

Simmons & Simmons

Irish Funds & Regulatory Quarterly Update
1 October 2021 – 31 December 2021



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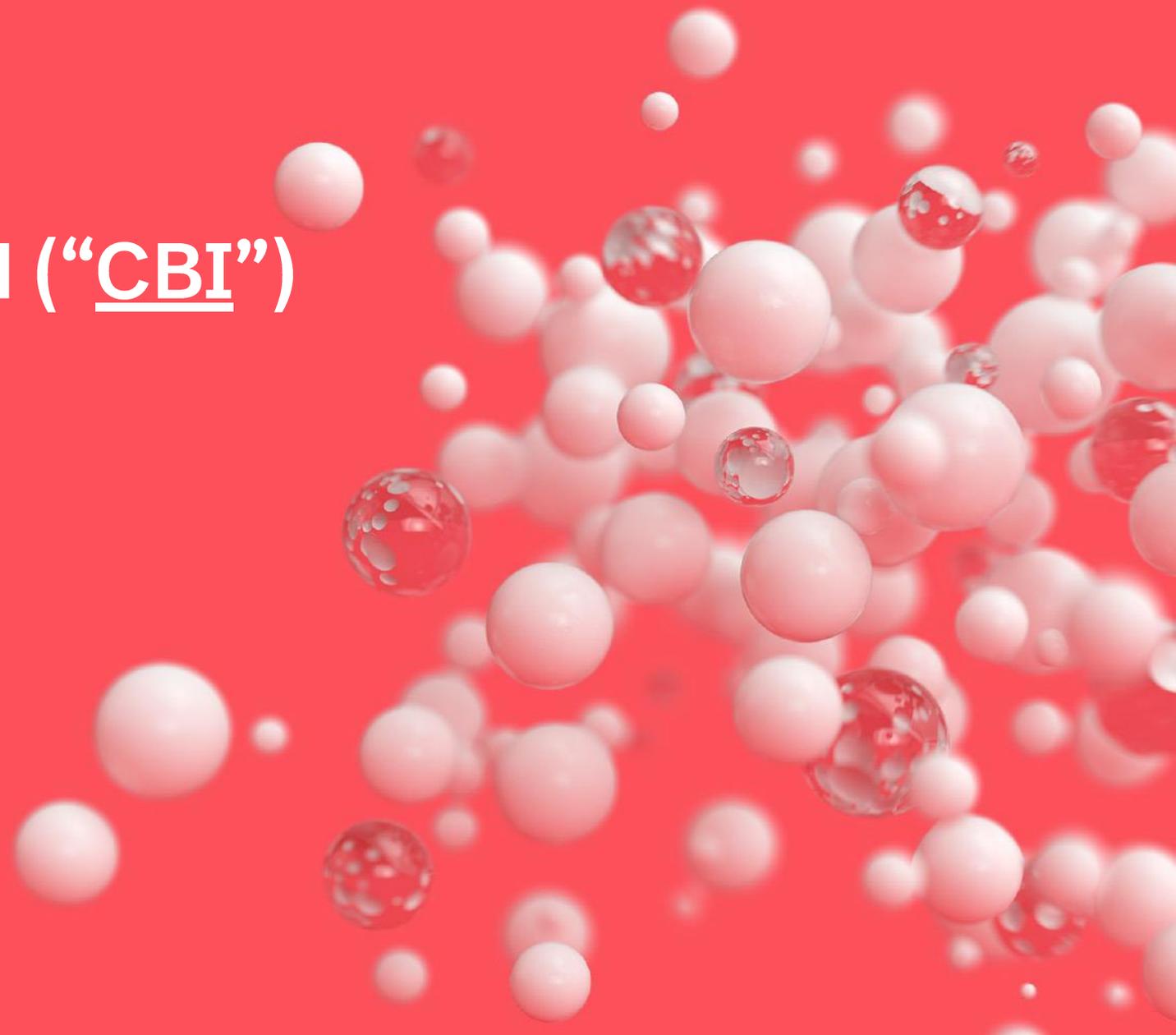
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Central Bank of Ireland (“CBI”) - Updates



PCF amendments and SEAR timing

The CBI published a notice of intention to amend the Pre-approval Controlled Functions (PCF) list by making the following changes:

PCF	Title	Proposed Change	Reason
PCF-16	Branch Manager	Expansion Previously restricted to branches in other EEA countries. Will now apply to all branches outside Ireland	UK no longer being a member of the EEA as a consequence of Brexit.
PCF-2	Non-Executive Director	Segregation Function will be split into: <ul style="list-style-type: none"> ● 2A: Non-Executive Director; and ● 2B: Independent Non-Executive Director. 	The purpose of this proposed amendment is to clarify the role of non-executive directors who are a fundamental safeguard within an RFSP's governance.
PCF-52	Head of AML and CTF	Segregation The PCF-15 role currently applies to a 'Head of Compliance with responsibility of AML and CTF'. The PCF-15 role would be updated to apply to a 'Head of Compliance'.	The purpose of this proposed amendment is to ensure that there is a dedicated role for the AML and CTF compliance function rather than that function being carried out by a Head of Compliance.
PCF-31	Head of Investment	Removal The PCF-31 role currently applies to a 'Head of Investment' while the PCF-30 role currently applies to a 'Chief Investment Officer'.	Given that these roles are effectively duplicated at present the Central Bank proposes to remove the PCF-31 role.

PCF amendments and SEAR timing continued...

SEAR Update

In a recent [speech](#), Director General Derville Rowland provided an update on the process to adopt SEAR, saying that when the relevant bill is adopted (expected in the first half of 2022), the Central Bank will launch a public consultation on the implementation of the individual accountability framework. Ms Rowland also stated that the Central Bank's initial focus will be embedding the framework into its processes and watching to ensure that regulated financial services providers embed it into their systems. During this initial period the Central Bank's task will be a supervisory one, not an enforcement one.

SEAR toolkit

Thank you to everyone that has registered their interest in our SEAR toolkit, an online tool based on our very popular [SMCR toolkit](#), which will help your firm comply with SEAR in Ireland. If you haven't yet done so, please register your interest [here](#).

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

Update	1 October – 31 December 2021
Regional impact	Ireland
Sector Focus	Financial Institutions
Links	PCF amendments and SEAR timing



CBI – Dear CEO Letter on ESG Expectations

The CBI recently issued a letter which sets out its supervisory expectations for regulated financial service providers when complying with their ESG obligations. These supervisory expectations focus on five key areas, as set out in our summary linked [here](#).

Update	1 October – 31 December 2021
Regional impact	Ireland
Sector Focus	Financial Institutions
Links	Simmons Summary and CBI “Dear CEO Letter”



ESG disclosures – Irish fast track process for UCITS and AIFs unveiled

The CBI confirms a fast-track filing process for Taxonomy Regulation disclosures for UCITS and AIFs with a deadline of 14 December 2021. Please see the CBI's published [series of Q&As](#). This sets out a fast-track filing process under which UCITS ManCos will be required to certify compliance with the requirements via an attestation. The CBI has also introduced a fast track process and filing date for compliance with SFDR RTS – this will be from 31 March 2022 to 27 May 2022.

After 1 January 2022 (for Taxonomy Regulation related updates) or 1 July (for SFDR RTS related updates) the fast-track process be no longer be available. Where a submission is made with the Central Bank subsequent to the relevant Deadline (see above), the disclosures will be subject to review by the Central Bank and may be subject to comment.

When can the fast track process be used?

The fast-track process is only available for Taxonomy Regulation and/or SFDR RTS related disclosures.

All other changes must follow the usual Central Bank review process for the relevant fund and should be submitted to allow sufficient consideration time.

The fast-track process is only available for funds that have received approval from the Central Bank.

Where a submission has been made to the Central Bank for the authorisation of a new fund/sub-fund and is currently under review, the Taxonomy Regulation and/or SFDR RTS disclosures should be included as part of the normal review.

For further information a link our Simmons Insights article as well as the CBI's Q&As has been included below.

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Regional impact	Ireland
Sector Focus	Asset Management & Investment Funds, Hedge Fund Managers, Institutional Managers, Regulated funds and Private Fund Managers
Links	Simmons Article and CBI Q&A

Deadlines

- For disclosures made under the Taxonomy Regulation no later than **14 December 2021**.
- For disclosures made under the SFDR RTS: filings may be made at any time after 31 March 2022; and they must be made no later than 27 May 2022.

CBI Implementation Notice regarding IFD/IFR

On 1 October 2021, the CBI published an implementation notice outlining its approach to National Competent Authority (NCA) discretions under the Investment Firms Directive ((EU) 2019/2034) (the IFD) (the Implementation Notice) and the Investment Firms Regulation ((EU) 2019/2033) (the IFR), which is available [here](#).

By way of background the principal purpose of the IFD/IFR is to ensure harmonised prudential supervision of investment firms across the EU as well as providing clear, consistent and harmonised criteria in respect of the variable remuneration requirements applicable to investment firms which fall outside of CRD IV.

The Implementation Notice is limited in scope to the discretions whose exercise has been delegated to the CBI under the applicable Irish legislation:

- 1). S.I. No. 355 of 2021, European Union (Investment Firms) Regulations 2021 (the Irish IFD Regulations), which implement the IFD; and
- 2). S.I. No 356 of 2021, European Union (Investment Firms) (No. 2) Regulations 2021 (the Irish IFR), which relate to the IFR.

The CBI first outlined its proposed approach to the IFD/IFR NCA discretions in a consultation paper, which proposed to approach each of the NCA discretions on a case-by-case basis. The CBI further stated that the onus would be on an investment firm to apply for the exercise of a particular NCA discretion in its favour in a timely manner. The Implementation Notice provides that this is the approach the CBI will largely adopt.

The Implementation Notice discusses what the CBI considers the key NCA discretions and provides a full list of all NCA discretions in the appendices to the Implementation Notice.

For further information on the structure of the Implementation Notice a discussion regarding the NCA discretions please see a link to our article below.

Update	1 October – 31 December 2021
Regional impact	Ireland
Sector Focus	Financial Institutions
Links	Simmons Article and CBI Implementation Notice

Central Bank Dear CEO Letter – Payment and E-Money Firms

The CBI has issued a Dear CEO letter in which it sets out its supervisory expectations for Payment and E-Money firms. The letter has been issued in the context of substantial growth in the Payments and E-Money sector, and the resulting increased risk to consumers should a firm breach its regulatory requirements.

Supervisory expectations

The CBI’s supervisory expectations are divided into 7 themes:

Theme	Supervisory Expectation
Governance and Risk Management	<ul style="list-style-type: none"> The CBI’s expectation is that a firm will have a functioning board which is responsible for the oversight of the firm, and which has full responsibility for setting the firm’s overall strategy. The letter also refers back to the previous Dear CEO letters of April 2019 and November 2020 which highlighted the importance of the Fitness and Probity Regime and in particular the continuing nature of the obligation to ensure that relevant persons are fit and proper for their roles.
Conduct and Culture	<ul style="list-style-type: none"> Conduct and culture is a priority area for the CBI, with the new individual accountability framework expected to be in place towards the end of 2022. The CBI’s key expectation is to have a consumer-focused culture.
Safeguarding	<ul style="list-style-type: none"> Safeguarding is a key supervisory priority for the CBI, as it carries with it the risk for customer detriment. A firm must have a robust, board-approved safeguarding risk framework in place which allows for the identification and protection of client funds.
Business Model and Financial Resilience	<ul style="list-style-type: none"> Firms must have viable and sustainable business models with sufficient resources in place to support future business plans. The letter also states that firm must be proactive in their communications with the CBI, and are expected to inform the CBI of any material adverse development that may impact the business, as well as any expected change to the firm’s business model.
Operational Resilience	<ul style="list-style-type: none"> Firms must be able to respond to, recover and learn from operational disruptions. In particular, a firm which is part of a group must be able to operate on a standalone basis, and demonstrate control of its own activities and risks. In keeping with the CBI’s continuing focus on outsourcing, the letter states that this responsibility extends to any activities carried out on the firm’s behalf.
Financial Crime	<ul style="list-style-type: none"> Firms should carry out a risk assessment to identify the money laundering and terrorist financing risks most relevant to their particular business and design their procedures accordingly.
Resolution and Wind-Up	<ul style="list-style-type: none"> Where a firm is unable to recover from difficulty and enters an insolvency process, the process should be managed in an orderly fashion without customer detriment. A firm’s exit strategy should be linked to the business model and should anticipate the return of client funds.

Next Steps

In the letter, the CBI states that the authorisation and supervision of Payment and E-Money firms has moved to the Credit Institutions Supervision Directorate.

The CBI expects firms to note the contents of the letter and to carry out a comprehensive assessment of their compliance with the safeguarding provisions of the relevant regulations and with the conditions of their authorisation. A board-approved attestation of the completion of this assessment must be sent to the CBI by **31 March 2022**.

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Regional impact	Ireland
Sector Focus	Financial Institutions
Links	Simmons Article and the CBI’s “ Dear CEO Letter ”

CBI updates to AIFMD Q&A and UCITS Q&A

On 20 December 2021, the CBI released the 44th edition of the AIFMD Q&A and its 36th edition of the UCITS Q&A (the “Q&As”).

New IDs 1151, 1152 and 1153 have been added to the AIFMD Q&A whilst IDs 1105 and 1106 have been included to the UCITS Q&A. The Q&As have been included to clarify the CBI’s expectations regarding arrangement involving a non-discretionary investment advisor who provides services to a QIAIF and where that advisor receives a higher proportion of the fees over other service providers.

The new Q&As also outlines the CBI’s position regarding compliance with ESMA guidelines on performance fees in UCITS and certain types of AIFs.

The links to the Q&As have been included below.

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Sector Focus	Asset Management & Investment Funds, Hedge Fund Managers, Institutional Managers, Regulated funds and Private Fund Managers
Links	CBI AIFMD Q&A and CBI UCITS Q&A



CBI releases final Cross-Industry Guidance

We [previously reported](#) that the CBI launched a consultation on outsourcing, which built on themes set out in its discussion paper. Following The CBI released its Cross-Industry Guidance on Outsourcing.

Off the back of this consultation paper, the CBI has released its Cross-Industry Guidance on Outsourcing as well a Feedback Statement in respect to the consultation.

Timing

The Guidance is effective immediately, however, the CBI states “*supervisory approach to its implementation will be mindful of the adjustments to be made by firms relative to the nature, scale and complexity of the use of outsourcing as an element of their business model.*”

Next Steps

Notification templates for important outsourcing arrangements or material amendments , will be available on the CBI's website in Q1 2022 (with the exception to the template for banks as this will be available via the Single Supervisory Mechanism.

CBI outsourcing registers, will be required to be submitted on an annual basis in respect to the firms with a PRISM impact rating of medium-low or above.

First submission is required to made in **Q2 2022**. However, the CBI will provide further details in advance to any submission deadline with regard to firms which will be in scope.

The CBI has stated that that an exception for bank which are significant for Single Supervisory Mechanism purposes will be able to submit the required registered via the ECB Banking Supervision.

For further information in respect to the CBI's Guidance please see relevant links below.

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Links	Simmons Article , CBI Guidance and CBI Feedback Statement

CBI publishes latest AML Bulletin

The CBI states, “The Central Bank has conducted a number of AML/CFT/FS supervisory engagements with Funds and Fund Management Companies (Firms) to monitor compliance with the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended (the CJA 2010). The Central Bank, in the course of these engagements, identified a number of areas where Firms must introduce enhancements in order to ensure they can sufficiently demonstrate compliance with the requirements of the CJA 2010. These areas are:

- ❖ Corporate Governance
- ❖ AML/CFT/FS Business Risk Assessment
- ❖ Outsourced AML/CFT/FS Activities
- ❖ Customer Due Diligence

The Central Bank expects Firms to be in a position to demonstrate that appropriate governance structures are in place to manage and oversee existing and emerging ML/TF/FS risks, including addressing the deficiencies highlighted in this Bulletin. A robust risk management framework that appropriately and effectively identifies and mitigates the inherent ML/TF/FS risks at both a sectoral and individual firm level is key in supporting Firms to address the weaknesses identified by the Central Bank.”

For further information please see the CBI’s Bulletin linked below.

Update	1 October – 31 December 2021
Regional impact	Ireland
Sector Focus	Financial Institutions
Links	CBI Bulletin

CBI published Consultation Paper on Macroprudential measures for the Property Fund Sector.

The CBI states in summary, “Property funds have become a key participant in the Irish commercial real estate market in recent years. This entails benefits for both macroeconomic and financial stability, through increased diversification of funding sources. However, the changing nature of financial intermediation also raises the potential that new vulnerabilities could emerge.

In that context, the Central Bank has been examining the property fund sector in more depth, with a particular focus on two potential sources of financial vulnerability that could affect the resilience of this form of financing in future periods of stress: leverage and liquidity mismatch. The Central Bank’s analysis has established that:

- ❖ A cohort of Irish property funds have elevated levels of leverage and – on average – Irish property funds have higher levels of leverage than equivalent property funds in Europe.
- ❖ Although Irish property funds typically have a low dealing frequency, liquidity mismatch is evident for a subset of property funds, given the very illiquid nature of commercial property assets.

Absent policy interventions, these vulnerabilities have the potential to grow or become more widespread in the future. And, in the presence of such vulnerabilities, the property fund sector could respond to future adverse shocks through sales of property assets over a short period of time. This type of selling behaviour has the potential to amplify adverse shocks to the commercial real estate market and the wider economy.

Objective of the proposed measures

The proposed measures aim to safeguard the resilience of this growing form of financial intermediation, so that it is better able to absorb – rather than amplify – future adverse shocks. In turn, this would better equip the sector to continue to serve its purpose as a valuable and sustainable source of funding for economic activity.”

For further information on the CBI’s proposed measures, please see the CBI’s consultation paper linked below..”

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Sector Focus	Property Funds, Asset Management & Investment Funds, Hedge Fund Managers, Institutional Managers, Regulated funds and Private Fund Managers
Links	CP 145

Cross Industry Guidance on Operational Resilience

The CBI has now published its Cross-Industry Guidance on Operational Resilience.

The guidance intends to increase operational resilience by requiring that firms introduce operational resilience frameworks. The key principles of an operational resilience frameworks are as follows:

- ❖ Board and senior management ownership of the operational resilience framework;
- ❖ The identification of critical or important business services and all activities, people, processes, technologies and third parties involved in the delivery of these services;
- ❖ The setting of impact tolerances for each of these identified services, and the testing of the firm's ability to stay within those impact tolerances during a severe but plausible operational disruption scenario; and
- ❖ The continuous review of how a firm responded and adapted to disruptive or potentially disruptive events so that lessons learned can be incorporated into operational improvements to continually enhance the operational resilience of the firm.

For further information, please see link to the CBI's Guidance below.

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Links	CBI Guidance

Next Steps

Firms should now review the CBI's Cross Industry Guidance on Operational Resilience to determine whether what action is required in order to introduce an operational resilience framework or update its existing framework in light of the guidance.

Dear CEO Letter – Common Supervisory Action on MiFID II Suitability Requirements – 1 December 2021

The Dear CEO letter is addressed to MiFID Firms and Credit Institutions, who provide portfolio management and advisory services to retail clients but its findings and the required action should be noted.

The CBI's findings are similar to those set out in the ESMA public statement in respect of the Common Supervisory Action on MiFID II Suitability Requirements

- ❖ Firms need to adopt a client-focused approach;
- ❖ Firms must improve their assessment of clients' knowledge and experience, financial situation and investment objectives;
- ❖ Suitability Reports need to be sufficiently detailed and personalised; and
- ❖ Controls on 'Exception' Processes need to be stricter.

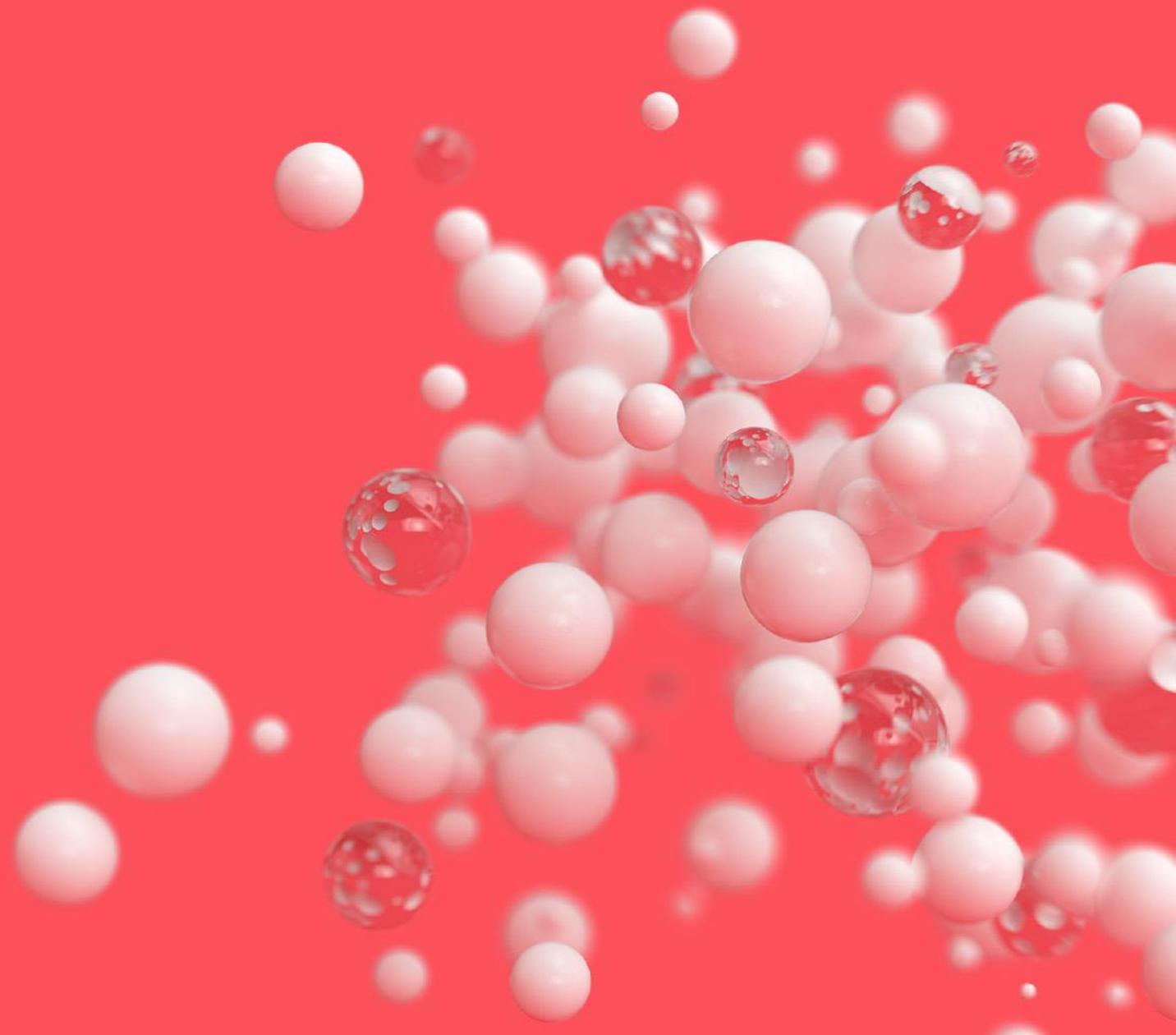
For further information, please see a copy of the CBI's "Dear CEO Letter" linked below.

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Regional impact	Ireland
Sector Focus	Property Funds, Asset Management & Investment Funds, Hedge Fund Managers, Institutional Managers, Regulated funds and Private Fund Managers
Links	CBI Dear CEO Letter

Timing

- **End of Q1 2022**
- In-scope firms must conduct a review and this should be completed and an action plan discussed and approved by the board of each in-scope firm.

Irish Government



Pre-legislative scrutiny of the individual accountability framework

On 3 November 2021, the Joint Committee on Finance, Public Expenditure and Reform debated the general scheme of *the Central Bank (Individual Accountability Framework) Bill 2021* as part of the pre-legislative scrutiny process. The session consisted of a presentation on the individual accountability framework by the CBI, followed by a series of questions from the committee members, which included the following topics:

Inherent Responsibilities	The responsibilities of the CEO of a firm will include the overall responsibility for the management of the firm and for leading the firm. This was articulated in response to a question on whether or not a CEO could be held responsible for a breach of an area of responsibility which has been delegated to a more junior person.
Enhancement of the fitness and probity regime	As regards the amendment to allow the Central Bank to investigate individuals who the Bank suspects pose a danger to consumers or the financial system, irrespective of whether they continue to perform a CF role at the time when an investigation is being commenced, the Central Bank confirmed that persons who have left a firm, or the financial services sector entirely, may still be subject to the administrative sanctions regime.
Comparison with the SMCR	Although SEAR will be based on the UK's SMCR, the Central Bank highlighted certain aspects in which the two regimes would differ, for example the inclusion of non-executive directors within the scope of SEAR (while noting that SEAR will not impose any additional duties on them).



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Regional impact	Ireland
Sector Focus	Financial Institutions
Links	Simmons Article

Pre-legislative scrutiny of the individual accountability framework continued...

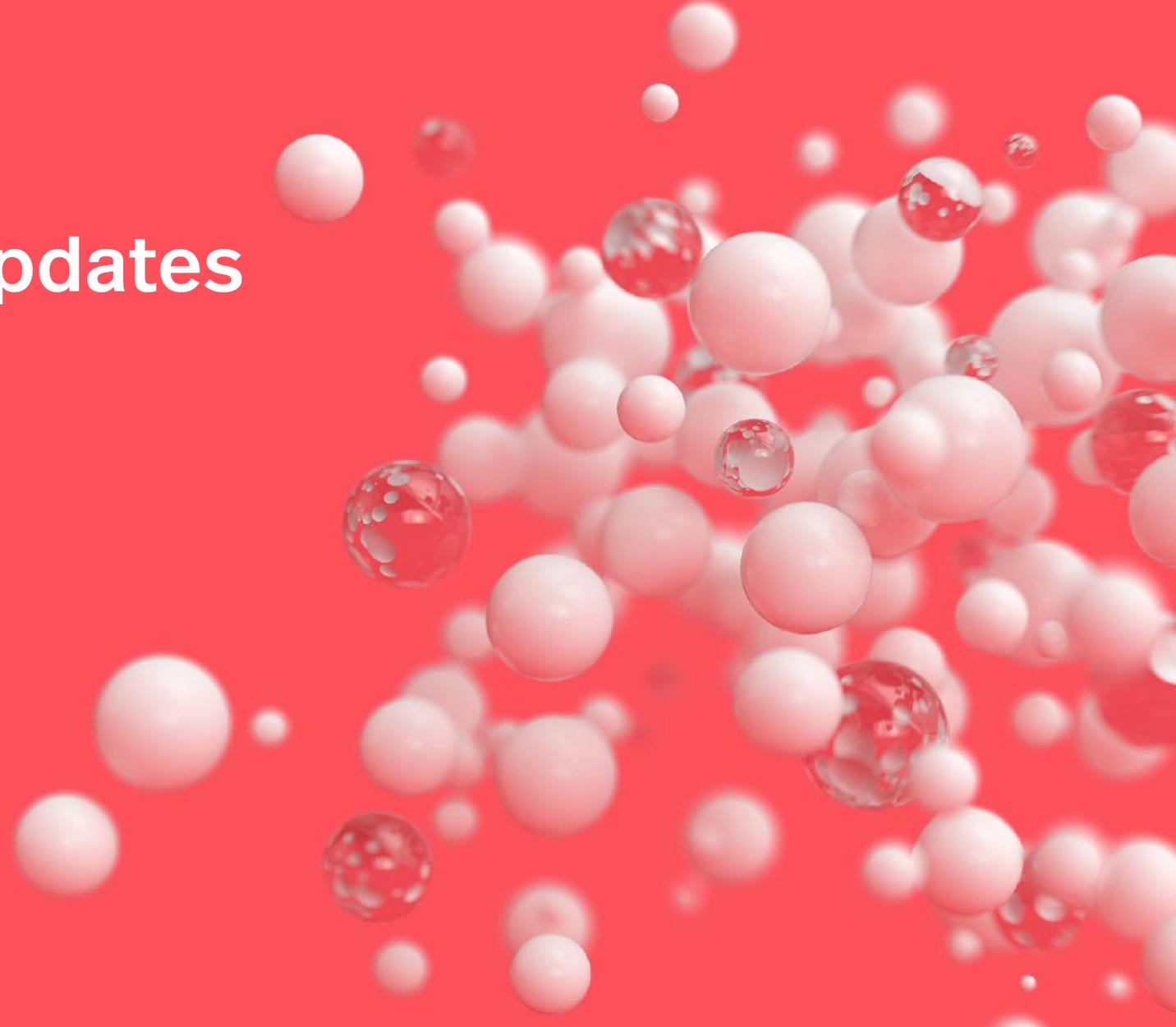
On 3 November 2021, the Joint Committee on Finance, Public Expenditure and Reform debated the general scheme of *the Central Bank (Individual Accountability Framework) Bill 2021* as part of the pre-legislative scrutiny process. The session consisted of a presentation on the individual accountability framework by the CBI, followed by a series of questions from the committee members, which included the following topics:

Payment of fines	When asked if there was any way to prevent a firm from paying an individual's fine, the Central Bank stated that while a variety of circumstances would be in play, there is no regulatory assurance in this regard.
Range of monetary sanctions	The Central Bank clarified that under current legislation, there are two limits on the monetary sanctions which can be imposed on an individual under the ASP; (i) it is capped at EUR 1,000,000; and (ii) it cannot have the effect of rendering someone bankrupt. The new framework will set out the principles under which a given monetary sanction will be determined.



Update	1 October – 31 December 2021
Regional impact	Ireland
Sector Focus	Financial Institutions
Links	Simmons Article

European Union (EU) Updates



European Commission proposes changes to the AIFMD and UCITS Directive

On the 25 November 2021 the European Commission published its long-awaited proposal for a new Directive which would amend the main ('Level 1') text of the [AIFMD](#) as well as an [annex](#).

The Commission is also proposing changes to the UCITS Directive's rules on delegation, liquidity risk management and reporting so it and AIFMD are properly aligned.

The amendments concentrate on a number of topics, including:

- ❖ Delegation;
- ❖ Liquidity management tools;
- ❖ Marketing under Articles 36 and 42;
- ❖ Loan origination; and
- ❖ Depositaries.

Next Steps

The Commission's proposals are just that – its views as to the wording of a new Directive. They will now be scrutinised by the European Parliament (EP) and by the Council of the EU (Council), which are at liberty to put forward alternative wording in some areas.

Following negotiations between them, the EP and Council will reach an agreement on the final text of the amendments and these will then be formally adopted and, in due course, published in the Official Journal.

This is unlikely to be a speedy process – it is quite possible that agreement won't be reached until well into 2022. Allowing time for the amendments to be translated into all official languages of the EU and then published, any meaningful implementation period means we are, perhaps, looking into 2024 (perhaps even 2025) before the rules actually bite.

For further information our full Simmons Articles can be found [here](#) and [here](#).

Euroshore – Spotlight: Ireland



Each month we bring you local regulatory developments from key EU jurisdictions. This Spotlight is on Ireland

CBI- Individual Accountability

In a recent speech, Derville Rowland (Director General, Financial Conduct at the CBI) set out the evolution of the CBI's approach to enforcement, covering both the development of the credible threat of enforcement and the future outline of the individual accountability framework.

In brief:

Since its inception, the majority of Administrative Sanctions cases undertaken by the Enforcement Division have been concluded by way of settlement agreement. This is the statutory mechanism available to the Central Bank to conclude investigations where the firm or individual has admitted the breach in question and accepted the sanctions the Central Bank believe to be fair and appropriate in the circumstances. Settlement means that a given case against a regulated firm has been concluded and will not need to go to Inquiry;

However, the Central Bank expects that in future, more cases will be determined by way of Inquiry. An Inquiry is the key statutory mechanism in the Administrative Sanctions Procedure by which the Central Bank, through one or more appointed impartial decision makers, can assess suspected breaches, make relevant determinations and impose sanctions on regulated firms;

In light of this expectation, the Central Bank has proposed a number of enhancements to the Inquiry process, which will be brought in along with the new individual accountability framework. One of these enhancements is the removal of the “hurdle of participation”, which was referred to in the 2018 behaviour and culture report – its removal will allow the Central Bank to pursue individuals directly for their misconduct rather than only where they have participated in a firm's wrongdoing.

Euroshore – Spotlight: Ireland



As set out in the behaviour and culture report and now in the draft heads of bill, the individual accountability framework will consist of:

- ❖ The Senior Executive Accountability Framework (SEAR);
- ❖ Enforceable Conduct Standards;
- ❖ Enhancements to the Fitness & Probity regime; and
- ❖ The introduction of a unified enforcement process.

The proposed timing for the introduction of the framework is that the bill will be enacted in the first half of 2022, which will be followed by a public consultation.

The framework should therefore be fully implemented in late 2022 or early 2023.

When implemented, the Central Bank's initial focus will be on embedding the framework into its processes and ensuring that firms embed it into theirs. The Central Bank's expectation is that at this early stage, its role will be a supervisory one rather than an enforcement one – while noting that enforcement actions will be taken where warranted.

For further information please see our Simmons & Simmons publication [here](#).

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