

Simmons & Simmons

Irish Funds & Regulatory Quarterly Update

1 October - 31 December 2022



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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 McKnight

James is a partner in our investment funds practice. James specialises in advising asset managers on the establishment and ongoing maintenance of investment vehicles. He has significant experience assisting clients with the establishment of a variety of fund types, ranging from broadly offered retail funds to private funds aimed at small groups of sophisticated investors and family offices, across every major asset class, liquid and illiquid, and also in respect of digital assets. James has advised in relation to the establishment of funds structured as companies, unit trusts, limited partnerships, common contractual funds, as well as umbrella fund structures and master feeder structures.

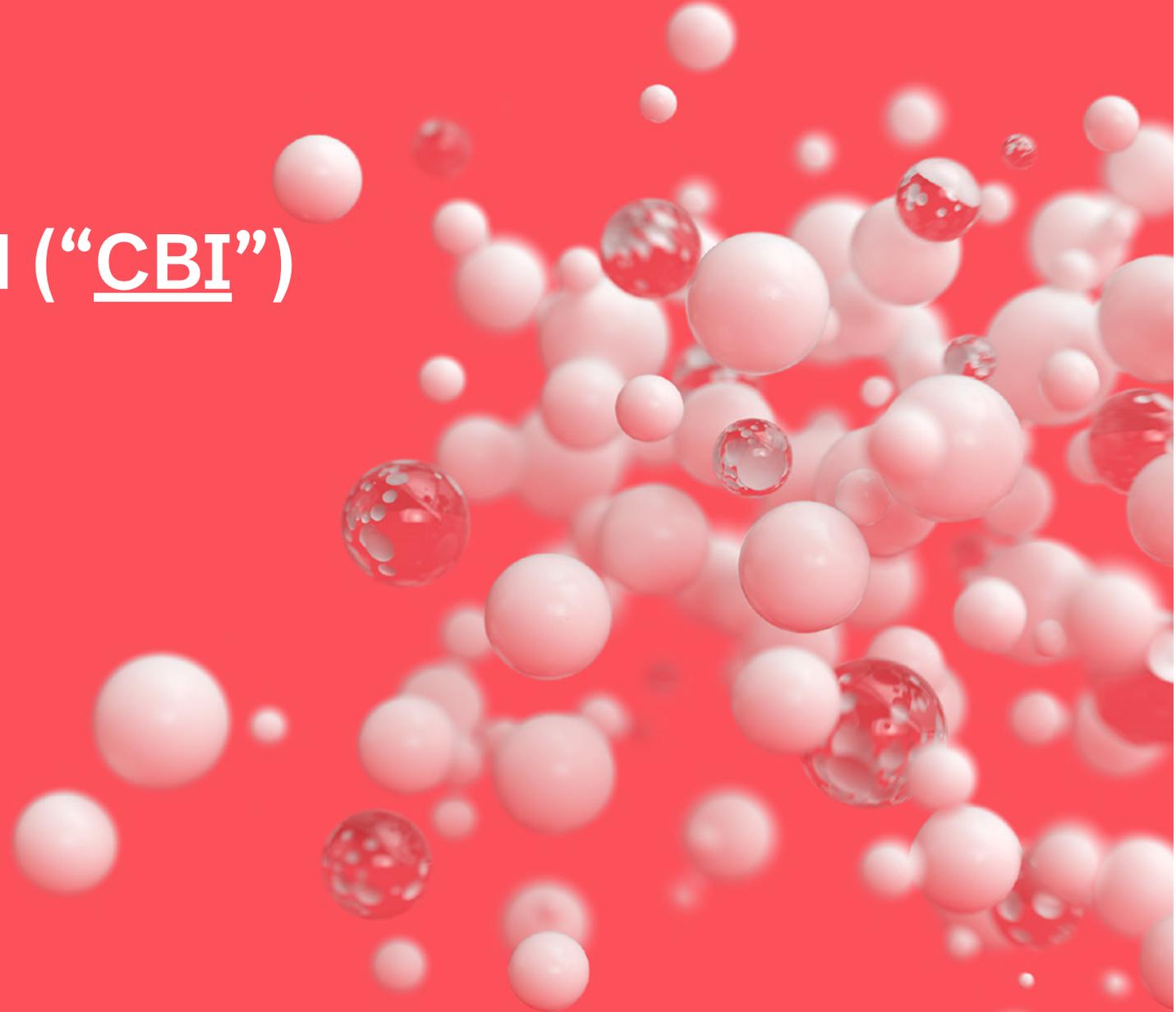
He has advised in relation to the establishment of investment structures domiciled in a number of jurisdictions including Ireland, Luxembourg, the Cayman Islands, the British Virgin Islands, Bermuda, the Qatar Financial Centre and Hong Kong and has advised managers based in a variety of jurisdictions including the U.K., the U.S., Ireland, the E.U., Switzerland, Latin America, Hong Kong, the People's Republic of China, Japan, Singapore and Taiwan.

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:

- The CBI's information note on the implementation of SFDR and Taxonomy;
- The CBI's introduction on real estate fund leverage limits; and
- The ECJ's decision in respect to the AML Directive will affect access to BOR.

Central Bank of Ireland (“CBI”) - Updates



CBI publishes Markets Update for October 2022

On 5 October 2022, the CBI published Issue 8 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 four:

1. Process clarifications for UCITS and AIFs pre-contractual documentation updates regarding the Level 2 measures in relation to the Sustainable Finance Disclosure Regulation
2. The CBI publishes updates to the Funds Authorisation section of the website
3. The CBI publishes the Forty-Fifth Edition of the CBI AIFMD Q&A Document
4. The CBI clarifies incorporation by reference in a prospectus of annual financial reports prepared in accordance with the ESEF Regulation

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

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and regulated Funds
Links	Simmons Insights Article, Issue 8 – CBI markets update and 45th edition of the CBI AIFMD Q&A

CBI publishes Markets Update for November 2022

A summary of the CBI's November 2022 Markets Update for regulated firms and other market participants.

On 1 November 2022, the CBI published [Issue 9 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 four:

1. Speech by Darragh Rossi, Head of Funds Supervision Division - Funds Supervisory Strategy & Outlook
2. IOSCO Survey on interaction between Index Providers and Asset Managers
3. ESMA Call for Evidence on the implementation of the revised Shareholders Rights Directive (SRD2)
4. ESMA to work on ESG disclosures as a new union strategic supervisory priority

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

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article and Issue 9 CBI markets update

CBI Updates

CBI publishes Markets Update 10 (14 November 2022)

On 14 November 2022, the CBI published Issue 10 of its regular Markets Update, which contained a single item, an information note (the Note) on the implementation of the SFDR and Taxonomy Regulation for Irish regulated firms and other market participants.

Information note on implementation of SFDR and Taxonomy

The Note sets out the findings of the CBI's "gatekeeper review" of investment fund disclosures, highlighting the CBI's expectations around the implementation of the EU's SFDR and Taxonomy Regulation and providing a roadmap for how the CBI will supervise these requirements in the future.

The Note is aimed at informing market participants of the main disclosure issues encountered in the review and outlines risks that the CBI has observed in terms of potential greenwashing. The report also highlights areas of good practice identified and sets out the CBI's expectations.

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

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article and Issue 10 CBI markets update

CBI publishes Markets Update 11 (24 November 2022)

On 24 November 2022, the CBI published Issue 11 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:

- Publication of the Macroprudential Policy Framework for Irish Property Funds and the Feedback Statement to Consultation Paper 145 on Macroprudential Measures for the Irish Property Fund Sector
- ESAs launch joint call for evidence on greenwashing
- ESMA consults on rules for passporting for investment firms
- ESMA launches a consultation on guidelines for the use of ESG or sustainability-related terms in funds' names
- ESMA issues advice on proposals for leverage limits on real estate funds in Ireland

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

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article and Issue 11 CBI markets update

CBI Updates

CBI publishes Markets Update 12 (1 December 2022)

On 1 December 2022, the CBI published [Issue 12](#) of its regular Markets Update.

This contained a single item, an [Industry Letter](#), “Liability Driven Investment Funds” (the Letter), which was sent on 30 November 2022 by Darragh Rossi, Head of the CBI’s Securities Markets and Funds Supervision Division.

The Letter follows interactions between the CBI, the Luxembourg regulator, the CSSF and ESMA (together, the NCAs) in the wake of volatility in yields associated with UK gilts.

This exposed vulnerabilities in Liability Driven Investment (LDI) funds - especially sterling denominated (GBP) LDI funds – led to a cycle of collateral calls and forced sales. As the situation has since improved, the NCAs do not consider that any reduction in the resilience at individual sub-fund level is appropriate at this juncture.

However, the Letter specifies a number of steps to be taken by managers who consider it necessary to reduce an individual GBP LDI Fund’s resilience below the levels achieved in the period following the dislocation in the UK gilt market. These include:

- giving advance notice to the fund manager’s NCA (and where relevant, the NCA of the fund’s country of domicile) of both the intention to reduce a GBP LDI Fund’s resilience and the level
- prior to making any reduction:
 - undertaking a detailed analysis justifying the need to reduce the fund’s resilience
 - completing a risk assessment of how the proposed reduction will not impact the fund’s orderly functioning in the current and in stressed environments
 - detailing a step-by-step plan for returning the GBP LDI Fund to current levels of resilience in the event of increased market volatility.

Clear policies and procedures must be established to increase resilience should there be further volatility in the market.

For non-sterling LDI Funds, this notification system does not apply for the time being. Managers, though, are expected to maintain “an appropriate level of resilience at an individual sub-fund level” for such funds in order to be able to absorb possible market shocks.

On 30 November, ESMA released a [statement](#) welcoming the CBI’s initiative (and that of the CSSF in Luxembourg) in relation to LDI funds.

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article Issue 12 CBI markets update and Industry Letter

CBI Updates

CBI publishes Markets Update 13 (7 December 2022)

On 7 December 2022, the CBI published Issue 13 of its regular Markets Update, in which it sets out alerts of interest to Irish regulated firms and other market participants.

The pace of the Markets Updates has noticeably quickened recently – having previously been, essentially, monthly publications, this is the fifth new issue since the start of November. 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:

1. The CBI updates the pre-submission process for QIAIFs proposing to invest in Irish property assets;
2. CBI consultation on own funds requirements for UCITS ManCos and AIFMs authorised to provide discretionary portfolio management services;
3. Dear Chair Letter - Follow up on thematic review of fund management companies' governance, management and effectiveness;
4. ESMA issues advice on proposals for leverage limits on real estate funds in Ireland;
5. ESMA welcomes NCAs' work to maintain resilience of liability driven investment (LDI) funds; and
6. ESMA updates guidelines on stress tests for money market funds.

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

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article and Issue 13 CBI markets update

CBI Updates

CBI publishes information note on implementation of SFDR and Taxonomy

On 14 November 2022, the CBI published an [information note](#) setting out the findings of a review of investment fund disclosures, highlighting its expectations around the implementation of the SFDR and the Taxonomy Regulation and providing a roadmap for how the CBI will supervise these requirements in the future.

The note is aimed at informing market participants of the main disclosure issues encountered in the review and outlines risks that the CBI has observed in terms of potential greenwashing. The report also highlights areas of good practice identified and sets out the CBI's expectations.

Gatekeeper Review

The note sets out the findings of the CBI's "gatekeeper review" in which it assessed a sample of investment fund disclosures made by fund managers in compliance with their SFDR level 1 and Taxonomy Regulation obligations. The CBI had established a filing process for pre-contractual document updates from which it drew its sample.

The CBI list the following as its key findings:

- SFDR classifications
- Generic sustainability risk and/or taxonomy alignment disclosures
- Quantification of taxonomy-alignment
- Integration of sustainability risks
- Pre-contractual product disclosures – Benchmark indices
- Naming convention for funds

For discussion regarding the CBI's key findings as well the supervisory roadmap. Please see link to our [Simmons Insights Article](#).

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Institutional Managers and Regulated Funds
Links	Simmons Insights Article and CBI Information Note

CBI introduces real estate fund leverage limit

On 24 November 2022, the CBI published its [Macroprudential Policy Framework for Irish Property Funds](#) (the Policy), introducing new limits on leverage and Guidance to limit liquidity mismatch in property funds.

This follows ESMA's [formal advice](#) the same day, which confirmed that ESMA considered the leverage limit proposal which the CBI had notified to it was "appropriate to address the concerns relating to the stability and integrity of the financial system".

What has the CBI proposed?

The Policy introduces a limit of 60% to the ratio debt over total assets of in scope funds as an authorisation condition under Regulation 26 and, where appropriate, Regulation 9 of the Irish AIFM Regulations.

The limit applies to Irish funds which have at least 50% of their assets under management (AuM) directly or indirectly invested in physical Irish property assets (Irish real estate funds).

In the context of ESMA's [Guidelines on Article 25 of the AIFMD](#) (the ESMA Guidelines), this is equivalent to

- a 150% limit to the financial leverage ratio (measured as the value of borrowings as percentage of NAV) and
- a 250% limit to the gross leverage (measured using the gross method for calculating the exposure of the AIF), where funds do not have recourse to another source of leverage. While the proposed limit applies to borrowing, in principle, synthetic leverage could allow funds to reach higher levels of leverage.

What does Simmons think?

We are pleased that the CBI's final policy document takes account of industry feedback to its consultation paper on the introduction of a leverage limit - a 60% leverage limit is more realistic for Irish real estate deals than the originally proposed 50%, while the 5 year transition period is welcome.

It is also interesting to note that the CBI made use of the provision under Article 25(3) of the AIFMD to obtain ESMA's view on proceeding in this manner and that it is referring to the leverage limit as its first macroprudential policy measure for non-banks.

As the CBI has made reference to the introduction of macroprudential measures for some time, it will be interesting to see what other measures it plans to introduce.

For further information please see link to our full Simmons Insights Article

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds, Private Fund Managers and Real Estate Funds
Links	Simmons Insights Article

Timing



From 24 November 2022, the CBI will only authorise new property funds with leverage below the 60% limit.

There will, though, be a five year implementation period for existing funds – this will last until 24 November 2027.

However, the CBI has stated that it expects funds to make "gradual and orderly progress" over this period to lower leverage levels and funds should be mindful that ESMA has specifically advised the CBI to encourage Irish real estate funds "not to take advantage of the implementation period to delay unnecessarily their compliance with the leverage limits".

Irish fund governance and management review – CBI feedback

On 7 December 2022, the CBI sent an [Industry Letter](#) to the Chairs of Fund Management Companies (FMCs) entitled, “Follow up on thematic review of fund management companies’ governance, management and effectiveness” (the Letter).

The CBI expects that the letter will be discussed by the Board and that any areas that require improvement ‘are given due consideration’.

The findings from the FMC review will inform the CBI’s policy development. The CBI will continue to work on identifying changes necessary to enhance and clarify certain aspects of the existing FMC requirements and Guidance.

A summary of the key points raised in the Letter was also given in a [speech](#) given on 6 December 2022 by Patricia Dunne, the CBI’s Director of Securities and Markets Supervision.

The background to the Letter

In 2019 and 2020, the CBI conducted a review of compliance with its FMC framework (the Framework), including related guidance on the organisation of FMCs.

In October 2020, the CBI published a [Dear Chair letter](#) setting out its main findings and what actions it now expected FMCs to take to ensure compliance.

In June 2022, the CBI conducted a follow-up industry survey to assess how the governance, structure and resources available to FMCs had evolved as a result of the October 2020 letter.

The new letter published on 7 December 2022 gives an indication of progress achieved in areas such as substance and resources.

What has the CBI found?

The Letter notes that, although there has been progress over the past few years, there is more work to be done.

FMCs “will be challenged on all aspects of their compliance with the framework as part of ongoing firm engagement and, in particular, as and when their operations grow”.

Irish FMCs must perform their duties to a high standard so there is a high degree of confidence in how the FMCs discharge these duties and so protect the interests of their investors.

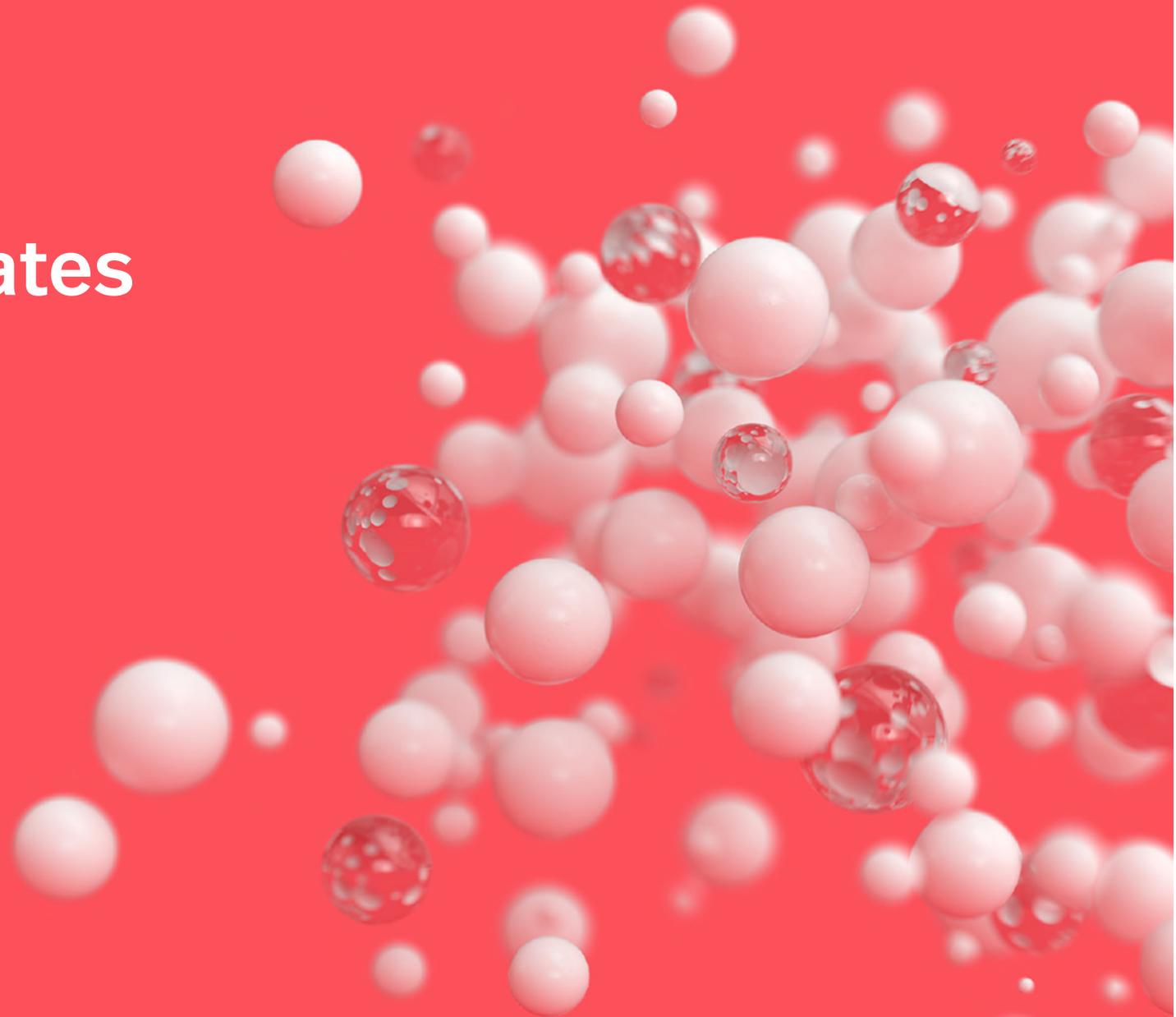
The CBI identifies a notable increase in resources available to FMCs and progress in areas such as CEO appointments, director time commitments and resourcing of managerial functions.

There has also been a material change in the sector’s scale, structure, complexity and risk profile.

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

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Asset Management and Investment Funds
Links	Simmons Insights Article

Irish Government Updates



Irish Government Updates

SEAR Update: The Central Bank Bill has now entered the third stage

The Central Bank (Individual Accountability Framework) Bill (the Bill) has now moved from the second stage, during which the general principles of the Bill were debated, to the third stage, also known as the committee stage, whereby the Bill is examined section by section and amendments may be made.

We have closely followed the debate at the second stage, during which the general principles of the Bill were debated, including the following points:

1. as indicated by the CBI previously, the conduct standards proposed in the new framework are in and of themselves, unremarkable. The innovation of the new framework is that a breach of the standards will be a prescribed contravention and therefore subject to enforcement by the CBI;
2. the removal of the participation link will require numerous amendments to the administrative sanctions procedure, including deletion of the concept of being concerned in the management of a regulated financial services provider;
3. the fitness and probity regime will be extended to persons performing controlled functions in relation to financial holding companies;
4. the Bill may be amended to take account of the ECB's opinion on the proposed individual accountability framework. While the ECB strongly welcomes the measures envisaged by Bill, the opinion notes that in the case of significant credit institutions, the approval of appointments to controlled functions is subject to the exclusive competence of the ECB under Articles 4(1)(e) and 9 of the SSM Regulation. The Irish government has been requested to refrain from conferring regulatory authority and tasks on the CBI which may impinge upon the ECB's exclusive competence in this regard; and
5. as regards timing, it was noted that: (i) much of the detail of the new framework will be set out in regulations to be made by the CBI; and (ii) a comprehensive consultation exercise will be conducted in relation to the CBI regulations.

For further information our full Simmons Insights article has been linked.

Update	1 October – 31 December 2022
Regional impact	Ireland
Sector Focus	Finance
Links	Simmons Insights Article

Irish Government Updates

Execution under Common Seal

In September 2020 and again in May 2022 we [previously reported](#) that the Extension of Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the “[Act](#)”) was enacted by the Dáil on 30 July 2020 with effect from 21 August 2020. The Act made a number of temporary amendments to the Companies Act 2014 (the “[Companies Act](#)”) to allow for greater flexibility during the pandemic.

The Act introduced an interim period in which a company seal and signatures for counter signatories may be signed in counterpart.

This interim period provided for by the Act is currently scheduled to come to an end on 31 December 2022.

There has been no indication that this interim period will be extended. Additionally, it should be noted that the Companies Act has not been amended permanently to ensure the interim measures for execution will remain.

For further information please see link to our previous Simmons Insights Articles below

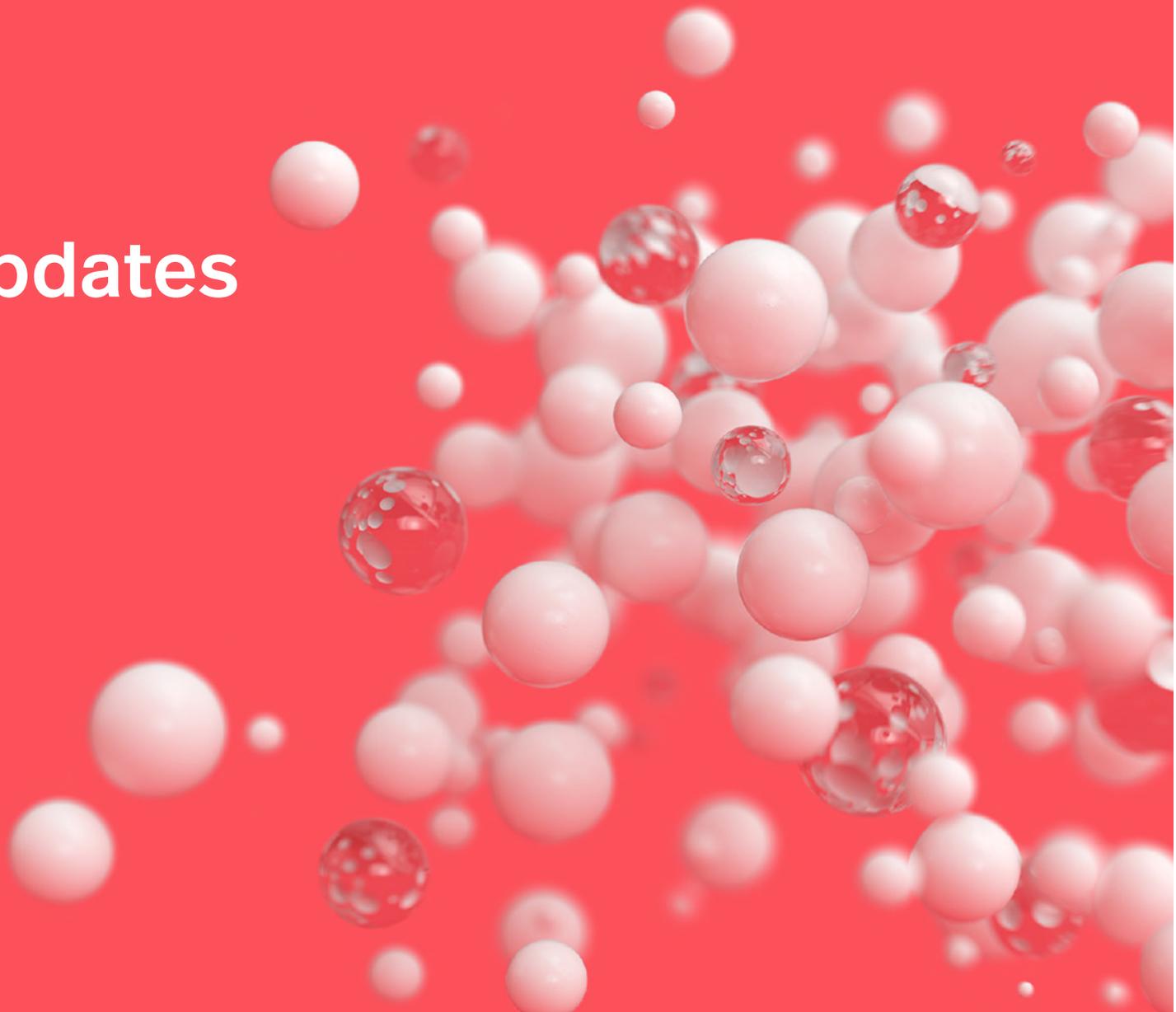
Timing

- **31 Dec 2022** – interim period to the Companies Act ends.



Update	1 October– 31 December 2022
Regional impact	Ireland
Sector Focus	Financial Institutions, Asset Management and Investment Funds, Private Fund Managers and Hedge Fund Managers
Links	Simmons Insight Article (1 September 2022) and Simmons Insights Article (24 May 2022)

European Union (EU) Updates



European Union Updates

Cross-border distribution of investment funds

The Cross Border Distribution of Funds Regulation requires ESMA to publish hyperlinks to the sections of NCAs' websites where they publish

- up-to-date information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS along with summaries of these;
- an up-to-date list of the fees and charges the NCA levies for carrying out their duties in relation to the cross-border activities of fund managers.

ESMA [published an updated version](#) of its collection of these links and summaries on 9 December 2022.

For further information, please see link to ESMA's update below.

Update	1 October – 31 December 2022
Regional impact	Ireland, UK, EU and Global
Sector Focus	Asset management and Investment Funds
Links	ESMA publication

European Union Updates

AML Directive – European Court of Justice (“ECJ”) Decision affects access to Beneficial Ownership Register (“BOR”)

On 22 November 2022, the ECJ released its findings in respect to the invalidity of the provision in the anti-money laundering directive whereby the information on the beneficial ownership of companies incorporated within the territory of member states is accessible to any member of the general public.

The ECJ held that “*the general public’s access to information on beneficial ownership constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data...the information disclosed enables a potentially unlimited number of persons to find out about the material and financial situation of a beneficial owner. Furthermore, the potential consequences for the data subjects resulting from possible abuse of their personal data are exacerbated by the fact that, once those data have been made available to the general public, they can not only be freely consulted, but also retained and disseminated.*”

What does this mean for Ireland?

Currently, general members of the public have been able to view restricted information in respect to the beneficial ownership of Irish corporates without needing to provide reasoning to justify this request. In light of the ECJ’s finding’s the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies has removed the search facility.

It should be noted that the CBI who maintains the BOR for ICAVs and credit unions has not suspended its search function. However, the CBI is now seeking confirmation from those requesting access whether they are a designated person or a competent authority.

For further information, please see links below

Update	1 October – 31 December 2022
Regional impact	Ireland, UK, EU and Global
Sector Focus	Asset management and Investment Funds
Links	ECJ announcement , ECJ decision and CBI BOR page

European Union Updates

Implementation of PRIIPS KIDs

The Packaged retail and insurance-based investment products (“PRIIPs”) Regulation launched the obligation to create a PRIIPs key investor document (“KID”) when investment products are sold to retail investors in the European Economic Area.

Due to the requirement under the UCITS Directive for a UCITS KIID to be produced they were exempt from the need to prepare a PRIIP KID due to their similarities.

However, this exemption for UCITS has now ended with the PRIIP KID to replace the UCITS KIID with effect from 1 January 2023.

New format and content requirements will apply to all PRIIPs KIDs in line with the implementation of the updated Regulatory Technical Standards.

Timing

- **1 Jan 2023** – PRIIPs KIDs to be produced from.



Update	1 October– 31 December 2022
Regional impact	Ireland
Sector Focus	Financial Institutions, Asset Management and Investment Funds, Private Fund Managers and Hedge Fund Managers

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