Asset Management & Investment Funds Update

December 2022

Key Dates & Deadlines: December 2022 & Q1 2023

Date	Source	Summary	Action/Impact
1 December		SFDR Level 2 – Central Bank fast-track process Filing deadline for Article 8 and 9 funds' pre-contractual disclosures required under SFDR Level 2 rules. See here for further details.	Fund managers of Article 8 and 9 funds must update offering documents to take account of the Level 2 rules, including the requirement to publish the relevant pre-contractual template annexed to Level 2, and prepare to file updated documents with the Central Bank in accordance with published guidance for the regulatory fast-track process for noting such documents.
7 December		AML - beneficial ownership Deadline for ICAVs, ILPs, CCFs and unit trusts (**CFVs**) to update their beneficial ownership record on the Central Bank's CFV Beneficial Ownership Register with beneficial owners' identity details (PPSN/CBI ref. no.) See here for further details.	Since 11 November 2022, all CFVs must include beneficial owners' identity details when filing the ONR beneficial ownership template with the Central Bank as Registrar. CFVs already on the CFV Beneficial Ownership register have until 7 December 2022 to update existing records to include beneficial owners' identity details.
27 December		GDPR – new third country SCCs A new version of the standard contractual clauses (**SCCs**) for the transfer of personal data outside of the EEA was published in June 2021, with the previous version repealed from 27 September 2021. Organisations have until 27 December 2022 to transition existing	Fund managers should advance reviews of existing sets of 'old' SCCs to identify those which need to transition to the new SCCs.

		sets of the 'old' SCCs over to the 'new' SCCs, after which date the 'old' SCCs will no longer be deemed to provide appropriate safeguards. See here for further details.	
30 December		SFDR – fund PAI disclosures SFDR compliance deadline for pre-contractual disclosure of any fund-level consideration of principal adverse impacts (**PAIs**) including whether and how PAIs are assessed at fund level and confirmation that fund annual reports contain reporting on any identified PAIs. See here for further details.	Fund managers should consider/address fund PAI disclosure ahead of the deadline, noting such disclosures can be included in the Central Bank's fast-track process for the year-end SFDR Level 2 compliance deadline.
31 December		SFDR – PAI reporting (assessment date) Fourth and final calculation date for the 2022 assessment of the PAIs of investment decisions under SFDR Article 4(1)(a), (3) or (4). See here for further details.	Fund managers should consider/address how relevant data is to be captured given that the first PAI reference period applies during 2022 for PAI Reporting by 30 June 2023.
31 December		COVID-19 – flexibility measures Interim company law flexibility measures introduced under the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 expire. See here for further details.	Fund managers utilising the flexibility measures to take note of the current expiration date.
31 December	 & 	PRIIPs for UCITS End of PRIIPs transitional period for UCITS. From 1 January 2023 UCITS made available (sold) to EEA retail investors must publish a PRIIPs KID. The Central Bank has confirmed that no regulatory filing of PRIIPs KIDs will be required ahead of the 1 January compliance deadline. See this month's article on topic for further details.	UCITS fund managers should advance preparations for the PRIIPs compliance deadline from when UCITS must publish: • a PRIIPs KID for EEA-based retail investors • either a PRIIPs KID or UCITS KIID for professional investors and non-EEA based retail investors • a UCITS KIID for any UK investors (under UK UCITS KIID rules).
31 December		Outsourcing – ESMA Cloud Outsourcing Guidelines End of transitional period for compliance of existing cloud outsourcing arrangements with the ESMA Cloud Outsourcing Guidelines (effective for new arrangements since July 2021) which set out guidance for the governance and risk management of cloud service provider arrangements. The Central Bank Cross-Industry Guidance on	Fund managers should consider/address compliance of existing arrangements with the Cloud Outsourcing Guidelines, whether as part of work programmes implementing the Central Bank Cross-Industry Guidance on Outsourcing or separately, but in any event prior to the end of the transitional period for compliance of existing arrangements with the Guidelines. Firms are required to notify their competent authority if the review of existing cloud

		Outsourcing, issued with immediate effect on 17 December 2021, incorporates the ESMA Cloud Outsourcing Guidelines. See here for further details.	outsourcing arrangements of critical or important functions is not finalised by 31 December 2022 and confirm the measures planned to complete the review or the possible exit strategy.
2023 (date dependent on publication date of relevant financial report)		SFDR Level 2 – fund annual report disclosures SFDR Level 2 financial report disclosure rules take effect from 1 January 2023 and must be addressed in annual reports published after this date irrespective of the relevant financial or reference period. See here for further details.	Fund managers must ensure annual financial statements published after 1 January 2023 for funds subject to SFDR Article 8 or 9 incorporate the relevant SFDR Level 2 disclosure template, completed in accordance with Chapter V, SFDR Level 2.
1 January 2023		Whistleblowing Commencement of new whistleblowing measures under the Protected Disclosures (Amendment) Act 2022 which provides for the protection of whistleblowers and includes requirements for employers to establish internal reporting channels to facilitate whistleblowers. See here for further details.	Ahead of the 1 January deadline, corporate funds and fund management companies must establish, or update existing, internal reporting processes and procedures facilitating whistleblowers.
1 January 2023		Performance fees – multi-manager funds Central Bank deadline for multi-manager UCITS' and RIAIFs' compliance with ESMA Q&A on performance fees which precludes the payment of performance fees to individual managers if overall the fund has underperformed. See here for further details.	Impacted fund managers should advance preparations to transition existing performance fee structures into compliance with the terms of ESMA UCITS Q&A (Section XI, Q&A 5) and ensure any necessary amendments to performance fee disclosures in offering documents are finalised ahead of the 1 January 2023 deadline.
1 January 2023		SFDR Level 2 - effective date SFDR Level 2 sets out additional disclosure obligations in respect of: • fund managers' disclosure of the PAIs of its investment decisions on sustainability factors under SFDR Article 4 • fund disclosures of environmental or social (E/S) characteristics under SFDR Articles 8, 10 and 11 • fund disclosures of sustainable investment objectives under SFDR Articles 9, 10 and 11. See this month's article on topic.	Funds using the Central Bank's fast-track process for noting Level 2 pre-contractual disclosures are subject to the filing deadline for that process of 1 December 2022. In addition to the pre-contractual disclosures, Level 2 includes website and financial report disclosures of funds' E/S characteristics or sustainable investment objectives. Website disclosures are required for in-scope funds from 1 January 2023 noting that such disclosures are not subject to a template but must be made in accordance with relevant Level 2 provisions. In-scope funds' Level 2 financial report disclosures must be included in reports published after 1

			January 2023 (irrespective of the finance year under report).
31 January 2023		Annual confirmation of ownership of Fund Management Companies Standard annual filing due to be filed via Central Bank ONR portal.	Fund managers should ensure to make the required filing in advance of the 31 January filing deadline.
Pre-February 2023 (exact date not yet confirmed)		SFDR Level 2 Amendments Commission-adopted Level 2 amendments, reflecting the inclusion of gas and nuclear activities in the Taxonomy, are expected to enter into force. Amendments impact both the pre-contractual and periodic disclosure templates for Article 8 and 9 funds.	While a date for the Level 2 amendments has yet to be confirmed, they are expected to be in force by next February and to trigger regulatory filing obligations for fund managers of Article 8 and 9 funds.
21 February 2023		Annual KIID Refresh – for UCITS with UCITS KIID Filing deadline for any UCITS which continue to use UCITS KIID following the end of the PRIIPs transitional period for UCITS on 1 January 2023.	Fund managers should ensure to make any required filing in advance of the 21 February deadline.
23 February 2023		CP152 – closed Response deadline under the Central Bank's consultation on new prudential rules for fund managers authorised to provide individual portfolio management. See article on topic in this month's update for further details.	In-scope fund managers should review and consider the impact of the proposed new capital requirements.
28 February 2023		Annual PCF Confirmation Return Standard annual return due to be filed via Central Bank ONR portal.	Fund managers should ensure to make the required filing in advance of the 28 February deadline.
28 February 2023		Annual Fund Profile Return Deadline for filing any updates to a sub-fund's' 'Fund Profile V2' regulatory return.	Fund managers should ensure to make the required filing in advance of the 28 February deadline.

Central Bank SFDR Review Findings

On 14 November 2022, the day of its SFDR seminar, the Central Bank published findings from a spot-check review of SFDR and Taxonomy disclosures filed ahead of the March 2021 and January 2022 SFDR compliance deadlines.

The findings note that, as of July 2022, the Irish funds sector includes 183 Article 9 funds, 1,276 Article 8 funds and 5,831 Article 6 funds.

As summarised below, the Central Bank's findings highlight both good and bad disclosure practices as well as regulatory expectations for SFDR disclosures which will be of interest to all fund managers but perhaps most acutely for those subject to the next key SFDR compliance deadline of 1 January 2023:

- **SFDR classifications** should not be used as fund labels. Reclassifications under SFDR are expected to be communicated, where appropriate, to investors and 'numerous changes' to funds' SFDR classifications should be avoided.

- **Sustainability risk disclosures** must be fund-specific and kept under review for accuracy (the ongoing review expectation also applies more generally to SFDR-related disclosures). Detailed reasons should be disclosed as to why sustainability risks are not relevant or, where relevant, how such risks are integrated and their likely impact on fund returns. Sustainability risk disclosures were also cited in the Central Bank's findings as an area of future supervisory focus.

- **Taxonomy alignment disclosures** should not include 'negative justifications and/or ambiguity' regarding funds' Taxonomy-aligned investment levels.

- **Article 8 benchmark funds'** managers must have processes in place to monitor relevant index providers and/or delegate investment managers. The Central Bank does not 'consider it appropriate' if neither the fund manager nor the investment manager monitor the composition of the index against the ESG screening criteria on the basis that the index provider is responsible for screening investments in the index or if the fund manager relies on an annual assessment of the ESG strategy but does not carry out ongoing monitoring of an investment manager's ESG approach.

- **Fund names** were generally found to be consistent with fund investment objectives and policies however the Central Bank expects that they be kept under review to ensure they are not misleading.

Areas of future supervisory focus, including as a result of the ESMA CSA on sustainability risks and disclosures planned for 2023, are:

- **Article 8 'Guardrails':** supervisory engagements will focus on funds with a low proportion of E/S aligned investments and reclassifications, including the relevant rationale. Fund managers must carefully consider each fund's SFDR classification "to ensure that it is aligned with both the letter and the intention of the legislative requirements".

- **Marketing materials:** the Central Bank will, where necessary, assess the consistency of disclosures across fund documentation and marketing materials.

- **Fees and costs:** transparent and proportionate cost disclosures must be ensured, and investors should not be subject to undue costs. The Central Bank expects "the fees and costs associated with Article 8 and Article 9 funds should not be disproportionately higher than Article 6 funds (without a legitimate rationale for such higher costs)".

- **Securities lending:** the Central Bank "is interested" in Article 8 and 9 funds engaged in securities lending "in particular, whether these investment funds are in a position to meet their [E/S] characteristics if they have lent out shares and those shares end up taking contradictory positions (such as via the exercising of associated voting rights or because the shares were lent to short sellers which take an opposing view)".

- **Fund service providers:** depositaries' monitoring of ESG-related investment restrictions and categorisation/reporting of breaches such restrictions will be a future supervisory focus.

Next steps

Fund managers should take account of the issues highlighted by the Central Bank as well as the areas of focus to ensure adequate preparation for future supervisory engagements, which are likely as early as next year.

Regulatory Guidance for Beneficial Ownership Filings

Since 11 November 2022, ICAVs, CCFs, unit trusts and ILPs (Certain Financial Vehicles or **CFVs**) are required to file beneficial owners' PPSNs or Central Bank reference numbers with the Central Bank as Registrar of the Central Beneficial Ownership Register for CFVs. As per previous briefings (see here), CFVs with an existing

beneficial ownership record on the Central Register have until 7 December 2022 to update that record to include beneficial owners' PPSNs or Central Bank reference numbers.

To assist CFVs the Central Bank has published an updated version of its FAQs on the Beneficial Ownership Register to include the following:

- Why is PPSN Required?
- How is PPSN used to verify the identity of a beneficial owner?
- What happens if the PPSN provided does not match DSP records?
- What happens if the Central Bank of Ireland reference number provided does not match Central Bank records?
- How will my PPSN be stored?
- What if a beneficial owner has not been issued with a PPSN?
- What if a beneficial owner has not been issued with a PPSN, nor been appointed in a PCF role?
- Where a beneficial owner does not have a PPS or Central Bank of Ireland Reference Number, can the unique RBO (Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies (RBO)) number be provided?

Next steps

All CFVs should take note of the new requirement to file beneficial owners' PPSNs/Central Bank reference numbers and those with an existing beneficial ownership record on the Central Register must ensure to update that record to include the required details in advance of 7 December 2022 deadline.

BMR Extension for Non-EU Benchmark Use

The Commission has confirmed its intention to amend the Benchmarks Regulation (**BMR**) in Q2 2023 to extend the transitional period for compliance by non-EU/third country benchmarks with the BMR third country rules. The transitional period is currently scheduled to expire at the end of 2023 and the proposed amendment would extend the expiration date to end-2025. Proposals for the BMR amendment will be published for feedback before the proposed adoption date of Q2 2023. Further details to follow once available.

Next steps

Subject to the terms of the proposed amendments, an extension of the transition period for non-EU benchmarks would allow for new use of non-EU benchmarks which are not yet compliant with BMR third country rules until end-2025.

New PRIIPs Q&As Published

On 14 November 2022, the ESAs published an updated version of their PRIIPs Q&A document with over thirty new Q&As of relevance to UCITS finalising their preparations for compliance with the 1 January 2023 PRIIPs deadline.

In addition to new 'general topic' Q&As, there are new Q&As on the 'What is this product', 'What are the risks and what could I get in return?', 'What are the costs?' sections of the PRIIPs KID as well as Q&As on the disclosure of past performance.

While the timing of publication is no doubt challenging given the imminency of the PRIIPs deadline, it is helpful that several of the new PRIIPs Q&As carry over existing UCITS Q&As, as well as guidance issued by ESMA, and so clarify that existing UCITS KIID guidance can, where indicated, be used in interpreting and complying with PRIIPs rules.

The updated ESA PRIIPs Q&A document is accessible here and a summary of new Q&As relevant to UCITS is set out below:

UCITS KIID Q&A and guidance carried over to PRIIPs

New PRIIPs Q&A have been published which apply the following existing UCITS Q&As and guidance to PRIIPs rules applicable to UCITS:

- **ESMA UCITS KIID Q&A 4: Past performance**: Q&As 4a, 4b, 4c*bis,* 4d, 4e, 4f and 4g have all been carried over and applied in respect of the past performance rules under PRIIPs (Annex VIII, PRIIPs Delegated Regulation (as amended)). Notably, the PRIIPs Q&A 1 on past performance, states that UCITS which do not have one year's performance should include a statement to that effect in the 'Other relevant information' section of the PRIIPs KID. See Q&As 1-7 in ' Past Performance' section of the updated ESA PRIIPs Q&A document.

- **ESMA UCITS KIID Q&A 5: Clear language**: Q&As 5a, 5b. See Q&A 7 & 8 in 'General Topics' section of the updated ESA PRIIPs Q&A document.

- **ESMA UCITS KIID Q&As 8: Disclosure of the benchmark index in the objectives and investment policies:** Q&As 8a, 8b, 8c. See Q&As 1-3 in the 'What is this product?' section of the updated ESA PRIIPs Q&A document.

- **ESMA Guidelines on ETFs and other UCITS issues:** relevant guidance (paras 10, 14-17) relating to index-tracking, index-tracking leveraged and UCITS ETF disclosures in the UCITS KIID. See Q&As 4–6 in the 'What is this product?' section of the updated ESA PRIIPs Q&A document.

New PRIIPs Q&As on general topics

New Q&As 9 & 10 in the 'General Topics' of the updated ESA PRIIPs Q&A document clarify that:

- where applicable, the group name should be included as part of the 'Name of the PRIIP manufacturer' at the beginning of the KID alongside other information required by Article 8(3)(a) of the PRIIPs Regulation

- where applicable, PRIIPs KIDs published prior to 1 January 2023 should comply with the PRIIPs regime in place as at the date of publication.

New PRIIPs Q&As on the 'What are the risks and what could I get in return?' section of the KID

New Q&As 6-17 and 19 in 'Performance Scenarios' section of the updated ESA PRIIPs Q&A document clarify various aspects of the performance scenario calculations including:

- of 'Element E' of the narrative: dates included in this disclosure should relate to the differing periods taken for each performance scenarios and disclosed in month/year format;

- for the calculation of sub-intervals, additional sub-intervals and the performance of linear transformations;

- for calculations by UCITS with insufficient data but with a benchmark, those with no benchmark/a benchmark with insufficient data, those with no benchmark and no proxy and those with a RHP>10 years;

- on the ability to use existing share class data for a new share class rather that a benchmark subject to relevant conditions;

- of the requirement to disclose the results (and not the underlying calculations) of previous performance scenario calculations in the 'Other relevant information' section of the KID; and

- of the requirement for monthly calculations (but not necessarily review or revision of) performance scenarios in the KID.

New PRIIPs Q&As on the 'What are the costs?' section of the KID

New Q&As 10 and 11 in the 'Presentation of costs' section of the updated ESA PRIIPs Q&A document clarify the:

- disclosure of performance fees and where explanatory narratives should be included e.g., in relation to any reference benchmark used or if fees are payable in the event of negative overall performance but positive performance against the benchmark; and
- calculation of performance fees which should be based on historical data.

Next steps

UCITS sold to EEA retail investors have until 1 January 2023 to publish a PRIIPs KID.

ESA SFDR Q&A Published

On 17 November 2022, the ESAs published the first edition of a SFDR Q&A incorporating Level 3 guidance on various aspects of the SFDR regime including on the calculation and disclosure of principal adverse impacts (**PAIs**), Taxonomy alignment, financial products' (including multi-option products') disclosures, and guidance for financial advisers and execution-only market participants.

The ESA SFDR Q&A is accessible here and the following are notable points of clarification:

Minimum investment proportions:

- **Part V. Q&As 7, 8:** the minimum investment proportions included in pre-contractual disclosures (**PCDs**) for (1) environmentally/socially aligned (**E/S aligned**) investments; (2) sustainable investments (**SIs**); and (3) Taxonomy-aligned SIs, are binding minimum commitments to investors that 'should be met at all times'. PCDs should only include minimum commitments and not 'targets' or indeed, the actual level of such investments as at a particular date (once a reporting period has passed).
- **Part V. Q&A 8:** only funds with PCD commitments to invest in SIs may report on their SI investments in the relevant financial report disclosure template annexed to Level 2. This clarification follows guidance from the Commission, in its May 2022 SFDR Q&A, that Taxonomy-aligned SIs must be reported in the periodic disclosure templates annexed to Level 2 irrespective of any PCD commitments noting, however, that PCDs should be updated to reflect any change to the investments of the fund on an ongoing basis. The ESAs reference this Commission guidance in their Q&A but confirm that it does not apply to SIs which are non-Taxonomy aligned. As a result, the ESAs clarify that those Article 8 funds with no SI commitments can leave out the SI sections when completing the periodic disclosure template at Annex IV to Level 2.

Assessing good governance practices:

- **Part III. Q&A 3:** the use of reference metrics such as UN Global Compact, OECD or ILO principles can form part of the 'policy to assess' good governance practices but this is not prescribed under SFDR (it being a disclosures regime).

Deletion of N/A sections of the annex:

- **Part III Q&A 1:** inapplicable sections of the PCD templates can be deleted provided this is permitted by the red drafting notes in the PCD templates.

Sustainable investments:

- **Part III. Q&A 6:** managers' SI frameworks are only limited by the definition of SIs set out under SFDR Article 2(17) however, the ESAs confirm that different interpretations of Article 2(17) cannot be used for different funds.
- **Part V. Q&A 15:** to avoid double counting when reporting SIs with both environmental (E) and social (S) objectives, managers should only consider one single E or S objective.

- **Part V. Q&A 2:** when using PAI indicators to assess DNSH compliance (which the ESAs have previously clarified is mandatory), the metrics can be adjusted e.g., in the case of green bonds to reflect that project financing bonds only finance specific activities and not the entire issuer.

SFDR Article 9:

- **Part III. Q&A 2:** rules under the Benchmarks Regulation for Paris-aligned benchmarks and climate transition benchmarks are not strict enough to mean that those benchmarks will only include SIs.

- **Part III. Q&A 7:** a 'reduction in carbon emissions' objective as referenced in Article 9(3) includes e.g. an objective to reduce GHG emissions as Article 9(3) is intended to cover all greenhouse gases and carbon emissions.

Reference benchmarks:

- **Part III Q&A 8:** reference benchmarks designated to achieve the E/S characteristics or SI objectives of a fund will not be broad market indexes.

Sustainability risk:

- **Part III Q&A 4:** in response to whether a manager can simply opt out and disclose under Article 6 that sustainability risks are not being integrated and not taken into account, the ESAs confirm that 'even in the unlikely situation' that sustainability risks are assessed as not relevant to any particular fund, disclosures under Article 6 must still 'explain the reasons for not considering [sustainability] risks relevant'.

In addition to the above, the ESAs' SFDR Q&A document includes Q&As on:

- *PAI calculations* – most relevant to those managers considering entity-level PAIs as these Q&As include clarifications on indicator calculation methodologies, how to take account of short positions and in many instances cross-referencing the clarifications set out in the June 2022 ESA SFDR RTS statement (see here for further details);

- *PAI disclosures* – most relevant to those managers considering entity-level PAIs as these Q&As include clarifications on elements of the PAI statement template and the application of SFDR Article 4.

- *Taxonomy-aligned investment*– most relevant to funds with Taxonomy-aligned investments as these Q&As include clarifications of the relevant calculation methodology and Taxonomy reporting requirements.

Next steps

Fund managers should take account of the SFDR Level 3 guidance set out under the ESAs' Q&A.

ESMA Proposes Minimum Investment Thresholds for Article 8 and 9 Funds

On 18 November 2022, ESMA published draft guidance on fund names for consultation which includes quantitative and qualitative thresholds for use by UCITS managers and AIFMs of ESG-related, sustainable and/or impact-related terms in fund names (the **Guidance**). The consultation on the Guidance is open until February 2023.

If finalised in its current form, the Guidance would introduce minimum investment criteria for Article 8 and 9 funds which would be triggered by the use one or more of the specified terms in the fund name.

Notably, ESMA specifically states that the Guidance is not for SFDR or Taxonomy disclosure rules. Instead, the Guidance is proposed in respect of the UCITS and AIFMD rules to act honestly and fairly and on the basis that managers' compliance with those rules can only be ensured if funds using one or more of the specified terms comply with the relevant quantitative and qualitative investment thresholds.

Quantitative & qualitative thresholds

The proposed Article 8 and 9 thresholds for use of ESG-related, sustainable or impact-related terms in the name are:

- **Article 8 funds** (including index trackers) that use **any ESG-related words** in the name, should invest a **minimum of 80% in environmentally or socially (E/S) aligned investments** (on an ex-ante and ex-post basis). Examples of ESG-related words include 'society', 'impact', 'biodiversity', 'water', 'climate change'. By way of additional criteria for such funds with the term 'impact'/'impact investing' or any other impact-related term, ESMA expects disclosure of investment in E/S aligned investments 'with the intent to generate, positive, measurable social or environmental impact alongside a financial return'.

- **Article 8 funds** (including index trackers) that use the term **'sustainable' or any derivative** thereof in its name, should invest a **minimum of 50% of its E/S aligned investments in SIs** (on an ex-ante and ex-post basis). By way of additional criteria for funds with the term 'impact'/'impact investing' or any other impact-related term, ESMA expects disclosure of investment in E/S aligned investments 'with the intent to generate, positive, measurable social or environmental impact alongside a financial return' in addition to the fund's compliance with the quantitative thresholds.

- **Article 9 funds** (including index trackers) that use **any ESG-related words and/or the term 'sustainable' or any derivative** therefor in the name, should invest **at least 80% in SIs** (on an ex-ante and ex-post basis). By way of additional criteria for funds with the term 'impact'/'impact investing' or any other impact-related term, ESMA expects disclosure of investment in SIs 'with the intent to generate, positive, measurable social or environmental impact alongside a financial return' in addition to the fund's compliance with the quantitative thresholds.

- **any Article 8 or 9 fund** that uses either an **ESG or sustainability-related term** is recommended to apply **minimum safeguards** to all fund investments including the exclusion criteria applicable to PABs under Article 12 BMR delegated regulation (2020/1288).

Binding limits & breaches

The above minimum investment amounts would apply on a binding basis throughout the life of the fund. Any temporary breach of a limit which is not due to a deliberate choice of the manager would be treated as a passive breach and should be corrected in the best interests of investors. Non-passive breaches should be a risk indicator for further investigation and supervisory action by the NCA.

Next steps

ESMA expects to publish finalised Guidance by Q2/Q3 2023 with an application date of 3 months after the publication of translations on the ESMA website. The application date would be subject to a transitional period of 6 months for existing funds. By the end of the 6-month transitional period, funds must either have adjusted their portfolio to comply with the thresholds or changed the name of the fund to remove the relevant ESG-related term.

The following is an extract from ESMA Chair speech addressing the consultation:

"In addition, today ESMA is launching a consultation paper on draft guidelines on the use in funds' names of ESG or sustainability-related terms. Many voices both in the public and private sector have expressed concerns with the misuse of article 8 and article 9 categories in the SFDR as marketing labels. We hope that through our proposal on the use of names we may address any such misuse of these categories by funds. Fund names are a powerful marketing tool, especially for retail investors. In order not to mislead investors, ESMA believes that when ESG- or sustainability-related terms are used in a fund's name, this should be supported in a material way by evidence of sustainability characteristics or objectives that are reflected fairly and consistently in the fund's investment objectives and policy. We are particularly seeking input on the introduction of quantitative thresholds for what would be the minimum proportion of investments to support the ESG or sustainability-related terms in funds' names. We are suggesting a threshold of 80% when ESG related terms are used and an additional threshold of 50% where sustainable or sustainability related terms are used. I encourage you to take part in this consultation, share your views, comments and suggestions. Your feedback will be essential."

Corporate Sustainability Reporting Rules Get Final Green Light

On 28 November, the Council gave its final approval to the Corporate Sustainability Reporting Directive (**CSRD**), which will make sustainability reporting mandatory for all large and listed companies in the EU. CSRD must now proceed through the final administrative stages of the EU process, following which it will enter into force 20 days after publication in the EU Official Journal. Member States will have 18 months in which to transpose the CSRD into national law.

Who is in scope?

CSRD extends the scope of mandatory sustainability reporting (under the current Non-Financial Reporting Directive or NFRD regime) to all large and listed companies in the EU. Non-EU companies "with substantial activity in the EU" – that is, with a turnover over €150 million in the bloc – will also have to comply.

CSRD sustainability reporting rules are specifically disapplied for investment funds, along with all other SFDR financial products. Fund management companies are not similarly excluded and as such may be in scope as either large or listed companies where large companies are those which exceed at least two of the three criteria of (i) >€20m balance sheet total; (ii) >€40m net turnover; and/or (iii) average of 250 employees during the financial year.

What must be reported?

All CSRD reports will be subject to an audit and companies will have to adhere to EU sustainability reporting standards which will be published as delegated measures to the CSRD.

On 23 November 2022, the first set of twelve draft reporting standards were submitted for the Commission's approval by the European Financial Reporting Advisory Group (the association designated by the Commission for providing technical advice on the reporting standards). Final draft standards submitted for the Commission's approval include those for reporting on climate change, pollution, water and marine resources, biodiversity and ecosystems, resource use and circular economy, workers in the value chain and own workforce, affected communities, consumers and end-users, and business conduct.

On 25 November 2022, the Commission published draft CSRD delegated measures to legislate for the implementation of the EFRAG draft reporting standards. Final CSRD delegated measures are expected to be available by June 2023.

When will reports be due?

CSRD will be introduced on a phased approach:

- **1 January 2024**: CSRD will apply to large public-interest companies with over 500 employees and already subject to the NFRD. Reports will be due in 2025;
- **1 January 2025**: CSRD will apply to large companies not presently subject to the NFRD, with 250 employees and/or €40 million turnover and/or €20 million in assets. Reports will be due in 2026; and
- **1 January 2026**: CSRD will apply to listed SMEs. Reports due in 2027. SMEs however can opt out until 2028.

What are the Taxonomy reporting obligations for companies in scope of CSRD?

All companies in scope of CSRD are automatically in scope of reporting under the EU Taxonomy Regulation (per Article 8 of the Taxonomy). The Taxonomy sets down environmental performance criteria for assessing companies' activities; the satisfaction of which criteria allows relevant activities to be classed as environmentally substantial activities under the EU rules.

Article 8 of the Taxonomy requires all companies in scope of CSRD to report on the extent to which activities are environmentally sustainable under the Taxonomy. In particular, companies must disclose the proportion of turnover from products or services associated with activities that satisfy the Taxonomy performance criteria and the proportion of both capital and operating expenditure related to assets or processes associated with such environmentally sustainable activities.

Next steps

Fund managers should consider the impact of coming in scope of CSRD and the Taxonomy, which would represent a significant additional sustainability reporting burden, in addition to that arising under SFDR.

Leverage Limits and Liquidity Guidance for Irish Property Funds

On 24 November 2022, the Central Bank published final leverage and liquidity-related macroprudential measures for Irish property funds following its consultation on such measures this time last year (**CP145**). The final measures, as set out in the Central Bank paper 'Macroprudential measures for Irish property funds' and supported by a CP 145 feedback statement, are:

1. **Leverage Limit:** 60% debt to assets leverage limit (increased from 50% under CP145) applied as a condition on authorisation under the Irish AIFM Regulations (or relevant domestic rules in the case of non-Irish AIFMs); and

2. **Liquidity Guidance:** for

    - a 12-month minimum liquidity timeframe (i.e., from redemption notice to redemption settlement) which should be appropriately balanced between the notification and settlement periods;

    - a longer liquidity timeframe where the property fund cannot sell its assets within the minimum timeframe;

    - property funds to only be structured as closed-ended or open-ended with limited liquidity; and

    - liquidity management tools, including liquidity buffers, to only be considered as complementary to, but not a replacement for, effective redemption policies (the **Liquidity Guidance**).

The Leverage Limit and the Liquidity Guidance are applicable to Irish and non-Irish AIFMs of Irish-authorised AIFs with >50% AUM in Irish property assets (**Property Funds**).

Timing of application of the macroprudential measures

- **Leverage Limit:** the Leverage Limit is immediately applicable as a condition for authorisation of new Property Funds from 24 November 2022. For existing Property Funds, application of the Leverage Limit is subject to a five-year transition period (up from three years under CP145) with a regulatory expectation for deleveraging to be significantly progressed by end of year three and for those existing Property Funds with leverage above the limit not to increase the quantum of their debt during the transition period. Those existing Property Funds with leverage close to or above the Leverage Limit will be required to submit action plans to the Central Bank outlining how they will deleverage or maintain leverage below the Leverage Limit throughout the fiver-year transition period in a gradual and orderly manner.

- **Liquidity Guidance:** new Property Funds are expected to adhere to the Liquidity Guidance from authorisation and existing Property Funds will have an 18-month transitional period in which to take 'appropriate actions in response' to the Liquidity Guidance.

Scope of the macroprudential measures

- The Leverage Limit and the Liquidity Guidance are applicable to Property Funds and do not target Irish funds 'invested mainly' in non-Irish property assets.

- Calculation of the 50% threshold for classification as a Property Fund should take account of direct (on-balance sheet) holdings and indirect holdings including through SPEs (or similar vehicles), partnership arrangements, investments in other funds but excluding holdings via equities, debt instruments and derivatives where those instruments are (1) traded on a regulated trading venue; and (2) the underlying Irish property asset is controlled by a party that is independent of the AIF, the AIFM and/or its delegates, and its investors.

- The Leverage Limit is applicable as a single limit across the property fund sector and therefore applies irrespective of Property Funds' individual investment strategies or sub-sector exposure.

- All on-balance sheet leverage, irrespective of borrowing source, should be included in the calculation of the Leverage Limit. Specifically, shareholder loans must be included in the debt calculation. Although the Central Bank acknowledged CP145 feedback highlighting the reduced risk associated with shareholder debt when compared to third-party debt, the Central Bank consider such loans will be 'more akin to commercial lending arrangements' in light of its recently published AIFMD Q&As setting out criteria for shareholder loans to be on an arm's length basis and transacted on normal commercial terms.

- Off-balance sheet leverage as a result of derivative investments is not to be included in the calculation of the Leverage Limit.

- The Liquidity Guidance, including the 12-month minimum liquidity timeframe, is applicable to the whole portfolio of Property Funds and not just the property-related assets.

- The Liquidity Guidance may not be applicable where (i) the designation of the redemption dealing day is at the discretion of the Directors (and not the option of the investors) and (ii) the Property Fund has sufficient liquid assets not generated by disposal of Irish property assets to meet redemptions.

Exemptions/derogations from the macroprudential measures

- *For social housing funds:* Property Funds investing at least 80% AUM in social housing are not in scope of the Leverage Limit subject to satisfaction of specified conditions; and

- *For development activity:* Property Funds pursuing development activity have the option to apply a 20% margin to the value of development assets for the purposes of calculating the Leverage Limit. The definition of 'development activity' is as defined by Revenue and the permission to apply a margin is to reflect that borrowing for development is done on an LTC basis. Property funds which avail of the 20% margin option will be required to include details in an ONR regulatory return, the form of which will issue in H1 2023. Once a development asset becomes an investment asset, the margin option falls away and the standard calculation method for the Leverage Limit must be used.

Regulatory monitoring and treatment of breaches

- Regular implementation monitoring of the Leverage Limit will be undertaken by the Central Bank via an annual risk assessment process supplemented by a tailored ONR return requiring information on e.g., ongoing satisfaction of exclusion criteria (for social housing funds); use of a different leverage calculation method (for development activity); indirect holdings of funds and the maturity of shareholder loans.

- Breaches of the Leverage Limit will be dealt with 'in accordance with the Central Bank's general approach to failure to adhere to regulatory requirements'.

- Regular monitoring of the implementation and effects of the Liquidity Guidance will be undertaken as part of the overall monitoring of the macroprudential measures (see below)

Regulatory review of the macroprudential measures

The Central Bank will keep the Leverage Limit and Liquidity Guidance under periodic review and while it does not intend to recalibrate the Leverage Limit regularly, it confirms that the limit may be tightened if deemed necessary to achieve its macroprudential objective e.g., if there was evidence of significant market overheating. Should the risk environment justify, the Central Bank may consider expanding the policy measures to apply additional measures for unregulated property funds.

Next steps

The Leverage Limit and Liquidity Guidance are immediately applicable (i.e., from 24 November 2022) for new Property Funds. Existing Property Funds (i.e., as of 24 November 2022) have a transition period in which to arrange for compliance with macroprudential measures. The transition period for the Leverage Limit expires on 24 November 2027 and that for the Liquidity Guidance on 24 May 2024.

Central Bank Fines UCITS Manager for Breaches of UCITS Regulations

On 14 November 2022, the Central Bank published notice of a €117,600 fine issued to an Irish UCITS management company for breaches of six UCITS regulations during a period between 2011 and 2018. The breaches related to ineffective investor disclosures in offering documents for five sub-funds under management.

During the investigation preceding the fine, the Central Bank identified prospectus and key investor information document (**KIID**) disclosures of the relevant funds' index strategies as inadequate for a proper consideration of an investment in the funds.

When publishing the fine, the Central Bank noted that:

"Transparency around the investment policy or strategy of a fund is a critical element in investor protection. Fund management companies … are responsible for ensuring prospectuses and key investor information documents issued in respect of funds they manage contain information necessary for investors to be able to make informed decisions regarding the investments proposed to them.

The requirements for accurate prospectuses and key investor information documents are an essential part of the UCITS regulatory framework. One of the key features of any sound regulatory system is ensuring that firms and their products meet the appropriate standards in order to enter the financial services industry in the first instance.

Effective gatekeeping by the Central Bank relies on accurate and complete information being submitted by firms seeking fund authorisation, as part of the assessment of their applications and in ongoing supervision. Compliance with the regulatory requirements placed on fund management companies is key to ensuring good governance, the protection of investors, the integrity of the market and systemic stability."

Next steps

This Central Bank fine is a useful reminder for fund managers of the importance of adequate disclosures in fund documents and of the supervisory focus on holding managers to account where disclosures are deemed ineffective for a proper understanding of a fund's investment strategy.

Dear CEO Letter Highlights Consumer Protection Expectations

On 14 November 2022, the Central Bank issued a reminder to financial service firms of the importance, given the challenging economic outlook, of meeting the regulatory expectations set out in the Central Bank's March 2022 Consumer Protection Outlook Report. Our briefing on the March 2022 Report is available here.

In addition to the expectations set out in the March 2022 Report, the Central Bank's latest correspondence highlights several regulatory expectations as particularly important in the current climate. Those of which are of particular relevance to fund managers are set out below:

- It is important that firms monitor and evaluate the investment products they sell and consider how their risk profile may change in this period of volatility and seek to mitigate risks to clients accordingly. Products that may have been considered suitable for sale to retail clients previously, may no longer be suitable in the current climate. Firms must ensure their due diligence on products takes account of all relevant factors, including risk-return profile, liquidity, costs and charges, and any 'kick-out' or 'trigger' features that may alter the nature of an investment product under certain conditions.
- The impact that inflation may have on the performance/value of an investment, as well as the impact on nominal returns, should be clearly explained to consumers. For products that include a guarantee or capital protection, it should be clearly outlined that this would not protect against the effect of inflation over time.
- Firms producing financial products are reminded of their responsibilities to provide information (including to intermediaries who sell or advise on their products) that is clear, accurate, up-to-date and not misleading in the context of the current economic circumstances and outlook. Information provided should help consumers make informed decisions.
- Firms should ensure they have robust product governance and oversight arrangements in place to proactively assess the risks and consumer impacts commercial decisions may pose to new and existing customers and develop action plans to mitigate these risks.

Next steps

Firms are expected to incorporate regulatory expectations into their work programmes and senior management and board considerations. As is standard for such 'Dear CEO' letters, the Central Bank may have regard to the terms of the correspondence as part of any future supervisory engagement with firms.

New Prudential Rules for Fund Managers with MiFID Top-Up

On 1 December 2022, the Central Bank published for consultation, revised capital requirements for UCITS managers and AIFMs (**CP152**).

The revised rules set out in CP152 are relevant for those fund managers which, in addition to being authorised to carry out collective portfolio management (**CPM**) services, are also authorised to provide individual portfolio management (**IPM**) services under, as relevant, Regulation 16(2) Irish UCITS Regulations/Regulation 7(4) Irish AIFM Regulations (**MiFID top-up managers**).

Responses to CP152 must be submitted by 23 February 2023.

Revised capital requirements for MiFID top-up managers

The Central Bank is consulting on revisions to the capital requirements for MiFID top-up managers as existing fund manager capital requirements (under Regulation 17, UCITS Regulations and Regulation 10, AIFM Regulations) only take account of fund managers' CPM activities i.e., the requirements do not take account of IPM activities.

While MiFID top-up managers are required by the Central Bank, as a condition of authorisation, to comply with additional capital requirements (calculated by reference to those applicable for investment firms performing similar services i.e., MiFID firms), such conditions are not set down in legislation/governing regime rules. Furthermore, the additional requirements which are applied as a condition of authorisation are not aligned with the latest rules (introduced in 2021) for MiFID firms set out under the Investment Firms Regulation.

To address the above issues, the Central Bank is proposing amendments to the UCITS Regulations and AIF Rulebook to provide for the following capital requirements for MiFID top-up managers (save for distinctions as noted, the new capital requirements are proposed as equally applicable to UCITS managers as to AIFMs with a MiFID top-up licence):

- **Small and non-interconnected MiFID top-up managers**: to be subject to existing CPM capital requirements under, as relevant, Regulation 17 UCITS Regulations/Regulation 10 AIFM Regulations. As a result, no additional capital requirements would be applicable to such MiFID top-up managers as a condition of authorisation.

  UCITS managers with a MiFID top-up would qualify as **'small and non-interconnected'** if they satisfy all of the following, where each are calculated based only a MiFID top-up manager's IPM activities and in accordance with prescribed methodologies:

  (i) AUM in respect of IPM activities is less than €1.2 billion;

  (ii) ASA (client assets safeguarded and administered) are zero;

  (iii) CMH (client money held) is zero;

  (iv) on- and off-balance-sheet total of the fund manager is less than €100 million;

  (v) total annual gross revenue from IPM services is less than €30 million, calculated as an average on the basis of the annual figures from the two-year period immediately preceding the given financial year.

  AIFMs with a MiFID top-up would qualify as **'small and non-interconnected'** if they satisfy (i) – (v) above and, as an additional condition, that the value of orders that the AIFM handles for clients through the receipt and transmission of client orders is [less than] (i) €100m/day for cash trades or (ii) €1b/day for derivatives.

- **MiFID top-up managers that are not small and non-interconnected**: to be required to hold the higher of (i) the existing CPM capital requirement applicable under, as relevant, the UCITS/AIFM Regulations and (ii) new Risk to Client K-Factor requirement calculated in accordance with revised UCITS/AIF Rulebook requirements. The K-Factor requirement would be calculated based only a MiFID top-up manager's IPM activities by adding together the following (each calculated using the prescribed methodology):

- K-AUM - assets under discretionary portfolio management (including those subject to delegation, but excluding those under sub-delegation, arrangements) multiplied by 0.02%
- K-CMH - client money held on segregated accounts multiplied by 0.4% or on non-segregated accounts by 0.5%
- K-ASA - assets safeguarded and administered for clients (including those subject to delegation arrangements) multiplied by 0.04%
- (for AIFMs only) K-COH – value of client orders handled for both cash trades and derivatives multiplied by 0.01%

- **All MiFID top-up managers**: to be "*required to have in place sound, effective and comprehensive arrangements, strategies and processes to assess and maintain an adequate level of internal capital on an ongoing basis and to submit an ICAAP questionnaire to the Central Bank on an annual basis."* It is proposed to amend the UCITS Regulations and AIF Rulebook to formally provide for this requirement which is currently a condition on authorisation of MiFID top-up managers. In addition, it is proposed to amend the current Minimum Capital Requirement Report to allow for reporting of compliance with the proposed capital requirements for MiFID top-up managers under CP152.

Next steps

Provision is made for MiFID top-up managers that are not small and non-interconnected managers to limit any increase in their capital requirements arising from the above proposals to twice their fixed overheads requirement for the period to end-June 2026.