

Simmons & Simmons

Irish Funds & Regulatory Quarterly Update

1 July – 30 September 2023



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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 Demi Mullen

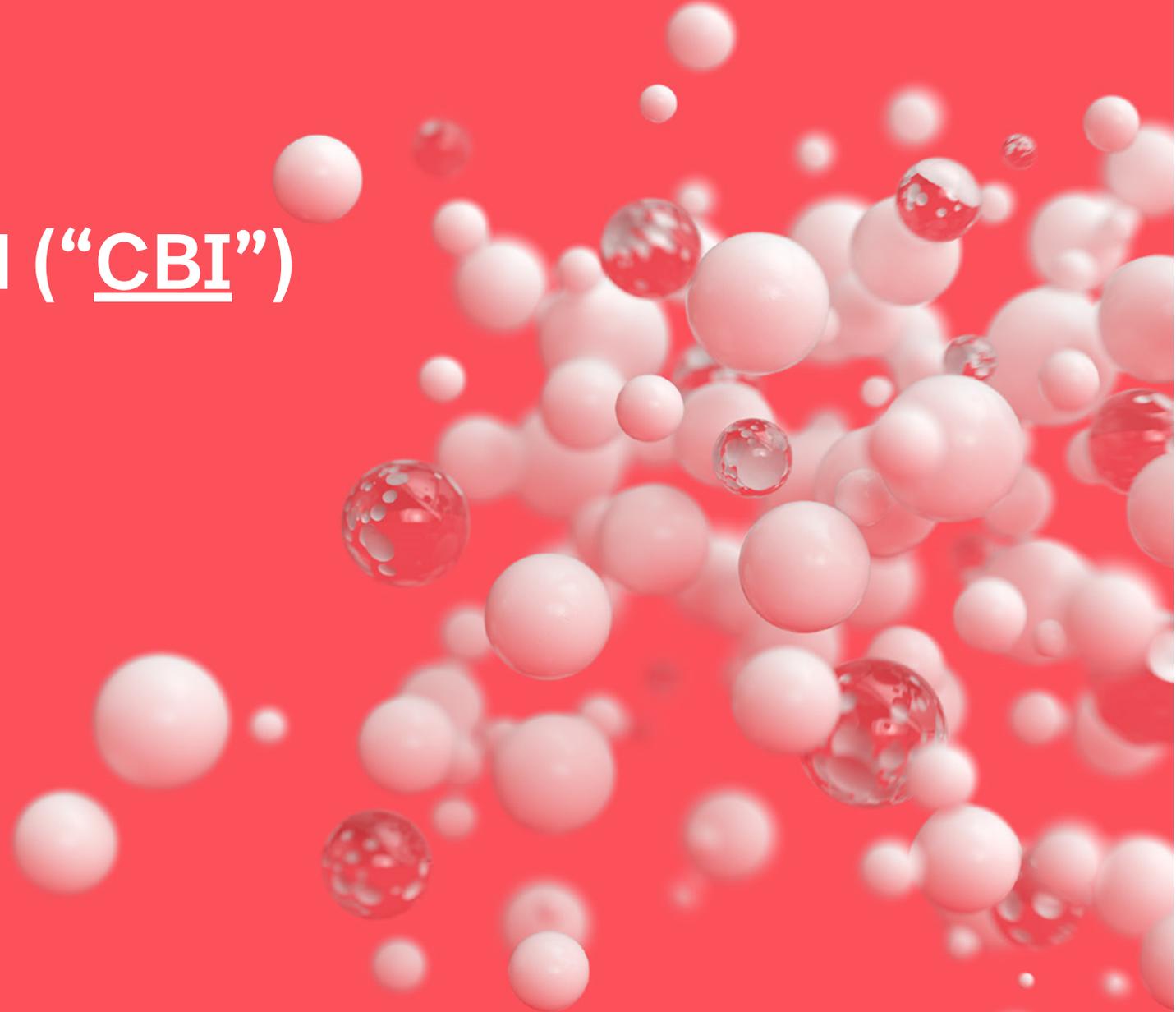
Demi is a supervising associate in Simmons & Simmons Dublin's office having joined the firm in 2022. Prior to this, Demi was an Associate in the Asset Management Department of a top-tier Irish law firm. She advises on the establishment, authorisation, regulation and operation of Irish regulated funds, including UCITS and AIFs, and has extensive experience on the authorisation and approval of investment managers. She also advises asset managers on the implications of a wide range of Irish and EU financial services laws and regulations. Demi has completed two secondments with global asset managers, one of which involved gaining extensive compliance experience by supporting their dedicated compliance team.

What's coming up in this edition

In this edition we cover updates from the CBI, the Irish Government and the European Union. Our highlights are as follows:

- CBI published Markets Update No. 6 of 2023;
- CBI published Markets Update No. 7 of 2023;
- Macroprudential policy for funds – CBI consults;
- Public consultation on Markets in Crypto Assets Regulation;
- ESMA's Public Statement on expected sustainability disclosures in prospectuses;
- ESMA consults on Level 2 measures for European Long-term Investment Funds (ELTIFs) and Irish Funds issue response; and
- SFDR – the European Commission consults on how the Sustainable Finance Disclosure Regulation ("**SFDR**") regime is functioning.

Central Bank of Ireland (“CBI”) - Updates



CBI published Markets Update No. 6 of 2023

On 3 July 2023, the CBI published Issue No 6 2023 of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

The following have been identified as being of particular interest:

- ESMA MiFID Remuneration Guidelines
- ESMA MiFID II Suitability Guidelines
- QIAIF Application/Post-Authorisation application form update
- CBI's comments on the Individual Accountability Framework
- ESMA updates its MiFID product governance guidelines
- ESMA updates its UCITS and AIFMD Q&As
- ESAs consult on extending and simplifying sustainability disclosures under the SFDR
- ESMA Opinion on preventing undue costs in funds
- ESMA consults on Level 2 measures for European Long-term Investment Funds (ELTIFs)
- ESAs progress reports on the prevention of greenwashing
- MMF stress tests - ESMA analysis of fund reporting
- ESMA report on ETF Guidelines peer review
- ESMA consults on integrating sustainability factors in suitability and product governance

For further information, please see link to our full article which discuss each of the topics in further detail.

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	All sectors
Links	CBI Markets Update No. 6

CBI published Markets Update No. 7 of 2023

On 18 July 2023, the CBI published Issue No 7 2023 of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

We have identified the following items as being of particular interest:

- Central Bank Discussion Paper on a macroprudential framework for investment funds
- ESMA report concludes that National Competent Authorities (“NCAs”) have strengthened supervision of the MiFID compliance function
- ESMA Statement highlights risks arising from securities lending to retail investors
- ESMA publishes a first consultation paper on Level 2 measures under MiCA
- ESMA publishes Final Report on revised technical standards for passporting under MiFID
- ESMA’s Public Statement on expected sustainability disclosures in prospectuses
- Results of ESMA’s CSA on disclosure of costs and charges under MiFID II
- ESMA’s CSA on disclosures and sustainability risks in the investment fund sector
- ESMA publishes second overview of national rules governing fund marketing

For further information, please see link to our full article which discuss each of the topics in further detail.

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and regulated Funds
Links	CBI Markets Update No. 7

CBI Updates

CBI Updates

CBI publishes Guidance Note for investment firms in respect of Monthly Client Asset Reporting

On 13 July 2023, the CBI has published a “Monthly Client Asset Report Guidance Note for investment firms” (the “[Guidance Note](#)”). The Guidance Note is to assist Investment Firms with completing the Monthly Client Asset Report (the “[MCAR](#)”) which is required under Regulation 8 of the Investment Firms Regulations, subject to the Client Asset Requirements (the “[CAR](#)”). The MCAR template is found [here](#).

For further information please see link the CBI Guidance Note below.

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	CBI Guidance Note , MCAR Template 2023

Macroprudential policy for funds – CBI consults

On 18 July 2023, the CBI initiated a conversation with the Irish funds sector through the publication of DP 11, "An approach to macroprudential policy for investment funds" (the "DP"). The consultation period is open to 15 November 2023. Further information on the DP can be found in the CBI's [blog](#) and on its dedicated [webpage](#).

Why has the CBI published the DP?

The DP reflects the CBI's concern that, as the funds sector has grown and become more integral to the wider functioning of several key markets, the collective actions of investment funds "have the potential to generate systemic risk" to the financial system. As a result, the current regulatory framework for the funds sector must evolve if it is to reduce the propensity of certain fund cohorts to amplify shocks in times of stress.

It will be remembered, for example, that, in November 2022, the CBI both:

- obtained the approval of ESMA under Article 25 of AIFMD to introduce a 60% leverage limit for Irish real estate funds - see our summary [here](#); and
- published its [Macroprudential Policy Framework for Irish Property Funds](#), introducing new limits on leverage and Guidance to limit liquidity mismatch in property funds.

The CBI has concluded that a macroprudential perspective is needed for the future regulation of the funds sector and it points to work done recently by [IOSCO](#) and the [Financial Stability Board](#).

The DP, then, opens a discussion with stakeholders on:

- how a comprehensive macroprudential perspective for regulating the funds sector could be achieved;
- what the objectives of such a macroprudential framework would be;
- key principles that might underpin its design;
- potential tools that could be used to achieve these macroprudential objectives; and
- the practical issues that would need to be progressed if such a framework is to be made operational.

Macprudential policy for funds – CBI consults continued...

What does the DP say?

Looking at the different issues on which the DP is seeking feedback:

Systemic risks

The CBI's view is that "economic frictions exist in the intermediation of financing by the investment fund sector".

These frictions include:

- co-ordination problems (when individuals act in a way that is 'individually-rational', but where the aggregate collective impact of such actions is sub-optimal);
- informational friction (when there is imperfect information among economic participants); and
- incentive frictions (which can arise where agents' incentives are not aligned fully with the principals they are acting for).

These can lead to excessive risk-taking, in aggregate, across the financial system.

Typically, though, it will be the actions of investment funds collectively, rather than individually, that can generate systemic risk (for example, in the wake of the UK Gilt market volatility in 2022).

The DP also identifies two main underlying potential sources of vulnerabilities for investment funds, liquidity mismatch and leverage. These can increase the fragility of investment funds and, in stressed market conditions, they can amplify and transmit a shock to other segments of the wider financial system.

The current regulatory framework

The primary concern of the regulatory framework as it stands is the protection of investors - requirements exist, for example, on disclosure, eligible assets, diversification requirements and differentiating between funds suitable for retail investors and those for professional investors.

The DP highlights the UCITS and AIFMD regimes in the European Union ("EU"), which contain, among other things, rules on liquidity mismatch and liquidity management tools.

Macprudential policy for funds – CBI consults continued...

However, while the tools available at present may be able to reduce certain types of risk at the fund level, the CBI's view is that they are insufficient to reduce the propensity of certain fund cohorts to amplify shocks. By way of example:

- the rules have largely been designed to protect investors, not to reduce systemic risk;
- the frameworks in respect of liquidity management and leverage allow significant scope for interpretation by asset managers, which limits how effective the rules can be from a system-wide perspective; and
- some existing features (such as fixed, minimum liquidity requirements for MMFs) of existing frameworks may not be optimal from a macroprudential perspective - if MMFs are required to maintain their regulatory liquidity requirements in times of stress, this means that those liquid assets are less able to be used to meet redemptions.

As well as the above tools, other EU legislation, such as MiFID/MiFIR and the Short Selling Regulation, provide national (and EU) authorities with the powers to intervene in the event of crystallisation of risks to financial stability. These tools, though, are primarily ex post in nature and are intended for use in very specific, narrow circumstances, which limits their effectiveness as macroprudential measures.

The objectives and principles of macroprudential policy

The aim of macroprudential policy for the funds sector would be focused on mitigating financial stability risks to ensure that the sector grows more resilient to stresses by preventing excessive vulnerabilities building up across relevant cohorts and is less likely to amplify adverse shocks, through its interconnectedness with other parts of the financial system.

The CBI, though, makes explicit that macroprudential policy would not aim to target asset prices or to replace the risk management practices of funds.

The DP sets out a number of key principles that could underpin and be core to the design of a macroprudential framework for funds. These include

- resilience-enhancing measures need to work on a collective or aggregate basis, aimed at the level of fund cohorts;
- resilience should be built ex ante - before crisis conditions occur - and be targeted at the identified sources of systemic risk;
- policy measures could either (a) seek to limit underlying vulnerabilities and/or (b) be targeted at the interconnectedness of the sector, thereby reducing the risk of contagion;
- policies must have a degree of flexibility over time to take into account the evolving nature and magnitude of systemic risks;
- policy intervention should follow a careful balance between costs and benefits for the broader economy; and
- global co-ordination is critical in a macroprudential policy framework for the funds sector, with macroprudential measures guarding against possible shifting of risks to other parts of the financial system.

Macprudential policy for funds – CBI consults continued...

The design of macroprudential tools

Exploring the relative merits of potential tools and asking whether new tools may be required, the DP considers:

Liquidity management

Effective macroprudential liquidity measures would limit how far liquidity mismatch contributes to 'excess' asset sales in times of stress, as well as related disruption in core markets. This can be achieved primarily by either: (a) reducing the underlying liquidity mismatch so any misalignment between the liquidity of the assets and the redemption frequency offered by the fund is narrowed; or (b) increasing the liquidity of assets, for example, through liquid asset buffers. Given the diversity of the sector, the DP notes that a 'one-size fits all' approach is unlikely to be effective and a mix of the above would most likely be needed. It also suggests that further exploration of macroprudential policy options for liquidity mismatch to build resilience in fund cohorts on an ex ante basis may be warranted, perhaps in the form of an enhanced approach to existing tools. Alternatively, new, bespoke tools targeted at liquidity mismatch may need to be developed.

Leverage

Macroprudential measures targeting leverage would need to guard against unsustainable levels of leverage across segments of the funds sector and to ensure that funds are better equipped to withstand adverse shocks, rather than amplify them. Leverage limits could address this risk but entail operational challenges that need to be overcome in terms of: (a) measuring leverage (especially, synthetic leverage); and (b) 'leakage', where funds could circumvent limits applied to cohorts of funds by establishing new entities which are not subject to the leverage limit at inception.

Interconnectedness

Tools covering the interconnectedness of funds would aim to limit material spillovers from fund cohorts to other parts of the financial system. Existing tools, such as the concentration limits under Article 57 of MiFID II could be adapted to limit the spillover and contagion risks from the interconnectedness of funds. Concentration limits, though, could have drawbacks for the market in which they are applied, as restrictions could alter market dynamics and reduce market liquidity. A different tool that might be used in this context is that of margining, though it is unclear whether they reduce counterparty credit risk at the cost of increasing liquidity risk. The DP concludes that the use of interconnectedness-targeting tools (for which it accepts there is "limited existing evidence and empirical analysis" as to how effective they are) would depend on the specific nature of the risk posed by a given fund cohort.

Macroprudential policy for funds – CBI consults continued...

Considerations for operationalising this framework

There are several important practical dimensions in developing a macroprudential policy framework foreseen by the CBI:

International co-ordination

The funds sector is inherently global and cross-border in nature, which may make implementation of macroprudential policy more difficult. To function effectively, a macroprudential framework would need to exhibit a high degree of consistency internationally, including a reciprocation framework. Operationally, introducing specific macroprudential tools in one jurisdiction can lead to impacts in other jurisdictions, which could generate regulatory arbitrage. In turn, this could limit the effectiveness of any interventions.

Role of regulatory authorities

The CBI's view is that, underlying any framework, a key principle should be that regulatory authorities are not there to replace risk management by the funds sector. That said, there are circumstances which can justify some form of regulatory interventions with a macroprudential purpose. The nature of any intervention by public authorities, though, must be balanced against ensuring that the relevant fund manager still has ultimate responsibility for managing individual investment funds.

Data requirements

Regulatory authorities and policymakers need to have an internationally consistent data framework, which is clear on the key data needed for investment funds (including measuring their leverage, liquidity mismatch and interconnectedness). Having good quality data and processes for sharing that should be at the forefront of considerations but this will require international, as well as national and regional coordination. A consistent data framework could also help understand who are the ultimate investors or counterparties in funds, rather than first counterparty investors - this can facilitate deeper assessments on cross-border interconnectedness.

For further information, please see our [Simmons Insights article](#) linked below.

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article

What's next?

The CBI invited comments on the points raised in the DP until 15 September 2023.

Once it has considered feedback to the DP, the CBI will publish a feedback statement covering some or all of the topics raised by respondents, although no timeline is given for this.

CBI Updates

CBI publishes updated Fitness & Probity guide

On 9 August 2023, the CBI issued a revised version of its Fitness and Probity Interview Guide which has been updated to include three main amendments: (i) the inclusion of an interpretation section to define terms used in the guide; (ii) the use of information and the importance of full disclosure which highlights that the CBI may use information gathered from other functions during the applicant's assessment for fitness and probity; and (iii) clarification as to whether there can be a recording of the interview and the ability to bring a legal representative to any such interview with the CBI.

The CBI assess the suitability (fitness and probity) of individuals who are put forward for certain senior positions in firms that they regulate. As part of their assessment, they may hold one or more interviews. This Guide explains the interview process, what to expect on the day of the interview and what happens after an interview.

This guidance is relevant for persons requested to attend for interview as part of a fitness and probity assessment with the CBI and proposing firms, which are the main point of contact for the CBI throughout the assessment process.

For further information, please see link to the guide [here](#).

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and regulated Funds
Links	Fitness and Probity Interview Guide

CBI Updates

Archiving error – CBI issues statement

On 21 August 2023, the CBI released a public statement in which it highlighted that they “identified an archiving error that effected the retention period of certain borrower information held on the Central Credit Register. As a consequence of this error, certain borrower information was retained on the Central Credit Register for up to an additional three months, and included in credit reports, when it should not have been retained or included. This error constitutes a data breach under data protection legislation. We wish to state clearly that borrowers’ data has not been compromised or accessed by any unauthorised third parties as a consequence of this error.”

“As a result of this error, additional, outdated information relating to these three months was available on the CCR database for inclusion in credit reports issued to borrowers and lenders in the period 1 June to 7 August 2023. While this information was accurate, the additional three months of information should not have been made available, and constitutes a data breach under data protection legislation.”

For further information please see link the CBI’s markets update provided as well as our full Simmons Insights Article.

Update	1 July – 30 September
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	CBI statement

CBI steps taken

“The Central Bank sincerely apologises for this error and can confirm that immediate action was taken to fix it. Remediation began on 4 August and the error was fully resolved on 7 August 2023, with the database reflecting the correct five-year retention period. The CCR is now functioning normally and credit reports being provided since this date do not reflect any additional information. We have also commenced an investigation to establish a full account of the issue and intend to conduct a wider review of the CCR’s relevant processes and procedures.

A key focus of our ongoing investigation is to establish whether any borrowers were impacted by this incident.

The Central Bank’s investigation so far has determined that, of the approximately 476,000 total enquiries made by lenders or borrowers for information held on the CCR over the period between 1 June and 7 August 2023, the records of around 20,500 borrowers contained performance data pointing to repayment difficulties in May, June or July 2018.

Our investigation into any potential impact on these borrowers is ongoing. We are engaging with lenders to advise them of the incident and to establish if the additional three months of historical credit information affected their lending decisions in any way. This will allow us to assess whether the incident has had any impact on prospective borrowers in the period, 1 June and 7 August 2023. Once we have a clearer view of the nature and extent of impacts on borrowers, the Central Bank will seek to communicate directly with those most likely to have been affected.

Borrowers can request a copy of their credit report, free of charge, on the [CCR website](#). Borrowers with loan performance issues in the impacted three-month period in 2018, and who had made a credit application over the period of 1 June to 7 August 2023 may also wish to engage with the relevant lender.

In line with our obligations under data protection legislation, the Central Bank of Ireland has notified the Data Protection Commission (DPC) of this matter. Our engagement with the DPC is continuing.”

CBI Updates

CBI publishes Regulatory Service Standards Performance Report

On 28 August 2023, the CBI published its “Regulatory Services Standards Performance Report (the “Report”) for the period covering January – June 2023 period. The Report as stated by the CBI “*sets out the performance of the CBI against the service standards to which it has committed in respect of:*

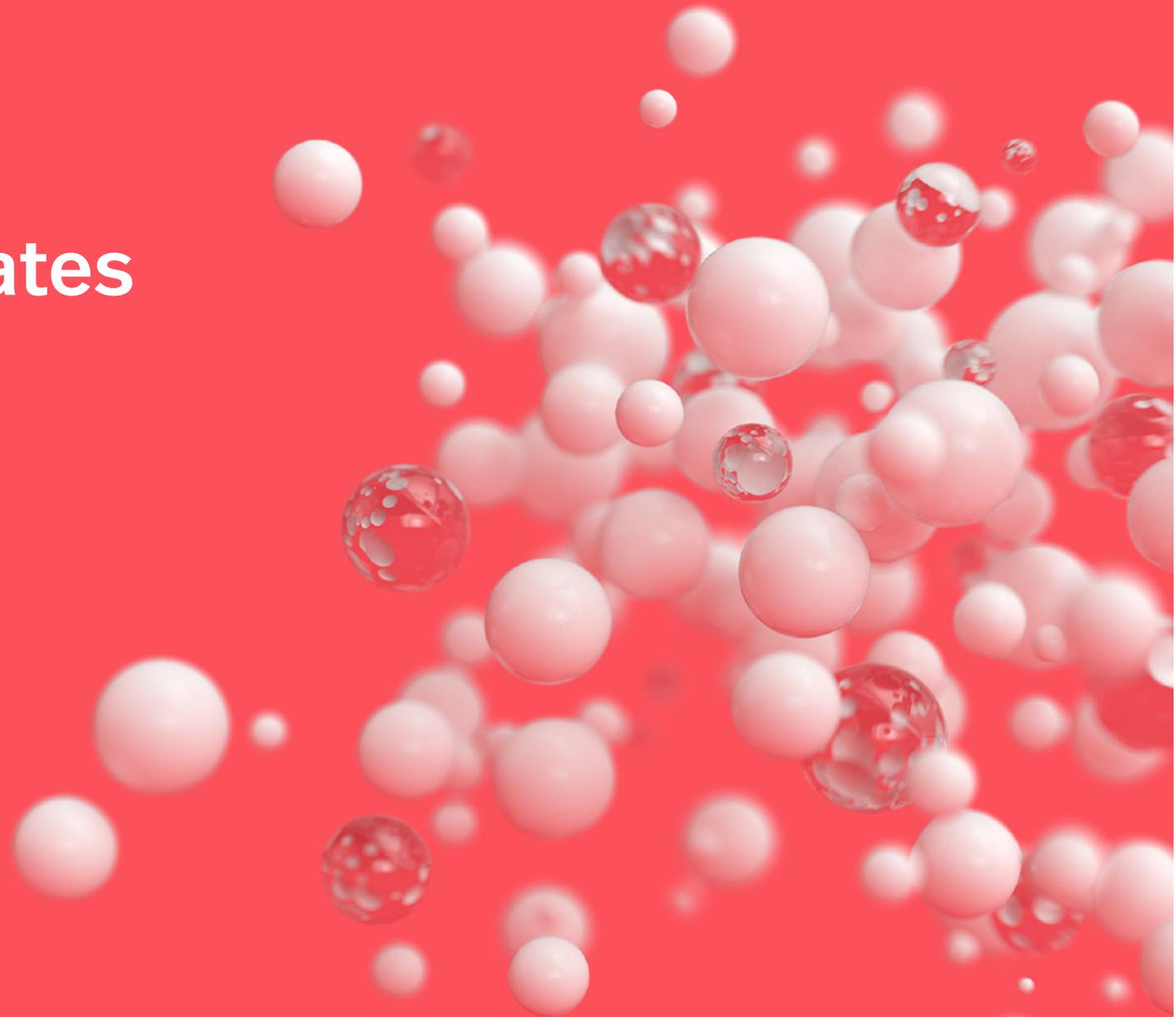
- (a) authorisation of Financial Service Providers (FSPs) and Investment Funds;*
- (b) approval of Prospectuses;*
- (c) assessment of Pre-Approval Controlled Function (PCF) Individual Questionnaire (IQ) applications; and*
- (d) performance of its third party contact management service.”*

The Report states that all services standards applied were either met or exceeded.

For further information please see link the CBI’s Report below.

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	<u>CBI Report</u>

Irish Government Updates



Irish Government Updates

The Department of Finance launched public consultation on Markets in Crypto Assets Regulation – exercise of national discretions

On 9 August 2023 the Government of Ireland launched a public consultation to obtain submissions on the transposition of national discretions included within the Markets in Crypto-Assets Regulation EU 2023/1114 (the “MiCAR”). The MiCAR is the first European-level legislation introducing a harmonised and comprehensive framework for crypto-assets, covering issues from the offering to the public of crypto-assets to preventing market abuse in crypto-asset markets.

MiCAR provides a set of prescriptive rules that will shape the functioning of the European markets in crypto-assets, including transparency rules, authorisation requirements, customer protection rules and an anti-market abuse framework. The purpose of the consultation was to allow all stakeholders to submit their views on whether and how Ireland should exercise national discretions contained within MiCAR.

Please see our regulatory view webinar series [here](#).

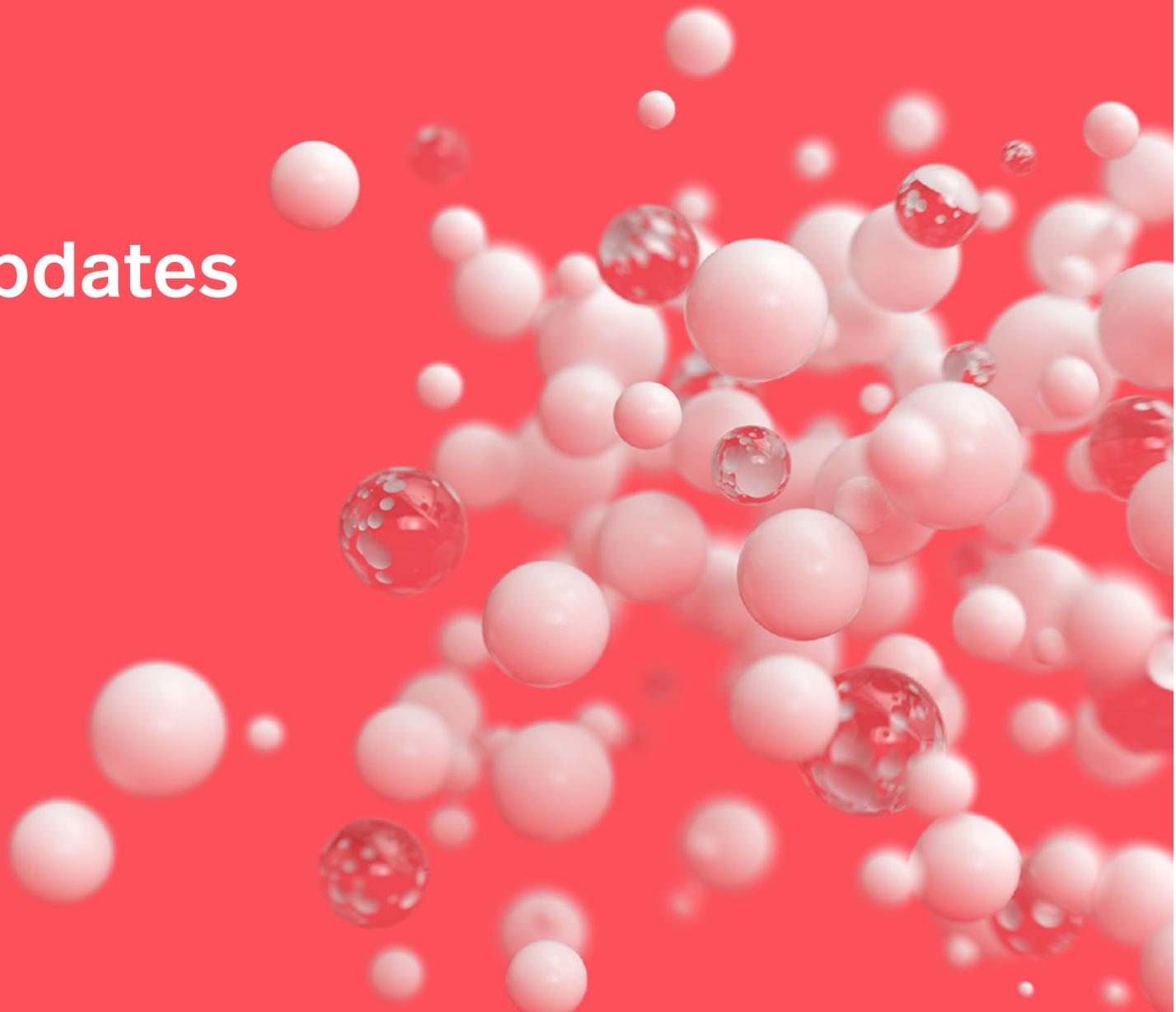
For further information we have included a link to the Department of Finance’s public consultation.

Update	1 July – 30 September 2023
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Public Consultation

What’s next?

Submissions to the consultation closed on 15 September 2023. The review team of the Department of Finance are analysing responses to this consultation prior to issuing a report. Further consultations may be held at a later stage in the review.

European Union (EU) Updates



European Union Updates

ESMA publishes second overview of national rules governing fund marketing

On 3 July 2023, ESMA submitted its second report ("Report") on national rules governing the marketing of investment funds under the Cross-border Distribution of Funds Regulation (the "Regulation") to the European Commission, the Council of the EU and the European Parliament.

The Report's key findings are that:

- the introduction of the Cross-border Distribution of Funds Directive and ESMA Guidelines on funds' marketing communications under the Regulation have led to a greater level of harmonisation in areas where national divergences existed (as identified in ESMA's first Report (June 2021); and
- only a limited number of NCAs carried out any ex-ante verifications of marketing communications, while an increasing number of NCAs reported carrying out ex-post verifications.

ESMA will produce a third Report in two years' time.

For further information, please see links to the reports below.

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Markets
Links	First Report and Second Report

European Union Updates

Results of ESMA's Common Supervisory Action on disclosure of costs and charges under MiFID II

On 6 July 2023, the European Securities and Markets Authority ("ESMA"), published a [Statement](#) on its 2022 Common Supervisory Action ("CSA") and associated 'Mystery shopping' exercise.

The CSA focused on firms' compliance with the ex-post costs and charges information to be provided to retail clients under MiFID II's disclosure requirements.

The mystery shopping exercise, on the other hand, concentrated on what ex-ante costs and charges information was actually given to retail clients and how understandable and useful this was.

Although the CSA exercise showed an 'adequate level of compliance' with most elements of the MiFID II requirements, this varied across Member States and a number of shortcomings were identified, including

- costs not always being shown as a percentage;
- variation in cost allocation between service and product costs;
- differing practices (and sometimes lack of disclosure) on inducements;
- implicit costs not always being shown; and
- wide differences in the format and content of ex-post disclosures.

From the mystery shopping exercise, ESMA has concluded that in only around half of the cases, proper MiFID II ex-ante information about costs and charges was provided, in a durable medium. In the other cases, the information was incomplete or only provided orally.

When providing investment advice, firms did not always adequately disclose whether or not their investment advice was independent and were not always forthcoming with respect to the disclosure of inducements.

In light of these results, ESMA will now focus on the development of a limited number of new Q&As and on working towards a possible standardised EU format for the provision of information about costs and charges to clients.

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Institutions
Links	Public Statement

European Union Updates

EU Updates

ESMA launches a CSA into disclosures and sustainability risks

On 6 July 2023, ESMA launched a Common Supervisory Action (the “[CSA](#)”) into sustainability-related disclosures and the integration of sustainability risks in the investment fund sector.

The aim of the CSA is two-fold:

- to assess how asset managers are complying with the relevant provisions in the Taxonomy Regulation, the SFDR and applicable Level 2 measures (including those that amended the UCITS and AIFMD on the integration of sustainability risks – see [here](#)); and
- to foster convergence in how the NCAs supervise sustainability related disclosure, in particular
 - assessing whether market participants in practice adhere to the applicable rules and standards
 - gathering further information on greenwashing risks in the investment management sector and
 - identifying any other supervisory or regulatory intervention needed to address the issue.

ESMA’s findings on identifying greenwashing risks at both the entity and product level will be used to inform its Final Report on greenwashing.

For further information on ESMA’s CSA, please see [here](#).

Timing and Next Steps



- The CSA will run until Q3 2024.

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Asset Management and Investment Funds
Links	ESMA Announcement

European Union Updates

ESMA's Public Statement on expected sustainability disclosures in prospectuses

On 11 July 2023, ESMA issued a Public Statement (the "Statement"), which sets out ESMA's expectations on how firms should comply with the specific disclosure requirements of the Prospectus Regulation ("PR") on sustainability-related matters in equity and non-equity prospectuses.

The aim of the Statement is to help ensure that the approach taken by NCAs is coordinated when it comes to the scrutiny of sustainability-related disclosure in prospectuses while providing issuers and their advisors with an understanding of the disclosure that NCAs will expect them to include in their prospectuses.

The Statement emphasises the importance of an issuer's non-financial reporting under the Non-Financial Reporting Directive and the future sustainability reporting under the Corporate Sustainability Reporting Directive, especially given that such disclosure may be material under the PR and included in an issuer's prospectus.

In respect of non-equity securities which as advertised as taking into account a specific ESG component or pursuing ESG objectives, ESMA clarifies the disclosure required in relation to 'use of proceeds' bonds and 'sustainability-linked' bonds.

For further information, please see the public statement [here](#).

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Regulation, Financial Services Regulation
Links	Public Statement

European Union Updates

ESMA Statement highlights risks arising from securities lending to retail investors

On 12 July 2023, ESMA published a Public Statement on the risks to retail clients arising out of securities lending (the “[Statement](#)”).

The Statement sets out the applicable requirements under MiFID II and

- highlights ESMA's investor protection concerns related to securities lending;
- outlines the obligations of firms engaging in this practice; and
- makes clear ESMA's expectations for firms' compliance with the relevant MiFID II requirements.

In particular, ESMA notes that

- revenues from securities lending should directly accrue to the retail client (net of a normal compensation for the firm's services); and
- express prior consent from retail clients should not be sought by way of the firm's general terms and conditions.

For our summary of the Statement, see [here](#).

For further information, please see the public statement [here](#).

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Regulation, Financial Services Regulation
Links	Public Statement

European Union Updates

ESMA publishes a first consultation paper on Level 2 measures under MiCA

On 12 July 2023, ESMA published the first (of three) consultation package on Level 2 measures under the Markets in Crypto-Assets Regulation (MiCA). The consultation period closed on 20 September 2023.

The aim of the consultation paper is to collect views, comments and opinions on the appropriate implementation of MiCA, in particular in relation to

- the content, forms and templates for notification by certain financial entities;
- the content, forms and templates for the application for authorisation of Crypto Assets Service Providers (CASPs);
- the complaint-handling procedure;
- the identification, prevention, management and disclosure of conflicts of interest by CASPs; and
- the assessment of intended acquisition of qualifying holdings requirements.

What's next?

ESMA expects to submit its draft technical standards to the European Commission for endorsement by no later than 30 June 2024.

It also intends to consult further on MiCA measures in October 2023 and Q1 2024.

For further insight, please see our [webinar recording 'MiCA and the Regulation of cryptoasset services'](#)

Timing and Next Steps



- October 2023 and Q1 2024 – further consultation on MiCA measures

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Institutions
Links	Consultation Paper , webinar recording

European Union Updates

ESMA consults on Level 2 measures for European Long-term Investment Funds (ELTIFs) and Irish Funds issue response

On 23 May 2023, ESMA published a [consultation paper](#), setting out proposed Level 2 RTS under the [revised ELTIF Regulation](#) (“ELTIF 2.0”). The consultation period closed on 24 August 2023 and final rules are expected to be in place by 10 January 2024, when ELTIF 2.0 is due to apply. For our summary of ESMA's consultation paper, see [here](#).

For our summary of the changes made to the ELTIF Regulation under ELTIF 2.0, see [here](#).

The Progress Report, identifies several high risk areas along with solutions which find managers should be aware of.

Timing and Next Steps



- 10 January 2024– ELTIF 2.0 is due to apply from.
- CBI to issue a standalone ELTIF chapter for inclusion in the AIF Rulebook.

What's next?

On 24 August 2023, the Irish Funds Industry Association (the “IF”) issued a response to ESMA’s consultation on the draft regulatory technical standards to be developed. The IF announced that the Central Bank of Ireland (the “CBI”) is working on a standalone ELTIF chapter for inclusion in the AIF Rulebook in preparation for the implementation of ELTIF 2.0 in Ireland. It is understood that the CBI will continue to engage with the industry as the ELTIF amendments to the AIF Rulebook progress.

The CBI plans to publish a revised AIF Rulebook to permit the authorisation of ELTIFs under the ELTIF Regulation in the coming months. It is suggested that the authorisation of the ELTIF will broadly follow the current authorisation processes in place for Retail Investor Alternative Investment Funds or Qualified Investor Alternative Investment Funds.

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Institutions
Links	Consultation Paper

European Union Updates

ESG – the European Commission consults on how the SFDR regime is functioning

On 14 September 2023, the European Commission (“Commission”) published two consultation papers on SFDR. The first consultation and targeted consultation which are addressed in the following three slides. In each case, the consultation period is open until 15 December 2023.

Both publications deal with issues around the implementation of the SFDR since its introduction in March 2021 and raise the prospect that they may lead, in time, to changes to apply the same ESG disclosure obligations to all funds sold in the EU given industry concerns on the costs and difficulty of compliance with the current rules.

It should be noted, though, that - at this stage, at least - the Commission is simply seeking input through a series of open questions, which allow respondents to give a view from 1 to 5, but with a text box provided for further comments.

Neither consultation proposes specific amendments to either Level 1 or Level 2 of the SFDR (though such proposals can, perhaps, be expected when the Commission publishes its report in Q2 2024).

All responses to the Consultations must be submitted by 15 December 2023 via the online questionnaire as linked in the following slides.

Timing



- **15 December 2023** – deadline for responses to the Consultations via the online questionnaires

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Institutions
Links	First Consultation First Consultation Online Questionnaire Targeted Consultation Document Targeted Consultation Online Questionnaire

European Union Updates

Commission Review into the functioning of the SFDR

The [consultation](#) (“Consultation”) looks at how the SFDR is working in practice and the potential issues stakeholders might be facing in implementing it (in particular, its interaction with other sustainable finance legislation).

This forms part of the Commission's overall review of the functioning of the SFDR, intended to address a number of issues that have become apparent, including:

- the lack of clarity in the use of SFDR as a disclosure regime;
- its use as a labelling tool by the market; and
- what additional safeguards may be needed to prevent greenwashing (given that there are no parameters to establish how "green" a product is).

The Commission seeks stakeholders' views on topics including the following:

- disclosure of principal adverse impacts (“[PAIs](#)”);
- the cost of disclosure under the SFDR;
- the ability of financial market participants to fulfil their ESG transparency requirements; and
- the SFDR's interaction with other sustainable finance legislation (including the Taxonomy Regulation, the CSDR, MIFID, and the PRIIPs Regulation).

All responses to the Consultation must be submitted by 15 December 2023 via the online questionnaire found [here](#).

Please see link to the [Consultation](#) document.

Timing



- **15 December 2023** – deadline for responses to the Consultation via the online questionnaire

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Institutions
Links	First Consultation First Consultation Online Questionnaire

European Union Updates

The Commission's targeted consultation

The Commission's second publication is a targeted consultation (the "Consultation") aimed at identifying potential shortcomings with the regulation and exploring possible options to improve the framework.

The main topics covered are:

1. Current requirements of the SFDR;
2. Interaction with other sustainable finance legislation;
3. Potential changes to the disclosure requirements for financial market participants; and
4. Potential establishment of a categorisation system for financial products.

It should be noted that the questions on Sections 1 and 2 replicate those in the consultation document referred to above. However, Sections 3 and 4 look to assess possible options to address any potential shortcomings in relation to:

- entity level disclosures;
- product level disclosures; and
- the pros and cons of establishing a categorisation system for financial products.

All responses to the Consultation must be submitted by 15 December 2023 via the online questionnaire found [here](#).

Please see link to the Consultation document.

Timing



- **15 December 2023** – deadline for responses to the Consultation via the online questionnaire

Update	1 July – 30 September 2023
Regional impact	Ireland, UK, EU and Global
Sector Focus	Financial Institutions
Links	Targeted Consultation Targeted Consultation Online Questionnaire

European Union Updates

Continued.. Background to the Consultation

It's widely acknowledged that there are challenges with the SFDR, such as:

- unclear or missing definitions of key concepts;
- difficulties with the functioning of the PAI regime; and
- the use of the article 8 and article 9 disclosure rules as de facto product labels.

The Consultation does not shy away from addressing these issues and, for that reason, we expect that the asset management industry will welcome the attention on the challenges.

The Consultation does not propose any specific new rules but the questions and associated commentary it contains clearly reveal the direction of travel of the Commission's thinking.

As a result, the Commission's final report (due in Q2 2024) may well involve some fundamental changes being proposed to the entire policy concept of SFDR.

Most importantly, SFDR 2 could become a regime based around opt-in ESG product labels which reference objective criteria, rather than the current subjective Article 8/9 disclosure regime. Although not expressly acknowledged in the consultation, the Commission's approach seems to be directly inspired by the UK Financial Conduct Authority product labelling proposals under the Sustainability Disclosure Rules.

Our client note assumes a working familiarity with the current SFDR regime. For more general information on SFDR, please see our [ESG notes for clients](#).

Timing



- 15 December 2023 – deadline for responses to the Consultation via the online questionnaire

Simmons & Simmons client note

Our [client note](#), "SFDR 2 - significant new policy direction revealed", provides a summary of the following top 10 things that firms need to know about the consultation.

1. What is covered in the consultation?
2. Do firms need to take action in response to the consultation?
3. What are the options for SFDR 2 to replace article 8/9 with product labels?
4. What is Approach 1 to product labels?
5. How is Approach 1 similar to the UK SDR proposals?
6. What is Approach 2 to product labels?
7. What does the Commission ask about the current SFDR regime?
8. How does the Commission approach SFDR's alignment with other EU regimes?
9. What changes are proposed to entity-level disclosures?
10. What changes are proposed to product-level disclosures?

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