

Simmons & Simmons

Irish Funds & Regulatory Quarterly Update

1 January – 31 March 2022



Subject Index



<u>Executive Summary</u>	3
<u>Central Bank of Ireland (CBI) – Updates</u>	4
● <u>CBI publishes Markets Update for March 2022</u>	5
● <u>CBI imposed the largest Monetary Fine ever on a Fund Service provider</u>	6
● <u>Industry Communication related to Fund Service Providers effectively managing risks due to the Russian war in Ukraine</u>	7
● <u>The CBI revises its “Publication of national provisions governing marketing requirements for AIFs” webpage</u>	8
● <u>CBI Operational Update</u>	9
● <u>Fitness & Probity – Amendments to PCF Functions</u>	10
● <u>CBI approves QIAIF which can take exposure to crypto-assets</u>	12
<u>Irish Government Updates</u>	13
● <u>Reverse Hybrid Mismatches – New Irish legislation</u>	14
● <u>Irish Interest Limitation Rule</u>	15
● <u>Industry communication – Senior Executive Accountability Regime (“SEAR”)</u>	16
● <u>Privilege and limited waiver agreements in Ireland</u>	17
<u>European Union (EU) Updates</u>	18
● <u>UCITS Directive and AIFM Regulation – Sustainable Finance Disclosures Regulation (“SFDR”)</u>	19
● <u>ESG – Commission publishes its proposed SFDR Level 2 RTS</u>	20
● <u>An overview of the European Venture Capital Funds (EuVECA) regime</u>	21
● <u>Legal Headwinds Q1 2022 - UK/EU Financial Institutions</u>	22
● <u>Legal Headwinds Q1 2022 - UK/EU Asset Management</u>	23
● <u>EU and CBI issue warnings against Crypto-assets</u>	24
<u>Contacts</u>	25

Spotlight in this edition

Each quarter we will introduce you to a member of our funds and regulatory team who will also outline what is covered for this quarter.



Meet Fionán Breathnach

Fionán is a Partner and the country head of the Irish office. He has over 25 years' experience in advising asset managers and fund promoters on the structuring and establishment of Irish domiciled funds, including UCITS and AIFs. Funds have ranged from retail funds to funds tailored for sophisticated investors and pursuing hedge, private equity, master/feeder and real asset strategies. He also advises service providers within the investment funds sector on the establishment of operations in Ireland and in relation to their ongoing businesses. Clients in this area include AIFMs, UCITS management companies, MiFID firms, fund administrators and depositaries.

Fionán also advises domestic and international institutions in the broader financial services sector on all Irish and European financial services regulatory matters, including credit institutions, insurance undertakings, investment firms and payments institutions.

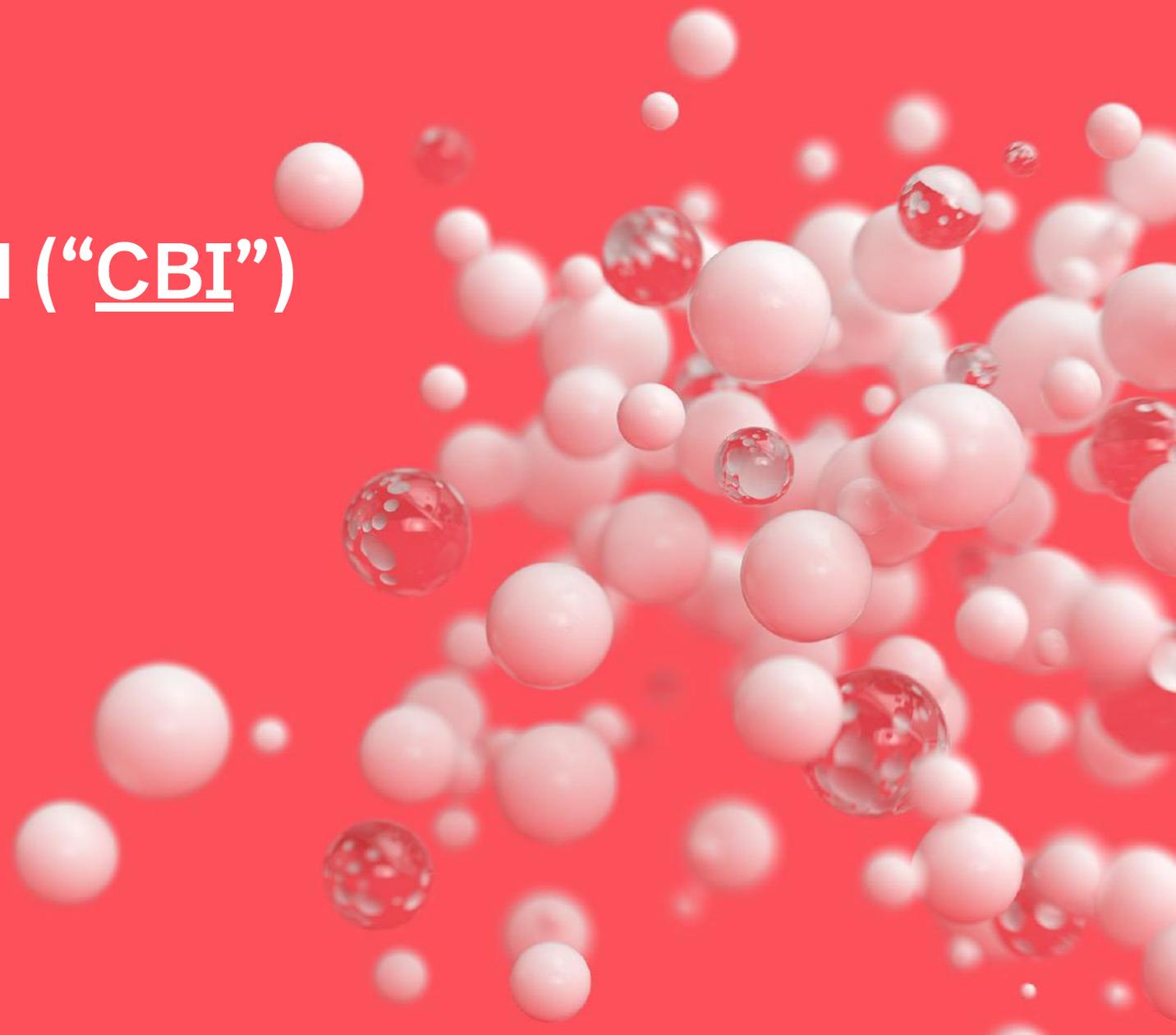
What's coming up in this edition

In this edition we cover updates from Central Bank of Ireland (“CBI”), the Irish Government and the European Union. The most poignant factor of this issue is the CBI's industry correspondence regarding the Russian war in Ukraine. The effects of the war can already be seen globally, with market volatility and inflation on the rise. The war in Ukraine has seen investor returns significantly reduced where a fund has invested in Russian securities.

Another major update discussed in this edition is the CBI's monetary fine against a service provider. This fine to date is the largest fine ever imposed on a financial service provider for regulatory breaches relating to outsourcing of fund administration activities. This fine should be a wake up call to all fund service providers to have a proper framework and governance in place with third parties where a function has been outsourced. This fine also reinforces the importance of early engagement with the CBI and taking all appropriate remedial action as soon as a breach has been identified.

An important step forward for investment in digital assets is highlighted in this edition with the CBI having now approved a QIAIF which can take exposure to crypto assets, albeit indirectly.

Central Bank of Ireland (“CBI”) - Updates



CBI publishes Markets Update for March 2022

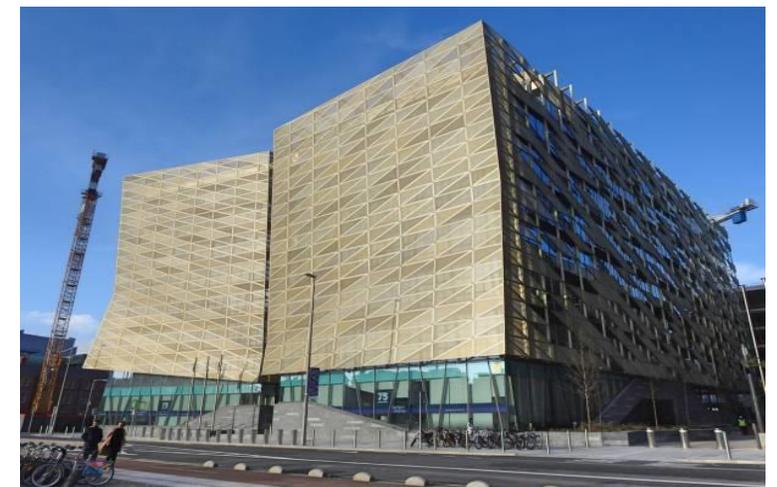
On 1 March 2022, the CBI updated its April 2020 communication (which allowed firms and market participants a degree of flexibility in light of the challenges posed by the COVID-19 crisis) to remove measures that have expired and will not be extended. The CBI may provide further updates as required.

The CBI's current expectations include:

- Pillar 3 Disclosures;
- Pillar 2 Guidance;
- Additional Data Requests;
- Risk Mitigation Programmes for Investment Firms, Fund Service Providers and Market Operators;
- Fund Service Provider on-site visits to outsourcing service providers/delegates; and
- European Single Electronic Format Regulation.

For further information, please read our full article as linked below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers, Regulated Funds
Links	Simmons Insights Article



CBI imposed the largest Monetary Fine ever on a Fund Service provider

The CBI issued a press release on 10 March 2022 confirming that it had fined BNY Mellon Fund Services (Ireland) DAC (“BNY”) €10,780,000 and was reprimanded for regulatory breaches relating to outsourcing of fund administration activities pursuant to its Administrative Sanctions Procedures relating to 16 regulatory breaches.

The CBI stated that BNY’s failures as follows:

- Failure to have in place adequate outsourcing governance framework (range of breaches from between 26 days-6 years);
- Weaknesses with BNY’s outsourcing framework and when identified by the CBI, BNY failed to remedy all issues which lead to further breaches;
- Upon investigation by the CBI, BNY committed additional breaches by providing inaccurate and misleading information to the CBI and failing to report such breaches once BNY became aware; and
- Serious systemic breaches across BNY’s outsourcing framework which affected BNY’s ability to identify and management the risks associated with its outsourcing which undermined the CBI’s ability to properly assess, monitor and supervise BNY’s outsourcing of regulated activities, thus, creating unnecessary potential risks to clients, investors and the financial market.

The CBI determined that an appropriate fine would be €15,400,000, however, the CBI reduced this by 30% to reach a total of €10,780,000 in accordance with the settlement discount scheme provided by its Administrative Sanction Procedures. The CBI states that to date this is the largest monetary penalty which has been imposed on a Fund Services Provider in Ireland.

For further information, please see link to the CBI’s press release below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Fund Service Providers
Links	CBI Press Release

Take away points

- The CBI states that it was BNY’s “failure to take remedial action” after the CBI identified the breaches as the aggravating factor which led to the CBI imposing a higher penalty.
- The CBI further states that there was a “theme of governance and operation issues” which BNY failed to address.

Next Steps

- Should a breach be identified, the CBI reinforce the importance of early engagement and taking remedial action as soon as a breach has been identified.
- Fund Service Providers should review all policies and procedures in respect to any outsourcing to prevent any breaches and take the required accountability of any breaches.

Industry Communication related to Fund Service Providers effectively managing risks due to the Russian war in Ukraine

On 7 March 2022, the CBI issued an [industry communication](#) in relation to Fund Service Providers (including fund management companies, fund administrators and depositaries) effectively managing risks due to the Russian invasion into Ukraine.

The communication covers, in particular, (a) financial sanctions, (b) Valuation, liquidity and fund suspensions and (c) engagement with the CBI.

The CBI will have regard to the contents of the communication as part of its supervisory engagements or other action, including enforcement action, it might take.

The communication must be brought to the attention of all members of the Board of the Fund Service Provider, fund, relevant Pre-Approved Control Function holders and other relevant responsible persons.

For further information, please read our full article as linked below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers, Regulated Funds
Links	Simmons Insights Article

Next Steps

Fund Service Providers should:

- take the communication’s contents into account when responding to unfolding events, particularly with respect to the financial sanctions, valuation of funds, liquidity management and decisions regarding dealing arrangements;
- engage with their relevant CBI supervisor in a timely manner where matters of concern arise or potential risks look likely to crystallise.

The CBI revises its “Publication of national provisions governing marketing requirements for AIFs” webpage

On 4 March 2022, the CBI revised its [Publication of national provisions governing marketing requirements for AIFs](#) webpage to include a list of information and documentation which must be submitted to the CBI where an AIF situated in another jurisdiction proposes to market to retail investors in Ireland.

The information to be submitted includes:

- the full name of the AIF;
- the full name and address of its management company and/or AIFM;
- the full name and address of the depositary;
- the jurisdiction in which the AIF is authorised and its supervisory authority’s name and address;
- the full name and address of the facilities agent to be used.

The documentation (to be submitted in English or Irish or accompanied by a translation in English or Irish) includes:

- a completed RIAIF application form and letter explaining any material differences between the requirements applicable to the AIF and those applicable to a RIAIF;
- a statement or certificate from the AIF’s supervisory authority confirming that it is authorised;
- a certified copy of the constitutional document;
- the prospectus and any amendments thereto;
- the latest annual report and any subsequent half-yearly report.

For further information, please read our full article as linked below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers, Regulated Funds
Links	Simmons Insights Article

CBI Operational Update

The CBI published a Notice of intention in relation to Review of Applications or the Authorisation of UCITS and Retails Investor AIFs (“[Notice](#)”). This Notice is a follow on to the CBI’s previous operational update of 15 March 2021 relating to the potential extended timeframe arrangements that apply to Fund Authorisations in light of COVID-19. The CBI have advised that the current arrangements will remain in place until 31 March 2022. It should be noted that the Notice was circulated prior to Ireland lifting restrictions. We will advise should this position change.

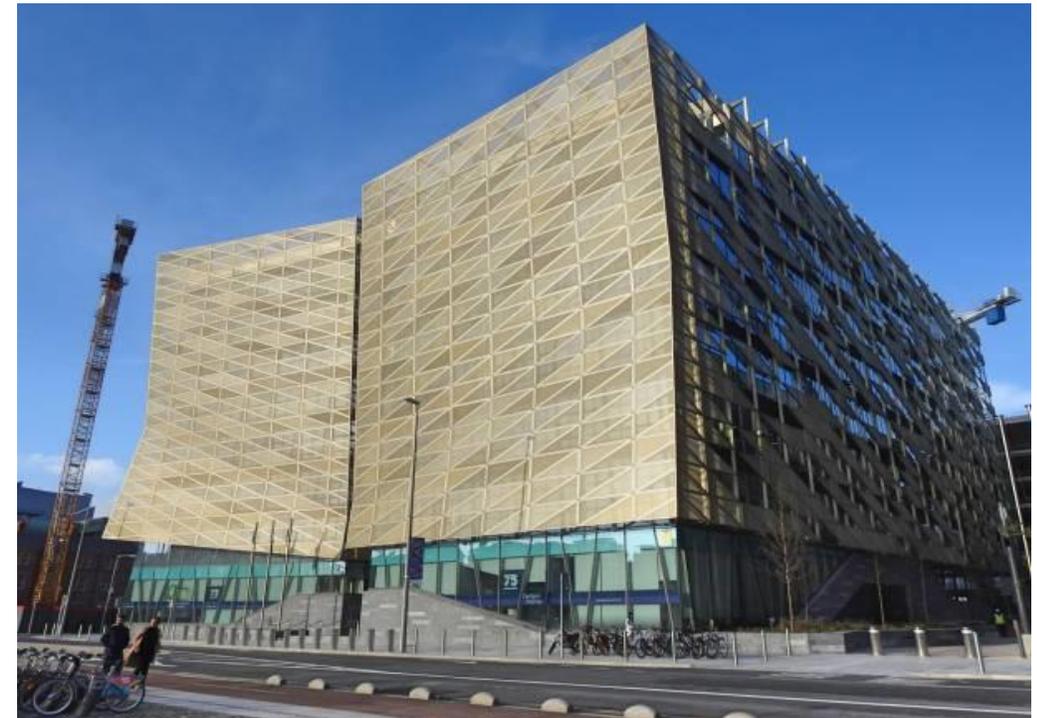
Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers, Regulated Funds

Next Steps

- Simmons & Simmons will provide an update should any further communication in this regard be released by the CBI.

Timing

- Still in effect.



Fitness & Probity – Amendments to PCF Functions

As previously advised last year, on 22 September, the CBI announced its proposal to amend regulations around certain Pre-Approval Control Functions (“PCF”) under the Fitness and Probity regime.

Changes

PCF-2

As mentioned previously, the CBI have now split the PCF-2 function to distinguish between Non-Executive Directors (PCF-2A) and Independent Non-Executive Directors (PCF-2B).

Next Steps

All Irish regulated financial service providers will be required to notify the CBI by 3 June 2022 of the individuals who should no be designated as PCF-2B. Additionally, individuals who will hold PCF-2B functions will have to confirm that all due diligence to access their independence has been undertaken. It should be noted that all existing PCF-2 holders will automatically be re-assigned as holding a PCF-2A role.

PCF-15

The current PCF-15 function (i.e. Head of Compliance with the responsibility for Anti-Money Laundering and Counter Terrorist Financing Legislation) will be replaced with a dedicated PCF-52 (Head of Anti-Money Laundering and Counter Terrorist Financing) and PCF-12 (i.e. Head of Compliance).

Next Steps

Individuals currently performing a PCF-15 function will be required to notify the CBI of the individual appointed to perform the new PCF-52 function. This new PCF role does not warrant the need to create a new role, but will require a review of functions to determine if these functions meet the requirements of this new PCF-52 role. If it is determined that the PCF-52 role does in fact exist, a regulated financial service provider will need to review and access of any individuals currently performing these roles and submit confirmation of this assessment to the CBI.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management & Investment Funds
Links	CBI September announcement , CBI Feedback statement

Timing

3 June 2022 Submit notification to the CBI in respect to PCF2A, PCF2B, PCF15 and PCF16 roles.

Fitness & Probity – Amendments to PCF Functions continued...

Changes

PCF-31 – Head of Investment)

The PCF-31 function is being removed as this is already covered by the PCF-30 (Chief Investment Officer).

Next Steps

No action required. All individuals currently performing the old PCF-31 function will be automatically re-assigned as holding a PCF-30 role.

PCF-16 – Branch managers of branches outside Ireland of Irish Regulated Financial Services Providers in other EEA countries)

The PCF-16 role is being re-named as Branch managers of branches established outside the State. Additionally, this role is being expanded to included all branch managers of regulated financial service providers outside Ireland, and not just limited to European Economic Area Countries.

Next Steps

Individuals currently holding a PCF-16 role will continue to be subject to the required due diligence of the host regulator. Regulated financial service providers will need to submit a confirmation of their assessment to the CBI in respect of any current PCF-16 holders by **3 June 2022**. It should be noted that that the CBI will take into account any feedback received from the host regulator’s application process.

Chairman

Update to the terminology in PCF roles such as PCF-3 (Chairman of the board), PCF-4 (Chairman of the audit committee), PCF-5 (Chairman of the risk committee), PCF-6 (Chairman of the remuneration committee) and PCF-7 (Chairman of the nomination committee) will be replaced by references to “Chair”. This change is to reflect the emphasis on diversity and inclusion.

Next Steps

None required. These changes will occur automatically.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management & Investment Funds
Links	CBI September announcement , CBI Feedback statement

Timing

3 June 2022 Submit notification to the CBI in respect to PCF2A, PCF2B, PCF15 and PCF16 roles.

CBI approves QIAIF which can take exposure to crypto-assets

On 31 March 2022, Irish Funds published a notice advising that the CBI has approved in principle a QIAIF with a low level of exposure to cash settled Bitcoin futures traded on the Chicago Mercantile Exchange (“[CME](#)”). The CME is the world’s leading derivatives marketplace.

The CBI has confirmed that this is the first type of indirect crypto exposure approved for a QIAIF. It should be noted that on 22 March 2022 (discussed later in this edition) the CBI issued a warning to consumers advising against investment in crypto-assets, stating that these are “highly risky and speculative”. The CBI’s decision to approve a QIAIF with exposure to crypto-assets should be distinguished in that the QIAIF can invest indirectly through futures (i.e. swaps), (essentially, meaning that the QIAIF cannot purchase crypto-assets such as Bitcoin directly). Instead the QIAIF will need to enter into an agreement with a seller in crypto-assets to purchase such assets.

QIAIFs seeking exposure to crypto-assets cannot avail of the 24 hour approval process which is generally afforded to QIAIFs who invest in standard securities. Rather, QIAIFs which are hoping to gain exposure to crypto-assets must submit the fund documents to the Central Bank for review. This approach has been set out in the CBI’s [Q&A](#).

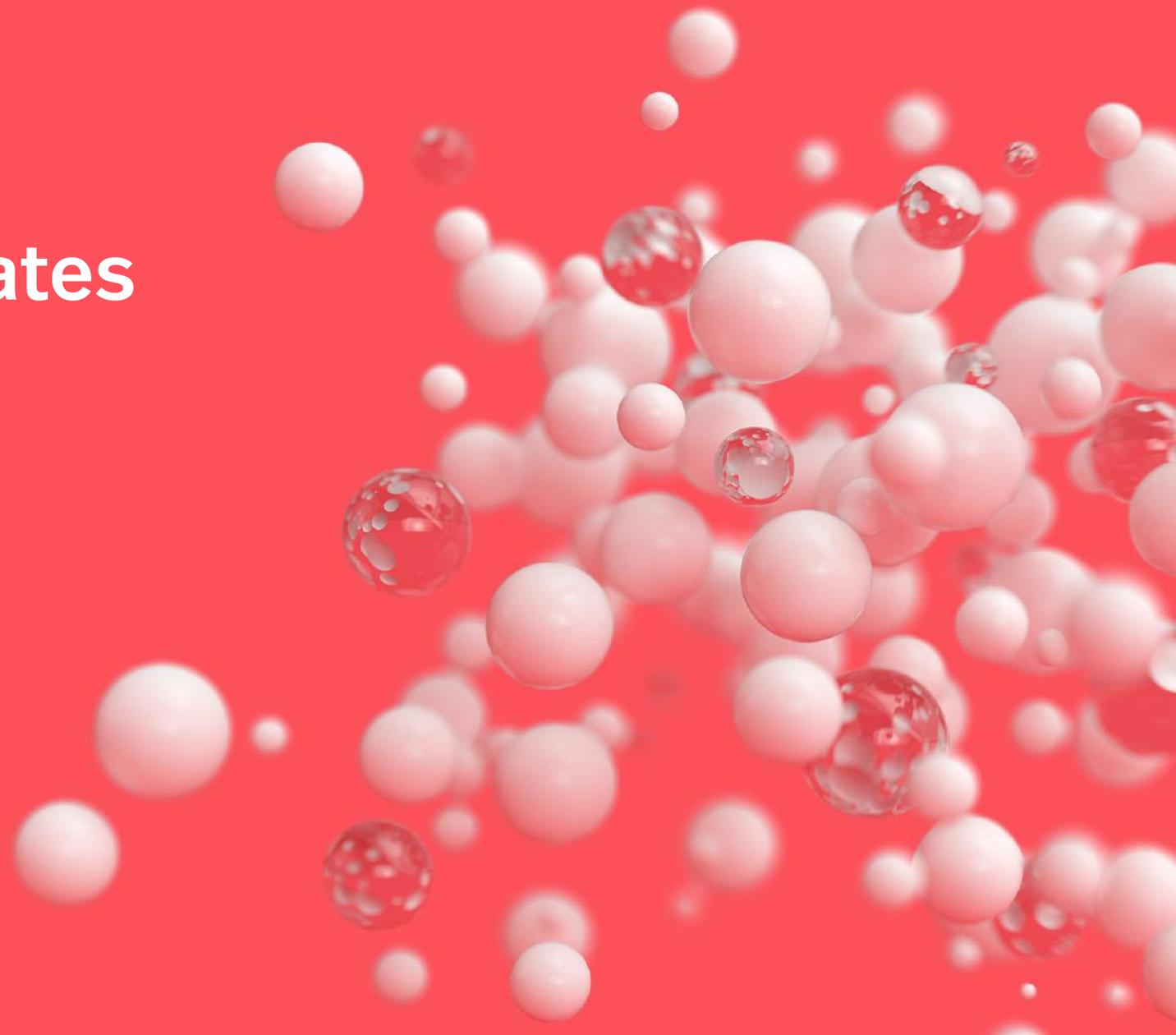
The CBI has advised that this approach in respect to crypto-assets will be kept under review and will continue to be guided by the European regulatory discussions on the topic.

For further information, we have included a link to the Irish Funds notification below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers, Regulated Funds
Links	Irish Funds Notice



Irish Government Updates



Reverse Hybrid Mismatches – New Irish legislation

The reverse hybrid mismatch rules apply to an entity that is treated as transparent for tax purposes by the Member State in which it is incorporated or established, but which is regarded as a taxable person by the jurisdiction(s) in which one or more associated (as defined for reverse hybrid purposes) non-resident entities are located.

Where a mismatch outcome has arisen between the hybrid entity and a non-resident associated entity, the intention of the reverse hybrid rule is to create an income inclusion event in the jurisdiction where the hybrid entity is incorporated or established, such that the income is subject to tax in that jurisdiction.

Finance Act 2021, which was signed into Irish law on 21 December 2021, applies the rule to hybrid entities only where a mismatch outcome has arisen between the hybrid entity and a non-resident associated entity. A “mismatch outcome” includes double deductions, and deductions without inclusion in relation to permanent establishments, hybrid entities and financial instruments.

Read our detailed summary of the new rules and their implications in full [here](#).

To access our webinars and articles related to the revised framework for the establishment of closed-ended funds in Ireland, please see our [Irish Private Funds webpage](#).

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Private Fund Managers, Real Estate Funds, Private Equity Funds, Financial Services Regulation
Links	Simmons Insights Article



Irish Interest Limitation Rule

The Finance Act 2021 was signed into Irish law on 21 December 2021. It implements, for the first time in Ireland, the interest limitation rule (“ILR”) under the Anti-Tax Avoidance Directive (“ATAD”), and it is now effective for accounting periods commencing on or after 1 January 2022.

We are pleased with the way in which the legislation has been drafted. Although there is no financial undertaking exemption as had been anticipated, the expected standalone exemption has been incorporated. Most Section 110 Companies should fall outside the scope of the ILR by virtue of being standalone entities or being part of a “single company worldwide group”. For those falling outside of this (e.g. Section 110 Companies which are subsidiaries), helpfully, the definition of “interest equivalent” has been widely drafted. We believe it includes all flows of funds through a Section 110 Company.

How the ILR is implemented in Ireland

Subject to specific group and equity ration provisions and other exclusions, the ILR limits corporation tax relief on net interest expenses of companies to the higher of 30% of Earning Before Interest Tax Depreciation and Amortisation of EUR 3 Million. ILR adjustments are to be calculated using a nine step approach. Full details of this 9 step approach are detailed in full in our Simmons Insight Article linked below.

Read our detailed analysis of the new rule and its implications in full [here](#).

To access our webinars and articles related to the revised framework for the establishment of closed-ended funds in Ireland, please see our [Irish Private Funds webpage](#).

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Private Fund Managers, Real Estate Funds, Private Equity Funds, Financial Services Regulation
Links	Simmons Insights Article



Industry communication – Senior Executive Accountability Regime (“SEAR”)

It can be expected that the CBI (Individual Accountability Framework) Bill will be enacted into law during the course of the months ahead. Mr Gerry Cross, Director of Financial Regulation – Policy Risk, confirmed that the CBI has been working in parallel on the regulations and guidance which will complete the new framework and stated it is the CBI’s intention to publish the proposed CBI regulations for consultation very shortly after the finalisation of the legislation.

Implications

In light of the above, preparations for the introduction of SEAR should start to be made once the legislation and guidance is published. SEAR will at first apply to credit institutions, insurance and investment firms and third-country branches.

SEAR is much like the Senior Managers and Certification Regime in the UK and will require that statements of responsibilities and responsibility maps are drafted and entered into amongst other issues.

For further information a link to Mr. Cross’ speech which was delivered on 21 February 2022 at the Compliance Institute has been linked below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Private Fund Managers, Real Estate Funds, Private Equity Funds, Financial Services Regulation
Links	Speech

Next Steps

- Review CF/exercise to identify persons who exercise ‘significant influence’ on the affairs of credit institutions, insurance and investment firms and third-country branches.
- Begin preparation of statements of responsibilities and responsibility PCF population and undertake a scoping maps.

Timing

- **Q2 2022** - The final draft of the legislation and guidance are expected in the coming weeks.

Privilege and limited waiver agreements in Ireland

A look at the position around limited waiver agreements, the risks involved and a possible alternative approach.

Legal Professional Privilege (LPP) is a fundamental right but the exercise of this right often gives rise to tension between regulators and their regulated entities in the context of an investigation conducted pursuant to the regulators' statutory powers. The regulator will understandably wish to obtain all relevant documentation and information, but may feel disadvantaged or ill-informed without obtaining access to documents which benefit from LPP.

The regulated entity is, of course, fully entitled to resist producing documents which enjoy the protection of LPP.

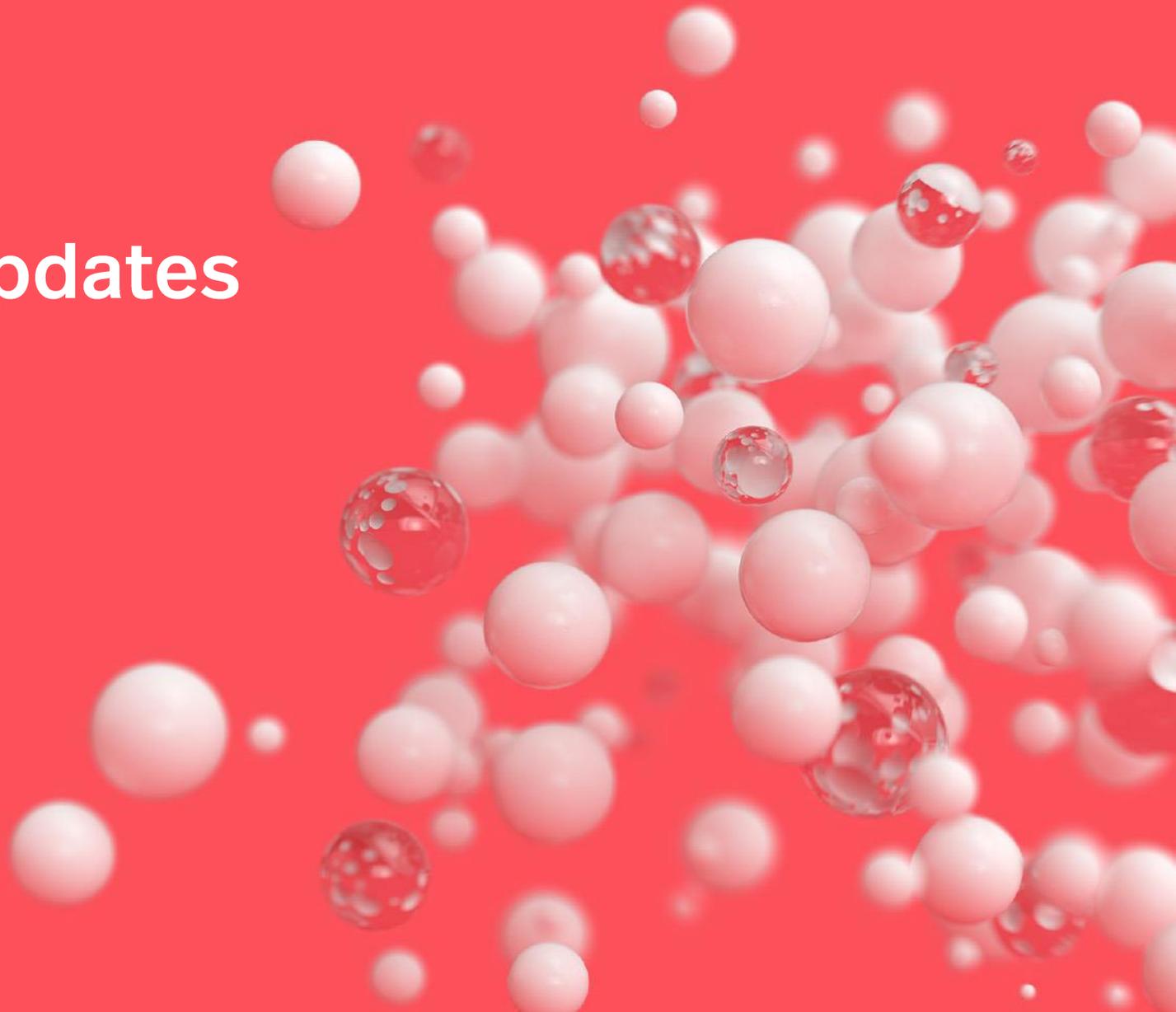
The regulated entity is, of course, fully entitled to resist producing documents which enjoy the protection of LPP: courts have long recognised that doing so may mean that, just as with judicial proceedings, regulators are thereby deprived of all relevant evidence. However, in recent years there has been a growing sense or belief among regulated entities that they must disclose privileged material in order to be seen to be co-operative with the regulator – this is in addition to the deployment of arguments often raised by the regulator over whether particular documents truly benefit from privilege or where the privilege is said to have been waived or lost.

Limited waiver agreements have become such an important and integral part of the regulatory environment in Ireland that the CBI is seeking to give a statutory footing to such agreements. As part of the General Scheme of the *Central Bank (Individual Accountability Framework) Bill 2021* it is proposed to place such limited waiver agreements on a statutory footing (Head 33). The proposed section is to be inserted in the *Central Bank (Supervision & Enforcement) Act, 2013* (the 2013 Act) as a new section 33A.

For further information on this topic which discusses the issue of privilege and the possibility of disclosing privileged document to the CBI a link to our Simmons Insights Article as well as our podcast has been included below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds and Financial Institutions
Links	Simmons Insights Article and podcast

European Union (EU) Updates



UCITS Directive and AIFM Regulation – Sustainable Finance Disclosures Regulation (“SFDR”)

On 21 April 2021 the European Commission adopted a delegated UCITS Directive as well as a delegated AIFM Regulation on SFDR (the “Directive and Regulation”). The Directive and Regulation outlines the SFDR factors which management companies and alternative investment fund managers are to have regard to (“Management Companies”). The implementation of the Directive and Regulation follows on from the implementation of the SFDR and the Taxonomy regulation.

Who is impacted?

The Directive and Regulations applies to all Management Companies irrespective of whether or not they manage a fund with an ESG focus. The Directive and Regulation also applies to investment companies and ICAVs that have not appointed Management Companies.

Update	1 January – 31 March 2022
Regional impact	Ireland, UK, EU and Global
Sector Focus	Asset management and Investment Funds
Relevant Legislation	Regulation (EU) 2019/2088 - Sustainable Finance Disclosure Regulation (SFDR)

Main Changes

Under the Directive and regulation, Management Companies are required to review and consider the following from a sustainability perspective:

- risk management procedures;
- investment decision making processes;
- organisation structure;
- Resources;
- Governance;
- Oversight;
- Reporting; and
- conflicts of investment management.

Next Steps

The Boards of the Management Companies should consider the extent of their responsibilities in relation to integration of sustainability risks and sustainability factors and how these align with those of the Management Companies.

Timing

- The changes to the Directive and Regulation will be effective from **1 August 2022**.

ESG – Commission publishes its proposed SFDR Level 2 RTS

The European Commission publishes its long-awaited proposals for Level 2 measures under the SFDR.

The European Commission has now published its [proposed SFDR Level 2 Regulatory Technical Standards \(RTS\)](#) to supplement the Level 1 measures which have applied since 10 March 2021. The RTS were accompanied by five draft annexes which can be found [here](#).

We will be reviewing the RTS against the drafts submitted by the European Supervisory Authorities (ESAs) in February and October 2021 and will be publishing our detailed summary on our website shortly.

For further information a link to our [Simmons Insights article](#) has been included below.

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset management and Investment Funds, Hedge Fund Managers, Private Fund Managers
Links	Simmons Insights Article

Next Steps

The proposed RTS must now be scrutinised by the European Parliament (EP) and the Council of the EU (the Council). When a final text has been agreed, it will be published in the Official Journal (OJ).

The Commission is proposing that the RTS come into effect from **1 January 2023** – although the EP and the Council have to formally agree this, it seems highly likely that they will.

An overview of the European Venture Capital Funds (EuVECA) regime

In the note below, we look at the regulatory regime for European Venture Capital Funds (EuVECA) with respect to proposed fund structures. The aim of the EuVECA regime, which is complementary to the Alternative Investment Fund Managers Directive (AIFMD), is to make it easier for qualifying venture capital funds (VCFs) to be established in the EU. The regime also permits a sub-threshold AIFM to market a VCF on a passported basis throughout the EEA.

The Note addresses the following questions:

1. What do the EuVECA Regulations cover?
2. What is a qualifying VCF?
3. What is a qualifying investment?
4. What is a qualifying portfolio undertaking?
5. To whom may EuVECAs be marketed?
6. What organisational, operational and transparency rules apply to managers wishing to market EuVECAs?
7. How is the EuVECA marketing passport obtained?

Update	1 January – 31 March 2022
Regional impact	Ireland
Sector Focus	Asset management and Investment Funds, Hedge Fund Managers, Private Fund Managers
Links	Simmons Insights Article and Simmons Note



European Union Updates



Legal Headwinds Q1 2022 - UK/EU Financial Institutions

This report focuses on key legal and regulatory developments relevant to clients operating in the FI sector in the UK and Ireland. We also cover significant developments more generally within the EU.

Update	1 January – 31 March 2022
Regional impact	Ireland, UK, EU and Global
Sector Focus	Asset management and Investment Funds, Hedge Fund Managers, Private Fund Managers
Links	Legal Headwinds – UK/EU Financial Institutions



European Union Updates



Legal Headwinds Q1 2022 - UK/EU Asset Management

This report focuses on key legal and regulatory developments relevant to clients operating in the asset management sector in the UK and Ireland. We also cover significant developments more generally within the EU.

Update	1 January – 31 March 2022
Regional impact	Ireland, UK, EU and Global
Sector Focus	Asset management and Investment Funds
Links	Legal Headwinds – UK/EU Asset Management



EU and CBI issue warnings against Crypto-assets

The European Supervisory Authorities (the “ESA”) has issued a warning to consumers advising against investment in crypto-assets, stating that these are “highly risky and speculative”. The ESA further warned that these are not suited for most retail consumers as an investment or as a means of payment or exchange. Should consumers invest in crypto-assets they face a very real possibility of losing their investment.

On 22 March 2022, as a result of the ESA’s warning the CBI has issued a related warning and emphasised that investing in crypto-assets are highly speculative and people should be particularly aware of misleading advertisements, particularly on social media, where influencers are being paid to advertise crypto assets.

To view each of the related warnings in full, please see links below.

Update	1 January – 31 March 2022
Regional impact	EU and Ireland
Sector Focus	Irish Funds, Capital Markets
Links	ESA warning and CBI warning



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