

# Simmons & Simmons

Irish Legal & Regulatory Quarterly Update  
1 January – 31 March 2021



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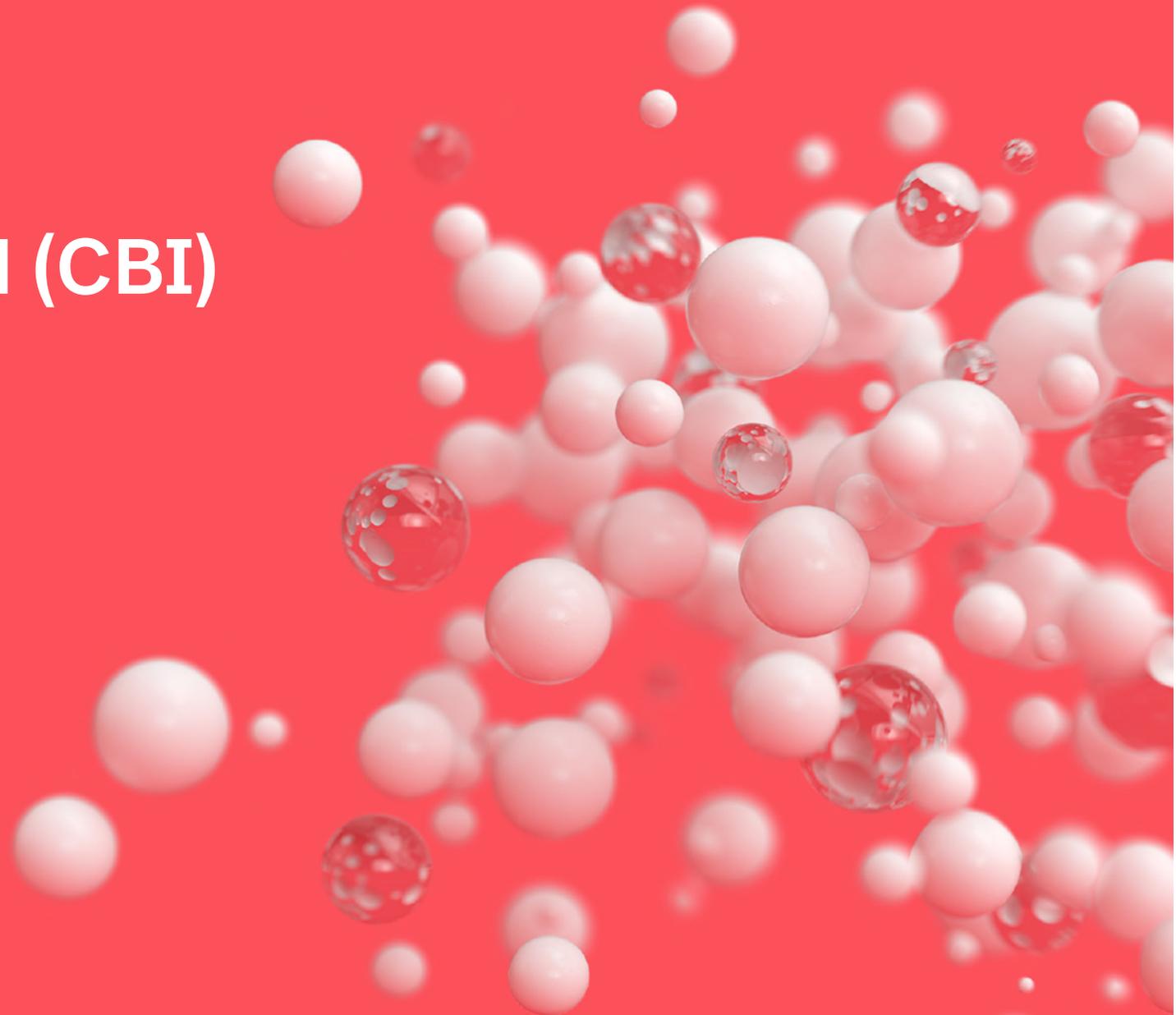
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# Central Bank of Ireland (CBI) - Updates



## Guidelines on performance fees

The CBI intends to comply with ESMA’s Guidelines on performance fees in UCITS and certain types of retail AIFs (the Guidelines).

As a result of ESMA’s publication of its Final Report on Guidelines on performance fees for certain types of authorised funds, the CBI has issued a Consultation Paper (CP 134) regarding its incorporation of Guidelines into its regulatory regime.

CP 134 sets out the approach which will be undertaken by the CBI in respect to how the CBI’s requirements will work in conjunction with the ESMA Guidelines.

The CBI is proposing a phased implementation of the Guidelines. This phased approach is due to allow for the consultation in respect to amending the current domestic framework to adopt the Guidelines and to maintain a consistent approach for retail investor funds.

The CBI intends to release a specific performance fee guidance. The CBI states that the Guidelines will apply immediately to new funds created after 5 January 2021 and for funds existing from 5 January 2021 where a performance fee is introduced. If a fund was in existence as at 5 January 2021 and uses a performance fee, the Guidelines apply by the beginning of the financial year following 5 July 2021.

*For further information the link to the ESMA Guidelines and CP 134 has been included below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland and EU
<b>Sector Focus</b>	Asset Management & Investment Funds
<b>Links</b>	<a href="#">ESMA Guidelines Compliance Table</a> , <a href="#">Consultation Paper (CP 134)</a> , <a href="#">Simmons Insights Article</a>



### Timing

**5 Jan 2021** ESMA Guidelines applies

**15 Jan 2021** Responses to CP 134 were to be submitted to the CBI



### Next steps

- Consider related developments in more detail and whether any updates are required to fund documents

## CBI issues final guidance on share class features of closed-ended QIAIFs

In our last [Legal & Regulatory update](#) we advised that the CBI had published its “Guidance on share class features of closed-ended QIAIFs” (CP 132)

In CP 132, the CBI proposes changes to its AIF Rulebook concerning how certain rules are applied in the context of the share class structure for closed-ended AIFs.

On 2 February 2021, the CBI issued its Final Guidance with the feedback statement to its consultation. The key factors of the CBI’s guidance are outlined below:

- Only applies to closed-ended QIAIFS (CE QIAIFS);
- Differentiated share classes are permitted in a CE QIAIF (subject to certain conditions);
- Excuse and exclude provisions;
- Stage investing; and
- Management participation.

The CBI’s Final Guidance will no doubt be of interest to those who invest in various private funds regimes.

*For further information please see our [Insights article](#) and the [CBI’s Guidance and Feedback Statement](#) linked below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Asset Management & Investment Funds, Private Funds, Financial Services Regulation
<b>Links</b>	<a href="#">Simmons Insights Article</a> , <a href="#">CBI Guidance</a> , <a href="#">CBI Feedback Statement</a>

## **CBI issues guidance on Depositories for AIFs under Regulation 22(3)(b) of the AIFM Regulations (“Depositories of Assets other than Financial Instruments” or “DAoFI”)**

On 2 February 2021, the CBI issued its guidance in respect the framework surrounding DAoFI (the “Guidance”).

The CBI has issued the Guidance following the Notice of Intention it issued on 19 November 2018. Based on the responses received by the CBI, the CBI recognised the need to provide for entities to act as a depository under Regulation 22(3)(b) of the AIFM Regulations 2013.

The Guidance outlines the following main features in respect to its authorisation requirements for DAoFI:

- The DAoFI may act as a depository for particular types of AIFs which typically invest in assets not falling within the classification of a financial instrument capable of being held in custody. The reason being is that the depository requirements are not as burdensome and thus, a tailored approach with regard to the depository can be applied.
- As mentioned above the DAoFI, may only act for certain types of AIFs. These AIFs being QIAIFs which have no redemption rights exercisable for at least 5 years from the date of initial investment and do not invest in financial instruments capable of being held in custody.
- A DAoFI may to a limited extent invest in financial instruments which are subject to custody obligations. However, where this situation arises, the CBI expects that the DAoFI will delegate this function to a depository.

The CBI has not provided an exhaustive list of assets acceptable for a DAoFI to keep in custody. Rather the CBI will update its AIFMD Q&A where necessary.

*For further information see the CBI’s Guidance linked below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Asset Management & Investment Funds, Financial Services Regulation
<b>Links</b>	<a href="#">CBI Guidance</a>

## Enhancing Engagement with CBI Stakeholders

CBI proposes enhancement to stakeholder engagement.

On 11 February 2021, the CBI published *Consultation Paper 136: Enhancing our Engagement with Stakeholders* (CP 136).

As the title suggests CP 136 seeks to enhance the CBI's engagement with its stakeholders in certain areas to enhance performance of the financial system and identify risk which may be developing.

CP 136 identifies the following 4 "Proposals" to build on existing stakeholder engagement:

- Enhancing engagement with civil society and with consumer representatives;
- Industry engagement;
- Financial system conference; and
- Engagement with business representatives.

To read more about CP 136, please see the link below.

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Financial Services
<b>Links</b>	<a href="#">Consultation Paper (CP 136)</a>



### Timing

**11 May 2021** closing date for responses



### Next steps

- Responses to CP 136 should be submitted to [C136@centralbank.ie](mailto:C136@centralbank.ie)

## The CBI has a new portal

The CBI has implemented a new platform called the “*Central Bank of Ireland Portal*” (the “Portal”).

This Portal came into effect on 15 February 2021. The Portal allows authorised users to request certain post-authorisation updates/amendments.

A full list of the changes able to be made via the Portal can be found [here](#). The Portal has been developed to submit ad hoc updates throughout the year as a “one-stop-shop”. It eliminates the need for the use of multiple email addresses.

Additionally, the CBI advised that whilst the annual KIID return should continue to be submitted via its ONR portal, the process for submitting updates to KIIDs intra-year is now required to be lodged via the Portal.

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<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Asset Management & Investment Funds, Financial Services
<b>Links</b>	<a href="#">Central Bank of Ireland Portal - List of Request Changes available per industry</a>



### Timing

**15 Feb 2021** The Portal came into effect



### Next steps

- Consider whether post authorisation updates can now be submitted via the Portal
- Consider delegate access to the Portal

## Securities Markets Risk Outlook Report

On 8 February 2021 the CBI published its first Securities Markets Risk Outlook Report (the “Report”). The aim of the Report is to inform regulated financial service providers, investors and market participants of the main conduct risks the CBI foresees to securities markets, more particularly to wholesale securities markets.

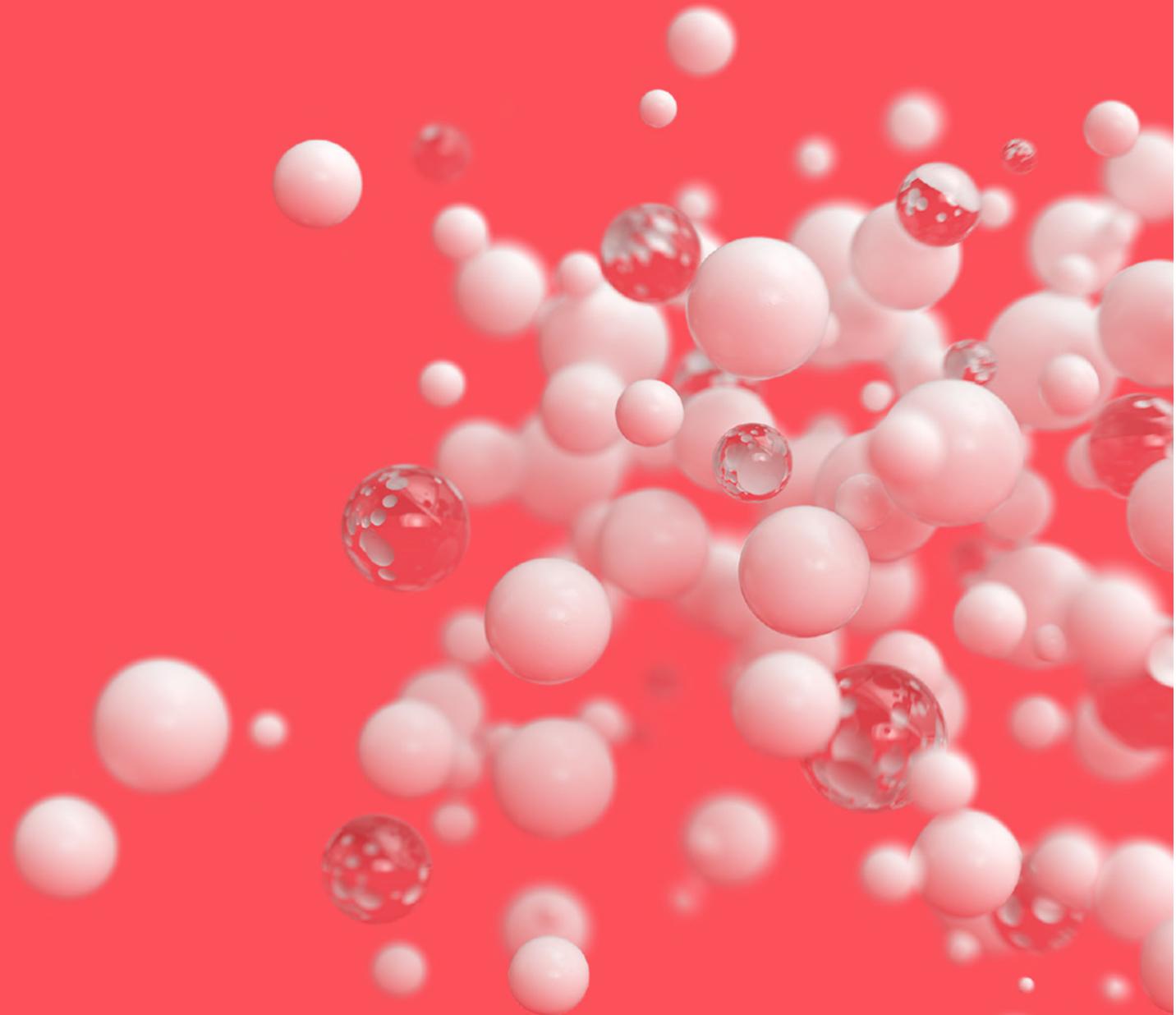
The Report, emphasises the CBI’s expectations for firm’s to review and mitigate certain risks. These risks include:

- Identifying all Brexit risks related to their business and have appropriate contingency plan in place;
- Migration towards Greener Securities Markets;
- Complexity of products – ensure products are designed with investor’s needs in mind;
- Transparency primarily surrounding costs and fees and indices used;
- Misconduct Risk in Securities Markets; and
- Accuracy in data.

*For further detailed discussion of the CBI’s risks highlighted above, please see link to the Report below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Financial Institutions
<b>Links</b>	<a href="#">CBI Report</a>

# Irish Updates



## Irish Private Funds – a new era

There is a lot of excitement in the private funds world at present in relation to the recent enhancements to the Irish Investment Limited Partnership (ILP) and private funds framework.

The Investment Limited Partnerships Act, 1994 has been modernised and updated significantly by the Investment Limited Partnership (Amendment) Act, 2020 including to permit the establishment of umbrella ILPs with segregated liability between sub-funds, to permit the migration of non-Irish limited partnerships into Ireland as an ILP by way of continuation, the use an alternative foreign name and perhaps most significantly, to expand and modernise the list of “safe-harbour” actions which a limited partner in an ILP can undertake without risking loss of limited liability.

Notably, there has also been an update to the regulatory framework for closed-ended funds. ILPs are required to be regulated and it is expected that the vast majority will be authorised as Qualifying Investor Alternative Investment Funds or “QIAIFs” which can avail of a 24 hour approval process by the CBI, without any review of the fund documentation. Certain requirements applicable to the GP of an ILP, which were out of step with other leading private fund domiciles and which negatively impacted on the speed to market of an ILP, were removed when the CBI updated its AIFMD Q&A document in November 2020. The CBI’s previous approach with classes of interests in an Irish fund also meant that certain market standard provisions for private funds such as providing for excuse and exclude rights, stage investing and also a standard carried interest and distribution waterfall proved challenging. The CBI no longer applies this approach to closed-ended funds which was confirmed by way of updated guidance issued in February 2021.

*For further information the link to our Insights article, the ILP Amendment Act and the AIFMD Q&A which have been linked below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Asset Management & Investment Funds, Private Funds, Financial Services Regulation
<b>Links</b>	<a href="#">Simmons Insights Article</a> , <a href="#">ILP Amendment Act</a> , <a href="#">AIFMD Q&amp;A</a>

## The Irish ILP - an Irish tax perspective

Succinct tax analysis of the new Irish Investment Limited Partnership by our tax teams in Dublin and Luxembourg has been set out in our Insights article linked below.

Thanks to the recent changes to the Irish ILP Act, the ILP has become a good alternative to limited partnerships in other jurisdictions and to Irish Collective Assets-management Vehicles (“ICAVs”) in Ireland. It is now a very attractive fund vehicle for investments in illiquid assets.

Our Insights article takes a look at the Irish tax treatment of the ILP focusing on:

- The Irish tax treatment of the ILP;
- Non-Irish resident Investors;
- Irish resident Investors;
- Withholding Tax and Treaty Access;
- No 8 year roll up regime;
- No Irish real estate fund withholding tax;
- VAT;
- Comparison with the Luxembourg special limited partnership; Tax at the level of the underlying investment; and
- filing obligations.

*For further information the link to our Insights article which has been included below .*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	Ireland
<b>Sector Focus</b>	Asset Management & Investment Funds, Private Funds, Financial Services Regulation
<b>Links</b>	<a href="#">Simmons Insights Article</a>

## Virtual asset service providers in Ireland

The new Irish anti-money laundering act, which transposes certain provisions of the AMLD5 into Irish law, will bring virtual asset service providers (“VASPs”) in scope of the Irish AML regime.

### Background

One of the aims of the AMLD5 is to bring providers engaged in exchange services between virtual and fiat currencies, and custodian wallet providers, within the scope of the EU's anti-money laundering and countering the financing of terrorism ("AML/CFT") framework. The reason for this is that, in the EU's view, the anonymity of virtual assets allows their potential misuse for criminal purposes.

### The 2021 Act

In this regard, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 (the "Act") amends the current Irish AML/CTF framework, which is set out in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended).

In respect to virtual currencies, the Act contain new definitions for “virtual asset service provider”, “virtual asset” and “custodian wallet provider” and brings VASPs within the meaning of “designated person”. The Act also summarises the obligations of designated persons under the Irish AML regime. The Act provides that a person shall not carry on business as a VASP unless the person has registered with the CBI. The CBI has set up a page [link page] which contains useful information for VASPs, including a sample VASP AML/CFT Registration Form.

*For further information a link to our full article has been included below.*

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<b>Sector Focus</b>	Asset Management & Investment Funds, Financial Institutions
<b>Links</b>	<a href="#">Simmons Insights Article</a>

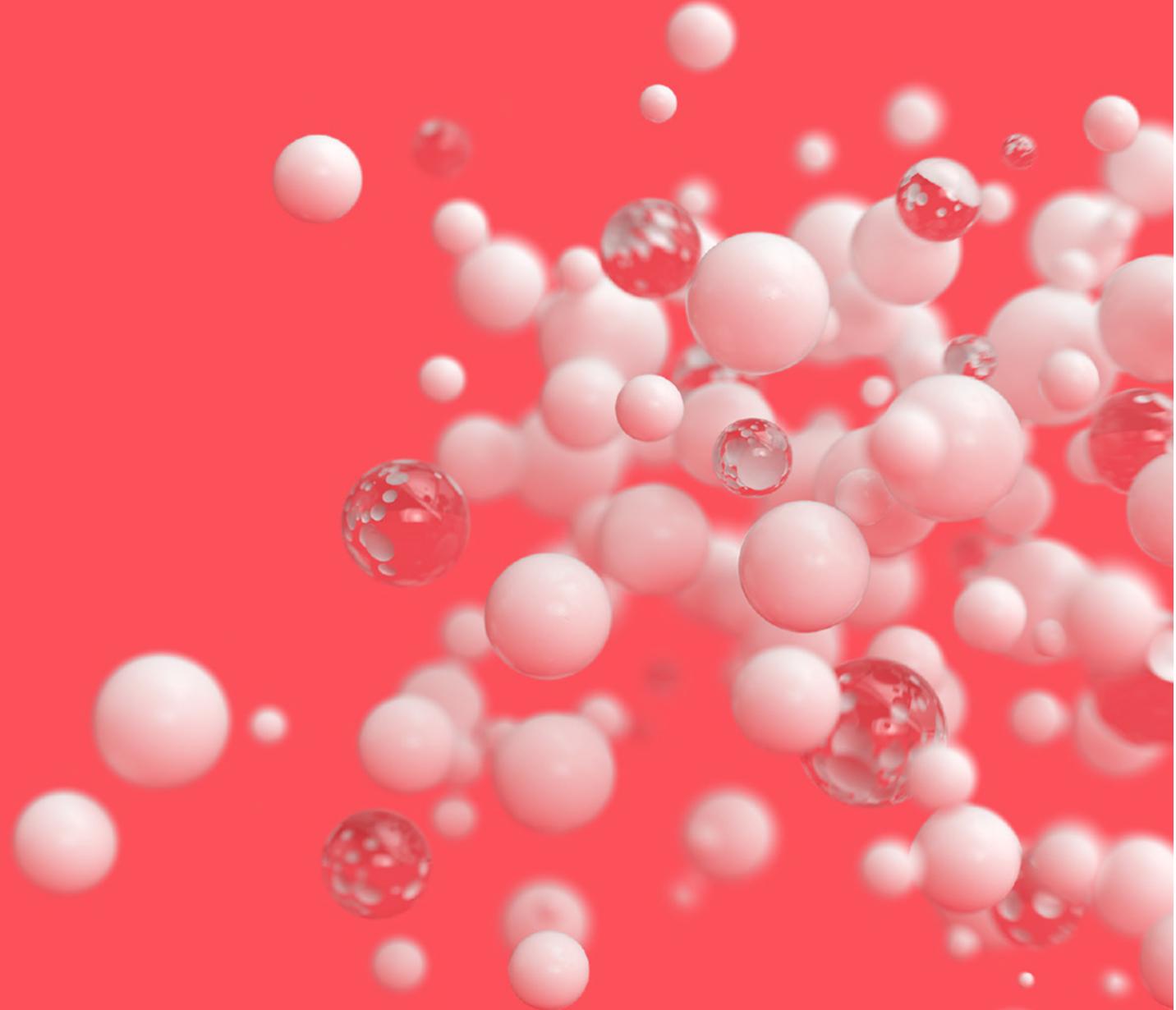


### Next steps

As many VASPs will be becoming designated persons for the first time, they should review their AML/CTF frameworks and the relevant legislation and guidance. As soon as the Act enters into force, all applicants should submit a Pre-Registration Information Form to the Central Bank at [VASP@centralbank.ie](mailto:VASP@centralbank.ie), to request a Central Bank Institution Number.

These new provisions are similar to the UK regime which entered into force on 10 January 2020. It is also expected that being within the AML/CTF framework will make carrying on business easier for those VASPs that are registered in Ireland, for example by making it more straightforward to open bank accounts.

# Irish Government



## Ireland for Finance Action Plan 2021

On 11 February 2021 the Department of Finance published its action plan (“Action Plan”) for the development of Ireland’s internal financial services sector.

The Government’s Action Plan has identified the following areas as priority areas:

- Sustainable finance;
- Diversity;
- Regionalisation; and
- Digital finance.

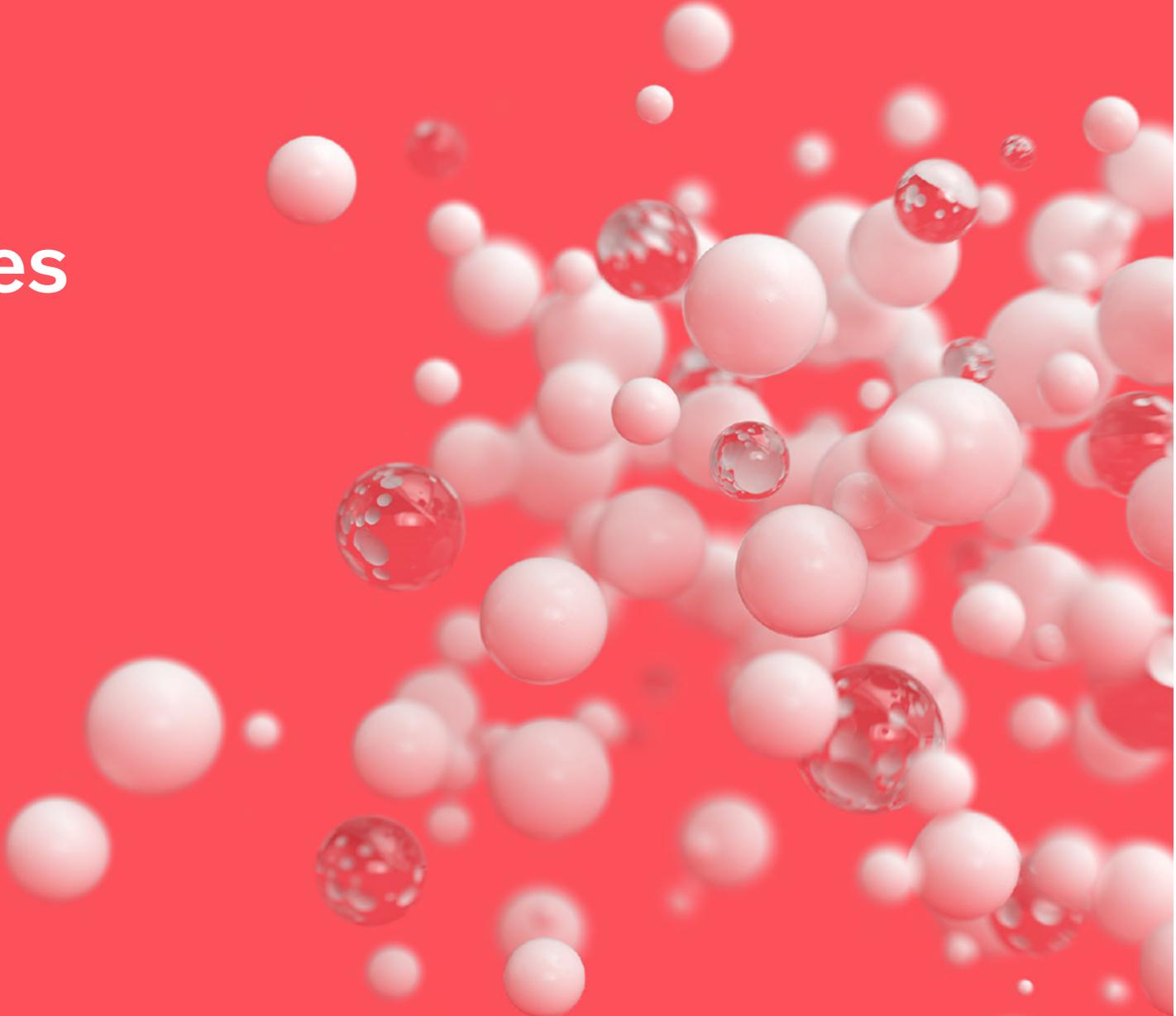
The Action Plan highlights the growing activity and employment across MiFID Firms, AIFMs and UCITS ManCos. The investment funds industry together with the ILP features in the Action Plan as a new Government measure. The Government has recognised the need to meet the demands of a growing private equity sector.

Additionally, the Action Plan has placed a significant spotlight on sustainable finance. This is especially true in a fund context in the Action Plan has placed specific emphasis on responsible investments.

*For further detailed discussion of the Government’s Action Plan, please see link included below.*

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<b>Sector Focus</b>	Asset Management & Investment Funds, Financial Services
<b>Links</b>	<a href="#">Ireland for Finance Action Plan 2021</a>

# European Union Updates



## Final Report on draft Regulatory Technical Standards for SFDR published

On 2 February 2021, the European Supervisory Authorities (“ESA”) provided its Final Report (the “Report”) to the European Commission (“EC”). This final Report also included draft Regulatory Technical Standards (“RTS”) in respect to the “content, methodologies and presentation of disclosures pursuant to the EU Regulation on sustainability-related disclosures.”

These draft RTS have outlined where further disclosures are required in respect to certain products. These include:

- Details of the presentation and content of the information in relation to the principle of “do not significantly harm”;
- A disclosure statement on an entities website describing its policy surrounding the adverse impact of their investment decisions on SFDR factors;
- Pre-contractual information in respect to Article 8 and 9 products;
- Website disclosures relating to Articles 8 and 9 products; and
- Periodic reporting for Article 8 and 9 products.

*For further information the link to the Final Report has been included below For further information on Sustainable Financing and ESG Investment see the link to the Simmons microsite below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	European Union
<b>Sector Focus</b>	Asset Management & Investment Funds, Financial Institutions
<b>Links</b>	<a href="#">Final Report, Simmons - Sustainable Financing and ESG Investment</a> , <a href="#">Simmons Insights Article</a>

### Timing

- May 2021** EC endorsement of the RTS expected.
- 1 Jan 2022** proposed application of the RTS



### Next steps

- The EC is expected to endorse the RTS within 3 months
- Financial market participants and financial advisers were required to have already applied the majority of SFDR related disclosures from 10 March 2021, the RTS will not be required to be applied until a later time. The ESA have suggested that the draft RTS should apply from 1 January 2022.

## The Framework Regulation

The EU's Regulation on the establishment of a framework to facilitate sustainable investment (the “Framework Regulation” or “Taxonomy”) was published in the Official Journal of the EU on 22 June 2020.

The Framework Regulation establishes a classification system (or taxonomy) to provide a common language to identify whether a given economic activity should be considered “environmentally sustainable” – this, in turn, allows it to determine how far an investment is environmentally sustainable. The Taxonomy is intended to be used by the EU, by EU member states, by corporate issuers, and by financial services firms, when assessing, and disclosing information on, environmental sustainability.

It’s worth emphasising that the Taxonomy focuses only on the “E” of the ESG concepts of Environmental, Social and Governance concerns. While the Framework Regulation refers obliquely to the potential for the taxonomy to be expanded in time to cover other sustainability matters, for the moment it deals with exclusively environmental sustainability. Much of the detail in the Framework Regulation is focused on the regulatory architecture for establishing and operating the taxonomy.

The Framework Regulation establishes a phased switch-on of the taxonomy which the first deadline to commence from 1 January 2022.

*For further information on Sustainable Financing and ESG Investment see the link to the Simmons microsite below.*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	European Union
<b>Sector Focus</b>	Asset Management & Investment Funds, Financial Institutions
<b>Links</b>	<a href="#">Final Report, Simmons-Sustainable Financing and ESG Investment</a>

<b>Timing</b>
<b>10 Mar 2021</b> The SFDR has an earlier start date of 10 March 2021, and this also imposes pre-contractual disclosure obligations. All financial market participants should now have made their respective SFDR updates and related filings in relation to the financial products which they manage
<b>1 Jan 2022</b> Environmental objectives and disclosures on climate change mitigation and climate change adaptation applies
<b>1 Jan 2023</b> Environmental objectives and disclosures on sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control and protection and restoration of biodiversity and ecosystems applies

## PRIIPs – the ESAs bow to Commission pressure to vote through draft RTS

Following a letter from the EC, the ESAs have now agreed draft level 2 Regulatory Technical Standards (“RTS”) under the PRIIPs Regulation (which they were unable to agree in July 2020). As we have [previously reported](#), the Commission had given the joint Committee of the ESAs six weeks in which to agree draft RTS, which the ESAs would then submit to the Commission for adoption. As a result, the ESAs published a [draft Final Report](#), containing their preferred (but not formally agreed) text.

### So .. what next?

This leaves us with a number of problems:

UCITS have an exemption from having to provide a PRIIPs KID as well as a KIID under the UCITS Directive, but this is due to run out on 31 December 2021 and the draft Final Report recommends avoiding the co-existence of the PRIIPs KID and the UCITS KIID. Which means that industry still doesn't know whether the exemption will be extended or whether new rules - still to be finalised - will have to be implemented in the space of a few months.

One consequence of the adoption by UCITS of the PRIIPs KID is that the requirement to provide a UCITS KIID arises pursuant to Article 80 of the UCITS Directive itself and so that must seemingly be “switched off” to avoid the doubling up of the requirement to provide both a UCITS KIID to all investors and a PRIIPs KID to retail investors from 1 January 2022 (or later if the exemption for UCITS is extended by the Commission)

The Commission (along with elements of the European Parliament), to date, has been opposed to the inclusion of past performance. While the ESAs were mandated to submit the draft RTS, there is no obligation on the Commission to approve these and formally propose them to the European Parliament and the Council of the EU. Further disagreement will mean further delay in the passing of the RTS - leaving even less time for industry to implement if no extension to the UCITS exemption is permitted.

*For further information the link to our full article has been included below.*

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<b>Regional impact</b>	European Union
<b>Sector Focus</b>	Asset Management and Investment Funds, Financial Institutions
<b>Links</b>	<a href="#">Simmons Insights Article</a> , <a href="#">Draft Final Report</a>

## UCITS liquidity risk management – ESMA reports findings of its CSA

Several areas for improvement are identified in ESMA’s findings on liquidity risk management in UCITS following its 2020 review with NCAs.

As we [reported](#) at the time, in January last year, ESMA and the EU’s National Competent Authorities (NCAs) launched a Common Supervisory Approach (CSA) into the supervision of how UCITS ManCos perform liquidity risk management (LRM) across the EU.

The CSA, which was in two stages, assessed whether (and how far) UCITS ManCos comply with LRM obligations and what implications this had on possible supervisory risks and market practice.

The first stage of the CSA involved each NCA requesting the large majority of the UCITS ManCos in its jurisdiction to supply quantitative data in order to get an overview of the supervisory risks faced. The second stage focussed on a sample of UCITS ManCos and UCITS and will entail more in-depth supervisory analyses.

On 24 March 2021, ESMA published a Public Statement which sets out its findings from the CSA. Overall, most UCITS ManCos were able to demonstrate that they have implemented and applied sufficiently sound LRM processes, with NCAs identifying only a small number of cases where there were significant liquidity risks, which could jeopardise the UCITS's capacity to meet redemption requests or honour other liabilities.

For a "very limited number of UCITS", ESMA reports that liquidity profiles pointed to potential asset/liability mismatch risks and these were only sometimes mitigated by the use of liquidity management tools.

The exercise also identified the need for improvements in certain key areas. As a result, NCAs are following up with market participants to address the supervisory findings identified by the CSA.

*For further information, please see [link to our full article below](#).*

<b>Update</b>	1 January to 31 March 2021
<b>Regional impact</b>	European Union
<b>Sector Focus</b>	Asset Management and Investment Funds
<b>Links</b>	<a href="#">Simmons Insights Article</a>

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