# Insurance Quarterly Legal and Regulatory Update

**1 January 2019 – 31 March 2019**

DILLON EUSTACE

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# INSURANCE QUARTERLY LEGAL AND REGULATORY UPDATE

## Solvency II

**(i) EIOPA publishes monthly symmetric adjustment of the equity capital charge**

On a monthly basis, EIOPA updates information on the symmetric adjustment of the equity capital charge. The symmetric adjustment to the equity capital charge shall be included in the calculation of the equity risk sub-module in accordance with the Solvency Capital Requirement (the "**SCR**") standard formula to cover the risk arising from changes in the level of equity prices. This adjustment is regulated mainly in Article 106 of the Solvency II Directive (2009/138/EC); Article 172 of the Solvency II Delegated Act (2015/35/EU) as well as in the Implementing Technical Standards on the equity index for the symmetric adjustment of the equity capital charge (Commission Implementing Regulation 2015/2016/EU).

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

- With reference to the end of December 2018 on 8 January 2019;
- With reference to the end of January 2019 on 6 February 2019; and
- With reference to the end of February 2019 on 6 March 2019.

The monthly symmetric adjustment of the equity capital charge can be accessed here.

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

During the period of 1 January 2019 to 31 March 2019, EIOPA published technical information in relation to risk free interest rate term structures, as follows:

- With reference to the end of December 2018 on 8 January 2019;
- With reference to the end of January 2019 on 6 February 2019; and
- With reference to the end of February 2019 on 6 March 2019.

The risk free interest rate term structures are published to ensure the consistent calculation of technical provisions for (re)insurance obligations across the European Union. Undertakings should note that EIOPA has stated on their website that, in certain circumstances, it may be necessary for EIOPA to amend and/or republish the technical information after it has been published.

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

**(iii) ECON outlines concerns over the review of the Solvency Capital Requirement standard formula**

On 22 January 2019, ECON published a press release in which it raised concerns in respect of the amendments to the Solvency II Delegated Regulation (EU) 2015/35 (The "**Delegated Regulation**"), related to the review of the Solvency Capital Requirement ("**SCR"**) standard formula.

In the press release, ECON reiterated its support for a reduction of the current risk margin in order to boost the financing of the real economy and to encourage the insurers to invest in long-term projects. However, it detailed its concern that the current design of the criteria of a new equity class for long-term investments could prevent the long-term equity class from working in practice. Specifically, the 12-year duration and the ring-fencing requirements were identified as potential concerns in this context.

ECON reiterated its position on the importance of finding a short-term solution to address the shortcomings of the current functioning of the Volatility Adjustment and recommended that the national component should be calculated at the end of the period if the conditions are met at any time during the period itself, based on a daily calculation.

ECON also highlighted concerns in relation to the application date of the new provisions in light of the delay in adopting amendments to the Delegated Regulation. In particular, ECON is concerned that the current application date may create non-negligible difficulties for the reporting process due to the very short period of time that will elapse between the expected date of entry into force of the new delegated act and the first application for reporting obligations.

ECON called on the European Commission to take the above-mentioned points into account as part of the 2018 SCR Review.

The press release can be accessed here.

**(iv) EIOPA publishes results of the peer review on propriety of administrative, management or supervisory body members and qualifying shareholders**

On 28 January 2019, EIOPA published a report containing the results of its peer review on propriety of administrative, management or supervisory body members and qualifying shareholders (the "**Report**"). The peer review examined the supervisory practices relating to the propriety assessment of the administrative, management or supervisory body ("**AMSB**") members and qualifying shareholders across the European Economic Area.

The Report sets out the findings of the peer review and details a number of recommended actions to enhance supervisory convergence in the areas of fitness and propriety. The

recommended actions suggest that specific National Competent Authorities ("**NCAs**") adopt the following measures:

- **National legislation or regulatory framework:** Seek changes to the national legislation or regulatory framework relating to either the strengthening of the scope of propriety assessment or the enhancement of the NCAs' legal powers to take necessary actions in relation to AMSB members;

- **Propriety Assessment Questionnaires:** Include explicit questions in questionnaires on tax and consumer protection offences, involvement in bankruptcies, AML, financial soundness of the applicant and doing business without a licence;

- **Ongoing assessment of propriety:** Carry out, using a risk-based and proportionate approach, ongoing assessment of propriety of qualifying shareholders and carry out ongoing assessment of propriety of AMSB members following the initial approval;

- **Guidance and supervisory records:** Improve or develop internal or external guidance in relation to propriety assessment of AMSB members or qualifying shareholders and either improve or develop supervisory records or databases.

The Report can be accessed here.

**(v) ESRB adopts decision establishing a co-ordination framework for consultation by a supervisory authority with the ESRB on the extension of the recovery period under Article 138(4) of the Solvency II Directive**

On 29 January 2019, the European Systemic Risk Board ("**ESRB**") adopted a decision establishing a common procedural framework for the consultation by a supervisory authority with the ESRB on the extension of the recovery period under Article 138(4) of the Solvency II Directive (the "**Decision**"). Article 138 of the Solvency II Directive establishes the rules and procedures in the event of a non-compliance or risk of non-compliance with the Solvency Capital Requirement ("**SCR**"). In these cases, specific procedures need to be followed to ensure compliance with the SCR within a specified period.

According to Article 138(4) of the Solvency II Directive, if EIOPA declares the existence of an exceptional adverse situation affecting (re)insurance undertakings representing a significant share of the market or of the affected lines of business, the supervisory authority concerned may extend the recovery period for the affected undertakings by a maximum period of seven years. In this case, the supervisory authority concerned may consult with the ESRB with respect to the extension of this recovery period for the affected undertakings.

The Decision establishes a co-ordination framework within the ESRB in order to facilitate the consultation process on the extension of a recovery period. It outlines the procedure to prepare and approve a response to a request for consultation and the information to be provided by a requesting authority and the role and composition of the assessment team.

The Decision entered into force on 18 February 2019 and can be accessed here.

**(vi) Central Bank updates the 'Domestic Actuarial Regime and Related Governance Requirements under Solvency II'**

In January 2019, the Central Bank of Ireland published an updated version of its '*Domestic Actuarial Regime and Related Governance Requirements under Solvency II*' (the "**Domestic Actuarial Regime**"). The Domestic Actuarial Regime provides for specific domestic requirements regarding the actuarial function and related governance arrangements within (re)insurance undertakings and applies to all (re)insurance undertakings subject to Solvency II. The Central Bank has introduced amendments to the Domestic Actuarial Regime, relating to:

- **The governance of With-Profits funds -** This amendment introduces new requirements for the governance of insurance With-Profits funds to ensure continued protection of fund members and improved risk management of With-Profits funds with the expected increase in volume of this business in Ireland; and

- **The format of the Actuarial Opinion on the Technical Provisions ("AOTP") -** The updated Domestic Actuarial Regime introduces amendments to the format of the AOTP that is outlined in the Appendix of the Domestic Actuarial Regime. The proposed amendments to the AOTP relate to the level of reliance the Head of Actuarial Function ("**HoAF**") is placing on others, whether there are material limitations within the calculation of the technical provisions and any recommendations for improvements.

The following sections of the Domestic Actuarial Regime have been updated to incorporate the amendments:

- Section 1 – Introduction;

- Section 3 - Sector Specific Requirements;

- Section 4 - Exemptions from the Requirements; and

- Appendix - Format of AOTP.

The updated document can be accessed here.

**(vii) Commission Implementing Regulation laying down technical information for the calculation of technical provisions and basic own funds for reporting for Q1 2019 in accordance with Solvency II published in OJ**

On 8 February 2019, Commission Implementing Regulation (EU) 2019/228 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 December 2018 until 30 March 2019 in accordance

with the Solvency II Directive (the **"Implementing Regulation"**) was published in the Official Journal of the European Union.

The objective of the Implementing Regulation is to lay down technical information on relevant risk-free interest rate term structures, fundamental spreads for the calculation of the matching adjustment and volatility adjustments for every reference date, in order to ensure uniform conditions for insurers and reinsurers calculating technical provisions and basic own funds for Solvency II purposes.

The technical information is based on market data related to the end of the last month preceding the first reporting reference date to which the Implementing Regulation applies.

The Commission adopted the Implementing Regulation on 7 February 2019 and it applies from 31 December 2018.

The Implementing Regulation can be accessed here.

**(viii) European Commission publishes letters to EIOPA on the amendment of the Solvency II Delegated Regulation and the review of the "country component" methodology**

In February 2019, the European Commission published the following letters sent by Olivier Guersent, the European Commission Director-General to Gabriel Bernardino, the EIOPA Chair:

- A letter dated 1 February 2019 regarding the proposed delegated regulation amending the Solvency II Delegated Regulation. The letter replies to a number of concerns raised by EIOPA in a letter sent to the European Commission on 10 December 2018. In particular, the letter indicates that the Commission will be publishing a staff working document as part of its work relating to the treatment of illiquid liabilities, which will explain the economic rationale for the calibration for the interest rate risk module. The Commission has also clarified that the amendments to the provisions on deriving risk-free interest rates represent clarifications of the procedures and do not rule out the possibility of changes to the methodology where changes in the market data necessitate them. The letter can be accessed here.

- A letter dated 7 February 2019 regarding the review of the methodology for the activation of the "country component" of the volatility adjustment under Solvency II. The letter notes that the current methodology applied by EIOPA to derive the "country component" of the volatility adjustment does not work as intended and does not allow properly mitigating country-specific spread crises in the valuation of technical provisions. In particular, the Commission noted that recent data show that there are uncertainties regarding the activation of this component due to potential "cliff-edge effects". As a result, the Commission has invited EIOPA to immediately start exploring if there are other possibilities to improve the functioning and efficiency of the country component of the volatility adjustment that would be in line with the current legal framework. The letter can be accessed here.

**(ix) European Commission requests Technical Advice from EIOPA on the review of Solvency II**

On 15 February 2019, EIOPA published a request from the European Commission for Technical Advice on the review of the Solvency II Directive. The request seeks Technical Advice on the following items:

- Long-term guarantees measures and measures on equity risk (Article 77f);
- Specific methods, assumptions and standard parameters used when calculating the Solvency Capital Requirement standard formula (Article 111(3));
- Rules and supervisory authorities' practices on the application of Article 129 (calculation of the Minimum Capital Requirement);
- The supervision of insurance and reinsurance undertakings in a group (Article 242(2));
- Other items related to the supervision of insurance and reinsurance undertakings, including macro-prudential issues, recovery and resolution of insurance undertakings in stressed situations, freedom to provide services and freedom of establishment, reporting and disclosure.

EIOPA must deliver this Technical Advice by 30 June 2020.

The European Commission's request can be accessed here.

**(x) Insurance Europe publishes response to ESRB report on macroprudential provisions, measures and instruments for insurance**

On 25 February 2019, Insurance Europe published its response to the ESRB report on macroprudential provisions, measures and instruments for insurance. Whilst Insurance Europe highlights its support for an effective macroprudential framework that mitigates risk in the financial system, it is of the opinion that additional macroprudential measures are not necessary for the insurance sector.

According to Insurance Europe, a comprehensive macroprudential monitoring framework is already in place in the form of specific reporting requirements for financial stability, EIOPA's biannual financial stability reports and stress tests. In addition, Insurance Europe notes that the insurance supervisory regime already includes many instruments with a macroprudential impact. In particular, Insurance Europe cites the Solvency II framework as representing a regime change in insurance supervision that also includes many elements that mitigate marcoprudential risks, the impact of which will only become apparent over time.

Insurance Europe noted that any approach taken for the regulation of macroprudential risk in insurance should take full account of developments at international level and be globally consistent.

Insurance Europe's response can be accessed here and a related press release is available here.

**(xi) The Association of Mutual Insurers and Insurance Cooperatives in Europe publishes response to EIOPA's call for input on reporting and disclosure**

On 26 February 2019, the Association of Mutual Insurers and Insurance Cooperatives in Europe ("**AMICE**") published its response to EIOPA's call for input on reporting and disclosure. EIOPA's call for input, published in December 2018, requested feedback from stakeholders on supervisory reporting and public disclosure, with the aim of assessing if the requirements remain fit-for-purpose and permit a risk-based and proportionate approach.

In response to the call for input, AMICE recommended a number of actions which could be adopted, including the following:

- The simplification of the amount of asset data that is needed for smaller insurers and the rationalisation of the reporting requirements;
- The extension of the current temporary waiver for quarterly reporting to a permanent basis;
- The assessment of whether certain waivers can be extended to the annual templates or of whether certain insurers can have a lower frequency of submission of annual templates;
- The merging of documents that contain overlapping content;
- The review of quarterly and annual reporting deadlines. AMICE suggested that reporting deadlines could be aligned with the reporting deadlines applicable for 2018; and
- Clarification as to which quarterly reporting templates are used for supervisory and statistical purposes and removal of those templates which are not used.

AMICE's response can be accessed here.

**(xii) European Commission adopts Delegated Regulation amending the Solvency II Delegated Regulation**

On 8 March 2019, the European Commission adopted a Delegated Regulation amending the Solvency II Delegated Regulation (the "**Delegated Regulation**"). The Delegated Regulation amends the Solvency II Delegated Regulation in the following manner:

- It removes unjustified constraints to the financing of the economy and introduces prudential criteria that allow the capital charges in the standard formula for insurers' unrated debt and unlisted equity investments to be reduced;

- It enhances proportionality in the framework and introduces further simplifications to unjustifiably burdensome or costly elements of the capital requirement standard formula, including a carve-out from the mandatory application of the look-through in investment funds and exceptions to the use of external ratings;

- It further aligns the rules applicable to the Solvency II capital requirement standard formula with the rules applicable in the banking sector, in order to remove unjustified inconsistencies between different EU financial legislation;

- It introduces further principles to ensure a level playing field in the Union against the background of widely divergent practices between Member States in the recognition of the capacity of deferred taxes to absorb present losses;

- It updates a number of parameters using additional data gathered on premiums earned and estimates of ultimate losses since the last calibration was performed, including risk calibrations for non-life premium and reserve risk and health and non-life catastrophe risk;

- It further refines the recognition of risk mitigation techniques, the group solvency calculation and the volume measure for non-life premium risk, in order to improve the risk sensitivity of the capital requirement standard formula;

- It lays down a more rigorous framework regarding amendments to the methodologies, principles and techniques for laying down the technical information on the relevant risk-free interest rate term structure, improving the system for determining the technical information, with the objective of increasing transparency, prudence, reliability and consistency over time.

The next step is for the new Delegated Regulation to be considered by the European Parliament and Council of the EU.

The Delegated Regulation can be accessed here.

On the same date, Insurance Europe issued a press release which identified a number of issues with the contents of the Delegated Regulation. Specifically, Insurance Europe noted that, despite the fact that the industry provided extensive evidence that the risk margin could be safely reduced, the Commission took no action. In addition, it expressed its concern that, despite the presence of evidence that the volatility adjustment does not work as intended, nothing has been included in the Commission's text to counter these issues.

Insurance Europe's press release is available here.

**(xiii) European Commission provides response to ECON concerns regarding the Solvency II Delegated Regulation**

On 13 March 2019, the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published a letter it received from the European Commission in response to ECON's letter of 6 December 2018, which had raised concerns in respect of the review of the Solvency II Delegated Regulation (the "**Delegated Regulation**").

The European Commission's letter responds to the following concerns raised by ECON:

- **The criteria for long-term equity investments:** ECON had stated that the criteria for long-term equity investments, particularly the ring-fencing criterion and the minimum holding period of 12 years, had the potential to prevent the measure from working in practice. In response, the European Commission removed any reference to ring-fencing and reduced the minimum holding period requirement to 5 years;

- **The volatility adjustment:** ECON had stressed the need for a short-term solution to perceived shortcomings in the activation of the country component of the volatility adjustment. In response, the Commission noted that the volatility adjustment, including the activation of the national component, was part of a formal request sent by the Commission to EIOPA on 11 February 2019 for technical advice on the review of the 2020 Solvency II Directive. In the meantime, the Commission is exploring whether other short-term solutions are possible;

- **The lowering of the risk margin:** The review of the Delegated Regulation focused on the cost-of-capital rate to calculate the risk margin. According to the European Commission, evidence gathered by EIOPA does not suggest that the cost-of-capital rate can be lowered from its current level of 6%, while still fulfilling its purpose in line with the Solvency II Directive. The Commission has requested EIOPA to analyse the broader design of the risk margin, beyond the level of the cost-of-capital rate, for the review of the Directive in 2020.

The European Commission's letter can be accessed here.

**(xiv) EIOPA publishes information request for its fourth long-term guarantees report and Solvency II review**

On 18 March 2019, EIOPA published a request to insurance undertakings from the European Economic Area and subject to Solvency II to provide information in the context of EIOPA's fourth Long-Term Guarantees ("**LTG**") Report due in 2019 as well as in the preparation for the review of Solvency II due in 2020. Insurance undertakings were requested to provide the information on the following:

- **Information on the LTG measures;**

- **Information on the dynamic volatility adjustment;**

- **Information on long-term illiquid liabilities;**

(Re)insurance undertakings have until 17 May 2019 to submit results to National Supervisory Authority ("**NSA**") with the NSAs required to report this data to EIOPA by 29 May 2019. Groups have until 14 June 2019 to submit results to NSAs who will need to report this data to EIOPA by 28 June 2019.

EIOPA's request for information and the templates can be accessed here.

**(xv) EIOPA publishes report on 2017 comparative study on market and credit risk modelling**

On 25 March 2019, EIOPA published a report outlining the findings from its year-end 2017 comparative study on market and credit risk modelling under Solvency II (the "**Report**").

The Report summarises the key findings from the study undertaken in 2018 based on year-end 2017 data and provides an insight into the supervisory initiatives being taken following the conclusions of the study, in order to provide an up-to-date overview of the modelling approaches and to further develop supervisory tools and foster common supervisory practices.

The Report can be accessed here.

**(xvi) Council of the EU publishes final compromise text of proposed Directive amending MiFID II and the Solvency II Directive**

On 29 March 2019, the Council of the European Union published the final compromise text of the proposed Directive amending Directive 2014/65/EU on markets in financial Instruments ("**MiFID II**") and the Solvency II Directive (the "**Proposed Directive**"). The Proposed Directive aims to strengthen and further integrate the current EU supervisory framework by means of the following:

- **Better coordination of supervision** – The Proposed Directive aims to strengthen macroprudential supervision across the EU, to strengthen the existing powers of the European Supervisory Authorities ("**ESAs**") in order to foster greater supervisory convergence and to increase the role of EIOPA in coordinating the authorisation of (re)insurance companies' internal risk measurement models;

- **Extension of the direct supervisory powers of ESMA** – The Proposed Directive aims to extend the direct supervisory powers of ESMA, focussing on those areas where direct supervision can remove cross- border barriers and promote further market integration;

- **Enhancing the focus on environmental, social and governance factors and FinTech** – The Proposed Directive will require the European Supervisory Authorities to

take account of environmental, social and governance factors, as well as issues related to FinTech, when performing tasks within their respective mandates;

- **The transfer of certain supervisory powers from national competent authorities to the ESAs** – With regard to ESMA, the Proposed Directive seeks to transfer the power to authorise and supervise data reporting service providers to ESMA. The Proposed Directive also seeks to assign EIOPA a greater role in contributing to supervisory convergence in the applications for the use of internal risk measurement models, changes with respect to information sharing regarding such model applications, and the possibility for it to issue opinions in that connection and to assist in the settlement of disputes between supervisory authorities.

The final compromise text of the Proposed Directive can be accessed here.

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

### (i) Draft Commission Delegated Regulations on sustainable finance published

On 4 January 2019, the European Commission published the following draft Delegated Regulations designed to ensure investment firms and insurance distributors take Environmental, Social and Governance ("**ESG**") issues into account when advising customers:

- Commission Delegated Regulation amending Delegated Regulation (EU) 2017/565 as regards the integration of ESG considerations and preferences into investment advice and portfolio management. The draft Delegated Regulation can be accessed here; and

- Commission Delegated Regulation amending Regulation (EU) 2017/2359 as regards the integration of ESG considerations and preferences into the investment advice for insurance-based investment products. The draft Delegated Regulation can be accessed here.
  (together the "**Delegated Regulations**").

The draft Delegated Regulations have been produced under Articles 24(13) and 25(8) of the MiFID II Directive and Article 30(6) of the Insurance Distribution Directive ("**IDD**"), respectively.

The European Commission can only officially adopt the draft Delegated Regulations once the new disclosure provisions for sustainable investments and sustainability risks have been agreed at European Union level. The publication of the draft Delegated Regulations should enable firms to start preparing to take ESG considerations and preferences into account.

In the suitability assessments they undertake to see if proposed investments are appropriate for a client. Once adopted by the European Commission, the Delegated

Regulations will enter into force twenty days after publication in the Official Journal of the European Union, unless the European Parliament and the Council of the European Union object to them within a period of three months (extendable to six months).

A copy of the press release and the Delegated Regulations can be accessed here.

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

### (i) Council of the EU confirms agreement on the pan-European pension product

On 13 February 2019, the Council of the EU published a press release announcing that it had reached an agreement on the Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product ("**PEPP**") (the "**Proposed Regulation**"). The PEPP is a voluntary regulated personal pension scheme which will be available to consumers on a pan-European basis.

The Proposed Regulation aims to create a single market for personal pensions and to enhance the cross-border provision and portability of personal pension products. It plans to harmonise a set of core features for the PEPP, which concern key elements such as distribution, minimum content of contracts, investment policy, provider switching, or cross-border provision and portability. It is hoped that the harmonisation of these core features will improve the level playing field for personal pension providers at large and help boost the completion of the Capital Markets Union and the integration of the internal market for personal pensions. To this end, the Proposed Regulation lays down uniform rules on the registration, provision, distribution and supervision of PEPP.

The PEPP framework will facilitate a wide range of providers being able to offer the PEPP product, including insurance companies, banks, certain investment firms and asset managers. While the PEPP product itself will be authorised by EIOPA, PEPP providers will remain regulated by national competent authorities in accordance with existing EU rules in their respective sectors. The Council's press release can be accessed here.

The European Parliament has indicated in its procedure file, available here, that the Parliament will consider the Proposed Regulation during its plenary session on 3 April 2019.

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

### (i) ESAs publish final report concerning amendments to the PRIIPs KID

On 8 February 2019, the Joint Committee of the ESAs published its final report (the "**Final Report**") concerning the proposed amendments to Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 on key information documents ("**KID**") for packaged retail and insurance-based investment products ("**PRIIPs**") (the "**Delegated Regulation**"). The Final Report summarises the responses received to the Joint Committee's consultation paper dated 8 November 2018 and sets out the intended next steps regarding the work to review the Delegated Regulation this year.

The Report notes that the overall feedback provided to the consultation paper indicated that stakeholders did not support the proposed targeted amendments to the PRIIPs Delegated Regulation, prior to a more comprehensive review of Regulation (EU) 1286/2014 (the "**PRIIPs Regulation**"). The proposed targeted amendments included:

- Proposals to change the approach for performance scenarios and a description of several other options that were identified;
- Potential amendments on a limited number of other specific issues based on the information gathered by the ESAs since the implementation of the KID; and
- Possible changes in view of the forthcoming expiry of the exemption in Article 32 of the PRIIPs Regulation and the possible use of the PRIIPS KID by UCITS and relevant non-UCITS funds from 31 December 2019.

The Final Report states that in light of the overall feedback on the consultation paper and in light of the implications of a possible decision by the European Co-legislators to defer application of the KID by UCITS and certain non-UCITS funds until 31 December 2021, the ESAs have decided not to propose substantive amendments to the PRIIPs Delegated Regulation at this time. Instead, the ESAs indicate that they have begun work to provide input to a review of the Delegated Regulation during 2019. The Final Report sets out how the ESAs plan to conduct this work and discusses the next steps that the ESAs intend to take.

The Final Report can be accessed here

**(ii) ESAs publish a Joint Supervisory Statement in relation to the presentation of performance scenarios in PRIIPs KIDs**

On 8 February 2019, the Joint Committee of the ESAs issued a joint supervisory statement, included as an annex to the Final Report of the same date (see above) in relation to the presentation of performance scenarios in PRIIPs KIDs. The Joint Supervisory Statement recommends that PRIIP manufacturers take the following actions in relation to the presentation of performance scenarios:

- To include a statement in the KID warning the retail investor of the limitations of the figures shown and to highlight that market developments in the future cannot be accurately predicted (specific wording is suggested);
- In respect of the other relevant information provided to the retail investor in relation to the PRIIP at the pre-contractual or post-contractual stage, to include additional explanations or to put the performance scenario figures in the KID in additional context;
- To ensure that any steps taken are proportionate and provide information that is complementary to the existing information within the KID. Any additions to the KID

should be limited to what is considered essential to ensure that the presentation of performance scenarios is fair, accurate, clear and not misleading.

The Joint Supervisory Statement can be accessed here.

**(iii) Proposals to align the expiry date of the PRIIPs derogation with the expiry date of the UCITS exemption**

In February 2019, the Council of the EU reached a political agreement with the European Parliament on the proposed Regulation and Directive on the cross-border distribution of collective investment funds. Amongst other matters, this Regulation amends the PRIIPs Regulation to:

- Delay the Commission's mandatory review of the PRIIPS Regulation from 31 December 2018 to 31 December 2019; and
- Prolong the time period for which UCITS (and relevant non-UCITS funds) are exempted from preparing a PRIIPs KID from 31 December 2019 (as reflected in Article 32 of the PRIIPs Regulation) to 31 December 2021.

In light of these developments, the Joint Committee of the ESAs published a letter sent to the European Commission on 8 March 2019. The letter highlighted the need to align the date in Article 18 of the Delegated Regulation (EU) 2017/653 (the "**PRIIPs Delegated Regulation**"), with the expiry date of the temporary exemption of UCITS from the PRIIPs Regulation. Draft RTS were appended to the letter to align the dates in both measures. The Joint Committee requested that the date of the exemption in Article 18 of the PRIIPS Delegated Regulation be amended to 31 December 2021 for consistency with the amendment to the PRIIPS Regulation as soon as possible.

The letter can be accessed here and the draft RTS can be accessed here.

## Personal Injuries Assessment Board (Amendment) Act 2019 (No. 3)

**(i) Personal Injuries Assessment Board (Amendment) Act 2019 signed into law**

On 25 February 2019, the Personal Injuries Assessment Board (Amendment) Act 2019 (No. 3) (the "**Act**") was signed into Irish law. The purpose of the Act is to amend the Personal Injuries Assessment Board Acts 2003 and 2007 to strengthen the Personal Injuries Assessment Board ("**PIAB**") to ensure greater compliance with the PIAB process and encourage more claims to be settled through the PIAB model, mainly in terms of operational issues. The Personal Injuries Assessment Board (Amendment) Act 2019 (Commencement) Order 2019 appointed 3 April 2019 as the day upon which the amendments introduced by the Act shall come into operation.

The Act can be accessed here.

## Data Protection / General Data Protection Regulation ("**GDPR**") / Cyber Security

### (i) Insurance Europe publish comments on the EDPB guidelines on GDPR's territorial scope

On 17 January 2019, Insurance Europe published its comments on the European Data Protection Board's ("**EDPB**") draft guidelines on the territorial scope of GDPR. Whilst Insurance Europe welcomed the publication of the draft guidelines, it expressed concern that the guidelines leave open some questions on the applicability of international transfer provisions under Chapter V of the GDPR.

In particular, Insurance Europe noted that the draft guidelines do not provide guidance on whether the EU processor has to comply with the provisions on international transfers in relation to the return of data to the non-EU controller on whose behalf the processing is taking place. In the absence of this guidance, Insurance Europe highlighted that it may be concluded that the EU processor would not be able to return to the non-EU controller the data that it processes on that non-EU controller's behalf, unless the latter has adopted appropriate safeguards or is based in a country for which an adequacy decision has been issued.

Insurance Europe have recommended that the EDPB should clarify that processors established in the EU do not have to comply with the provisions on transfers of personal data to third countries under the GDPR when transferring data to the controllers on whose behalf the data is being processed.

Insurance Europe's comments can be accessed here.

### (ii) EDPB publishes findings of Second Annual Joint Review of the EU – U.S. Privacy Shield

On 22 January 2019, the EDPB published a report which outlined its findings in respect of its second annual joint review of the EU – U.S. Privacy Shield (the "**Report**"). The EDPB's review involved an assessment of both the commercial aspects of the EU – U.S. Privacy Shield adequacy decision (the "**Privacy Shield**") and on the government access to personal data transferred from the EU for the purposes of Law Enforcement and National Security, including the legal remedies available to EU citizens. The main findings of the Report include the following:

- The EDPB welcomed actions undertaken by the U.S. authorities and the Commission to adapt the initial certification process and to start ex officio oversights and enforcements actions in order to implement the Privacy Shield;

- The EDPB highlighted the need for further attention to be paid to the Privacy Shield requirements concerning onward transfers, HR Data and processors and the recertification process. The EDPB also noted that a lack of oversight and supervision of compliance with the principles of the Privacy Shield remains a concern;

- The EDPB encouraged the Privacy and Civil Liberties Oversight Board ("**PCLOB**") to issue further reports, noting that the collection and access of personal data for national security purposes still remains an important issue for the EDPB, especially with regards to massive and indiscriminate access; and

- The EDPB noted that it is still awaiting the appointment of a permanent independent Ombudsperson and the exact powers of the Ombudsperson need to be clarified through the declassification of internal procedures concerning the interactions between the Ombudsperson and the other elements of the intelligence community or oversight bodies.

The Report can be accessed here.

**(iii) EDPB publishes updated Guidelines on certification and identifying certification criteria in accordance with Articles 42 and 43 of GDPR**

On 23 January 2019, the EDPB published an updated version of Guidelines 1/2018 on certification and identifying certification criteria in accordance with Articles 42 and 43 of GDPR (the "**Guidelines**"). The objective of the Guidelines is to identify overarching criteria that may be relevant to all types of certification mechanisms issued in accordance with Articles 42 and 43 of the GDPR. The Guidelines:

- Explore the rationale for certification as an accountability tool;

- Explain the key concepts of the certification provisions in Articles 42 and 43; and

- Explain the scope of what can be certified under Articles 42 and 43 and the purpose of certification.

The updated Guidelines provide for further clarification concerning the European Data Protection Seal, the application for approval of criteria pursuant to Article 42(5) and 70(1)(o) and the role of accreditation.

On 15 February 2019, the EDPB also published Annex 2 to the Guidelines for public consultation purposes. Annex 2 provides guidance for review and assessment of certification criteria pursuant to Article 42(5). It identifies a minimum list of topics that a data protection supervisory authority and the EDPB will consider and apply for the purpose of approval of certification criteria of a certification mechanism.

The deadline for receipt of comments was 29 March 2019.

The updated Guidelines can be accessed here and Annex 2 is available here.

**(iv) Data Protection Commission publishes guidance on transfers of personal data from Ireland to the UK in the event of a "No Deal" Brexit**

On 8 February 2019, the Data Protection Commission ("**DPC**") published guidance on transfers of personal data from Ireland to the UK in the event of a "No Deal" Brexit (the "**Guidance**"). The Guidance begins by setting out a non-exhaustive list of examples of ways in which a company might be transferring data to a UK-based company.

It then discusses the extra measures that companies will need to put in place to legally transfer this data in the event of a "No Deal" Brexit, discussing the specific safeguards which Irish companies which intend to transfer personal data to the UK will need to put in place to protect the data in the context of its transfer and subsequent processing.

In particular, the Guidance recommends the use of Standard Contractual Clauses ("**SCCs**"), whereby both parties to the contract give contractually binding commitments to protect personal data in the context of its transfer from the EU to the Third Country and the data subject is given certain specific rights under the SCCs, even though he or she is not party to the relevant contract. The DPC notes that these SCCs can be adopted by putting in place a stand-alone or new contract between the Irish-based controller and the UK-based recipient, or can be incorporated into existing contracts between Irish-based controllers and UK-based processors.

The Guidance provides for a sample set of SCCs which can be used by Irish data controllers who are transferring personal data to a UK-based service provider, where the service provider is acting as a data processor.

The DPC's Guidance can be accessed here.

**(v) Information note on data transfers under the GDPR in the event of a no-deal Brexit**

On 12 February 2019, the EDPB issued an information note to commercial and public organisations on data transfers under GDPR in the event of a no-deal Brexit (the "**Information Note**").

Part 1 of the Information Note sets out details of the five steps which organisations should take to prepare for a no-deal Brexit when transferring data to the United Kingdom

Part II of the Information Note sets out details on the basis for data transfers from the EEA to the UK (i.e. the available data transfer instruments) which comprise:

- Standard or ad hoc Data Protection Clauses;
- Binding Corporate Rules ("**BCRs**");
- Codes of Conduct and Certification Mechanisms;

- Derogations; and

- Instruments exclusively available to public authorities or bodies.

Part III of the Information Note relates to data transfers from the UK to EEA Members.

A copy of the Information Note can be accessed here.

**(vi) DPC publishes Annual Report for the period 25 May - 31 December 2018**

On 28 February 2019, the Commissioner for Data Protection, Helen Dixon, published the first annual report (the "**2018 Annual Report**") of the DPC covering the period 25 May to 31 December 2018, detailing the work of the Irish data protection authority following the introduction of GDPR on 25 May 2018. Highlights of the 2018 Annual Report include:

- 2,864 complaints were received for the period 25 May to 31 December 2018 with a total, 4,113 complaints were received in the 2018 a 56% increase on the total number of complaints received in 2017;

- 3,542 valid data security breaches were notified with a total of 4,740 valid data security breaches being notified in 2018 demonstrating a 70% increase on the total number of valid data security breaches recorded in 2017;

- 136 cross-border processing complaints were received through the new One-Stop-Shop mechanism that were lodged by individuals with other European Union data protection authorities;

- 900 Data Protection Officer notifications were received by the DPC;

- 15 statutory investigations were opened in relation to the compliance of certain technology companies with GDPR;

- 32 new complaints were investigated under the E-Privacy Regulations in various forms of electronic direct marketing. A number of these investigations concluded with successful District Court prosecutions;

- The first public consultation on the processing of children's personal data and the rights of children as data subjects under the GDPR was launched on 19 December 2018;

- The DPC commenced a significant project to develop a new five-year DPC regulatory strategy which will include extensive external consultation during 2019; and

- Staffing numbers in the DPC increased from 85 at the end of 2017 to 110 at the end of 2018.

A copy of the 2018 Annual Report can be accessed here.

**(vii) Data Protection Commission publishes results of GPEN 2018 'Sweep'**

On 5 March 2019, the DPC published the results of the Global Privacy Enforcement Network's ("**GPEN**") 'Sweep'. The GPEN's Sweep is an annual intelligence gathering operation that examines organisations' self-reporting of their implementation of the core concepts of accountability for compliance with data protection laws. The DPC noted the following trends from the Sweep carried out in Ireland:

- 86% of organisations have a contact for their DPO listed on their website. All have privacy policies which are easily accessible from the homepage;
- Most organisations reported that they have policies and procedures in place to respond to requests and complaints from individuals;
- 75% of organisations reported that they have adequate data breach policies in place;
- All organisations reported that they provide some form of data protection training for staff. However, only 38% of those organisations provided evidence of training programmes for all staff, including new entrants and refresher training;
- In most cases, organisations reported that they undertake some data protection monitoring/ self-assessment, but not to a sufficiently high level. 3 of the 29 respondents scored 'poor' in this section, while 13 reached 'satisfactory';
- One third of organisations failed to provide evidence of documented processes to assess risks associated with new products and technology. However, most organisations appear to be aware of the need for this and many reported that they are in the process of documenting appropriate procedures; and
- 30% of organisations failed to demonstrate that they had an adequate inventory of personal data while almost half failed to maintain a record of data flows.

**(viii) EDPB published and adopted Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR**

On 12 March 2019, the EDPB published and adopted 'Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities' (the "**Opinion**"). The Opinion arose from the Belgian DPA requesting that the EDPB examine and issue an opinion on the interplay between the ePrivacy Directive and GDPR, regarding:

- The competence, tasks and powers of data protection authorities;
- Whether the cooperation and consistency mechanisms can or should be applied; and

- Which processing can be governed by provisions of both the ePrivacy Directive and the GDPR.

A copy of the Opinion can be accessed here.

**(ix) EDPB publish and adopted Statement 3/2019 on an ePrivacy regulation**

On 13 March 2019, the EDPB published and adopted 'Statement 3/2019 on an ePrivacy regulation' (the "**Statement**"), whereby the EDPB calls on European Union legislators to increase their efforts towards the adoption of an ePrivacy Regulation.

The EDPB continue further in the Statement that the ePrivacy Regulation must not lower the level of protection offered by the current ePrivacy Directive 2002/58/EC, must complement the GDPR and provide additional strong guarantees for all types of electronic communications. It must also not hinder the development of new technologies and services and ensure a level playing field and legal certainty for market operators.

The Statement can be accessed here.

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

**(i) FATF publishes new consolidated assessment ratings**

For the period 1 January 2019 to 31 March 2019, the Financial Action Task Force ("**FATF**") updated the consolidated assessment ratings which provide a summary of (1) the technical compliance; and (2) the effectiveness of the compliance, of the assessed parties against the 2012 FATF Recommendations on combating money laundering and the financing of terrorism & proliferation. FATF also released new mutual evaluations for the same period.

The updated consolidated rating table can be accessed here and the full set of reports for each country can be accessed here.

**(ii) The General Scheme of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019**

On 7 January 2019, the Department of Justice published the General Scheme of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019 (the "**Bill**"). The Bill will transpose many of the provisions of Directive (EU) 2018/843 (the "**Fifth Money Laundering Directive**" or "**MLD5**") into Irish law, amending the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the **CJA 2010**) in the process. Some of the key amendments which the Bill proposes to introduce include the following:

- The extension of the definition of "designated persons" in the CJA 2010;

- The imposition of additional customer due diligence ("**CDD**") requirements on designated persons prior to establishing a business relationship where the customer is a body corporate or a trust required to register its beneficial ownership information;

- The broadening of the measures that must be taken where senior managing officials are identified as beneficial owners;

- The inclusion of additional information to be obtained by a designated person where enhanced due diligence is required;

- The amendment of the defence for "tipping off" in section 51 of the CJA 2010; and

- The inclusion of additional categories of high risk investors in Schedule 4 of the CJA 2010.

The General Scheme of the Bill can be accessed here.

**(iii) ESAs publish multilateral agreement on the exchange of information between the ECB and AML/CFT competent authorities**

On 15 January 2019, the Joint Committee of the ESAs published a multilateral agreement on the practical modalities for exchange of information between the ECB and NCAs responsible for supervising compliance of credit and financial institutions with anti-money laundering and countering the financing of terrorism obligations under Directive (EU) 2015/849 (the "**Fourth Money Laundering Directive**" or "**MLD4**"). The agreement establishes a framework for exchanging information.

The agreement can be accessed here and a related press release is available here.

**(iv) Wolfsberg Group publish guidance on use of sanctions screening by financial institutions**

On 21 January 2019, the Wolfsberg Group published guidance on how Financial Institutions ("**FIs**") should carry out sanctions screening.

Sanctions screening is a control used within FIs to detect, prevent and disrupt financial crime and manage sanctions risk. This is done by comparing data sourced from an FI's operations, customer and transactional records, against lists of names and other indicators of sanctioned parties or locations. These lists are derived from regulatory sources and are often supplied by specialist external providers with the FIs augmenting these with lists of sanctions-relevant terms, names or phrases, which have been identified through their own operations, research or intelligence.

The guidance concludes that FIs should seek to adopt a risk-based approach to sanctions screening and consider all aspects of a comprehensive sanctions screening control framework. It states that:

- FIs must have a robust Financial Crime Compliance ("**FCC**") programme for sanctions screening;

- FIs approach should recognise that sanctions screening has its limitations and for it to be fully effective it should be deployed alongside a broader set of non-screening controls;

- FIs should document their approach to screening by linking it to their risk appetite statements;

- The accuracy and completeness of the FI's own data is central to an effective and efficient sanctions screening process;

- Technology remains a key enabler in the effectiveness of identifying financial crime risk through screening;

- FIs must have a robust governance and oversight mechanisms to ensure transparency of risk decisions to key stakeholders and risk owners; and

- FIs should ensure that those involved in the end-to-end risk event management are trained, supervised and that the appropriate levels of quality control are in place to ensure compliance with requirements;

A copy of the guidance can be accessed here.

**(v) European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019**

On 29 January 2019, the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019 came into effect (the "**Regulations**"). The Regulations transpose into Irish law certain paragraphs of Article 31 of MLD4 requiring obligations to be imposed on trustees of trusts to identify beneficial owners.

The Regulations require the trustee (or manager in the case of a collective investment scheme) to establish a beneficial ownership register (the "**Register**") which must contain details of all beneficial owners of the trust as well as information on the date on which each beneficial owner was entered on the register and, where applicable, the date on which any such person ceased to be a beneficial owner of the trust. The Register must be kept up-to-date and reflect any change in beneficial ownership as and when that change occurs. The Register must be made available to the Revenue Commissioners, Central Bank, Department of Finance and other competent authorities on request.

The Regulations also require the trustee to keep records of steps taken to identify the beneficial owner(s) of the relevant trust and retain those records for at least 5 years after the date on which the final distribution is made under the trust. Where the trustee of a trust engages with other "designated persons", it must inform that entity that it is acting in the

capacity of a trustee. It must also provide that designated person with details of the beneficial owner(s) of the trust on request and, where relevant, notify that designated person of any change to the beneficial ownership of the trust.

The Regulations can be accessed here and for further information, please refer to a related Dillon Eustace article, which can be found here.

**(vi) The European Commission adopts Delegated Regulation containing RTS on measures to mitigate money laundering and terrorist financing risk under MLD4**

On 31 January 2019, the European Commission adopted a Delegated Regulation supplementing MLD4 with RTS specifying the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries.

The RTS specify how credit and financial institutions should manage money laundering and terrorist financing risk as required by Article 8 of MLD4, where a third country's law prevents the implementation in their branches or majority-owned subsidiaries of group-wide policies and procedures on AML and CFT. This may occur, for example, when the sharing of customer-specific information within the group conflicts with local data protection or banking secrecy requirements.

The Council of the European Union and the European Parliament will now consider the Delegated Regulation and if neither objects, it will enter into force twenty days after it is published in the Official Journal of the European Union and will apply three months after it has entered into force.

A copy of the Delegated Regulation can be accessed here.

**(vii) EBF, AFME and IIF publish joint response to ESAs consultation on AML Colleges Guidelines**

On 8 February 2019, the European Banking Federation ("**EBF**"), the Association for Financial Markets in Europe ("**AFME**") and the Institute of International Finance ("**IIF**") published a joint response to the ESAs' draft guidelines on the cooperation and information exchange for the purposes of MLD4 between competent authorities supervising credit and financial institutions (the "**AML Colleges Guidelines**").

In the response the organisations encourage the ESAs, where possible, to maximise the use of existing structures as efficiently as possible. The organisations note that setting up supervisory colleges has potential to add another layer of complexity for firms and duplicating existing procedures should be avoided in order to ensure seamless cooperation and information exchange between competent authorities. The response advocates a holistic view on the importance of enhancing cooperation between all sectors, which will assist in the reduction of criminal abuse of the financial system.

The organisations' response can be accessed here and a related press release is available here.

**(viii) Political agreement reached on proposed Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences**

On 12 February 2019, the European Commission published a press release which announced that it had reached a political agreement with the European Parliament and the Council of the European Union on the proposed Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences (the "**Proposed Directive**"). The Proposed Directive has the following primary objectives:

- **To allow timely access to financial information:** Law enforcement authorities and Asset Recovery Offices will have direct access to bank account information contained in national centralised bank account registries or data retrieval systems. Europol will also be able to access this information indirectly;

- **To improve cooperation:** The new rules enhance cooperation between national authorities, Europol and the Financial Intelligence Units; and

- **To safeguard data protection:** Law enforcement will have access to limited information only on the identity of the bank account holder and in specific cases of serious crime or terrorism, ensuring that the rights and freedoms of individuals are fully protected, in particular the right to the protection of personal data.

The Directive will now need to be formally adopted by the European Parliament and the Council.

The European Commission's press release can be accessed here.

**(ix) Council of the EU objects to European Commission's Delegated Regulation identifying high-risk third countries with strategic deficiencies in their anti-money laundering and counter-terrorist financing frameworks**

On 13 February 2019, the European Commission adopted a Delegated Regulation supplementing MLD4 by identifying high-risk third countries with strategic deficiencies (the "**Delegated Regulation**").

The list of high-risk third countries (as provided for in an annex to the Delegated Regulation) was produced by the European Commission using new methodology set out under MLD5.The Commission concluded that 23 countries had strategic deficiencies in their anti-money laundering or counter terrorist financing regimes.

The Delegated Regulation can be accessed here. The list of high-risk third countries was provided in the annex to the Delegated Regulation and can be found here and a related press release is available here.

On 7 March 2019, the Council of the EU published a press release which announced that it had objected to the European Commission's Delegated Regulation. The Council justified its decision on the grounds that it could not support the proposal as it was not established in a transparent and resilient process that actively incentivised affected countries to take decisive action while also respecting their right to be heard.

The Commission will now have to propose a new draft list of high-risk third countries that will address member states' concerns.

The Council's press release can be accessed here.

On 14 March 2019, the European Parliament published a resolution which stressed the urgency for the adoption of an EU blacklist identifying high-risk third countries with strategic deficiencies. The Parliament expressed its regret at the Council's decision to object to the Delegated Regulation and called on the European Commission to take into account all of the concerns expressed and to come up with a new delegated act as soon as possible.

The Parliament's resolution can be accessed here.

**(x) FATF updates methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems**

In February 2019, FATF published its updated methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems.

The document sets out how FATF will determine whether a country is sufficiently compliant with the 2012 FATF Standards and whether its AML/CFT system is working effectively. It provides an overview of the assessment methodology and how it will be used in evaluations and sets out the criteria for assessing technical compliance with each of the FATF Recommendations. It also outlines the outcomes, indicators, data and other factors used to assess the effectiveness of the FATF Recommendations.

FATF's updated methodology can be accessed here.

## European Deposit Insurance Scheme ("**EDIS**")

### (i) EFDI publishes status report on DGS stress testing

On 8 January 2019, the European Forum of Deposit Insurers ("**EFDI**") published a status report on deposit guarantee scheme ("**DGS**") stress testing (the "**Report**"). The Report summarises the current state of play with regard to DGS stress testing, the lessons to date and the next steps. In particular, the Report identifies the following issues that will require attention in the future:

- There may be a difficulty in delivering the testing, as much of it is concentrated to the periods of Q3 2018 and Q2 2019;
- The DGS community's ability to deliver the testing in relation to cross border pay-out is not something that can be realised in isolation. This will require significant coordination to achieve the desired increase in volume of testing which is to be completed;
- Whilst under the Deposit Guarantee Schemes Directive the Designated Authority ("**DA**") is not required to participate in the testing itself, the EBA guidance states that those DAs should be consulted in the development of the stress test plan. With this background, a significant number of respondents mentioned that there has be no engagement with their DA; and
- There remains differing interpretations of the stress test indicators as defined within the guidance produced by the EBA, which could lead to an inability by the EBA to perform the peer review and/or investment in a testing programme which may generate suboptimal results.

Appendix 1 to the Report provides for a detailed analysis of the responses to the survey. The EFDI's Report can be accessed here.

## Prospectus Regulation

### (i) ESMA publishes updated Q&As on Prospectuses

On 31 January 2019, ESMA published the Twenty-Ninth Edition of the updated version of its Q&As on Directive 2003/71/EC (the "**Prospectus Directive**"). The updates apply in the event that the UK withdraws from the EU with no withdrawal agreement in place;

- **Q&A 103**: This question considers how issuers who have chosen the UK as their home member state should choose a new home member state; and
- **Q&A 104:** This question clarifies the status within the European Union / EEA EFTA of prospectuses approved by the United Kingdom's Financial Conduct Authority ("**FCA**") while the United Kingdom was a Member State.

A copy of the press release can be accessed here and a copy of the Q&A can be accessed here.

**(ii) ESMA publishes list of thresholds below which an EU prospectus is not required**

On 8 February 2019, ESMA published a list of the thresholds below which an offer of securities to the public does not need a prospectus in EU Member States. The document provides the following information:

- A short description of the national thresholds below which no prospectus is required;
- A summary of any national rules which apply to offers below that threshold; and
- Hyperlinks to the relevant national legislation and rules.

The document can be accessed here and a related press release from ESMA is available here.

**(iii) Draft Commission Delegated Regulation supplementing the Prospectus Regulation with regard to RTS on key financial information**

On 14 March 2019, the European Commission published a draft text of its Delegated Regulation supplementing Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") with regard to RTS on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal (the "**Draft Delegated Regulation**"). The Draft Delegated Regulation:

- Sets out a brief set of key financial information taking into account the various categories of issuers and types of securities that can be accommodated within the seven-page limit of the prospectus summary;
- Specifies requirements relating to the publication of prospectuses by (i) carrying forward existing Level 2 provisions which have not already been incorporated in the Prospectus Regulation or become obsolete and (ii) removing the ban on hyperlinks in prospectuses;
- Sets out a list of data that will allow ESMA to (i) provide a centralised storage mechanism of prospectuses allowing access free to charge and appropriate search facilities for the public and (ii) draw up the annual report containing statistics on prospectuses and an analysis of trends that will facilitate the future evaluation of prospectus rules;
- Strengthens the protection of investors about advertisements and allows competent authorities to supervise the advertising activity and cooperate in a more efficient way;

- Specifies situations that require the publication of a supplement to the prospectus by adapting recent RTSs addressing the same issue to the new prospectus regime and adding measures to cover the new elements set out in the Prospectus Regulation; and

- Specifies the technical arrangements to expand ESMA's IT system to cover the whole set of documents that will be passported through the notification portal.

The Draft Delegated Regulation can be accessed here. The annexes to the Draft Delegated Regulation, which set down the key financial information for various entities in the summary of a prospectus, can be accessed here.

**(iv) Draft Commission Delegated Regulation supplementing the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus**

On 14 March 2019, the European Commission published a draft text of its Delegated Regulation supplementing the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**Draft Delegated Regulation**"). The Draft Regulation details:

- The minimum information to be included in the registration documents and in the securities notes and additional information to be included in prospectuses;

- The format of a prospectus and a base prospectus, the categories of information to be included in the base prospectus and the requirements of a prospectus summary;

- The key information which must be contained in the specific summary for the EU Growth prospectus, the required contents of the EU Growth registration document and of the EU Growth securities note and the format of the EU Growth prospectus;

- The criteria for the scrutiny of the completeness of information contained in the prospectus and for the scrutiny of comprehensibility and consistency of the information; and

- The proportionate approach to be taken in the scrutiny of draft prospectuses and the review of the universal registration document, the requirements for submission of draft prospectuses for approval and the steps that must be taken where there are changes to a draft prospectus during the approval procedure.

The Draft Regulation can be accessed here.

### (v) ESMA publishes Q&As in respect of the Prospectus Regulation

On 27 March 2019, ESMA published a Q&Aa document in respect of the Prospectus Regulation. The Q&As provide clarification on the following issues in respect of the Prospectus Regulation:

- The scope of the grandfathering of prospectuses approved under the national laws of Member States implementing Directive 2003/71/EC (Prospectus Directive);
- The applicability of the current level 3 guidance concerning the Prospectus Directive after the entry into application of the Prospectus Regulation; and
- The process of updating the information included in registration documents and universal registration documents.

The Q&As can be accessed here.

### (vi) ESMA publishes final guidelines on risk factors under the Prospectus Regulation

On 29 March 2019, ESMA published its final report setting out its guidelines on risk factors under the Prospectus Regulation (the "**Guidelines**"). The Guidelines aim to encourage appropriate, focused and more streamlined disclosure of risk factors, in an easily analysable, concise and comprehensible form.

The Guidelines note that risk factors should be limited to those risks which are material and specific to the issuer and its securities and which are corroborated by the content of the prospectus. ESMA's Guidelines are divided into the following groups:

- **Guidelines on Specificity** - Before approving the prospectus, the competent authority should ensure that specificity of the risk factor is clear from the disclosure;
- **Guidelines on Materiality** - Before approving the prospectus, the competent authority should ensure that materiality of the risk factor is clear from the disclosure;
- **Guidelines on Corroboration of the materiality and specificity** - Before approving the prospectus, the competent authority should ensure that the materiality and specificity of the risk factor is corroborated by the overall picture presented by the prospectus;
- **Guidelines on Presentation of risk factors across categories** - The presentation of risk factors across categories (depending on their nature) should aid investors in navigating the risk factors section. Before approving the prospectus, the competent authority should ensure that risks factors are presented across categories based on their nature;

- **Guidelines on Focused/concise risk factors** - Before approving the prospectus, the competent authority should ensure that the disclosure of each risk factor is presented in a concise form; and

- **Guidelines on Risk factors in the summary** - Where a summary has been included in the prospectus, before approving the prospectus the competent authority should ensure consistency in disclosure presentation.

Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities to which the Guidelines apply must notify ESMA whether they comply, do not comply or intend to comply with the Guidelines.

The final report can be accessed here.

**(vii) ESMA publishes final report on technical advice on minimum information content for prospectus exemption**

On 29 March 2019, ESMA published its final report setting out its technical advice on the minimum information required for a document that is made available to the public under the prospectus exemption.

In accordance with the Prospectus Regulation, issuers may offer/admit securities connected with a takeover, merger or division without publishing a prospectus, provided that an alternative document is made available to investors which describes the transaction and its impact on the issuer, described as an "Exempted Document" by ESMA.

ESMA intends that its technical advice will ensure a harmonised approach in all jurisdictions with regard to the information provided to investors when takeovers, mergers and divisions are connected with public offers of securities or admissions to trading on regulated markets. This will also bring transparency to the market regarding the information that needs to be disclosed in the context of public offers/admissions to trading connected with takeovers, divisions or mergers, in particular when these transactions have a cross-border element. In this case, only a single document, complying with the requirements, would need to be published.

Annex IV to the report sets out ESMA's technical advice regarding the minimum information content for the Exempted Document.

The technical advice will now be delivered to the European Commission and will form the basis for delegated acts related to the Prospectus Regulation.

ESMA's final report can be accessed here.

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

### (i) Insurance Europe publish response to the IAIS' Consultation on a Holistic Framework for Systemic Risk in the Insurance Sector

On 29 January 2019, Insurance Europe published its response to the IAIS' proposal for a holistic framework for identifying and managing systemic risk. The response expresses the concern that the proposed framework currently lacks sufficient clarity and recommends, amongst other things, that:

- Before supervisory intervention is required, national supervisors should coordinate with insurers to achieve a mutual understanding of situations that might give rise to systemic risk and discuss alternatives to intervention;
- There must be a clearer distinction between measures that are reflective of good practice and that should be applied proportionally and more drastic measures (such as resolution) that should only be applied where it can be demonstrated that there are material risks to the global financial system;
- A well-calibrated threshold to identify systemically risky activities that could, if undertook by several insurers, amplify shocks to the rest of the financial system, should be defined;
- A globally-consistent, proportionate application of policy measures linked to systemic risk is needed;
- The framework needs to be compatible with other existing requirements, such as national provisions, stress tests, European initiatives on macroprudential and the Insurance Capital Standard.

Insurance Europe's response can be accessed here and a related press release is available here.

### (ii) IAIS publishes application paper on proactive supervision of corporate governance

On 27 February 2019, IAIS published an application paper on proactive supervision of corporate governance (the "**Application Paper**"). The Application Paper sets out good practices related to the organisation and functioning of the supervisor, with the aim of promoting proactive supervision of corporate governance.

The objective of the Application Paper is to raise awareness of, and to address, the organisational, cultural, and procedural challenges faced by supervisors in detecting problems in corporate governance and taking appropriate steps at an early stage. It supports the practical application of the corporate governance-related Insurance Core Principles ("**ICPs**"), particularly ICP 7 and ICP 8.

The Application Paper is divided into the following sections in order to address key aspects of fostering and supporting proactive supervision:

- **Section 1 - Supervisory organisation, culture and processes:** Section 1 discusses how the supervisor's own organisation, culture and process should support proactive supervision. It identifies some challenges to the supervisors' organisation, culture and processes, including the ability and willingness of staff, in carrying out proactive supervision of corporate governance, and proposes good practices to address those challenges;

- **Section 2 - Information:** Section 2 highlights that the supervisor needs relevant and timely information in order to be proactive. It notes that supervisors should be able and willing to gather both quantitative and qualitative information from different sources on the corporate governance-related issues facing the insurer and the insurer's ability to address them and sets out a range of approaches to gathering relevant information in order to facilitate the early identification of corporate governance-related problems that require proactive supervisory steps;

- **Section 3 - Yellow and red flags:** Section 3 provides a non-exhaustive list of early warning indicators, or "yellow and red flags" that may signal the need for investigation and, potentially, further steps. The Application Paper recommends that supervisors develop an early warning system based on these potential indicators; and

- **Section 4 - Communication:** Section 4 explains how effective communication by the supervisor with both insurers and the wider public can promote proactive supervision. It recommends that supervisors share the objectives and strategy of supervision and principles which guide their supervisory approach with insurers and the wider public in order to increase their awareness and understanding.

The Application Paper can be accessed here.

**(iii) IAIS publishes peer review process questionnaire for ICPs 4, 5, 7 and 8**

On 8 March 2019, IAIS published a peer review process ("**PRP**") questionnaire for the following Insurance Core Principles ("**ICPs**"):

- ICP 4 – Licensing;

- ICP 5 – Suitability of Persons;

- ICP 7 – Corporate Governance; and

- ICP 8 – Risk Management and Internal Controls.

The IAIS conducts thematic assessments of members' observance of supervisory material and publishes the aggregated findings from these assessments. The findings provide a

global and regional picture of implementation and provide a key component of the feedback between the IAIS' standard setting and implementation activities.

A copy of the PRP questionnaire can be accessed here.

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

### (i) EIOPA publishes updated Q&As

During the period 1 January 2019 to 31 March 2019, EIOPA published updated Questions and Answers ("**Q&As**") on the following:

- (EU) No 2015-35 supplementing the Solvency II Directive (last updated 18 March 2019);
- (EU) No 2009-138 Solvency II Directive (Insurance and Reinsurance) (last updated 1 February 2019);
- Answers to (EU) No 2016-97 – Insurance Distribution Directive (last updated 25 February 2019);
- Answers to guidelines on undertaking-specific parameters (last updated 1 March 2019);
- Answers to risk-free interest rate – General questions (last updated 1 March 2019);
- Answers to guidelines on reporting for financial stability purposes (last updated 1 February 2019); and
- (EU) No 2015-2450 templates for the submission of information to the supervisory authorities (last updated 25 March 2019).

The updated Q&As can be accessed here.

### (ii) EIOPA publishes report on cost and past performance of insurance-based investment products and pension products

On 10 January 2019, EIOPA published a report on costs and past performance of insurance-based investment products and pension products (the "**Report**"). The Report provides aggregate data on the costs of insurance-based investment products ("**IBIPs**") and, to a limited extent, certain personal pension products ("**PPPs**") across the EU and sets out net performance for the period between 2013 and 2017, based primarily on data derived from key information documents.

In respect of IBIPs, the main findings of the Report include the following:

- Costs vary depending on the type of product, premium, risk category and jurisdiction, impacted for the most part by the category of the product or underlying fund. For unit linked products, this appears to be due to different asset management costs;

- The type of premium impacts overall product costs, with regular premium products carrying higher costs than single premium ones. EIOPA found that other on-going costs do not appear to be materially impacted by holding periods;

- Given the differences between profit participation and unit-linked products, and diversity in the market for profit participation products, there are significant challenges with comparing performance, for example in view of the value of guarantees, the impact of smoothing mechanisms and the impact also of risk and volatility. In light of these differences, EIOPA noted that, for this project report, direct comparisons between unit-linked and profit participation products or conclusions on profit participation products of different types should be avoided;

- There are fewer passively managed funds or products available to consumers than expected and ESG options have not become mainstream.

EIOPA noted that a significant proportion of the sample could not be used for the Report due to data quality and comparability limitations and expressed the intention to further develop common definitions of costs, as well as common methods for calculating past performance to address these issues in future reports.

In respect of PPPs, EIOPA noted that the sample of PPP products included in the analysis was too small to draw any conclusions or results.

The Report can be accessed in full here.

**(iii) EIOPA publishes call for evidence on integrating sustainability risks and factors under Solvency II and the Insurance Distribution Directive**

On 16 January 2019, EIOPA published a Call for Evidence on the integration of sustainability risks and factors in the Delegated Acts under Solvency II and the IDD. This follows the European Commission's call for opinions on whether Solvency II presents any inherent incentives and/or disincentives to sustainable investment.

The objectives of the Call for Evidence were to collect market data to analyse how sustainability risks affect (re)insurers' investments, with particular focus on climate change and market practices with respect to insurance underwriting. Based on the feedback received, EIOPA intends to prepare a draft Opinion for consultation during the second half of 2019, for submission to the European Commission in Q3 2019.

The deadline for receipt of responses was 8 March 2019 and the related press release can be accessed here.

On 30 January 2019, AMICE responded to the call for evidence. Highlighting that Solvency II is a principles-based, risk-based regulatory regime in which (re)insurers rake full account of all types of risks – including sustainability risks, AMICE believes that there are significant aspects of these proposals that are already captured in the regulatory regime. AMICE expressed its concern that there is a risk of introducing new requirements which are not fully harmonised with Solvency II, particularly at a time when there is a full review of Solvency II taking place under a separate initiative. AMICE welcomed these proposals to develop the regulatory regime. AMICE suggested that the consultation should be delayed until after the work on taxonomy has been concluded, and should be focused on integrating sustainability factors and risks rather than creating a new category of risk.

AMICE's response can be accessed here.

On 30 January 2019, the European Fund and Asset Management Association ("**EFAMA**") submitted its response to the Call for Evidence. In the response, EFAMA supports EIOPA's approach to identifying in principle 'sustainability risks' based on the impact ESG factors have on the financial performance of an investment, and not on the ESG impact of the fund. EFAMA also highlighted the need to ensure cross-sectoral consistency between work-streams being undertaken by EIOPA and ESMA on integrating sustainability risks and factors in Level 2 delegated acts of Solvency II and IDD and the Undertakings for the Collective Investment in Transferable Securities Directive ("**UCITS**"), the Alternative Investment Fund Managers Directive ("**AIFMD**") and the Markets in Financial Instruments Directive II ("**MiFID II**").

EFAMA's response can be accessed here.

On 31 January 2019, EIOPA's Insurance and Reinsurance Stakeholder Group ("**IRSG**") responded to the call for evidence. The IRSG welcomed the European Commission initiative and the EIOPA proposals on integrating sustainability risk and factos. However, in response, it recommended that EIOPA and the European Commission should consider the implications of implementing the proposed changes in advance of factual and legal clarity regarding the definition and scope of "sustainability risk", as different interpretations across borders is a distinct possibility in the absence of clarity of definition. It also suggested that EIOPA should consider including a distinction between "financial" risks which impact on insurance companies and their customers and broader "non-financial" or societal sustainability risks, noting that Solvency II legislation, as prudential insurance regulation, is not designed to address the wider societal risks and implications.

The IRSG's response can be accessed here.

On 1 February 2019, Insurance Europe also responded to the Call for Evidence. In the response, Insurance Europe noted that Solvency II already supports the integration of material sustainability risks, as it provides requirements on governance, risk management and investment decisions and these requirements apply to all material risks, including sustainability. Insurance Europe called for consideration of proportionality in the proposed requirements as a key factor to be taken into account with regard to EIOPA's proposals to

amend specific elements of Solvency II and also recommended that the prudent person principle be clarified.

In relation to IDD, Insurance Europe stressed that the IDD already establishes appropriate criteria for determining different types of conflicts of interest, which would capture any potential conflict that could arise from ESG considerations and welcomed EIOPA's clarification that insurers are required to consider ESG factors only in the product approval process for insurance products with an ESG profile.

**(iv) EIOPA publishes revised Single Programming Document 2019-2021 including its Annual Work Programme for 2019**

On 30 January 2019, EIOPA published its revised Single Programming Document for 2019-2021 which includes its Annual Work Programme for 2019 (the "**SPD**"). The SPD sets out the key priorities for the coming years and is updated to include resource information for the years 2019-2021.EIOPA has identified the following strategic objectives for 2019:

- **To drive forward conduct of business regulation and supervision** – EIOPA has highlighted the completion of a European Single Rulebook, the introduction of strengthened methodology for monitoring conduct of business risks and the alignment of supervisory practices as its priorities for 2019;

- **To lead convergence towards high-quality prudential supervision throughout the EU** – EIOPA lists the development of a sound, smart and robust regulatory framework and the improvement of the quality and consistency of supervision and supervisory information as its main priorities for 2019;

- **To strengthen the financial stability of the insurance and occupational pensions sectors** – EIOPA's priorities include the maintenance and further development of core products such as stress tests, financial stability reports and the risk dashboard, the provision of transparent and credible risk reports and statistics and the development of preventative policies and actions to mitigate risks to financial stability; and

- **To deliver EIOPA's mandate effectively and efficiently** – EIOPA plans to build new structures to meet any new requirements resulting from the review of the ESAs, PEPP or Brexit, whilst continuing to deliver added value in the areas of conduct of business supervision, quality and consistent prudential supervision and financial stability. EIOPA will also seek improvements in the functioning and efficiency of its processes.

EIOPA's revised Single Programming Document for 2019-2021 can be accessed here.

**(v) EIOPA publishes updated Risk Dashboard based on the third quarter 2018 data**

On 31 January 2019, EIOPA published its risk dashboard for the third quarter of 2018. The risk dashboard gives an overview of risks faced by the insurance industry on a pan-European basis. The results show that the risk exposure of the European Union insurance sector remains broadly stable. Macro risks continue at medium level given the ongoing reduction in the accommodative stance of monetary policy. Despite this, EIOPA highlights that further downward revisions of economic growth forecasts remain a concern going forward.

During the quarter, interlinkages and imbalances risks increased due to an increase in intrasectoral exposures that can be explained by corporate actions and Merger and Acquisition activities by some insurance groups. Insurance risks also increased following the impact on (re)insurers' loss ratios of natural catastrophes in the third quarter, but these risks remained at low level. Market perceptions were stable at medium level, with insurance stocks outperforming the market in spite of a general deterioration in equity market performance. Insurers' price-to-earnings ratios went slightly down, while Credit Default Swaps spreads slightly increased.

The updated risk dashboard can be found here.

**(vi) EIOPA publishes recommendations for the insurance sector in light of the withdrawal of the UK from the EU**

On 19 February 2019, EIOPA published a list of recommendations for the insurance sector in light of the withdrawal of the UK from the EU (the "**Recommendations**"). The general objective of the Recommendations is to foster convergence and consistent supervisory approaches in the treatment of UK insurance undertakings and distributors across Member States by setting out guidance on the application of the existing legal framework considering arrangements between EU and non-EU counterparties.

The Recommendations are addressed to supervisory authorities and include the following:

- **General Objective** – Competent authorities should aim to minimise the detriment to policyholders and beneficiaries in their treatment of cross-border business of UK insurance undertakings;

- **Orderly run-off** – Competent authorities should prevent UK undertakings from concluding new insurance contracts or from establishing, renewing, extending, increasing or resuming insurance cover under the existing insurance contracts in their jurisdiction as long as they are not authorised for such insurance activities under EU law;

- **Authorisation of third-country branches** – In accordance with Article 162 of the Solvency II Directive, UK insurance undertakings may seek authorisation to carry out cross-border business through a branch in a Member State and thus ensure that they

can service cross-border business in that Member State. In assessing whether the legal conditions for authorisation are fulfilled, competent authorities should apply the principle of proportionality and take into account that the UK insurance undertaking was subject to Solvency II before the UK's withdrawal;

- **Portfolio transfers** – Competent authorities should allow the finalisation of portfolio transfers from UK insurance undertakings to EU insurance undertakings, provided that it was initiated before the withdrawal date;

- **Change in the habitual residence or establishment of the policyholder** – Where a policyholder established or residing in the UK concluded a life insurance contract with a UK insurance undertaking and afterwards changed its residence or place of establishment to an EU Member State, competent authorities should take into account in the supervisory review that the insurance contract was concluded in the UK and the UK insurance undertaking did not provide cross-border services for the EU for this contract;

- **Communication to policyholders and beneficiaries** – Competent authorities should inform UK insurance undertakings with cross-border business in their Member State of the requirement to disclose to the policyholders and beneficiaries of those contracts that are affected by the consequences of the UK's withdrawal, the consequences for the rights and obligations of policyholders and beneficiaries regarding those contracts;

- **Distribution activities** – Competent authorities should ensure that UK intermediaries and entities which intend to continue or to commence distribution activities to EU policyholders and for EU risks after the UK's withdrawal are established and registered in the EU in line with the relevant provisions of the IDD.

EIOPA's Recommendations can be accessed here.

**(vii) EIOPA publishes framework for assessing conduct risk through the product lifecycle**

On 20 February 2019, EIOPA published a framework for assessing conduct risk through the product lifecycle (the "**Framework**"). The objective of the Framework is to identify drivers of conduct risk and the implications of these in the emergence of consumer detriment by providing and aid for taking stock of the issues faced by consumers and to provide input to the types of risks EIOPA and NCAs should focus on.

The Framework assesses product risk throughout the entire product lifecycle, from the point before the contract is entered into to the point at which all of the obligations under the contract have been fulfilled. The Framework covers the following risks:

- **Business model and management risks:** Risks arising from how undertakings structure, drive and manage their business and from relationships with other entities in the value-chain;

- **Manufacturing risks:** Risks arising from how products are manufactured by insurance undertakings prior to being marketed and how they are targeted to customers;

- **Delivery risks:** Risks arising from how products are brought to the market and from the interaction between customers and insurance undertakings or intermediaries at the point of sale; and

- **Product Management risks:** Risks arising after the sale of the insurance product relating to how products are managed and how insurance undertakings or intermediaries interact with and service customers until all obligations under the contract have ceased.

EIOPA notes that the Framework should support NCAs in the identification of conduct and consumer protection risks sufficiently early and sufficiently clearly for effective conduct supervision. Consequently, it should further enhance market monitoring and conduct risk assessment and drive forward practical supervisory convergence.

EIOPA's Framework can be accessed here.

**(viii) EIOPA and its Members agree on No-deal Brexit Memoranda of Understanding with the Bank of England and the Financial Conduct Authority**

On 5 March 2019, EIOPA published a press release announcing the agreement of Memoranda of Understanding ("**MoUs**") between EIOPA, the NCAs within the EEA and the Bank of England in its capacity as the Prudential Regulation Authority ("**PRA**") and the Financial Conduct Authority in the event of a no-deal Brexit.

The MoUs aim to maintain sound prudential and conduct supervision over (re)insurance undertakings and groups based either in the UK or in an EEA member state, with cross-border business activities in the EEA or the UK respectively and to maintain financial stability of the financial markets within the EEA and the UK. The following MoUs were agreed:

- A Multilateral MoU on supervisory cooperation, enforcement and information exchange between the EEA NCAs and the UK Authorities;

- A Bilateral MoU between EIOPA and the UK Authorities on information exchange and mutual assistance in the field of insurance regulation and supervision.

The MoUs provide for the reciprocal flow of appropriate and reliable information to ensure risk-based and effective supervision of cross-border (re)insurance establishments incorporated either in the UK or in an EEA member state, cross-border groups and special purpose vehicles established in the UK or in an EEA member state.

EIOPA's press release can be accessed here.

### (ix) EIOPA publishes report on best practices in an InsurTech context

On 27 March 2019, EIOPA published a report on best practices on licencing requirements, peer-to-peer ("**P2P**") insurance and the principle of proportionality in an InsurTech context (the "**Report**"). The aim of the Report is to provide an overview of the work EIOPA has done in mapping current authorising and licencing requirements and assessing how the principle of proportionality is being applied in practice in the area of financial innovation. The Report also highlights emerging best practices for NCAs.

In the Report, EIOPA highlights the constantly evolving nature of InsurTech and notes that developments have to be monitored closely. The Report recommends that NCAs engage further with one another and exchange experience with each other and with EIOPA considering the rise of new technology driven business models (e.g. P2P), the use of new technologies (e.g. artificial intelligence and Distributed Ledger Technology) and the licencing and on-going supervision of highly digitised insurers in order to avoid supervisory arbitrage.

EIOPA plans to work with NCAs and InsurTech firms in the promotion of sound financial innovation in the European insurance and pensions market in order to facilitate this process. In particular, the Report notes that this could include:

- Exploring options to develop a European insurance innovation hub for the benefit of NCAs and InsurTech firms;
- The assessment of InsurTech-related data which should be collected systematically to support NCAs and EIOPA work on InsurTech;
- Understanding how risks shift given new technologies and business models, enabling further work on understanding different business models, including InsurTech's impact on traditional business models on insurance companies; and
- Other topics worth of further attention and regular monitoring are those of outsourcing, developments in licencing InsurTech companies and potential growth of the P2P insurance market.

EIOPA's Report can be accessed here.

### (x) EIOPA publishes report on outsourcing to cloud service providers

On 27 March 2019, EIOPA published its report titled 'Outsourcing to the Cloud: EIOPA's contribution to the EU Commission Fintech Action Plan' (the "**Report**"). The Report provides an overview of cloud computing and related market practices. It also lists a number of key takeaways with regard to EIOPA's analysis of cloud computing, including the following:

- Cloud computing is mostly used extensively by newcomers, by a niche of the market and by larger undertakings mostly for non-critical functions. However, as part of their

wider digital transformation strategies many European large (re)insurers are expanding their use of the cloud;

- The current Regulatory framework of Solvency II appears to be sound;

- Cloud computing is a fast developing service so in order for its regulation to be efficient it should be principle-based rather than attempting at regulating all (re)insurance-related aspects of it;

- Cloud computing services used by (re)insurance undertakings are aligned to the one used by banking sector. The risks arising from the usage of cloud computing by (re)insurance undertakings appear to be, generally, aligned to the risks borne by the banking players with few minor (re)insurance specificities;

- Both banking and (re)insurance regulations discipline cloud computing by their current outsourcing provisions. Where these institutions are required to classify whether the cloud services they receive are "critical or important". The most common approach is to classify cloud computing on a case-by-case approach – similarly to the other services – on the basis of the service / process / activity / data outsourced;

- The impact of cloud computing on the (re)insurance market is assessed differently among jurisdictions.

- From the gap analysis carried out, the EBA Recommendations are more specific on the subject (e.g. the specific requirements to build a register of all the cloud service providers) and, being built on shared common principles, can be applied to the wide Solvency II regulations on outsourcing; and

- To provide legal transparency to the market participants and to avoid potential regulatory arbitrage, EIOPA should issue guidance on cloud outsourcing aligned with the EBA Recommendations and, where applicable, the EBA Guidelines on outsourcing arrangements with minor amendments.

Having regard to the takeaways above and the discussions with other ESAs, EIOPA will develop its own guidelines on cloud outsourcing. EIOPA aims to draft these during the first half of 2019 for consultations and aims to have them finalised by the end of the year.

EIOPA's Report can be accessed here.

**(xi) EIOPA publishes discussion paper on systemic risk and macro-prudential policy in insurance**

On 29 March 2019, EIOPA published a discussion paper on systemic risk and macro-prudential policy in insurance. The discussion paper is based on three papers previously published by EIOPA which aimed at contributing to the debate on systemic risk and macroprudential policy in insurance. EIOPA notes that this work should now be turned into a

specific policy proposal for additional macroprudential tools or measures where relevant and possible as part of the Solvency II Review.

The discussion paper identifies and primarily focuses on the principles of a number of potential macroprudential tools and measures to enhance the current framework, including the following:

- Leverage ratio;
- Enhanced monitoring against market-wide under-reserving;
- Capital surcharge for systemic risk;
- Additional reporting on liquidity risk and liquidity risk ratios;
- Enhancement of the own-risk and solvency assessment;
- Enhancement of the prudent person principle;
- Request of recovery plans;
- Development of resolution plans;
- Request of systemic risk management plans; and
- Request of liquidity risk management plans.

The closing date for comments on the discussion paper is 30 April 2019.

EIOPA's discussion paper can be accessed here.

**(xii) EIOPA launches 2019 Occupational Stress Test Exercise**

On 29 March 2019, EIOPA published its specifications for the 2019 stress test for Institutions for Occupational Retirement Provision ("**IORPs**"). The IORP stress test constitutes a European-wide exercise, including all EEA countries with material IORP sectors and covering all types of IORPs. The stress test consists of a part for IORPs providing Defined Benefit or hybrid schemes and a part for IORPs providing Defined Contribution schemes. The 2019 IORP stress test has three main objectives:

- To assess the vulnerability of IORPs and plan members to adverse scenario(s);
- To analyse the second-round effects on the real economy and financial stability, which involves:

- A quantitative assessment of the impact on sponsor's projected additional contributions and benefit reductions over time, for which a relevant 'cash flow analysis' will be crucial;

- The exploration of options for a qualitative/quantitative assessment of the implications of specific activities and common behaviours; and

- To investigate the assessment of IORPs' exposure towards ESG risks.

For the 2019 exercise, EIOPA decided to add an analytical component to focus on pension funds' current exposures and risk management practices regarding ESG factors, which will provide a relevant starting point for ESG-related financial stability assessments of the European financial sector.

The Stress test exercise launched on 2 April 2019 and participating IORPs will have to complete the exercise and submit the results to the relevant NSA by 19 June 2019. The results and conclusions of the stress test are expected to be published by the end of 2019.

The 2019 IORP stress test specifications can be accessed here and a related press release is available here.

## Insurance Europe

### (i) Insurance Europe publishes overview of the supervisory benefits of using internal models

On 9 January 2019, Insurance Europe's Reinsurance Advisory Board published an overview of the benefits of insurers' use of internal models, titled "*Internal models: a reinsurance perspective*". The publication addresses the supervisory criticisms that have been levelled against internal models and explains why, for reinsurers, internal models remain the most accurate measure of risk, the best driver of good risk management and the most appropriate basis for comparing risks between companies.

The publication lists the following benefits of using internal models for prudential purposes:

- **Holistic understanding of risks:** Internal models represent the most practical way in which the diversification effects and risk concentrations within a globally diverse portfolio can be appropriately captured. In contrast with standard formulas that tend to only capture the co-movement of losses through correlation, internal models can also deal with causal relationships between risks in an appropriate manner;

- **Incentivising good risk management:** The internal model calibration process forces the (re)insurer to individually assess all risks and to establish proper procedures that guarantee that the calibration processes are transparent and well-documented. As a result, the (re)insurer establishes a unified framework to measure and monitor risks;

- **Supporting financial stability:** Internal models are a more sophisticated means by which to understand and quantify risk aggregations and have contributed to society's knowledge and understanding of risks. By ensuring that capital requirements reflect risks, internal models also enable reinsurers to continue to play an important stabilising role for the financial industry and the economy; and

- **Enhancing supervisory scrutiny and risk dialogue:** The whole process of interaction and discussion with supervisors concerning the development of internal models has brought substantial benefits to internal risk assessment, management and governance procedures and has, in some cases, led to improvements in the internal models.

The publication can be accessed here and a related press release is available here.

**(ii) Insurance Europe publishes Q&As on the use of big data in insurance**

On 23 January 2019, Insurance Europe published a Q&A document on the use of big data in insurance. The Q&A explains the importance of data in the insurance business model and provides guidance in respect of the following frequently asked questions relating to the use of big data in insurance:

- What is big data and what role does data mining have in insurance?

- What are the benefits of using big data in insurance for consumers?

- What is the impact of big data on the insurance business model and risk sharing?

- Is the use of big data in insurance regulated?

- What is the role played by insurers' telematic devices?

- What is the way forward for big data?

The document concludes with the insurance industry's view on how policymakers and supervisors can support innovation in this area for the benefit of consumers and insurers.

The document can be accessed in full here.

## European Parliament

**(i) European Parliament adopts proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims**

On 20 February 2019, the Council of the European Union published an information note outlining the European Parliament's first-reading position concerning the proposed Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (the "**Proposed Regulation**"). The European Parliament adopted the Proposed Regulation by means of a legislative resolution on 13 February 2019.

The Proposed Regulation aims to increase cross-border transactions in claims by providing legal certainty through the adoption of uniform conflict of law rules at Union level and thereby facilitate access to finance. It provides that, as a general rule, the law of the country where the assignor has its habitual residence will govern the third-party effects of assignments of claims, whilst also setting down exceptions to this rule, where the general rule would not be suitable and also a choice of law possibility for securitisations aimed at expanding the securitisation market.

The main amendments which were adopted by the European Parliament relate to the scope of the Proposed Regulation (Article 1), definitions of 'cash' and 'third-party effects' (Article 2), applicable law (Article 4), the application of overriding mandatory provisions of the laws of the Member State (Article 6) and the application of the Proposed Regulation in the case of competing claims based on assignments (Article 14).

The Council's information note can be accessed here.

## Council of the European Union

**(i) Council of EU invites COREPER to approve final compromise texts on the reform of the European System of Financial Supervision**

On 29 March 2019, the Council of the European Union published an "I" item note in which it invited COREPER to approve the final compromise texts of the European Commission's proposed legislative reforms to the European System of Financial Supervision (the "**Proposed Regulation**"). The Proposed Regulation aims to put in place an improved supervisory framework for European financial institutions through the introduction of the following measures:

- By altering the existing system for supervisory convergence in order to make the process more efficient, coherent and transparent. The Proposed Regulation builds on existing tools, such as peer reviews, guidelines and Q&As while introducing new ones, for example the establishment of coordination groups at EU level;

- By reviewing the ESAs' governance structure. The Proposed Regulation maintains the principle that decisions have to be taken by the Board of Supervisors and ensures a key role for the national competent authorities within the ESAs governance structure;

- By reviewing the powers of each of the three ESAs. The Proposed Regulation intends to give ESMA direct supervision powers over third country critical benchmark administrators, as well as in respect to data reporting service providers; and

- By strengthening the role and powers of the EBA as regards anti-money laundering supervision. In particular, the EBA is given the tasks of collecting information from national competent authorities, enhancing the quality of supervision through the development of common standards, performing risk assessments and facilitating cooperation with non-EU countries on cross-border cases.

The 'I' item note can be accessed here and the final compromise text in respect of the Proposed Regulation is available here.

## Central Bank of Ireland

### (i) Central Bank (National Claims Information Database) Act 2018

On 19 January 2019, the Central Bank (National Claims Information Database) Act 2018 (Commencement) Order 2019 was introduced (the "**Order**"). The Order appointed 28 January 2019 as the day on which the Central Bank (National Claims Information Database) Act 2018 (the "**Act**") came into operation.

The purpose of the Act is to provide the Central Bank with the additional function of establishing and administering the National Claims Information Database. This will involve the collection and study of data from insurance undertakings on the income and expenditure associated with the carrying on of business of the classes of non-life insurance which the Central Bank specifies as relevant having regard to the policy set down in the Act.

The Act also requires the Central Bank to produce a report based on its findings at least once a year and, subject to certain restrictions, to share information with requesting persons.

A copy of the Act can be accessed here.

### (ii) Central Bank publishes Consultation Paper on a New Levy Calculation Methodology for Insurers

On 23 January 2019, the Central Bank of Ireland (the "**Central Bank**") published a Consultation Paper on a New Levy Calculation Methodology for Insurers (the "**Consultation Paper**"). The aim of the Consultation Paper is to elicit views on a revised methodology for calculating the industry-funding levy for all insurance entities supervised by the Central Bank.

The Central Bank's proposed new levy calculation methodology is designed to eliminate the threshold effect inherent in the existing approach and to increase the transparency of the methodology behind the levies payable, while maintaining the principle that larger or riskier firms should pay higher levies than smaller or less risky firms. The new methodology proposes to place greater emphasis on the individual or firm-specific characteristics and impact scores, rather than on the rating category assigned under the current approach.

The Central Bank's proposed methodology distinguishes between insurers with a head office in Ireland and EEA insurers passporting into Ireland on either a branch or a freedom of services basis for levy purposes.

The public consultation process closed on 29 March 2019 and the Consultation Paper can be accessed here.

**(iii) Central Bank Act 1942 (Section 32D) (Additional and Supplementary Supervisory Levies - Regulated Entities) Regulations 2019 [S.I. No. 17 of 2019]**

On 29 January 2019, the Central Bank Act 1942 (Section 32D) (Additional and Supplementary Supervisory Levies - Regulated Entities) Regulations 2019 [S.I. No. 17 of 2019] were signed into law (the "**Regulations**"). The additional supervisory levy is a once off fee that is to be payable by fund service providers, MiFID firms, investment funds and sub-funds following authorisation / approval by the Central Bank.

In addition, a regulated entity may be liable to pay a separate additional supervisory supplementary levy ("**ASSL**") in addition to the additional supervisory levy. The ASSL will be payable for the purposes of providing the Bank with sufficient funds to enable it to consider matters of particular complexity in relation to an authorisation, or extension of existing authorisation or of a significant expansion in activities of a regulated entity.

The Regulations can be accessed here and for further information on the Additional Supervisory Levy is provided on the Central Bank's website and can be found here.

## Brexit

**(i) ESMA and European Union securities regulators agree no-deal Brexit MoUs with the FCA**

On 1 February 2019, ESMA and European securities regulators have agreed MoUs with the FCA. These form part of the preparations should the United Kingdom leave the European Union without a withdrawal agreement and will only take effect in the event of a no-deal Brexit scenario. The MoUs are:

- Between ESMA and the FCA concerning the exchange of information in relation to the supervision of CRAs and TRs; and

- A multilateral MoU ("**MMoU**") with the European Union and EEA NCAs and the FCA covering supervisory cooperation, enforcement and information exchange.

On 1 February 2019, EFAMA issued a statement welcoming the announcement with a view to have a framework for supervisory cooperation in place between ESMA, the EU 27 NCAs and the FCA, in the event of a Brexit.

A copy of ESMAs press release can be found here and EFAMAs statement can be accessed here.

**(ii) Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019**

On 20 February 2019, the 'Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019' (the "**Bill**") was presented to Dáil Éireann.

The Bill, an omnibus bill is composed of 15 parts and 91 sections which has been developed by nine ministers and is a contingency plan in the event that the United Kingdom's exit from the European Union results in a 'no deal' scenario. If a managed withdrawal arrangement is brokered between the European Union and the United Kingdom in advance of 11pm on 29 March 2019, then the Bill will not become operational.

More than half of the Bill's provisions seek to address matters of taxation and set out a number of amendments to the primary Income Tax, Capital Tax, Corporation Tax and Stamp Duty acts. These amendments seek to ensure continuity in relation to current access to certain taxation measures such as reliefs and allowances.

Amongst other measures, the Bill proposes to make amendments necessary to support the implementation of the European Commission's equivalence decision under the Central Securities Depositories ("**CSD**") Regulation and to extend the protections contained in the Settlement Finality Directive to Irish participants of United Kingdom systems for temporary period. In relation to insurance and reinsurance, there are provisions in the Bill to ensure contract continuity for existing insurance policies. A temporary run-off regime will enable insurance undertakings and intermediaries to service existing contracts for three years from the date of withdrawal of the United Kingdom.

On 13 March 2019, the Bill was passed by both Houses of the Oireachtas and signed into law by the President on 17 March 2019.

A copy of the Act can be accessed here.

**(iii) FCA and PRA extend notification window for temporary permissions regime to 11 April 2019**

On 25 March 2019, the FCA updated its webpage on the temporary permissions regime ("**TPR**") to announce an extension to the notification window for firms and funds wishing to enter into the TPR until the end of 11 April 2019. The extension to the original 28 March 2019 deadline for firms and funds who wish to enter the TPR regime comes in light of the European Council and United Kingdom Government's agreement to a short extension of the Article 50 process.

On 26 March 2019, the PRA also updated its webpage on the TPR to make a similar announcement.

The FCA updated its TPR webpage with supplementary directions to provide guidance on how a firm can withdraw its notification and the PRA published an equivalent supplementary direction on withdrawals of notifications before exit day.

The updated FCA webpage is available here.

**(iv) Central Bank issues updated Brexit FAQ for consumers**

During the period 1 January 2019 to 31 March 2019, the Central Bank issued updated Brexit related FAQ document providing general information to consumers on the potential implications of Brexit. The Central Bank's FAQ for consumers discusses a variety of topics including:

- The Central Bank's work in preparation for Brexit;
- The impact of Brexit on financial services firms providing services to Irish customers;
- The Central Bank's proposed approach to issues concerning Irish consumers who have insurance policies with UK insurers or brokers;
- The effects of Brexit on Irish banks; and
- The effects of Brexit on the Irish economy.

A copy of the Central Bank's updated FAQ for consumers can be found here.

**(v) Central Bank issues updated Brexit FAQ for financial services firms**

During the period 1 January 2019 to 31 March 2019, the Central Bank issued an updated Brexit related FAQ document providing general information to financial services firms considering relocating their operations from the UK to Ireland. The Central Bank's FAQ for financial services firms addresses a number of topics including:

- The Central Bank's approach to authorisation, its timelines and requirements;
- The impact of Brexit on existing Irish authorised firms;
- The Central Bank's proposed approach to issues concerning a firm's substance in Ireland; and
- The Central Bank's approach to outsourcing to the UK firms.

It also deals with other questions such as whether Ireland has a similar regime to the UK's Senior Managers Regime and Certification Regimes. In addition, the document addresses the Central Bank's views on centralised risk management in the UK or elsewhere and whether a firm's key employees can hold more than one position before the entity goes live.

The FAQ provides links to the Central Bank's relevant web-site application documentation as well as explanatory material on the authorisation processes for the different regulatory regimes.

A copy of the Central Bank's updated FAQ for financial services firms can be found here.

**Dillon Eustace**
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