Fund News
Issue 109 - December 2013

Investment Fund Regulatory and Tax developments in selected jurisdictions

This month developments from:

- Europe
- UK
- Ireland
- Switzerland

European Union

COREPER agrees position on UCITS V proposal to support progress early in 2014

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Joint position of the European Supervisory Authorities on manufacturers’ product oversight and governance processes

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On 13 November 2013 the European Parliament issued a draft report on the Commission proposal regarding European Long-Term Investment Funds (“ELTIFs”). The main amendments proposed by

For further details on any of these topics, or for any questions or queries you may have, please get in touch with your usual KPMG contact or one of the KPMG LLP (UK) contacts listed below

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the Parliament are as follows. Read more

**Draft ECON resolution on proposed Money Market Fund regulation**
The Committee on Economic and Monetary Affairs ("ECON") published a draft report in November 2013 on the proposal for a regulation of the European Parliament and of the Council on Money Market Funds ("MMFs"). The report proposes several amendments to the MMF regulation. Read more

**ECON draft report on the proposal for a regulation on financial benchmarks**
On 15 November 2013, the Committee on Economic and Monetary Affairs ("ECON") issued a draft report on the proposal of the European Commission for a regulation on indices used as benchmarks in financial instruments and financial contracts. The main objectives of this proposal are to improve benchmarks' market integrity and fairness in order to restore confidence in financial markets and ensure the protection of consumers and investors. Read more

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On 27 November ESMA published an updated version of its Q&A on the Guidelines on ETFs and other issues (Ref: 2013/1547). Two new questions were added to the document: the first specifies that the reinvestment of cash collateral should be taken into account for the calculation of the issuer concentration limits laid down in the UCITS Directive; and the second clarifies paragraph 59 mentioning that calculation mistakes in financial indices are not considered as retrospective changes. The Q&A (now 11 pages) is available via the following web link:

http://www.esma.europa.eu/content/ESMA%E2%80%99s-
Guidelines-ETFs-and-other-UCITS-issues-1

**ESMA work on Market Abuse Regulation**
ESMA has published a Discussion Paper (ESMA/2013/1649) setting out its initial views on the possible implementing measures it will have to develop for the new Market Abuse Regulation ("MAR") which aims at enhancing market integrity and investor protection. The Discussion Paper covers the following. Read more

**ESMA publishes revised AIFMD reporting guidelines**
On 15 November 2013 ESMA published a revised version of its final report on ‘Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD (revised)’ as well as revised reporting templates. The revised final report (69 pages) and documents are available via the following web link:

FCA issues consultation on the use of dealing commissions

On the 25 November the Financial Conduct Authority (“FCA”) issued a consultation paper (“CP 13/17”) on the use of dealing commission. CP 13/17 was expected following the speech by Martin Wheatley, CEO of the FCA, at the FCA’s asset management conference on 30 October. A summary of his speech was included in the prior issue of Fund News (Issue 108). The FCA has a range of concerns on the use of dealing commission by managers and the CP proposes clarifications to its ‘use of dealing commission’ requirements that are set out in the Conduct of Business Sourcebook (COBS 11.6). Appendix 1 to the CP proposes amendments to COBS 11.6 which are intended to clarify the current position. However these proposals are only the first stage of a more extensive exploration of how dealing commissions, paid by investors, are spent by managers. The review will include consideration of wider regulatory reform including, at the European level, via MiFID II. Read more

Regulations issued that support the payment of gross interest to non-UK investors in UK authorised funds

Regulations were issued on 28 November and come into effect for unit sales from 19 December that permit UK Authorised Funds (“UK AFs”), that qualify as bond funds, to pay gross interest distributions to non-UK investors provided certain conditions are met. These Regulations support the tax efficient sale of UK AFs to non-resident investors. Read more

FRC clarification and consultation on proposed amendments to FRS 102

On 12 November the Financial Reporting Council (“FRC”) clarified FRS 102 ‘The Financial Reporting Standard applicable in the UK and Republic of Ireland’ as regards Section 12 ‘Other Financial Instruments’ and specifically the net investment hedges of foreign operations established as branches. The FRC’s clarification is available at the following link:


Also in November, the FRC published FRED 51 a consultation on proposed amendments to FRS 102 on hedge accounting to achieve two ends:

• allow entities to apply hedge accounting when this reflects the economic and risk management strategies, without onerous conditions; and
Ireland

**CBI Issues 5th AIFMD Q&A – AIFMD Exemption for Securitisation Companies**
On 8 November 2013 the Central Bank of Ireland published a fifth edition of the AIFMD Q&A document. The additional information covers whether a special purpose vehicle (“SPV”) should seek authorisation as, or appoint, an AIFM. The Central Bank of Ireland responds that in most cases: (i) registered ‘financial vehicle corporations’; and (ii) securitisation companies funded by way of debt or other non-equity instruments (i.e. which do not issue shares or units to investors), are not currently within the scope of the AIFMD, however, this is subject revision and to any further clarification by ESMA.

**Finance (No.2) Bill 2013 Published**
The Finance (No.2) Bill 2013 (the ‘Bill’) was published on 24 October 2013. The Bill makes a number of adjustments, including, but not limited to, the following. Read more

**IFIA Guidance Paper 3 - Depositary duties**
On 16 October 2013 the Irish Funds Industry Association (“IFIA”) Depositary Committee issued a revised Guidance Paper 3A – AIFMD Depositary Duties. The paper addresses changes that will be required in order to reflect depositary obligations post AIFMD. The paper is available on request from the IFIA at the following link:

http://www.irishfunds.ie/

**Irish Stock Exchange updates listing requirements for investment funds**
The Code of Listing Requirements and Procedures applicable to applicant or listed investment funds was updated by the Irish Stock Exchange in November 2013. The revised code can be obtained on the Irish Stock Exchange website at the following link.

Switzerland
**FINMA confirms cooperation with foreign authorities to supervise distribution of funds to non-qualified investors**

The Swiss Financial Market Supervisory Authority ("FINMA") has concluded an agreement on cooperation and the exchange of information with the Irish financial regulator, the Central Bank of Ireland, regarding the distribution of foreign collective investment schemes in Switzerland to non-qualified investors (retail investors). The existing cooperation agreement with the French Autorité des Marchés Financiers ("AMF") could also be confirmed. More information is available via the following link:

http://www.finma.ch/e/aktuell/Pages/mm-mou-fondsvertrieb-20131115.aspx

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**Other publications**

- **The cost of compliance: 2013 KPMG/AIMA/MFA Global Hedge Fund Survey**
- **Evolving Investment Management Regulation – June 2013**
- **Industry Insights: A snapshot of the key trends, issues and challenges facing the investment management industry**

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**European Union**

**COREPER agrees position on UCITS V proposal to support progress early in 2014**

On 4 December the Permanent Representative Committee ("COREPER") agreed the legislative position, on behalf of the Council, on UCITS V. This should enable the Trilogues to take place early in 2014 with the goal of reaching agreement with the European Parliament at first reading.

Both the rapporteur and the Greek Presidency are said to be keen to see progress and there are not considered to be major differences between the Parliament and Council which means there is a reasonable expectation that UCITVS V will be legislated ahead of the next European Parliamentary election in May 2014.

It has been reported that there is a strong qualified majority support to the text amongst member states which could support delivering the UCITS V legislation before the elections, and so
mitigate the risk that a new Parliament could seek to reconsider certain of the proposals.

The position adopted by the Council (38 pages) is available here.

Joint position of the European Supervisory Authorities on manufacturers’ product oversight and governance processes

In November 2013 the European Supervisory Authorities (“ESAs”) released a set of high level cross-sector product oversight and governance principles for product manufacturers in the Banking, Insurance and Investment Management sectors. The principles cover responsibilities of manufacturers in organising processes, functions and strategies aimed at designing, operating and bringing products to market, and reviewing them over the life of the product.

The principles are:

1. In order to minimise potential consumer detriment, avoid potential conflicts of interest, and ensure that the interests and objectives of target markets are duly taken into account, the manufacturer should establish, implement, and review on an ongoing basis product oversight and governance processes.

2. The manufacturer’s executive board should endorse the product oversight and governance processes. Senior management should take responsibility for compliance with these processes before and after the launch of a product, and should ensure that adequate records of this assessment are maintained.

3. As part of the application of its product oversight and governance processes, the manufacturer should identify the target market of the product; analyse its characteristics; and ensure that the product meets the identified objectives and interests of that target market.

4. The manufacturer should conduct product testing to assess how the product would function in different, likely scenarios, including stressed scenarios, to ensure that the product is aligned with the interests and objectives of, and leads to fair outcomes for the target market.

5. When setting the charges and features of the product, the manufacturer should also take appropriate steps to ensure they are transparent for the target market.

6. The manufacturer should select distribution channels that are appropriate for the target market and disclose clear, accurate and up-to-date information to distributors.

7. The manufacturer should monitor periodically the functioning and operation of the product to ensure that it continues to meet the objectives and interests of the target market and should, where appropriate, review the product to ensure compliance.

8. The manufacturer should take appropriate action when issues that may lead to consumer detriment have materialised or can be reasonably anticipated.

The European Securities and Markets Authority (“ESMA”) will undertake substantial further work on product governance and distribution, based on an expected mandate from the European Commission that may result from the on-going legislative process for the review of MiFID (MiFID II and MiFIR).

Following the final legislative text, expected by the end of 2013, ESMA will provide technical advice to the European Commission in this area for the future legislative measures implementing the revised MiFID.
The ESAs product oversight and governance principles (seven pages) are available here.

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European Parliament issues draft report on the proposal for a regulation on European Long-Term Investment Fund (“ELTIF”)

On 13 November 2013 the European Parliament issued a draft report on the Commission proposal regarding European Long-Term Investment Funds (“ELTIFs”). The main amendments proposed by the Parliament are as follows:

1. **Inclusion of SMEs within the eligible assets**  
The Commission proposal restricted the eligible assets to qualifying portfolio undertakings that are not admitted to trading on a regulated market, on a multilateral trading facility or on an organised trading facility. The Parliament is proposing to increase the scope of the eligible assets to listed small and medium-sized enterprises (“SMEs”).

2. **Distinct treatment of retail and professional investors**  
In the Commission proposal, ELTIFs are categorised as closed-end funds. The fund could however be listed to allow investors to trade units or shares on the regulated market or alternatively investors could also transfer their shares or units to third parties. The Parliament introduces a distinction between retail investors and professional investors, allowing retail investors a redemption right before the end of the life cycle of the ELTIF.

3. **Possibility to change the life cycle of the ELTIF**  
Under the Commission proposal, the life cycle of the ELTIF is determined at the creation of the fund. The Parliament proposes that the manager can, in exceptional circumstances, decide to change the life cycle of the ELTIF to take into account the life cycles of different projects as well as the variation in terms of profitability among projects.

4. **Transparency**  
The provision authorising Member States to request the addition in the prospectus of any information considered relevant to allow investors to make an informed judgment is now deleted in order to ensure that the marketing across Member States is harmonised. Information about redemption rights must be clearly written in the prospectus and the KID for retail investors.

5. **Borrowing of cash**  
While the Commission banned the encumbrance of the assets held in the portfolio of the ELTIF, the Parliament considers that such borrowing can encumber assets of the fund provided those assets do not represent more than 30% of the capital of the ELTIF. The manager must also inform investors in advance about borrowing needs that arise within the investment strategy.

The text of the draft report (34 pages) can be found at the following web link.


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Draft ECON resolution on proposed Money Market Fund regulation
The Committee on Economic and Monetary Affairs ("ECON") published a draft report in November 2013 on the proposal for a regulation of the European Parliament and of the Council on Money Market Funds ("MMFs"). The report proposes several amendments to the MMF regulation, including:

- Constant net asset value ("CNAV") MMFs should not be offered to retail investors.
- CNAV MMFs would have five years after entry into force of the regulation to convert into variable net asset value MMFs.
- The deadline for the implementation of a NAV buffer for CNAV MMFs would be 31 December 2014.
- The transitional provisions on the NAV buffer would be removed from the proposed regulation.
- There would be additional restrictions relating to the location of third country MMFs and MMF managers.
- A transparent remuneration policy would be required for all MMFs.
- MMFs with more than €10 billion of assets under management should be directly supervised by ESMA.

The proposed amendments from ECON’s rapporteur are globally more restrictive than the regulation proposed by the Parliament on MMFs. This report from the rapporteur is a draft and will be subject to a vote at the Committee on Economic and Monetary Affairs planned in February 2014.

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**ECON draft report on the proposal for a regulation on financial benchmarks**

On 15 November 2013, the Committee on Economic and Monetary Affairs ("ECON") issued a draft report on the proposal of the European Commission for a regulation on indices used as benchmarks in financial instruments and financial contracts. The main objectives of this proposal are to improve benchmarks’ market integrity and fairness in order to restore confidence in financial markets and ensure the protection of consumers and investors.

The ECON introduced the following main changes:

- **Scope**
  The scope of the Regulation is now restricted to administrators of benchmarks that administer a benchmark falling into one of the qualified benchmarks categories.

- **Supervision**
  The role of ESMA has been strengthened, drawing further on their expertise to provide guidelines, calibrate technical standards and mediate between National Competent Authorities.

- **Third country provisions**
  The basis for third country equivalence is now the compliance with the IOSCO standards or other international standards for benchmarks. ESMA and National Competent Authorities should play a role in the authorisation and developing lists of approved benchmark providers.

- **Transparency**
Transparency of the data used or the methodology applied when producing a benchmark is a useful tool for investors and supervisors. All input data and methodologies used in the production of critical or major benchmarks used for substantial retail investment should be made public.

- **Financial stability**
  
  A special procedure is foreseen when the cessation of a benchmark could have negative consequence for financial stability.

The Regulation concerning financial benchmarks is expected to be voted in March 2014 and thus should enter into force in 2016. The text of the draft report (70 pages) can be found at the following web link:


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**ESMA publishes an updated Q&A on its Guidelines on ETFs and other UCITS issues**

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**ESMA work on Market Abuse Regulation**

ESMA has published a Discussion Paper (ESMA/2013/1649) setting out its initial views on the possible implementing measures it will have to develop for the new Market Abuse Regulation ("MAR") which aims at enhancing market integrity and investor protection. The Discussion Paper covers the following:

- conditions to be met by buyback programmes and stabilisation measures to benefit from the exemption from market abuse prohibitions;
- arrangement and procedures required for market soundings, from the perspective of both the sounding and the sounded market participants;
- indicators and signals of market manipulation;
- criteria to establish Accepted Market Practices;
- arrangement, systems and procedures to put in place for the purpose of suspicious transactions and order reporting as well as its content and format;
- issues relating to public disclosure of inside information and the conditions for delay;
- format for insider lists;
• issues concerning the reporting and public disclosure of managers’ transactions;
• arrangements for fair presentation and disclosure of conflicts of interests by producers and disseminators of investment recommendations; and
• reporting of violations and related procedures.

The closing date for responses is 27 January 2014 and the Discussion Paper (109 pages) is available via the following link:

http://www.esma.europa.eu/page/Market-abuse

ESMA publishes revised AIFMD reporting guidelines

On 15 November 2013 ESMA published a revised version of its final report on ‘Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD (revised)’ as well as revised reporting templates. The revised final report (69 pages) and documents are available via the following web link:


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CP13/17 follows from the findings of the FCA’s conflicts of interest thematic review, from which it concluded that the regime introduced at the start of 2006, after the extensive consultations between 2003 and 2005, is no longer effective or operating as was intended.

The FCA considers that some firms are making extensive use of client commissions to pay for non-eligible services or managers are paying more for those services than they would if the costs were coming out of their own funds.

In addition, it found significant payments made for ‘corporate access’, whilst it does not have a problem with such payments per se, nor does it seek to mandate rules for such payments, it considers that managers should not pay for corporate access with dealing commissions unless the firm can demonstrate that this complies with the rules.
The FCA estimate dealing commission payments totalled £3 billion in 2012 and that about half was used to buy ‘research’. It has evidence that the purchase of research goods and services has failures in judgements and controls and that investors’ money is being spent: on services out of line with the intent and requirements of COBS 11.6; and without the requisite challenge and control that would be applied if the manager was spending its own money.

The FCA expects managers to exercise the same or greater care and judgement when spending investor’s money as they would with their own, and to manage costs with the same tenacity as they produce returns.

The CP (35 pages) sets out the FCA’s thinking and includes the proposed revisions to COB 11.6. This consultation is expected to have a significant impact and, accordingly, the period to respond is three months to 25 February 2014. The CP is available here:


Regulations issued that support the payment of gross interest to non-UK investors in UK authorised funds

Regulations were issued on 28 November and come into effect for unit sales from 19 December that permit UK Authorised Funds (“UK AFs”), that qualify as bond funds, to pay gross interest distributions to non-UK investors provided certain conditions are met. These Regulations support the tax efficient sale of UK AFs to non-resident investors.

Originally announced in the 2013 Budget, these Regulations permit UK AFs that qualify as bond funds to pay gross distributions to non-UK investors provided that the marketing of units of the relevant share class is not directed to UK resident investors and information is available to investors that notifies them of the UK tax treatment if they are UK resident.

The Regulations take effect in relation to units acquired by investors on/after 19 December 2013. They will assist fund managers to market UK bond funds to non-UK investors as they are more commercial than the existing ‘reputable intermediary condition’. The Regulations (three pages) are available here:

http://www.legislation.gov.uk/uksi/2013/2994/contents/made

FRC clarification and consultation on proposed amendments to FRS 102

On 12 November the Financial Reporting Council (“FRC”) clarified FRS 102 ‘The Financial Reporting Standard applicable in the UK and Republic of Ireland’ as regards Section 12 ‘Other Financial Instruments’ and specifically the net investment hedges of foreign operations established as branches. The FRC’s clarification is available at the following link:


Also in November, the FRC published FRED 51 a consultation on proposed amendments to FRS 102 on hedge accounting to achieve two ends:
allow entities to apply hedge accounting when this reflects the economic and risk management strategies, without onerous conditions; and

use concepts and language that are consistent with those included in IFRS 9 Financial Instruments, the IASB’s standard that includes hedge accounting.

The proposed amendments to FRS 102 would allow: entities to use hedge accounting where the hedging instrument, hedged item and hedging relationship meet certain broad conditions; permit these relationships to be discontinued at any point; and prescribe the accounting treatment for ongoing use and discontinuation.

The consultation paper (35 pages) is available at the following link:


Ireland

CBI Issues 5th AIFMD Q&A – AIFMD Exemption for Securitisation Companies

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Finance (No.2) Bill 2013 Published

The Finance (No.2) Bill 2013 (the 'Bill') was published on 24 October 2013. The Bill makes a number of adjustments, including, but not limited to, the following:

Investment Fund Tax Rates Increased
From 1 January 2014 the exit tax rate for Irish individuals on distributions from Irish and EU regulated funds will increase (potentially by up to 52%). To avoid these higher rates, Irish resident investors may wish to redeem investments in funds before 31 December 2013. However, the exit tax should not arise where the relevant investor is an exempt Irish resident or is foreign tax resident.

New Residency Rules for Irish Companies
The Bill prescribes on a company’s management and control for residency purposes, something which previously was largely based on case law. The intention is that an Irish company cannot be ‘stateless’ i.e. that there should not be a mismatch between Ireland’s company tax residence rules and those of an EU member state or another country with which Ireland has a double taxation treaty.

The proposed changes to the residency rules have been effective from 24 October 2013 for companies which are formed on or after that date and will be effective from 1 January 2015 for all
companies incorporated before 24 October 2013.

**Extension of Treasury Company Exemption**

The Bill also extends an exemption from interest withholding tax applicable to Irish treasury companies. The new exemption will permit treasury companies to pay interest free from withholding tax to other Irish resident companies which are part of the same 51% group.

For further information on the Finance (No.2) Bill 2013 see KPMG’s website at the following link:

http://www.kpmg.ie/financeact2013/overview/index.htm

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**IFIA Guidance Paper 3 - Depositary duties**

On 16 October 2013 the Irish Funds Industry Association (“IFIA”) Depositary Committee issued a revised Guidance Paper 3A – AIFMD Depositary Duties. The paper addresses changes that will be required in order to reflect depositary obligations post AIFMD. The paper is available on request from the IFIA at the following link:

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**Irish Stock Exchange updates listing requirements for investment funds**

The Code of Listing Requirements and Procedures applicable to applicant or listed investment funds was updated by the Irish Stock Exchange in November 2013. The revised code can be obtained on the Irish Stock Exchange website at the following link:

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**Key dates reminder**

- **20 December 2013** – normal timeframes apply for QIAIF authorisations and filings until 20 December 2013, the QIAIF filing deadlines for the Christmas period have been notified to the industry in a letter to the IFIA.

- **31 December 2013** – Fitness & Probity: Collective investment schemes, management companies and other regulated financial service providers, that have not already done so, will need to obtain their annual certification from persons performing PCFs (e.g. directors) and CFs (e.g. Money Laundering Reporting Officer (“MLRO”) and Company Secretary) that they are: aware of the fitness and probity standards; agree to continue to abide by those standards; and will notify the relevant entity if they no longer comply.

- **31 December 2013** – UCITS Business Plan: UCITS management companies and Self-Managed Investment Companies, that have not already done so, may need to obtain annual confirmations from service providers and relevant persons in accordance with their business plans.

- **21 February 2014** – the latest date when applications for authorisation as an AIFM, self/internally managed AIF, or ‘Registered AIFM’ must be submitted to the Central Bank of
Switzerland

FINMA confirms cooperation with foreign authorities to supervise distribution of funds to non-qualified investors

The Swiss Financial Market Supervisory Authority ("FINMA") has concluded an agreement on cooperation and the exchange of information with the Irish financial regulator, the Central Bank of Ireland, regarding the distribution of foreign collective investment schemes in Switzerland to non-qualiﬁed investors (retail investors). The existing cooperation agreement with the French Autorité des Marchés Financiers ("AMF") could also be conﬁrmed. More detail is available at the following link:

http://www.finma.ch/e/aktuell/Pages/mm-mou-fondsvertrieb-20131115.aspx