS.
- Sets out the structure of a temporary permissions regime for EEA UCITS (including money market funds which use a UCITS structure). This regime will last for three years from exit day. HM Treasury has a power to extend the regime by no more than 12 months at a time in certain specified circumstances.
- Treat EEA firms the same as third country firms. This means that after exit day the depositary, trustee, operator and/or manager of UK authorised funds will have to meet certain requirements depending on the legal form of the fund.
- Delete provisions enabling cross-border mergers between UCITS in different Member States as they will no longer be possible.

HM Treasury intends to lay these draft regulations before the UK Parliament in the autumn. They will come into force on exit day.

For more information see our client update, *Marketing of UCITS and AIFs in the UK Post Brexit*

1.4 ETFs – Central Bank Response to Discussion Paper

The Central Bank published its Feedback Statement on DP6 – Exchange Traded Funds on 14 September 2018 following consideration of feedback received from the exchange traded funds ("**ETFs**") industry to its May 2017 discussion paper ("**DP6**") on ETFs and subsequent engagement with selected stakeholders.

It summarises the responses on DP6 and sets out some policy changes which have resulted from the feedback received regarding share class dealing arrangements and listed and unlisted share classes. In it the Central Bank clarified that investment funds can establish both listed and unlisted shares classes within a single fund structure, subject to disclosure requirements, and that it will permit different dealing times for hedged and unhedged share classes in an ETF. However it does not relax the requirement that ETFs must make full daily portfolio disclosure to the public.

For more information see our client update, *Exchange Traded Funds – Central Bank of Ireland Feedback Statement to Discussion Paper 6*

1.5 Money Market Funds Regulation

The Money Market Funds Regulation (EU) 2017/1131 ("**MMFR**") came into force on 20 July 2017. It applies to money market funds established, managed or marketed in the EU and aims to make these investment products more resistant to contagion risks.

Most provisions apply from 21 July 2018 (with the exception of Article 11(4), Article 15(7), Article 22 and Article 37(4) which have applied since 20 July 2017).

The European Union (Money Market Funds) Regulations 2018 came into effect on 21 July 2018 and designate the Central Bank as the competent authority in Ireland for the purposes of the MMFR and give it the power to withdraw authorisation of a MMF in certain circumstances. Existing MMFs benefit from a transitional period and are required to comply with the MMFR by 21 January 2019. In order that a decision on application for authorisation could be made for existing MMFs by the 21 January 2019 deadline, the Central Bank required draft documentation for review to be submitted by 1 September 2018.

On 20 July 2018 ESMA wrote to the European Commission asking it for clarity for market participants and investors on the issue of the compatibility of the reverse distribution mechanism or share cancellation with the MMFR.

Commission Delegated Regulation (EU) 2018/990 amending and supplementing the MMF Regulation with regard to simple, transparent and standardised ("**STS**") securitisations and asset-backed commercial papers, requirements for assets received as part of reverse repurchase agreements and credit quality assessment methodologies entered into force on 2 August 2018. It applies from 21 July 2018, with the exception of Article 1, which will apply from 1 January 2019. It covers MMF investment requirements and ensures coherence of those requirements by giving the people subject to them an overview and single point of access to them.

On 4 September 2018 Irish Funds published a Q&A on the implementation of MMFR which addresses questions in relation to: product categories and rules; transition to MMFR valuations and fund accounting considerations; transfer agency considerations; depositary considerations; and transparency and regulatory reporting.

On 28 September 2018 ESMA published a consultation and draft guidelines on how European MMFs should conduct their internal stress testing. Under the MMFR, MMF managers are required to conduct regular stress tests as part of their risk management and regulatory disclosure. The consultation (which closes on 1 December) is the first step in developing detailed specifications for these stress tests by proposing common parameters and scenarios which take into account the following hypothetical risk factors: liquidity changes of the assets held in the portfolio of the MMF; credit risk, including credit events and rating events; changes in interest and exchange rates; redemptions; spread changes of indexes to which interest rates of portfolio securities are tied; and macro-economic shocks.

1.6 Criminal Justice (Corruption Offences) Act 2018

This Act came into force on 30 July 2018. It modernises and consolidates existing legislation relating to bribery and corruption dating back to 1889. The Act introduces a number of new corruption offences and penalties including a strict liability offence where a corporate body can be liable for the actions of directors, managers, employees or agents who commit a corruption offence for the benefit of that body. The penalty for the company can be an unlimited fine. Other new offences include active and passive trading in influence; an Irish official doing a corrupt act in relation to his or her office; giving a gift, consideration or advantage knowing that it will be used to commit a corrupt offence; and creating or using false documents.

Corruption offences are also given extra-territorial effect under the Act similar to the UK Bribery Act 2010.

For more information see our client update, *New Irish Anti-Corruption Legislation*

1.7 CP86 – Fund Management Companies Guidance Notice

In December 2016 the Central Bank issued its CP86 feedback statement together with the final guidance for fund management companies on managerial functions, operational issues and procedural matters. Its requirements in relation to the organisation of fund management companies came into effect on 1 July 2018. The requirements are supported by the December 2016 guidance.

On 5 July 2018 the Central Bank clarified that from 1 July 2018 its supervisory focus will shift to assessing how fund management companies have implemented the new requirements and related guidance into their organisations. Specific emphasis will be placed on assessing the appropriateness of resources and organisational structure. It will focus on the assessment work performed by the organisational effectiveness role holder and, in particular, how boards have implemented any proposals to improve organisational effectiveness.

1.8 Corporate Governance Requirements for Investment Firms: Second Consultation

The Central Bank's May 2018 consultation paper (CP120) closed on 31 July 2018. It proposes rules relating to the:

- Composition of a board. In particular, it requires that the board is composed of a majority of independent non-executive directors, subject to certain exceptions where firms are subsidiaries of groups.
- Appointment of a chairman who has sufficient expertise, qualifications and experience and who is an independent non-executive director. Again there is an exception to this requirement for subsidiary firms to allow the chairman to be a group director.
- The establishment and composition of certain committees of a board.

The revised requirements will apply from 1 July 2019.

For more information see our client update *CP120 – CBI Consults on Corporate Governance Requirements for Investment Firms*

1.9 Cross Border Distribution of Investment Funds Proposals

On 12 March 2018 the European Commission published a regulation on facilitating cross-border distribution of collective investment funds, amending the European Venture Capital Funds Regulation 345/2013/EU ("**EuVECA Regulation**") and the European Social Entrepreneurship Funds Regulation 346/2013/EU ("**EuSEF Regulation**") and a proposal for a directive amending the UCITS Directive and AIFMD.

On 21 September 2018 the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published two draft reports on the proposed Directive and on the proposed Regulation which contain a European Parliament legislative resolution with suggested amendments and an explanatory statement. The reports are generally supportive of the proposals. The suggested amendments include procedures for meeting marketing requirements by national authorities, transparency on fees set by national authorities and the possibility of "pre-marketing" across borders AIFs that have not been established. On 2 October 2018 a revised version of the draft report on the proposed Directive was published.

For more information see, *Cross Border Distribution of Investment Funds - Progression of Draft EU Legislation*

1.10 Companies (Statutory Audits) Act 2018

Most provisions of the Companies (Statutory Audits) Act 2018 came into force on 21 September 2018 and consolidate existing audit legislation into the Companies Act 2014. The provisions not in force relate to the filing of annual returns and filing periods for applications to extend the annual return date.

The Act replaces the Irish Collective Asset-management Vehicles Act 2015 references to "Audits Regulations" with the relevant new provisions of the Companies Act 2014 and updates eligibility for appointment as an auditor of an ICAV provisions. Similarly it amends European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 to confirm that sections 1099 to 1110 of Companies Act 2014 (which implement the Shareholders' Rights Directive 2007/36/EC) do not apply to UCITS and corrects a reference to the Companies Act 2014 on the obligation on UCITS to submit financial statements to the Companies Registration Office.

1.11 EU Securitisation Regulation

Regulation (EU) 2017/2402 on a general framework for securitisation and creating a specific framework for simple, transparent and standardised ("**STS**") securitisation ("**Securitisation Regulation**") and Regulation (EU) 2017/2401 amending the Capital Requirements Regulation 575/2013/EU applies to securitisations the securities of which are issued on or after 1 January 2019 or which create new securitisation positions on or after that date.

The Securitisation Regulation impacts both AIFs and UCITS. AIF managers' current due diligence, transparency and risk retention requirements under AIFMD will be repealed and replaced by the Securitisation Regulation. It will also bring UCITS management companies and internally managed UCITS that are authorised investment companies into the framework.

On 16 July 2018 ESMA published the following draft technical standards under the Securitisation Regulation:

- RTS specifying the information that the originator, sponsor and special purpose vehicle are required to provide to ESMA in compliance with the STS notification obligations.
- ITS establishing the templates to be used when providing the requisite notification on STS status.
- RTS specifying the application requirements for third party entities seeking to be authorised as providers of STS verification services.

On 31 July 2018 the European Banking Authority ("**EBA**") published two final draft RTS:

- On the homogeneity of the underlying exposures in securitisation.
- Specifying the requirements for originators, sponsors and original lenders relating to risk retention.

On 22 August 2018 ESMA published a final report on disclosure requirements under the Securitisation Regulation which contained draft regulatory and implementing standards which require certain information to be reported about securitisations by the originator, sponsor or special purpose entity.

All the above draft standards have been submitted to the European Commission for endorsement.

For more information see article, *Impact of the Securitisation Regulation for UCITS*

1.12 EMIR Update

The European Market Infrastructure Regulation (Regulation on over the counter ("**OTC**") derivative transactions, central counterparties ("**CCPs**") and trade repositories ("**TRs**") (Regulation 648/2012)) ("**EMIR**") is relevant to all Irish funds trading in financial derivative instruments ("**FDI**") 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 12 July 2018 ESMA published an updated version of its Q&As on the implementation of EMIR. ESMA has amended:

(i) General Q&A 1 on the identification of counterparties to a derivative to confirm that a portfolio manager can be a counterparty to a derivative when entering into a derivative on its own account and own behalf.

(ii) TR Q&A 40 on legal entity identifier ("**LEI**") to simplify the description of the existing process. ESMA has also added explanations on other processes that TRs should follow in different scenarios where reports must be updated in relation to the LEI.

(iii) Part IV of the Q&As (Reporting to TRs – Transaction scenarios) to add a new case for reporting to TRs in a transaction scenario involving portfolio management companies.

On 9 August 2018 ESMA published an updated version of its validation rules for the reports submitted under the revised technical standards ("**RTS**") on reporting under Article 9 of EMIR. The updated rules take effect from 5 November 2018 and relate to the following fields: reporting timestamp; reporting counterparty id; id of the other counterparty; underlying identification; and confirmation means.

The revised Central Bank EMIR FAQ which issued on 10 September 2018 includes the following new answer on LEI codes (Question 8): "An LEI is available from LEI issuers accredited by the Global LEI Foundation ("**GLEIF**"). A list of all LEI issuers, also referred to as Local Operating Units, can be found on the GLEIF website. The GLEIF has also introduced the concept of a registration agent to streamline the issuance of LEIs. Registration agents help legal entities to access the network of LEI issuing organisations."

On 20 September 2018 ESMA, published a study on data reported under EMIR which found that funds that are part of a large group are more likely to use credit default swaps "(**CDS**"). A high reliance on CDS is seen, in particular, among fixed income funds that invest in less liquid markets, and alternative funds that implement hedge-fund-like strategies. The main driver of net CDS exposures is fund size.

On 26 September 2018 ESMA updated its EMIR Q&A. It includes a new Q&A (no. 23) which provides clarification on access models at European CCPs and specifically models that typically aim at facilitating buy-side or small participant access to CCPs and allowing better

capital treatment for clearing members. It also adds a new Q&A (no. 49) to the trade repositories section explaining how a reporting counterparty should report an FX swap derivative under Article 9 of EMIR. This specific Q&A applies from 26 September 2019.

On 27 September 2018 ESMA published its Final Report on the Clearing Obligation under EMIR (no 6) on extending the deferred date of application of the EMIR clearing obligation for certain intragroup transactions concluded with a third country counterparty (following its July 2018 consultation paper). It includes draft RTS on the clearing obligation which have been submitted to the European Commission for endorsement. Three delegated regulations on the clearing obligation include a temporary exemption from the clearing obligation of up to three years for these transactions, in the absence of a relevant equivalence decision in respect of the third country. The temporary exemptions currently expire on:

(i) 21 December 2018 for the Commission delegated regulation (EU) 2015/2205 on interest rate swaps ("**IRS**").

(ii) 9 May 2019 for the Commission delegated regulation (EU) 2016/592 on credit default swaps.

(iii) 9 July 2019 for the second Commission delegated regulation (EU) 2016/1178 on IRS.

ESMA proposes to prolong these exemptions for all three regulations to 21 December 2020.

1.13 Central Beneficial Ownership Register Update

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 which transpose parts of the Fourth Anti-Money Laundering Directive 2015/849/EU ("**MLD4**") require companies and other legal entities incorporated in Ireland to hold adequate, accurate and current information on their "beneficial owners" on an internal register since 15 November 2016. MLD4 also required EU Member States to establish a central register of beneficial ownership by 26 June 2017.

On 4 September 2018 the Companies Registration Office ("**CRO**") newsletter stated that the Department of Finance has advised that the drafting of legislation to establish a central register of beneficial ownership is at an advanced stage and is expected to be concluded soon and that these transposing measures will be in place before the end of 2018.

1.14 AML Update

EU Member States were obliged to transpose the Fourth Money Laundering Directive (EU) 2015/849 ("**MLD4**") into national law by 26 June 2017. Only parts of it have been transposed into Irish law; the rest of its provisions will be implemented by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2018 which is currently progressing through the legislative process.

On 30 August 2018 Commission Delegated Regulation (EU) 2018/1108 setting out RTS on the criteria for the appointment of central contact points for electronic money issuers and

payment service providers and with rules on their functions under Article 45(11) of MLD4 entered into force.

On 12 September 2018 the European Commission published a communication on strengthening the EU framework for prudential and anti-money laundering ("**AML**") supervision for financial institutions setting out a strategy for seamless supervisory co-operation between prudential and AML supervisors. It also published a revised legislative proposal for its Omnibus Regulation on reforms to the European System of Financial Supervision relating to increased responsibilities for the EBA relating to AML supervision.

MLD5

The Fifth Money Laundering Directive (EU) 2018/843 ("**MLD5**") which amends MLD4 came into force on 9 July 2018. EU Member States have to transpose it into national law by 10 January 2020. It improves co-operation between EU FIUs (financial intelligence units) and their access to information including centralised bank account registers; enhances due diligence requirements for financial transactions to and from high-risk third countries; addresses risks associated with the use of pre-paid cards and virtual currencies; and widens access to the central beneficial ownership registers (introduced by MLD4) for companies and other legal entities to the general public (but not for trusts, which will still require demonstration of a legitimate interest). For more details see "Central Beneficial Ownership Register Update" above.

1.15 MiFID II/MiFIR Update

The Markets in Financial Instruments Directive (2014/65/EU) ("**MiFID II**") and the Markets in Financial Instruments Regulation (Regulation 600/2014) ("**MiFIR**") apply from 3 January 2018. The European Union (Markets in Financial Instruments) Regulations 2017 (as amended by the European Union (Markets in Financial Instruments) (Amendment) Regulations 2017) transpose MiFID II into Irish law. Some complementary measures (for instance, to provide for significant penalties for convictions on indictment) require primary legislation and therefore the Markets in Financial Instruments Bill 2018 is currently progressing through the legislative process for this purpose.

On 13 July 2018 ESMA published a consultation paper on amendments to the tick size regime under the MiFID II to ensure that the tick sizes applicable to third-country instruments are adequate and appropriately calibrated. On 1 August 2018, ESMA published data necessary for investment firms to assess whether they are systematic internalisers in specific financial instruments under MiFID II.

The Central Bank's Guidance on Reporting Requirements for MiFID Investment Firms was published in September 2018 on its website. It covers a list of all returns applicable to MiFID firms.

Over the quarter ESMA updated its MiFID II/MiFIR Q&As on temporary product intervention measures on the marketing, distribution or sale of contracts for differences ("**CFDs**") and binary options to retail clients under Article 40 of MiFIR; on transparency topics; on investor

protection and intermediaries topics; on transitional transparency calculations or TTC for equity derivatives, equities and equity-like instruments; and on data reporting under MiFIR.

1.16 Benchmark Regulation

The Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds 2016/1011/EU ("**BMR**") applies from 1 January 2018.

On 13 July 2018 the European Commission adopted ten Delegated Regulations setting out RTS under the BMR. The next step is for the Council of the EU and the European Parliament to consider them and if no objection is raised they will enter into force 20 days after they are published in the Official Journal of the EU.

On 29 August 2018 the following implementing regulations came into force and will apply from 29 October 2018:

- Regulation (EU) 2018/1105 laying down implementing technical standards ("**ITS**") with regard to procedures and forms for the provision of information by competent authorities to ESMA under the BMR.
- Regulation (EU) 2018/1106 laying down ITS with regard to templates for the compliance statement to be published and maintained by administrators of significant and non-significant benchmarks pursuant to the BMR.

On 7 September 2018 ESMA announced that its register of administrators and third country benchmarks, which it is required to establish and maintain under Article 36 of BMR has moved to the ESMA registers database.

BMR Q&A

On 17 July 2018 ESMA updated its questions and answers on the BMR with new answers:

- Confirming that calculation agents (third parties who calculate payments due under a financial instrument) are not considered users of benchmarks under Article 3(1)(7) of the BMR if the issuer of securities has set the terms of the financial instrument that references the benchmark; and
- In what circumstances a benchmark can be considered as a "regulated-data benchmark" if a third party is involved in the process of obtaining the data.

A further update issued on 27 September 2018 which set out new clarifications on the following topics:

- When the written plan to be produced by users of benchmarks should be considered robust and how such plans should be reflected in the contractual relationship with clients;
- The reference to systematic internaliser in the definition of financial instruments;
- When banks issuing certificates classify as users of benchmarks;

- Why NAV of investment funds should be considered input data and not benchmarks;
- The application for endorsement of family benchmarks; and
- The language of benchmark statements.

1.17 PRIIPs KID Regulation

The Regulation on key information documents ("**KIDs**") for packaged retail and insurance-based investment products (Regulation 1286/2014) ("**PRIIPs**") ("**PRIIPs KID Regulation**") introduced a new pan-European pre-contractual product disclosure document for PRIIPS in EU Member States from 1 January 2018.

On 20 July 2018, the Joint Committee of the European Supervisory Authorities ("**ESAs**") (that is the EBA, EIOPA and ESMA) published further guidance on the KID for PRIIPs. It consists of:

- Updated Q&As.
- An updated flow diagram for the risk and reward calculations (there is a new calculation example for a category 3 PRIIPs stress performance scenario).

The guidance seeks to promote common supervisory approaches and practices based on ongoing work to monitor the implementation of the KID.

In response to a European Commission letter (dated 10 August 2018) about the ESAs developing guidance on facilitating the production and distribution of information on investment funds, the Joint Committee of the ESAs published a letter to the Commission about PRIIPs KID stating they are unconvinced that UCITS KID information can be effectively articulated together with PRIIPs KID information. The ESAs suggest other solutions are needed, including legislative changes, to avoid a situation where there are duplicate information requirements from 1 January 2020.

1.18 EBA Report - Prudential Risks and Opportunities arising for Institutions from Fintech

The EBA's latest report on the prudential risks and opportunities arising for institutions from Fintech (July 2018) is a follow on from the Fintech roadmap setting out the EBA's priorities for 2018/2019. It aims to raise awareness and support institutions in understanding the potential risks and opportunities that may arise from the use of emerging technologies – its intention is to inform and share information without making recommendations to institutions.

While FinTech is still in its early stages, the EBA sets out certain financial technologies of interest for investment firms:

(i) The use of algorithms for providing automated investment advice – while a number of new propositions on automated investment advice have been launched in recent years, not many have been identified as offering automated investment advice in the context of MiFID/MiFID II; and

(ii) The use of distributed ledger technology ("**DLT**") and smart contracts for trade finance and in the management of customer due diligence ("**CDD**") documentation, data and information. The concept of using DLT for CDD purposes is still only theoretical.

The EBA summaries, in high level, the risks and opportunities of a number of technologies such as cloud services, biometrics, mobile wallets and so on. Data protection is one of the key risks. From the prudential risks' perspective, there is a growing shift towards operational risk, arising mainly from the increase of information and communication technology risks as institutions move towards more technology based solutions.

1.19 CSDR: Regulating Central Securities Depositories

Central securities depositaries or "CSDs" operate the infrastructure that enables securities settlement systems and are regulated by Regulation 909/2014/EU ("**CSDR**") since 2014. Article 3(1) of CSDR will apply from 1 January 2023 to transferable securities issued after that date, and from 1 January 2025 to all transferable securities. Certain other implementing measures will apply from the date that they enter into force.

On 13 September 2018 Commission Delegated Regulation (EU) 2018/1229 supplementing CSDR with regard to RTS on settlement discipline, was published in the Official Journal of the EU. It enters into force and applies from 13 September 2020 and sets out measures to address settlement fails and encourage settlement discipline, by:

(i) Monitoring settlement fails.

(ii) Collecting and distributing cash penalties for settlement fails.

(iii) Specifying the operational details of the buy-in process.

On 27 September 2018 ESMA updated its Q&As on the implementation of CSDR. It covers the following:

(i) Book-entry form requirements The Q&A specifies the scope and timing of application of the requirement in Article 3(2) of CSDR to dematerialise certain transferable securities when they are transferred as collateral;

(ii) Organisational requirements. The Q&A concerns the scope of the services and activities of a CSD covered by the requirements in Article 30 of CSDR on outsourcing;

(iii) Settlement discipline. Four issues are covered in this area: the frequency of the update of the exchange rate used to determine the tolerance level for settlement instructions in currencies other than EUR; the scope of the joint management of the penalty mechanism for CSDs which use a common settlement infrastructure; clarification that the use of a common framework or

rulebook is not sufficient to comply with the requirement for joint management of the penalty mechanism by CSDs using a common settlement infrastructure; and the possibility for CSDs to perform bilateral netting of cash penalties, as long as it is followed by the aggregation of the amounts resulting in one credit and one debit amount per CSD participant.

1.20 SFTR

The SFTR (or Regulation on securities financing transactions ("**SFTs**") EU/2015/2365 covers all forms of lending, borrowing and re-use of securities in the EU and in all the branches of counterparties to SFTs no matter where they are located. It requires market participants to report details of SFTs to an approved EU TR and introduced new transparency requirements for prospectuses and financial statements for investment funds using securities financing transactions and total return swaps.

On 5 September 2018 ESMA published an Opinion in response to the European Commission's proposed amendments to the technical standards on reporting under the SFTR which were notified to ESMA on 24 July 2018.

ESMA has declined to amend the draft technical standards as proposed by the Commission which relate to provisions on the use of LEIs for branches and unique transaction identifiers for reporting to TRs, stating that the proposed amendments:

(i) Will hinder the possibility to take into account international developments and reporting standards agreed at global level and risk timely alignment with international reporting standards;

(ii) Will deviate from and create inconsistency with the currently applicable EMIR reporting standards;

(iii) Will not provide certainty, clarity, predictability and consistency, which is essential for the market and public authorities in relation to reporting standards; and

(iv) Would result in a significantly extended timeline for the introduction of global standards in the EU.

The Commission may now adopt the standards submitted by ESMA or the amended standards. The European Parliament and EU Council then have the right to object to them.

1.21 Capital Requirements Regulation

The Capital Requirements Regulation 575/2013/EU ("**CRR**") applies to credit institutions and investment firms and contains provisions relating to, among other things, own funds and capital requirements, large exposures, securitisations, liquidity, leverage and supervisory reporting.

On 26 July 2018 Commission Delegated Regulation (EU) 2018/959 supplementing the CRR as regards RTS for specification of the assessment methodology relating to use of advanced measurement approaches AMA for operational risk came into force.

On 17 August 2018 the European Central Bank's ("**ECB's**") July 2018 consultation on a draft regulation on exercising a discretion under Article 178(2)(d) of CRR relating to the threshold for assessing the materiality of credit obligations past due closed.

1.22 Investment Funds Statistics: Q2 2018

The main points to note in the Central Bank's September 2018 Q2 2018 update are as follows:

(i) The net asset value ("**NAV**") of investment funds resident in Ireland increased by 3.4% (€66bn) over Q2-2018, reaching €2,001bn. The total value of assets held by investment funds increased by €84bn during Q2-2018 to €2,380bn.

(ii) The total equity holdings of all funds increased to €1,057bn in Q2-2018 from €1,004bnin Q1-2018 driven by net purchases of €13bn and valuation gains of €40bn.

(iii) Holdings of debt securities by all funds amounted to €915bn in Q2-2018, driven by net purchases of €4bn and valuation gains of €4bn.

2 Tax

2.1 Budget 2019

Budget 2019 was published on 9 October 2018. The Minister for Finance announced a number of proposed consultations in relation to the implementation of the Anti-Tax Avoidance Directive or ATAD, however there was very little of direct impact for regulated investment funds.

For more information see our client update, *Irish Government Budget 2019 - "at the heart of the EU and open to the world"*

2.2 New Tax Reporting Obligations for IREFs

New reporting obligations will be imposed on Irish regulated funds which invest in Irish real estate and related assets (so called Irish real estate funds or IREFs). Under the new regulations, IREFs must provide the Irish Revenue Commissioners ("**Revenue**") with financial statements and related materials. These must be filed by 30 January 2019 for the financial year ending 31 December 2017. For financial periods ending on 31 December 2018, the statements must be filed by 30 July 2019.

The obligations are contained in the Investment Undertaking Electronic Account Filing Requirements Regulations 2018. The filing must be made electronically and include the financial statements, the auditor's report and notes to the financial statements. Revenue have ancillary powers to inspect additional records and make enquiries to establish whether the information provided is correct.

See also, *New Tax Reporting Obligations for Irish Real Estate Funds*

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