




## Asset Management & Investment Funds Update

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May 2023



### Key Dates & Deadlines: Q2/3 2023

Date	Source	Summary	Action/Impact
2023 (date dependent on publication date of relevant financial report)		<p><b>SFDR Level 2 – fund annual report disclosures</b></p> <p>SFDR Level 2 financial report disclosure rules, effective 1 January 2023, must be addressed in annual reports published after that date irrespective of the relevant financial or reference period.</p>	Fund managers must ensure annual financial statements published after 1 January 2023, for funds subject to SFDR Article 7, 8 or 9, incorporate the relevant disclosures and using the Level 2 templates where applicable.
Q2/3 (exact date TBC)		<p><b>ESMA Guidelines on Fund Names – publication of final report</b></p> <p>Guidelines on use of ESG or sustainability-related terms in the name of funds are expected to be finalised and published with an application date of 3 months post publication and a 6-month transition period for existing fund names.</p> <p>See article on topic in this month's edition for further details.</p>	Draft Guidelines set out quantitative thresholds for investment in E/S aligned or sustainable investments for Article 8 and 9 funds which use ESG/sustainability-related terms in the fund name.
20 April		<p><b>Markets in Crypto-assets (MiCA)– final text agreed</b></p> <p>Following its formal approval by Parliament, MiCA will now have to be formally endorsed by Council before it is published in the EU Official Journal and will enter into force 20 days later.</p>	MiCA will cover crypto-assets that are not regulated by existing financial services legislation. Key provisions for those issuing and trading crypto-assets (including asset-reference tokens and e-money tokens) cover transparency, disclosure, authorisation and supervision of transactions.

30 June		<p><b>SFDR- first entity-level PAI statements due and second calculation date in current reference period</b></p> <p>First full PAI statements are due for publication reflecting the entity-level PAIs of investments as identified on at least four calculation dates during the initial reference period of Jan – Dec 2022.</p> <p>See <a href="#">here</a> for further details.</p> <p><b>CSRD – first set of reporting standards due for adoption</b></p> <p>The Commission will adopt the draft reporting standards published by EFRAG last November as CSRD delegated acts and these will be applicable from the first effective date of CSRD of 1 January 2024.</p> <p>See <a href="#">here</a> for further details.</p>	<p>SFDR Level 2 requires entity-level PAIs to be disclosed using the template PAI statement at Annex I which must be published by the 30 June deadline on the website of the relevant entity.</p>
4 July		<p><b>SFDR Level 2 – Consultation response deadline</b></p> <p>Included for consultation are proposals for an extended list of social PAI indicators and refinement of existing indicators, decarbonisation targets, further specification of the DNSH disclosure rule, simplification of the templates and other technical adjustments.</p> <p>See article on topic in this month's edition for further details.</p>	<p>Consultation response deadline.</p>

## Updates to the Central Bank's Fitness and Probity Enforcement Procedures

The **Central Bank (Individual Accountability Framework) Act 2023** (the **IAF Act**) was signed into law by the President of Ireland on 9 March 2023. Part 3 of the IAF Act, which was commenced by Order of the Minister for Finance on 19 April 2023 (the commencement date), makes changes to the Central Bank's fitness and probity regime under Part 3 of the Central Bank Reform Act 2010 (the **2010 Act**).

These amendments to Part 3 of the 2010 Act necessitated a number of changes to the Central Bank's regulations and guidance in relation to fitness and probity enforcement procedures. The updated regulations and guidance, applicable from 20 April 2023, are as follows:

- the **Fitness and Probity Investigations, Suspensions and Prohibitions: Guidance (April 2023)** replaces the **previous guidance**; and
- the **Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) Regulations 2023** replace the **previous regulations**.

The Central Bank has issued a guide explaining the changes to Part 3 of the 2010 Act, and how they apply to investigations and related procedures which were ongoing at that time – see **Fitness and Probity Investigations, Suspensions and Prohibitions: Guide to Transitional Arrangements Arising from the Central Bank (Individual Accountability Framework) Act 2023 (April 2023)**. Below is an overview of the changes to Part 3 of the 2010 Act, as set out at Appendix 1 of this guide:

Change	Summary
<b>Investigation of individuals who formerly performed CF roles</b>	The Central Bank can now investigate an individual who formerly performed a controlled function (CF) role provided that they performed the role within the shorter of the following periods: (a) the period since 19 April 2023 (the commencement date of the relevant provision), and (b) the 6 years before the date on which an investigation is commenced.
<b>Commencement of investigation</b>	A new statutory procedure has been introduced for giving notice of investigations.
<b>Suspension</b>	The limit for the initial duration of suspension notice issued by the Central Bank has increased from 3 months to 6 months. Suspension notices confirmed by the Central Bank may now be appealed to the Irish Financial Services Appeals Tribunal. The period for which the High Court may extend a suspension notice has increased from 3 months to 6 months. The Central Bank may make subsequent applications to the High Court to further extend the suspension notice.
<b>Investigation report</b>	The statutory procedure for investigation reports has been changed to provide for the preparation and service of a draft report followed by a final report.
<b>Discontinuing an investigation</b>	The Central Bank may discontinue an investigation for reasons to be stated in the notice.
<b>Prohibition</b>	Prohibition notices, which previously took effect on service, will now take effect only when confirmed by the High Court or agreed in writing,
<b>Varying / revoking prohibition</b>	A procedure has been introduced allowing the Central Bank or the subject to apply to the High Court for an order varying or revoking a prohibition notice that was previously confirmed by the Court.
<b>Regime extended to certain holding companies</b>	The fitness and probity regime will (upon the Central Bank issuing regulations) apply to individuals performing certain CF roles in holding companies of certain regulated firms.
<b>Enhanced independence requirements</b>	Certain requirements have been introduced to ensure the independence of an investigation and associated decision-making procedures.

The Central Bank has also notified relevant industry bodies of these changes – see [Industry Letter of 21 April 2023](#).

The amendments to Part 3 of the 2010 Act are part of a suite of changes that are being introduced in order to give effect to the individual accountability framework (the **IAF**). The Central Bank has opened a three-month consultation (which closes on 13 June 2023) on certain aspects of the IAF. Further information is available at [www.centralbank.ie/IAF](http://www.centralbank.ie/IAF).

## ESAs Consult on SFDR Level 2 Revisions

On 12 April 2023, the ESAs published proposed amendments to the SFDR Delegated Regulation (Level 2) for industry consultation. The consultation is open until 4 July 2023.

The proposed amendments, summarised below, fall into two categories:

1. Commission-mandated amendments to the PAI indicators and new disclosure rules for decarbonisation targets; and

2. additional ESA-recommended amendments to further specify disclosures for sustainable investments' compliance with the 'do no significant harm' (DNSH) principle, simplify annex templates, clarify multi-option product rules and other technical adjustments.

## 1. Commission-mandated amendments

### *PAI indicators – new mandatory and optional social indicators proposed*

The ESAs are proposing an extension of the current list of mandatory social PAI indicators for investee companies which will require identifying exposure to non-cooperative tax jurisdictions, tobacco producers, interference in trade union formation and those with a high share of employees earning less than the adequate wage.

Six new optional social PAI indicators, again for investee companies, are also proposed including to identify exposure to companies which excessively use temporary contract employees, fail to employ persons with disabilities and do not have adequate grievance/complaints policies.

In addition, the ESAs are consulting on a proposed application of the social PAI indicators to the managers of real estate assets. Currently, Level 2 does not include any (mandatory or optional) PAI indicators to assess the adverse social impact of investments in this asset class, a situation which the ESAs are proposing to remedy by requiring the application of the indicators to the manager of the real estate, either the financial market participant itself or any other company it hires to manage the asset. Amendments are also proposed to further align the indicators for this asset class with the Taxonomy.

### *PAI indicators – revised to further align with the Taxonomy, Climate Benchmark rules and the forthcoming CSRD standards*

Proposals include:

- revisions to the wording of a number of indicators to better align with CSRD data points along with new formulae for PAI indicators which do not already have them;
- replacement of the UN Global Compact in PAI indicators 10 (Violations of UN Global Compact principles and Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises) and indicator 11 (Lack of processes and compliance mechanisms to monitor compliance with UN Global Compact principles and OECD Guidelines for Multinational Enterprises) with the UN Guiding Principles on Business and Human Rights;
- adjustments to PAI indicator metrics e.g., replacement of metrics with 'expressed per million euros' with 'expressed as weighted average', distinguishing between hazardous and radioactive waste;
- a new requirement to disclose the portion of data received direct from investee companies in the 'explanation' column of the PAI statement;
- replacement of the 'current value of all investments' as denominator with 'current value of all the investments in the relevant asset class';
- a new requirement to disclose on investee companies' value chains where reported by the investee company; and
- a requirement to include net long exposure from derivatives in the numerator of the PAI indicators unless it can be shown that the derivative did not result in a physical investment by the counterparty along with a proposal to clarify that impacts should be netted at the level of the individual counterparty without going below zero.

### *GHG emission reduction targets*

For funds which have adopted such targets, the ESAs propose new pre-contractual, periodic and website disclosure requirements including that all targets be disclosed using the Partnership for Carbon Accounting Financials (PCAF) Standard for measuring financed GHG emissions to ensure consistency with the forthcoming CSRD standards.

## 2. Additional ESA amendments

### *Derivatives*

The ESAs request feedback on proposals to:

- exclude net long derivative positions as sustainable investments;
- reduce sustainable investments by any short derivative positions on the issuer (in line with the current requirement for Taxonomy-aligned investments) while not disclosing negative sustainable/Taxonomy-aligned investments; and
- extend the requirement for Taxonomy-aligned investments to take account of short positions to additional classes e.g. corporate bonds (currently the netting requirement applies in respect of short equity and sovereign debt positions only).

### *DNSH disclosures*

The ESAs acknowledge the issues that have arisen as a result of the differing application of the DNSH principle under SFDR and the Taxonomy, including that certain investments may be assessed as Taxonomy-aligned (where a portion of the investee company's activities are aligned with the Taxonomy TSC) but not qualify as a sustainable investment under SFDR by virtue of the remainder of the activities failing the SFDR DNSH test. The ESAs consider Level 1 amendments may be necessary to address these issues but suggest several possible solutions:

1. maintain status quo as the regime beds down;
2. require additional website disclosures of harm thresholds for the PAI indicators – this option is included for consultation as it would only require Level 2 amendments;
3. safe harbour in respect of the environmental PAI indicators for Taxonomy-aligned sustainable investments; and
4. move to a single Taxonomy-based system for DNSH.

### *Simplification of the annex templates*

The ESAs are consulting on changes to enhance and simplify the templates including a new 'dashboard' section, to replace the current asset allocation chart, with (as applicable) the minimum E/S aligned investments, sustainable investments, Taxonomy-aligned investments and details of PAI consideration and GHG emission target.

### *Technical adjustments*

The ESAs request feedback on proposals to:

- restrict changes to the colours used in the templates;
- permit display of digital disclosures as extendable on click;
- guidelines on what can be accepted as 'equivalent information' for Taxonomy-aligned investments; and
- further specification of the calculation of sustainable investments including the above-mentioned DNSH disclosures of harm thresholds and derivative-related proposals.

### **Next Steps**

The consultation is open until 4 July 2023.

## **AIFMD Review Series: Liquidity Management**

Trilogue negotiations of the AIFMD Review text are underway and parties continue to target an agreed text by year end. Assuming the proposal for a two-year transposition period is retained, industry can expect an application date of end 2025.

In this, the third edition in our AIFMD Review Series, we consider the key proposals relating to liquidity management. Previous editions in this series covered the topics of [Delegation and Substance](#) and the [UCITS proposals](#) under the AIFMD Review.

### *1. Harmonised list of liquidity management tools and required use*

**Commission proposal:** Member States to make available, for use by AIFMs, a harmonised list of liquidity management tools (LMTs) of dealing suspension; redemption gates; notice periods; redemption fees; swing pricing; anti-dilution levy; redemptions in kind; and side pockets. AIFMs managing open-ended AIFs

must select at least one relevant (redemption gates, notice periods and redemption fees) LMT and notify competent authorities of (de)activation of specified LMTs.

*Council and Parliament views:* Parliament and Council propose a number of amendments, including that AIFMs be required to choose at least two LMTs (other than those managing money market funds for whom the requirement would be to select one LMT) from the harmonised list, other than suspension and side pockets. Council also proposes limiting the use of redemptions in kind to requests from professional investors and to those that correspond to a pro rata share of the assets held (other than in the case of professional investor, index-tracking and ETF AIFs).

## 2. *Regulatory power to (de)activate LMTs:*

**Commission proposal:** competent authorities may require an AIFM, including non-EU AIFMs marketing in the EU and EU AIFMs managing non-EU AIFs, to activate or deactivate a redemption gate (in addition to the existing power to require suspension) or such other LMT selected by the AIFM, whichever is more suitable considering the type of AIF and the investor protection or financial stability risks that necessitate the (de)activation. ESMA to develop delegated measures setting down the situations in which such competent authority intervention would be warranted.

*Council and Parliament views:* while Council does not support the proposal, the Parliament does but notes the primary responsibility of the AIFM for liquidity risk management and qualifies the competent authority power noting that it should only be used as a last resort and only in "*exceptional circumstances and after consulting the AIFM, and if there are reasonable and balanced investor protection or financial stability risks that necessitate this requirement*".

## 3. *Delegated measures*

**Commission proposal:** ESMA is tasked with developing draft regulatory technical standards (RTS) (1) to provide definitions and specify the characteristics of the harmonised list of LMTs, and (2) on selecting and using suitable LMTs by AIFMs.

*Council and Parliament views:* Council provides for the development of guidelines (rather than RTS) on selecting and using suitable LMTs by AIFMs and extends these guidelines to cover indications of the circumstances in which side pockets could be activated. Parliament provides for the development of guidelines (rather than RTS) in relation to best practice as regards the characteristics of the harmonised list of LMTs but agrees with the proposal to develop RTS relating to disclosures around the selection and calibration of LMTs by AIFMs (however, they require that these RTS recognise that primary responsibility for liquidity risk management remains with the AIFM and provide for adequate time for adaptation of the RTS, particularly for existing AIFs).

## Next steps

Further details to follow as the proposals progress through the EU legislative process.

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## Final ESMA Fund Name Guidelines Expected

ESMA issued proposed guidelines for fund names for consultation last November with an expectation for final guidelines to issue in Q2/3 this year.

The guidelines include quantitative and qualitative thresholds for the use, by UCITS managers and AIFMs, of ESG-related and/or sustainable and/or impact-related terms in fund names (the **Guidelines**) and would, if finalised in current form, effectively introduce minimum investment criteria for relevant Article 8 and 9 funds.

The Guidelines are for compliance with the UCITS and AIFMD rules to act honestly and fairly etc, on the premise that managers' compliance with these rules can only be ensured if funds using the above-mentioned terms comply with the relevant quantitative and qualitative investment thresholds. The Guidelines are specifically cited as not relating to compliance with SFDR or Taxonomy disclosure rules.

The Article 8 and 9 thresholds for use of ESG/sustainable/impact terms in the fund name are:

- Article 8 funds (including index trackers) that use any ESG-related words in the name, should invest a **minimum of 80% in 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 sustainable investments**. 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 thereof in the name, should invest **at least 80% in sustainable investments** (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 sustainable 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.
- 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 (2020/1818).

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 issue the final Guidelines by Q2/Q3 2023 with an application date 3 months after the publication of their translation 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 transitional period, such funds should have either adjusted their portfolio to comply with the thresholds or changed the name of the fund to remove the relevant ESG-related term.

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