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Central Bank of Ireland

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Eurosystem

**ENFORCEMENT ACTION**

**CENTRAL BANK OF IRELAND**

and

**MERCER GLOBAL INVESTMENTS MANAGEMENT LIMITED**

**Mercer Global Investments Management Limited fined €117,600 and reprimanded by the Central Bank of Ireland for breaches of UCITS investment fund regulations.**

On 14 November 2022, the Central Bank of Ireland (the **Central Bank**) reprimanded and fined Mercer Global Investments Management Limited (**MGIM**) €117,600 pursuant to its Administrative Sanctions Procedure for six breaches of UCITS investment fund regulations (the **UCITS Regulations**).

MGIM is a UCITS Management Company. A UCITS Management Company typically provides management services for UCITS funds. MGIM was responsible for issuing the prospectuses and key investor information documents for funds it managed. MGIM has admitted that, for varying periods between 1 July 2011 and 31 December 2018, the prospectuses and key investor information documents (**KIIDs**) for five sub-funds failed to disclose that the sub-funds relied upon an index-tracking strategy, or provide the details of the index being tracked.

The UCITS Regulations require that certain information must be included in prospectuses and KIIDs and that this information should be kept up to date in order to enable investors to make informed decisions about their investments. Failure to comply with these requirements may result in investors not being fully informed of the investment strategy of a particular fund or the risks associated with investment in that fund.

In addition, as part of its “gatekeeper” function in the authorisation of funds, the Central Bank reviews prospectuses (including any supplements to those prospectuses) before authorising a

fund. The effectiveness of this function ultimately relies on accurate and complete information being submitted by fund management companies in respect of the strategies and the risks associated with the fund seeking authorisation.

The Central Bank has determined the appropriate fine to be €168,000, which was reduced by 30% to €117,600 in accordance with the settlement discount scheme provided for in the Central Bank's Administrative Sanctions Procedure.

Seána Cunningham, the Central Bank's Director of Enforcement and Anti-Money Laundering, has commented as follows:

*"Transparency around the investment policy or strategy of a fund is a critical element in investor protection. Fund management companies such as MGIM are responsible for ensuring prospectuses and key investor information documents issued in respect of funds they manage contain information necessary for investors to be able to make informed decisions regarding the investments proposed to them. The requirements for accurate prospectuses and key investor information documents are an essential part of the UCITS regulatory framework.*

*One of the key features of any sound regulatory system is ensuring that firms and their products meet the appropriate standards in order to enter the financial services industry in the first instance. Effective gatekeeping by the Central Bank relies on accurate and complete information being submitted by firms seeking fund authorisation, as part of the assessment of their applications and in ongoing supervision.*

*This investigation found that MGIM failed in its obligations to both investors and to the Central Bank by not including required information regarding index-tracking strategy in the prospectuses and KIIDs of five investment funds managed by MGIM.*

*Compliance with the regulatory requirements placed on fund management companies is key to ensuring good governance, the protection of investors, the integrity of the market and systemic stability."*

## **BACKGROUND**

In 2016, the European Securities and Markets Authority (**ESMA**) published its research on the alleged practice of "closet indexing" in the EU funds sector. The practice of closet indexing refers to instances where funds that are "passively" managed by following a benchmark or an index are represented by the fund managers (also referred to by ESMA as asset managers) as being "actively" managed, requiring the investment manager to be more actively involved in the management of the fund. According to ESMA's research the issues relating to closet indexing

formed “part of a broader issue on the effectiveness of investment disclosure and the legitimate expectations of investors in respect of the service provided by some asset managers”<sup>1</sup>.

## **THEMATIC REVIEW**

On foot of the concerns identified by ESMA, the Central Bank undertook a thematic review of all 2,550 Irish authorised UCITS funds, classified as actively managed as at March 2018, to identify potential closet indexing.

As part of the thematic review, the Central Bank identified issues around the effectiveness of investor disclosure. This included a significant finding that investors were not always given sufficient or accurate information about the fund’s investment strategy in the prospectus and key investor information documents provided to them<sup>2</sup>.

Arising out of the above finding, the Central Bank commenced an enforcement investigation in respect of six suspected contraventions of the UCITS Regulations by MGIM.

## **THE INVESTIGATION**

The investigation into MGIM identified five sub-funds in respect of which the investment strategy was to follow or track an index, however this information was not set out in the investment policy or strategy outlined in the relevant prospectuses and KIIDs and this resulted in the Firm’s failure to comply with the disclosure requirements in the UCITS regulations for the relevant funds.

## **THE PRESCRIBED CONTRAVENTIONS**

The Central Bank’s investigation identified four breaches of S.I. No. 352/2011 - European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (the **2011 UCITS Regulations**) and two breaches of S.I. No. 420/2015 - Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 (the **2015 UCITS Regulations**).

### ***Breaches related to Prospectuses***

1. Prospectuses issued by MGIM in respect of five sub-funds did not include the information regarding the index-tracking strategy, together with the index being tracked, necessary for investors to be able to make an informed judgement of the

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<sup>1</sup> ESMA/2016-165 dated 2 February 2016, page 1

<sup>2</sup> <https://www.centralbank.ie/news-media/press-releases/press-release-thematic-review-of-closet-indexing-18-july-2017>

relevant investment proposed to them, and, in particular, of the risks attached thereto, during the Relevant Period. This is contrary to Regulation 89 (1) of the 2011 UCITS Regulations.

2. An essential element of the prospectuses of five sub-funds, specifically the index-tracking element of the fund together with the index being tracked, was not kept up to date during the Relevant Period. This is contrary to Regulation 92 of the 2011 UCITS Regulations.
3. Required information regarding the index-tracking nature of five sub-funds was not included in prospectuses during the Relevant Period. This is contrary to Regulation 57 (1) of the 2015 UCITS Regulations.

***Breaches related to key investment information***

4. Information about an essential characteristic of five sub-funds, specifically the index-tracking element of the fund together with the index being tracked, was not included within the KIIDs during the Relevant Period, such that investors would not reasonably be able to understand the nature and the risks of the investment product offered to them and, consequently, to take investment decisions on an informed basis. This is contrary to Regulation 98 (2) of the 2011 UCITS Regulations.
5. Key investor information of five sub-funds, specifically the index-tracking element of the funds together with the index being tracked, was not kept up to date during the Relevant Period. This is contrary to Regulation 102 (2) of the 2011 UCITS Regulations.
6. Required information regarding the index tracked by five sub-funds was not included in the KIIDs during the Relevant Period. This is contrary to Regulation 73 (1) (a) of the 2015 UCITS Regulations.

***Relevant Period***

The duration of the prescribed contraventions of the UCITS Regulations (the **Relevant Period**) varies according to the fund and the breach.

<b>Fund</b>	<b>Breach of 2011 UCITS Regulations</b>	<b>Breach of 2015 UCITS Regulations</b>
Fund A	01/7/2011 - 31/12/2018	01/11/2015 - 31/12/2018
Fund B	01/7/2011 - 31/12/2018	01/11/2015 - 31/12/2018
Fund C	16/10/2013 - 31/12/2018	01/11/2015 - 31/12/2018
Fund D	09/11/2015 - 31/12/2018	09/11/2015 - 31/12/2018
Fund E	25/05/2017 - 31/12/2018	25/05/2017 - 31/12/2018

## **REMEDIATION**

The Central Bank is satisfied that the Firm has remediated the failings identified by the Central Bank's thematic inspection and the resulting enforcement investigation.

## **PENALTY DECISION FACTORS**

In deciding the appropriate penalty to impose, the Central Bank considered the ASP Sanctions Guidance issued in November 2019. The following particular factors are highlighted in this case:

- The duration of the contraventions, which occurred for varying periods between July 2011 and December 2018.
- The breaches constitute a significant departure from the standard required of MGIM.

## **MITIGATING FACTORS**

- MGIM has not previously come to the adverse attention of supervisors or been the subject of previous enforcement action by the Central Bank.

## **OTHER CONSIDERATIONS**

- The Firm's financial position and the need to impose a proportionate level of penalty.
- The Central Bank notes MGIM's co-operation in this investigation.

The Central Bank confirms that the investigation into the Firm in respect of this matter is now closed.

## NOTES

1. The fine imposed by the Central Bank was imposed under Section 33AQ of the Central Bank Act 1942. The maximum penalty under Section 33AQ is €10,000,000, or an amount equal to 10% of the annual turnover of a regulated financial service provider, whichever is the greater.
2. This is the Central Bank's 153rd enforcement outcome. The Central Bank has imposed fines of over €401 million under this procedure.
3. Funds collected from penalties are included in the Central Bank's Surplus Income, which is payable directly to the Exchequer, following approval of the Statement of Accounts. The penalties are not included in general Central Bank revenue.
4. The fine reflects the application of an early settlement discount of 30%, as per the discount scheme set out in the [Central Bank's Outline of the Administrative Sanctions Procedure 2018](#).
5. The Central Bank's [ASP Sanctions Guidance November 2019](#) provides further information on the application of the sanctioning factors set out in the Outline of the Administrative Sanctions Procedure 2018 and the [Inquiry Guidelines](#) prescribed pursuant to Section 33BD of the Central Bank Act 1942. These documents should be read together.