

Simmons & Simmons

Irish Funds & Regulatory Quarterly Update

1 January - 31 March 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 James Cullinane

James is a Supervising Associate in Simmons & Simmons having joined the firm in 2021. Prior to this, James was a Senior Associate in the Asset Management Department of a top-tier Irish law firm. James focuses on the establishment, structuring, ongoing operation and regulation of UCITS, RIAIFs and AIFs (whether structured as ICAVs, investment limited partnerships, public limited companies, unit trusts or common contractual funds) for a wide variety of asset managers and investment banks and has extensive experience in the authorisation and approval of UCITS management companies, alternative investment fund managers and investment managers.

James also advises international corporate service providers on fund administration and depositary approval applications. James has completed secondments with both a large international service provider and a large international asset manager in Dublin, gaining extensive experience in non-Irish structures and the laws and regulations of off-shore jurisdictions.

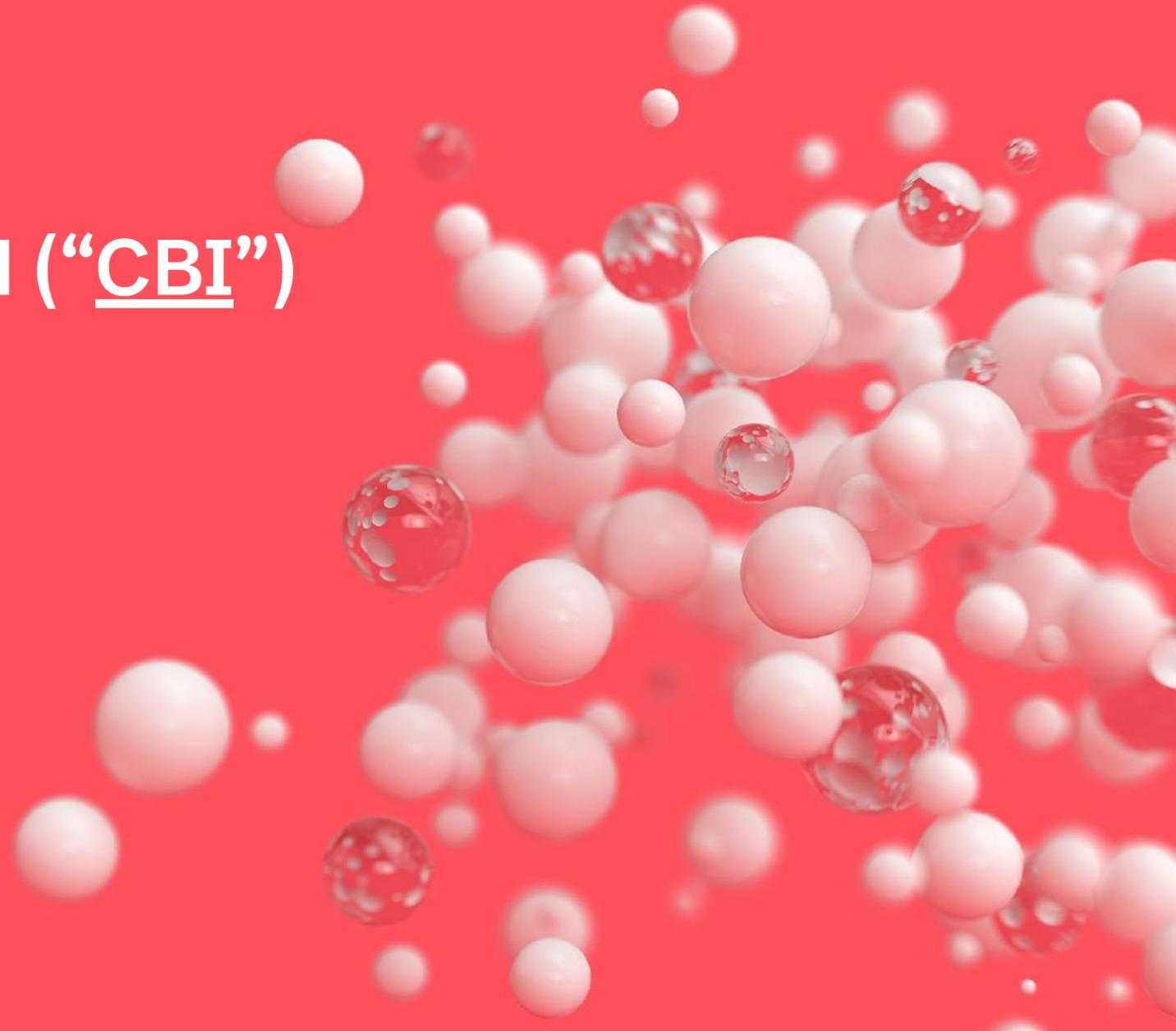
James has worked extensively on ETFs and loan-originating funds and was involved in the establishment of one of Ireland's first loan originating funds in 2017, and the first open-ended investment limited partnership in 2023.

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:

- Consulting and engaging on regulatory developments under the Consumer Protection Framework and the Individual Accountability Framework leading to enhancements in existing and new regulations.
- Implementing changes to credit union regulations/ guidance arising from the Department of Finance-led policy framework review, including through engaging with sectoral stakeholders.
- Ensuring that the EU's Anti-Money Laundering Action Plan, including the establishment of a single supervisory authority (the Anti-Money Laundering Authority), results in a consistent and robust EU-wide framework.
- Contributing to progressing European regulation, particularly the review of the Payment Services Directive (PSD2) and the functioning of open banking.
- Implementing new EU regulations on digital operational resilience (DORA) and markets in crypto assets (MiCA)

Central Bank of Ireland (“CBI”) - Updates



Diversity in Irish fund boards – a new Irish Funds Guide

A new guide, “Board Diversity - A Guide for Investment Fund Boards” (the Guide), has been published by Irish Funds - the industry body for the investment funds sector in Ireland.

The Guide is currently restricted to Irish Funds members – please contact James McKnight, Niamh Ryan or your usual contact at Simmons & Simmons for more details if required.

Its intention is to help investment fund boards achieve greater diversity and inclusion (D&I) in their make-up.

Existing international best practice guidance has suggested that:

1. there is a consensus that diversity has positive outcomes for companies and boards;
2. although, as shown below, progress is being made on D&I - specifically gender diversity - progress is still slow across all industries and countries; and
3. there is little specific guidance on how boards can improve their D&I.

For further information, please see link to our full Simmons insights article below.

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| Update | 1 January – 31 March 2023 |
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| Sector Focus | Asset Management and Investment Funds, Institutional Managers and regulated Funds |
| Links | Simmons Insights Article |

CBI publishes Markets Update No 14 (December 2022)

On 21 December 2022, the CBI published [Issue 14 of its regular Markets Update](#), in which it sets out alerts of interest to Irish regulated firms and other market participants.

For our summaries of the previous issues, please see the right-hand column of this page.

Of the various items covered in this Issue, we would highlight, in particular, the following:

- **CBI publishes 37th Edition of the UCITS Q&A**

On 21 December 2022, the CBI published the 37th Edition of its [Q&As on the UCITS Directive](#). This update looks at the new PRIIPs filing requirements, which came into effect on 1 January 2023.

- **CBI publishes the 46th Edition of the CBI AIFMD Q&A**

On 21 December 2022, the CBI also published the 46th edition of its [Q&As on the AIFMD](#). The update revises the answer to ID 1126, which asks whether AIFs which are in scope of the PRIIPs Regulation must file KIDs with the CBI.

- **ESMA provides guidance for supervision of cross-border activities of investment firms**

On 14 December 2022, ESMA published a MiFID II Supervisory Briefing, [Supervision of cross-border activities of investment firms](#). Note that the contents of the MiFID II Supervisory Briefing do not constitute new policy.

- **ESMA updates its Q&As on the application of the AIFMD**

On 16 December 2022, ESMA updated a number of its Q&A documents including that on the application of the AIFMD.

For further information please see [link the CBI's markets update](#) provided as well as our [full Simmons Insights Article](#).

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| Sector Focus | Asset Management and Investment Funds, Institutional Managers and Regulated Funds |
| Links | Simmons Insights Article and Issue 14 CBI Markets update |

CBI Updates

CBI publishes Markets Update no1 of 2023

On 3 February 2023, the CBI published Issue No 1 2023 of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

Of the various items covered in this Issue, we would highlight, in particular, the following:

- ESMA issues its first opinion on the draft European Sustainability Reporting Standards;
- ESMA publishes data for the quarterly liquidity assessment of bonds;
- ESMA consults on the review of the methodology on stress test scenarios for money Market Funds; and
- ESMA reviews the scope of clearing derivatives trading obligations.

For further information please see [link the CBI's markets update](#) provided as well as our full [Simmons Insights Article](#).

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| Sector Focus | Asset Management and Investment Funds |
| Links | Simmons Insights Article and Issue 1 CBI markets update |

CBI publishes Markets Update no2 of 2023

On 17 February 2023, the CBI published Issue No 2 2023 of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

For our summaries of the previous issues, please see the right-hand column of this page.

The new Update contains two items:

1. Process clarifications for UCITS and AIFs documentation updates following Commission Delegated Regulation (EU) 2023/363; and
2. Extension of the application date for the clearing obligation and bilateral margin requirements for OTC derivative contracts not cleared by a CCP related to counterparties which are part of the same group.

For further information please see [link the CBI's markets update provided as well as our full Simmons Insights Article.](#)

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| Links | Simmons Insights Article and Issue 2 CBI markets update |

CBI publishes Markets Update no3 of 2023

On 28 February 2023, the CBI published [Issue No 3 2023](#) of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

For our summaries of the previous issues, please see the right-hand column of this page.

The new Update contains a number of items, including the following:

CBI publications:

- CBI ends COVID related regulatory flexibility for Investment Management, Investment Firms and Services Provider; and
- CBI updates marketing guidance fro UCITS and AIFs.

ESMA publications:

- New Q7A on the application of the UCITS Directive
- DORA – the ESAs meet financial sector stakeholders
- ESMA's first market report on EU MMFs
- ESMA's Trends, Risk and Vulnerabilities Report notes high risk amid fragile markets

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

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| Links | <u>Simmons Insights Article</u> and <u>Issue 3 CBI markets update</u> |

CBI publishes Markets Update no4 of 2023

On 20 February 2023, the CBI published Issue No 2 2023 of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

For our summaries of the previous issues, please see the right-hand column of this page.

The new Update contains two items:

1. Process clarification for UCITS and AIFs documentation updates following Commissions Delegated Regulation (EU) 2023/363; and
2. Extension of the application date for the clearing obligation and bilateral margin requirements for OTC derivative contracts not cleared by a CCP related to counterparties which are part of the same group.

For further information please see [link the CBI's markets update provided as well as our full Simmons Insights Article.](#)

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| Links | Simmons Insights Article and Issue 4 CBI markets update |

CBI's streamlined process for document updates

The CBI has unveiled a streamlined process for funds filing updated disclosures following the recent changes to the SFDR RTS.

The CBI has published [Process clarifications for UCITS and AIFs pre-contractual documentation updates in relation to the Commission Delegated Regulation \(EU\) 2023/363](#).

Why has this been published?

[Complementary Delegated Regulation \(EU\) 2022/1214](#), from July 2022, made under the Taxonomy Regulation, covers fossil gas and nuclear activities.

Among other things, it required amendments to be made to the [SFDR Level 2 RTS](#). As we [previously reported](#), these amendments were published in the [Official Journal](#) on 17 February 2023.

In the context of Irish funds, they will result in updates to pre-contractual documentation for UCITS, RIAIFs and QIAIFs.

In light of this, the CBI has established a streamlined filing process for pre-contractual document updates based on the revised requirements, with UCITS ManCos and AIFMs being required to certify compliance via an attestation.

What do we know about the new CBI process?

The CBI's [new publication](#) provides details of how this process will work through a series of seven Q&As (which we summarise below).

Note that the CBI specifically points out:

- responsibility rests with the relevant Manager to ensure compliance with the applicable requirements
- the streamlined regime should not be seen as providing scope for a lesser quality of disclosures than would otherwise be produced.

For further information please see [link to our full Simmons Insights Article](#).

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CBI Updates

Irish Individual Accountability Framework – the CBI consults

On 13 March 2023, the CBI published CP153, “Enhanced governance, performance and accountability in financial services” (the CP).

This follows the signing into law on 9 March 2023 of the *Central Bank (Individual Accountability Framework) Act 2023* (the Act).

The CP sets out proposals on a number of key aspects of implementing the new Individual Accountability Framework (IAF) as introduced by the Act.

Published with the CP are two annexes, the first containing draft Regulations and the second draft Guidance under the Act. These are intended to clarify the CBI’s expectations for the implementation of three aspects of the IAF:

- the Senior Executive Accountability Framework (SEAR);
- the Conduct Standards; and
- enhancements to the Fitness & Probity (F&P) regime.

The consultation period closes on 13 June 2023.

What does the CP set out?

The IAF includes the following key elements:

- Senior Executive Accountability Regime (SEAR);
- Conduct Standards;
- Enhancements to the current Fitness & Probity (F&P) Regime;
- Amendments to the Administrative Sanctions Procedure (ASP)

For further information please see [link to our full Simmons Insights Article](#).

Next Steps

- Simmons & Simmons will shortly be hosting a series of short webinars on aspects of the new IAF.
- For more information on these and details on how to register, please contact [Aine Hayes](#).

Timing

The CP proposes a number of deadlines in respect of the IAF implementation timeline.



- March 2023: The CBI plans to issue revised F&P Investigations Regulations and F&P Investigations Guidance
- 13 June 2023: The consultation period for CP153 closes
- 31 December 2023: Conduct standards start to apply
- 31 December 2023: F&P – certification and inclusion of holding companies to start to apply
- 1 July 2024: proposals in respect of the SEAR regulations to apply to in-scope firms

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UCITS costs and fees – CBI’s Dear CEO letter

In January 2021, ESMA launched a Common Supervisory Action (CSA) in order to review practices around costs and fees charged to UCITS. The CSA was conducted by the National Competent Authority (NCA) of each Member State, among them the CBI.

Our summary of the aims of the CSA can be found [here](#).

Our summary of ESMA’s findings, published in June 2022 can be found [here](#).

The CBI has now published a [Dear CEO letter](#) (the Letter) which sets out the CBI’s overall findings, examines six key areas of concern and identifies actions it expects firms to take to mitigate these issues.

The CBI makes clear that it expects the Letter to be discussed and considered by Boards of UCITS firms and that these take appropriate action without delay.

Those with queries about the Letter’s contents should contact CommonSupervisoryAction@centralbank.ie.

What did the CBI find?

Although the CSA did not identify UCITS being charged material undue costs, a number of deficiencies were found where management companies (ManCos) set the cost and fee structure for investment funds. These deficiencies “substantially increase the risk that investors will be subject to undue costs and may negatively impact on investment returns”.

In setting the cost and fee structure, a firm must act in the best interests of investors and treat investors fairly – this must be evidenced by clearly documented policies and procedures, with clear oversight and approval from senior management.

Costs and fees charged (and the methodology for their calculation) should be reviewed at least annually, the review being documented and an assessment undertaken as to whether the costs and fees charged to investors remains appropriate in light of:

- the fund’s investment objective and strategy of the fund;
- the target and actual level of performance achieved; and
- the role and responsibilities of service providers.

Given the key deficiencies identified by the CBI (see below), UCITS should make the oversight and calibration of costs and fees a priority for UCITS.

CBI Updates

CBI Updates

UCITS costs and fees – CBI’s Dear CEO letter continued...

What did the CBI find? (continued)

Six key findings and expectations

1. A lack of policies and procedures on costs and fees;
2. Periodic reviews of costs and fees
3. Design and oversight of fee structure
4. Efficient Portfolio Management;
5. Fixed Operating Expense models; and
6. Non-discretionary investment advisor charge.

For further information please see link the our full Simmons Insights Article.

Next Steps

- Firms should calculate costs and fees on an ongoing basis, in a fair and equitable manner which serves the best interests of investors.
- To address the concerns arising out of the CSA, all firms which manage both UCITS and AIFs should conduct a gap analysis of the findings and expectations above and, where appropriate, put a plan in place to address any gaps identified. They should do this by the end of Q3 2023.
- Where a firm does not comply with the requirements raised in the Letter, the CBI may have regard to the consideration the firm has given to the matters raised in the Letter in the course of its future supervisory engagement.
- The findings from the CBI’s review will inform future policy development and enhancements to the current regulatory framework for the supervision of costs and fees.

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CBI Updates

CBI issues important update

On 20 March 2023, the CBI issued an important update (the “Update”) via the CBI portal to all portal administrators. The Update advised that the CBI’s online reporting system known as the (“ONR”) will be permanently disabled in H2 2023.

In order to access and file any required returns this will now move over to the CBI’s portal.

Fitness and probity services will also move from the ONR to the CBI portal with the transitional operations from 24 April 2023. In addition to the new system to submit the fitness & probity individual questionnaire, the CBI has made an update to the questionnaire itself relating to:

- More specific questions about experience and qualifications
- Explanation of remuneration clawbacks for alleged wrongdoing
- Employer reference questions
- Compliance with internal targets on diversity
- Process for identifying conflicts of interest

Next Steps

- All portal administrators are to strongly encourage all portal users in your firm to link their CBI portal and ONR accounts by the very latest the end of June 2023 to avoid potential disruption.
- Linking the CBI portal and ONR accounts will ensure that users retain the same permissions and access levels for the CBI portal that are currently held of the ONR.

Timing

Disablement – ONR login

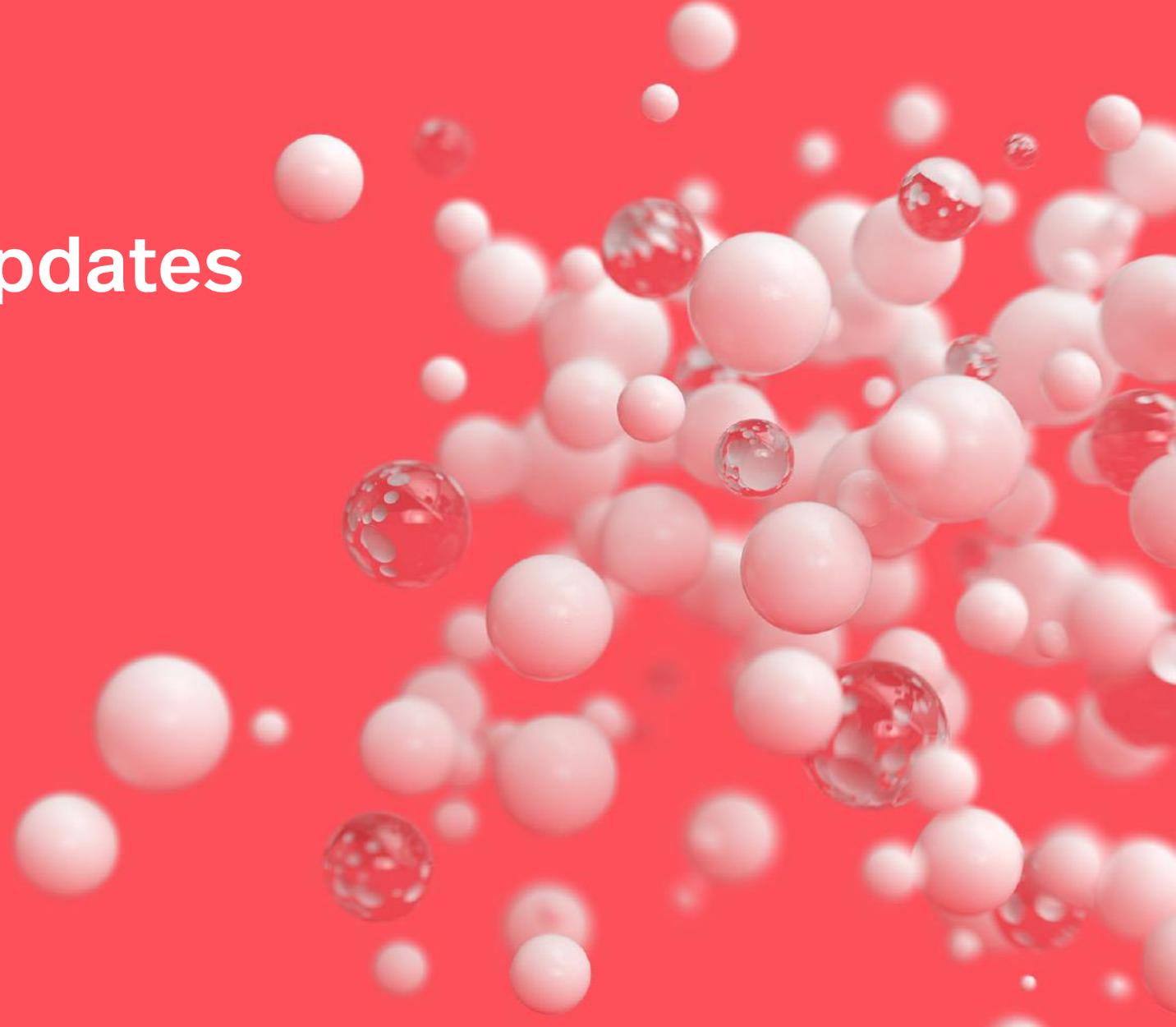
- H2 2023

Changes to Fitness & Probity Portal Services

- Changes come into effect from 24 April 2023.

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| Links | CBI Guidance on new F&P application process |

European Union (EU) Updates



European Union Updates

Digital Operational Resilience Act (“DORA”)

On 16 January 2023 (Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector came into force. DORA forms part of the EU’s Digital Finance Package (DFP).

Enacted in response to financial entities increased dependence on ICT, as a result of Covid-19 and subsequent remote working arrangements, which are now clearly here to stay, DORA aims to combat the heightened cyber risks by providing a harmonised and comprehensive structure on digital operational resilience for European financial institutions.

One of the major effects of the frameworks introduction is that it doesn’t just cover all authorised European financial entities, third-parties who provide crucial ICT-related services to these institutions also fall within the regulations remit.

What this means for businesses:

- DORA requires financial entities to have in place and maintain comprehensive internal governance and control frameworks for the “effective and prudent” management of ICT risks.
- Within this framework, comprehensive testing programmes must be implemented. This involves engaging independent parties to conduct institution wide ICT testing, with firms required to test vital systems at least once a year.
- DORA requires financial entities to establish a specific ICT-related management process to detect any potential incidents or threats, and in the event of any incidents arising, have a procedure in place to manage, record and notify of such. Entities are further required to assess the seriousness and impact of any incidents, based off a set of criteria outlined in secondary legislation.
- DORA requires policies and recovery plans to be implemented, ensuring quick recovery and minimal disruption to operations as a result of ICT-incidents.
- In line with these heightened security procedures, financial entities may only enter into contractual arrangements with ICT third-party service providers that comply with appropriate information security standards. DORA further sets out a list of elements that a contractual arrangement between such parties will have to include.
- DORA permits the exchange, between financial entities, of information and intelligence in regards to cyber threats. This is with the aim of promoting co-operation within the harmonised framework, reverting back to the overall aim of enhancing cyber security.
- DORA places supervision of compliance with its requirements with the respective competent authorities responsible for overseeing the in-scope financial entities.

For further information on the harmonised security framework across the EU financial sector, please see link to DORA.

Timing

- 17 January 2025 – DORA will become applicable.



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| Links | DORA |

European Union Updates

International Organisation of Securities Commissions (“IOSCO”)

On 27 January 2023, the IOSCO published edition 2 of its Investment Funds Statistic Report. (“IFSR”). The IFSR outlines new insights into the global funds industry. The IFSR was drafted from information collected from IOSCO members’ supervisory data which was current as at the end of 2021. *For further information, please see links below*

“The IFSR observes that:

- Leverage levels across investment funds are similar to those of the previous year, with some variations depending on the type of fund. For example, reported metrics suggest declines in the leverage of hedge funds;
- At an aggregate level, hedge funds’ portfolio liquidity appears to exceed considerably the liquidity normally offered to investors;
- Similar to last year, open-ended funds are not highly leveraged in terms of both derivatives use and financial leverage; and
- Open-ended funds’ portfolio liquidity as reported appears managed in line with the liquidity normally offered to investors”.

For further information, the IOSCO press release and the IFSR are linked below.

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| Sector Focus | Asset management and Investment Funds |
| Links | IOSCO press release and IFSR |

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