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Maples and Calder Funds Update – Ireland

Quarterly Update | October – December 2017

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Contents

1 Legal & Regulatory

1.1 UCITS Update

There have been a number of developments over the quarter:

Central Bank Q&A

On 6 October 2017 the 20th edition of the Central Bank of Ireland ("**Central Bank**") UCITS Q&A was published with a new question on the maintenance of a designated email address for regulatory correspondence in respect of Irish UCITS.

The Q&A was further updated on 20 November 2017 in relation to a UCITS acquiring Chinese shares through the Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect. It was updated to coincide with the roll-out of a real-time delivery versus payment ("**RDVP**") settlement system under Stock Connect, which was approved by the Securities and Futures Commission of Hong Kong ("**SFC**") and officially went live on the same date.

On 2 January 2018 a further edition added two new questions. One confirms that the name of the benchmark administrator does not need to be identified in the UCITS prospectus in the context of the Benchmark Regulation. The other question on the PRIIPS Regulation confirms that UCITS are exempt from producing a PRIIPS KID until 31 December 2019.

ESMA Q&A

On 5 October 2017 the European Securities and Markets Authority ("**ESMA**") updated its Q&A on the application of the UCITS Directive (2009/65/EC). It includes a new Q&A on the periodic reporting (under Article 13 of the SFTR) for UCITS and alternative investment funds ("**AIFs**") to investors on the use of securities financing transactions ("**SFTs**") and total return swaps.

1.2 AIFMD Update

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

Central Bank Q&A

On 6 October 2017 the Central Bank published the 26th edition of its AIFMD Q&A with a new question on the maintenance of a designated email address for regulatory correspondence in respect of Irish authorised AIFs.

The Q&A was further updated on 20 November 2017 in relation to an AIF acquiring Chinese shares through the Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect. It was updated to coincide with the roll-out of a RDVP settlement system under Stock Connect, which was approved by the SFC and went live on the same date.

On 2 January 2018 a further edition of the Q&A added a new question confirming that there is no obligation on an Irish authorised AIFM managing AIFs which reference a benchmark in the prospectus to comply with the Article 29(2) disclosure requirements in the Benchmark Regulation unless the AIF is subject to the Prospectus Directive 2003/71/EC. It also added new questions on the PRIIPS Regulation which confirms that QIAIFs are required to produce a PRIIPS KID if it can be marketed to investors who are not professional clients under MiFID II and that the Central Bank is likely to require AIFs in scope of PRIIPS to file KIDs on an ex post basis.

See our update, *Do AIFs Need to Produce a PRIIPs KID?*

ESMA Q&A

On 5 October 2017 ESMA updated its Q&A on application of AIFMD. It includes three new Q&A on the:

(i) Application of remuneration disclosure requirements in annual accounts to staff of the delegate of an alternative investment fund manager ("**AIFM**") to whom portfolio management or risk management activities have been delegated.

(ii) Manner of disclosure of AIFM delegates' staff remuneration in annual reports.

(iii) Periodic reporting (under Article 13 of the SFTR) for UCITS and AIFs to investors on the use of SFTs and total return swaps.

We are working with clients to assess the implications of this guidance.

1.3 GDPR for Irish Funds

The General Data Protection Regulation (EU) 2016/679 ("**GDPR**") will become law across the EU on 25 May 2018. It updates the current data protection regime in Ireland and replaces the current rules on the collection, storage and processing of personal data in the Data Protection Acts 1988 to 2003. Firms need to be compliant by 25 May 2018.

Maples' GDPR update package helps ensure compliance for funds and fund management companies. For more information see our client updates:

GDPR and the Funds Industry – What you Need to Know

GDPR for Funds: Is Consent Required From Investors?

1.4 New EU Securitisation Regulation

Regulation (EU) 2017/2402 on a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation ("**Securitisation Regulation**") and Regulation (EU) 2017/2401 amending the Capital Requirements Regulation 575/2013/EU were published in the Official Journal on 28 December 2017. Both regulations enter into force on 17 January 2018 and will apply from 1 January 2019.

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. For UCITS management companies and internally managed UCITS, no due diligence rules will apply initially. The European Commission may adopt delegated regulations under the UCITS Directive to bring them under the due diligence rules in the future.

For more information see our client update, *New EU Securitisation Regulation: Impact for Investment Funds*

1.5 Central Bank Brexit Letter

The Central Bank issued a letter to industry on 6 November 2017 on Brexit contingency planning for investment funds. It indicates what investment funds and their managers should consider when planning for Brexit and fulfilling their obligations to their investors. It indicates that the boards of these entities should be analysing the potential impact of Brexit on asset management and distribution and should include examining the extent to which Brexit will affect fund investors, their day-to-day fund operations and delivery of investment strategies.

We are working with clients in addressing the actions mandated in this letter.

1.6 Money Market Funds Regulation

The Money Market Funds Regulation (EU) 2017/1131 ("**MMFR**") came into force on 20 July 2017. It is a broad set of new regulatory measures that apply to money market funds established, managed or marketed in the EU and aims to make these investment products more resilient and 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 apply from 20 July 2017). Existing MMFs can avail of a further six month transition period to submit an application to the national competent authority ("**NCA**") demonstrating compliance with the MMFR.

On 17 November 2017 ESMA published technical advice, implementing technical standards ("**ITS**") and guidelines under the MMFR. The key requirements include:

- Advice relating to asset liquidity and credit quality.
- ITS on the development of a reporting template containing the information that MMF managers must send to the MMF's NCA.
- Guidelines on common reference parameters of the scenarios that need to be included in MMF managers' stress tests.

The technical advice and ITS have been submitted to the European Commission (in the case of the ITS, for endorsement).

With respect to the ITS on the establishment of a reporting template and the timing of implementation of the corresponding database, ESMA confirms that managers will need to send their first quarterly reports to NCAs in October/November 2019.

1.7 EMIR Update

The European Market Infrastructure Regulation (Regulation on over the counter ("**OTC**") derivative transactions, central counterparties ("**CCPs**") and trade repositories (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, subject to the full scope of EMIR obligations.

There have been a number of developments over the quarter:

On 13 October 2017 the European Commission published a statement issued jointly with the US Commodity Futures and Trading Commission ("**CFTC**") announcing a common approach to certain derivatives trading venues. Under the approach, both EU and US firms will be able to trade certain derivatives on their respective trading venues while complying with their OTC risk mitigation obligations. European Commission Implementing Decision ((EU) 2017/1857) on the equivalence of arrangements of US CFTC regime for purposes of Article 11 of EMIR (relating to timely confirmations, dispute resolutions, daily valuation and collateral arrangements for non-cleared OTC derivatives) came into force on 3 November 2017.

On 1 November 2017 Commission Delegated Regulation (EU) 2017/104 and Commission Implementing Regulation (EU) 2017/105 setting out revised standards regarding the minimum details, and the format and frequency, of trade reporting requirements under EMIR and Delegated Regulation (EU) 2017/1800 amending Delegated Regulation (EU)151/2013 with regard to regulatory technical standards ("**RTS**") on the data to be published by trade repositories and operational standards for aggregating, comparing and accessing data under EMIR both came into force.

On 11 December 2017 a Commission Delegated Regulation (EU) 2017/2155) which amends a Delegated Regulation under EMIR regard to RTS on indirect clearing arrangements entered into force and will apply from 3 January 2018 (which is the date that the MiFID II applies).

Variation margin requirements for physically settled FX forwards

Under EMIR, the two way exchange of variation margin for physically settled forward foreign exchange contracts ("**FX Forwards**") traded between "Financial Counterparties" was due to come into effect on 3 January 2018. The European Supervisory Authorities (the "**ESAs**") on 24 November 2017 acknowledged the challenges for certain counterparties to satisfy these requirements by 3 January 2018. Changes were also proposed to EMIR to limit the scope of this variation margin requirement to credit institutions and investment firms (i.e. excluding UCITS and AIFs) but are not going to be in place on 3 January 2018. These draft regulatory technical standards ("**RTS**") amending EMIR to this effect were issued by the ESAs on 18 December 2017 which must now be considered by the Commission and then by the Parliament and the Council.

Consistent with similar releases by the competent authorities in other EU Member States, the Central Bank issued a statement on 19 December 2017 outlining its position, aligned with the ESA's expectations, confirming that it will apply its risk-based supervisory powers in the day-to-day enforcement of applicable legislation in a proportionate manner until the amended RTS enter into force.

For more information see our client update, *CBI Issues Waiver Statement on EMIR Variation Margin Requirements for FX Forwards*

ESMA Q&As

On 2 October 2017 ESMA published updated versions of its Q&As on the implementation of EMIR with an amended answer to general question 1 on funds and counterparties. The amended answer applies from 1 November 2017. In addition, the Q&A on the definition of OTC derivatives has been modified. There is also a new Q&A on the ongoing monitoring of collateral requirements.

ESMA updated its Q&As further on 20 November 2017 relating to trade repositories. A new Q&A 24(b) has been added regarding buy/sell indicators. ESMA states that, for FX swaps and cross-currency swaps, where multiple exchanges of currencies take place, the relevant point in time for the determination of the buyer and seller should be the far leg, which is closer to the maturity date. The answer to Q&A 40, on updating legal entity identifiers or LEIs as a result of mergers or acquisitions now clarifies that, to the extent possible, the reporting entity should provide the required information in advance so that the change is not done retrospectively but by the date on which it takes place. Further the answer to Q&A 44, on the validation of reports on old outstanding trades, has been modified.

On 14 December 2017 ESMA published another version which includes new answers on: indirect clearing; reporting of collateral; swap reporting to trade repositories and contracts with no maturity.

1.8 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.

In December 2017 the Department of Finance indicated that it is on track to have the beneficial ownership elements of MLD4 transposed by Q1 2018. It is still envisaged that there will be an extended timeframe for companies to make their beneficial ownership filings which will commence after the launch of the register.

1.9 Fitness and Probity Requirements

The Central Bank updated its Fitness and Probity FAQs and guidance in December 2017. Failure to comply with the regime can result in sanctions. On 12 December 2017 the Central

Bank fined a regulated firm €200,000 and reprimanded it for a breach of section 21 of the Central Bank Reform Act 2010. Under the fitness and probity regime, individuals performing certain influential and customer facing roles in regulated entities are considered to be performing controlled functions ("**CFs**"). The most significant of these roles are pre-approval controlled functions ("**PCFs**"') in respect of which Central Bank approval is required prior to appointment.

The Central Bank's enforcement investigation identified that the firm did not have adequate systems or controls to ensure that individuals holding CFs and PCFs complied with the Fitness and Probity Standards. The breach occurred from the introduction of the fitness and probity regime on 1 December 2011 and persisted for over four years.

1.10 AML Update

The Central Bank issued bulletins in November and December 2017 with guidance on suspicious transaction reporting; an update on some anti-money laundering ("**AML**") and counter-terrorist financing ("**CTF**") developments and giving guidance on customer due diligence, in particular, in relation to the discontinuance of a business relationship. On the latter point, this looks to be quite a significant development as, in the context of existing non-compliant investors, the bulletin recognises that legacy accounts with delinquent know-your-customer data can be marked as "discontinued", thereby inferring that compulsory redemption is not necessarily the only practical means of achieving the legal obligation to "discontinue the business relationship".

EU Member States were obliged to transpose MLD4 into national law by 26 June 2017 (the date it entered into force). Only parts of the MLD4 have been transposed into Irish law; the rest of its provisions are due to be implemented shortly.

On 27 October and 13 December 2017 the European Commission adopted Delegated Regulations adding Ethiopia, Sri Lanka, Trinidad and Tobago and Tunisia to the list of high risk third countries in Delegated Regulation (EU) 2016/1675, which supplements MLD4. The next step will be for the Council and the Parliament to consider them.

On 3 November 2017 the Financial Action Task Force ("**FATF**") published revised guidance on AML and CTF measures and financial inclusion to assist in designing AML and CTF measures that support financial inclusion without compromising measures for combating financial crime. It includes a supplement on customer due diligence ("**CDD**") and financial inclusion to encourage countries to implement the FATF Recommendations and the risk based approach in a way that brings the financially excluded into the regulated financial sector, while maintaining safeguards against money laundering risks. It also published final guidance for private sector information sharing between financial institutions.

On 6 December 2017 the Joint Committee of the ESAs published draft RTS (which were submitted to the European Commission for approval) on how credit and financial institutions should manage money laundering and terrorist financing risks at group level where they have branches or majority owned subsidiaries in third countries whose laws do not permit the application of group wide policies on AML/CFT. They require credit and financial institutions to

determine the extent of these measures on a risk sensitive basis and be able to demonstrate to their competent authorities that the steps taken are commensurate with the risk.

On 20 December 2017 the Council of the EU's Permanent Representatives Committee or COREPER confirmed that political agreement was reached on the proposed Fifth Money Laundering Directive ("**MLD5**") with the European Parliament. The aims of MLD5 (which amends MLD4) include increasing the transparency of trusts and company ownership by improving access to information on beneficial ownership. The main changes it makes are:

(a) Enhanced access to beneficial ownership registers. The registers will also be interconnected between member states. Access to this information is foreseen as follows: public access to beneficial ownership information on companies; access on the basis of 'legitimate interest' to beneficial ownership information on trusts and similar legal arrangements; and public access on written request to beneficial ownership information on trusts that own a company not incorporated in the EU.

(b) Improving cooperation between the member states' financial intelligence units.

(c) Improved checks on risky third countries.

Once the Council and the Parliament have formally adopted MLD5, it will enter into force 20 days after its publication in the Official Journal of the EU. EU Member States will then have 18 months to implement it. The Parliament is to vote on MLD5 at its plenary session on 16 to 19 April 2018.

1.11 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**") set out new requirements on the provision of investment services and activities in the EU and apply from 3 January 2018. In particular, requirements are established in respect of the authorisation and operation of investment firms, stock exchanges and other types of trading venues, and certain data reporting service providers. The implementation of the LEI requirements under MiFIR has been delayed (see "ESMA Statement on LEI Implementation" at 3.1 below).

On 26 October 2017 the European Commission published FAQs that clarify how EU investment firms should interact when they seek out brokerage and research services from broker-dealers in non-EU countries.

The following entered into force in Q4 2017 and apply from 3 January 2018:

- Implementing Regulation on ITS on standard forms, templates and procedures for the transmission of information under MiFID II.
- Commission Delegated Regulation (EU) 2017/2417 supplementing MiFIR with regard to RTS on the trading obligation for certain derivatives.

- European Commission Implementing Decisions recognising certain third-country equities markets (US, Hong Kong Special Administrative Region and Australia) under MiFID II.
- Delegated Regulation (EU) 2017/2294 as regards the specification of the definition of systematic internalisers for the purposes of MiFID II.
- Commission Implementing Decision (EU) 2017/2238 on the equivalence of the legal and supervisory framework applicable to US designated contract markets and swap execution facilities under MiFIR.
- Delegated Regulation (EU) 2017/2194 supplementing MiFIR with regard to the treatment of package orders.
- Commission Delegated Regulation (EU) 2017/2154, which supplements MiFIR with regard to RTS on indirect clearing arrangements.
- Commission Delegated Regulation (EU) 2017/1943 and Commission Implementing Regulation (EU) 2017/1945, which contain technical standards on the authorisation of investment firms.
- Commission Delegated Regulation (EU) 2017/1946 and Commission Implementing Regulation (EU) 2017/1944, which contain technical standards relating to notifications of proposed acquisitions of qualifying holdings in investment firms.
- Delegated Regulation (EU) 2017/1799 which supplements MiFIR exempting certain third countries' central banks from pre- and post-trade transparency requirements.

On 15 December 2017 ESMA published two revised opinions on transaction on third-country trading venues for post-trade transparency and position limits requirements under MiFID II. They state that, pending an ESMA assessment of more than 200 third-country trading venues under the criteria in the two opinions, transactions on third-country trading venues do not need to be made post-trade transparent and positions held in those third-country venue contracts are not considered to be economically equivalent over-the-counter contracts. ESMA will carry out the determination of the third-country trading venues and publish the results in 2018.

Over the quarter ESMA updated its FAQs on transitional transparency calculations for equity and bond instruments required under MiFID II and MiFIR; investor protection; MiFIR data reporting; market structures and transparency; MiFID II and MiFIR commodity derivatives; MiFID II and MiFIR post trading issues; transitional transparency calculations for equity and bond instruments; trading obligation for shares under MiFID II; and transitional transparency calculations for non-equity instruments.

On 3 January 2018 the European Union (Markets in Financial Instruments)(Amendment) Regulations 2017 were published which correct typographical errors in the European Union (Markets in Financial Instruments) Regulations 2017 (which implemented MiiFID II into Irish law).

1.12 SFTR

The SFTR (or Regulation on securities financing transactions 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 trade repository. It came into force on 12 January 2016 and introduced transparency requirements for prospectuses and financial statements for investment funds using securities financing transactions and total return swaps.

UCITS and AIFs must ensure prospectuses clearly disclose the intention to use these techniques (including maximum and expected exposure levels) and describe the risks they entail.

On 5 October 2017 ESMA updated its Q&As on the application of the UCITS Directive and AIFMD which included new Q&As on the periodic reporting (under Article 13 of the SFTR) for UCITS and AIFs to investors on the use of SFTs and total return swaps.

The European Union (Securities Financing Transactions) Regulations 2017 signed on 22 December 2017 designate the Central Bank as competent authority for the purposes of SFTR, its enforcement powers and applicable sanctions for breaches of the Regulation.

1.13 Investment Funds - Additional Supervisory Levy

The Central Bank Act 1942 (Section 32D) (Investment Funds – Additional Supervisory Levy) Regulations 2017 apply from 1 December 2017 and require regulated entities during the levy period to pay the levy contribution and the supplementary levy contribution (if applicable) to the Central Bank. Following a consultation, the Central Bank has implemented a new method for the calculation of levies and published a Guide to Industry Funding Regulations 2017 which explains how the levy is calculated and sets out the 2017 changes.

1.14 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**") entered into force on 30 June 2016 and applies fully from 1 January 2018.

On 8 November and 14 December 2017 ESMA published updated versions of its Q&As on the implementation of the BMR. New Q&As have been added on:

(i) The application of the regulation outside the EU.

(ii) Transitional provisions applicable to third country benchmarks.

(iii) Authorisation and registration: on the obligations applicable to administrators.

(iv) Requirements for users: on the written plans to be produced by supervised entities.

On 13 November 2017 Council decided not to object to the following European Commission Delegated Regulations supplementing the BMR on:

(a) Specifying technical elements of the definitions laid down in Article 3(1).

(b) Specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed.

(c) The establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks.

(d) Specifying how the criteria of Article 20(1)(c)(iii) are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more member states.

Once published in the Official Journal of the EU, they will come into force 20 days later.

On 19 December 2017 ESMA announced that it will start publishing the register of administrators and third country benchmarks on 3 January 2018. Until the new register release is fully available on its website, ESMA will publish daily the latest register information listing benchmark attributes in csv format, which will be available for download. ESMA will make an administrators file and a third countries benchmarks file available daily in csv format also. These files are available for download on ESMA's benchmarks registers webpage. The new register will be available from the third quarter of 2018.

On 29 December 2017 Implementing Regulation (EU) 2017/2446 which adds the LIBOR to the list of critical benchmarks for the purposes of the BMR entered into force. The other two benchmarks on the list are EURIBOR and EONIA.

On 2 January 2018 the Central Bank's updated UCITS Q&A in the context of the BMR confirmed that the name of the benchmark administrator does not need to be identified in the UCITS prospectus; and that there is no obligation on an Irish authorised AIFM managing AIFs which reference a benchmark in the prospectus to comply with the Article 29(2) disclosure requirements unless the AIF is subject to the Prospectus Directive 2003/71/EC.

1.15 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**") introduces a new pan-European pre-contractual product disclosure document for PRIIPS in EU Member States from 1 January 2018.

The Joint Committee of the ESAs on 20 November 2017 published an updated version of its Q&A on the KID requirements for PRIIPs which includes new questions and answers on:

(i) Whether a KID is always required when an investment product is listed on a regulated market and the definitions of the terms "biometric risk premium" and "insurance premium".

(ii) How credit linked notes should be treated under the Delegated Regulation and how to apply a correction for risk neutrality.

(iii) How the number of trading periods to use should be calculated under Point 9 of Annex IV of the Delegated Regulation and how the term "rolling" in Point 10(c) of Annex IV should be applied.

(iv) Whether it is possible to alter the prescribed wording in the KID template for OTC derivatives.

(v) How the information on the underlying options of a multi-option product should be provided and, in the case of Article 10(b) of the Delegated Regulation, how information on costs should be set out in the generic KID.

The European Union (Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPS)) Regulations 2017 signed on 21 December 2017 designate the Central Bank as competent authority and set out applicable sanctions for breaches of the PRIIPS KID Regulation. They apply from 31 December 2017.

On 2 January 2018 the Central Bank's updated UCITS and AIFMD Q&As confirmed that that UCITS are exempt from producing a PRIIPS KID until 31 December 2019; and that QIAIFs are required to produce a PRIIPS KID if it can be marketed to investors who are not professional clients under MiFID II and that the Central Bank is likely to require AIFs in scope of PRIIPS to file KIDs on an ex post basis.

For more information see our update, *Do AIFs Need to Produce a PRIIPs KID?*

1.16 IOSCO Good Practices for the Termination of Investment Funds

On 23 November 2017 the International Organization of Securities Commissions ("**IOSCO**") published its final report setting out good practices for the termination of investment funds. It highlights the importance of adopting termination procedures that take into account investor protection issues. The report sets out 14 good practices under the following headings: disclosure at time of investment; decision to terminate; decision to merge; during the termination process and specific types of investment funds.

For more information see our update, *IOSCO Report Recommends Tools to Terminate Funds Efficiently*

1.17 European Venture Capital Funds and Social Entrepreneurship Funds

The European Venture Capital Funds Regulation 345/2013/EU ("**EuVECA Regulation**") sets out a marketing passport to allow fund managers to market qualifying venture capital funds to EU investors using the EuVECA designation. The European Social Entrepreneurship Funds Regulation 346/2013/EU ("**EuSEF Regulation**") sets out a marketing passport to allow fund managers to market qualifying social entrepreneurship funds to EU investors using the EuSEF designation.

The Regulation amending the EuVECA and the EuSEF Regulations entered into force on 30 November 2017 and applies from 1 March 2018. The amending Regulation:

(a) Widens the range of managers eligible to set up EuVECA and EuSEF funds to include those with assets under management in excess of €500 million.

(b) Widens the range of firms that EuVECAs can invest in to include unlisted companies with up to 499 employees.

(c) Broadens the definition of enterprises that EuSEFs can invest in to include "services and goods generating social return".

(d) Enables EuSEF and EuVECA registered managers to market their funds across the EU.

(e) Gives ESMA oversight so it can ensure that funds are consistently supervised.

1.18 ELTIF Regulation

On 4 December 2017 the European Commission adopted a Delegated Regulation supplementing the Regulation on European Long-Term Investment Funds ("**ELTIFs**") (EU) 2015/760 with regard to RTS. The RTS specify the following under the Regulation:

- The circumstances in which the use of financial derivative instruments solely serves hedging purposes under Article 9(3).
- The circumstances in which the life of an ELTIF is considered sufficient in length to cover the lifecycle of each of the individual assets of the ELTIF under Article 18(7).
- The elements and risks related to each ELTIF underlying asset that an ELTIF manager must take into account in the assessment of the market for potential buyers.
- The criteria to be considered for the valuation of the assets to be divested under Article 21(3) so as to include an appropriate value in the schedule for the orderly disposal of the ELTIF assets.
- The characteristics and functions of the facilities to be adopted by the manager of an ELTIF marketed to retail investors under Article 26(2).

The delivery of draft RTS on cost disclosures has been postponed to ensure they are consistent with the legal requirements for KIDs for PRIIPs under the PRIIPs Regulation.

The next step is for the Council of the EU and the European Parliament to consider the RTS. If neither objects, it will enter into force 20 days after it is published in the Official Journal of the EU.

1.19 Investment Firms Regulations 2017 and Updated Q&A

The Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 [S.I. No. 604 of 2017] ("**Central Bank Investment Firms Regulations**")

were signed in December 2017 and come into operation on 3 January 2018. They consolidate all of the requirements which the Central Bank imposes on certain investment firms, fund service providers and market operators and includes changes related to MiFID II. (See also 1.11 above "MiFID II/MiFIR Update".) The Central Bank will issue guidance on Part 6 (Client Asset Requirements) and Part 7 (Investor Money Requirements). Pending its issuance the current guidance continues to apply.

They revoke the:

(a) Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 [S.I. No. 60 of 2017];

(b) Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Investor Money Regulations 2015 for Fund Service Providers.

(c) Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Client Asset Regulations 2015.

On 2 January 2018 the Central Bank published the fourth edition of its Investment Firms Q&A which amends question ID 1001 setting out who the Central Bank Investment Firms Regulations apply to. It also adds new questions ID 1032-1037 on:

- Management/annual accounts return deadlines.
- Outsourcing return deadlines which must include administration activities outsourced to another legal entity in the annual outsourcing return where these activities were never previously carried out directly by the firm in Ireland.
- Confirmation that existing documentation does not need to be redrafted as a result of the integration of the Client Asset Regulations and the Investor Money Regulations into Parts 6 and 7 of the Central Bank Investment Firms Regulations.
- Confirmation that the auditor who performs the client asset or the investor money examination is not required to be the same auditor who audits the financial statements of the investment firm/fund service provider.
- Reporting requirements of client assets as required under Article 63 of EU Delegated Regulation 2017/565 by making statements of client financial instruments available in a secured website,

1.20 CSDR: Regulating Central Securities Depositories

Central securities depositaries or "CSDs" operate the infrastructure that enables securities settlement systems. The Regulation on improving securities settlement and regulating CSDs (Regulation 909/2014/EU) ("**CSDR**") is in effect since 2014. However, Article 3(1) 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 2 October 2017 ESMA published an updated version of its Q&As on the implementation of CSDR which contains three new Q&As: CSD 5(c) on the protection of securities of

participants and those of their clients; CSD 7(b) and (c) on the provision of banking-type ancillary services; and CSD 10(a)-(c) on requirements for CSD links. On 17 November 2017 ESMA published a further updated Q&A which provides detailed answers on certain aspects of the following: relevant authorities; conduct of business rules; protection of securities; and prudential requirements. On 14 December 2017 ESMA published a further update covering organisational requirements regarding membership of user committee and record keeping requirements in respect of settlement banks.

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 30 November 2017 the Central Bank published a revised Notice on its Implementation of Competent Authority Options and Discretions in the European Union (Capital Requirements) Regulations 2014 and CRR. It sets out how it intends to exercise the competent authority options and discretions in this legislation and supersedes the Central Bank's May 2014 Implementation Notice.

On 10 December 2017 the eighth Implementing Regulation (EU) 2017/2241 on the extension of the transitional periods related to own funds requirements for exposures to CCPs set out in the CRR and EMIR entered into force. This extends the transitional period by an additional six months to 15 June 2018 to avoid disruption to the international financial markets and to prevent penalising institutions by subjecting them to higher own funds requirements during the process of authorisation and recognition of existing CCPs.

On 13 December 2017 Commission Delegated Regulation (EU) 2017/2295 supplementing the CRR with regard to RTS for the disclosure of encumbered and unencumbered assets was published in the Official Journal of the EU. It will enter into force from 2 January 2018. Article 2 will apply from 2 January 2019.

On 15 December 2017 Commission Delegated Regulation (EU) 2017/2188 amending the CRR as regards the waiver on own funds requirements for certain covered bonds entered into force and will apply from 1 January 2018.

On 26 December 2017 Implementing Regulation (EU) 2017/2144 on templates and instructions under the CRR entered into force and will apply from 1 March 2018.

On 28 December 2017 the Regulation amending the CRR as regards transitional arrangements for mitigating the impact of the introduction of International Financial Reporting Standard on own funds and for the large exposures treatment of certain public sector exposures denominated in any EU Member State domestic currency entered into force and will apply from 1 January 2018.

Regulation (EU) 2017/2401 amending CRR was published in the Official Journal of the EU on 28 December 2017. It makes consequential amendments to the CRR required by the EU

Securitisation Regulation (see 1.4 above). It enters into force on 17 January 2018 and will apply from 1 January 2019.

1.22 CBI Response to the Regulatory Enforcement and Corporate Offences LRC Paper

The Central Bank published its response to the Law Reform Commission's Issues Paper "Regulatory Enforcement and Corporate Offences" on 9 January 2018. The response contains a number of recommendations including:

(i) Reforms strengthening the accountability of senior personnel in regulated entities to be adopted. These would permit the Central Bank to require senior managers to submit a statement of responsibilities that states the matters for which they are responsible and accountable.

(ii) The extension of the period for which individuals can be suspended from senior positions in regulated firms as part of the fitness and probity regime.

(iii) That the legislative framework includes a criminal offence of egregious recklessness by those in charge of financial firms that fail.

(iv) The embedding of certain core common standards in legislation to guide regulated entities and the individuals who exercise influence and authority over them, as to what is expected of them. Such core standards could include the requirement on entities and individuals that they conduct themselves with honesty and integrity, possess the competence and capability to conduct their business properly and co-operate with relevant regulatory authorities.

With regard to the specific issues, the Central Bank:

(i) Supports the enactment of a single Act setting out the full suite of inspection and investigation powers of regulatory agencies.

(ii) Supports measures designed to facilitate coordination and cooperation between regulators.

(iii) Encourages the establishment of a specialised appeals body like the UK Competition Appeals Tribunal.

1.23 Investment Funds Statistics: Q3 2017

The main points to note in the Central Bank's December 2017 update for Q3 2017 are:

(i) The net asset value of investment funds resident in Ireland increased by 3% (€59bn) over Q3 2017, reaching €1,825bn. The total value of assets held by such funds increased by €35bn to €2,174bn.

(ii) Q3 2017 saw investor inflows of €57bn, continuing the trend of high net issuances over 2017. Bond funds registered the largest net investor inflows, amounting to €32bn.

(iii) Equity holdings of all funds amounted to €952 billion at end-September, increasing by €25bn from Q2 2017. This was mainly explained by €17bn in purchases of US shares.

2 Tax

2.1 Finance Act 2017 – Tax Changes for Funds

The Finance Act 2017 was enacted on 25 December 2017 and makes a number of changes which could affect regulated funds, investors and managers.

New financial reporting requirements

Section 18 of Finance Act 2017 empowers the Revenue Commissioners ("**Revenue**") to make regulations requiring Irish investment undertakings, or sub-funds, to provide financial statements to Revenue. It allows Revenue to make regulations prescribing the entities to which the requirement relates as well as the date and format of the financial statements most likely following a consultation process. The financial statements will be delivered by electronic means which will likely mean iXBRL accounts. These may lead to increased compliance burdens for funds.

Irish real estate funds

In 2016 the IREF regime was introduced for regulated Irish funds which hold real estate. Many of the amendments made by Finance Act 2017 confirm Revenue's administrative practices. However, it also removes the exemption from IREF withholding tax which previously applied to the proceeds of land and buildings held for five years. The exemption ceases to apply to disposals on or after 1 January 2019. The first IREF tax returns for 2017 have to be filed during 2018. The detailed nature of these returns, and their relative novelty, means that affected managers and administrators need to take steps to ensure they are filed properly.

Capital gains tax

Irish capital gains tax ("**CGT**") applies to disposals of shares and securities which derive their value from Irish land, even indirectly. This potentially exposes non-Irish resident investors to tax. Disposals of shares in IREFs are not subject to CGT. Finance Act 2017 clarifies that an indirect interest in an IREF is not subject to CGT.

Stamp duty – transfers of shares in property holding entities

Finance Act 2017 increased the rate of stamp duty on Irish commercial property from 2% to 6%. Given the scope for tax arbitrage if property to be transferred in corporate form (such as through the transfer of interests in a corporate entity or partnership), the Act introduced a new

6% rate which applies to transfers of an entity which holds non-residential Irish real estate which has been developed or intended for development.

These changes could impact existing structures including where Irish land is held through an Irish regulated fund, such as an ICAV, partnership or investment company. The changes should not impact the majority of transactions however a transfer of a significant controlling interest in certain funds could be subject to the 6% rate.

2.2 VAT on Research Fees under MIFID II

On 3 January 2018 MiFID II comes into force. Amongst other changes, it sets out certain rules in relation to the payment by investment firms for research services. Investment firms now need to make explicit payments for investment research in order to demonstrate that they are not receiving an inducement to trade. Investment firms and the funds which they service will need to consider the potential VAT impact of these payment arrangements.

Research services

The changes mean that MiFID investment firms can now only receive research and other services from third parties in the context of the provision of portfolio management services to a client where either:

- The investment firm pays for such research directly; or
- It establishes a Research Payment Account ("**RPA**") funded by a specific research charge to the client.

Previously, these research services would have been bundled with other services and may not have been charged for separately or at all. As the services with which the research services were bundled were generally VAT exempt, any ancillary research charges would not have come within the VAT net. Now that research services are to be charged for separately, the VAT treatment of those services requires more careful consideration.

Services received by Irish regulated funds and section 110 companies

Where services are provided cross border between businesses, the place of supply for VAT purposes is deemed to be the place where services are received and, if a service is taxable, VAT must be accounted for by the recipient on a reverse charge basis. The reverse charge rule is significant because it means that where services are provided to an entity established in Ireland, it is the Irish VAT rules which apply to determine whether that service is taxable or exempt.

This is important because of the Irish exemption for management of special investment funds which extends to Irish regulated funds and companies which benefit from Ireland's section 110 tax regime ("**section 110 companies**").

VAT treatment of research services

Research services supplied on their own would generally be subject to VAT at 23% in Ireland. However, if the services are structured correctly and the contractual arrangements support the position, the research services may be considered VAT exempt as part of the exemption

for management of regulated investment funds and section 110 companies. Revenue has no specific guidance on MiFID II research services. Revenue guidance supports the view that services provided by third parties which are intrinsically connected to investment management and specific to and essential for the management of special investment funds may constitute VAT exempt management services. In each case, whether the research services are taxable or VAT exempt will depend on the specific circumstances, the nature of the research and the terms of the services contracts.

(See also 1.11 above "MiFID II/MiFIR Update".)

2.3 BEPS and ATAD

The Irish Minister for Finance has launched consultations on implementation of the EU Anti-Tax Avoidance Directives and the OECD Base Erosion and Profit Shifting initiative ("**BEPS**") which focus on a number of points including:

(i) The implementation of the Anti-Tax Avoidance Directives, to understand the effect of the proposed changes to the Irish corporation tax code. This will cover issues such as interest limitation rules, hybrid mismatches and CFC rules.

(ii) The implementation of Actions 8 (Intangibles), 9 (Transfer Pricing – Risk and Capital) and 10 (Transfer Pricing – High Risk Transactions) of the G20/OECD BEPS initiative.

(iii) Additional considerations regarding Ireland's domestic transfer pricing rules.

(iv) Reform of the Irish dividend tax position.

Although Irish regulated funds should not be overly concerned with these reforms, the outcome of these consultations could impact future tax treatment.

Treaty abuse - multilateral instrument

Finance Act 2017 has paved the way for ratification of the Multilateral Convention arising from BEPS. The multilateral instrument ("**MLI**") will enable Ireland to update double tax treaties, while dispensing with the need for individual bilateral negotiation. The MLI includes measures against hybrid mismatches, treaty abuse, avoidance of permanent establishment status and measures to make mutual agreement procedures more effective as set out in the BEPS recommendations.

There are currently 72 signatories to the convention and six other countries have expressed their intention to sign it. The MLI will enter in to force three months after five or more jurisdictions have deposited their instruments of ratification with the OECD. It is anticipated that it will be ratified in autumn 2018 in Ireland and that the Convention will come in to force in January 2019.

Ireland has made certain choices in relation to the MLI, for more information see our client update *Over 60 Countries Sign up to Revolutionary OECD Multilateral Instrument*.

In terms of treaty abuse, Ireland has opted for the application of a "principal purpose test" as a method of restricting so called "treaty shopping" in line with a significant number of other countries. As set out in Finance Act 2017, those choices will form the basis of how the MLI is implemented into Ireland's tax treaties.

3 Listings

3.1 ESMA Statement on LEI Implementation

The Legal Entity Identifier or LEI is a 20-digit, alpha-numeric code that enables clear and unique identification of legal entities participating in financial transactions. It was developed, following the financial crisis, as a global system for the identification of legal entities.

On 20 December 2017 ESMA published a statement relating to the implementation of the LEI requirements under MiFIR because of indications that not all investment firms will be able to obtain LEI codes from all of their clients before 3 January 2018 (the date from which MiFIR applies). This may also be the case for trading venues' non-EU issuers whose financial instruments are traded on European trading venues. Consequently, to support the smooth introduction of the requirements, for six months after 3 January 2018 ESMA will allow:

(i) Investment firms to provide a service triggering the obligation to submit a transaction report to the client, from which it did not previously obtain an LEI code, under the condition that before providing such service the investment firm obtains the necessary documentation from this client to apply for an LEI code on their behalf.

(ii) Trading venues to report their own LEI codes instead of the LEI codes of non-EU issuers that do not currently have their own LEI codes.

(See also 1.11 above "MiFID II/MiFIR Update".)

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Maples and Calder is a leading international law firm advising financial, institutional and business clients around the world on the laws of the Cayman Islands, Ireland and the British Virgin Islands. The firm's affiliated organisation, MaplesFS, provides specialised fiduciary, accounting and administration services to corporate, finance and investment funds entities. The Maples group comprises more than 1,600 staff in 15 offices worldwide.

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