Investment Firms Quarterly Legal and Regulatory Update

Period covered:

1 April 2016 – 30 June 2016

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INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

Markets in Financial Instruments Directive ("MiFID")

(i) ESMA peer review report on MiFID suitability requirements

On 7 April 2016, the European Securities and Markets Authority ("**ESMA**") published a summary of the key findings of its recent peer review regarding compliance with the MiFID suitability requirements (the "**Report**").

The peer review took the form of a self-assessment questionnaire for all Competent Authorities ("**CAs**"). CAs had 1 year to complete the review, with the review period running from 1 January 2013 to 31 December 2014.

The purpose of the questionnaire was to capture the possible different ways CAs determine when investment advice is provided and how they consistently supervise and enforce the relevant suitability requirements. The Annex to the report provides a detailed summary of all replies received from the various CAs.

Overall, ESMA found that while most CAs have a good understanding of the investment advice market in their jurisdictions and regularly review the distribution methods and business models of investment firms, there is scope to adopt more proactive supervisory approaches and strengthen enforcement activities.

ESMA found that:

- CAs have a good understanding of the types of distribution methods used in their jurisdictions and where the boundary between investment advice and information lies. However, limited supervision was performed to verify whether clients are receiving investment advice in practice or have the perception that they are receiving advice;
- Most CAs do not perform supervision which is targeted at the particular behaviour of a firm or group of firms as part of a specific suitability project;
- Most CAs stated they used a wide range of tools to monitor the main aspects of advice suitability but only a limited number of regulators provided specific information on the tools they use to supervise compliance with the suitability requirements;
- Enforcement action, such as imposing fines or placing restrictions on firms' activities, was rarely taken. Many CAs considered their supervisory approach alone was sufficient to address issues; and
- In many cases, CAs could improve how they publicly communicate with stakeholders on their supervision and enforcement activities and findings.

A copy of the Report is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-584_suitability_peer_review_-_final_report.pdf

(ii) ESMA publishes and updates Q&A relating to the provision of contracts for dfferences ("CFDs") and other speculative products to retail investors under MiFID

On 8 April 2016, ESMA published a new questions and answers document relating to the provision of CFDs and other speculative products to retail investors under MiFID (the "**Q&A**").

The purpose of the Q&A is to promote common supervisory approaches and practices in the application of MiFID and its implementing measures to certain key aspects that are relevant when CFDs and other speculative products are marketed and sold to retail clients. It does this by providing responses to questions identified by CAs in relation to practical aspects of the day-to-day supervision of firms involved in offering these products.

The Q&As are targeted at CAs. However, the answers are also intended to help firms by providing clarity on MiFID rules. The Q&A has been produced with reference to the current (i.e. MiFID I) legislative framework that is currently in application. However, it should be noted that the principles and requirements underpinning the content of the Q&A will remain unchanged once the MiFID II package, which overall strengthens the protections for investors, enters into application.

For a copy of the Q&A in full see:

https://www.esma.europa.eu/sites/default/files/library/2016-590_qa_on_cfds_and_other_speculative_products_-_mifid.pdf

(iii) ESMA updates document on waivers from MiFID pre-trade transparency requirements (June 2016)

On 20 June 2016, ESMA published an updated version of the waiver document (the "**Waiver Document**") that sets out its assessment of applications for waivers from pre-trade transparency requirements under MiFID.

The Waiver Document is aimed at competent authorities under MiFID to ensure that, in their supervisory activities, their actions converge with the opinions provided by ESMA. The examples are also intended to provide clarity for firms on the MiFID requirements for pre-trade transparency.

In the updated Waiver Document there is a new ESMA opinion relating to large-in-scale waivers. The new opinion, which is written in red, provides an example of functionalities that satisfy the MiFID criteria

A copy of the Waiver Document is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2011-241h_esma_opinions_cesr_positions_on_pre-trade_waivers_0.pdf

(iv) ESMA publishes statement on MiFID practices for firms selling financial instruments subject to the BRRD resolution

On 2 June 2016, ESMA issued a statement (the "**Statement**") to all credit institutions and investment firms, clarifying how these entities should apply the relevant MiFID requirements governing the distribution of financial instruments (which are "bail-in-able" under the Bank Recovery and Resolution Directive 2014/59/EU ("**BRRD**") resolution regime) to clients, both on an advised and non-advised basis, as well as in the context of portfolio management.

In the Statement, ESMA outlines its concerns that, following the implementation of the BRRD, firms are likely to issue a significant amount of potentially loss-bearing instruments to fulfil their obligations and that investors, particularly retail investors, may be unaware of the risks they may face when buying such instruments.

ESMA noted that aside from the general duties of conduct, MiFID contains several provisions which apply to firms when selling or advising on the sale of financial instruments, including those subject to the resolution regime, or providing portfolio management, namely:

- Provision of information to clients;
- Provision of investment advice;
- Suitability and appropriateness; and
- Conflicts of interest.

A copy of the Statement can be found here:

https://www.esma.europa.eu/sites/default/files/library/2016-902_statement_brrd_0.pdf

Markets in Financial Instruments Directive II ("MiFID II")

(i) ESMA risk assessment on temporary exclusion of exchange-traded derivatives from Articles 35 and 36 of MiFIR

On 4 April 2016, ESMA published its risk assessment on the temporary exclusion of exchange-traded derivatives ("**ETDs**") from Articles 35 and 36 of the Markets in Financial Instruments Regulation ("**MiFIR**").

Article 35 of MiFIR requires CCPs to provide access to trading venues on a non-discriminatory basis to clear transactions executed on different trading venues. Article 36 of MiFIR requires trading venues to provide access on a non-discriminatory basis, including trade feeds, to CCPs that wish to clear transactions executed on these trading venues.

Under Article 52(12) of MiFIR, the European Commission is required to report to the European Parliament and the Council of the EU on assessments of the need to temporarily exclude ETDs that require open and non-discriminatory access to CCPs and trading venues from the scope of Articles 35 and 36 of MiFIR.

The report prepared by the European Commission will be based on a risk assessment carried out by ESMA and had to be submitted by 3 July 2016. Depending on its conclusions, the European Commission may adopt a delegated act to exempt ETDs from the scope of Articles 35 and 36 of MiFIR for up to 30 months following the date MiFIR enters into force.

Articles 35 and 36 of MiFIR establish that CAs may only grant access to a particular CCP or trading venue where granting access would not: 1) require an interoperability agreement for ETDs, or 2) threaten the smooth and orderly functioning of the market, in particular due to liquidity fragmentation, or would not adversely affect systemic risk.

In its risk assessment, ESMA provides an overview of the market for ETDs and of existing access arrangements in the EEA including any potential benefits and risks stemming from open access provisions for ETDs. It concludes that the possible risks stemming from access related to ETDs are already appropriately covered in Article 35 and 36 of MiFIR and the draft RTS on access to CCPs and trading venues and consequently does not recommend that ETDs should be temporarily exempted from the scope of Articles 35 and 36.

ESMA's full risk assessment can be found here:

https://www.esma.europa.eu/sites/default/files/library/2016-461_etd_final_report.pdf

(ii) European Commission publishes Delegated Regulation under MiFID II as regards organisational requirements and operating conditions for investment firms

On 25 April 2016, the European Commission adopted a Delegated Regulation (C(2016) 2398 final) (and Annexes) supplementing the MiFID II Directive as regards organisational requirements and operating conditions for investment firms and defined terms (the "**Delegated Regulation**").

The Delegated Regulation aims at specifying, in particular, the rules relating to exemptions, the organisational requirements for investment firms, data reporting services providers, conduct of business obligations in the provision of investment services, order execution rules, client order handling, small and medium-sized enterprises ("**SME**") growth markets,

thresholds above which the position reporting obligations apply and the criteria under which the operations of a trading venue in a host Member State could be considered as of substantial importance for the functioning of the securities markets and the protection of the investors.

The Delegated Regulation is based on final technical advice on the MiFID II Directive that ESMA provided to the European Commission in December 2014 (the Council of the EU has decided not to object). The European Parliament will now consider the Delegated Regulation and – if cleared without objection – the Delegated Regulation will enter into force 20 days after its publication in the Official Journal of the EU, applying from the date that the MiFID II Directive applies (3 January 2018).

A copy of the Delegated Regulation can be found at:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2398-EN-F1-1.PDF

(iii) European Commission adopts Delegated Regulation for determination of market material in terms of liquidity relating to trading halt notifications

On 26 May 2016, the European Commission adopted a Delegated Regulation (C(2016) 3020 final) supplementing the MiFID II Directive with regard to RTS for the determination of a material market in terms of liquidity relating to notifications of a temporary halt in trading (the "**Delegated Regulation**").

Under Article 48(5) of MiFID II, Member States must require a regulated market to be able to halt or constrain trading if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction that took place. The parameters used for deciding to halt trading and any material changes to those parameters must be reported to the competent authority, which in turn must report them to ESMA. This requirement is extended to multilateral trading facilities ("**MTFs**") and organised trading facilities ("**OTFs**") by virtue of Article 18(5) of MiFID II.

In this context, Article 48(12)(d) of MiFID II Directive requires ESMA to develop draft RTS further specifying the determination of where a regulated market is material in terms of liquidity in a given instrument for that market. The draft RTS were submitted to the European Commission on 28 September 2015.

If the Delegated Regulation is adopted by the European Parliament without objection (the Council of the EU has already decided not to object to it), it will enter into force 20 days after publication in the Official Journal of the EU and it will apply from the date appearing in the second sub-paragraph of Article 93(1) of MiFID II (3 January 2018).

A copy of the Delegated Regulation can be found at:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3020-EN-F1-1.PDF

(iv) European Commission adopts Delegated Regulation on RTS criteria for determining whether derivatives subject to clearing obligation should be subject to trading obligation

On 26 May 2016, the European Commission adopted a Delegated Regulation (C(2016) 2710 final) supplementing MiFIR with regard to RTS on criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation (the "**Delegated Regulation**").

MiFIR lays down a trading obligation applicable to non-intra group transactions in sufficiently liquid contracts when traded by counterparties subject to clearing under EMIR. The application of the trading obligation is defined under Article 32 of MiFIR, which outlines the process for deciding which derivatives should be declared subject to mandatory trading.

Once a class of derivatives has been mandated as subject to the clearing obligation under EMIR, ESMA must determine whether those derivatives (or a subset of such) should be subject to the trading obligation, meaning they can only be traded on a regulated market, MTF or OTF. Whether or not a class of derivatives subject to the clearing obligation should also be made subject to the trading obligation will be determined by the venue test (the class of derivatives must be admitted to trading or traded on at least one admissible trading venue) and the liquidity test (whether the derivatives are "sufficiently liquid") and there is sufficient third party buying and selling interest.

The Delegated Regulation provides clarity in the determination of a class/subset of class of derivatives that is sufficiently liquid. Article 2 specifies the criteria with respect to the average frequency of trades, Article 2 sets out the average size of trades, Article 4 details the number and type of active market participants and Article 5 notes the average size of spreads. Together, these indicate the level of third-party buying and selling interest, laid out in Article 1.

The Delegated Regulation is subject to consideration by the European Parliament and the Council of the European Union. Once final, the adopted RTS will apply directly across the EU from the date that MiFID II applies (3 January 2018).

To view the Delegated Regulation on the draft RTS in full see:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2710-EN-F1-1.PDF

(v) European Commission adopts Implementing Regulation laying down Implementing Technical Standards ("ITS") with regard to content and format of description of functioning of MTFs and OTFs

On 26 May 2016, an Implementing Regulation (the "**Implementing Regulation**") laying down ITS with regard to the content and format of the description of the functioning of MTFs and OTFs was published in the Official Journal of the EU.

The Implementing Regulation sets out the information that investment firms and market operators operating MTFs and OTFs ("**Relevant Operators**") must provide to their competent authority. When Relevant Operators provide the competent authority with the description of the functioning of the MTF or OTF they operate, they must include clear references in their submissions that satisfy the requirements of the template in table 1 of the Annex.

The Implementing Regulation provides that the competent authority must notify ESMA of the authorisation of a Relevant Operator as an MTF or an OTF in electronic format and in the format set out in Table 2 of the Annex, enabling ESMA to publish the list of all MTFs and OTFs in the EU together with their unique code and information on the services they provide.

The Implementing Regulation is based on the draft ITS that ESMA submitted to the European Commission in September 2015 and entered into force 20 days after its publication in the Official Journal of the EU on 16 June 2016. The Regulation will apply from the date that appears in the second sub-paragraph of Article 93(1) of MiFID II (3 January 2018).

(vi) European Commission adopts Delegated Regulation on RTS for suspension, removal and admission of financial instruments from trading under MiFID II Directive

On 24 May 2016, the European Commission adopted a Delegated Regulation (C(2016) 3014 final) supplementing the MiFID II Directive with regard to RTS for the suspension and removal of financial instruments from trading (the "**Suspension Regulations**").

The Suspension Regulation further specifies the cases in which a derivative relating or referenced to a financial instrument suspended or removed from trading should also be suspended or removed from trading by regulated markets, MTFs and OFTs. The Suspension Regulation also further specify the criteria for transferable securities to be freely negotiable and for transferable securities, units and shares in collective investment undertakings and derivatives to be traded in a fair, orderly and efficient manner

This Suspension Regulation is based on the draft RTS that ESMA submitted to the European Commission in September 2015. The next step will be to consider the Suspension Regulation. If the European Parliament pass the Suspension Regulation without objection (the Council of the EU previously indicated that it will not object to the

Suspension Regulation), it will enter into force 20 days after its publication in the Official Journal of the EU. Article 2 of the Delegated Regulation states that it shall apply from the date it appears in the second subparagraph of Article 93(1) of MiFID II (3 January 2018).

A copy of the Suspension Regulation can be found here:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3014-EN-F1-1.PDF

(vii) European Commission adopts Delegated Regulation on RTS on authorisation and organisational requirements and publication of transactions for data reporting services providers under MiFID II

On 2 June 2016, the European Commission adopted a Delegated Regulation (C(2016) 3201 final) supplementing MiFID II with regard to RTS on requirements on authorisation, organisation and the publication of transactions for data reporting services providers ("**DRSPs**") (the "**Data Reporting Services Regulation**").

MiFID II introduces data reporting services as a new type of service that is subject to authorisation and supervision, operated by DRSPs. Data reporting services include the operation of approved publication arrangements, consolidated tapes and approved reporting mechanisms.

The European Commission has power under Articles 61, 64, 65 and 66 of the MiFID II Directive to adopt a delegated regulation following submission of draft RTS by ESMA. The aim of the Data Reporting Services Regulation is to further specify the information a DRSP must provide to competent authorities when seeking authorisation, to set out the organisational requirements to be met by DRSPs at the time of authorisation and on an ongoing basis, and to provide for more specific requirements in relation to the publication arrangements.

ESMA submitted its draft RTS to the European Commission in September 2015. The Data Reporting Services Regulation is subject to consideration by the European Parliament and the Council of the European Union. Once final, the adopted Data Reporting Services Regulation will apply directly across the EU from the date that MiFID II applies (3 January 2018).

A copy of the Data Reporting Services Regulation in full can be found at:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3201-EN-F1-1.PDF

(viii) European Commission adopts Delegated Regulation on RTS on access to benchmarks under MiFIR

On 2 June 2016, the European Commission adopted a Delegated Regulation (C(2016) 3203) supplementing MiFIR with regard to RTS on access to benchmarks (the "**Benchmark Regulation**").

MiFIR provides for the non-discriminatory access for CCPs and trading venues to licences of and information relating to benchmarks that are used to determine the value of some financial instruments for trading and clearing purposes. Article 37(4) of MiFIR gives the European Commission the right to adopt a delegated regulation to specify:

- the information to be made available through licensing for the sole use of the CCP or trading venue;
- other conditions under which access is granted, including confidentiality of information provided; and
- the standards guiding how a benchmark may be proven to be new.

Article 1 of the Benchmark Regulation lays down the list of information to be provided to a trading venue or CCP requesting access from the benchmark owner, including further clarification on what constitutes relevant trading and clearing functions, relevant information on scope of price and data feeds, and relevant information on composition, methodology and pricing. Articles 2 to 4 set out the conditions under which access must be granted as well as specifications on non-discriminatory treatment. Article 5 sets out the standards for determining how a benchmark can be considered to be new and therefore benefit from transitory arrangements.

The Benchmark Regulation is subject to consideration by the European Parliament and the Council of the European Union. Once final, the adopted Benchmark Regulation will apply directly across the EU from the date that MiFID II applies (3 January 2018).

A copy of the Benchmark Regulation in full can be found at:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3203-EN-F1-1.PDF

(ix) European Commission adopts Delegated Regulation on RTS on the specification of the offering of pre-and-post-trade data and the level of disaggregation of data under MiFIR

On 2 June 2016, the European Commission adopted a Delegated Regulation (C(2016) 3206 final) supplementing MiFIR with regard to RTS on the specification of the offering of pre and post-trade data and the level of disaggregation of data (the "**Delegated Regulation**").

MiFIR requires market operators and investment firms operating a trading venue to make publicly available the information published in accordance with Articles 3, 4 and 6 to 11 of MiFIR by offering pre-trade and post-trade transparency data separately. Article 12(2) of MiFIR gives the European Commission power to adopt, following submission of draft RTS by ESMA, a Delegated Regulation further specifying the offering of pre-trade and post-

trade transparency data, including the level of disaggregation of the data to be made available to the public.

The Delegated Regulation is subject to consideration by the European Parliament and the Council of the European Union. Once final, the adopted Delegated Regulation will apply directly across the EU from the date that MiFID II applies (3 January 2018).

A copy of the Delegated Regulation in full can be found at:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3206-EN-F1-1.PDF

(x) ESMA opinion on MiFID II RTS on ancillary activities

On 31 May 2016, ESMA published an opinion proposing amendments to its draft technical standards ("**RTS 20**") on criteria for establishing when an activity is to be considered ancillary to the main business, (the "**Opinion**"). RTS 20 provides criteria to establish when a non-financial firm's commodity derivatives trading activity is considered to be ancillary to its main business.

MiFID II aims at ensuring that non-financial firms are appropriately regulated and compete on a level-playing-field if they engage in commodity derivatives trading to an extent that cannot be considered ancillary to their main business. In order to achieve this, RTS 20 had designed quantitative tests, a trading activity and a business activity test. The two tests measured the size of the speculative commodity trading activity of the firm relative to the total size of the commodity market concerned and relative to the total activity of the firm. RTS 20 also included a backstop mechanism to ensure that only activities of certain relevance are captured. On 20 April 2016, (and while supporting the overall approach of RTS 20), the European Commission asked ESMA to amend the business activity test and to introduce a capital-based test, where appropriate, for certain firms.

ESMA has stated that it considers that the original test it postulated in the original RTS 20 is in line with the objectives pursued by the exemption contained in Article 2(1)(j) of MiFID II Directive. Notwithstanding the foregoing ESMA identified some metrics for a numerator and denominator that could be used by the European Commission to construct a capital test as an alternative to the main business test already designed by ESMA. The amended RTS 20 has been sent to European Parliament and to the Council for review and endorsement.

The Opinion can be found at:

https://www.esma.europa.eu/sites/default/files/library/2016-730_opinion_rts_ancillary_activity.pdf

(xi) Council of EU publishes texts of legislative package to delay implementation of MiFID II

On 30 June 2016, Directive (EU) 2016/1034 and Regulation (EU) 2016/1033 were published in the Official Journal of the EU.

The legislation enacts a one year delay of MiFID II and MiFIR respectively – officially postponing the implementation date to 3 January 2018.

The legislation may be accessed via the links below:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1034&from=EN

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1033&from=EN

(xii) European Commission adopts Delegated Regulations on RTS relating to level of accuracy of business clocks/ execution venues/ requirements to ensure fair and non-discriminatory co-location services and fee structure under MiFID II

On 6 June 2016, the European Commission adopted a Delegated Regulation (C(2016) 3266 final) supplementing MiFID II with regard to RTS on requirements to ensure fair and non-discriminatory co-location services and fee structures (the "**Delegated Regulation**").

Under Articles 48(8) and (9) of MiFID II, trading venues must ensure that their rules on co-location and fee structures are transparent, fair and non-discriminatory.

In this context, Article 48(12)(d) of MiFID II requires ESMA to develop draft RTS further specifying the requirements to ensure that co-location services and fee structures are fair, non-discriminatory and do not create incentives for disorderly trading conditions or market abuse.

The Delegated Regulation is subject to consideration by the European Parliament and the Council of the European Union. Once final, the adopted Delegated Regulation will apply directly across the EU from the date that MiFID II applies (3 January 2018).

A copy of the Delegated Regulation can be found at:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3266-EN-F1-1.PDF

Capital Requirements Directive ("CRD IV")

(i) EBA publishes responses to consultation on draft guidelines on the collection of information related to ICAAP and ILAAP

On 21 April 2016, the EBA published a list of responses (the "**Responses**") to its December 2015 consultation paper draft guidelines on the collection of information related to the internal capital adequacy assessment process ("**ICAAP**") and the internal liquidity adequacy assessment process ("**ILAAP**") (the "**Consultation Paper**").

The Consultation Paper contained draft guidelines which aimed to facilitate the consistent approach to the supervisory assessment of ICAAP and ILAAP frameworks as well as the assessment of reliability of institutions' own capital and liquidity estimates as part of the supervisory review and evaluation process ("**SREP**") following the criteria and methodologies specified in the EBA Guidelines on common procedures and methodologies for SREP.

The consultation process closed on 11 March 2016 and, in total, nine Responses were received.

The text of the Consultation Paper is available at the following link:

http://www.eba.europa.eu/documents/10180/1307235/EBA-CP-2015-26+%28CP+on+GL+on+ICAAP+and+ILAAP+Information%29.docx

The Responses may be accessed via the following link:

http://www.eba.europa.eu/regulation-and-policy/supervisory-review-and-evaluation-srep-and-pillar-2/guidelines-on-icaap-and-ilaap-information/-/regulatory-activity/consultation-paper/1307232#responses_1307232

(ii) Regulation extending exemptions for commodity dealers published in the Official Journal of the EU

On 29 June 2016, the Regulation (EU) No. 2016/1014 amending the Capital Requirements Regulation ((EU) No. 575/2013) ("**CRR**") as regards exemptions for commodity dealers (the "**Amending Regulation**") was published in the Official Journal of the EU.

Under the CRR, commodity dealers are exempt from large exposure and own funds requirements until 31 December 2017. The Amending Regulation extends these exemptions until 31 December 2020. The measure is designed to protect commodity dealers from an unstable regulatory environment in the short term.

The text of the Amending Regulation is available at this link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1014&from=EN

The Bank Recovery and Resolution Directive 2014/59/EU (BRRD")

(i) European Commission adopts Delegated Regulation on business reorganisation plans under the BRRD

On 10 May 2016, the European Commission adopted Delegated Regulation (C(2016) 2665) containing RTS specifying the minimum elements of a business reorganisation plan and the minimum contents of the reports on the progress in the implementation of the plan (the "**Business Reorganisation Regulation**").

The Business Reorganisation Regulation is based on the EBA's final draft RTS which were published in December 2015 and provides that a business reorganisation plan should contain the following:

- Details of the firm's business reorganisation strategy;
- The firm's projected financial performance;
- Sufficient information to enable the relevant authorities to conduct a viability assessment of the feasibility of the proposed measures; and
- Quarterly implementation milestones and performance indicators.

The Business Reorganisation Regulation also sets out requirements on the contents of the reports that the firm's management should submit to the relevant authority on the progress of the implementation of the plan.

The Business Reorganisation Regulation is subject to scrutiny by the European Parliament and the Council of the EU. Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication.

The text of the Business Reorganisation Regulation can be found at the following link:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2665-EN-F1-1.PDF

(ii) European Commission adopts Delegated Regulation on RTS specifying standards for methodologies and principles on valuation of derivatives' liabilities under BRRD

On 23 May 2016, the European Commission adopted Delegated Regulation (C(2016) 2967 final) supplementing the BRRD with RTS specifying standards for methodologies and

principles on the valuation of liabilities arising from derivatives (the "**Valuation Regulation**").

The Valuation Regulation is based on the final draft RTS that the EBA submitted to the European Commission in December 2015. The Valuation Regulation specifies:

- Appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;
- Principles for establishing the relevant point in time at which the value of a derivative position should be established; and
- Appropriate methodologies for comparing the destruction in value that would arise from the close-out and bail-in of derivatives with the amount of losses that would be borne by derivatives in a bail-in.

The Valuation Regulation is subject to scrutiny by the European Parliament and the Council of the EU. Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication.

The text of the Valuation Regulation can be found at the following link:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2967-EN-F1-1.PDF

(iii) European Commission adopts Delegated Regulation on RTS specifying criteria for setting the minimum requirement for own funds and eligible liabilities under BRRD

On 23 May 2016, the European Commission adopted Delegated Regulation (C(2016) 2976 final) supplementing the BRRD with RTS specifying criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities (the "**Delegated Regulation**").

In December 2015, the European Commission informed the EBA that it intended to endorse the Delegated Regulation (submitted by the EBA in July 2015) subject to certain amendments. In February 2016, the EBA published an opinion rejecting the European Commission's amendments to the Delegated Regulation and resubmitted a revised draft of the Delegated Regulation to the European Commission.

The Delegated Regulation is subject to scrutiny by the European Parliament and the Council of the EU. Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication.

The text of the Delegated Regulation can be found at the following link:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2976-EN-F1-1.PDF

(iv) Delegated Regulation on exclusion from application of write-down or conversion powers under BRRD published in the Official Journal

On 1 June 2016, the European Commission Delegated Regulation (EU) 2016/860 (the "**Regulation**") was published in the Official Journal of the EU. The Regulation specifies the circumstances where exclusion from the application of write-down or conversion powers is necessary under Article 44(3) of the BRRD.

Article 44 sets out the specific exclusions to the BRRD's bail-in tool, which gives a resolution authority the power to bail-in all the liabilities of a firm in resolution. Article 44(3) permits the resolution authority to exclude certain liabilities from the scope of the bail-in tool, provided that certain conditions are met.

The Regulation entered into force on 21 June 2016.

The text of the Regulation can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0860&from=EN

(v) European Commission adopts Delegated Regulation on RTS on detailed records of financial contracts under BRRD

On 7 June 2016, the European Commission adopted Delegated Regulation (C(2016) 3356 final) supplementing the BRRD with regard to RTS on a minimum set of the information on financial contracts that should be contained in the detailed records, and the circumstances in which the requirement should be imposed (the "**Records Regulation**").

The Records Regulation is based on the draft RTS submitted by the EBA in December 2015. The draft RTS specify that an institution (or relevant entity) must maintain detailed records of financial contracts where, pursuant to the applicable resolution plan or the group resolution plan, it is foreseen that resolution actions would be applied to the institution or entity concerned should the relevant conditions for resolution be satisfied.

The Records Regulation is subject to scrutiny by the European Parliament and the Council of the EU. Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication.

The text of the Delegated Regulation can be found at the following link:

http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3356-EN-F1-1.PDF

European Markets Infrastructure Regulation ("EMIR")

(i) Interest Rate Swap Clearing came into effect for certain market participants on 21 June 2016

On 1 December 2015, Commission Delegated Regulation (EU) 2015/2205 (the "**Delegated Regulation**") for the regulatory technical standards in respect of central clearing for the first classes of interest rate derivatives under EMIR was published in the Official Journal of the EU. The Delegated Regulation came into force on 21 December 2015.

The clearing obligation in the Delegated Regulation covers the following class of OTC interest rate derivatives denominated in the following currencies:

- Fixed-to-float interest rate swaps ("**IRS**") (also known as plain vanilla interest rate derivatives) for EUR, GBP, JPY, USD;
- Float-to-float swaps (also known as basis swaps) for EUR, GBP, JPY, USD;
- Forward rate agreements for EUR, GBP, JPY, USD; and
- Overnight index swaps for EUR, GBP, USD.

The Delegated Regulation sets out five different categories of counterparties to which the clearing obligation applies and specifies the phase-in periods for each. The different categories and the phase-in periods are as follows:

Category	Counterparty Type	Clearing Obligation Commencement
1	Clearing members of a recognised or authorised CCP for at least one of the classes of interest rate swaps covered by the Delegated Regulation	21 June 2016
2	Financial Counterparties ("**FCs**") and certain AIFs belonging to a group whose group aggregate month-end average of outstanding notional amount of non-centrally cleared derivatives is in excess of €8 billion using the month end average for January, February and March 2016	21 December 2016

3	FCs and AIFs not in either category 1 or 2 above	21 December 2018
4	Non-Financial Counterparties that exceed the clearing threshold ("**NFC+**") not falling within another category	21 December 2018
5	Category 1, 2 or 3 involving an intra-group transaction with a non-EU counterparty	21 December 2018 or, if by such date an equivalence decision has been adopted regarding a relevant third country, a specified date following such decision

A contract between two counterparties in different categories would be subject to the clearing obligation from the later date.

The obligation to clear the above referenced OTC derivative instruments will apply not only to transactions entered after the effective date applicable to the relevant category of counterparty but also to transactions concluded between the first authorisation of a CCP under EMIR (which took place on 18 March 2014) and the later date on which the clearing obligation actually takes effect for the relevant category of counterparty, unless the OTC derivative entered into has a remaining maturity lower than the minimum remaining maturities which are laid down in the Delegated Regulation and which are based on the category of counterparty and type of OTC derivative.

The text of the Delegated Regulation is available at this link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2205&from=EN

(ii) Clearing Obligation for two iTraxx Index Credit Default Swaps ("CDS")

Commission Delegated Regulation (EU) 2016/592 (the "**Second Delegated Regulation**") supplementing EMIR was published in the Official Journal of the EU on 19 April 2016 and came into effect twenty days later on 9 May 2016. The Second Delegated Regulation applies the clearing obligation to to iTraxx Europe Main and iTRaxx Europe Crossover (5 years Euro denominated). The Second Delegated Regulation follows a very similar phase-in to the phase-in of interest rate swaps (see (i) above).

The Second Delegated Regulation sets out five different categories of counterparties to which the clearing obligation applies and specifies the phase-in periods for each. The different categories and the phase-in periods are as follows:

Category	Counterparty Type	Clearing Obligation Commencement
1	Clearing members of a recognised or authorised CCP for at least one of the classes	9 February 2017

	of CDS covered by the Second Delegated Regulation	
2	Financial Counterparties ("**FCs**") and certain AIFs belonging to a group whose group aggregate month-end average of outstanding notional amount of non-centrally cleared derivatives is in excess of €8 billion using the month end average for January, February and March 2016	9 August 2017
3	FCs and AIFs not in either category 1 or 2 above	9 February 2018
4	Non-Financial Counterparties that exceed the clearing threshold ("**NFC+**") not falling within another category	9 May 2019
5	Category 1, 2 or 3 involving an intra-group transaction with a non-EU counterparty	9 May 2019 or, if by such date an equivalence decision has been adopted regarding a relevant third country, a specified date following such decision

(iii) Proposed Clearing obligation for IRS in Norwegian Krone ("NOK"), Polish Zloty ("PLN"), and Swedish Krona ("SEK")

On 10 June 2016, the European Commission published a proposed delegated regulation (the "**Draft Regulation**") which would impose mandatory clearing obligations to IRS denominated in NOK, PLN and SEK. The Draft Regulation is subject to scrutiny by the European Parliament and the Council.

The Draft Regulation can be found at the following link:

http://ec.europa.eu/finance/financial-markets/docs/derivatives/160610-delegated-regulation_en.pdf

(iv) Margin Requirements of EMIR delayed

On 8 March 2016, the European Supervisory Authorities (the European Banking Authority ("**EBA**"), ESMA and the European Insurance and Occupational Pensions Authority ("**EIOPA**") (the "**ESAs**") submitted to the European Commission their final draft RTS on risk-mitigation techniques for OTC derivative contracts not cleared by a CCP under Article

11 of EMIR. The RTS detail the requirements for firms to exchange margins on non-centrally cleared OTC derivatives as well as specify the criteria regarding intragroup exemptions. The RTS also outline the list of eligible collateral for the exchange of margins, the criteria to ensure the collateral is sufficiently diversified and not subject to wrong-way risk, as well as the methods to determine appropriate collateral haircuts

The RTS reflect the minimum global standards for margin requirements for non-centrally cleared OTC derivatives introduced by the Basel Committee on Banking Supervision and the International Organisation of Securities Commissions in September 2013 (and then revised in March 2015).

The RTS are stated to enter into force on 1 September 2016. However, the RTS must be endorsed by the European Commission and then accepted by the European Parliament and the Council and published in the Official Journal of the EU before they can take effect. With this in mind a spokeswoman for the European Commission has recently stated that this deadline (i.e. 1 September 2016) will not be met and that the deadline has been pushed out to the end of the year.

The RTS can be found at the following link:

https://www.esma.europa.eu/press-news/esma-news/esas-publish-final-draft-technical-standards-margin-requirements-non-centrally

(v) ESMA publishes updated Q&A on the implementation of EMIR

On 6 June 2016, ESMA updated its questions and answers paper (the "**Q&A**") on practical questions regarding EMIR. The updated Q&A includes new answers in relation to the clearing obligation, specifically about the self-categorisation that is necessary in order to establish which counterparties belong to which categories for the purpose of interest rate clearing. The Q&A also provide clarifications on how counterparties should handle the situation where some of their counterparties have not provided the information on the category they belong to.

A copy of the updated Q&A is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-898_qa_xviii_emir.pdf

(vi) ESMA final report on draft RTS on indirect clearing arrangements under EMIR and MiFIR

On 26 May 2016, ESMA issued two final draft RTS on indirect clearing under MiFIR and EMIR respectively (the "**Draft Regulatory Technical Standards**"). The Draft Regulatory Technical Standards clarify provisions of indirect clearing arrangements for OTC and exchange-traded derivatives and help to ensure consistency and that an appropriate level of protection for indirect clients exists.

The Draft Regulatory Technical Standards include provisions on the following key points:

- Default management – in order to take into account that there can be a conflict of law between EU regulation and certain national insolvency regimes, the Draft Regulatory Technical Standards propose an obligation of means, i.e. relying on having appropriate default procedures and committing to trigger them;

- Choice of account structures to be offered to indirect clients – the Draft Regulatory Technical Standards provide a choice of possible account structures that reflect the current practice in the OTC derivative and the exchange traded derivative markets in terms of level of segregation. Furthermore, the number of accounts required has been simplified to minimise the operational burden for market participants; and

- Long chains – the Draft Regulatory Technical Standards, under certain conditions, allow indirect clearing chains that are longer than the standard chains of four entities.

ESMA has sent its Draft Regulatory Technical Standards on indirect clients for endorsement to the European Commission which has three month to accept or reject them. This is followed by a non-objection period by the European Parliament and Council.

The Draft Regulatory Technical Standards can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-725.pdf

Benchmark Regulation

(i) ESMA consults on draft implementing measures under Benchmark Regulation

On 27 May 2016, ESMA published a consultation paper on the technical implementation of the proposed Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (the **"Benchmark Regulation"**) (the "**Consultation Paper**").

The Consultation Paper follows ESMA's February 2016 discussion paper in which ESMA set out its policy orientations and initial proposals both for the technical advice ESMA has been required to provide to the European Commission and the draft technical standards it is required to provide under the Benchmark Regulation.

The Consultation Paper sets out the relevant provisions and their objectives in each of the five areas in which the European Commission requested ESMA's advice, including an explanation of the related policy issues and references to the relevant responses to the discussion paper. The five areas are broken down as:

- Some elements of the definitions;

- Measurement of the use of critical and significant benchmarks;
- Criteria for the identification of critical benchmarks;
- Endorsement of a benchmark or family of benchmarks provided in a third country; and
- Transitional provisions.

Annex III of the Consultation Paper also includes the text of draft technical advice for comment. The deadline for comments on the consultation paper was 30 June 2016. ESMA is required to provide technical advice to the European Commission by 31 October 2016. The feedback received will help ESMA to finalise the technical advice. A second consultation paper on the draft technical standards under the Benchmark Regulation is expected by ESMA in the second half of 2016.

A copy of the Consultation Paper may be accessed via the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-723_cp_benchmarks_regulation.pdf

(ii) Benchmark Regulation published in the Official Journal of the EU

On 29 June 2016, the Benchmark Regulation was published in the Official Journal of the EU. The Benchmark Regulation introduces a common framework to ensure the accuracy and integrity of benchmarks used in financial instruments and financial contracts, and to measure the performance of investment funds in the EU.

The Regulation creates three categories of benchmark namely critical, significant and non-significant with differing standards of regulatory requirements applying to each category.

The Regulation entered into force on 30 June 2016 and will apply from 1 January 2018 with the exception of:

- Certain provisions specified in Article 59 which applied from 30 June 2016; and
- Article 56 which amends Articles 19, 35 and 38 of the Market Abuse Regulation will enter into force on 3 July 2016.

The text of the Benchmark Regulation can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN

Credit Rating Agencies ("CRAs")

(i) SMSG advice to ESMA on Discussion Paper on the validation and review of CRAs methodologies

On 22 April 2016 the Securities and Markets Stakeholder Group ("**SMSG**") published advice to ESMA in response (the "**Response**") to its discussion paper on the validation and review of CRAs methodologies dated 17 November 2015 (the "**Consultation**"). The SMSG is an advisory group and, while not answering the Consultation in detail, advised ESMA of the importance of keeping to mind the wider context of maintaining market integrity and protecting investors when considering consultation responses.

SMSG stresses in the Response that the validation of credit ratings cannot be considered in isolation. Any assessment must be set in context of the circumstances under which it was applied and take on board any influence and/or bias which may have occurred as a result of the fees paid to the ratings agency for the specific rating or indeed ancillary services.

SMSG also commented that the arrival of the European Ratings Platform ("**ERP**") would greatly assist not only EMSA but interested third parties including academics and journalists in identifying possible anomalies in methodologies as well as in their application.

In addition, the transparency provided by the ERP on both the performance of individual ratings and on fee arrangements will help highlight where and when there are problems with the application of any specific methodology.

A copy of the Response can be found here:

https://www.esma.europa.eu/sites/default/files/library/2016-smsg-011_smsg_advice_on_validation_of_cras_methodologies.pdf

(ii) ESMA update on reporting structured finance instruments information under CRA Regulation

On 27 April 2016, ESMA published a press release providing an update in relation to the requirement under the CRA Regulation for issuers, originators and sponsor entities to report information in respect of structured finance instruments ("**SFIs**") to ESMA.

Under Article 8b of the CRA Regulation, ESMA is responsible for setting up an SFI website on which information concerning SFIs will be published.

The European Commission's Delegated Regulation 2015/3 requires that, to implement Article 8b, the reporting entities must submit data files in accordance with the reporting

system of the SFI website and the technical instructions to be provided by ESMA on its website.

The reporting obligations will apply from 1 January 2017. ESMA is required to issue these technical instructions by 1 July 2016. However, due to several issues encountered by ESMA in preparing to set up the SFI website, including the absence of a legal basis for the funding of the website it is unlikely that the SFI website will be available to reporting entities by 1 January 2017. Similarly, it is unlikely that ESMA will be in a position to publish the technical instructions by 1 July 2016.

Given these issues, ESMA does not expect to be in a position to receive the information related to SFI from reporting entities from 1 January 2017. ESMA expects that proposed Securitisation Regulation, which is currently being considered by the European Parliament and the Council, will provide clarity on the future obligation regarding reporting on SFIs.

(iii) Council of EU responds to European Court of Auditors' report on ESMA supervision of CRAs

On 26 May 2016, the Council, acting as the European Economic and Financial Affairs Council ("**ECOFIN**"), published a press release reporting on the outcome of its meeting held on 25 May 2016.

At the meeting, the Council adopted its conclusions to the European Court of Auditors' ("**ECA**") February 2016 report on ESMA's supervision of CRAs. The Council called on the ESMA to implement the ECA's recommendations on:

- Examining certain aspects of the design and implementation of CRAs' methodologies to promote a more consistent and objective approach by CRAs in reviewing their own methodologies;
- Considering developing additional guidance on disclosure requirements;
- Examining, as a priority, in a structured manner the systems put in place by the CRAs for dealing with conflicts of interest; and
- Enhancing its work on documentation and traceability (that is, the traceability of the risk identification process).

The Council invited ESMA to report back on the implementation these recommendations via the Financial Services Committee ("**FSC**") by the end of 2016.

International Organisation of Securities Commissions ("IOSCO")

(i) IOSCO publishes report on cyber risk co-ordination efforts

On 6 April 2016, IOSCO published a report on regulatory approaches to deal with cyber risk (the "**Report**"). The Report outlines the various approaches by regulators related to cyber security that IOSCO members have implemented to date and the potential tools available to regulators to respond to cyber risk.

The Report outlines that regulators are still in the early stages of developing policy responses in the area of cyber security. The Report also describes some of the practices adopted by market participants and encourages, where appropriate, the adoption of those or similar practices. In addition, it identifies the issues and opportunities related to co-operation and information sharing among market participants and regulators. The report covers the following:

- Reporting issuers;
- Trading venues;
- Market intermediaries;
- Asset managers; and
- Financial market infrastructures.

The Report concludes by reasserting that securities market participants have a multitude of threats to contend with from a cyber security perspective. The Report highlights a number of processes that regulated entities should consider implementing or reviewing their cyber security framework and outlines the importance of sharing information relating to cyber security among market participants and regulators.

A copy of the Report is available at the following link:

https://www.iosco.org/library/pubdocs/pdf/IOSCOPD528.pdf

(ii) IOSCO publish report on the impact of storage and delivery infrastructure on commodity derivatives market pricing

On 9 May 2016, IOSCO published its report on the impact of storage and delivery infrastructures on commodity derivatives market pricing (the "**Storage Report**"). The Storage Report sets out its findings and conclusions of the IOSCO review of the impact of storage infrastructures on the integrity of the price formation process of physically-delivered commodity derivatives contracts traded on regulated exchanges.

The Storage Report outlines that the price formation process for commodity derivatives is complex and is not simply affected by supply and demand but is influenced by many factors – rail cars, grain silos, oil tankers, warehouses etc. are all essential components of a delivery system that ensures that derivatives contracts can be fulfilled and commodities are delivered. The Storage Report further outlines the impact of physical delivery and storage infrastructure on the economics of the futures markets, such as the cost of carrying the derivatives contract, convergence between the derivative and the physical market prices, and the premiums for each of the contract's delivery points.

The Storage Report concludes that IOSCO's report on the principles for the regulation and supervision of commodity derivatives markets, published in September 2011, provides an adequate framework for implementing effective oversight, governance and operational controls of storage infrastructure and does not require additional principles or revision of the existing principles.

The Storage Report did identify certain practices surrounding storage infrastructure that may have the potential to affect derivatives pricing and efficient market operation and would ultimately increase uncertainty among market participants. The Storage Report also outlines certain practices that may hinder financial regulators and exchanges from identifying emerging problems which could potentially cause market disruption, affect market efficiency and impair the price convergence process. IOSCO encourages all parties involved in storage infrastructure to anticipate, identify and address potential issues at an early stage in order to avoid problems and avoid the requirement for regulatory involvement.

A copy of the Storage Report may be accessed via the following link:

http://www.iosco.org/library/pubdocs/pdf/IOSCOPD530.pdf

European Securities and Markets Authority ("ESMA")

(i) ESMA publishes final guidelines on Alternative Performance Measures

On 5 October 2015, ESMA published its final guidelines on Alternative Performance Measures ("**APM's**") for listed issuers (the "**Guidelines**").

The Guidelines will apply to APMs disclosed on or after 3 July 2016.

An APM is "*a financial measure of historical or future financial performance, financial position, or cash flows, other than a financial measure defined or specified in the applicable financial reporting framework".* The Guidelines are aimed at promoting the usefulness and transparency of APMs included in prospectuses or regulated information. Adherence to the Guidelines will improve the comparability, reliability and/or comprehensibility of APMs.

The Guidelines are not applicable to:

- Measures defined or specified by the applicable financial reporting framework such as revenue, profit or loss or earnings per share;
- Physical or non-financial measures such as number of employees, number of subscribers, sales per square meter (when sales figures are extracted directly from financial statements) or social and environmental measures such as breakdown of workforce by type of contract or by geographic location;
- Information on major shareholdings, acquisition or disposal of own shares and total number of voting rights; and
- Information to explain the compliance with the terms of an agreement or legislative requirement such as lending covenants or the basis of calculating the director or executive remuneration.

According to the Guidelines, issuers or persons responsible for the prospectus should define the APMs used and their components as well as the basis of calculation adopted, including details of any material hypotheses or assumptions used. The prospectus should also indicate whether the APM or any of its components relate to the (expected) performance of the past or future reporting period.

The Guidelines are available at the link below:

https://www.esma.europa.eu/sites/default/files/library/2015/10/2015-esma-1415en.pdf

(ii) ESMA opinion on EU Framework for loan origination by investment funds

On 12 of April 2016, ESMA published an opinion regarding the necessary elements for a common EU framework for loan origination by investment funds, to be considered in the broader context of ESMA's response to the CMU Green Paper (the "**Opinion**"). The Opinion, addressed to the European Parliament, the Council and the European Commission sets out ESMA's views on components such as the authorisation of loan-originating funds and their AIFMs, eligible investors, organisational requirements and leverage.

Loan origination is the process by which an investment fund provides credit or originates a loan, acting as a sole/primary lender, to borrowers such as small or medium enterprises ("**SMEs**"). The activity is an alternative form of market-based financing.

A unified EU approach to loan origination by funds will be considered by the European Commission in the second quarter of 2016. ESMA were asked to give their opinion on the key issues on which the consultation could focus. The Opinion takes into account the different stipulated frameworks currently in place in several Member States, which mean

that funds operating cross-border must comply with different requirements. The Annex to the Opinion illustrates national practices in this area.

Regulatory arbitrage is set to decrease with a unified framework, and in turn the take-up of loan origination by investment funds should be promoted, in line with the objectives of the CMU.

A copy of the Opinion is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-596_opinion_on_loan_origination.pdf

(iii) ESMA publish Risk Dashboard for Q1 2016

The ESMA Risk Dashboard for Quarter 1, 2016 sets out that the overall risk assessment remains materially unchanged from previous quarters. Systematic stress remained high driven by the materialisation of key risks in emerging markets, in particular China.

The low interest rate environment persisted in the EU as did the downward trend in commodity market prices. Funding issuance remained stable and was higher over the reporting period compared to Quarter 4, 2014. Resilience in systems remained a key concern following market disturbances in the US after the Chinese market crash, notably the mispricing of several ETFs.

A copy of the Risk Dashboard is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-349_risk_dashboard_1-2016_0.pdf

(iv) ESMA economic report on order duplication and liquidity measurement in EU equity markets

On 6 June 2016, ESMA published an economic report on order duplication (i.e. where traders replicate the same order on multiple trading venues at the same time) and liquidity measurement in EU equity markets (the "**Report**"). It forms the second part of ESMA's high-frequency trading ("**HFT**") research, focussing on liquidity measurement where equity trading is fragmented. A previous HFT report was published by ESMA in December 2014.

ESMA considered a sample of 100 stocks across twelve European trading venues in 9 EU countries for May 2013.

Taking into account HFT the Report finds that overall, multi-venue trading has increased the liquidity in EU equity markets. It was also found, however, that 20% of orders across European venues are duplicated and 24% of duplicated trades are immediately cancelled if unmatched.

The report found that order duplication and immediate cancellation is used by traders to ensure execution across multiple trading venues. This strategy is often used for market makers' activities and by institutional investors seeking liquidity.

While the strategy contributes positively to liquidity, the Report found that duplicated orders and immediate cancellation can lead to an overestimation of available liquidity in fragmented markets.

The duplication of orders varies between the type of trades, the market capitalisation of the underlying stock and the trading fragmentation in a stock. However, order duplication is more recurrent for HFT.

A copy of the Report is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-907_economic_report_on_duplicated_orders.pdf

(v) Memorandum of Understanding Related to ESMA's Assessment of Compliance and Monitoring of the Ongoing Compliance with Recognition Conditions by Derivatives Clearing Organisations Established in the United States

On 6 June 2016 the Commodity Futures Trading Commission ("**CFTC**") and ESMA reached a Memorandum of Understanding ("**MoU**") with respect to the covered CCPs pursuant to Article 25 of EMIR.

The MoU sets out arrangements for cooperation regarding ESMA's assessment of compliance and monitoring of the ongoing compliance by the Covered CCPs with the recognition conditions set out in Article 25 of EMIR and with the specific conditions set out in the European Commission Implementing Decision (EU) 2016/377 on 15 March 2016.

A copy of the MoU is available at the following link:

https://www.esma.europa.eu/sites/default/files/library/mou_for_usa.pdf

(vi) SMSG Advice to ESMA – Position Paper on Supervisory Convergence

On 13 June 2016 SMSG published its position paper providing advice to ESMA on supervisory convergence as one of the key strategies to be pursued by ESMA from 2016 until 2020 and clarifies the role SMSG may play in supporting ESMA in its task to ensure consistent supervisory practices across the EU (the "**Position Paper**").

The focus of the Position Paper is on the tools and instruments which ESMA may use for fostering consistency within the network of financial supervisors and developing high-quality and uniform supervisory standards. In particular, the Position Paper looks at ways how ESMA may, to a greater extent, benefit from the experiences of stakeholders.

The SMSG considers guidelines and recommendations to be an important instrument in ensuring a uniform application of EU law, although a disadvantage of these instruments is that they can increase the complexity of the regimes for financial markets. Consequently, it is not desirable to clarify every technical aspect by way of guidelines hence the use of questions and answers is a more informed and practical approach.

A copy of the Position Paper in full can be found at:

https://www.esma.europa.eu/sites/default/files/library/2016-smsg-014_position_paper_sc.pdf

(vii) ESMA publishes 2015 Annual Report

On 15 June 2016, ESMA published its Annual Report for 2015 (the **"Annual Report"**).

In 2015 ESMA has made significant steps in realising the mission of enhancing investor protection and promoting stable and orderly financial markets by:

- Assessing risks to investors, markets and financial stability;
- Creating a single rulebook;
- Promoting supervisory convergence; and
- Supervising CRAs and TRs.

A copy of the Annual Report is available at the following link:

https://www.esma.europa.eu/press-news/esma-news/esma-publishes-annual-report-2015

The Joint Committee (ESMA, EIOPA and EBA)

(i) Responses to Joint Committee discussion paper on automation in financial advice

On 4 April 2016, the EBA published a list of responses to the December 2015 discussion paper of the Joint Committee of the ESAs on automation in financial advice.

The respondents included, but are not limited to, the Association of British Insurers, the European Banking Federation, EFAMA and Insurance Europe.

In the discussion paper, the Joint Committee stated that it would consider the feedback it received to better understand the phenomenon of the continued increase in the digitalisation of financial services and decide what, if any, regulatory or supervisory action is required.

A copy of the responses to the Joint Committee Discussion Paper can be found here:

https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/discussion-paper-on-automation-in-financial-advice/-/regulatory-activity/discussion-paper/1299860#responses_1299860

(ii) New website launched by Joint Committee

On 31 May 2016, the Joint Committee of ESAs launched a new website, to present information regarding the work of the Joint Committee, which centres particularly around the areas of micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability, retail investment products, supervision of financial conglomerates, accounting and auditing, and measures combating money laundering.

In a press release published on 1 June 2016, ESMA explained that the new website presents information and news about the cross-sectoral work of the three ESAs, who cooperate regularly and closely to ensure consistency in their practices through the Joint Committee.

The new website can be located at:

https://esas-joint-committee.europa.eu/

The European Commission

(i) Commission supports crowdfunding in the EU

On 3 May 2016 the European Commission published its report on the EU crowdfunding sector as part of the Capital Markets Union Action Plan (the "**Report**").

The Report states the European Commission's support of crowdfunding as alternative source of finance for Europe's start-ups. Crowdfunding is an open call to the public to raise funds for a project. Crowdfunding platforms are websites that enable fundraisers, be they individuals or businesses, to interact with investors and donors. Financial pledges can be made and collected through the platform.

Crowdfunding is still small but growing fast in Europe. The Report highlights (based on available data) that approximately €4.2 billion was successfully raised through crowdfunding platforms in 2015 in the EU, compared with €1.6 billion in 2014. In 2015, €4.1 billion was raised through crowdfunding models that entail a possible financial return for those contributing to the funds.

A copy of the Report is available here:

http://ec.europa.eu/finance/general-policy/docs/crowdfunding/160428-crowdfunding-study_en.pdf

(ii) European Commission Green Paper on retail financial services

On 10 December 2015, the European Commission published a Green Paper on retail financial services (the "**Green Paper**") that aimed to provide more choices and greater opportunities for consumers and businesses, consulting on a number of questions aimed at improving products, product choice, transparency and competition in retail financial services. It also explored how to facilitate cross-border supply of financial services to ensure greater portability across Member States as well as the digitalisation on retail financial services.

On 21 April 2016, ESMA published its response to the Green Paper (the **"Response"**) in which it conveyed its views on a number of topics covered in the Green Paper which are considered relevant to ESMA's activities and its objective of ensuring providers and customers of retail financial products make better use of the Single Market. EMSA support the objective of achieving a deeper and fairer Single Market and suggest that the European Commission's main focus should be on ensuring the effective and uniform implementation of regulations to establishing a Single Market in financial services. ESMA expressed its views on a number of issues raised within the Green Paper, including accessing financial services across Europe through more harmonised EU-wide regimes, the encouragement of comparability and portability of products and the impact of digital technologies on the retail financial markets.

A copy of the Response can be found at the following link:

https://www.esma.europa.eu/sites/default/files/library/2016-648_esma_response_to_ec_green_paper_on_retail_financial_services.pdf

On 26 May 2016, the European Parliament's Committee on Economic and Monetary Affairs published a draft report on the Green Paper (the "**Report**").

The Report contains a motion for a European Parliament resolution on the Green Paper.

The motion notes the increasing complexity of retail financial products, and insists on the need to develop initiatives and instruments that allow consumers to identify safe and simple products.

It calls on the European Commission to intensify its work against discrimination on grounds of residence in the EU retail financial services market and emphasises that the enforcement of EU and national financial and consumer legislation needs to be strengthened. It stresses that the ESAs should step up their activities on consumer issues, and that the responsible agencies in a number of Member States should start to work more actively and competently in this area.

It also asks the European Commission to further study the costs and benefits of guaranteeing domestic and cross-border portability in various parts of the retail financial services market, and encourages the European Commission to move forward in creating a

stronger single market for mortgages and consumer credit carefully, balancing privacy and data protection concerns with improved cross-border access to better co-ordinated credit databases.

A copy of the Report can be found here:

http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-583.922&format=PDF&language=EN&secondRef=01

(iii) Commission proposes new e-commerce rules to help consumers and companies reap full benefit of Single Market

On 25 May 2016, the European Commission published a proposal of measures to allow consumers and companies to buy and sell products and services online more easily and confidently across the EU (the "**Proposal**"). Based on its Digital Single Market and Single Market strategies, the European Commission presented a three-pronged plan to boost e-commerce. The three main aims of the rules are:

- To prevent geoblocking and other forms of discrimination based on nationality or place of residence;
- Make cross-border parcel delivery more affordable and efficient; and
- To increase consumer trust in e-commerce.

A copy of the Proposal may be accessed via the following link:

http://europa.eu/rapid/press-release_IP-16-1887_en.pdf

(iv) European Commission consults on cross-border distribution of investment funds

On 2 June 2016, the European Commission published a consultation paper on the main barriers to cross-border distribution of investment funds (the "**Consultation**").

Funds relevant to the consultation are UCITS, AIFs, European long-term investment funds ("**ELTIFs**"), EuVECA and EuSEF funds.

The European Commission's overall aim is to increase the proportion of funds marketed and sold across the EU, allowing capital to be more effectively allocated across the EU and delivering better value and greater innovation.

The Consultation acts as a further part of the European Commission's action plan for CMU, of which a key aim is to foster retail and institutional investment in investment funds. The European Commission will use the information gathered from the Consultation as a basis for taking action to address the cross-border barriers to distribution.

The Consultation closes on 2 October 2016.

A copy of the Consultation may be accessed via the following link:

http://ec.europa.eu/finance/consultations/2016/cross-borders-investment-funds/docs/consultation-document_en.pdf

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

(i) European Commission adopts a Delegated Regulation on RTS on a key information document for PRIIPs

Further to Joint Committee's submission in April 2016 of its final draft RTS on KIDs for PRIIPs, the European Commission adopted a Delegated Regulation on 30 June 2016 with regard to RTS on the presentation, content, review and revision of KIDs and conditions for fulfilling the requirements to provide such documents.

The RTS address the content and presentation of the KIDs and include:

- A mandatory template for the KID, covering the texts and layout to be used;
- A methodology for the assignment of each PRIIP to one of the seven classes in the summary risk indicator and narrative explanations to be included;
- Details on performance scenarios and a format for their presentation, including possible performance for different time periods;
- A methodology for the calculation of costs and the requirements relating to the presentation of costs;
- Rules on revision and republication of the KID; and
- Rules regarding the timeframe for providing the KID to a retail investor to ensure they have sufficient time to consider its contents when making an investment decision.

The Delegated Regulation is subject to scrutiny by the European Parliament and the Council of the EU (the "**Council**"). Once finalised, the rules will be published in the Official Journal of the EU and will enter into force on the twentieth day following publication and will apply from 31 December 2016 being the application date specified in the Regulation (EU) 1286/2014 on Key Information Documents ("**KIDs**") for Packaged Retail and Insurance-based Investment Products (the "**PRIIPs Regulation**").

On 27 April 2016, the European Banking Federation, Insurance Europe, the European Fund and Asset Management Association ("**EFAMA**") and the European Structured Investment Products Association (together the "**Financial Associations**") wrote to the European Commission requesting a one-year delay of the entry of application of the PRIIPs Regulation.

However, on 18 May 2016, the European Commission issued a letter to the European Banking Federation acknowledging the challenges with the timeline of the RTS and stating that actions have been put in place to ensure that the final draft RTS are adopted before the summer to provide legal certainty over the final format of the PRIIPs KID.

The European Commission also outlined its position on the following:

- There are no transitional provisions for existing PRIIPs (i.e. both new and existing products offered to retail investors must be accompanied by a KID from 1 January 2017).

- Insurers offering multi-option insurance products (as in the case of unit-linked products) will need to disclose information required under the PRIIPs Regulation;

- A derivative would generally fulfil the definition of a PRIIP and therefore, a KID is required. The RTS will provide a simplified KID for certain derivatives;

- The obligations imposed by the PRIIPS Regulation on PRIIPs Manufacturers and those persons advising on and/or selling PRIIPs are triggered when a PRIIP is offered or sold to retail investors within the EU.

The European Commission will host, together with the ESAs, a workshop open to all stakeholders, which will allow questions about the new rules to be posed. The workshop will take place in Brussels on 11 July 2016 and aims to provide further clarification on the technical standards developed by the ESAs.

A copy of the Delegated Regulation adopted by the European Commission on 30 June 2016 is available at the following link:

http://ec.europa.eu/finance/finservices-retail/docs/investment_products/20160630-delegated_regulation_en.pdf

Central Bank of Ireland

(i) Central Bank publishes research on consumer perceptions of complaints handling in regulated firms

On 11 May 2016, the Central Bank published the findings of commissioned research undertaken by PWC on a panel of over 1000 customers to understand customers' perception of complaints handling process in regulated firms (the "**Paper**"). The Consumer Protection Code 2012 introduced a strong framework for complaints handling, and the purpose of the research was to assess customer's experiences and perceptions of how firms are applying this framework.

The research found only 41% of respondents felt they were treated fairly and only 39% of respondents felt satisfied with how the complaint was handled. It was also found that 52% of respondents who were given a named contact during the process were satisfied with how their complaint was handled as opposed to 29% of those not given a named contact. The timely resolution of the complaint was regarded as an important aspect of the complaint process by 50% of those respondents who made a complaint.

The Central Bank will use the results of this research to contribute to wider discussions with industry and policy makers both domestically and internationally in the area of complaints handling.

A full copy of the Paper can be found here:

http://www.centralbank.ie/regulation/processes/consumer-protection-code/compliance-monitoring/Documents/Complaints%20Handling%20within%20Regulated%20Financial%20Services%20Firms-%20Consumer%20Research.pdf

(ii) Regulatory reporting requirements of Irish authorised investment funds

On 17 May 2016, the Central Bank published a guidance note on the regulatory reporting requirements of Irish authorised investment funds (the "**Guidance Note**"). The purpose of the Guidance Note is to provide information and direction to investment funds and their service providers regarding the extension of the CBI's Online Reporting System ("**ONR System**"). This includes the board of directors, management companies/AIF management companies and general partners of an investment fund.

The Guidance Note sets out the conditions for returns to be carried out by named parties in both UCITS and non-UCITS. The Guidance Note is also applicable to depositaries and independent statutory auditors reporting on behalf of investment funds. A return generally involves the user completing a Return Form (questionnaire) and attaching supporting document(s). The specifics of each Return Form and required supporting document(s) are outlined within the Guidance Note.

A full copy of the Guidance Note can be found at:

http://www.centralbank.ie/regulation/industry-sectors/funds/Documents/Guidance%20Note%20Regulatory%20Report%20ing%20Vol%201.5%20April%20%2013.pdf

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

(i) European Commission publish roadmap relating to its proposal for a Directive to amend MLD4

On 7 April 2016, the European Commission published a roadmap (or inception impact assessment) relating to its proposal for a Directive to amend MLD4 (the "**Roadmap**"). Points of interest in the Roadmap include the following:

- The Financial Action Task Force (FATF) is currently examining what further actions can be taken to strengthen the fight against terrorist financing. However, this work will take time, and even if it leads to a change in the FATF standards (which is not certain) the standards would not be legally binding;

- A targeted data collection is currently being conducted to fill a limited number of information gaps that the European Commission has identified. Initial desk research has been based on MLD4 preparatory work. The European Commission already has some data from card schemes, but reliable data on virtual currencies, both at the EU and national levels, remains a challenge. The Roadmap lists the areas relating to which the European Commission needs further information and data;

- To collect the additional data, the European Commission launched a survey, in December 2015, asking financial intelligence units (FIUs) and public authorities for policy views and data about the agreed problem areas relating to terrorism finance. Also in December 2015, the European Commission launched a consultation asking affected stakeholders (including the payment industry, virtual currencies market players, and the financial services sector) about terrorist financing challenges and potential solutions. Due to "political urgencies" and against the background that the envisaged amendments are targeted, the European Commission believes that a comprehensive public consultation is not needed;

- The relevant issues will be covered, as appropriate, by extending or building on the already existing implementation plan that seeks to ensure that MLD4 is transposed into national legislation no later than 26 June 2017;

- The five targeted amendments concern issues that were already envisaged or discussed during the EU-level negotiations on MLD4; and

- Section E of the Roadmap sets out the European Commission's preliminary assessment of the expected impacts of the envisaged amendments. The assessment is based on the consultations already carried out or currently ongoing. Among other things, taking into account the fact that this initiative is limited and targeted, the European Commission considers that negative economic impacts should be small and that the administrative burden will be limited.

The proposed Directive forms part of the European Commission's February 2016 action plan to strengthen the fight against terrorism. There is no mention in the Roadmap of the Commission's call on Member States to bring forward the date for effective transition and entry into application of MLD4 to the fourth quarter of 2016 at the latest, which was set out in the action plan. The European Commission is expected to publish the proposed Directive to amend MLD4 by the second quarter of 2016 at the latest.

A copy of the Roadmap is available at the link below:

http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_054_amld_en.pdf

(ii) Cayman Beneficial Ownership – business as usual, but faster

The Cayman Government announced on 12 April 2016 that it has signed an agreement with the United Kingdom to make enhancements to its beneficial ownership system.

The agreement confirms a commitment to establish a central technical platform to ensure that:

- Law enforcement and tax authorities in the UK and Cayman can access company beneficial ownership information subject to relevant safeguards;
- Law enforcement and tax authorities in the UK and Cayman can quickly identify all companies that a particular beneficial owner has a stake in; and
- Companies and their beneficial owners are not alerted to the investigation of their information.

No public access will be given to information on the beneficial ownership of Cayman companies. The mechanism will build on the existing regime in Cayman which prevents the incorporation of companies without the use of a Cayman licensed entity which is required to verify and record the identity of each company's beneficial owners. That information is currently available to local regulatory and law enforcement authorities on lawful request and can be disclosed to the law enforcement, tax and regulatory authorities of other jurisdictions, including the UK, through international co-operation arrangements. The Cayman beneficial ownership system is already more wide ranging and effective than that operated in the UK and many other international financial centres.

Jude Scott, the CEO of Cayman Finance, has commented that:

> "*We are pleased the UK Government has recognised that our licensed corporate services provider verified beneficial ownership system is a world class system that provides for due diligence know-your-customer checks that are critical to proper law enforcement authorities conducting legitimate investigations and is superior to other proposed systems. Whilst there are already agreements in place that allow UK law*

enforcement agencies to request and obtain beneficial ownership information for the Cayman Islands, we have agreed to an enhancement to that system which will help the UK law enforcement agencies access that information with the utmost urgency, but in a way that is also appropriate for our jurisdiction. This is not a public central register."

It is anticipated that amendments will be made to a number of existing Cayman laws to provide for the implementation of these commitments.

Data Protection

(i) High Court Judgment on Dawn Raids addresses Data Protection issues

On 5 April 2016, the High Court (Barrett J) delivered its judgment in the CRH plc, Irish Cement Limited and Seamus Lynch v The Competition and Consumer Protection Commission (the "**CCPC**") [2016] IEHC 162.

This judgment relates to a dawn raid carried out by the CCPC at the premises of Irish Cement Limited ("**Irish Cement**"), pursuant to a search warrant, in relation to an investigation into alleged contravention of competition law by Irish Cement. During the course of the raid, the CCPC took a copy of the entire e-mail box of Mr Lynch, a senior executive within the CRH Group, of which Irish Cement is part. The High Court was satisfied, that on the balance of probabilities, that some of the emails and attachments in Mr Lynch's email box were not caught by the terms of the search warrant. The central issue before the High Court was what should be done with the emails and attachments which it was claimed the CCPC did not lawfully have in its possession.

Amongst the declarations sought, the plaintiffs sought a declaration that the CCPC had acted in breach of the Data Protection Acts 1988 and 2003. The High Court was not satisfied to grant this declaration as it noted in its judgment that, in respect of personal data to which the CCPC was not entitled, it was open to the persons present at the time of the dawn raid to refuse to release some or all of the personal data being sought. Barrett J went on to state:

"But, perhaps in the general spirit of cooperation that informed Irish Cement's actions vis-à-vis the Commission officials on the day of the 'dawn raid', Irish Cement elected to release the data sought. This being so, it cannot now 'off-load' all the consequences of any such election onto the Commission." (para. 69 of the Judgment)

The High Court further stated (at para. 70) the following:

"The long and the short of the foregoing is that: (1) Irish Cement allowed (a) the release of certain personal data to the Commission which is covered by s.8(e) – in which case no liability of any nature arises for either Irish Cement or the Commission, and/or (b) the release of certain personal data to the Commission, to which the

Commission has no entitlement – in which case Irish Cement is liable as data controller for its breach of the Data Protection Acts in this regard; and
(2) the Commission may have in its possession some personal data that was released to it without the relevant data subject consenting to such release and without there being a s.8 exemption applicable to such release."

This judgment highlights the issues that can arise for data controllers in respect of regulatory investigations and inspections where an authority seeks or obtains personal data which is not necessary for the investigation or inspection.

A full copy of the High Court judgment can be found here:

http://www.courts.ie/Judgments.nsf/0/9E7ECF2C5B64FCA380257FA400365CCC

(ii) EU Parliament approves data protection reform package

On 14 April 2016, the European Parliament formally approved the EU's general data protection reform package after more than 4 years of negotiation and roughly 4,000 amendments overhauling the EU's data protection rules.

The package comprises the General Data Protection Regulation ("**GDPR**") which will replace the Data Protection Directive (95/46/EC) and a Data Protection Directive for the police and criminal justice sector which will replace the Framework Decision for the police and criminal justice sector.

On 4 May 2016, the official text of the GDPR and the Directive were published in the Official Journal of the EU. The GDPR will be directly applicable in all Member States and shall apply from 25 May 2018. The Directive entered into force on 5 May 2016 and EU Member States are required to transpose it into national law by 6 May 2018.

A copy of the GDPR is available at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN

A copy of the Directive may be accessed via the link below:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0680&from=EN

(iii) Statement of the Article 29 Working Party on the Opinion on the EU-U.S. Privacy Shield

The Article 29 Working Party ("**WP29**") has published its opinion on the EU-U.S. Privacy Shield (the "**Privacy Shield**") and has concluded that although the proposed new arrangement is an improvement on Safe Harbour, it requires further work. The Privacy Shield was developed jointly by the European Commission and the US Department of

Commerce to replace the Safe Harbour framework, which was declared invalid by the Court of Justice in the 2014 Schrems case.

The WP29, an advisory group composed of representatives of the national data protection authorities, the European Data Protection Supervisor and the European Commission, adopted an opinion on the Privacy Shield draft adequacy decision on 13 April 2016.

The WP29 welcomed the "major improvements" the Privacy Shield offers compared to the Safe Harbour decision, stated that it still had "strong concerns" on both the commercial aspects of the Privacy Shield and the potential access by US public authorities to personal data transferred from the EU to the US under the Privacy Shield. The WP29 states in there is an overall lack of clarity and that the Privacy Shield needs to be consistent with the EU data protection framework. WP29 urges the Commission to resolve their noted concerns and provide the requested clarifications in order to ensure the proper equivalency of the Privacy Shield to that of the EU.

A full copy of the WP29 Opinion on the Privacy Shield can be found here:

http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238_en.pdf

(iv) Executive Summary of Preliminary Opinion of the European Data Protection Supervisor on the US-EU agreement on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences

On 25 May 2016, the Executive Summary of the Preliminary Opinion (the "**Opinion**") of the European Data Protection Supervisor ("**EDPS**") on the agreement between the United States of America ("**US**") and the European Union ("**EU**") on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences (the "**Agreement**") was published in the Official Journal of the EU (Notice 2016/C 186/04).

The Agreement is an international law enforcement agreement aimed at ensuring a high level of data protection for the personal data transferred between the US and the EU for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism.

After negotiations between the European Commission and the US, the Agreement was initialled on 8 September 2015. The European Parliament must consent to the initialled text of the Agreement and the Council must sign it. Until this consent has been given and the Agreement has been formally signed, negotiations can be reopened on specific points and it is in this context that the EDPS issued the Opinion.

In the Opinion, the EDPS notes his support for the European Commission's efforts to conclude the Agreement with the US but also notes that safeguards for individuals must be clear and effective in order to fully comply with EU primary law.

The Opinion aims to provide constructive and objective advice to EU institutions given that when the European Commission finalise this Agreement it will have broad ramifications, not only for EU-US law enforcement cooperation but also for future international accords.

In the Opinion, the EDPS recommends the following three essential improvements to the text of the Agreement to ensure compliance with EU law:

- Clarification that all the safeguards apply to all individuals, not only to EU nationals;
- Ensuring judicial redress provisions are effective within the meaning of the Charter of Fundamental Rights; and
- Clarification that transfers of sensitive data in bulk are not authorised.

The EDPS also highlights other aspects where important clarifications are recommended.

The Agreement is separate from but must be considered in conjunction with the EU-US Privacy Shield on the transfer of personal information in the commercial environment.

The Executive Summary of the Opinion can be found here:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XX0525(01)&from=EN

(v) European Commission Consultation of e-Privacy Directive

The European Commission has launched a public consultation on the current text of the e-Privacy Directive 2002/58/EC coupled with possible changes to the existing legal framework to make sure it is up to date with the advancements of the digital age. The e-Privacy Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality.

Interested parties, who wish to participate in the consultation process, have until 5 July 2016 to submit responses to the European Commission's online questionnaire who will then begin the process of consolidating all feedback received in preparation for a new legislative proposal on e-Privacy by the end of 2016.

The European Commission has already identified several issues as needing to be addressed in the review of the e-Privacy Directive including: ensuring consistency of ePrivacy rules with the provisions of the GDPR; enhancing security and confidentiality of

communications and simplifying the electronic marketing rules to avoid inconsistencies between Member States.

The public consultation can be responded to at the following:

https://ec.europa.eu/eusurvey/runner/EPRIVACYReview2016

Dillon Eustace
June 2016

CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 667 0022
Fax: +353 1 667 0042

Cayman Islands

Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022
Fax: +1 345 945 0042

New York

245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501
E-mail: enquiries@dilloneustace.ie
Website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the Regulatory and Compliance team members below.

Breeda Cunningham
E-mail:
breeda.cunningham@dilloneustace.ie
Tel : + 353 1 673 1846
Fax: + 353 1 667 0042

Michele Barker
E-mail: michele.barker@dilloneustace.ie
Tel : + 353 1 673 1886
Fax: + 353 1 667 0042

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