Insurance Quarterly Legal and Regulatory Update

Period covered:
1 January 2018 – 31 March 2018

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INSURANCE QUARTERLY LEGAL AND REGULATORY UPDATE

Solvency II

(i) EIOPA publishes monthly technical information for Solvency II relevant risk free interest rate term structures

The European Insurance and Occupational Pensions Authority ("**EIOPA**") intends to publish the technical information in relation to risk free interest rate ("**RFR**") term structures on a monthly basis to ensure consistent calculation of technical provisions across the European Union.

In Quarter 1, EIOPA published the RFR as follows:

- With reference to the end of December 2017 on 9 January 2018;
- With reference to the end of January 2018 on 6 February 2018; and
- With reference to the end of February 2018 on 6 March 2018.

Undertakings should note that EIOPA has stated on their website that, in certain circumstances, it may be necessary for EIOPA to amend and/or republish the technical information after it has been published.

EIOPA's background material and the monthly technical information on the relevant risk-free interest rate term structures can be accessed here.

(ii) EIOPA publishes monthly symmetric adjustment of the equity capital charge for Solvency II

On a monthly basis, EIOPA updates information on the symmetric adjustment of the equity capital charge. The symmetric adjustment to the equity capital charge shall be included in the calculation of the equity risk sub-module in accordance with the Solvency Capital Requirements ("**SCR**") standard formula to cover the risk arising from changes in the level of equity prices. This adjustment is regulated mainly in Article 106 of the Solvency II Directive; Article 172 of the Solvency II Regulation as well as in the Implementing Technical Standards on the equity index for the symmetric adjustment of the equity capital charge (Commission Implementing Regulation 2015/2016/EU).

EIOPA published the technical information on the symmetric adjustment of the equity capital charge for Solvency II as follows:

- With reference to the end of December 2017 on 9 January 2018;

- With reference to the end of January 2018 on 6 February 2018; and
- With reference to the end of February 2018 on 6 March 2018.

The monthly symmetric adjustment of the equity capital charge can be accessed via the following link.

(iii) EIOPA publishes report on the application of group supervision under Solvency II

On 25 January 2018, EIOPA published its report (dated 22 December 2017) to the European Commission under Article 242(1) of Directive 2009/138/EC (the "**Solvency II Directive**") on the application of group supervision under Solvency II.

The report follows on from a request by the European Commission for EIOPA to consider 29 issues, which are listed in the annex to the report on the application of Title III (Supervision of insurance and reinsurance undertakings in a group) of Solvency II. The report covers areas such as:

- EIOPA's involvement in promoting supervisory convergence in group supervision;
- Definitions and scope of group supervision;
- Functionality of the colleges of supervisors and cooperation of authorities within them;
- EIOPA's role in promoting supervisory convergence on Group internal models;
- Group capital add-ons; and
- The annex which contains the 29 issues for consideration by EIOPA from the European Commission.

A copy of the report can be found here.

(iv) Insurance Europe publishes response to EIOPA's draft advice to the European Commission on Solvency II

On 25 January 2018, Insurance Europe published its response to EIOPA's draft advice to the European Commission on its 2018 review of Solvency II. The response commented on EIOPA's draft advice and provided technical input into the areas under consideration.

Amongst other issues, Insurance Europe:

- Noted with concern that EIOPA had chosen to address the interest rate risk Solvency Capital Requirement ("**SCR**"), despite this issue being out of the scope of the European Commission call for advice. As this issue will be a key focus of the Solvency II 2020 review, Insurance Europe noted that this is a more appropriate forum for its review;

- Expressed concern regarding the theoretical approach taken by EIOPA in its draft advice. Instead, Insurance Europe advocated EIOPA take a more practical approach by measuring the economic impacts of its advice. This approach, the response noted, is more likely to achieve its intended outcomes;

- Noted that, although Insurance Europe supports the level of supervisory convergence already provided for in the Solvency II framework, the favouring by EIOPA of a restrictive approach to convergence across all markets defeats the risk-based approach to regulation already provided for;

- Recommended that EIOPA conduct an overall impact assessment of its proposals, as opposed to an assessment for each area of review, in order to provide an industry-wide picture of their impact; and

- Advocated that EIOPA balance the aims of simplicity and risk-sensitivity more consistently throughout its advice.

A copy of the response is available here.

(v) EIOPA publishes updated Solvency II Q&A

On 2 February 2018, EIOPA published updated questions and answers ("**Q&A**") on the following:

- (EU) No 2015-2450 with regard to the templates for the submission of information to the supervisory authorities;

- (EU) No 2015-2452 with regard to the procedures, formats and templates of the solvency and financial condition report;

- (EU) No 2015-2011 with regard to the lists of regional governments and local authorities;

- Answers to questions on Commission Delegated Regulation (EU) 2015/35 supplementing Directive 2009/138/EC;

- Guidelines on the System of Governance;

- Answers to questions on Risk-free interest rate - VA calculations; and

- Symmetric adjustment of the equity capital.

The Q&A may be accessed here.

(vi) European Commission publishes Implementing Regulation on technical information for calculation of technical provisions and basic own funds in the Official Journal of the European Union

The European Commission Implementing Regulation (EU) 2018/165 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 December 2017 until 30 March 2018 under the Solvency II Directive was published in the Official Journal of the European Union on 3 February 2018.

The Implementing Regulation entered into force on 4 February 2018, and it applies from 31 December 2017 (the first reporting reference date to which the Implementing Regulation applies).

The Implementing Regulation can be found here.

(vii) EIOPA publishes final set of advice to the European Commission on Solvency II Delegated Regulation

EIOPA, on 1 March 2018, published its final set of advice to the European Commission on specific items in the Solvency II Delegated Regulation (the "**Advice**"). Elements of the Solvency Capital Requirement ("**SCR"**) not covered by previous advice formed the scope of the review.

The Advice, dated 28 February 2018, makes a number of recommendations including the following:

- In areas such as natural catastrophe risks and assistance and medical expenses, the availability of more recent data allows for revised calibrations. However, in areas such as longevity risks, mortality and cost-of-capital, analysis of recent developments provided no justification for change;
- It recommended the recalibration of the interest rate risk SCR. This is because the current rate is not effective when interest rates are low, nor does it cater for negative interest rates;
- In cases where unrated debt and unlisted equity can be given the same treatment as rated debt and listed equity, EIOPA recommended the use of objective criteria in these asset classes; and
- As a follow-up to their analysis of the loss-absorbing capacity of deferred taxes, EIOPA recommended a set of principles to encourage supervisory convergence across markets.

The Advice is available here. The Advice is comprehensively summarised by EIOPA's cover letter to the European Commission, available here.

(viii) EIOPA publishes paper on Solvency II tools with macroprudential impact

On 21 March 2018, EIOPA published a paper titled, 'Solvency II tools with macroprudential impact.' The purpose of the paper is to set out and assess the tools already within the Solvency II framework which may be used to mitigate sources of systemic risk.

The tools analysed within the paper are as follows:

- Symmetric adjustment in the equity risk module;
- Volatility adjustment;
- Matching adjustment;
- Extension of the recovery period; and
- Transitional measure on technical provisions.

The preliminary assessment carried out in this paper shows that the above tools ensure sufficient loss absorbency capacity and reserving. Furthermore, the tools also contribute to the policy objective of limiting procyclicality.

In addition, the paper notes that Solvency II has a number of other elements with indirect macroprudential impact, such as the prudent person principle. Although such instruments were not primarily designed to mitigate systemic risk, when considered in the aggregate they may contribute to this objective.

The paper may be accessed here.

(ix) EIOPA publishes consultation paper on revisions to Solvency II ITS and disclosure and reporting guidelines

On 28 March 2018, EIOPA published a consultation paper inviting comments on draft amendments to the Commission Implementing Regulations setting out implementing technical standards on reporting and disclosure. The implementing technical standards relate to the Solvency II Directive.

The closing date for receipt of comments is 11 May 2018. The consultation paper can be accessed here. An accompanying impact assessment, which provides background to the consultation, is available here.

EIOPA has published the two Implementing Regulations separate to the consultation paper:

- The proposed implementing regulation amending Commission Implementing Regulation (EU) 2015/2450 is available here.

- The proposed implementing regulation amending Commission Implementing Regulation (EU) 2015/2452 is available here.

International Association of Insurance Supervisors ("**IAIS**")

(i) IAIS publishes draft application paper on use of digital technology in inclusive insurance

On 15 February 2018, IAIS published a draft application paper on the use of digital technology in inclusive insurance. The draft paper focuses on the factors to be taken into consideration when choosing, designing and implementing regulations and supervisory practices on the use of digital technology in inclusive insurance. Inclusive insurance, in this context, means insurance products aimed at underserved or excluded markets. In addition, the paper examines relevant aspects of InsurTech and FinTech. The paper:

- Illustrates the environment within which supervisors are typically operating by profiling the typical inclusive insurance market and customer;

- Illustrates the context within which the IAIS principles known as the insurance core principles ("**ICPs**") should be proportionately applied, by describing the use of digital technology in inclusive insurance. Some key examples provided relate to big data and telematics and m-insurance channels (which relate to the use of the mobile phone channel for any part of the insurance product lifecycle);

- Considers the impact of technology on the scope of existing insurance regulatory and supervisory frameworks, the nature of the insurance value chain, the parties involved and their roles, and has implications for the jurisdiction of insurance supervisors;

- Provides application guidance on the use of digital technology in inclusive insurance regarding the relevant ICPs;

- Considers the implication of the use of digital technology within inclusive insurance as regards effective supervision of insurers (such as requirements relating to powers, resources and exchange of information and the complexities arising from multiple supervision); and

- Considers corporate governance and risk management requirements, code of business requirements and integrity requirements (such as those relating to safeguarding of client funds and anti-money laundering/ customer due diligence requirements).

Feedback on the paper closed on 16 March 2018.

A copy of the draft issues paper may be found here,

(ii) Deadline for comments on IAIS consultation on activities-based approach to mitigating systemic risk in the insurance sector extended

In February 2018, IAIS extended its deadline for comments on its consultation paper on developing an activities based approach to mitigating systemic risk in the insurance sector. The aim of the paper, published in December 2017, is to invite input from stakeholders on the development of the activities based approach and how this work will be structured going forward. The deadline for comments was extended from 15 February 2018 to 25 February 2018. The consultation paper may be found here.

(iii) Insurance Europe publishes response to IAIS pre-consultation on systemic risk

On 20 February 2018, Insurance Europe published its response to the IAIS pre-consultation on an activities-based approach ("**ABA**") to systemic risk. Amongst other things, Insurance Europe:

- Reiterated its position that traditional insurance is not systemically risky, noting that systemic risk from individual insurers can only originate from a small number of activities, undertaken on a large scale, in the wrong conditions;
- Advocated for the development of a proportionate and properly-designed ABA, with its focus on risk management and preventative actions, to address both "tsunamai" and "domino" views of risk;
- Warned that the EBA is not appropriate for assessing systemic risk, noting that this type of risk should always be determined holistically;
- Recommended that assessment of systemic risk take into account whether the risk generated can actually be transmitted to the wider global financial system and how this impact may be reduced; and
- Advocated that the ABA include an assessment of materiality regarding the potential systemic risk transmitted to the financial system.

The Insurance Europe Response is available here

(iv) Insurance Europe publishes response to the IAIS consultation on revisions to ICP 15 and 16

In February 2018, Insurance Europe published its response to the IAIS consultation on revisions to Insurance Core Principles ("**ICP**") 15 (Investment) and 16 (Enterprise Risk Management for Solvency Purposes).

With regard to ICP 15, Insurance Europe recommended the incorporation of the "freedom of investment" principle. The response emphasised that a risk and principle-based prudential framework is preferable to the placing of obligations on insurers to invest in

specific assets. This, Insurance Europe notes, leads to greater flexibility for insurers in taking investment risks, as long as the quantitative and qualitative tools are available to adequately measure such risks.

The response further recommends that guidance under ICP 15.1 provide for a "prudent person principle", which should require that an insurer only makes an investment when it can properly identify and measure its risk, and consider it within an overall assessment of its solvency requirements.

In addressing ICP 16, Insurance Europe pointed out that there were significant overlaps between ICP 16 and 8, and recommended that they be merged for the purposes of consistency. The response noted that a significant portion of the guidance in ICP 16 is too granular, and this prevents the implementation of an adequate risk management system.

Furthermore, such requirements may not be suitable for small or medium sized insurers. Finally, the response recommended that existing high regulatory standards should form the benchmark for ICP 16, as opposed to aiming for more prescriptive requirements.

The Insurance Europe Response is available here.

(v) IAIS publishes updates on ComFrame

On 2 March 2018, IAIS updated its webpage on ComFrame. ComFrame is a set of international supervisory requirements focusing on the group-wide supervision of internationally active insurance groups ("**IAIGs**"). The framework is intended to provide a basis for comparability of IAIG regulation and supervisory processes, which in turn aim to reduce compliance and reporting demands on IAIGs. ComFrame is expected to be adopted at the end of 2019, at which point users will be able to access ICP and ComFrame material via the IAIS website.

The webpage also notes the development of a risk-based, global insurance capital standard ("**ICS"**) for IAIGs which forms a key part of the development of this project. It will be adopted, alongside ComFrame, at the end of 2019.

IAIS have also published two new documents relating to the development of ComFrame:

- A document showing the timeline and status of ComFrame, available here; and
- A timeline of ComFrame development and ICPs revision, available here.

The webpage may be accessed here.

(vi) IAIS Secretary General speech on the role of the IAIS in times of turbulence

The IAIS, on 5 March 2018, published the text of a speech given by the IAIS Secretary General, Jonathon Dixon. The speech, titled "The Role of the IAIS in Times of Turbulence", was made on 2 March 2018 at the Geneva Association 34th Regulation and Supervision (PROGRES) Seminar.

The speech addressed three main areas of 'turbulence': the effect of the Global Financial Crisis, the changing environment for both insurers and regulators, and the future disruption that may be caused by emerging risks.

The speech made a number of points of note, including:

- Following the IAIS public consultation on developing an activities based approach to mitigating systemic risk, the feedback received is now under review with a view to publishing another consultation paper by the end of 2018. This paper aims to outline the IAIS thinking on a holistic approach.

- In response to the post-financial crisis socioeconomic and political climate within which IAIS members operate, the IAIS has adopted a new strategy to strengthen their approach to implementation of their standards and policies.

- The IAIS plans to incorporate the themes of monitoring, evaluation and developing actions in response to emerging risks into their work on developing their next five-year strategic plan, commencing in 2020.

- The IAIS has put in place processes to provide supervisors with further guidance on emerging issues such as FinTech, cybersecurity, climate change and sustainable finance.

The text of the speech is available here.

European Insurance and Occupational Pensions Authority ("**EIOPA**")

(i) EIOPA publishes revised version of its single programming document

On 30 January 2018, EIOPA published a revised version of its single programming document ("**SPD**"), which was originally published in September 2017. The document, dated 29 January 2018, has been revised to incorporate resources information for the years 2019 and 2020, that relate to the European Commission's legislative proposals review of the European Supervisory Authorities ("**ESAs**") and the proposed Regulation on a pan-European personal pension product (the "**proposed PEPP Regulation**").

The first part of the SPD addresses the future direction of the authority and its strategic objectives for the period 2017 – 2019. The second part sets out EIOPA's mandate, and the tasks it will undertake pursuant to this mandate for the period 2017 – 2020.

The SPD notes EIOPA's aim to build its credibility as a European Supervisory Authority by focusing on the following strategic priorities: supervisory convergence, consumer protection and preserving financial stability. Further areas of development include ensuring sustainable and adequate pensions for European citizens, the building of risk based international capital standards, and an overall focus on better regulation.

The SPD also addresses the upcoming challenges EIOPA is preparing for, including the possibility of an abrupt change in interest rates, the volatilities introduced by technological innovation, and the impact of the withdrawal of the United Kingdom from the European Union.

EIOPAs revised version of the SPD may be found here.

(ii) EIOPA publishes paper on systemic risk and macroprudential policy in insurance

EIOPA published a paper on systemic risk and macroprudential policy in the insurance sector on 6 February 2018. The aim of the paper is to identify the sources of systemic risk in insurance, and in doing so it analyses three potential sources of systemic risk: entity-based, activity-based and behaviour-based. The paper goes on to define specific operational objectives based on the sources of the systemic risk identified, and includes a proposal for a macroprudential framework for insurance. Finally, the paper sets out lessons learned from the banking sector and the financial crisis. A number of points were made in the paper, including that:

- Systemic risk may be created or amplified by insurance;
- Systematic risk arising from certain activities should be given special attention; and
- If insurance is not included within the wider macroprudential framework, there is a risk of arbitrage.

The paper indicates that a strong governance framework that deals with all relevant aspects of the decision-making process (e.g. how to deal with conflicting micro and macro-prudential policies) is needed.

A link to the paper may be found here.

(iii) EIOPA publishes decision on annual market and credit risk modelling comparative study

EIOPA published a decision of its Board of Supervisors on the annual market and credit risk modelling comparative study on 12 February 2018. The decision determines that an annual market and credit risk modelling comparative study shall be performed by national competent authorities in the context of the Solvency II capital requirement calculation.

The decision provides that the comparative study will be conducted on an annual basis and the first study will cover 2017. The format and specifications of the requested data will be set out in the corresponding data request, which will include the submission deadline.

The study shall seek to provide valuable supporting tools to the competent authorities for the supervisory review process on internal models, inter alia for monitoring the development of models and their calibration over time and for assessing model changes.

Typical asset risk profiles of European insurance undertakings shall be reflected in the comprehensive set of realistic asset portfolios.

The data received from undertakings will be transmitted by the competent authorities to EIOPA. Thereafter, the findings and conclusions of EIOPA will be published by the end of the year.

The decision entered into force on 13 February 2018 and a copy of the decision may be found here.

(iv) EIOPA publishes letter to European Commission on the 'Fitness Check on Supervisory Reporting'

On 6 March 2018, EIOPA published a letter from the EIOPA Chair, Gabriel Bernardino, to Olivier Guersent, DG FISMA. The letter, dated 5 March 2018, was in response to the European Commission's ongoing consultation on the 'Fitness Check on Supervisory Reporting.' The consultation is seeking to assess the efficacy of the reporting systems currently in place, and assess whether improvements can be made.

In the letter, Mr. Bernardino emphasised the importance of supervisors receiving meaningful data in order to make an early assessment of the risks faced by the insurance industry. He also commended the harmonization of information provision to supervisory authorities across the Member States, noting that it was 'an essential tool to promote supervisory convergence.'

Mr. Bernardino acknowledged that the value of reporting obligations needs to be assessed. However, he emphasised that data collection is mainly driven by prudential requirements introduced by Solvency II, as opposed to reporting obligations. Mr. Bernardino went on to emphasise EIOPA's commitment to the assessment of different reporting frameworks for proportionality and reasonableness.

The full text of the letter is available here.

(v) EIOPA publishes new Q&As on Regulation

On 7 March 2018, EIOPA published a number of new Q&As on the following:

- (EU) No 2015-2450 with regard to the templates for the submission of information to the supervisory authorities, available here.
- (EU) No 2015-2011 with regard to the lists of regional governments and local authorities, available here.
- Answers to questions on Commission Delegated Regulation (EU) 2015/35 supplementing Directive 2009/138/EC, available here.
- Answers to questions on Guidelines on reporting and public disclosure, available here.

(vi) Update on EIOPA Stress Test 2018

EIOPA has published the timeline for its 2018 Stress Test exercise. EIOPA, in coordination with the European Systemic Risk Board ("**ESRB**") is obliged to coordinate Union-wide insurance stress tests. The objectives of the tests are (1) to assess the resilience of financial institutions to adverse market developments and (2) assess the potential for systemic risk that may be posed by financial institutions in situations of stress.

Important dates to note include:

- The submission deadline for participating insurance groups results to the national supervisory authorities will be in July 2018; and
- The results will be published in December 2018.

The update is available here.

Insurance Distribution Directive ("**IDD**")

(i) EIOPA publishes the official translations of its final guidelines on complex insurance-based investment products under the IDD

On 19 January 2018, EIOPA published the official translations of its final guidelines on complex insurance-based investment products ("**IBIP**") that incorporate a structure which makes it difficult for the customer to understand the risks involved under the IDD. The guidelines aim to:

- Minimise the risks of consumer detriment arising from mis-selling of IBIPs and are developed in line with Articles 30(7) and (8) of the IDD;

- Include criteria to identify product features difficult for the customer to understand; and

- Intend to set a suitable framework to allow for "execution-only" sales of products, where an assessment of the suitability or appropriateness of an IBIP for the customer does not need to be carried out.

National competent authorities have a period of two months to confirm whether they comply or intend to comply with the guidelines and the guidelines apply from 19 January 2018.

The official translations of the guidelines can be found here and the accompanying press release can be found here.

(ii) Update as regards the delay to the application date for the IDD and the two IDD Delegated Regulations

On 20 December 2017, the European Commission published a proposal for a Directive delaying the application date for the Insurance Distribution Directive (EU Directive 2016/97) ("**IDD**") (and the two IDD Delegated Regulations) by seven months to 1 October 2018.

On 14 February, 2018, the Council of the European Union announced that it had agreed to delay the application date of the IDD to 1 October 2018 and to delay the Transposition Deadline by Member States to 1 July 2018.

On 15 February 2018, European Parliament's Committee on Economic and Monetary Affairs ("**ECON**") published a report on the proposed Directive inviting the Commission to provide for the delay in the application date of the IDD to 1 October 2018 and the delay in the Transposition Deadline until 1 July 2018. The report sets out a number of amendments, suggested by ECON to the proposed Directive, including that from 23 February 2018, the proposed Directive shall apply retroactively. The report suggests that this is necessary to avoid potential market disruption and ensure legal certainty.

On 1 March, the EU Parliament, with a majority of 543 votes, confirmed the postponement of the IDD until 1 October 2018, by allowing the Member States to adopt the relevant implementing measures by 1 July 2018. On 2 March 2018, the European Parliament published the proposed text of the legislative resolution of 1 March 2018 reflecting this position.

On 19 March 2018, Directive (EU) 2018/411 amending Directive (EU) 2016/97 as regards the application of Member States' transposition measures was published in the Official Journal of the European Union. The amending Directive has the effect of delaying the transposition date of the Insurance Distribution Directive to 01 July 2018, and its application date to 01 October 2018.

The amending Directive entered into force on 19 March 2018, and it applies retroactively from 23 February 2018.

A copy of the Directive (EU) 2018/411 is available here.

(iii) EIOPA publishes a consultation paper on draft RTS adapting base euro amounts for professional indemnity insurance and financial capacity of intermediaries under IDD

On 1 February 2018, EIOPA published a consultation paper (dated 30 January 2018) on draft RTS adapting the base euro amounts for professional indemnity insurance ("**PII**") and for financial capacity of intermediaries under the IDD. The draft RTS increases the base amount by 4.03% as this reflects the increase in the European index of consumer prices.

The consultation closes on 27 April 2018 and the finalised draft RTS will be submitted to the European Commission by 30 June 2018.

A copy of the consultation paper can be found here.

(iv) Department of Finance publishes Feedback Statement on the IDD

In March 2018, the Department of Finance published a Feedback Statement following its public consultation on the national discretions contained in the IDD. This consultation was held in Spring 2017, and invited the views of stakeholders on the aspects of the IDD for which Member States are granted discretion in its transposition.

The Feedback Statement summarises the responses to the questions posed in the public consultation. It also provides the decision of the Minister for Finance in relation to these questions.

The Feedback Statement can be accessed here.

Pan-European Personal Pension Product ("**PEPP**")

(i) Update on the European Commission's proposal on PEPP

On 29 June 2017, the European Commission released a long-awaited proposal on a Pan-European Personal Pension Product ("**PEPP**"). The PEPP is a voluntary regulated personal pension scheme which will be available on a pan-European basis to any individual wishing to save for retirement, regardless of whether they are employed, self-employed, unemployed or in education.

Rather than replacing existing state-based pension arrangements, occupational or personal pension arrangements, it is expected that PEPPs will be used by savers to supplement other pensions which may be inadequate to meet their retirement needs. By ensuring sufficient consumer protection with regard to the key features of the PEPP product, the European Commission intends to create a quality label for EU personal pension products.

The PEPP framework facilitates a wide range of providers being able to offer the PEPP product, including insurance companies, banks, certain investment firms and asset managers (including AIFM and UCITS management companies).

It is currently expected that the new framework will enter into application in the course of 2019.

On 5 March 2018, the Economic and Monetary Affairs Committee of the European Parliament ("**ECON**") published its draft report on the PEPP proposal. The report, dated 28 February 2018, contains a draft European Parliament Resolution, setting out suggested amendments to the European Commission's proposal.

ECON will now vote on the draft report, after which it will be considered by the European Parliament in plenary session.

The draft report may be accessed here.

(ii) Position paper on the proposed Pan-European Personal Pension Product published by PensionsEurope

On 26 January 2018, PensionsEurope published a position paper setting out its views on the European Commission proposal for a PEPP. PensionsEurope welcomed the proposal, noting its value for workers who don't have access to workplace pensions, and for European citizens who have worked in multiple Member States.

The paper noted the potential for the product to improve supplementary retirement savings, particularly in Member States without a well-developed pension system. However, the paper cautioned against the product interfering with systems that already ensure high quality standards.

PensionsEurope argued that the PEPP proposal should form part of a broader EU strategy that, in addition to voluntary private pensions, supports the development of private retirement savings and occupational pensions. PensionsEurope make a number of recommendations within the paper, including that:

- National Competent Authorities should be competent for authorising PEPPs;
- Uniform distribution rules for PEPPs should be implemented in order to level the playing field across and within Member States;
- Information requirements for this product should be tailored to the specific nature of the PEPP. PensionsEurope has published a proposal on the information to be included in the PEPP Key Information Document, which has been included in Annex I to the position paper;

- Investment options should be limited in number, however clarification is needed on the conditions that these options must satisfy;

- PEPP providers should be granted more flexibility to decide how frequently PEPP savers have the right to switch providers;

Finally, PensionsEurope welcomed the flexibility of the Commission proposal, and emphasised that the ability of the PEPP to accommodate different business models and different types of investors will be central to its success.

The position paper may be accessed here.

(iii) Insurance Europe publishes key priorities for the Pan-European Pension Product

Insurance Europe, on 30 January 2018, published a number of position papers outlining their key recommendations for the proposed PEPP. Insurance Europe identified the following key priorities:

- **Pension Features**: Insurance Europe proposed a number of pension features to encourage sustainability. For example, protection against longevity risk should be promoted over other forms of pay-out;

- **Safety**: Insurance Europe sought clarity on the concepts of "capital protection" and "risk mitigation techniques." The paper noted that these were key elements to clarify from the outset, to ensure PEPPs come with a strong level of consumer protection;

- **Long-term**: Insurance Europe stressed that the PEPP must be a long-term product that makes long-term investments, and achieves the dual aim of increasing growth and providing good pensions to consumers. To this end, Insurance Europe makes a number of proposals;
- **Portability**: Insurance Europe acknowledged that to encourage competition, the portability service must work for small and large providers alike; and

- **Information**: Insurance Europe recommended pre-contractual information be clear, transparent, and tailored to the specific nature of personal pensions, to enable consumers make informed pension decisions. However, the paper cautioned that detailed PRIIPs methodologies are not a suitable starting point for PEPP pre-contractual information disclosure requirements.

The Insurance Europe position papers are available here.

Insurance Europe

(i) Insurance Europe publishes response to European Commission consultation on fiduciary duties regarding sustainability

On 1 February 2018, Insurance Europe published a position paper in response to a European Commission consultation on the fiduciary duties of institutional investors and asset managers regarding sustainability.

Insurance Europe, in its paper, noted that many insurers already consider Environmental, Social and Governance ("**ESG**") factors as part of their business models, and this is expected to increase given the increasing incorporation of such factors in European Union policy-making and regulation. However, the paper went on to note that the limited availability of ESG data formed a barrier to engagement on sustainability, particularly for smaller entities.

Regarding the fiduciary duty of the insurance industry toward its policyholders, Insurance Europe argued that there was no need for the introduction of an additional fiduciary requirement, given that the 'prudent person principle' already provides that investments are made in "the best interest of all policyholders …"

The Insurance Europe position paper is available here, and the accompanying press release is available here.

(ii) Insurance Europe publishes papers on Brexit transitional arrangements

Insurance Europe has published a paper calling for a transitional arrangement to be agreed between the United Kingdom and the European Union, following the United Kingdom's withdrawal from the European Union on 29 March 2019. The paper, published 9 February 2018, suggests that this framework will ensure that the United Kingdom remains covered by the existing supervisory framework and European Union law until an agreement on the future legal relationship between the United Kingdom and the European Union is reached. The paper advocates that such measures are needed to allow insurers sufficient time to organise their business and adapt their contingency plans to the new regulatory framework.

The paper addresses the considerable uncertainty faced by the industry, noting that there may not be enough time to avoid a "cliff-edge scenario" before the 2019 deadline, after which the United Kingdom will become a third country. The paper highlights the following areas as facing particular challenges if transitional arrangements are not put in place:

- **Structural Changes**: The paper notes that as insurers will need to apply for new authorisations and establish new branches in order to ensure continuity of services, this presents a significant workload for national regulators and will impact their ability to handle all applications before the deadline.

- **Portfolio Transfer:** The paper warns that in light of the amount of business that will need to be moved in a short time frame, courts and regulators will not have the capacity to handle this task.

- **Product-Specific Considerations:** The paper notes due to the highly-tailored nature of insurance products, some will need to be adjusted to ensure they remain valid after the United Kingdom leaves the European Union.

- **Data Flows:** The paper warns that should data transfers between the United Kingdom and the European Union no longer be permitted following the United Kingdom's exit, consumers would experience significant adverse effects.

A copy of the paper is available here:

Insurance Europe has published a separate paper on the consequences for transfers of personal data following the United Kingdom leaving the European Union. The paper warns of disruption to insurers and policyholders should such transfers no longer be allowed.

To avoid such disruption and ensure legal certainty, Insurance Europe advocates for the adoption of an adequacy decision under the General Data Protection Regulation (*(EU) 2016/679*) ("**GDPR**"). Under such a decision, the European Commission would recognise that the United Kingdom's data protection framework as adequate, which would allow for the free flow of data between the European Union and the United Kingdom. Alongside this decision, Insurance Europe recommends that the United Kingdom recognise the European Union's data framework as adequate for data flows from the United Kingdom to the European Union. The paper recommends that this process be launched as soon as possible, and states that should agreement on an adequacy decision not be reached on the date of the United Kingdom's withdrawal, an interim solution be put in place.

A copy of the paper is available here.

(iii) Insurance Europe publishes position paper supporting EIOPA as a stand-alone authority

Insurance Europe, on 26 February 2018, published a position paper in response to a proposal by the European Commission to review the European Supervisory Authorities ("**ESAs**"), including EIOPA. The paper, which focuses on EIOPA, advocates for maintaining it as a stand-alone authority, in line with the Commission's position.

In the paper, Insurance Europe warns that adequate checks and balances are not provided for within the current governance structure of EIOPA. In particular, the paper calls for changes to its proposed Executive Board and its interaction with the Board of Supervisors.

The paper advocates for improved transparency regarding the activities of EIOPA, noting that this is crucial to ensure robust supervision. Recognising the vital role of National

Competent Authorities ("**NCAs**") in the supervisory system, the paper recommends the improvement of information sharing between NCAs and EIOPA.

More broadly, the paper advocates for the inclusion of a requirement for the ESAs to act in the best interest of the European public good in addition to its existing obligation to contribute to the stability and effectiveness of the financial system. The paper notes that this will ensure that the ESAs take a proportionate approach to their supervision.

The Insurance Europe Position Paper is available here.

(iv) Insurance Europe publishes updated position paper on the consequences of Brexit on existing contracts

Insurance Europe, on 5 March 2018, published an updated position paper on the consequences of Brexit on insurance contracts. The paper advocates for a grandfathering arrangement to be put in place between the European Union and the United Kingdom for existing long-term insurance and reinsurance contracts provided on a passporting basis between the European Union and the United Kingdom. Following the United Kingdom's exit from the European Union, insurers will no longer have the capacity to service these contracts.

The paper argues that a grandfathering agreement would prevent consumer detriment as a result of the United Kingdom leaving the European Union and ensure legal certainty. The paper further notes that for some types of business a grandfathering agreement is the only solution. For example, contracts which relate to assets and liabilities that cannot be separated into United Kingdom and EU27 components, and pan-European contracts.

Insurance Europe recommends a grandfathering agreement include the following requirements:

- That the rights and obligations of the parties to existing (re)insurance contracts continue;
- (Re)insurance contracts in force on the date upon which the United Kingdom leaves the European Union continue to be in force until they expire in accordance with their terms; and
- (Re)insurers can maintain a legal representative in other Member States, appointed under Articles 145 or 152 of the Solvency II Directive, until the relevant National Competent Authority is satisfied that the business has been fully completed.

The paper also advocates for a transitional arrangement for the industry more generally. However, the paper notes that this is not a suitable solution for servicing products such as life insurance contracts. A transitional arrangement is likely to last two to three years, while the obligations under such passported contracts could run for many decades. The position paper is available here.

Packaged Retail Insurance-based Investment Products ("**PRIIPs**")

(i) European Union (Key Information Documents for Packaged Retail and Insurance-Based Investment Products ("PRIIPs")) Regulations (the "Irish Regulations") published

The European Union (Key Information Documents for Packaged Retail and Insurance-Based Investment Products ("**PRIIPs**")) Regulations 2017 (S.I. No. 629 of 2017) (the "**Irish Regulations**") came into operation on 31 December 2017 and were published in January 2018.

The purpose of the Irish Regulations is to give full effect to Regulation EU No 1286/2014 (the "**PRIIPs Regulation**") which took effect on 1 January 2018. In particular it designates the Central Bank as the competent authority in Ireland responsible for carrying out the functions of a competent authority set down in the PRIIPs Regulation. The Irish Regulations provide as follows:

- Regulated financial services providers (which will include UCITS ManCos, AIFMs and those regulated firms selling PRIIPs) must put in place whistleblowing arrangement to allow their employees to report actual or potential infringements of the PRIIPs Regulation. Therefore the whistleblowing policy of the relevant UCITS Man Co, AIFM or self-managed investment company should be updated accordingly to incorporate specific reference to the PRIIPs Regulation;

- The Central Bank, as the relevant competent authority, can impose sanctions for any infringements listed in Article 24(1) of the PRIIPs Regulation;

- Regulation 5 of the Irish Regulations set down the criteria which will be taken into account by the Central Bank in determining the type and level of administrative sanctions to be applied in respect of an infringement of the PRIIPs Regulation; and

- Regulation 6 of the Irish Regulations provides that any decision taken/sanction imposed by the Central Bank is an appealable decision.

A copy of the Irish Regulations can be found here.

European Markets Infrastructure Regulation ("**EMIR**")

(i) Central Bank issues revised FAQ's on EMIR

During the period 1 January 2018 to 31 March 2018, the Central Bank issued a revised Frequently Asked Questions document ("**FAQs**") on Regulation (EU) No 648/2012 of the European Parliament and of the European Council on OTC derivatives, central counterparties and trade repositories ("**EMIR**"). Question 2 has been revised in order to update references to MiFID II as required, with Questions 3 and 4 being deleted as they are no longer relevant. The revised FAQ can be found here.

(ii) ESMA publishes updated Q&As on EMIR implementation

During the period 1 January 2018 to 31 March 2018, ESMA published an updated version of its Question & Answers ("**Q&A**") on the implementation of EMIR. The revisions to the Q&As comprise:

- **TR Q&A 45**: A new Q&A has been inserted regarding the timelines applicable to trade repositories in the case of scheduled (or non-scheduled) maintenance that impacts TR services related to authorities' access to data.

A copy of the Q&A on the implementation of EMIR can be accessed here.

(iii) ECON Committee publishes draft report on the EMIR Reform Proposal

On 30 January 2018, the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published its draft report (dated 26 January 2018) on the proposals published by the European Commission in May 2017 to amend EMIR (the "**EMIR Reform Proposals**").

The draft report sets out ECON's suggested amendments to the proposed EMIR Reform Proposals.

A number of the key amendments are set out below:

- Reporting of OTC transactions between a financial counterparty and a non-financial counterparty: ECON supports the Commission's proposal that OTC transactions between a financial counterparty and a non-financial counterparty would be reported by the financial counterparty on behalf of both parties, and the financial counterparty would be responsible for the accuracy of the details that are reported. However, ECON suggests that a non-financial counterparty must be allowed to choose to carry out this reporting if it wishes (in which case the non-financial counterparty would be responsible for the accuracy of the details that are reported). ECON also suggests amendments to clarify how the reporting should be done in case of OTC derivatives contracts concluded between a non-financial counterparty established within the European Union that does not report itself and a financial counterparty established in a third-country;

- Reporting of intra-group OTC transactions; ECON supports the Commission's proposals whereby intragroup OTC transactions, where at least one counterparty is a non-financial counterparty, should be exempted from the reporting obligation. ECON also suggests amendments to clarify that this exemption should apply regardless of the non-financial counterparties' place of establishment;

- Clearing obligation & exchange of collateral/ segregation requirements: ECON supports the Commission's proposal that the scope of the clearing obligation for non-financial counterparties should be narrowed, so that those non-financial counterparties who are subject to the clearing obligation will only be required to clear with regards to the asset class or asset classes that exceed the clearing threshold. However, ECON also

recommends that non-financial counterparties exceeding the clearing threshold ("NFCs+") should not be subject to segregation and exchange of collateral requirements for other asset classes than the one where the threshold has been breached;

- Restriction of the categories of AIFs to be treated as a financial counterparty: Under the Commission's proposals, all AIFs would be treated as a financial counterparty. ECON has rejected this proposal, instead stating that the definition of a "financial counterparty" should only include AIFs established in the Union or managed by an EU AIF;

- Classification of securitisation special purpose entities ("**SSPEs**"): Under the Commission's proposals, SSPEs would be treated as a financial counterparty. ECON has rejected this proposal and recommends that SSPEs should remain in the category of non-financial counterparties on the basis that SSPEs neither carry the risks nor have the same financial and operational capacities as financial institutions;

- Clearing access; ECON supports the Commission's proposals aiming to make clearing more accessible to smaller entities, particularly non-financial counterparties. ECON has suggested further amendments to further this aim;

- Physically-settled FX forwards and physically-settled FX swaps: ECON has suggested that the Commission's proposal to exclude physically settled FX forwards from the requirement to exchange of variation margin should be extended. In this regard, ECON recommends that the exemption should relate to physically settled foreign exchange swap derivatives, as well as physically settled FX forwards;

  Exchange-traded derivatives ("**ETDs**"): ECON supports the Commission's proposals that ETDs would be reported by the central counterparty ("**CCP**") only (on behalf of both parties) and the CCP would be responsible for the accuracy of the details that are reported. ECON has suggested that it should also be clear that the counterparty should be able to choose to which trade repository the CCP should report the ETDs;

- Pension Scheme Arrangements ("**PSAs**"): The European Commission has suggested that the exemption for PSAs from central clearing should be extended by a further 3 years and then possibly by two more years via a delegated act. Whilst ECON is supportive of this, it has suggested that the European Commission could step in to propose measures in the absence of a market-led solution;

- Small financial counterparties: The European Commission has suggested that small financial counterparties would benefit from an exemption from the clearing obligation if they fall below certain thresholds. ECON is supportive of this.

ECON has suggested other amendments in relation to CCPs (their insolvency and transparency), back loading and front loading requirements and requirements relating to the suspension of the clearing obligation.

ECON is to vote to finalise the draft report, before it is considered by the Parliament in plenary in Spring 2018.

A copy of the draft report can be found here.

(iv) ESMA publishes a final report on guidelines relating to the management by Central Counterparties of conflicts of interest

On 7 February 2018, ESMA published a final report on guidelines relating to the management by central counterparties ("**CCPs**") of conflicts of interest. Under EMIR, the CCPs are required to have organisational arrangements and policies in place to prevent potential conflicts of interest and to solve them should the preventative measures fail to be sufficient. The guidelines will help CCPs' how to manage conflicts of interests by:

- Clarifying how CCPs should prevent or mitigate risks of conflicts of interest;
- Ensuring a consistent implementation across all CCPs;
- Setting out circumstances where conflicts of interests could arise; and
- Specifying the organisational arrangements and procedures to be established.

The final report contains feedback to ESMA's June 2017 consultation on the guidelines and highlights where ESMA has changed the proposed guidelines following the consultation process.

National competent authorities must notify ESMA whether or not they intend to comply with the guidelines within two months of the date of publication.

A copy of the final report can be accessed here.

(v) ESMA publishes updated validation rules for EMIR

On 1 March 2018, ESMA published updated validation rules with regard to revised technical standards on reporting under Article 9 of EMIR.

ESMA updated the validation rules to allow for the reporting of exchange-traded derivatives in products for when the effective date may be earlier than the date of execution and to clarify how the identification of a product should be validated in the reports that are submitted on or after 3 January 2018.

A copy of the validation rules and the accompanying press release can be accessed here.

(vi) European Commission adopts proposal for a Council Decision on incorporating EMIR Implementing and Delegated Regulations into the EEA Agreement

On 21 March 2018, the European Commission adopted a proposal regarding the incorporation of EMIR Delegated and Implementing Regulations into the EEA Agreement. It is proposed that the two draft decisions of the EEA Joint Committee (available at Annex 1 and Annex 2 to the proposal) amend Annex IV (Financial Services) to the EEA Agreement in order to incorporate these Regulations. The proposal has been sent to the Council for approval.

The text of the proposal is available here.

Annex 1 and 2 are available here and here respectively.

(vii) ESMA publishes Guidelines for position calculation by Trade Repositories under EMIR

On 27 March 2018, ESMA published its final report on Guidelines for position calculation by Trade Repositories ("**TRs**") under EMIR. The aim of the Guidelines is to create a framework for TRs to calculate positions in derivatives in a harmonised and consistent manner in accordance with Article 80(4) EMIR.

The Guidelines provide specific instructions on the aggregation of certain data fields and how these should be calculated by TRs before the data is provided to regulatory authorities.

The Guidelines will become applicable on 3 December 2018, and will require an annual assessment of compliance.

The report is available here.

Central Clearing Counterparties ("**CCPs**")

(i) ECON publishes its report on the proposed Regulation on the recovery and resolution of CCPs

On 1 February 2018, the European Parliament's Committee on Economic and Monetary Affairs ("**ECON**") published its report (dated 31 January 2018) on the proposals previously published by the European Commission on a framework for the recovery and resolution of CCPs (the "**Proposed Regulation**") in the event of the failure of a CCP. ECON has voted to adopt the Proposed Regulation and it has tabled a number of amendments to strengthen the Commission's proposed text. Some of the amendments are highlighted below:

- ECON has suggested that the framework should also address the possibility of CCPs entering into resolution for reasons other than the default of one or several of their clearing members;

- As regards the minimum standards for the contents and information to be included in recovery plans, ECON has suggested that the plans should contemplate an appropriate range of scenarios envisaging both systemic stress and stress specific to the CCP and that the scenarios should contemplate situations of stress that would be more extreme than those used for the purposes of regular stress testing under the RTS on CCPS under EMIR;

- Recovery plans should ensure that the CCP's capital is relied upon to bear first losses in default cases and even more so in non-default cases. Substantial loss absorption by clearing members should be foreseen before any tools are used that allocate losses to clients;

- Recovery plans should explicitly set out actions to be taken by the CCP in case of cyber-attacks; and

- As regards the early intervention powers afforded to competent authorities, ECON recommends that early intervention rights shall include the power to restrict or prohibit any remuneration of equity and instruments treated as equity to the fullest extent possible without triggering outright default.

The European Parliament, the Council of the European Union and the European Commission will negotiate between one another on the Proposed Regulation, once the Council of the European Union has agreed its negotiating position. A copy of the report can be accessed here.

(ii) ECON publishes its draft report on proposed Regulation amending EMIR supervisory regime for the European Union and third-country CCPs

On 2 February 2018, ECON published its draft report (dated 31 January 2018) on the proposed Regulation amending the ESMA Regulation (Regulation (EU) No 1095/2010) and EMIR with regard to the procedures and authorities involved for the authorisation of CCPs and the recognition of third-country CCPs.

In the explanatory memorandum to the report, ECON welcomes the proposal for the proportionate treatment and classification of third-country CCPs depending on their systemic importance. This is because it agrees that one of the major weaknesses of the current EMIR regime is the over-reliance on the third country supervisory authorities as regards the authorisation and recognition of CCPs, particularly as regards CCPs which could be deemed to have systemic importance.

ECON also indicates that it agrees with the proposal that the Commission, acting upon a recommendation of ESMA and the central bank of issue, could deny recognition to a third country CCP on the basis of the significance of the activities of that CCP for the Union. Whilst it recognises that this is a last resort tool, it feels that it should remain. However, ECON states that the process for denying recognition should be made on a “fact and evidence based” approach to increase market certainty. ECON proposes that the

discretionary nature of the procedure for denying recognition to a third-country CCP should be mitigated by requiring ESMA and the central bank of issue to conduct a prior impact analysis and consider clear criteria.

The draft report also contains a number of other amendments to the proposals received from the European Commission.

A copy of the draft report can be accessed here.

(iii) Results of second European Union-wide CCP stress test published by ESMA

On 2 February 2018, ESMA published the results of the second European Union wide stress test exercise for CCPs. The purpose of the stress test is to:

- Assess the resilience of CCPs to detrimental market developments;
- Identify any deficiencies in the CCPs' resilience; and
- Issue recommendations in light of these findings.

The results confirm that European Union CCPs are generally resilient to multiple defaults and common shocks. The report also highlights individual CCP specific results.

The results may be accessed here.

An accompanying press release and Q&A are available here and here respectively.

(iv) ESMA publishes responses to its Consultation on Draft Guidelines on Anti-Procyclicality Margin Measures for CCPs

On 8 March 2018, ESMA published the responses it received to its Consultation on Draft ESMA Guidelines on Anti-Procyclicality Margin Measures for CCPs. The purpose of the guidelines is to provide direction on the requirements for CCPs to set prudent and stable margins to limit procyclicality under Article 16(2) of the ESMA Regulation.

The consultation paper, published on 8 January 2018, invited feedback from stakeholders on the draft guidelines. Nine responses were received from parties such as the London Stock Exchange Group and Eurex Clearing AG.

ESMA expects to publish the final guidelines by June 2018. The responses can be accessed here.

The consultation paper can be accessed here.

(v) ESMA publishes list of trading venues benefiting from a transitional exemption from the access provisions under Article 36(5) MiFIR

On 26 March 2018, ESMA published a list of trading venues benefiting from the transitional exemption from the access provisions under Article 36(5) of MiFIR.

Articles 35 and 36 of MiFIR establish the legal framework for trading venues to access CCPs, and for CCPs to access trading venues.

Each trading venue on the list has notified ESMA and its competent authority that it intends to temporarily opt-out from the access provisions for exchange-traded derivatives ("**ETDs**"). These trading venues, as a result, do not benefit from any of the access rights under Article 35 and 36 of MiFIR for ETDs within the relevant threshold for the duration of the opt-out. The list of trading venues is available here.

(vi) ESMA publishes list of trading venues and CCPs benefiting from a transitional exemption from the access provisions under Article 54(2) MiFIR

On 26 March 2018, ESMA published a list of trading venues benefiting from the transitional exemption from the access provisions under Article 54(2) of MiFIR.

Article 54(2) MiFIR provides that a trading venue may apply to its competent authority for permission to avail of transitional arrangements. Where such a transitional period is approved, the CCP or trading venue cannot benefit from access rights under Article 35 and 36 MiFIR regarding exchange-traded derivatives for the duration of the transitional period which is in place until 3 July 2020. The list of trading venues is available here.

European Parliament

(i) Bilateral agreement on insurance and reinsurance prudential measures between EU and US

The European Parliament, on 1 March 2018, published the provisional text of a resolution on the bilateral agreement on prudential measures regarding insurance and reinsurance between the European Union and the United States (the "**Agreement**").

The Agreement addressed three areas of prudential insurance oversight:

- **Reinsurance**: The Agreement will lead to the elimination of collateral and local presence requirements for European Union and United States reinsurers operating in the other's market.

- **Group supervision**: Under the Agreement, European Union and United States insurers operating in the other's market will only be subject to worldwide prudential insurance group oversight by supervisory authorities in their home jurisdiction.

- **Exchange of insurance information between supervisory authorities**: The Agreement encourages insurance supervisory authorities in the United States and the European Union to continue to exchange information on (re)insurers that operate in the two markets. It also includes model information sharing memorandum of understanding provisions.

The European Union and United States will meet regularly as a Joint Committee to ensure proper implementation of the Agreement. The text of the Agreement is available here.

On 20 March 2018, the Council of the European Union adopted a decision concluding the Agreement.

The press release notes that the effect of the Agreement will be to provide legal certainty for European Union and United States insurers in the application of regulatory frameworks. Pursuant to Article 8 of the Agreement, each party is to give notification that it has completed their respective internal requirements and procedures. Following exchange of notifications between the European Union and the United States, the Agreement will enter into force.

The text of the decision is available here, and the press release announcing its adoption is available here.

European Commission

(i) The European Commission publishes results of public consultation on a revision of the European Union Consumer Law Directives

On 6 February 2018, the European Commission published a summary of the main results from a public consultation issued by the European Commission in June 2017 on a revision of the European Union Consumer Law Directives.

The summary report groups the responses into a number of categories. In total, 414 responses were received in the consultation, with a mix of individual citizens, companies, business and consumer associations, public bodies and Member States responding. The European Commission will prepare an Impact Assessment on the results received from the consultation and will consider legislative amendments to the current consumer law framework.

The summary report can be accessed here and the consultation outcome page can be accessed here.

(ii) European Commission issues notice to stakeholders in field of insurance/reinsurance

On 8 February 2018, the European Commission issued a notice to stakeholders in the field of insurance/reinsurance setting out some of the legal consequences of the United Kingdom becoming a third country following its withdrawal from the European Union.

The notice focused on the areas of authorisation and contract continuity, while also addressing information disclosure, group supervision and the impact on insurance/reinsurance intermediaries in the United Kingdom. Some points of note include:

- That branches of United Kingdom insurance undertakings based in the European Union will no longer be authorised to conduct business across the European Union. Such undertakings will be required to seek authorisation from each Member State in which they wish to continue operating;

- United Kingdom insurance undertakings will lose their authorisation under Solvency II to provide services across the European Union; and

- The ability of United Kingdom insurance undertakings to uphold their obligations under certain contacts will be impacted. The notice emphasised that firms are required under Solvency II to take action to ensure continuity of such contracts.

The notice can be accessed here.

(iii) European Commission issues Notice to Stakeholders in the Insurance/Reinsurance field post Brexit

The European Commission has issued a notice to stakeholders in the field of insurance/reinsurance on some of the main legal and regulatory repercussions arising from the United Kingdom becoming a "third country" following Brexit (the "**Notice**").

While the Notice acknowledges that there are currently "considerable uncertainties", particularly in relation to a finalised withdrawal agreement and any transitional arrangements that may be contained therein, the purpose of the Notice is to remind insurance/reinsurance undertakings, policyholders and other stakeholders of the need to assess the potential impact that Brexit may have on their businesses and plan accordingly, with the impact on the United Kingdom in particular the following consequences, such as:

- **Authorisations**

  Upon the United Kingdom's exit from the European Union, United Kingdom insurance undertakings will no longer be able to provide services in the European Union as they will lose their authorisation to do so under the Solvency II Regulation. Branches of United Kingdom undertakings will be classified as 'third-country' and will be required to seek authorisation from the national competent authority of each Member State in

which they wish to continue business. An EU-27 subsidiary (that is a legally independent company established in the European Union and controlled by or affiliated to insurance undertakings established in the United Kingdom), may continue to operate across the European Union, subject to their compliance with European Union rules.

- **Insurance Contracts**

  Due to the loss of European Union authorisation, United Kingdom insurance undertakings will no longer be able to perform their obligations under contracts concluded prior to the date the United Kingdom leaves the European Union. Firms will be required, under the Solvency II Directive, to take measures to ensure that these contracts can continue to be serviced.

- **Information Disclosure**

  According to both the Solvency II Directive, and the recast Insurance Distribution Directive, firms will be obliged to inform policyholders about the potential impact on their rights and on the provision of services that will follow the United Kingdom's withdrawal from the European Union.

- **Group Supervision**

  If an insurance/reinsurance undertaking is operating in the European Union, however it is part of a group in which the parent undertaking is registered in the United Kingdom, it will remain subject to the Solvency II provisions which empower European Union supervisory authorities to apply methods to ensure appropriate group level supervision for example, the requirement of worldwide group solvency, or the establishment of a holding company with a head office in the European Union.

- **Insurance/Reinsurance Intermediaries registered in the United Kingdom**

  Such intermediaries will no longer benefit from their registration rights under the recast Insurance Distribution Directive, and therefore cannot continue to conduct business in the European Union on the basis of their United Kingdom registration.

A copy of the Notice may be accessed here.

Market Abuse Regulation ("**MAR**")

(i) ESMA publishes updated Q&As on the Market Abuse Regulation

During the period 1 January 2018 to 31 March 2018, ESMA published updated versions of its questions and answers ("**Q&As**") on the Markets Abuse Regulation (Regulation 596/2014) ("**MAR**"). The update comprises of:

- **Q&A 5.1**: Disclosure of inside information related to Pillar II requirements under Article 17 of MAR.

A copy of the Q&As can be found here.

(ii) ESMA publishes final report on draft ITS on forms and procedures for co-operation under MAR

On 6 February 2018, ESMA published its final report on draft ITS on forms and procedures for co-operation under Articles 24 and 25 of MAR.

The draft ITS aims to clarify how NCAs and ESMA should cooperate and communicate with each other as well as with other European Union authorities, entities and public bodies that fall under MAR or the Regulation on wholesale energy market integrity and transparency ("**REMIT**"). The report sets out procedures and forms for NCAs and ESMA to exchange information and assist each other as well as the rest of European Union authorities, entities and public bodies mentioned in Article 25 of MAR. The relevant forms for the co-operation and exchange of information activities to be used are set out in the annexes of the draft ITS.

The final report has been submitted to the European Commission for its endorsement, whereby the European Commission has three months to decide whether to endorse the draft ITS.

A copy of the final report can be accessed here.

The accompanying press release can be found here.

(iii) Commission Implementing Regulation on ITS on co-operation under MAR published in the Official Journal of the European Union

Further to a final report on draft ITS prepared by ESMA in June 2017, the Commission Implementing Regulation (EU) 2018/292 which lays down the ITS on forms and procedures for co-operation between NCAs under MAR was published in the Official Journal of the European Union on the 27 February 2018 and entered into force on 19 March 2018.

A copy of the Commission Implementing Regulation (EU) 2018/292 can be accessed here.

(iv) The European Court of Justice judgment on whether both a criminal and administrative penalty can be imposed for same market abuse offence

On 20 March 2018, the European Court of Justice ("**ECJ**") handed down its judgment in *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob).*

The judgment relates to a request for a preliminary ruling by the Corte suprema di cassazione (the "**Court of Cessation**") concerning the interpretation of the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights of the European Union (the "**Charter**") and Protocol 7 of the European Convention on Human Rights ("**ECHR**") in the context of proceedings being brought under the Criminal Sanctions for Market Abuse Directive ("**CSMAD**") which precludes national legislation from allowing administrative proceedings to be brought in respect of market manipulation for which the same person has already been convicted in criminal proceedings.

The court held that it was possible for the *ne bis in idem* principle to be limited so that both "criminal proceedings and penalties" and "administrative proceedings and penalties of a criminal nature" could be brought against the same person in respect of the same acts. However, any such limitation must be justified.

The court concluded that the objective of guaranteeing the integrity and public confidence of the financial markets was a justification for a duplication of proceedings and penalties of a criminal nature. It noted that the Italian legislation penalising market manipulation did not appear to respect the principle of proportionality. In addition, the legislation did not appear to guarantee that all of the penalties are proportionate to the seriousness of the offence.

A copy of the full judgment can be accessed here.

Prospectus Regulation

(i) ESMA publishes responses to its Consultation on draft RTS under the new Prospectus Regulation

On 21 March 2018, ESMA published the responses it received to its consultation on draft RTS under the new Prospectus Regulation (Regulation (EU) 2017/1129) which may be of particular interest to investors, issuers, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who are affected by the new Prospectus Regulation.

The response to the consultation can be accessed here and the accompanying press release can be found here.

(ii) ESMA publishes updated Q&As on Prospectuses

On 28 March 2018, ESMA published the Twenty-Eight Edition of the updated version of its questions and answers ("**Q&A**") on prospectuses related issues to include a new Q&A on profit forecasts. ESMA notes that although the Prospectus Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") will become applicable on 21 July 2019, repealing Prospectus Regulation 809/2004, the definition of a profit forecast should be carried over to the new prospectus regime. The March update comprised:

- **Q&A 102** - **Definition of Profit Forecasts**

  The new Q&A provides clarification on how to identify profit forecasts and explains the definition of profit forecasts by providing examples on what may or not constitute a profit forecast.

A copy of the Q&A on prospectuses and the associated press release can be found here.

The Pensions Authority

(i) Pension Authority issues summary of 2017 regulatory activity and plans for 2018

On 6 March 2018, the Pensions Authority released a summary of regulatory activity undertaken in 2017, and its plans for 2018. Prioritising the misappropriation of pension assets with a view to safeguarding members' savings was a priority for the Pensions Authority in 2017, during which 18 prosecution cases were concluded.

Regarding risk and compliance, in 2017 the Pensions Authority focused on its programme of direct engagement with regulated entities. This proactive approach will continue into 2018, through its varied programme of on-site inspections.

Regarding technical and policy work, transposition of the European Union Directive on the activities and supervision of institutions for occupational retirement provision ("**IORPs II**") and development of the Pensions Authority's pension reform proposals were priorities during 2017. The Pensions Authority indicated it will publish draft codes of conduct for trustees during 2018, which will provide certainty for trustees in light of the transposition of the IORPs II Directive and implementation of proposed reforms.

The Pensions Authority engaged with Registered Administrators ("**RAs**") throughout 2017, with a view to improving the quality of pension's data. The Pensions Authority will continue to pursue compliance in this area in 2018 by monitoring compliance by RAs with their administration obligations.

The press release can be accessed here.

Department of Finance

(i) Department of Finance Cost of Insurance Working Group Update

On 20 February 2018, the Department of Finance published the fourth quarterly update on the implementation of the Action Plan on the Report on the Cost of Motor Insurance. The report summarises the work of the various Government Departments and Bodies that sit on the Cost of Insurance Working Group.

The report notes that, of the 46 deadlines set in 2017, 39 were met. These include ten actions completed in the final quarter of 2017. A notable achievement of this quarter was the publication of the first report from the Personal Injuries Commission. Recommendations made in this report include the use of a standardised medical reporting template and the linking of the Book of Quantum to such reporting. In addition, preparation for the establishment of a fully integrated insurance fraud database is ongoing.

The report can be accessed here.

The report also notes that progress has been made in other areas including the publication, in December 2017, of the Central Bank (National Claims Information Database) Bill (the "**Bill**"). In accordance with the Bill the database will collect data from insurers on insurance claims. The purpose of the database is to develop greater transparency in the non-life insurance sector, with the aim of decreasing the volatility of premiums for consumers and improving the insurers' ability to price more accurately.

In February 2018, the Department of Finance published a consultation paper on the Bill and invited stakeholders to make submissions in response to it. The consultation period ran until 9 March 2018.

The Department of Finance public consultation paper can be accessed here. The General Scheme of the Bill can be accessed here.

Central Bank of Ireland

(i) Central Bank publishes response to the Law Reform Commission's Issues Paper "Regulatory Enforcement and Corporate Offences"

On 9 January 2018, the Central Bank published its response to the Law Reform Commission Issues Paper "Regulatory Enforcement and Corporate Offences." The Central Bank, drawing from its regulatory experience, makes a number of recommendations, including:

- That reforms assigning responsibility to senior personnel, modelled on the UK's Senior Managers and Certification Regime, be adopted in this jurisdiction;

- Regarding fitness and probity regulations, the duration of suspension for individuals under investigation should be extended beyond six months, owing to the complexity of such investigations;

- The introduction of an criminal offence of "egregious recklessness in risk-taking" which would apply in cases where misconduct is so egregious that it merits a criminal sanction;

- The introduction of a set of 'core common standards.' This proposed framework would be non-sector specific and would guide individuals who exercise authority and influence in regulated entities as to what standards are expected of them; and

- Support for a dedicated division within an existing criminal agency to investigate white collar crime.

The Paper can be accessed here.

An accompanying Press Release which summarises the paper can be accessed here.

(ii) Central Bank speech - Financial regulation, technological innovation and change

On 17 January 2018, the Director of Policy and Risk of the Central Bank, Gerry Cross, delivered a speech to the Association of Compliance Officers in Ireland concerning on financial regulation, technological innovation and change. Mr. Cross's speech focused on the following areas:

- Mr. Cross first addressed recent European legislative developments, such as the entry into force of MiFID II and MiFIR on 3 January 2018; the entry into force of the Payments Services Directive on 13 January 2018 and the entry into force of the Packaged Retail and Insurance-based Investment Products Regulation ("**PRIIPS**").

- Regarding financial technology ("**FinTech**"), Mr. Cross confirmed that the Central Bank is currently engaged in an internal review regarding its regulatory approach. As part of this review, the Central Bank will be examining the ways in which this innovation is relevant for the Irish financial services sector, and how it can enhance the quality and efficiency of supervision.

- To date, the Central Bank has sought to develop a clearer picture of FinTech in Ireland. The Central Bank is currently reviewing survey responses to the Discussion Paper on the Consumer Protection Code and the Digitalisation of Financial Services, with the aim of assessing how the Consumer Protection Code may best address developments in FinTech.

- In light of the increased reliance on information technology by financial firms, the Central Bank is continuing to develop its supervisory and inspections capacity in this area.

- Finally, Mr. Cross addressed the topic of initial coin offerings ("**ICOs**") and virtual currencies. Depending on how they are structured, ICOs may fall outside the regulatory space, and Mr. Cross noted that further work is to be done on clarifying this distinction. Similarly with regard to virtual currencies, Mr. Cross reiterated the Central Bank's warning that they exist in an unregulated space, and that users of such currencies cannot avail of the protections that regulation provides in respect of financial instruments.

A copy of the full speech can be found here.

(iii) The Central Bank Communication to firms seeking authorisation in 2018

On 16 February 2018, the Central Bank published a communication addressed to firms that will be seeking authorisation in the Republic of Ireland in 2018. The communication emphasises the need for any firm seeking authorisation in 2018, not just those seeking authorisation in light of Brexit, to engage with the Central Bank as soon as possible. It further emphasises the need for firms that have already engaged with the Central Bank, but who have not yet commenced the application process, to be aware of the authorisation timelines.

The communication goes on to note that the Brexit FAQs have been updated with two new questions in light of this communication, addressing the impact of any transitional period agreed for Brexit and the need for Irish firms in the UK to engage with the Bank of England, and its own authorisation timelines.

The communication can be accessed here and the updated Brexit FAQ can be accessed here.

(iv) Central Bank issues update on Brexit planning for insurance intermediaries

On 26 March 2018, the Central Bank published a special edition of the Intermediary Times newsletter. The purpose of the newsletter is to set out expectations for Irish registered insurance intermediaries providing services in the United Kingdom, and United Kingdom registered intermediaries providing services in the Republic of Ireland (known as "**passporting**"). Following the withdrawal of the United Kingdom from the European Union, the United Kingdom will be deemed a third country, and passporting will no longer be possible for these intermediaries.

The newsletter notes that the United Kingdom Government has announced that it will legislate for a temporary permission scheme for EEA firms passporting into the United Kingdom if necessary. Details on how the United Kingdom Financial Conduct Authority ("**FCA**") intend to use this scheme are available on its website, which may be accessed here.

The newsletter goes on to outline a number of steps it expects the aforementioned insurance intermediaries to undertake prior to the date that the United Kingdom leaves the

European Union. These include providing for the continuity of insurance mediation contracts and developing contingency plans that set out measures to prevent insurance mediation activity without registration and to ensure service continuity after the United Kingdom leaves the European Union. Furthermore, firms are recommended to take on board communications from the FCA regarding the temporary permission scheme.

The March 2018 newsletter may be accessed here.

(v) Central Bank issues March 2018 edition of Insurance Quarterly

On 27 March 2018, the Central Bank issued its March 2018 edition of its Insurance Quarterly update. Topics covered within this issue include:

- Governance in risk culture;
- Solvency II annual reporting;
- Feedback from the thematic onsite inspection of outsourcing in the cross border life insurance sector; and
- Coverage of EIOPA updates.

The update may be accessed here.

Irish Stock Exchange ("**ISE**")

(i) The Irish Stock Exchange publishes 2017 review

On 16 January 2018, the Irish Stock Exchange ("**ISE**") published its review of 2017. This confirms that the ISE has experienced another exceptional year with total securities on the ISE's markets now standing at over 36,700 securities.

The ISE is ranked number 1 for new and total bond listings (attracting 10,360 new bond listings) and number 1 for investment fund listings among exchanges worldwide. There were three initial public offerings ("**IPOs**") in 2017 (€5.1bn equity funds raised including AIB, the largest IPO in Europe in 2017), with turnover in equity markets recorded their sixth successive year of growth.

The ISE attracted 917 new fund classes during the year and had 5,310 fund and exchange-traded fund ("**ETF**") securities listed at the end of the 2017.

The full 2017 review can be accessed here.

(ii) Euronext acquires Irish Stock Exchange

On 27 March 2018, Euronext completed its acquisition of the ISE. The ISE has joined Euronext's federal model and with effect from 9 April 2018 will be known as "The Irish Stock Exchange trading as Euronext Dublin" and can be referred to as Euronext Dublin.

A copy of the press release can be accessed here.

Anti-Money Laundering ("**AML**") / Counter-Terrorist Financing ("**CTF**")

(i) European Parliament to debate and vote on MLD5 at its plenary session to be held in April 2018.

On 12 January 2018, the European Parliament updated its procedure file on the proposed Fifth Money Laundering Directive ("**MLD5**") which indicates that the European Parliament will debate and vote on MLD5 at its plenary session to be held in April 2018.

The European Commission published its MLD5 proposal in July 2016 and the European Parliament and the Council of the European Union reached a political agreement on MLD5 in December 2017, with the final compromise text set out in an Annex to a European Council note on 19 December 2017.

When MLD5 has been adopted, Member states will have 18 months to transpose MLD5 into national legislation after its publication in the Official Journal of the European Union.

A copy of the European Parliament's procedure file can be found here.

(ii) ESAs publish opinion on use of innovative solutions in customer due diligence process

On 23 January 2018, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published an opinion on the use of innovative solutions by credit and financial institutions in the customer due diligence process. In the opinion, the ESAs consider:

- The use by firms of innovative solutions in the CDD process such as non-face-to-face verification of customers' identity through portable devices such as smartphones and by the use of know your customer ("**KYC**") repositories;
- NCAs should consider a number of factors when assessing the extent to use, or intention to use innovative CDD solutions such as adequate money laundering and terrorist finance risks, oversight and control mechanisms and the quality and adequacy of the CDD measures;
- NCAs should support developments relating to innovative solutions and for firms to demonstrate to NCAs that they have identified, assessed and mitigated all relevant risks before introducing the innovative solution in their CDD process;

- NCAs should work together in exchanging information on their experiences with the use of the innovative solutions to increase their understanding of these new solutions and their awareness of the benefits and risks associated with them; and

- Firms should be encouraged to keep NCAs informed about the innovative solutions that they intend to use so that NCAs can engage in the process at an early stage.

A copy of the opinion can be accessed here.

(iii) Delegated Regulation adding Ethiopia to the list of high-risk third countries under MLD4 is published in the Official Journal of the European Union

On 24 January 2018, the Commission Delegated Regulation (EU) 2018/105 amending the Commission Delegated Regulation (EU) 2016/1675, which supplements the Fourth Money Laundering Directive ("**MLD4**") by identifying high-risk third countries with strategic deficiencies, was published in the Official Journal of the European Union. The amending Delegated Regulation adds Ethiopia to the list. The amending Delegated Regulation was adopted by the European Commission in October, 2017 and it entered into force on 13 February, 2018.

A copy of the amending Delegated Regulation can be found here.

(iv) European Parliament votes to approve the inclusion of Tunisia, Sri Lanka and Trinidad and Tobago on list of high-risk third countries under MLD4

On 7 February 2018, the European Parliament published a press release announcing that it had voted not to object to a Commission Delegated Regulation amending the list of high-risk third countries as set out in Commission Delegated Regulation (EU) 2016/1675. The amending Delegated Regulation includes of Tunisia, Sri Lanka and Trinidad and Tobago in list of high-risk third countries under MLD4. The amending Delegated Regulation was adopted by the European Commission in December, 2017.

The European Parliament's Committee on Economic and Monetary Affairs ("**ECON**") and its Committee on Civil Liberties, Justice and Home Affairs ("**LIBE**") had published a press release in January 2018 stating that MEPs only narrowly supported the amending Delegated Regulation as some MEPs expressed concerns that the inclusion of Tunisia on the list was inappropriate. The press release states that the European Commission intends to reassess Tunisia "*as soon as possible in 2018*" and that it will "swiftly" remove it from the list if it is found to be implementing its AML / CFT commitments.

A copy of the press release of the European Parliament can be found here.

The Commission Delegated Regulation (EU) 2018/212 was adopted on the 14 February 2018 and can be found here.

(v) Committee on Foreign Affairs of the European Parliament adopts draft recommendation on cutting the sources of terrorist income

On 21 February 2018, the European Parliament's Foreign Affairs Committee ("**AFET**") published a press release announcing that it has adopted a draft recommendation titled "*Cutting the sources of income for Jihadists: targeting the financing of terrorism*."

The draft recommendation urges the European Council, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to:

- Increase information sharing and coordination between financial institutions, law enforcement, intelligence agencies and judicial bodies through the establishment of a European counter-terrorism financial intelligence platform;
- Increase the monitoring of suspicious organisations engaged in fraudulent and illegal practices; and
- Assess whether technological developments such as crypto currencies and FinTech help fund terrorists and whether they should be regulated by EU rules.

The text has be adopted by AFET on 2 March 2018 which can be accessed here.

The press release is available here, and the draft recommendation is available here.

(vi) FATF Report to the G20 Finance Ministers and Central Bank Governors

On 16 March 2018, the Financial Action Task Force ("**FATF**") published its report to the March 2018 G20 Finance Ministers and Central Bank Governors' meeting. The Report sets out FATF's ongoing work to fight money laundering and terrorist financing in a number of areas, including:

- FATF has agreed a new Operational Plan to develop its work in the area of terrorist financing, in response to the evolving nature of terrorist threats faced;
- FATF is working to improve transparency regarding legal arrangements such as corporate vehicles, and is cooperating with international bodies regarding implementation of FATF recommendations on beneficial ownership;
- FATF is continuing to review the risks related to FinTech, RegTech and virtual currencies, and explore opportunities to ensure a more coherent approach to mitigate these risks; and
- FATF will continue to prioritise financial inclusion and de-risking as part of its strategy to counter terrorist financing.

The Report can be accessed here.

(vii) Wolfsberg Group published FAQs on assessments for financial crime country risk

On 19 March 2018, the Wolfsberg Group (the "**Group**") published its Frequently Asked Questions ("**FAQs**") on how to manage country risk in the context of financial crime compliance.

The FAQs relate to financial crime risk which includes money laundering, sanctions, bribery and corruption risks, financial secrecy and tax transparency. The Group has prepared the FAQs, based on its members' views on current best practices and how it believes those practices should develop over time. The FAQs will contribute to the promotion of effective risk management and help to prevent the use of its members for criminal purposes and explains what they mean by the term "country risk" which refers to the additional risk created by investing in, or lending across borders to, a foreign country in the context of credit facilities. The issues covered by the FAQs include:

- The data sources considered when developing a methodology to assess country risk;
- What models or methodologies should be considered to measure country risk and how they can be tested and validated;
- Who should own country risk methodologies and what resources are required.

The Group intends to publish guidance on models and methodologies later in 2018.

A copy of the FAQs can be accessed here.

Data Protection / General Data Protection Regulation ("**GDPR**")

(i) Insurance Europe publishes responses to Article 29 Working Party draft guidelines on transparency and consent

On 23 January 2018, Insurance Europe published two papers in response to the Article 29 Working Party draft guidelines on transparency and consent. In both papers, Insurance Europe warned that the guidelines should not expand the scope of Level 1 of the General Data Protection Regulation ("**GDPR**") text, and should instead focus on providing clarity and facilitating implementation.

Regarding the Article 29 draft guidelines on transparency, the Insurance Europe response agreed with the working party's assertion regarding the risk of information fatigue and welcomed a layered approach to disclosures online, noting that this approach be adopted in a non-digital context too. The response went on to make a number of recommendations, including that:

- The obligation to provide information to the data subject on the consequences/effects of data processing be removed as it incurs an unnecessary burden on the data controller and it goes beyond the Level 1 GDPR text; and

- The obligation contained in the guidelines that the controller should reacquaint data subjects with the scope of data processing where data processing occurs on an ongoing basis should be removed as it incurs an unnecessary burden on the data controller and it goes beyond the Level 1 GDPR text.

The Insurance Europe response regarding transparency may be found here.

In response to the Article 29 draft guidelines on consent, Insurance Europe emphasised the need for legal certainty. This is particularly important given that explicit consent is the only legal basis upon which insurers may process sensitive data under the GDPR. The response emphasised the need for legal certainty, especially in the context of health data. In light of this, Insurance Europe recommended that the guidelines provide clarity on a number of issues, including:

- When consent is deemed "freely given" for the purposes of Article 7(4) GDPR and Recital 43, particularly in circumstances where consent for the processing of special categories of data is required for the performance of a contract in an insurance context;

- What constitutes a "detriment" as a result of withdrawing or refusing consent, for the purposes of Recital 42, in the insurance context; and

- The ability of an insurer to arrange insurance cover on behalf of third parties without having obtained consent directly from the third parties themselves.

The Insurance Europe response regarding consent may be found here.

(ii) Data Protection Bill 2018 is published in Ireland

On 1 February 2018, the text of the Data Protection Bill was published in Ireland (the "**Bill**"). The Bill gives effect to the provisions of the General Data Protection Regulation (EU) 2016/679 ("**GDPR**") which will enter into force on 25 May 2018.

The GDPR regulates the processing of the personal data by individuals, companies or organisations relating to individuals in the EU. The GDPR introduces higher standards for the protection of personal data and accordingly increases the compliance obligations on data controllers and processors. In particular, it gives individuals more control over their data, for example by introducing the 'right to be forgotten' and the right to request that their personal data be erased. The GDPR also grants increased supervisory and enforcement powers to national supervisory authorities, which will now have the power to issue fines of up to €20m or 4% of global turnover in the case of a serious data breach.

The Bill also transposes the Police and Criminal Justice Data Protection Directive and Law Enforcement Data Protection Directive (EU) 2016/680 into Irish law. This Directive sets data protection standards for the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection and prosecution of criminal offences.

The Bill itself gives effect to the GDPR in areas where Member States may derogate from the GDPR. For example, section 44 of the Bill proposes that health data may be processed for insurance purposes provided it is necessary and proportionate. The Bill also proposes the establishment of a new Data Protection Commission as the State's data protection authority.

The text of the Data Protection Bill 2018 can be accessed here and is expected to be signed into law in the coming weeks.

(iii) Data Protection Commissioner publishes 2017 Annual Report

On 27 February 2018, the Data Protection Commissioner ("**DPC**") published the Annual Report of the Irish Data Protection Commissioner for 2017 (the "**Annual Report**").

The Annual Report highlights the increased activities of the DPC in 2017 and the priorities of the DPC for the coming years. The increase in the DPC's activities has been matched by an increase in resources, with budget of €7.5 million for 2017 (increasing to €11.7 million in 2018) and a significant increase in staffing levels. Highlights of the 2017 Annual Report include:

- An increase both in the number of complaints received with the largest single category being data subject access requests and a record number of data breach notifications the majority of which related to the financial services sector;
- 91 audit / inspections were carried out by the DPC in 2017 across a broad range of sectors and organisations and large scale investigations related to the hospital sector in relation to the handling of medical files in public areas of hospitals, direct marketing activities and the governance of personal data in case management files by the Child and Family Agency (TUSLA) and the introduction of the controversial Public Services Card;
- Prosecutions for offences in respect of electronic marketing;
- The DPC appeared before the High Court in relation to ongoing litigation regarding the validity of standard contractual clauses facilitating the transfer of data outside the European Economic Area;
- The Article 29 Working Party plenary and subgroup meetings and the DPC acted as lead rapporteur on the GDPR transparency guidance;
- Case Studies and a number of significant judgments delivered by the Court of Justice of the European Union regarding data protection cases law; and
- Preparing for the General Data Protection Regulation ("**GDPR**") with a dedicated GDPR Awareness and Training Unit being established in 2017 with responsibility for driving the DPC's awareness activities.

A copy of the press release can be accessed here and a copy of the full Annual Report can be accessed here.

(iv) Proposal for a Regulation on Privacy and Electronic Communications

On 7 March 2018, the Council of the European Union issued an updated Presidency note on the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) (the "**Proposal**").

The Presidency has asked delegations to provide written comments and drafting suggestions on the issues covered in this updated note, on articles 18 to 29, as well as on any additional comments on the remaining articles by the end of March.

A copy of the initial European Commission proposal dated 10 January 2017 can be accessed here and a copy of the European Commission's press release can be accessed here.

A copy of the updated Presidency note Proposal can be accessed here.

(v) Rights of Individuals under the General Data Protection Regulation ("GDPR")

On 15 March 2018, the Data Protection Commissioner published the "Rights of Individuals under the General Data Protection Regulation" (the "**Guide**"). The GDPR applies from 25 May 2018 and is designed to give individuals more control over their personal data. The rights of the data subject are:

- **The right to be informed**

  The data controller must provide the data subject with the following information such as:

  - The identity and contact details of the data controller and the Data Protection Officer;
  - The purpose(s) of the processing and the lawful basis for the processing of the personal data;
  - If the processing is based on the legitimate interests of the controller or a third party;
  - The retention period (how long an organisation holds onto data);
  - Details of any intended transfers to a third country (non-EU Member State) or international organisation and details of adequacy decisions and safeguards;

- Where processing is based on consent, the right to withdraw consent at any time without affecting the lawfulness of the processing based on the consent before its withdrawal;

- The right to lodge a complaint with a supervisory authority;

- Whether the personal data is a statutory or contractual requirement necessary to enter into a contract, or an obligation, and the consequences of failing to provide the personal data;

- That automated decision making processes existence and will be applied to the data, including profiling, and how decisions are made, the significance and the consequences of the processing of personal data.

The right to access information

A data subject can establish whether a data controller processes information relating to them, to access and obtain a copy of that data and certain additional information in relation to the processing, such as its purposes, the categories of data, the recipients of the data and the existence of additional rights such as the rights to erasure and objection.

The right to rectification

If your personal data is inaccurate, the data subject has the right to have the data rectified, by the controller, without undue delay. If personal data is incomplete, the data subject has the right to have the data completed, including by means of providing supplementary information.

The right to erasure

The right to erasure is also known as the “right to be forgotten”. A data subject has the right to their data erased, without undue delay, by the data controller in circumstances where:

- The data is no longer necessary for the purpose for which it was collected;

- Processing is based on consent, but the data subject has withdrawn consent and there is no other legal ground for continued processing available to the controller;

- A data subject has exercised their right to object, and there is no overriding legitimate interest on which the controller can continue to legitimise its processing;

- The data is unlawfully processed;

- The erasure is required by a law applicable to the controller; or

- The data was collected in connection with the offer of information society services to a child.

The right to data portability

The right to data portability is a new right introduced by the GDPR, which allows the data subject to obtain and reuse their personal data. A data subject can either obtain the data themselves to provide it to a third party or require the data controller to transfer the personal data directly to a third party.

This right only applies where processing of personal data (supplied by the data subject) is carried out by automated means, and where you have either consented to processing, or where processing is conducted on the basis of a contract between you and the data controller.

The right to object to processing of personal data

The data subject has the right to object to certain types of processing of their personal data where this processing is carried out in connection with tasks in the public interest, or under official authority, or in the legitimate interests of others.

The right to object to processing of personal data in relation to direct marketing. Where a data controller is using personal data for the purpose of marketing something directly, or profiling for direct marketing purposes, the data subject can object at any time and the data controller must stop processing as soon as they receive the objection.

The right of restriction

The data subject has a limited right of restriction of processing of personal data by a data controller. Where processing of data is restricted, it can be stored by the data controller but most other processing actions, such as deletion, will require the data subjects permission.

Your rights in relation to automated decision making, including profiling

The data subjects right to not to be subject to a decision based solely on automated processing where the processing is “automated” without human intervention and where it produces legal effects or significantly affects the data subject. Automated processing is permitted only with the data subjects express consent.

A copy of the Guide can be accessed here.

(vi) Insurance Europe publishes final template for data breach notifications under the GDPR

Insurance Europe, on 19 March 2018, published its final template for data breach notifications under the GDPR.

The GDPR places an obligation upon companies that process personal data to notify any personal data breaches to the competent supervisory authority. Article 33 of the GDPR sets out the information that this notification is to contain, including a description of the nature of the breach, and its likely consequences. This notification must be made within 72 hours of the company becoming aware of the breach.

The Insurance Europe template has been drafted to meet the notification obligations under the GDPR. The template comes in three sections:

- A section containing personal details and information on the affected company;
- A section which contains detail on the data breach incident as per Article 33 GDPR, to be sent to the national supervisory authority within 72 hours of the breach; and
- A section to be completed following the 72 hour period, when more information will be available on the breach.

The template and an accompanying explanatory document are available here.

Financial Services and Pensions Ombudsman

(i) Financial Services Ombudsman publishes 2017 Annual Review

On 29 March 2018, the Financial Services and Pensions Ombudsman ("**FSO**") published its Annual Review of the Financial Services Ombudsman for the year 2017.

The Annual Review provides a summary of complaints made to the FSO in 2017 which contains the details of the complaints made against individual financial service providers with three or more complaints that were upheld or partly upheld and includes case studies which outline the types of complaints dealt with during 2017 and how they have been resolved.

The number of complaints that were adjudicated has reduced significantly as a direct result of the introduction of a new Dispute Resolution Service in 2016 as this service resolves disputes through mediation at an early stage with 5,000 complaints being resolved through this process since its introduction.

The Financial Services and Pensions Ombudsman, Mr. Ger Deering stated that:

"*I am very pleased to see the significant changes to our services undertaken in 2016 continuing to bear fruit. The vast majority of complaints resolved by the FSO in 2017 were resolved through mediation, which is proving to be a very fast method of resolving complaints. Of the 2,370 complaints closed in 2017 through mediation, 57% were resolved in less than three months. The outcome of both mediations and adjudications can have a significant impact on the lives of real people. In 2017, a total of 1,482 complainants received some form of financial compensation, rectification and redress*."

A copy of the full Annual Review for 2017 can be accessed here.

Dillon Eustace
31 March 2018

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This Insurance Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 31 March 2018, and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace.

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