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Asset Management & Investment Funds Update

August 2024

Key Dates & Deadlines: Q3/4 2024

The following are key dates and deadlines in Q3/4 2024 along with possible impacts and action items arising for fund managers.

Date	Source	Summary	Action/Impact
31 July		UK Sustainability Disclosure Requirements (SDR) and labelling regime Sustainable product labels are available for use by UK fund managers in relation to UK funds and UK portfolio managers for UK clients.	See here for further details. The UK Government plans to consult, in Q3 this year, on broadening the scope of UK SDR to include funds availing of the new UK Overseas Funds Regime to distribute to UK investors.
7 August		Review of UCITS Eligible Asset Directive (EAD) Deadline for responding to ESMA Call for Evidence on the UCITS EAD Review.	Please see article on topic in this month's update for further details.
Q4		EMIR 3.0 Regulation and amending Directive expected to be adopted with impacts across the key EMIR requirements of clearing, risk management and reporting.	EMIR 3.0 focusses on incentivising clearing in the EU post-Brexit, including through the introduction of a new EU CCP active account obligation. It also sets down rules for NCAs' application of penalties for EMIR breaches and amends the clearing threshold calculation methodology. Provision is made for the adoption of technical standards before certain EMIR 3.0 provisions come into effect.
October		UK Overseas Funds Regime (OFR) OFR gateway opens for TMPR stand-alone schemes and in November for TMPR umbrella schemes.	Please see article on topic in this month's update for further details.

8 October	ESMA draft guidelines and regulatory technical standards on liquidity management tools Deadline for feedback on draft measures mandated by amendments to AIFMD and UCITS as part of the AIFMD Review.	Please see article on topic in this month's update for further details.
22 November	Macroprudential policy for non-banks Closing date for Commission consultation on the adequacy of macroprudential policies for the non-bank financial intermediation sector	See our June 2024 Update for further details.
21 December	European Green Bond Standard Application date for key provisions of the Regulation setting down the voluntary standard for issuing bonds using the 'European Green Bond' or 'EuGB' designation.	The proceeds of EuGB bonds are (subject to limited flexibilities) allocated to Taxonomy-aligned environmentally sustainable activities and the Regulation includes pre- and post-issuance transparency rules, regulated prospectus rules, and a new registration system and supervisory framework for external reviewers which are required to review issuers' reports.
30 December	Markets in Crypto-Assets Regulation (MiCAR) Final MiCAR application date.	See here for further details.

UCITS Eligible Assets Review

The review of the UCITS Eligible Assets Directive (**EAD**) kicked off this time last year with a Commission request to ESMA for technical advice on recommended amendments. Following which, ESMA published a call for evidence (CfE) seeking feedback on two specific areas; (i) convergence issues and the clarity of key concepts and definitions and (ii) direct and indirect exposure to more 'exotic' asset classes of crypto, loans, commodities etc.

The following are key points from the Irish Funds industry response to the CfE (with emphasis added):

*"One of the most pressing issues to address in the UCITS Eligible Assets Directive ("EAD") is **supervisory convergence** across the European Union ("EU") member states which could be achieved by the EAD and/or applicable Level 3 Guidance being amended to provide greater clarity regarding the criteria to be taken into account in assessing whether or not a class of financial instrument is covered by the various definitions within the UCITS Directive. However, sufficient flexibility is needed to accommodate evolving financial markets which have already resulted and inevitably will further result in different types of financial instruments."*

*"In most cases, the **enhanced scrutiny process** [*operated by NCAs to consider the UCITS eligibility of instruments] *results in investment in such financial instruments being either prohibited or limited. This enhanced scrutiny process is insufficiently transparent in the context of the timeframe involved and rationale for decisions made (in particular where global asset manager(s) with expertise in the relevant financial instrument have provided data regarding liquidity, valuation information, safe-keeping, etc.)."*

*"It is important to recognise that **liquidity** is not a static measure, instead liquidity is dynamic and may change depending on multiple of factors. [] The notion of liquidity should therefore be considered within the context of the overall portfolio and not just on the basis of individual security types."*

*"the **presumption of liquidity** remains a valid concept when supplemented by pre-investment and ongoing liquidity analysis, where deemed appropriate."*

*"We would support further clarification on the relevant limit to the holding of **ancillary liquid assets** at a European level, in order to avoid the national divergences being applied. Irish Funds supports the position that there should be no limit on the level of assets held for ancillary liquid purposes subject to regulatory restrictions to any one institution/issuer."*

*"We believe there is **merit in updating the [ESMA] Opinion [on the UCITS trash bucket]** in order to allow other types of CIU to be eligible in the 10% ratio (where they meet the criteria for constituting a transferable security or money market instrument). This would permit limited exposure of UCITS to certain CIUs which do not fulfil the eligibility criteria in Article 50(1)(e), such as certain EU AIFs and ELTIFs, and certain non-EU ETFs listed on regulated markets in EU jurisdictions or countries such as the US, Switzerland and several jurisdictions in Asia (e.g. Singapore, Hong Kong, Japan)."*

*"Irish Funds suggests that the criteria of what constitutes a **transferable security** should be amended to either (a) exclude matters which are part of the UCITS management company's risk management process (such as liquidity risk management and management of other risks) …or (b) provide greater clarity in order to avoid ambiguity caused by the broader interpretation by NCAs of the specific criteria relating to liquidity and risk management… In addition, Irish Funds suggests the requirement that the acquisition of a financial instrument be consistent with the investment objectives and policy, or both, of the UCITS in order for that financial instrument to constitute a transferable security should be deleted."*

*"In order to address diverging interpretations on the treatment of **delta-one instruments** under the EAD, Irish Funds would suggest that all delta one instruments are assessed as to whether they constitute transferable securities in the same way as any other financial instrument"*

*"it is suggested that the term '**closed-ended funds'** in Article 2(2) of the EAD should be replaced to include AIFs, regardless of being open or closed-ended, as well as similar funds from non-EU jurisdictions, provided they adhere to equivalent standards regarding manager supervision and valuation accessibility."*

*"We advocate for the recognition of **non-EU open-ended funds** from highly regulated jurisdictions, such as the US, Switzerland, and various Asian markets, as investible assets for UCITS, either directly or indirectly. [ ] Addressing this issue could involve harmonizing the implementation of these requirements across EU Member States or modifying the UCITS regime to allow investments in **non-EU ETFs** as listed transferable securities"*

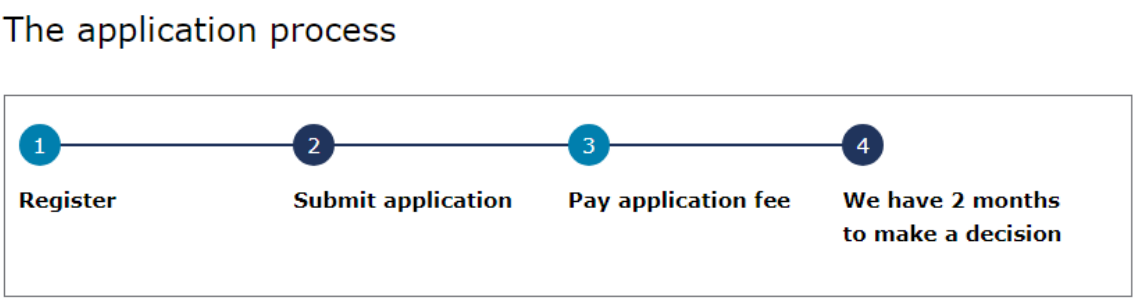
*"The UCITS Eligible Assets Directive should clearly permit a fee division related to **EPM activities**. Since the division of fees is based on total earnings before expenses, there's no chance for any concealed profits to be subtracted."*

Next Steps

CfE feedback will be considered by ESMA in the preparation of its technical advice to the Commission on the EAD Review.

UK Overseas Funds Regime Finalised

The UK FCA has published its final rules and guidance for the OFR which came into force on 31 July 2024. Eligible funds (currently non-MMF EEA UCITS) will be able to apply for recognition under the OFR later this year: in September for new schemes and from October for TMPR schemes.



Application to market in the UK under the OFR

When applying to the FCA to market under the OFR, a fund will be required to submit the following information:

- **information identifying the fund** including name, product reference number for TMPR funds, LEI, domicile, structure, fund type and name and address of fund manager. As part of the final OFR rules and in a departure from the consultation version, the FCA clarifies that while the fund name must be fair, clear and not misleading, it will not reject an application on the basis of the fund having an identical name to a UK authorised fund;
- **information on the fund's profile** including investment objective, policy and strategy, AUM and the portion attributable to UK investors (which may be estimated under the final OFR rules), main

categories of asset classes, derivative usage, use of benchmarks, dealing frequency, target investors, any particular ESG focus;
- **fees and charges** including initial and exit fees, ongoing charges, performance fees and amount of annual management charges retained by the management company;
- **share class characteristics** including name and ISIN, minimum initial investment amount, whether tokenised or not, accumulation or income;
- **connected parties** including details of the management company, depositary, investment manager, UK representatives, sponsor, promoter, UK authorised person approving financial promotions on behalf of the fund;
- **marketing/distribution information** including details of any promotional payments to entities associated with marketing or distributing the fund.

The FCA will provide additional information on the application requirements in its soon-to-be published 'OFR how-to guide', including support for ETF applications which must use the same application process but likely require additional interpretative guidance.

Post-recognition notifications

Post-recognition changes should be notified using the Connect system or by sending an email, depending on the type of change (see FCA website for further details).

In a departure from the consultation version, the final OFR rules do not require advance notification to the FCA of post-recognition changes. Advance notification is requested, if possible and particularly in the event that funds or sub-funds are to be terminated, however the requirement is:

- in respect of changes that need home NCA approval, for the fund manager to notify the FCA as soon as reasonably practicable after that approval has been obtained.
- in other cases, for the fund manager to notify the FCA as soon as reasonably practicable after the decision to make the change has been reached or the event has occurred.

Disclosure rules for funds marketed in the UK under the OFR

The prospectus of the overseas fund must contain the information required by COLL 4.2.5R to the extent such information is not incompatible with an existing statement in the prospectus as approved by the fund's home NCA.

The prospectus or UK country supplement of the overseas fund should disclose on redress arrangements including information:

- explaining how UK investors can make a complaint,
- explaining whether the fund manager or depositary's activities are covered by the Financial Ombudsman Service and the compensation scheme and, if not, including a clear warning of the impact for UK investors,
- explaining whether a UK investor can access a dispute resolution mechanism or a compensation scheme in the fund's home state and if so, how such rights may be exercised, and
- including, at the discretion of the fund manager, any additional information useful to investors on redress arrangements.

Initially, once the OFR enters into operation, overseas funds will be required to produce a UK UCITS KIID. However, the FCA/HMT joint OFR roadmap notes that funds accessing the OFR are expected, in due course, to be subject to the reformed UK point-of-sale disclosure rules for retail-facing financial service products. Such rules will be contained in the new framework for Consumer Composite Investments (legislation for which is awaited) and are expected to be applicable to overseas funds accessing the OFR from 1 January 2027 at the latest.

Further additional disclosures may also be required following the forthcoming consultation on the application of the UK Sustainability Disclosure Requirements (**SDR**) to overseas funds accessing the OFR, which is expected to issue in Q3 this year. As per the FCA/HMT joint OFR roadmap, should the outcome of that process be to apply SDR to such funds, the FCA would require to consult on rules reflecting that decision, after it has been made. Any legislation applying SDR to overseas funds would be expected to come into force in H2 2025 with the FCA following a separate process to make final rules. As mentioned on the Irish Funds' recent webinar with the FCA on the OFR, the FCA sees a number of ways to apply SDR to overseas funds but notes any approach will need to consider SFDR and how to best ensure UK investors can compare UK/EU products like for like. As a result, consumer facing disclosures and not entity-level disclosures will likely be the key consideration when looking to apply SDR to overseas funds.

Obligation to provide UK facilities

Under the OFR, overseas funds will be required maintain facilities in the UK which allow investors to access fund documentation, dealing information, and for existing investors to give dealing instructions, update essential information and submit complaints about the fund's management. The FCA notes that while most of these services will not attract regulation in the UK, accepting dealing instructions may constitute a regulated activity and firms should ensure they hold the appropriate FCA authorisation for any such activities.

The requirement for UK facilities does not mean that a physical presence in the UK is required and provision through electronic means is permitted provided the prospectus states that investors will normally be communicated in this way, investors have consent to this form of communication and all services are provided in English and free of charge. The prospectus must state how facilities can be accessed through electronic means.

TMPR v OFR

Funds should be aware that, in contrast to the TMPR, the OFR does not permit funds to apply themselves for recognition as they are no longer UK authorised persons. Unless there is a UK authorised group entity which can apply for recognition of the fund, the fund will need to identify a 'Section 21 approver' (a person authorised as a UK financial promotion approver) to apply on the fund's behalf.

No changes during allotted landing slot

As per the FCA website, no changes to the management company can be made from the date the fund's landing slot issues until recognition, no new sub-funds can be added from 2 weeks prior to the fund's landing slot opening until recognition and application for recognition of a fund's non-TMPR sub-funds cannot be applied for until after recognition of the umbrella.

New SFDR Q&A Published

On 25 July 2024, ESMA and the other European Supervisory Authorities published 15 new Q&A on SFDR across the topics of scope (Q4&5), PAI disclosures (Q26-29), financial product disclosures (Q20-28).

New Scope Q&A (Q4&5)

New Q&A 4 addresses the obligation of a registered AIFM with Article 8 or 9 products to set up a website if it, its product(s) or a group member do not have a website on which the required product website disclosures can be published.

New Q&A 5 clarifies that governing regime obligations cannot be overridden by SFDR disclosures, for example an AIFM that discloses under Article 6 SFDR that sustainability risks are not relevant must still comply with the AIFMD requirement to take account of sustainability risks as part of its investment decision making process.

New PAI Q&A (Q26-29)

Q&A 26 clarifies that PAI4 Table 1 (exposure to companies active in the fossil fuel sector) should be calculated on a pass/fail basis and that a company is considered to be active in the fossil fuel sector as soon as it derives any revenue from fossil fuel activities.

Q&A 27 clarifies that PAI6 Table 1 (Energy consumption intensity per high impact climate sector) requires disclosure of an aggregate figure for each high impact sector and not an aggregate figure for all high impact sectors.

Q&A 28 clarifies that for non-Euro currency values for PAIs, the exchange rate at the end of the fiscal year end for all the reference points should be used.

Q&A 29 clarifies, in response to a question about the allocation of investee companies' emissions at the level of the financial market participant (**FMP**), that investee companies' Scope 1 and 2 emissions should be allocated to the FMP's Scope 1 and 2 emissions in the PAI indicators. This being the case as the PAI indicators measure the financed emissions of the FMP's investments (rather than of the FMP itself).

New financial product disclosure Q&A (Q20-28)

Q&A 20 and 21 clarify the calculation method for Taxonomy-aligned sustainable investments and sustainable investments (at both activity and investment level) with detailed examples for both.

Q&A 22 clarifies that an FMP is responsible for ensuring that sustainable investments comply with Article 2(17) SFDR even where a fund under management fulfils a commitment to sustainable investments by investing in underlying funds with sustainable investments. In which case, the FMP must look-through to the underlying investments to ensure they qualify as sustainable investments under the FMP's sustainable investment methodology and to accurately assess the proportion of sustainable investments held.

Q&A 23 expands on the existing Q&A 16 in relation to FMP's consistent application of its sustainable investment methodology and confirms that an FMP must have its own sustainable investment methodology and is responsible for ensuring compliance of investments with such methodology irrespective of whether management is delegated or not.

Q&A 24 clarifies that, in relation to Article 9 funds and alongside sustainable investments, EPM techniques can be used but only if used for hedging or liquidity purposes and whether MMFs may be held for liquidity depends on the type of MMF e.g. if it qualifies as cash equivalent under IFRS (i.e. if it is readily convertible to known amounts of cash and subject to an insignificant risk of changes in value).

Q&A 25 clarifies that SFDR disclosures apply equally to passive funds tracking a PAB or CTB.

Q&A 26 clarifies that there is an expectation but not a requirement to publish PCDs on the website as part of the required website product disclosures.

Q&A 27 clarifies that only investee companies need to be assessed to comply with the Article 8 good governance rule.

Q&A 28 clarifies that Article 9(3) funds may be actively or passively managed and an actively managed fund which applies the PAB or CTB minimum standards can use this to comply with Article 9(3) second subparagraph requirement to disclose "*how the continued effort of attaining the objective of reducing carbon emissions is ensured in view of achieving the long-term global warming objectives of the Paris Agreement.*"

ESMA's Sustainable Finance Wish List

Despite the inevitable lull in EU policy making following recent elections, there has been no similar let up in sustainability-related missives from EU regulators.

Over the last 10 weeks or so, the ESAs have published a joint Final Report on Greenwashing, a Joint Opinion with recommendations on SFDR amendments, an EIOPA Opinion on sustainability claims and greenwashing and an ESMA Final Report on Guidelines for Funds' Names with ESG or sustainable terms.

The latest is an ESMA Opinion, published yesterday, with recommendations for improving the 'usability and coherence of the EU sustainable finance framework'. Five of the key recommendations in the Opinion are summarised below and range from replacing the SFDR sustainable investment definition to introducing a 'sustainability KID' for retail investors to moving beyond sustainable finance and developing a transition finance framework. Whether or not any of the recommendations are taken on board is of course, similar to most all Green Deal-related initiatives, entirely in the hands of the newly elected/established EU legislative bodies.

1. *Develop the Taxonomy to include social and environmentally harmful activities*

ESMA recommends developing the Taxonomy to cover:

- all activities capable of contributing substantially to its environmental objectives (the current edition is limited to those activities considered to have the highest potential to substantially contribute to GHG emission reduction based on their share of the overall emissions and emission-reduction potential);
- harmful activities that have the potential to improve; and
- harmful activities which do not have the potential to improve and should be decommissioned.

2. *Phase out SFDR sustainable investment definition and define sustainability by reference to the Taxonomy only*

ESMA recommends phasing out the SFDR sustainable investment definition and instead relying solely on the Taxonomy for the assessment of sustainability across all EU sustainable finance legislation. However, recognising the infeasibility of this while the Taxonomy remains under development, an interim measure of introducing further prescription in the current SFDR definition is recommended e.g. by referencing the Taxonomy, where possible, or specific PAI indicators or ESRS data points to define contribution to a sustainable objective.

3. *Create a transition finance framework*

The initial focus of EU efforts to funnel private investment in support of its Green Deal was clearly on funding sustainable activities, as distinct from activities which are in the process of becoming sustainable i.e. transition activities. It is now abundantly clear that transition activities are not only essential to achieving the Green Deal climate targets but also have as much, if not more, of a requirement for funding as activities which are already sustainable.

It's not surprising therefore, that ESMA recommends significantly increasing the focus on transition finance within the existing framework, with specific recommendations for:

- defining transition investments which *"could be understood as those that are compatible with and support the transition, i.e., aligned with headline EU and global objectives. With regards to environmental objectives, those headline objectives are identified under Article 9 of the Taxonomy Regulation. Alignment with these objectives would mean improvement in the environmental performance of the underlying assets in a timeframe that is aligned with the contribution expected from the said assets under a transition scenario that delivers on the objectives of limiting global warming to 1.5°C above pre-industrial levels, the objective of climate change adaptation and other environmental objectives of the EU. For activities covered by the EU Taxonomy, this alignment may be assessed by reference to Taxonomy reporting and the gradual achievement of Taxonomy alignment over time. For other activities and assets outside of the scope of the Taxonomy (e.g., sovereign bonds, shares and bonds of companies active outside of the EU) this alignment may be assessed by reference to commonly accepted sectoral and/or regional transition pathways."*
- adopting transition-related disclosure rules e.g., as part of the development of the Taxonomy (per 1. above) or by complementing existing CSRD transition plan disclosures; and
- adopting new, and increasing the ambition of existing, transition investment tools e.g. setting additional constraints on the sectoral allocation of the Climate Benchmarks to ensure the decarbonisation of the benchmarks relies on a minimum amount of actual GHG emissions reduction by constituents over a given period of time.

4. *Sustainability disclosures for all SFDR products and a 'sustainability KID' for retail investors*

ESMA recommends all products, irrespective of whether they have a sustainable investment strategy, be required to at least report on a small number of key sustainability metrics which, by way of example, might include GHG emissions, impact on biodiversity, human and labour rights, and Taxonomy alignment.

In addition to the existing range of SFDR disclosures, ESMA recommends developing a 'vital' sustainability information document for retail investors based on the PRIIPs KID. The contents of the sustainability KID should be subject to consumer testing but should include the above mentioned key sustainability metrics.

5. *Voluntary labelling regime with science-based eligibility criteria and label-specific reporting obligations*

ESMA advocates for sustainable product labels with eligibility criteria based on the Taxonomy and transition product labels with criteria which might include an actual reduction in sustainability impacts of investee companies e.g. reducing emissions over a period of time. ESMA also indicates that sustainable and transition product labels could replace the current investment-specific MiFID sustainability preference options.

In addition to the above, the ESMA Opinion includes recommendations for the application of the ESMA Funds' Names Guidelines' expectations to more/all SFDR products, extending the scope of the forthcoming ESG Ratings Regulation to also include ESG data products, clarifying the role of depositaries in monitoring SFDR disclosures and introducing an EU-level stewardship code for asset managers and institutional investors.

AIFMD (UCITS) Review: ESMA Level 2 & 3 Measures on Liquidity Management Tools

On 8 July 2024, ESMA published for consultation draft guidelines and regulatory technical standards (**RTS**) on the characteristics of liquidity management tools (**LMTs**) under AIFMD and UCITS. The draft guidelines and RTS are mandated by new AIFMD and UCITS provisions inserted by the AIFMD Review and are required to be finalised by 16 April 2025 i.e., one year prior to the application of the new AIFMD and UCITS provisions.

The new AIFMD and UCITS provisions require both AIFMs (for open-ended AIFs) and UCITS (note the obligation on the fund, not the manager) to select at least two (one, in the case of MMFs) appropriate LMTs from the harmonised list of LMTs (other than suspensions and side pockets and not only dual and swing pricing) which is now annexed to both Directives.

The two (or one for MMFs) LMTs must therefore be selected from the list of redemption gates, extension of notice periods, redemption fee, swing pricing, dual pricing, Anti-Dilution Levy (**ADL**), redemption in kind. Suspensions and side pockets are always to be available and hence not required to be selected prior to use. The selected LMTs must be included in the fund's constitutional document and policies must be adopted governing the LMTs' (de)activation and the operational and administrative arrangements necessary for their use.

The RTS

In accordance with its mandate, ESMA details the characteristics of all of the LMTs included in the list now annexed to AIFMD and the UCITS Directive i.e., dealing suspension, redemption gates, extension of notice periods, redemption fees, swing pricing, dual pricing, anti-dilution levy, redemption in kind and side pockets.

The characteristics are essentially rules for how each LMT should operate and be applied in a fair and equitable manner. As there are already various domestic rules governing Irish funds' operation and application of LMTs, the RTS may trigger a review and alignment exercise for the Central Bank, depending on the outcome of the consultation. For example, unlike domestic requirements, the RTS provide that a suspension must involve the suspension of both subscriptions and redemptions – it is not possible to suspend only redemptions.

ESMA notes however, that AIFMs and UCITS are free to adopt and implement LMTs in addition to the two (one for MMFs) required to be selected from the AIFMD and UCITS lists which might include tools such as soft closures which allow a fund temporarily close to all/new subscriptions to ensure the fund remains at an optimum size.

The Guidelines

The Guidelines detail expectations for the selection and calibration of the AIFMD and UCITS LMTs and, for side pockets only, the circumstances in which they can be (de)activated. While not specifically mandated to, ESMA decided also to set out minimum expectations, as well as examples, to identify instances for each LMT that may lead to activation.

In addition to general principles on the selection of LMTs, the Guidelines detail governance principles including that LMTs should be embedded in the fund's liquidity risk management framework and there should be a documented LMT policy for the selection, calibration methodology, (de)activation of both the selected LMTs as well as available LMTs (suspensions and side pockets), and for investor disclosures.

For selected LMTs, the Guidelines set out expectations for the LMT selection process, and for both selected and available LMTs, expectations for the LMT activation process and the calibration of the LMT.

Next Steps

The consultations on the draft Guidelines and RTS conclude on 8 October 2024 and the final RTS and Guidelines are scheduled to be published by 16 April 2025.

Recommendations to reform the fitness and probity approval process

The Governor of the Central Bank has endorsed all twelve recommendations in the report of an independent review of the fitness and probity (**F&P**) assessment process.

Following a finding by the Irish Financial Services Appeals Tribunal (**IFSAT**) that the Central Bank of Ireland (**Central Bank**) breached constitutional and natural justice in a F&P assessment process, the Governor of the Central Bank commissioned an independent review of the F&P approval process. The findings of the independent review include twelve key recommendations which will be of interest to both firms and applicants for F&P approval.

IFSAT Decision

On 14 February 2024, IFSAT found on appeal that a Central Bank F&P approval assessment process breached constitutional and natural justice requirements under administrative law.

The appeal concerned a decision by the Central Bank to refuse an application for two senior roles (pre-approval controlled functions (**PCF**s). The applicant had already been approved by the Central Bank to act as a Non-Executive Director or Chair of seventeen regulated financial service provider firms in Ireland.

The tribunal concluded that key elements of constitutional and natural justice were missing from the F&P assessment, including fair notice, the duty to give reasons and the duty to hear the other side. Specifically, it was noted that:

- The applicant was questioned off camera on issues beyond the scope of the agenda.
- Questions were lengthy and complex.
- Briefing information was sent the day before the interview.
- The Minded to Refuse letter did not properly consider the applicant's experience and qualifications.
- The final decision maker didn't hear the other side or consider the rebuttal evidence.

IFSAT emphasised that it concerned the applicant's right to earn a livelihood and their reputation in the funds industry.

Please find further analysis of the IFSAT decision here.

Independent Review

Following the IFSAT finding, the Governor of the Central Bank of Ireland (**the Governor**) commissioned an independent review of the Central Bank's F&P approval process. The review was conducted by Andrea Enria, the former Chair of ECB Supervisory Board.

On 11 July 2024, the Central Bank published Mr. Enria's F&P review report (the **Report**). While the Report concluded that the F&P process in Ireland is broadly aligned with other jurisdictions, it was found that the requisite standards of fairness and transparency are not always met.

The Report makes the following twelve recommendations.

1. Fostering industry role in gatekeeping

The Central Bank should provide guidance and clarity on the gatekeeping role of regulated entities including the Central Bank's proportionate expectations of regulated entities regarding the role they undertake prior to submitting an application for PCF approval in relation to due diligence/screening, background checks, record keeping and the ongoing monitoring of the F&P of individuals.

2. Clear fitness and probity standards

To provide greater clarity of the F&P standards, the Central Bank should:

- Consolidate F&P standards, guidance and requirements in a single location to promote greater accessibility.
- Incorporate objective measurements (e.g. specific qualifications, certifications or experience to reduce subjectivity of the F&P assessment; expectations regarding the number of mandates that an individual can hold).
- Develop specific guidance on the role of an executive, non-executive and independent non-executive director.
- Add provisions on identifying, managing and mitigating conflicts of interest.
- Clarify how collective suitability and diversity within boards will be assessed.
- Clarify expectations regarding consideration of past events.
- Establish a mechanism for regular review of the F&P standards.
- Review materials relating to F&P, corporate governance and the individual accountability framework to ensure they operate in an integrated manner.

3. Governance

A gatekeeping unit should be established within the Central Bank with responsibility for the entire gatekeeping process. The Central Bank should reconsider the overall number of PCF roles and increase the number of interviews held in the funds sector given its increased systemic footprint in Ireland.

4. Decision-making

Where legal advice is required on any PCF gatekeeper application, this advice should be obtained by the in-house legal division of the Central Bank.

In the event that significant F&P concerns persist in relation to a candidate, a Minded to Refuse Letter should be issued by the F&P team. It should include a draft decision, provide a clear outline of the circumstances,

concerns and guidance and address all relevant issues raised to date including written responses to any arguments raised by the applicant.

A significant decisions committee should be established within the Central Bank to deal with applications that could potentially be refused. The significant decisions committee should be chaired by a senior official not routinely involved in the assessment to ensure independence.

5. Communication and IT platform

Annual information sessions and workshops should be held to assist firms and potential candidates in their understanding of the F&P process.

Ad hoc workshops should be organized to obtain feedback from firms on the functioning of the online portal for applications and other possible improvements of the practical aspects of the application process including the Individual Questionnaire.

6. Interview Stage

The Report recommends:

- A minimum of five working days' notice should be provided for an F&P interview.
- Notices should include the Central Bank staff members attending (which should be limited to three staff members) and their roles.
- Interviews should be kept to a time limit (e.g. ninety minutes as it is good practice in other jurisdictions).
- The format should be conversational and not adversarial.
- Minutes of the interview should be shared with the individual within one week, allowing one week for providing comments.
- The individual may decide to bring a note keeper or lawyer as observers.
- Feedback should be provided in all cases where an interview is conducted (whether an assessment interview or a specific interview) and such feedback should be provided to both the firm and the individual.

7. Efficiency of the interview process

The Central Bank should aim to conduct a single comprehensive interview to avoid unnecessary duplication, such as conducting an initial assessment interview followed by a specific interview, particularly when a specific issue is known in advance. "*Meet and greet*" interviews are to be avoided.

8. Withdrawals/feedback

Feedback should also be provided where an application is withdrawn.

Off-the-record discussions between the Central Bank and regulated entities relating to specific F&P applications received by the Central Bank should not occur to maintain integrity and impartiality of the process.

9. Management information

In relation to management information:

- Service standards should be clear and comprehensive and there should be no exclusions from the service standards.
- Although voluntary, the Central Bank should commit to a timeframe within which it will have processed to conclusion all F&P applications. Based on a comparison of other peer regulators, ninety days is recommended with limited opportunities to stop the clock.
- Standardised information should be published annually with data on all F&P applications received (without exclusions) including on the number of applications, interviews, approvals, refusals, withdrawals, incomplete applications received, timeframes (i.e. the date from which the application is received until it is closed by way of decision or withdrawal) and approvals with recommendations (i.e. to address knowledge gaps or other issues that emerged in the assessment). The report should be by reference to all regulated entity types, individual regulated entity types and sectors and should include average times for applications received during that year.

10. Quality Assurance

A robust quality assurance mechanism should be established. The Report suggests that it would be conducted by Central Bank staff but with oversight from an externally appointed risk advisor.

11. Complaints procedure

A complaints process should be established specifically for the F&P gatekeeping process. This procedure should be led by an externally appointed risk advisor.

12. Training

A comprehensive training programme for the F&P gatekeeping process (including but not limited to conduct of interviews and provision of feedback) should be developed.

Conclusion

With the endorsement of the twelve recommendations by the Governor of the Central Bank at the launch of the Report, the F&P approval process is likely to experience a material overhaul. Currently, a complex overlapping regulatory regime exists for applicants between F&P, conduct standards and the individual accountability framework/senior executive accountability regime. The review and the anticipated reforms will hopefully bring greater clarity for firms and individuals in the regulated financial services sector.

Firms and applicants will welcome a reformed F&P approval process which embeds fairer and more transparent procedures and processes. William Fry's Financial Regulation team supports firms and applicants for PCF roles as they navigate the F&P approval process.

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