




Asset Management & Investment Funds Update






October 2022






Key Dates & Deadlines: Q4 2022

| Date | Source | Summary | Action/Impact |
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| 23 September |  | MiFID - sustainability preferences Revised ESMA Suitability Guidelines published with an effective date of six months post the publication of translations of the guidelines on ESMA's website. See article on topic in this month's update for further details. | Fund managers with MiFID top-up licences should review their compliance approach for MiFID sustainable preference rules (effective 2 August 2022) for any necessary revisions to align, in due course, with ESMA guidelines. |
| 30 September |  | SFDR Level 2 - disclosure templates ESMA, together with the other ESAs, published revised draft SFDR disclosure templates reflecting the addition of fossil fuel gas and nuclear activities to the Taxonomy. Other technical changes have also been made to the templates to take account of clarifications from the Commission and correct typographical errors in the questions/instructions in the templates. The Commission must now confirm the effective date of the revised templates. See article on topic in this month's update for further details. | As the Commission may require use of the revised templates from 1 January 2023, fund managers should take account of the revised templates published by the ESAs as part of the Level 2 compliance preparations. |
| Q4 (revised forward from 13 September) |  | AML - beneficial ownership Deadline for ICAVs, ILPs, CCFs and unit trusts to file beneficial owners' identity verification details (PPSN or | Relevant fund vehicles to collect PPSNs and CBI reference numbers (issued as part of PCF approval process) for beneficial owners. For |

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| | | <p>CBI reference number) with the Central Bank as Registrar of the Register of Beneficial Ownership of Certain Financial Vehicles. See here for further details.</p> | <p>those beneficial owners without a PPSN/CBI reference number, a verification of identity process is available to obtain a CBI reference number.</p> |
| <p>19 October (extended from 7 October)</p> |  | <p>Outsourcing - registers</p> <p>Markets firms (including fund management companies) with a PRISM rating of Medium Low or above (or its equivalent) are required to submit their outsourcing register, prepared using the relevant regulatory template, via the ONR. See here for further details.</p> | <p>Relevant fund managers to complete mapping of all outsourcing relationships and finalise outsourcing register template for submission to the Central Bank. Fund managers not subject to the filing requirement are equally required to prepare an outsourcing register which must be made available on request from the Central Bank.</p> |
| <p>November 2022 (exact date to be confirmed)</p> |  | <p>Corporate Sustainability Reporting Directive (CSRD)</p> <p>Reporting standards for the proposed CSRD are expected to be published. CSRD reporting rules are expected to be effective from 1 January 2024 (using 2023 data) for companies already subject to the NFRD, from 1 January 2025 (using 2024 data) for large non-NFRD companies and from 1 January 2026 (using 2025 data) for listed SMEs. See here for further details.</p> | <p>Fund managers should consider the scope and impact of being subject to the extensive sustainability reporting standards under CSRD. CSRD is intended to align with SFDR and the EU Taxonomy but will represent a not insignificant additional reporting obligation for in-scope companies.</p> |
| <p>1 December</p> |  | <p>SFDR Level 2 – Central Bank fast-track process</p> <p>Filing deadline for Article 8 and 9 funds for pre-contractual disclosures required under SFDR Level 2 rules. See article on topic in this month's update for further details.</p> | <p>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.</p> |
| <p>27 December</p> |  | <p>GDPR – new third country SCCs</p> <p>A new version of the standard contractual clauses (SCCs) for the transfer of personal data outside of the EEA were published in June 2021, with the previous version repealed from 27 September 2021. Organisations have until 27 December 2022 to transition existing 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.</p> | <p>Fund managers should advance reviews of existing sets of 'old' SCCs to identify those which need to transition to the new SCCs.</p> |

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| <p>30 December</p> |  | <p>SFDR – fund PAI disclosures</p> <p>SFDR compliance deadline for pre-contractual disclosure of any fund-level consideration of 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.</p> | <p>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.</p> |
| <p>31 December</p> |  | <p>SFDR – PAI reporting (assessment date)</p> <p>Fourth and final calculation date for the 2022 assessment of the principal adverse impacts (PAIs) of investment decisions under SFDR Article 4(1)(a), (3) or (4). See here for further details</p> | <p>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.</p> |
| <p>31 December</p> |  | <p>COVID-19 – flexibility measures</p> <p>Interim company law flexibility measures introduced under the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 expire. At the moment plcs are permitted concessions in relation to virtual meetings and manner of executing documents under seal. The expiration date of these measures has been extended on several occasions with the latest extension to the end of the year. See here for further details.</p> | <p>Fund managers utilising the flexibility measures to take note of the current expiration date.</p> |
| <p>31 December</p> |  | <p>PRiIPs – for UCITS</p> <p>Following several extensions, the PRiIPs transitional period for UCITS comes to an end on 31 December 2022 and from 1 January 2023 UCITS made available (sold) to EEA retail investors must publish a PRiIPs KID. See article on topic in this month's update for further details.</p> | <p>UCITS fund managers should advance preparations for the PRiIPs compliance deadline from when UCITS must produce:</p> <ul style="list-style-type: none"> • 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). |
| <p>31 December</p> |  | <p>Outsourcing – ESMA Cloud Outsourcing Guidelines</p> <p>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</p> | <p>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</p> |

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| | | <p>arrangements and third-party outsourcing arrangements where the third party relies significantly on a cloud service provider. The Central Bank Cross-Industry Guidance on Outsourcing, issued with immediate effect on 17 December 2021, incorporates the ESMA Cloud Outsourcing Guidelines. See here for further details.</p> | <p>required to notify their competent authority if the review of existing cloud 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.</p> |
| <p>1 January 2023</p> |  | <p>Performance fees – multi-manager funds</p> <p>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.</p> | <p>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.</p> |
| <p>1 January 2023</p> |  | <p>SFDR Level 2 - effective date</p> <p>SFDR Level 2 sets out additional disclosure obligations in respect of:</p> <ul style="list-style-type: none"> • fund managers' disclosure of the principal adverse impacts (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 <p>See here for further details.</p> | <p>Advance preparations for any disclosure of entity-level PAIs and Article 8/9 product-level green/social characteristics/objectives using the mandated disclosure templates appended to SFDR Level 2 and by reference to the website disclosure rules in Chapter IV, SFDR Level 2.</p> |
| <p>2023 (date dependent on publication date of relevant financial report)</p> |  | <p>SFDR Level 2 – fund annual report disclosures</p> <p>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.</p> | <p>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.</p> |

Revised SFDR L2 Disclosure Templates

On 30 September 2022, the European Supervisory Authorities (ESAs) published regulatory technical standards (RTS) amending SFDR Level 2, including the pre-contractual and periodic disclosure templates for Article 8 and 9 funds annexed to Level 2.

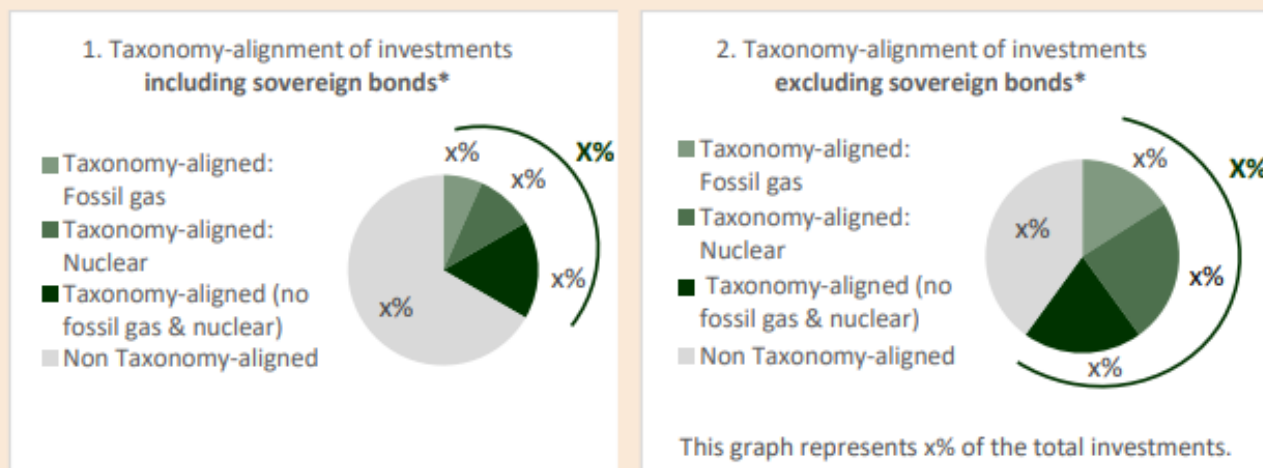
Key changes

The RTS amend Level 2 to require pre-contractual, website and periodic disclosures of the portion of any Taxonomy-aligned investments in fossil gas and nuclear activities by those funds subject to the Taxonomy disclosure rules (i.e., Article 8 funds with environmental characteristics and Article 9 funds with environmentally sustainable investments). Such amendments, which were [requested by the Commission](#), were deemed necessary following the inclusion of these activities in the Taxonomy and to ensure investor awareness of the extent of funds' exposure to these activities.

As depicted in the extract below from the revised pre-contractual disclosure template for Article 8 funds, the RTS require a breakdown of any Taxonomy-aligned commitment highlighting any commitment to invest in environmentally sustainable fossil gas or nuclear activities.

The two graphs below show in green the minimum percentage of investments that are aligned with the EU Taxonomy. As there is no appropriate methodology to determine the Taxonomy-alignment of sovereign bonds*, the first graph shows the Taxonomy alignment in relation to all the investments of the financial product including sovereign bonds, while the second graph shows the Taxonomy alignment only in relation to the investments of the financial product other than sovereign bonds.

[only include in the graphs the figures for Taxonomy aligned fossil gas and/or nuclear energy as well as the corresponding legend and the explanatory text in the left hand margin if the financial product makes investments in fossil gas and/or nuclear energy]



* For the purpose of these graphs, 'sovereign bonds' consist of all sovereign exposures.

The same pre-contractual disclosures are required for Article 9 funds with environmentally sustainable investments. Similar disclosures are required in the periodic templates to highlight the portion of any Taxonomy-aligned investment holdings in environmentally sustainable fossil gas and nuclear activities.

Other changes

The ESA RTS include a 'technical change' to the Level 2 rules for Article 8 funds' periodic disclosure of the level of Taxonomy-aligned holdings, to clarify that the such disclosures are not contingent on the disclosure of a pre-contractual commitment to invest in Taxonomy-aligned activities. This change follows the clarification in

the [Commission's May 2022 SFDR Q&A](#) that the Taxonomy requires periodic disclosures by Article 8 funds with environmental characteristics 'irrespective of commitments made in the pre-contractual disclosure'. Notably, however, the Commission also clarified that where such funds' investments change over time to include Taxonomy-aligned investments, that change should be reflected in the pre-contractual document.

Further typographical errors and inaccurate cross-references have also been corrected by the ESAs draft RTS.

Timing

The ESAs have not included an effective date for the draft RTS, which they note is a matter for the Commission to determine. However, as 1 January 2023 has been fixed as the effective date of the changes to the Taxonomy to include fossil gas and nuclear activities there is every possibility that the Commission will seek to adopt and apply the draft RTS as a matter of urgency.

SFDR Level 2 Fast-track Process

On 4 October 2022, the Central Bank published guidance on the fast-track process it will operate for noting UCITS and AIF pre-contractual document updates made to comply with SFDR Level 2 rules.

As per our [Level 2 guide for fund managers](#), the filing deadline for noting using the fast-track process is 1 December 2022.

Permitted updates

The following prospectus/supplement updates may be filed for noting by the Central Bank using the fast-track process:

1. amendments made in accordance with SFDR Level 2 requirements;
2. amendments made to the investment policies and strategies to allow consistency with the disclosures included in the Level 2 template annexed to the prospectus/supplement. This includes amendment to disclosures made to comply with SFDR Level 1 and/or the Taxonomy Regulation requirements which now require amendment for consistency with SFDR Level 2 disclosures;
3. product-level disclosure of the consideration of principal adverse impacts (**PAIs**) in accordance with Article 7(1)(a) SFDR; and/or
4. amendments made to the prospectus/supplement to reflect the requirements of European Commission Q&As on SFDR, ESMA supervisory briefing on sustainability risks and disclosures in the area of investment management, amendments to reflect other clarifications published by the ESAs' or the Central Bank in relation to the SFDR Level 2 requirements
5. reclassifications of funds i.e. to revise the SFDR product-level rules to which a fund is subject

Attestation

As part of the fast-track filing, the fund manager must confirm that the updated pre-contractual documents filed for noting do not contain any amendments other than those permitted at 1-4 above. The Central Bank has not prescribed any additional requirements for this attestation, save that it must be submitted along with the updated documents for noting to the dedicated mailbox SFDR@centralbank.ie.

Dating documents

Documents filed for fast-track noting should be dated the date of submission, according to the Central Bank's guidance. This is likely problematic for most fund managers as Level 2-required website disclosures may only be published closer to the 1 January 2023 and so links to these disclosures, which are required to be included in the pre-contractual template, may not be operational by the 1 December fast-track filing deadline. This point is expected to be raised via Irish Funds with the Central Bank.

Name changes

SFDR-related name changes should be made in the usual manner however, the Central Bank will apply a version of the fast-track process to these submissions provided the submission includes the above-mentioned attestation.

Post-authorisation and new fund applications

For those funds with post-authorisation applications in train as at the fast-track filing deadline, the Central Bank has confirmed that they may not use the fast-track process and instead must comply with the usual Central Bank review process. This also applies where existing applications are cleared of comment but not yet authorised in advance of the 1 December filing deadline.

New fund/sub-fund applications which have been submitted ahead of the 1 December fast-track filing deadline may not use the fast-track process and SFDR Level 2 disclosures must be filed for review in the normal course.

All applications made post-1 December will be subject to review by the Central Bank in the normal course.

ESMA Sustainability Preference Guidelines

On 23 September 2022, ESMA published revised MiFID Suitability Guidelines incorporating guidance for compliance with the MiFID sustainability preference rules which came into effect on 2 August 2022 (the **Guidelines**).

Application date

The Guidelines were preceded by an industry consultation process (see [here](#) for further details) which concluded in April 2022. In response to industry feedback as to the complex and challenging nature of the MiFID sustainability preference rules and the wider EU sustainable finance legislative framework, ESMA has set the date of application of the Guidelines to six months after the publication of their translations on the ESMA website, instead of the originally proposed two months in the draft guidelines issued for consultation. Publication of the translations of the Guidelines is currently awaited.

Guidelines v consultation version

The Guidelines differ in several other respects to the draft version issued for consultation however, many of the provisions which were highlighted by respondents to the consultation as problematic have been retained.

Professional investors

No additional flexibility as regards the application of the Guidelines when engaging with professional clients has been incorporated, however ESMA has left the door open to doing so via other Level 3 measures: "ESMA notes issues related to the application of the MiFID II suitability requirements to professional clients might be quite specific and therefore [ESMA] notes that it believes it will be more efficient to develop specific Q&As in response to practical issues emerging rather than developing a new section in the guidelines."

Lack of available products to meet sustainability preferences

In response to respondents' feedback citing a lack of available products in the market to meet investors' sustainable preferences, ESMA notes in its feedback statement that the "recent estimates put the share of [Article 8 and 9 funds] in the total assets managed by UCITS investment funds available for sale in the EU at 50%, with this share still growing".

The limitation of MiFID firms' ability to discuss product availability with clients at the same time as collecting sustainability preferences has been retained and a new Guideline has been included stating that firms may only disclose information about available products after, but not before, the client adapts its sustainable preferences.

PAI product preferences

A welcome change however, when compared to the consultation version, is the alignment of the Guidelines on the collection of clients preference for products which consider principal adverse impacts (PAIs) with the MiFID sustainability preference rules. While the consultation version referred to the collection of clients' preferences for products which consider PAIs using quantitative and qualitative criteria demonstrating the consideration of PAIs, the Guidelines amend this to either quantitative or qualitative criteria. ESMA also confirmed in the feedback statement that, "while considering it is a good practice, firms are not bound by the

use of SFDR PAI indicators and there is no minimum number of PAIs indicators that has to be considered when collecting clients' sustainability preferences."

Timing of collection of clients' sustainability preferences

While the Guidelines clarify that firms were required by MiFID sustainability preference rules to have new client questionnaires ready as of 2 August 2022 such that new or existing clients that wished to update their profile could do so from that date, ESMA has retained the ability for firms to collect clients' sustainability preferences at the 'next regular update'. However, this is subject to the regulatory expectation that firms 'launch the campaign to proactively invite clients to update their profiles with regard to sustainability preferences (unless they have already done so) no later than 12 months after the entry into application of the rules" i.e., 2 August 2023. ESMA further clarifies that, until the firm acquires information on the client's sustainability preferences, the client will be considered as "sustainability-neutral" and can therefore be recommended products both with and without sustainability-related features.

Next steps

The Guidelines are to apply six months after the publication of their translations on the ESMA website. Accordingly, while MiFID firms have been subject to the MiFID sustainability preference rules since 2 August 2022, firms will have at least another six months in which to comply with these rules in line with the Guidelines.

ESAs Request Further SFDR Clarifications

On 9 September 2022, the ESAs published a further series of questions issued to the Commission on the interpretation of SFDR, responses to which may provide clarification, whether welcome or otherwise, of several of the key outstanding SFDR issues ahead of the 1 January 2023 Level 2 compliance deadline. This is the third such request from the ESAs and both previous requests resulted in highly impactful and detailed SFDR Q&As from the Commission. A summary of the ESAs questions most relevant to fund management companies is set out below.

The definition of Sustainable Investments (SIs)

The ESAs have asked the Commission how to calculate an investment's contribution to environmental or social (**E/S**) objectives in accordance with the first limb of the SI definition and whether investments should be weighted by reference to the proportion of sustainable activities of the investee company when classifying SIs. The ESAs question includes the example of a €100k investment in a company which satisfies limbs two ('do no significant harm' principle) and three (the good governance rule) of the SFDR definition of SIs and which reports 20% of its activities as contributing to E/S objectives, with the question being whether the whole investment can be classified as a SI or only the 20% referencing the sustainable activities of the investee company.

Notably, the ESAs second question on the SI definition relates to how an investee company's activity(ies) may be considered to contribute to E/S objectives and whether some, or all of the following must be met to satisfy the contribution test under the SI definition:

- the relevant E/S activity of the investee company itself contributes to E/S objective(s),
- the activity is, relatively speaking, carried out in a sustainable manner,
- the activity is covered by a climate change action plan adopted by the investee company,
- the investee company has adopted an E/S harm reduction strategy,
- the investee company has a transition plan to avoid significantly harming E/S objectives

A long-standing industry issue for those seeking to classify SIs has been whether the classification should be at the level of the investee company or at the level of its underlying activities and, if at the level of the company, to what extent do the company's activities need to contribute to E/S objectives before an investment in the company as a whole can be classified as sustainable. To date, no legal or regulatory guidance has been published for investors in SIs and while clarification of the high-level, principles-based SI definition would undoubtedly be welcome, the timing of any such clarification so close to the Level 2 compliance deadline has the potential to be extremely challenging for funds already implementing SI methodologies.

Carbon emission reduction objectives

In July 2021 the Commission issued its first SFDR Q&A and clarified that SFDR Article 9(3) funds are subject to the dual obligation of only investing in SIs (Article 9(1)) and tracking an EU Climate Benchmark, where available (Article 9(3)). Perhaps in response to the practical and interpretative questions arising from the Commission's clarification, the ESAs have asked whether funds with a carbon emission reduction objective that track an EU Climate Benchmark (either passively or actively by applying the minimum standards for such benchmarks) can be automatically deemed to satisfy the requirements under Articles 9(1) and 9(3).

The ESAs have also requested clarification

- that Article 9(3) funds can have either a passive or active investment strategy and, if so, whether funds with an active strategy that designate a benchmark are subject to any specific requirements, and
- whether funds with carbon emission reduction targets are always in scope of Article 9(3) or if funds can have this target as an environmental characteristic and be in scope of Article 8.

PAI consideration

The ESAs have requested clarification of the term 'consider' in the context of product-level consideration of PAIs under Article 7 SFDR and whether this term refers to the identification and disclosure of PAIs or does it also require mitigating action(s) be taken to address those PAIs identified? And, if mitigating action is required, whether there are any minimum criteria for such actions.

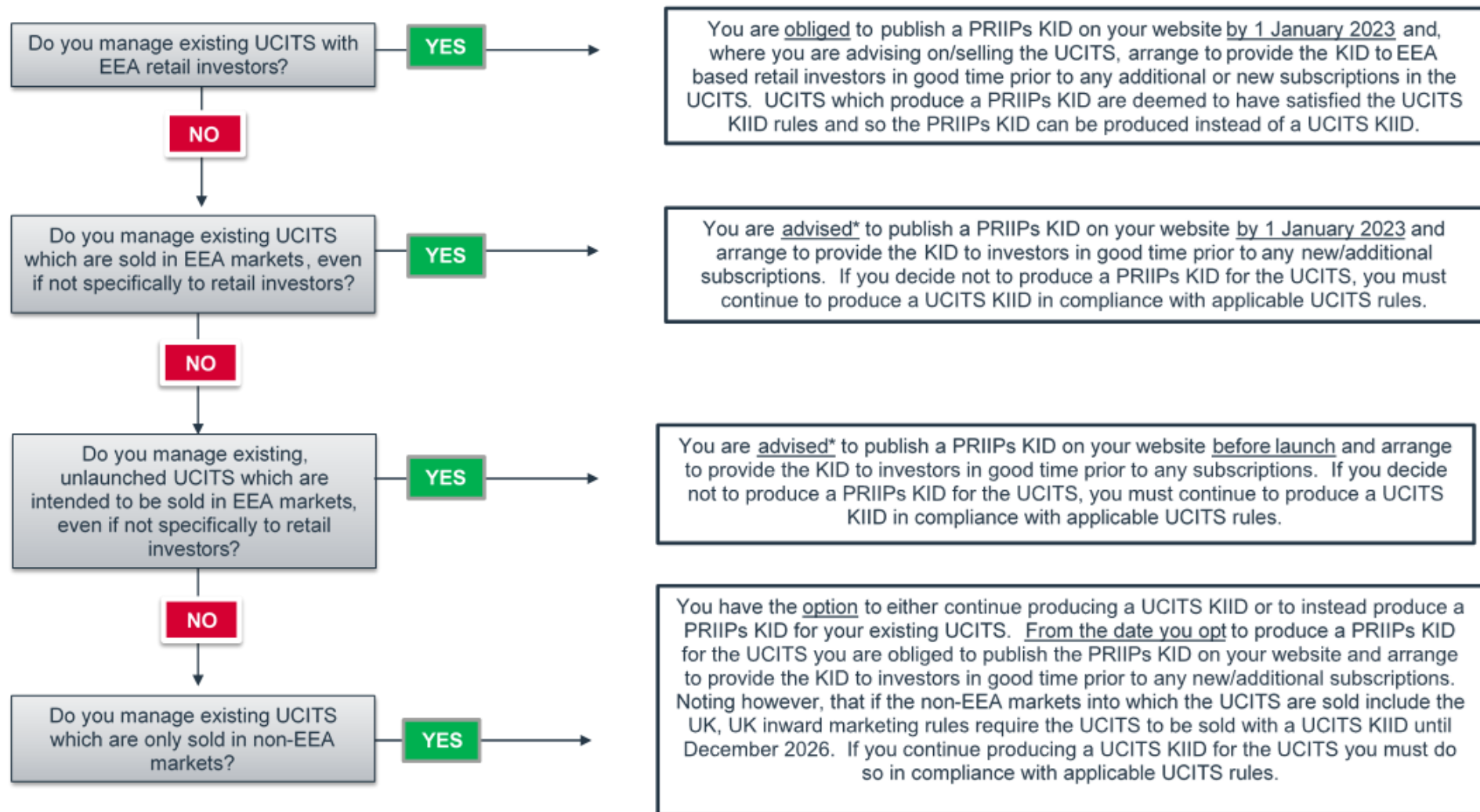
Next steps

A response from the Commission to the ESAs request for clarifications is currently awaited. However, funds which may be impacted by the Commission's should be aware of the issues raised by the ESAs and, if at all feasible, seek to prepare for further SFDR clarifications, which may issue close to the 1 January 2023 Level 2 compliance deadline.

PRIIPs Decision Tree

As UCITS managers prepare to comply with the PRIIPs regime from 1 January 2023, the following decision tree can be used as a ready reckoner for managers of existing UCITS in finalising their approach to compliance with the obligation to prepare and publish a PRIIPs key information document (**KID**).

PRIIPs decision tree for existing UCITS



*This is on the basis that UCITS 'made available' to EEA retail investors are obliged to produce a PRIIPs KID, where the Commission considers the 'made available' threshold to be met where the UCITS is sold to EEA retail investors, whether with or without advice or at the initiative of the investor or otherwise (para (16)&(17) Commission Guidelines). As UCITS must provide for public participation in their regulated fund documents, it is difficult to discount the possibility of an EEA retail investor accessing the fund, particularly in circumstances where the UCITS is marketed in the EEA. Accordingly, it is advisable for the UCITS to produce a PRIIPs KID to mitigate the risk of breaching PRIIPs rules should an EEA retail investor invest in the UCITS.

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