Insurance Quarterly Legal and Regulatory Update

Period covered:
1 October 2018 – 31 December 2018
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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 September 2018 on 5 October 2018;
- With reference to the end of October 2018 on 8 November 2018; and
- With reference to the end of November 2018 on 6 December 2018.

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 October 2018 to 31 December 2018, EIOPA published technical information in relation to risk free interest rate term structures, as follows:

- With reference to the end of September 2018 on 5 October 2018;
- With reference to the end of October 2018 on 8 November 2018, republished on 19 November 2018; and
- With reference to the end of November 2018 on 6 December 2018.

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) ESAs launch Consultation on Draft implementing technical standards amending Implementing Regulation (EU) 2016/1800 on the allocation of credit assessments of external credit assessment institutions to an objective scale of credit quality steps

In October 2018, the European Supervisory Authorities (“ESAs”) published a ‘Consultation Paper on Draft implementing technical standards amending Implementing Regulation (EU) 2016/1800 on the allocation of credit assessments of external credit assessment institutions to an objective scale of credit quality steps in accordance with the Solvency II Directive’ (the “Consultation”) and invited comments on the Consultation until 31 December 2018.

The Solvency II Delegated Regulation permits (re)insurance undertakings to use an external credit assessment for the calculation of the Solvency Capital Requirement (“SCR”) in accordance with the standard formula only where it has been issued by an External Credit Assessment Institution (“ECAI”) or endorsed by an ECAI in accordance with the Credit Rating Agencies (“CRA”) Regulation (1060/2009/EU). Mappings should be specified for all ECAIs.

The Consultation proposes that the adequacy of the mappings that are specified for all ECAIs should be reviewed. ECAIs are CRAs which are Credit Rating Agencies registered or certified in accordance with the CRA Regulation or a central bank issuing credit ratings that are exempt from the application of CRA Regulation.

The performance of the mappings has been monitored based on the additional quantitative information collected after the Implementing Regulation entered into force and on the qualitative developments registered by the ECAIs. The current mapping review exercise only considered those credit assessments officially published up to 1 December 2017 and as a result of this monitoring exercise, the Implementing Regulation needs to be amended to reflect developments on credit rating scales and the allocation of credit rating types. Individual amended mapping reports are also published on the EIOPA website.

The Consultation Paper can be accessed here.

(iv) EIOPA Insurance and Reinsurance Stakeholder Group publishes informal advice on Solvency II Guidelines on System of Governance

On 9 October 2018, EIOPA’s Insurance and Reinsurance Stakeholder Group (“IRSG”) provided informal advice to EIOPA on the Guidelines on System of Governance (the “Guidelines”). EIOPA posed the following two questions to the IRSG:

- What is your view concerning a review of EIOPA Guidelines on system of governance?
- Please identify those guidelines to be amended/deleted or new guidelines that could be added and provide short rationale for the amendment/deletion/addition.
The IRSG considers that a review of all EIOPA guidelines would be welcome and that this should begin with a thorough assessment of existing guidelines and the extent to which they have brought added value to the regulatory and supervisory landscape. The IRSG also noted that a review should ensure that existing guidelines do not conflict with each other.

The informal advice contains the IRSG’s views on a review, some points for consideration if undertaking a review and also noted that any change in the Guidelines must be consistent with the Solvency II Delegated Regulation. IRSG members provided initial feedback on specific provisions of the Guidelines, which was intended to provide EIOPA with a sense of some topics which may require more in-depth analysis in the future, without representing an exhaustive set of views.

The IRSG’s informal advice on the Solvency II Guidelines on System of Governance can be accessed here.

(v) European Commission publishes draft Delegated Regulation amending Solvency II Delegated Regulation for consultation purposes

On 9 November 2018, the European Commission published a draft Commission Delegated Regulation amending the Solvency II Delegated Regulation (the “Draft Amending Regulation”). The Draft Amending Regulation proposes the following amendments:

- To introduce prudential criteria that allow reducing the capital charges in the standard formula for insurers’ unrated debt and unlisted equity investments;
- To introduce further simplifications to burdensome or costly elements of the capital requirement standard formula, including inter alia a carve-out from the mandatory application of the look-through in investment funds and exceptions to the use of external ratings, to enhance proportionality in the framework;
- To further align the rules applicable to the Solvency II capital requirement standard with the rules applicable in the banking sector;
- To update a number of parameters, including risk calibrations for non-life premium and reserve risk and health and non-life catastrophe risk;
- To improve the risk sensitivity of the capital requirement standard formula to further refine the recognition of risk mitigation techniques, the group solvency calculation and the volume measure for non-life premium risk;
- To revise the methodologies, principles and techniques for laying down technical information on the relevant risk-free interest rate term structure; and
- To introduce further principles relating to the recognition of the capacity of deferred taxes to absorb present losses to ensure a level playing field in the European Union and foster supervisory convergence between national jurisdictions.
The Draft Amending Regulation can be accessed here.

(vi) Central Bank publishes Statistics National Specific Template 13 Notes on Compilation

On 12 November 2018, the Central Bank of Ireland (the “Central Bank”) published its “Statistics National Specific Template 13 (“NST.13”) Notes on Compilation”. The Central Bank collects NST.13 in order to reconcile between differences in the reporting of statistical and supervisory data by giving a head office/non-resident branch split.

Insurance corporations must complete the template on an individual basis. The reporting population for the template is any insurance corporation with their head office/subsidiary resident in Ireland, any non-Irish resident branch with their head office resident in Ireland, and/or Irish resident branch with their head office outside the EEA.

The template should be completed on a quarterly basis and the relevant reporting dates can be accessed here.

The Central Bank’s notes on compilation can be found here.

(vii) Commission Implementing Regulation laying down technical information for the calculation of technical provisions and basic own funds for reporting for Q4 in accordance with Solvency II published in OJ

On 13 November 2018, Commission implementing Regulation (EU) 2018/1699 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 30 September 2018 until 30 December 2018 in accordance with the Solvency II Directive (the “Implementing Regulation”) was published in the Official Journal of the European Union.

The Commission adopted the Implementing Regulation on 9 November 2018 and it applies from 30 September 2018.

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 Implementing Regulation can be accessed here.
Central Bank publishes Policy Notice on ring fenced funds

On 18 November 2018, the Central Bank published a policy notice on ring fenced funds ("RFF") (the “Policy Notice”). The Policy Notice details the Central Bank’s policy position and provides guidance in respect of the assessment of arrangements which may be subject to an RFF classification under Solvency II. The Policy Notice replaces Policy Notice – November 2015 “Solvency II – Ring Fenced Funds”.

The Policy Notice provides a non-exhaustive list of factors which should be considered when making an assessment as to whether an arrangement may be subject to an RFF classification, including:

- The particular nature of the arrangement;
- The specific wording, structure and all relevant contractual terms of the arrangement;
- Whether there are restrictions on assets in relation to certain liabilities on a going concern basis;
- Whether certain policyholders have distinct rights relative to other business written by the undertaking;
- The nature, terms and degree of any restrictions on assets;
- Whether there are restrictions on the use of assets, and the return on such assets, within one fund to meet liabilities or losses arising outside that fund;
- Whether own funds are, or could be, restricted;
- Whether surpluses are freely available to the undertaking and can be freely extracted as they arise and in a timely manner, particularly in stressed circumstances;
- Whether there is profit sharing within the RFF whereby policyholders receive a minimum proportion of profits generated in the fund;
- Whether there are any operational or complex issues involved in the accessing or unwinding of assets;
- Whether the arrangement displays the characteristics of a separate undertaking;
- Whether ownership of the assets remains with the undertaking;
- The frequency of the recalculation of the exposure and rebalancing of any collateral; and
- Whether funds are subject to restrictions or arrangements specified in national law.
The Policy Notice states that it is the responsibility of each undertaking to assess all relevant arrangements and determine if it should be classified as an RFF.

The Policy Notice can be accessed here.

(ix) **Central Bank publishes Policy Notice on discretions and options on submission of information to the Central Bank**

On 21 November 2018, the Central Bank published a Policy Notice titled “Discretions and Options on Submission of Information to the Central Bank of Ireland - 2018” (the “Policy Notice”). The Policy Notice provides the following details of the Central Bank’s requirements in respect of the implementation of discretions and options on the submission of information:

- Section 2 explains the Central Bank’s policy in respect of the exercise of a discretion related to exemptions from Solvency II quarterly regulatory reporting;
- Section 3 outlines the Central Bank’s policy in respect of the exercise of a discretion related to the currency in which insurance and reinsurance undertakings and groups, must prepare and submit their Solvency II regulatory reports;
- Section 4 outlines the Central Bank's policy in respect of the exercise of a discretion related to the exchange rate that must be used when converting assets and liabilities into the reporting currency for the purposes of Solvency II regulatory reporting;
- Section 5 outlines the Central Bank's policy on exemptions from Solvency II annual regulatory item-by-item reporting;
- Section 6 outlines the Central Bank’s policy on the lines of business undertakings are required to report in template S.21.03.01;
- Section 7 outlines the Central Bank’s policy on the definition of number of claims reported in template S.20.01.01;
- Section 8 outlines the Central Bank’s policy on the reporting by currency in templates S.16.01.01 and S.19.01.01;
- Section 9 outlines the Central Bank’s policy on accident or underwriting year reporting in templates S.16.01.01, S.19.01.01, S.19.01.21, S.20.01.01, S.21.01.01 and S.29.03.01;
- Section 10 outlines the Central Bank’s policy on the brackets that must be used when reporting loss distribution information by claims incurred in template S.21.01.01; and
- Section 11 outlines the Central Bank’s policy on the brackets that must be used when reporting information on underwriting risks by sum insured in template S.21.03.01.
The Policy Notice replaces the policy notices of December 2016 and May 2017 on “Discretions and options on submission of information to the Central Bank under Solvency II” and can be accessed in full here.

(x) Central Bank publishes 2018 guidance on major changes to internal models

On 21 November 2018, the Central Bank published its guidance on major changes to internal models for 2018 (the “Guidance”). The Guidance outlines the Central Bank’s requirements in respect of undertakings applying for approval for a major change to their approved internal models.

When notice is being given of a model change application, the undertaking must submit the following to the Central Bank:

- A summary of their planned model change(s);
- The reasons for the change(s);
- The potential impact (both qualitative and quantitative);
- The impact that the approval would have, if granted, on the accumulation of minor changes; and
- The intended timescales for implementation.

Model change applications should address previous Central Bank feedback, previous data audits, limitations of the model, improvements driven by ongoing use of the model, validation findings, and/or findings arising from the Central Bank’s supervisory review process and articulate how the undertaking has identified and prioritised the model change in the application as opposed to other model improvements in their model development plan.

The application can comprise several individual major changes, but no more than one model change application should be permitted per year. Once an application is submitted, the undertaking should continue to use its existing approved internal model when determining its Solvency Capital Requirement (“SCR”) for formal Solvency II reporting purposes, but can include minor changes implemented within the existing approved internal model provided these fall below the undertaking’s threshold in respect of accumulating minor changes.

A copy of the Central Bank’s Guidance can be accessed here.
(xi) Reporting and disclosure developments under Solvency II

On 26 November 2018, the following Commission Implementing Regulations were published in the Official Journal of the European Union:

- Commission Implementing Regulation (EU) 2018/1843 of 23 November 2018 amending Implementing Regulation (EU) 2015/2452 as regards the scope of application of the template for disclosing premiums, claims and expenses by country; and


The Implementing Regulations entered into force on 16 December 2018.

For further information, the Implementing Regulations can be accessed here and here.

On 19 December 2018, EIOPA published a call for input on the Solvency II reporting and disclosure review 2020, with the aim of assessing if the requirements remain fit-for-purpose and if they permit a risk-based and proportionate approach.

The call for input seeks the views of stakeholders in respect of the following areas:

- Supervisory Reporting, with questions put to stakeholders in respect of the consistency of the SII reporting framework with other EU supervisory reporting frameworks, narrative reporting, internal models, the proportionality principle, reporting processes and specific templates; and

- Public Disclosure, with questions put to stakeholders in respect of the aim and structure of the solvency and financial condition report ("SFCR"), the advantages/disadvantages of the external audit requirements of the SFCR and the language and means of disclosure. It invites suggestions for other specific improvements.

EIOPA’s call for input can be accessed here.
Central Bank publishes Feedback Statement in respect of Consultation Paper 122 on Changes to the Domestic Actuarial Regime and Related Governance Requirements under Solvency II

On 27 November 2018, the Central Bank published its Feedback Statement in respect of Consultation Paper 122 ("CP122") titled “Changes to the Domestic Actuarial Regime and Related Governance Requirements under Solvency II” (the “Feedback Statement”). CP122 proposes amendments to the Domestic Actuarial Regime relating to:

- The governance of With-Profits funds – The Central Bank proposes to introduce new requirements developed in order to ensure continued protection of fund members and improved risk management of With-Profits funds in preparation for the expected increase in volume of the business in Ireland;

- The format of the Actuarial Opinion on the Technical Provisions ("AOTP") as outlined in the Domestic Actuarial Regime – The proposed amendments to the AOTP aim to clarify the level of reliance the Head of Actuarial Function is placing on others and whether there are material limitations within the calculation of the Technical Provisions and any recommendations for improvements.

The Feedback Statement provides a summary of the responses received to CP122 together with comments from the Central Bank providing clarification on issues raised in the responses. The Domestic Actuarial Regime has been updated to incorporate the amendments outlined in the Feedback Statement and the updated Domestic Actuarial Regime is detailed in Annex 1 of the Feedback Statement.

The updated Domestic Actuarial Regime will be imposed upon (re)insurance undertakings as a condition of authorisation pursuant to the European Union (Insurance and Reinsurance) Regulations 2015.

A copy of the Feedback Statement can be accessed here.

Central Bank replaces Solvency II Information Notes 1, 3 and 4 with new guidance

On 28 November 2018, the Central Bank published the following guidance:

- Guidance on Applications for Approval of Ancillary Own Funds, which can be accessed here;

- Guidance on Applications for Approval of Basic Own Funds & Capital Contributions, which can be accessed here;

- Guidance on Applications for Approval of the Matching Adjustment, which can be accessed here;
Guidance on Applications for Approval of the Volatility Adjustment, which can be accessed here;

Guidance on Applications for Approval of Transitional Risk Free Interest Rates, which can be accessed here;

Guidance on Applications for Approval of Transitional Technical Provisions, which can be accessed here; and

Guidance on Applications for Approval of Undertaking Specific Parameters, which can be accessed here.

The above guidance notes collectively replace “Solvency II Information Note 1 – Applications for approval of certain items specified in Article 308a of the Solvency II Directive”, “Solvency II Information Note 3 – Applications for approval of certain items specified in Article 308a of the Solvency II Directive”, and “Solvency II Information Note 4 – Applications for approval of certain items specified in Article 308a of the Solvency II Directive – Undertaking Specific Parameters”.

(xiv) Correspondence on the 2018 review of Solvency II

On 29 November 2018, the European Parliament’s Economic and Monetary Affairs Committee (the “Committee”) published correspondence with the European Commission on the 2018 review of the Solvency II Delegated Regulation (the “Review”).

A letter (dated 18 September 2018) sent by the Committee to the European Commission related to discussions on the Review at a meeting held in May 2018, which mainly focused on the 2018 review of the specific items of the Solvency Capital Requirement (“SCR”) standard formula. In this regard, the letter sets out the Committee’s priorities for the 2018 which relate to:

- The review of the methodology for calculating interest rate risk;
- A review of the treatment of equities;
- The fact the “national component” of the volatility adjustment (“VA”) does not work as intended; and
- Recalibration of the premium risk of the credit and suretyship lines of business.

The Committee explains that the improvements outlined will help but not address wider concerns which means that the Solvency II Framework will not function as intended before the 2020 Solvency II review and asks the European Commission to address the Committee’s priorities that are set out in the letter.
The European Commission responded to the Committee’s letter (dated 27 November 2018) outlining the work that the European Commission and EIOPA are or will be carrying out in the areas identified and noted that items identified by the Committee will be considered as part of the 2020 review instead of the 2018 review.

A copy of the Committee letter can be accessed here and the European Commission’s response can be accessed here.

On 10 December 2018, EIOPA published a letter (dated 7 December 2018) to the European Commission on the European Commission’s consultation paper on draft amendments to the Solvency II Delegated Regulation noting that the draft amendments to the Solvency II Delegated Regulation largely reflected EIOPA’s advices of 30 October 2017 and 28 February 2018. In the letter, EIOPA covers:

- The investigations which it has been conducting on the treatment of illiquid liabilities and related investments and advises the European Commission to wait and take into account the findings of EIOPA’s analysis before making any standalone amendments such as reducing the capital charge of 22% for a portfolio of long-term equity investments backing long-term liabilities, in line with the European Commission’s current proposals; and

- The European Commission’s proposal to modify the general provisions on the relevant risk-free rate interest rate term structure (the “RFR Structure”). As the RFR Structure plays an important role in underpinning the calculation of technical provisions, EIOPA stresses the importance of it remaining objective and technically sound for all insurance undertakings in Europe. Consequently, EIOPA notes that the current draft amendments raise practical issues and suggest that the proposed definition of a “substantial change” is too wide for a well-functioning process and puts the market consistent valuation of technical provisions at risk.

A copy of EIOPA’s letter can be accessed here.

On 11 December 2018, Insurance Europe published its response to the European Commission’s consultation on its draft proposals for the 2018 review of the Solvency II Delegated Regulations, in which it raised a number of serious concerns. The letter welcomes the proposals aim of introducing a number of simplifications and a more proportional application of the framework, but outlined the following issues:

- The 2018 review lacks ambition in some important areas such as the recalibration of long-term equity investments and the review of the risk margin. These areas are identified as key areas which would have a significant and direct impact on long-term investments and would support the Commission in achieving the objectives of its Capital Markets Union (“CMU”) project;

- Insurance Europe also expressed its disappointment that the European Commission has not proposed any improvements to the volatility adjustment, referring to evidence that the existing trigger for application of the national market component is deficient and
improvements are needed and justified. The response calls on the European Commission to improve the trigger in the proposals, an amendment which would be highly feasible and fully within the text of the Solvency II Directive;

- Insurance Europe also references the need to avoid unnecessary limits on the calculation of loss absorbing capacity of deferred tax and calls for adjustments to the draft text in order to remove arbitrary limits.

Insurance Europe’s response can be accessed [here](#) and a related press release can be accessed [here](#).

On 12 December 2018, the Committee published a letter (dated 6 December 2018) it sent to the European Commission on the 2018 review of the Solvency II Delegated Regulation. The Committee’s letter responds to the European Commission’s letter of 27 November 2018, welcoming the results of the European Commission’s November 2018 consultation on amendments to the Solvency II Delegated Regulation. In the letter, the Committee:

- Reiterates its position on the importance of reconsidering the three points mentioned in its previous letter and believes that the four-week consultation period will enable the European Commission to collect further input to address its priorities. The Committee recognises that some changes have been introduced with the intention of incentivising long-term investments in equity but it believes that further efforts are necessary to guarantee the success of this newly created equity class for long-term investments. In particular, it is concerned that the current design of the criteria, such as the 12-month duration and the ring-fencing requirements, can prevent the long-term equity class from working in practice and does not see sufficient grounds to postpone this matter to the 2020 review of the Solvency II Directive as the European Commission proposed in its letter;

- Notes the European Commission’s acknowledgement of the shortcomings of the current functioning of the national component of the VA matter and reiterates its position that a short-term solution needs to be found for this in the 2018 review. Although the Committee acknowledges its preference for the solution proposed in its previous letter, it invites the European Commission to explore other potential solutions on the basis of the current Article 77 (d)(4) of the Solvency II Directive; and

- Regrets that the European Commission considers that most of the suggestions made in its previous letter can only be explored as part of the 2020 review of the Solvency II Directive.

A copy of the Committee letter (dated 6 December 2018) can be accessed [here](#).
FSI insights on policy implementation No.14 – Proportionality in the application of insurance solvency requirements

On 11 December 2018, the Financial Stability Institute (“FSI”) published its insights on policy implementation No.14, titled “Proportionality in the application of insurance solvency requirements” (the “Paper”). The objective of the Paper is to outline contrasting approaches to proportionate solvency regulation, by describing the different aspects of a proportionate approach to solvency regulation and the rationale of jurisdictions which do not adopt such an approach.

The Paper is based on a survey of 16 insurance authorities and outlines findings and recommendations which include the following:

- In most of the surveyed jurisdictions, the risk profile of insurers is the main criterion that insurance regulators typically use to identify insurers that are eligible for simplified solvency requirements;

- There is a wide range of ways in which solvency requirements can be simplified in practice, such as the use of an alternative and simpler formula for the calculation of regulatory capital requirements for certain risks or the partial exemption of certain types of insurer from supervisory reporting;

- A proportionate regime should be consistent with key prudential policy objectives and should not be misunderstood to mean relaxing rules at the expense of compromising the safety and soundness of insurance firms;

- A proportionate framework should have the objective of preserving a level playing field, but should not be used to justify overprotection of certain firms from legitimate competition forces;

- Insurance regulators should consider a number of critical issues in developing a sound proportionality framework, including the extent to which simplified regulatory requirements may weaken incentives for insurers to manage their business properly, the trade-off between simplification and risk sensitivity and the absolute minimum level of complexity that may be needed to achieve prudential objectives.

The Paper can be accessed in full here.
EIOPA updates representative portfolios to calculate volatility adjustments to the Solvency II risk-free interest rate term structures

On 18 December 2018, EIOPA published updated representative portfolios that will be used for calculation of the volatility adjustments (“VA”) to the relevant risk-free interest rate term structures for Solvency II.

EIOPA will start using these updated representative portfolios for the calculation of the VA at the end of March 2019, which will be published at the beginning of April 2019. EIOPA has published the updated representative portfolios now in order to allow (re)insurers sufficient time to prepare for this change.

The updated representative portfolios enable more accurate reflection of the impact of market volatility under the Solvency II framework. The updated representative portfolios are based on the end-of-2017 annual reporting templates as reported by European (re)insurance companies to their National Competent Authorities (“NCAs”).

EIOPA is revising the representative portfolios on a yearly basis, with the next update being scheduled for the end of 2019.

A copy of the updated representative portfolios can be accessed here.

Central Bank publishes consolidated view of publicly available data for insurance and reinsurance firms

On 18 December 2018, the Central Bank published a repository on its website which provides details of all individual Solvency and Financial Condition Reports (“SFCRs”) from firms regulated by the Central Bank.

All insurance and reinsurance undertakings are required to publicly disclose their SFCR, in accordance with the Solvency II Delegated Regulation, which supplements the Irish Solvency II Regulations (S.I. 485/2015). The repository aims to facilitate access by interested parties to publicly disclosed SFCRs through a single access point. When read in conjunction with the narrative in the individual reports, the tables offer important insights into the activities of firms regulated by the Central Bank.

The repository can be accessed here and a related press release from the Central Bank is available here.
EIOPA announces change of financial market data provider for the calculation of Solvency II Risk-Free Interest Rate Term Structures

On 18 December 2018, EIOPA published a press release in which it announced that Thomson Reuters (Markets) Deutschland GmbH (“Thomson Reuters”) has been awarded the role of financial market data provider for the calculation of Solvency II risk-free interest rate term structures. Thomson Reuters replaces Bloomberg Finance L.P. in the role, although data currently provided by Bloomberg Finance L.P. will continue to be used during the transition phase.

EIOPA expects to release a communication in the second quarter of 2019 when data provided by Thomson Reuters will be used for the first time for the calculation of the technical information relating to monthly risk-free interest rate term structures.

The press release can be read in full here.

EIOPA publishes annual report on long-term guarantees measures and measures on equity risk

On 18 December 2018, EIOPA published its annual report on long-term guarantee measures and measures on equity risk (the “Report”).

The Report provides an overview of the impact of the application of the long-term guarantee measures and the measures on equity risk to the European Parliament, the Council and the European Commission. The main findings of the Report include the following:

- In the European Economic Area, 737 insurance and reinsurance undertakings in 23 countries were using at least one of the following non-mandatory measures on 31 December 2017:
  - The matching adjustment;
  - The volatility adjustment;
  - The transitional measures on the risk-free interest rates;
  - The transitional measures on technical provisions;
  - The duration-based equity risk sub-module.

- The average Solvency Capital Requirement ratio of undertakings using the voluntary measures is 231 % and would drop to 172 % if the measures were not applied, confirming the importance of these measures for the financial position of insurance undertakings;

- The vast majority of products with long-term guarantees (“LTG”) occur in life insurance;
The Report also contains a section detailing a thematic focus, which includes an analysis on risk management aspects in view of the specific requirements on the LTG measures. Such requirements include:

- The liquidity plan for undertakings applying the matching or the volatility adjustment;
- The assessment of sensitivity of technical provisions regarding the assumptions underlying the extrapolation, the matching and volatility adjustments;
- The assessment of compliance with capital requirements with and without the measures;
- Potential measures to restore compliance and analysis of LTG measures in the own risk and solvency assessment.

The level of detail of the regular supervisory reporting was identified by national supervisory authorities as an area where there is room for improvement.

The Report can be accessed in full here and a related press release is available here.

(xx) Central Bank publishes revised Solvency II National Specific Template DPM and Taxonomy – Version 1.3.0

On 18 December 2018, the Central Bank published a revised version of the National Specific Template (the “NST”) Data Point Model (“DPM”) and Taxonomy (“Taxonomy”) - Version 1.3.0 (the “Release”).

The Release updates the set of NSTs previously published on the Central Bank website. The templates contained in the Release are based on the EIOPA Solvency 2.3.0 package (as published on 16 July 2018) in particular the DPM Dictionary, the DPM Annotated Templates and the XBRL taxonomy.

The Central Bank clarifies that it is planned for the Release to be used for collection of NST quarterly submissions from Quarter 4, 2018 onwards. Revised documentation relating to the Release was published on the Central Bank’s website:

The Central Bank’s website page containing details of the Release can be accessed here.

(xx[i]) EIOPA publishes report to the European Commission on Group Supervision and Capital Management with a Group of Insurance or Reinsurance Undertakings and FoS and FoE under Solvency II

On 19 December 2018, EIOPA published a report to the European Commission on group supervision and capital management with a group of insurance or reinsurance undertakings and also specific topics relating to freedom to provide services (“FoS”) and freedom of establishment (“FoE”) under the Solvency II Directive (the “Report”). The Report is a response to the Commission’s request for information on various aspects of group supervision of
insurance and reinsurance undertakings as outlined in Article 242(2) of the Solvency II Directive and specific topics related to the FoS and FoE.

The Report notes that substantial progress has been made in the convergence of practices of National Competent Authorities (“NCAs”) as a result of the development of EIOPA’s tools to strengthen group supervision and supervision of cross-border issues. However, it highlights the following areas for improvement:

- There are gaps in the regulatory framework leading to divergent supervisory practices, which include issues in relation to the definition and reporting of intra-group transactions, the assessment of availability of eligible own funds at group level and the treatment of insurance holding companies and mixed financial holding companies;

- There are further areas which would benefit from a harmonised approach, including early intervention, recovery and resolution, the assessment of group own funds, supervisory colleges and cross-border business activities provided by groups and solo undertakings through FoS and FoE.

For further information, the full Report can be accessed here. An accompanying letter sent by EIOPA to the European Commission can be found here.

(xxii) EIOPA publishes annual report on the use of limitations and exemptions from reporting

On 20 December 2018, EIOPA published its annual report on the use of limitations and exemptions from reporting during 2017 and the first quarter of 2018 (the “Report”).

The Report details EIOPA’s findings and provides quantitative information in respect of EIOPA’s analyses of the annual and quarterly use of the limitations and exemptions across Member States, in order to inform stakeholders on their use. The main findings of the Report include the following:

- 13 National Competent Authorities (“NCAs”) granted limitations to 791 solo undertakings for the first quarterly reporting in 2018 (compared to 10 NCAs and 703 solo undertakings in the first quarter 2017);

- Three NCAs (four in quarterly 2017) granted exemptions from quarterly reporting to 33 groups in Q1 2018 (compared to 21 in the first quarter 2017);

- Three NCAs (three in 2016) granted exemptions from annual reporting to seven groups in 2017 (compared to 8 groups in 2016);

- 27% of undertakings are allowed a limited quarterly reporting, with the market share of these undertakings varying between 0% and 14.6% for non-life gross written premiums and between 0% and 4.5% for life technical premiums;
The majority of NCAs confirmed in 2017 not having any formal policies in place for granting the authorisation to use limitations or exemptions from reporting and to withdraw such authorisation in order to ensure the effective supervision and the stability of the insurance sector.

For further information, the Report can be accessed in full here.

(xxiii) EIOPA publishes annual report on the use of capital add-ons during 2017

On 20 December 2018, EIOPA published its annual report on the use of capital add-ons by NCAs under Solvency II during 2017 (the “Report”).

The Report aims to contribute to a higher degree of supervisory convergence in the use of capital add-ons between supervisory authorities in the different Member States and highlight any concerns regarding the capital add-ons framework, without inhibiting in any way the use of capital add-ons as a supervisory measure. The main findings of the Report include the following:

- The majority of NCAs have no formal policy in place for setting and reviewing the capital add-ons;
- Six NCAs have applied capital add-ons to 23 solo insurance and reinsurance undertakings, representing a slight increase in the use of capital add-ons. However, overall usage remains extremely limited. EIOPA attributes this limited usage to the negative image that is attributed to capital add-ons which in turn inhibits supervisors from using it or to the level of judgment that it associated to the decision and calculation of the capital add-ons; and
- When used, capital add-ons have a material impact on the solvency capital requirement (“SCR”) of some of the entities. The weight of the capital add-on ranges from a low 1% to a high 83% respectively with an average of 30% of the total SCR.

EIOPA concludes that capital add-ons are a good and positive measure to adjust the SCR to the risks of the undertaking, when the application of other measures is not adequate.

EIOPA’s full Report can be accessed here.
International Association of Insurance Supervisors (“IAIS”)

(i) IAIS publishes updates to a number of Insurance Core Principles

The insurance core principles (“ICPs”) provide a globally accepted framework for the supervision of the insurance sector. On 8 November 2018, the International Association of Insurance Supervisors (“IAIS”) published draft revised versions of the following ICPs:

- ICP 8 on risk management and internal controls;
- ICP 15 on investments;
- ICP 16 on enterprise risk management (“ERM”) for solvency processes;
- ICP 20 on public disclosure.

According to the IAIS, the draft revised ICPs relating to the Common Framework for the Supervision of Internationally Active Insurance Groups (“ComFrame”) may require further redrafting to ensure consistency with other elements of the supervisory materials being developed for ComFrame. The revised ICPs relating to the ComFrame material will be submitted to the IAIS general membership for adoption at the 2019 AGM.

On 8 November 2018, the IAIS also published drafts of revised definitions of terms relating to ERM to be included in the IAIS glossary and on 9 November 2018, the IAIS published a finalised revised version of ICP 6 on changes in control and portfolio transfers, which follows on from its consultation on a draft revised version of ICP 6 in June 2018.

The IAIS’s full list of ICPs, standards, guidance and assessment methodology updated to November 2018, including revised draft ICPs 8, 15, 16 and 20, the revised ERM-related glossary terms and the finalised ICP 6 can be accessed here.

In November 2018, the IAIS published an up-to-date table of the timelines and status of ICPs including any ongoing or planned revisions and a timeline of ComFrame Development which can be accessed here.

(ii) IAIS publishes final version of its application paper on supervision of insurer cybersecurity

On 8 November 2018, the IAIS published the final version of its application paper on the supervision of insurer cybersecurity (the “Application Paper”). The fundamental objective of the Application Paper is to provide further guidance to supervisors seeking to develop or enhance their approach to supervising the cyber risk, cybersecurity and cyber resilience of insurers.

The Application Paper examines existing international, national and industry cybersecurity standards, frameworks and guidance with respect to the supervision of insurance
cybersecurity and outlines key attributes for jurisdictions to consider when planning and designing effective programmes for conducting cybersecurity assessments.


The Application Paper concludes that, taking a risk-based and proportionate approach, the regulation and supervision of jurisdictions should be tailored to the specific conditions and characteristics of each jurisdiction, permitting solutions that are adequate to achieve outcomes consistent with the ICPs, without becoming excessive. Nevertheless, the IAIS notes that cyber resilience must still be achieved by all insurers, regardless of their size, speciality, domicile or geographic reach.

The IAIS’s Application Paper can be accessed [here](#).

(iii) **IAIS publishes final version of its application paper on the composition and role of the board**

On 9 November 2018, the IAIS published the final version of its application paper on the composition and the role of the board (the “Application Paper”). The Application Paper outlines the primary challenges related to the supervision of the board’s composition and functioning. In particular, it outlines challenges for the supervisor of the board in the following areas:

- Competence of board members, including diversity of competencies within the same board;
- Allocation of the roles and responsibilities between the board and senior management and delegation of activities and tasks of the board;
- Combining the roles of the Chair and the CEO;
- Being a board member of multiple entities within the same group;
- The appropriate level of access to information for board members;
- Behavioural aspects of the board’s functioning.

Each section of the Application Paper aims to set out a description of the problems or potential challenges for the supervisor followed by proposals for supervisory tools and good practices to remedy the problem or challenge. The Application Paper concludes that both formal aspects and behavioural aspects may be deemed to be essential for a board to be effective but that the practice and tools for supervising these two aspects can differ.
Depending on the type of problem that arises, the Application Paper recommends that the supervisor should consider encouraging insurers to apply tools such as policies (succession, conflicts of interest, recruitment etc.), diversity, self-assessments, profile for new candidates, processes, roles and responsibilities map, independent board members, suitability matrix and information flows.

The IAIS’s Application Paper can be found here.

(iv) IAIS publishes final version of its application paper on the use of digital technology in inclusive insurance

On 12 November 2018, the IAIS published the final version of its application paper on the use of digital technology in inclusive insurance (the “Application Paper”).

The objective of the Application Paper is to provide guidance to supervisors, regulators and policymakers when considering, designing and implementing regulations and supervisory practices in relation to the use of digital technology in inclusive insurance. The Application Paper is structured around three main sections:

- **Section 2**: Presents the main features of the typical insurance market context within which the ICPs need to be applied in order to enhance inclusion, examining the profile of an inclusive insurance customer, country-specific context and conditions for inclusive insurance, the typical distribution models for inclusive insurance and elements of the insurance lifecycle;

- **Section 3**: Describes the different technologies that are impacting the design, delivery and value chain for insurance, whether that be as a tool for distribution, servicing of customers or as a means for reshaping business models;

- **Section 4**: Provides considerations and guidance on the implementation of various ICPs relevant to the use of digital technology from a proportionality perspective, and outlines a number of observed practices.

A complete copy of the Application Paper can be accessed here.

(v) IAIS publishes draft application paper on recovery planning for consultation

On 12 November 2018, the IAIS published its draft application paper on recovery planning (the “Application Paper”). The objective of the Application Paper is to provide guidance in relation to draft supervisory material related to recovery planning in the ICPs and ComFrame. The IAIS defines a “recovery plan” as a plan that identifies in advance options to restore financial strength and viability if the insurer comes under severe stress.

The Application Paper examines the following topics related to recovery planning:

- Objectives and concepts of recovery planning;
- Requirements for recovery plans, and the application of the proportionality principle to recovery planning;

- Governance-related matters in recovery planning, including the development and approval process of a recovery plan and how it relates to overall risk management of an insurer;

- Key elements of a recovery plan, and examples of how these can be addressed in a recovery plan; and

- The role of the supervisor with regard to recovery planning.

The deadline for feedback on the draft Application Paper was 7 January 2019.

The Application Paper can be accessed here.

(vi) **IAIS publishes issues paper on increasing digitalisation in insurance and its potential impact on consumer outcomes**

On 12 November 2018, the IAIS published an issues paper titled “Increasing Digitalisation in Insurance and its Potential Impact on Consumer Outcomes” (the “Issues Paper”). The Issues Paper considers the effects of the increasing digitalisation of insurance on consumer outcomes and insurance supervision in light of ICP 19 on conduct of business.

The Issues Paper focuses on the following aspects of the effects of increasing digitalisation on consumer outcomes:

- It assesses the impact of digitalisation on product design and underwriting and provides examples of the impact of digitalisation on product design;

- It examines robo advice and price comparison websites to demonstrate the effects of digitalisation on the marketing, sale and distribution of those products; and

- It describes new supervisory responses that will have to be adopted to keep up-to-date with the challenges posed by the manner in which digitalisation is changing the way insurance products are designed, marketed and distributed.

Whilst the Issues Paper notes that increased digitalisation can potentially enhance customer experiences and reduce insurers’ and intermediaries’ operating costs, it notes that digitalisation may also have a negative impact on consumer protection.

The Issues Paper recommends that supervisors should:

- Consider how to ensure that new innovation does not come at the expense of protections for policyholders and the integrity of the insurance sector as a whole;
- Develop a thorough understanding of how innovations work and are applied to ensure a proper assessment of new products and business models and the design and functioning of the IT architecture, infrastructures and processes and how this is catered for in the insurers’ risk management framework;

- Develop new tools and skills for supervision of digitalised insurers and enhance cooperation with financial and other authorities; and

- Consider establishing guidance for appropriate and responsible use of new technologies to safeguard the fair treatment of customers and promote advice and services that are suitable and affordable for the customers.

The Issues Paper can be accessed here.

(vii) Oman Capital Market Authority joins the IAIS International Information Exchange Agreement

On 13 November 2018, the Chair of the Executive Committee of IAIS announced that the Capital Market Authority of the Sultanate of Oman has become a member of the IAIS Multilateral Memorandum of Understanding (“MMoU”).

The MMoU is a global framework for cooperation and information exchange among insurance supervisors which sets a minimum standard to which signatories must adhere. All applicants are subject to review and approval by an independent team of IAIS Members. Members of the MMoU are able to exchange relevant information and provide assistance to other signatories which promotes financial stability and sound supervision of cross-border insurance operations for the benefit and protection of consumers.

A copy of the press release can be viewed here and the list of other MMoU signatories can be accessed here.

(viii) IAIS launches Consultation on a Holistic Framework for Systemic Risk in the Insurance Sector

On 14 November 2018, the IAIS published a consultation document which proposes a holistic framework for systemic risk in the insurance sector. The aim of the framework is to assess and mitigate systemic risk, recognising that systemic risk may arise from the collective activities or exposures of insurers at a sector-wide level and from the distress or disorderly failure of individual insurers. The proposed framework consists of:

- An enhanced set of supervisory policy measures which are designed to help prevent vulnerabilities and exposures from developing into systemic risk, through macro-prudential surveillance by supervisors, ongoing supervisory requirements applied to insurers and crisis management and planning;
A global monitoring exercise by the IAIS, which is designed to detect the possible build-up of systemic risk in the global insurance sector;

Implementation assessment by the IAIS, which involves the assessment of the consistency of the implementation of the supervisory policy measures set out in the framework;

Supervisory powers of intervention that enable a prompt and appropriate response where a potential systemic risk is detected; and

Mechanisms that help ensure the global consistent application of the framework.

Feedback is invited by 25 January 2019.

On the same date, the FSB confirmed in a statement that it will assess the IAIS’s recommendation to suspend G-SII identification from 2020 once the holistic framework is finalised. In November 2022, the FSB will review the need to discontinue or re-establish its annual identification of G-SIIs in consultation with the IAIS and national authorities based on the initial years of implementation of the holistic framework.

A copy of the FSB statement can be accessed here and the consultation document can be accessed here.

(ix) Updates on 2018 G-SII identification process

On 14 December 2018, the IAIS published a report on the 2018 identification process of global systemically important insurers (“G-SIIs”).

The IAIS participates in a global initiative with other authorities, central banks and financial sector supervisors to identify global systemically important financial institutions (“G-SIFIs”) which focuses on identifying G-SIIs (which is a class of G-SIFIs) whose financial distress or failure would potentially cause a significant disruption to the global financial system and economic activity. The IAIS used the 2016 G-SII Assessment Methodology to complete the 2018 G-SII Exercise.

In November 2018, the FSB announced it would not engage in an identification of G-SIIs in 2018 on account of the IAIS consultation on a holistic framework for systemic risk in the insurance sector. The implementation of the holistic framework, which is expected to take effect in 2020, should remove the need for an annual G-SII identification by the FSB and national authorities.

A copy of the report can be accessed here.
(x) **IAIS publishes Instructions for the 2018 Data Collection Exercise**

On 14 December 2018, the IAIS published the ‘Instructions for the 2018 Data Collection Exercise’ (the “Instructions”) which is conducted by the Bank for International Settlements (“BIS”) in collaboration with the IAIS.

The data collection exercise enables the IAIS to assess the potential systemic importance of insurers in a global context (the “G-SII Project”) and is part of the FSB’s ongoing work to identify global systemically important financial institutions. The focus of the IAIS’s analysis is in relation to potential global systemically important insurers.

The Instructions supplement the guidelines for G-SII data collection exercises by setting out the specificities of the 2018 G-SII data collection exercise conducted for the G-SII Project. The guidelines provide a general overview of the data collection exercises conducted for the G-SII Project and how the requested data will be utilised and the applicable confidentiality protections. For a complete overview of the data collection and processing in connection with the G-SII Project, the guidelines, these Instructions and the G-SII assessment methodology should be read together.

The data collection will support the IAIS’s review of its framework to assess and mitigate systemic risk in insurance and in particular the development of an activities-based approach.

A copy of the Instructions can be accessed [here](#).

**European Insurance and Occupational Pensions Authority (“EIOPA”)**

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

During the period 1 October 2018 to 31 December 2018, EIOPA published updated Questions and Answers (“Q&As”) on the following:

- (EU) No 2015-2011 lists of regional governments local authorities exposures (last updated 21 December 2018);
- (EU) No 2015-2450 templates for the submission of information to the supervisory authorities (last updated 21 December 2018);
- (EU) No 2015-35 supplementing Directive 2009-138 (last updated 21 December 2018);
- Guidelines on treatment of related undertakings, including participations (last updated 19 November 2018);
- Guidelines on own risk and solvency assessment (last updated 21 December 2018);
(i) Guidelines on classification of own funds (last updated 19 November 2018);

(ii) Answers to other;

The updated Q&As can be accessed here.

(ii) EIOPA publishes its updated Risk Dashboard based on the second quarter 2018 data

On 22 October 2018, EIOPA published its risk dashboard for the second 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 insurance sector in the European Union remains stable overall. Macro risks continue at medium level amid continued economic recovery and less expansionary monetary policy. A potential future deterioration in the assessment due to political and international trade tensions cannot be excluded.

Bond market volatility declined since June and overall Credit Default Swap spreads remained broadly stable at low levels despite substantial developments in sovereign bond markets in some countries. Liquidity and funding risks increased due to a higher average coupon-to-maturity ratio of a limited number of bond issuances.

Profitability has been overall stable and Solvency Capital Requirement ratios are above 100% for most insurers. Market perceptions were mixed with insurance stocks outperforming the market, but at the same time there was an increase in the price-to-earnings ratio for some insurance groups.

A copy of the risk dashboard can be found here.

(iii) Insurance Europe, AMICE and IRSG issue papers in response to EIOPA’s discussion paper on resolution funding and national insurance guarantee schemes

On 26 October 2018, Insurance Europe issued a position paper responding to EIOPA’s discussion paper on resolution funding and national insurance guarantee schemes (“IGS”). In the paper, Insurance Europe outlined its strong support for using existing tools and powers provided by the Solvency II regulatory regime to their fullest extent, rather than considering new rules for IGS, thus maintaining the status quo.

It reiterated that Solvency II already provides several policyholder safeguards, such as the Solvency Capital Requirement, which significantly reduces the risk of insolvency in the insurance industry. While EIOPA acknowledged that adequate protection of policyholders is at the core of Solvency II in its discussion paper, Insurance Europe noted that the discussion paper lacks any assessment as to how Solvency II actually impacts on the risks faced by insurers and how this might affect existing national IGS.
In the event that minimum harmonisation of IGS is pursued at EU level, Insurance Europe observed that, in order to satisfy the EU’s principles of proportionality and subsidiarity, the functioning and funding of IGS should be a matter within the discretion of Member States, with national authorities permitted significant discretion to choose features that best suit their market.

Insurance Europe’s position is that it is too soon to harmonise the organisation or funding of IGS before the effects of the Solvency II regime for insurers on policyholder protection are better understood.

Insurance Europe’s position paper is accessible here and a related press release can be found here.

On 26 October 2018, the Association of Mutual Insurers and Insurance Cooperatives in Europe (“AMICE”) also published a response to EIOPA’s discussion paper. AMICE similarly expressed the view that existing tools and powers should be used before introducing any new regulatory framework on IGS. They agreed that it is not necessary to introduce a minimum degree of harmonisation in the field of IGS since Solvency II already provides a sufficiently robust prudential framework with policyholder protection at its core.

AMICE’s response can be accessed here.

On 12 November 2018, EIOPA’s Insurance and Reinsurance Stakeholder Group (“IRSG”) issued an additional response to EIOPA’s discussion paper. On the subject of resolution funding, the IRSG expressed its general support for most of EIOPA’s ideas, although it stressed that it is important for EIOPA to provide principles and potentially some minimum requirements as to how resolution funds should work.

With regard to IGS, the IRSG considers that there should be some consistency in the level of protection afforded to customers in different Member States, and that this might lead to some basic requirements which would apply to resolution and IGS regimes across Member States. Some IGS members favoured retaining the status quo, whilst others expressed the view that minimum harmonisation would be preferable.

For further information, the IRSG’s response can be accessed here.

(iv) EIOPA launches request for feedback on methodological considerations regarding illiquid liabilities

On 29 October 2018, EIOPA launched a request for feedback on methodological considerations regarding illiquid liabilities following the Call for Information from the European Commission to EIOPA on asset and liability management in April 2018. EIOPA requested this feedback from stakeholders with the overall objective of assessing how the short and long term risks of long term investments relate to the potential illiquid characteristics of insurance liabilities.
In its request, EIOPA identified a three step sequence of analysis which it will adopt when considering whether the risks connected to illiquid liabilities and the assets covering long-term liabilities are adequately reflected in the current regulatory regime. Firstly, EIOPA will analyse the characteristics of the current products available in the market so that it may assess the illiquidity characteristics of insurance liabilities.

EIOPA’s second step will be to analyse evidence on the actual holding period of assets by insurers to obtain an overview of the management of different asset classes and whether the holding of assets depends on the characteristics of the underlying insurance liabilities. EIOPA’s request for feedback asks stakeholders for feedback on these two steps, which will then assist EIOPA in moving to a third step, which involves the assessment of any unintended consequences of the current regulatory treatment and how such consequences, if any, can be mitigated.

The feedback will help EIOPA to prepare an information request to undertakings, which it expects to send out at the beginning of 2019.

EIOPA’s request for feedback can be accessed here

On 7 December 2018, the Association of Mutual Insurers and Insurance Cooperatives in Europe (“AMICE”) published its response to each individual question raised by EIOPA in the form of a comment template. AMICE’s comments template is available here.

On 11 December 2018, EIOPA’s Insurance and Reinsurance Stakeholder Group (the “IRSG”) also published a response to the request for feedback. The IRSG’s response includes the following general feedback:

- The purpose of the illiquidity study is not sufficiently clear;
- The appropriate starting point should be on whether or not assets are exposed to losses on forced selling;
- The illiquidity of liabilities is only part of the process for assessing if there is potential for forced-selling and overall liquidity and illiquidity can only be assessed by looking at the liabilities together with the assets and other sources of liquidity;
- Neither the duration of liabilities nor the holding period for individual securities can be used as general indicators of illiquidity or potential for forced-selling.

The response by the IRSG can be accessed here.
EIOPA publishes results of the EU-US Insurance Dialogue Project in 2018

On 31 October 2018, EIOPA published a press release which detailed the results of the EU-US Insurance Dialogue Project in 2018 (the “Project”). The work undertaken during the project and future objectives are set out in the following papers:

- The insurance industry cybersecurity issues paper, which can be accessed [here](#).
  
  This paper outlines current legislative and supervisory frameworks in the EU and the US and describes a number of initiatives and resources addressing insurance industry cybersecurity risk, with the aim of enhancing supervisory cooperation between the EU and the US and of improving the mutual understanding of their respective cybersecurity regimes. Future project work will focus on examining examples and approaches to insurer cybersecurity and post-incident co-ordination;

- The cyber insurance market paper, which is available [here](#).
  
  This paper describes the cyber insurance market, the types of cyber insurance coverage available and highlights challenges in underwriting cyber insurance. The paper also describes current supervisory practices for assessing cyber insurance underwriting and notes that future work may focus on the assessment of non-affirmative cyber risk and the potential for catastrophic losses, the challenges of reinsuring cyber risk and the availability of cyber insurance data;

- The big data issue paper, which can be found [here](#).
  
  This paper discusses the type, quality and means for collecting big data and how this data is then used by insurers and third parties for underwriting, rating, marketing and claims handling in the EU and the US. The paper also sets out the methods by which US and EU supervisors are addressing their data needs to monitor the insurance marketplace and evaluate underwriting, rating, claims and marketing practices in their respective markets, given the increase in the use of big data in the market place. Future work will look further into third-party vendor issues, disclosures to applicants and policyholders on rating factors, and insurers’ use of artificial intelligence models;

- The supervision of intra-group transactions (“IGTs”) paper, which can be accessed [here](#).
  
  The objective of the paper is to seek mutual understandings regarding definitions of IGTs and to improve understanding of each other’s risk and impact assessment practices, supervisory review processes and reporting requirements. The paper concluded that continued focus on co-operation and transparent information exchange must be a priority in the future.

EIOPA’s related press release is available [here](#).
EIOPA publishes findings of peer review of supervisory practices and application of key functions

On 15 November 2018, EIOPA published the findings of its peer review evaluating how NCAs supervise and determine the application of the key functions by the insurer in compliance with Solvency II, with a particular focus on proportionality. The main practices examined under the peer review include:

- **The combination of key functions under one holder** – EIOPA found that this occurs in almost all countries and the most frequently combined combinations are between risk management and actuarial functions and between risk management and compliance functions;

- **The combination of key functions with administrative, management or supervisory body membership or carrying out operational tasks** – EIOPA found that most NCAs follow a similar comprehensive approach to the combination of these functions and accept such cases only if deemed justified under the principle of proportionality;

- **The subordination of one key function below another key function** – This was observed in half of the countries reviewed.

- **The splitting of one key function among several holders** – EIOPA found that the most common split concerns the actuarial function (split between life and non-life business).

- **The assessment of the fitness of key function holders** – Most NCAs assess the fitness of the key function holder at the time of initial notification and apply the principle of proportionality, although several NCAs did not systematically assess the key function holders appointed before 2016. EIOPA advised these NCAs to do so using a risk-based approach; and

- **The outsourcing of key functions** – EIOPA found that eight NCAs make a distinction between intra-group and extra-group outsourcing and six NCAs do not require a designated person in all cases, which may give rise to operational risks

In addition to setting out the findings from a comparative analysis of the key functions, the peer review sets out a number of best practices in order to provide guidance to NCAs for a more systematic approach regarding the principle of proportionality as well as for ensuring consistent and effective supervisory approaches. It also identifies a number of weaknesses and sets out recommended actions to NCAs in this respect.

The peer review can be read in full [here](#) and a related press release can be accessed [here](#).
(vii) European Court of Auditors analyse EIOPA’s contribution to the insurance sector

On 15 November 2018, the European Court of Auditors ("ECA") published a report which analyses whether EIOPA makes an effective contribution to supervision and financial stability in the insurance sector (the "Report"). The ECA’s analysis particularly focused on EIOPA’s actions in the area of supervision and supervisory convergence, the 2016 insurance stress test and the adequacy of EIOPA’s resources and governance between 2015 and 2017.

On the subject of supervision and supervisory convergence, the Report found that EIOPA has made good use out of a broad range of tools available to it but notes that there are still significant challenges to be addressed by EIOPA itself, national supervisors and legislators, such as those relating to the European Supervisory Authorities’ ("ESAs") and Solvency II reviews. The Report also identifies the lack of any systematic arrangement for EIOPA to follow up on recommendations made to NCAs as a further weakness.

In respect of the 2016 stress test, the Report found that the scope of the test was appropriate and the scenarios identified the main risks for the sector. However, the ECA found shortcomings in their calibration and considered that recommendations issued after the stress test were sometimes too general.

In order to improve the efficiency and effectiveness of EIOPA’s actions, the Report recommends that EIOPA should:

- Have a clearer focus and follow up its supervisory tools in a systematic way;
- Co-operate with the Commission and co-legislators to address systemic weaknesses in the supervision of cross-border business;
- Co-operate with the Commission and the co-legislators to address limitations on access to information about internal models and provide NCAs with more support on how to supervise them;
- Improve the soundness of stress test scenarios;
- Issue more specific and relevant recommendations to the NCAs after the stress test;
- Promote the publication of stress test results at company level;
- Ensure that the stress test methodology is more transparent; and
- Strengthen human resources assigned to supervision.

The ECA’s Report can be accessed in full here.
EIOPA speech on current priorities, future challenges and opportunities

On 20 November 2018, EIOPA published a speech made by its Chairman, Gabriel Bernardino at the “Insurance and Pensions: Securing the Future” conference, in which he discusses EIOPA’s current priorities, future challenges and opportunities.

The speech discusses the following issues in detail:

- **The review of Solvency II** – Mr. Bernardino welcomed the European Commission’s efforts to take most of EIOPA’s advice into account in their draft Delegated Acts but expressed his regret at the Commission’s decision to postpone the review of the treatment of interest rate risk until the 2020 review. A similar decision is expected by EIOPA in respect of other areas like the treatment of equity risk and the risk margin. EIOPA believes that the 2020 review should result in an evolution of Solvency II to take into account new market conditions, without fundamentally changing the basic principles of the risk-based regime;

- **Achieving supervisory convergence** – As part of the supervisory convergence plan, Mr. Bernardino notes that EIOPA will focus on tools and benchmarks related to the application of proportionality, the supervision of internal models and on the supervisory assessment of conduct risks. Other areas of focus for EIOPA include the stronger supervision of cross-border business and the enhancement of measures to examine and mitigate emerging risks in the areas of IT resilience and cyber risks, the use of big data and Brexit;

- **Working for consumers** – EIOPA’s priority going forward it to ensure that consumers are not overloaded with information which they do not understand and do not use. Mr. Bernardino suggests that a deep analysis of the current disclosure requirements in place for insurance products in different parts of the European legislation is needed in order to streamline it to make sure the result is ready for the digital economy. The introduction of the Insurance Product Information Document under the Insurance Distribution Directive (“IDD”) and the Key Information Document under the PRIIPs Regulation are highlighted as examples of EIOPA’s work to improve which have been taken in the provision of accessible information to consumers.

The speech concludes with a brief analysis on some of the challenges and opportunities presented by digitalisation, sustainable finance and Brexit.

The speech can be read in full [here](#).
(ix) **EIOPA publishes European Insurance Overview 2018**

On 27 November 2018, EIOPA published its first annual European Insurance Overview report (the "Report"). The Report provides an overview of the European insurance sector and is published by EIOPA as an extension of its statistical services.

It is based on annually reported Solvency II information which ensures that the data has a high coverage in all countries and is reported in a consistent manner across the European Economic Area.

A full copy of the Report can be accessed [here](#).

(x) **EIOPA publishes results of its Stress Test for 2018**

On 14 December 2018, EIOPA published the results of its 2018 Stress Test exercise. EIOPA, in conjunction with the European Systemic Risk Board ("ESRB"), is obliged to coordinate Union-wide insurance stress tests.

The objectives of the tests are (1) to assess the resilience of financial institutions to adverse market developments and (2) to assess the potential for systemic risk that may be posed by financial institutions in situations of stress.

The test assessed 42 European (re)insurance groups, representing a market coverage of 75% based on consolidated group assets. The reference date was 31 December 2017. The assessment scenarios encompass a wide range of risks, including market and insurance specific risks, providing more insight into potential vulnerabilities from a financial stability perspective.

The test found that the European insurance sector has a significant sensitivity to severe but plausible market shocks. Groups were found to be vulnerable not only to low yields and longevity risks but also to a sudden and abrupt reversal of risk premia combined with an instantaneous shock to lapse rates and claims inflation. On aggregate, the test found that the sector is adequately capitalised to absorb the prescribed shocks.

Further information on EIOPA’s 2018 Stress Test results can be accessed [here](#).

(xi) **EIOPA publishes Seventh Consumer Trends Report**

On 20 December 2018, EIOPA published its Seventh Consumer Trends Report (the "Report"), covering both the insurance and pensions sectors. The objective of the Report is to identify risks for consumers arising from trends in the market, which may require specific policy proposals or supervisory action from EIOPA or its members.

The Report describes the main market developments and provides an analysis of quantitative data from EIOPA’s Solvency II database. It also details specific financial
innovations and analyses trends in consumer complaints and NCAs’ consumer protection activities. The main findings of the Report include the following:

- Digitalisation of the insurance and pension sector affecting the whole life-cycle of a product continues as an important trend;
- In terms of digital technology, innovation is taking place across the entire insurance value chain and, in particular, the use of telematics in health as well as motor insurance is increasing;
- On-demand products are increasingly being brought to market alongside an increase in cross-selling of insurance with other products, such as add-on travel insurance when buying plane tickets;
- Cyber-risk concerns are increasing as consumers generate more and more data using connected devices and cyber-risk insurance represents an opportunity for both insurers and consumers which would address potential concerns relating to cyber-risk coverage;
- On the pension side, with the pace of reform having slowed down, no major changes have been reported, although the shift from defined benefits to defined contribution schemes continues.
- The Report notes that regulatory changes such as the IDD, IORP II and PRIIPs are expected to increasingly affect trends in the insurance and pensions sector.

The Report can be accessed [here](#) and a related press release is available [here](#).

(xii) **EIOPA publishes Financial Stability Report - December 2018**

On 20 December 2018, EIOPA published its December 2018 Financial Stability Report (the “Report”). The Report outlines the findings of EIOPA’s market development and economic analyses, drawing on both quantitative and qualitative information from EIOPA’s member authorities. The Report is structured as follows:

- **Chapter 1**: Sets out the primary risks for the insurance and occupational pension sector which are low yields and signs of volatility, climate risk and sustainable insurance and technological developments and the insurance sector;
- **Chapters 2-4**: Elaborate on the risks identified in Chapter 1 relating specifically to the insurance, reinsurance and pensions sectors;
- **Chapter 5**: Sets out the final qualitative and quantitative assessment of the risks discussed by analysing the likelihood and the gravity of the actualisation of the event; and
The Report concludes with a thematic article discussing the concept of an Early Warning System for the European insurance sector.

The main findings of the Report include the following:

- The risk of a sudden reassessment of risk premia has become more pronounced over recent months amid rising political and policy uncertainty;
- A persistent low yield environment remains challenging for insurers and pension funds;
- Interconnectedness with banks and domestic sovereigns remains high for European insurers, making them susceptible to potential spillovers; and
- Some European insurers are significantly exposed in their investment portfolios to climate-related risks and real estate.

A copy of the full Report is available here and a related press release can be accessed here.

(xiii) EIOPA publishes opinion on non-life cross border insurance business of a long-term nature and its supervision

On 21 December 2018, EIOPA published an opinion on non-life cross border insurance business of a long-term nature and its supervision (the "Opinion").

The objective of the Opinion is to ensure the appropriate application of the legal requirements and consistent supervisory practices with regard to technical provisions for non-life insurance obligations of a long-term nature.

To this end, the Opinion highlights the need for all parties involved in long-term cross-border business to be aware of the local specificities when cross-border business is carried out. The Opinion also outlines EIOPA’s expectations to undertakings and recommendations to the competent authorities in the following three areas:

- Expectations on technical provisions with a focus on the best estimate calculation – The Opinion highlights the requirement for data used in the calculation of technical provisions to be complete, reliable and up-to-date, provides guidance on the choice of method for the calculation and for the assessment of potential errors introduced by approximations when calculating the best estimate;
- Expectations on the key functions and the administrative, management or supervisory body ("AMSB") – The Opinion outlines the specific roles that the risk management function and the actuarial function have to play in assisting the AMSB;
- Recommendations on the supervisory review process and the collaboration between home and host Member State competent authorities.
The Opinion is accompanied by annexes which outline specific examples and provide quantitative information on technical provisions for specific non-life long-term insurance obligations.

EIOPA has expressed the intention to look into the supervisory actions taken by the competent authorities as a follow-up six months after publication of the Opinion and will provide further guidance as necessary.

A full copy of the Opinion can be accessed here.

**Insurance Distribution Directive (“IDD”)**

(i) **EIOPA decision reinforces co-operation in the supervision of cross-border insurance distribution under IDD**

On 28 September 2018, EIOPA published a decision of its board of supervisors on the co-operation of national competent authorities (“NCAs”) in respect of the supervision of cross-border insurance distribution activities of insurance undertakings and insurance intermediaries (the “Decision”).

The Decision replaced the “Luxembourg Protocol” (CEIOPS-DOC-02/06) relating to the co-operation of NCAs under the Insurance Mediation Directive (2002/92/EC) and aims to strengthen cooperation between NCAs by, in particular, enhancing the exchange of all relevant information which enables NCAs to fulfil their supervisory tasks and to protect customer interests.

EIOPA views the decision as an important step in ensuring a well-functioning, risk-based and preventive supervision of the insurance market throughout the European Union.

The Decision entered into force on 1 October 2018 which can be accessed here and a related press release can be accessed here.

(ii) **EIOPA publishes consultation paper on technical advice on integrating sustainability risks and factors in the delegated acts under Solvency II and IDD**


The Consultation Paper proposes that the Solvency II Delegated Regulation be amended in a manner which will ensure the identification and assessment of sustainability risks in the areas of investments and underwriting. EIOPA suggests that insurance and reinsurance undertakings not only assess sustainability risks in the investment portfolio of undertakings, but also assess the potential long-term impact of their investments on sustainability factors, which would support undertakings’ active engagement with investees to achieve sustainable...
investment outcomes. Insurers should also have regard to the environmental, social and governance ("ESG") preferences of policyholders.

With regard to the IDD delegated acts, EIOPA proposes amendments in respect of the following two areas:

- **Conflicts of Interest** – EIOPA states that, when identifying conflicts of interest, insurance intermediaries and undertakings should also consider whether conflicts arise with regard to the ESG preferences of their customers and should employ appropriate arrangements to ensure that these preferences are included in the advisory process;

- **Product Oversight and Governance** – in case an insurance product is offered to customers seeking products with an ESG profile, EIOPA proposes that insurance intermediaries and undertakings should consider customers' ESG preferences in the target market at various stages of the product lifecycle.

The closing date for comments in response to the Consultation Paper is 30 January 2019. EIOPA will consider the responses it receives to this Consultation Paper and will finalise the draft technical advice for submission to the Commission by the end of April 2019.

The Consultation Paper can be accessed in full here.

(ii) **European Union (Insurance Distribution) (Amendment) Regulations 2018 (S.I. No. 520 of 2018)**

On 5 December 2018, the European Union (Insurance Distribution) (Amendment) Regulations 2018 (S.I. No. 520 of 2018) (the “Amending Regulations”) was enacted to amend the European Union (Insurance Distribution) Regulations 2018 (S.I. No. 229 of 2018) (the “Principle Regulations”). The Amending Regulations amended the following regulations of the Principle Regulations:

- Regulation 15, relating to the exercise of the freedom to provide services;

- Regulation 22(2), relating to the obligation imposed on insurance and reinsurance distributors to require them to provide a reply to all complaints received from their customers;

- Regulation 24, relating to the division of competence between home and host Member States;

- Regulation 28, relating to cooperation between competent authorities on freedom of establishment in respect of the home Member State.

A copy of the Amending Regulations can be accessed here and the Principle Regulations can be accessed here.
EIOPA publishes report on the structure of insurance intermediaries markets in Europe

On 13 December 2018, EIOPA published a report in which it evaluated the structure of insurance intermediaries markets in Europe at the end of 2017 (the “Report”). The Report clearly shows the wide diversity of insurance intermediary channels and other distribution channels brought about by the national implementation of the Insurance Mediation Directive (“IMD”).

EIOPA notes that, although it was difficult to make an accurate and comprehensive analysis because of the lack of harmonised categorisation and reporting, the Report outlines some key developments, including the following:

- There are significant variations in terms of the size and nature of European intermediaries’ markets and often a limited relationship between the total population and insurance market size;
- There has been a decrease in the number of registered intermediaries at the European level in recent years, which has mainly affected intermediaries registered as natural persons and those operating as agents;
- Traditional distribution channels including insurance brokers, bancassurance and insurance agents continue to dominate in most Member States, although direct sales and online insurance marketplaces are becoming more popular;
- In respect of cross-border business, there has been an incremental increase in cross-border activity by insurance intermediaries between 2013 and 2017 and a significantly high proportion of notifications in certain Member States, particularly in comparison with the data collected on cross-border business of insurance undertakings.

The Report has been submitted to the European Commission and European Parliament. EIOPA intends to continue to closely monitor developments in national markets in preparation for a further report on the application of IDD by February 2020.

The Report is accompanied by an annex which details EIOPA’s findings in respect of individual Member States on a country-by-country basis.

For further information, EIOPA’s Report can be found here.
Association of Mutual Insurers and Insurance Cooperatives in Europe (“AMICE”)

(i)  AMICE issues press release calling for a fair and competitive marketplace in Europe

On 20 November 2018, the Association of Mutual Insurers and Insurance Cooperatives in Europe (“AMICE”) issued a press release highlighting the barriers to cross-border insurance for its members.

In its press release, AMICE states that, there are significant barriers for many mutual and cooperative insurers to actively participate in cross-border insurance activities and continues to call for all European countries to recognise the mutual model and ensure a balanced approach to supervision and proportionality to maintain diversity in the market and choice for policymakers.

A copy of the press release can be found here.

Insurance Europe

(i)  Updates on the implementation of the International Financial Reporting Standard (IFRS 17) for insurance contracts

On 3 October 2018, Insurance Europe published a statement outlining its position on the International Financial Reporting Standard (“IFRS 17”) for insurance contracts noting that the industry supports the new IFRS 17 and is allocating considerable resources to prepare for its implementation.

However, the statement highlighted that there are issues with the manner in which the standard depicts insurers’ performance and business models that must be resolved before IFRS 17 is endorsed.

Insurance Europe expressed the view that IFRS 17 should be reopened and that the 11 issues identified during the European Financial Reporting Advisory Group’s (“EFRAG”) testing must be addressed. As a result, Insurance Europe called for a two year delay in implementation of the standard to enable the improvements to be made and to allow time for the wide range of companies that are affected to implement the standard.

It was recommended that a decision to re-open IFRS 17 should be made as soon as possible and that clarity should be given on the impact on the application date so that companies may plan accordingly.

Insurance Europe’s statement can be accessed here.

On 17 October 2018, Insurance Europe published a press release which revealed that global insurers had written a joint letter to the chair of the International Accounting Standards Board highlighting concerns about IFRS 17. The letter called for a two year delay in implementation
of the standard to allow for necessary improvements to be made and to give adequate time to companies to tackle the challenges of implementation.

The press release can be accessed here and the joint letter can be found here.

On 18 October 2018, the three ESAs wrote a letter to EFRAG which highlighted the importance of replacing the current accounting standard for insurance contracts, IFRS 4 and cautioned against further delays in the endorsement of IFRS 17, on the grounds that it would challenge the coordinated application of IFRS 9 and the new insurance contracts standard. The letter stressed the need to progress and finalise the analysis of IFRS in a timely manner, due to the inability of IFRS 4 to facilitate comparable and transparent financial statements of insurance undertakings in Europe.

The ESAs letter is available here.

On 19 October 2018, EIOPA published its analysis of the benefits of IFRS 17 (the “Analysis”), with the objective of fostering a better understanding of the implications and potential effects of the standard on European insurance and reinsurance undertakings. The Analysis also sought to provide an insight into future interplay between insurers’ financial and prudential reporting.

EIOPA found that the implementation of IFRS 17 would result in increased transparency and comparability of insurers’ financial statements, providing better insights into insurers’ business models and potentially strengthening financial stability in the EEA and considered its implementation to be long overdue.

Despite considering the introduction of IFRS 17 to be long overdue, EIOPA highlighted the following reservations:

- IFRS 17’s principles on determining the applicable discount rate and risk adjustment may have exceeded the appropriate level of allowing for entity-specific inputs and consequently may give rise to significantly different and potentially incomparable results; and

- Issues such as level of contracts’ aggregation or gains from reinsurance contracts held may lead to further complexity of the financial statements.

With regard to the actual implementation of IFRS 17, EIOPA proposed that crucial inputs and processes developed for Solvency II can be used, but may need to be adapted to varying degrees. Nonetheless, this should result in significant efficiency gains, which are most prevalent in the building blocks of IFRS 17: cash flows, discount rate and risk adjustment.

The full report is accessible here and the related press release can be found here.
(ii) Insurance Europe publishes joint guide on preparing for cyber insurance

On 9 October 2018, Insurance Europe, BIPAR and FERMA, in association with Aon and Marsh published a joint guide titled “Preparing for cyber insurance”. The objective of the guide is to assist organisations in gaining a better understanding of cyber exposures which in turn can assist them to better assess their potential need for cyber insurance. It describes potential scenarios that can help an organisation consider how cyber insurance could be useful in their situation.

The guide also aims to assist organisations in preparing for discussions with insurers and brokers, to evaluate the different kinds of cyber insurance on offer, and to understand the practical impact of that coverage.

The guide can be accessed [here](#) and Insurance Europe’s press release is available [here](#).

(iii) Insurance Europe’s Reinsurance Advisory Board’s views on proposed revisions to the Credit for Reinsurance Model Law and Regulation

On 23 October 2018, Insurance Europe’s Reinsurance Advisory Board (“RAB”) published its letter to the National Association of Insurance Commissioners (“NAIC”) outlining its views on the proposed revisions to the Credit for Reinsurance Model Law and the Credit for Reinsurance Model Regulation which proposes to implement the bilateral agreement on (re)insurance prudential measures that was concluded between the EU and the US in 2017.

The RAB notes that the language in the proposed revisions deviates significantly from the language of the Bilateral Agreement between the EU and the US on Prudential Measures Regarding Insurance and Reinsurance (the “Bilateral Agreement”), thereby providing extensive discretion to state regulators in their compliance with the terms of the Bilateral Agreement, which could lead to legal uncertainty and potential inefficiencies from a European reinsurer’s perspective.

In particular, the RAB noted that the NAIC proposals foresee a more limited scope of application of zero collateral in the Bilateral Agreement and urged the NAIC to eliminate the proposed amendments to the Model Law Section 2(F)(7), on the grounds that it is inconsistent with the provisions of the bilateral agreement’s reinsurance-specific provisions in Article 3(8).

The RAB’s additional comments on the Model Law and Model Regulation are annexed to the letter which can be accessed [here](#).
(iv) **Insurance Europe publishes response to European Consultation on the “Stocktaking of the Commission’s better regulation approach”**

On 24 October 2018, Insurance Europe published its response on the European Commission’s “Better Regulation” agenda. Despite stating its support for the agenda and its objectives to improve internal processes and stakeholder consultations, Insurance Europe warned that stakeholders are often not given sufficient time to provide input or such input is sought late in the process, rendering it ineffective.

In its response to the European Commission’s public consultation on the “Stocktaking of the Commission’s better regulation approach”, Insurance Europe made recommendations for improvements in the following areas of the Commission’s processes:

- Transparency of the Commission's legislative process;
- Systematic and open consultation of stakeholders;
- Time allowed for stakeholder consultation; and
- Time allowed for a serious and thorough review of stakeholder feedback.

Insurance Europe's press release is accessible [here](https://www.insuranceeurope.eu) and the response to the European Commission's public consultation can be found [here](https://www.insuranceeurope.eu).

A summary of the recommendations contained in Insurance Europe's submission to the European Commission titled “Recommendations to make better regulation” was also published on 24 October 2018 and can be accessed [here](https://www.insuranceeurope.eu).

(v) **Insurance Europe publishes response to IAIS consultation on the development of the ICS 2.0**

On 5 November 2018, Insurance Europe published its response to an International Association of Insurance Supervisors (“IAIS”) consultation on the development of the global Insurance Capital Standard version 2.0 (“ICS”). While Insurance Europe welcomed several improvements made to the ICS since the beginning of its development, it suggested that further significant improvements are required for the ICS version 2.0 to correctly identify and measure the risks facing insurers.

In the response, Insurance Europe highlighted the need for the international standard to be implemented consistently across jurisdictions. The response recommended that the IAIS should have discussions on:

- The potential impact of the ICS on competitiveness of global market players in different jurisdictions;
- The performance of the ICS in times of financial market turbulence;
The need for the ICS to support asset/liability management and appropriately measure actual investment risks faced by insurers in their investment;

- The need to ensure that the ICS is appropriately representing the insurance business models and the avoidance of unnecessarily conservative measurement of the business.

Insurance Europe recommended that the IAIS should make proposals for simplifications and the possibility of applying a proportionality approach to the different reporting elements, in line with the risk exposures of various undertakings. The need to consider transitional and grandfathering provisions prior to ICS implementation was also highlighted.

The response also contains specific recommendations from Insurance Europe on issues relating to valuation approaches, the use of a margin over current estimate, restrictions applying to capital resources, tax treatment, design and calibration of capital requirements in the standard model, allowance of internal models in the monitoring period and reporting.

The response can be accessed here and Insurance Europe’s related press release can be found here.

(vi) Joint Statement issued to raise concerns on EC collective actions proposals

On 5 December 2018, Insurance Europe published a joint statement (dated 30 November 2018) along with more than a dozen other organisations that raises concerns about the European Commission’s collective actions proposals.

The statement calls for proper safeguards to be imposed on qualified entities that can start a collective action or seek an injunction against a company on behalf of consumers and warns about the risks of letting collective actions become assets. The statement also highlights the dangers of agreeing a text too quickly and without due regard to its implications for consumers and traders.

A copy of the joint statement can be accessed here.

The European Commission’s collective action proposals were approved by the European Parliament’s Legal Affairs Committee on 6 December 2018. The proposals aim to:

- Strengthen the right of access to justice by allowing consumers to join forces across borders and jointly request unlawful practices to be stopped or prevented, or to obtain compensation for the harm;

- Harmonise collective redress mechanisms and end disparities across Member States;

- Reduce the financial burden and make remedies more accessible through collective representation; and
Strike a balance between citizens’ access to justice and protecting businesses from abusive lawsuits.

Further information on the proposals is provided in a press release from the European Parliament titled “First EU collective redress mechanism to protect consumers”, which can be accessed here.

Insurance Ireland

(i) Insurance Ireland views on the lack of a reduction in the exit tax on life assurance policies

On 9 October 2018, Insurance Ireland issued a statement in response to the decision in Budget 2019 to reduce DIRT tax by 2%, resulting in a further increase in the gap between it and the 41% Exit Tax on gains from Life Assurance funds.

Insurance Ireland views the failure to reduce the Exit Tax in line with DIRT as a missed opportunity and has highlighted that life assurance customers should not be unduly taxed for choosing an investment policy over bank savings at a time of historically low interest rates on deposits. Insurance Ireland has requested that the Irish Government use the Finance Bill to reduce the Exit Tax accordingly.

The full statement is accessible here.

Packaged Retail Insurance-based Investment Products (“PRIIPs”)

(i) ESA’s concerns about key information document requirements for packaged retail and insurance-based investment products prompts consultation

On 1 October 2018, the European Supervisory Authorities (“ESAs”) issued a letter to the European Commission regarding key information documents (“KID”) for packaged retail and insurance-based investment products (“PRIIPs”).

The ESAs expressed concern that under the KID requirements in the Commission Delegated Regulation (EU) 2017/653 (the “Delegated Regulation”) which supplements the Regulation on KIDs for PRIIPs (Regulation 1286/2014), effective 1 January 2020, undertakings for the collective investment in transferable securities (“UCITS”) will be required to produce both a UCITS KIID and a PRIIPs KIID.

The ESAs considers the impending regime unsatisfactory given that the retail investors who are intended to benefit from this information will be reluctant to rely on these KIIDs due to the overlapping and seemingly conflicting information used in the presentation of risks, performance and costs.
In pursuit of legislative changes to the Delegated Regulation, the ESAs published a consultation paper on 8 November 2018 that contains the following proposed amendments to the PRIIPs Delegated Regulation:

- **Section 4.1**: includes proposals to change the approach for performance scenarios and a description of several other options that were identified;

- **Section 4.2**: presents potential amendments on a limited number of other specific issues based on the information gathered by the ESAs since the implementation of the KIID;

- **Section 4.3**: considers 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 KIID by UCITS and relevant non-UCITS funds from 1 January 2020.

The ESAs anticipate submitting these proposed amendments to the European Commission in January 2019 along with a final report which includes feedback obtained during the consultation period.

The ESAs letter can be accessed in full [here](#) and the consultation paper can be accessed [here](#).

(ii) **ESAs issue consultation paper on proposed amendments to the key information document for PRIIPs**

On 8 October 2018, the ESAs published a consultation paper on targeted amendments to Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 on key information documents ("KID") for packaged retail and PRIIPs.

The paper outlines proposals to amend the approach to presenting information in the KID on what the investor may get in return when investing in a PRIIP in the form of performance scenarios. Based on the information gathered by the ESAs since the implementation of the KID, it also proposes other specific amendments, including in relation to the following areas:

- The market risk measure calculation for regular investment of premium PRIIPs;

- Products with autocallable features;

- Narratives for the summary risk indicator;

- Narratives for performance fees.

The paper also considers possible changes in light of the exemption in Article 32 of the PRIIPs Regulation being due to expire and examines the possible use of the PRIIPs KID by UCITS and relevant non-UCITS funds from 1 January 2020. Preliminary analysis of the expected costs and benefits of the proposed amendments is also detailed, in order to gather feedback.
on possible costs and benefits of the proposals and the relative scale of these costs and benefits for different stakeholders.

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

(iii) Insurance Europe publishes its response to the ESA’s joint consultation paper concerning amendments to the PRIIPs KID

On 10 December 2018, Insurance Europe published its response to the European Supervisors Authorities’ (“ESAs”) joint consultation paper concerning amendments to the PRIIPs Key Information Document (“KID”) (the “Response”). In the Response, Insurance Europe:

- Noted its concerns with the quick-fix approach taken by the ESAs in this consultation and highlighted that it is vital for any new measures to properly address the underlying problems with the PRIIPs KID and not propose superficial and ineffective responses to these problems. The ESAs need to conduct a thorough impact assessment and proper consumer testing to ensure the KID is fit for purpose and will benefit the consumer;

- Requests that fundamental changes required to address the issues relating to performance scenarios are only considered as part of the formal review as they require a thorough impact assessment and proper consumer testing to ensure that consumers are provided with meaningful information. Insurance Europe views the proposals set out in this consultation as interim measures which would incur additional compliance cost without achieving any added value for consumers and Insurance Europe considers this to be an unsatisfactory approach; and

- Warns that without a well-considered and evidenced approach, the proposed changes could lead to further confusion among consumers and a loss of trust in the KID and the information that is presented to them.

Insurance Europe recognises that the ESAs were restricted in the consultation by the potential end of the UCI TS exemption in 2019. However, there are proposals to extend this exemption and as an extension becomes increasingly likely Insurance Europe does not see any reason to rush through the proposals.

Insurance Europe notes that their response only addresses issues raised by the ESAs in the consultation paper and does not address additional issues with the RTS.

A copy of the Response can be accessed here.
European Markets Infrastructure Regulation ("EMIR")

(i) LEI ROC publish policy on corporate actions and data history in the Global LEI System

On 30 October 2018, the Legal Entity Identifier Regulatory Oversight Committee ("LEI ROC") published its policy on legal entity events (formerly referred to as “corporate actions”) and data history in the Global Legal Entity Identifier System ("GLEIS"). The main features of the policy include:

- A change in the terminology of referring to events captured in the reference and relationship data in the GLEIS as “legal entity events”, instead of the previously used “corporate actions”;
- The adoption of an incremental approach to implementation of capturing legal entity events that would prioritise those events that occur relatively frequently and directly affect Level 1 and Level 2 reference data (e.g., name changes) over events that occur relatively infrequently (e.g., reverse takeovers);
- The need to incorporate commercial or regulatory data feeds into the GLEIS;
- The need to incorporate effective dates into the GLEIS;
- The need for users to be able to easily access and use an entity’s data history through multiple channels;
- Spin-off relationships will be recorded in the GLEIS on a fully operational basis;
- A number of publicly and non-publicly available sources may be used for data validation, including financial statements.

The policy notes that the area of technical standards which are the responsibility of the Global Legal Entity Identifier Foundation ("GLEIF") are yet to be finalised, together with the role of GLEIF of consulting local operating units ("LOUs") and industry on the most cost-effective way for implementing ROC policies.

The policy can be accessed [here](#).

(ii) ESMA rejects stakeholder calls to allow general grandfathering for OTC derivative contracts in final report

On 8 November 2018, ESMA released a final report which contains new draft regulatory technical standards ("RTS") on the clearing obligation that ESMA has developed under Article 5(2) of Regulation (EU) No 48/2012 of the European Parliament and Council of the European Union on over-the-counter ("OTC") derivatives, central counterparties and trade repositories ("EMIR").
The draft RTS relate to the treatment of OTC derivative contracts novated from a United Kingdom counterparty to a counterparty established in another Member State, as a result of Brexit. The draft RTS amends three Commission Delegated Regulation on the clearing obligation under EMIR in order to facilitate these novations.

The report indicates that ESMA has rejected the call from stakeholders to allow for a general grandfathering for OTC derivative contracts, and has instead proposed a limited exemption as a regulatory solution that would: (i) allow the novation of contracts to a new counterparty within the European Union only; and (ii) apply from the date of application of the proposed Delegated Regulation until twelve months after Brexit.

Due to the limited window of time remaining within which to achieve this regulatory solution, ESMA has opted not to engage in a public consultation campaign in this instance. The final report has been sent to the European Commission to submit the draft RTS for endorsement in the form of Commission Delegated Regulations. Once endorsed, the RTS will be considered by the European Parliament and the Council of the European Union.

The report can be read in full here.

(iii) **Council of the European Union issue compromise proposal on the Regulation amending the supervisory regime under EMIR**

On 9 November 2018, the Council of the European Union issued a Presidency compromise text on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 (“EMIR”) as regards the procedures and authorities involved for the authorisation of central counterparties (“CCP”) and requirements for the recognition of third-country CCPs (the “Regulation”). The objective of the Regulation is to enhance financial stability and to support the further development and deepening of the Capital Markets Union. It follows the release of an earlier proposal for a Presidency compromise text on the Regulation published on 26 October 2018.

The latest version can be accessed in full here.

On 27 November 2018, the Council of the EU published an ‘I’ item note (the “Note”) from the Presidency and General Secretariat of the Council to COREPER in respect of the Regulation. The Note indicates that the latest Presidency compromise proposal is now supported by a vast majority of delegations representing a clear qualified majority. The Council Presidency and General Secretariat therefore recommended that COREPER:

- Agrees on the negotiating mandate with regard to the proposed Regulation; and
- Invites the Presidency to start, when practicable, negotiations with the European Parliament on the basis of that mandate with a view to reaching an agreement at first reading.

A complete copy of the Note is available here.
(iv) **FSB publish report on trade reporting legal barriers**

On 19 November 2018, the FSB published a report on trade reporting legal barriers. The report outlines the progress that has been made by FSB member jurisdictions in adopting the FSB’s 2015 recommendations to remove or address legal barriers to fill reporting of over-the-counter (‘OTC’) derivatives data to trade repositories and to access by authorities to trade data held in TRs.

The report primarily considers progress made in the following three aspects of trade reporting and transparency:

- **Barriers to full trade reporting** – The report highlights that the recommendations on removing or addressing barriers to full trade reporting have been implemented in all but three of the FSB’s 25 member jurisdictions (Mexico, Saudi Arabia and China);

- **Masking** – Five FSB member jurisdictions allow masking of counterparty identifiers for some transactions, although specific dates have been identified for masking relief to expire in Singapore and Australia. Canada, Hong Kong and the US have indicated that masking will discontinue once legal barriers are removed;

- **Regulators’ access to TR data** – Changes have been made or are underway in twelve jurisdictions to remove barriers to access to TR data by foreign authorities and/or non-primary domestic authorities.

The report states that the 2015 Recommendations should stand and that no further extensions should be made to the due date for implementation.

The report can be accessed [here](#).

(v) **FSB publishes thirteenth progress report on implementation of OTC derivatives market reforms**

On 19 November 2018, FSB published its thirteenth report on the implementation of OTC derivatives and market reforms. The report outlines progress made across the G20’s OTC derivatives reform agenda since the 12th progress report in the following areas:

- **Trade reporting** – Twenty-one FSB member jurisdictions now have comprehensive trade reporting requirements in force, as opposed to nineteen in the previous reporting period. The scope of trade reporting and the availability of trade repositories is continually increasing;

- **Central Clearing** – Eighteen member jurisdictions have in force comprehensive standards or criteria for assessing when standardised OTC derivatives should be centrally cleared, as opposed to seventeen jurisdictions in the previous reporting period;
Margin requirements for non-centrally cleared derivatives ("NCCDs") – Sixteen jurisdictions have comprehensive margin requirements for NCCDs in force, as opposed to fourteen in the last reporting period;

Higher capital requirements for NCCDs – Only some FSB jurisdictions have implemented the final standardised approach to central counterparty credit risk and capital requirements for bank exposures to CCPs, due to have been implemented in January 2017 and FSB urged jurisdictions to fully implement the requirements without further delay;

Platform trading – There are now thirteen jurisdictions which have in force comprehensive assessment standards or criteria for determining when products should be platform traded. In six jurisdictions, new determinations entered into force for specific derivatives products to be executed on organised trading platforms.

The FSB’s thirteenth progress report is available here.

(vi) IOSCO publishes final report evaluating the effects of the G20 financial regulatory reforms on incentives to centrally clear OTC derivatives

On 19 November 2018, IOSCO published a final report on the impact of the G20 regulatory reforms on incentives to centrally clear OTC derivatives. The report was jointly published with the Basel Committee on Banking Supervision, the Committee on Payments and Market Infrastructures and the FSB (the “Standard-Setting Bodies”). The report sets out the following findings:

The changes observed in OTC derivatives markets are consistent with the G20 Leaders’ objective of promoting central clearing as part of mitigating systemic risk and making derivatives markets safer;

The relevant post-crisis reforms, in particular the capital, margin and clearing reforms, taken together, appear to create an overall incentive, at least for dealers and larger and more active clients, to centrally clear OTC derivatives;

Non-regulatory factors including market liquidity, counterparty credit risk management and netting efficiencies are also important and can interact with regulatory factors to affect incentives to centrally clear;

Some categories of clients, including smaller clients and those with more directional portfolios have lesser incentives to use central clearing, and may have a lower degree of access to central clearing;

The provision of client clearing services is concentrated in a relatively small number of bank-affiliated clearing firms;
Some aspects of regulatory reform may not incentivise provision of client clearing services.

The report notes that the findings demonstrated that, overall, the G20 financial regulatory reforms are achieving their objectives of promoting central clearing, especially for the most systemic market participants and meaningful progress has been made towards enhancing systemic stability.

The findings of the report can be found here.

(vii) IOSCO publishes the results of its updated survey on the principles for the regulation and supervision of commodity derivatives markets

On 19 November 2018, IOSCO published a final report containing the results of its updated survey on the implementation of the principles for the regulation and supervision of commodity derivatives markets by IOSCO members. The report updates IOSCO's 2014 survey on the implementation status of the principles.

The survey indicates that IOSCO members have made improvements across the following areas of focus:

- Contract design principles;
- Principles for market surveillance;
- Principles to address disorderly commodity derivatives markers;
- Principles for enforcement and information sharing;
- Principles for enhancing price discovery on derivatives markets.

Annex A of the report highlights the IOSCO members that have made substantial progress towards achieving full compliance with the principles. Annex B provides the responding IOSCO members’ with a summary of updated survey results, including regulatory reforms undertaken, the date of their implementation and their impact on compliance with the principles.

The report can be accessed here.
On 19 November 2018, LEI ROC published its second consultation paper on fund relationships in the GLEIS. The objective of the paper is assist in the consistent implementation of data throughout the GLEIS and to facilitate a standardised collection of fund relationship information at the global level. The paper advocates a limited update to the way relationships affecting funds are recorded in the GLEIS in order to achieve these objectives. LEI ROC proposes to replace the current optional reporting of a single “fund family” with the following relationships, each of which is individually defined:

- The Fund Management Entity relationship;
- The Umbrella Structures relationship; and
- The Master-Feeder relationships.

The paper suggests the elimination of the proposed generic category “Other Fund Family” and recommends that no additional relationships are included at this stage.

LEI ROC suggests that the collection of these relationships in the GLEIS would be optional, except for the following two exceptions:

- If the relationship is mandated to be reported and publicly available in the relevant jurisdiction and if the LEI is mandatory for the related entity in the relevant jurisdiction; and
- If the relationship is one between an umbrella structure and a sub-fund or compartment.

LEI ROC also proposes to create a flag or indicator that would be completed by the entity when a fund has reported all fund relationships relevant for that fund, in order to mitigate the limitations of optional reporting.

LEI ROC’s second consultation paper can be accessed here.

On 23 November 2018, ESMA published a public statement titled “Managing risks of a no-deal Brexit in the area of central clearing” (the “Statement”). In the Statement, ESMA underlined its support for continued access to UK central counterparties (“CCPs”) in order to limit the risk of disruption in central clearing and to avoid a negative impact on EU financial market stability in a no-deal Brexit scenario.

ESMA welcomed the European Commission’s communication titled “Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency
Action Plan” and, in particular, the intention expressed by the Commission therein to adopt a temporary and conditional equivalence decision to ensure that there will be no disruption to central clearing in the event of a no-deal Brexit.

ESMA highlighted that it is engaging with the Commission to plan, as far as possible, the preparatory actions for the recognition process for UK CCPs in the event that the UK withdraws without agreement and ESMA has already begun to communicate with UK CCPs to carry out preparatory work. ESMA aims to ensure that EU clearing members and trading venues have continued access to UK CCPs as of 30 March 2019, provided that all the conditions in EMIR are fulfilled.

A copy of ESMA’s statement can be accessed here.

(x) ESA’s publish final report on RTS on the novation of bilateral contracts not subject to bilateral margins under EMIR

On 29 November 2018, the European Supervisory Authorities (“ESAs”) published their final report presenting new draft regulatory technical standards (“RTS”) on the novation of bilateral contracts not subject to bilateral margins under EMIR (the “Report”).

The focus of the Report is on bilateral non-centrally cleared OTC derivative contracts currently benefiting or that would benefit from the grandfathering arrangements under EMIR, either because the relevant dates set out in Commission Delegated Regulation (EU) No 2016/2251 (the “Commission Delegated Regulation”) have not applied yet, or because the contracts have not been novated after those dates.

The Report proposes amendments to the existing Commission Delegated Regulation that would enable EU counterparties facing UK counterparties to novate their contracts to EU counterparties without triggering the EMIR margining requirements, in light of the withdrawal of the UK from the EU. This limited exception aims to maintain a level playing field between EU counterparties and to ensure that EU counterparties facing UK counterparties are not placed at a disadvantage compared to EU counterparties facing other EU counterparties.

The Report sets out a limited time window of 12 months following the UK’s withdrawal from the EU for the novation of OTC derivative contracts that fall within the scope of the amending Delegated Regulation. As a result, the Report recommends that parties should begin negotiating the novations of any transactions within the scope of the amending regulation as soon as possible and to consider repapering their contracts ahead of the application date.

Annex III of the Report sets out the draft amending Delegated Regulation containing the final draft RTS in full.

A copy of the Report is available here.
European Council agrees stance on proposed Regulation amending EMIR supervisory regime for EU and third-country CCPs

On 3 December 2018, the European Council published a press release communicating that it has agreed a compromise position on the proposed Regulation amending EMIR with respect to the procedures and authorities involved for the authorisation of central counterparties ("CCPs") and the requirements for the recognition of third-country CCPs (the "Proposed Regulation").

The Proposed Regulation has the objective of enhancing the supervision of CCPs, having regard to the growing size, complexity and cross-border dimension of clearing in Europe. It introduces a two-tier system which differentiates between non-systematically and systematically important CCPs, with systematic importance assessed by ESMA according to specific criteria, including the nature, size and complexity of the CCP’s business, its membership structure or the availability of alternative clearing services in the currency concerned. “Tier 2” CCPs will be subject to stricter rules in order for them to be recognised and authorised to operate in the EU, including:

- Compliance with the necessary prudential requirements for EU-CCPs while taking into account third-country rules;
- Confirmation from the relevant EU central banks that the CCP complies with any additional requirements set by those central banks; and
- The agreement of a CCP to provide ESMA with all relevant information and to enable on-site inspections, as well as the necessary safeguards confirming that such arrangements are valid in the third country.

The Proposed Regulation also introduces a mechanism within ESMA to bring together expertise in the field of CCP supervision and to ensure closer cooperation between supervisory authorities and central banks responsible for EU currency.

The European Council’s press release can be accessed here and the Proposed Regulation can be found here.

ESMA updates Q&As on the implementation of EMIR

On 3 December 2018, ESMA published an updated of its Q&As in respect of the implementation of EMIR. The purpose of the Q&As is to promote common supervisory approaches and practices in the application of EMIR.

The updated Q&As provide for a modified answer to Question 9, which considers the margin requirement under Article 41 of EMIR.

The updated Q&As can be accessed in full here.
(xiii) **Commission Implementing Regulation ((EU) 2018/1889) on the extension of the transitional periods related to own funds requirements for CCP exposures**

On 5 December 2018, Commission Implementing Regulation ((EU) 2018/1889) on the extension of the transitional periods related to own funds requirements for exposures to central counterparties (the “Regulation”) was published in the Official Journal of the European Union.

The Regulation extends the transitional periods by an additional six months until 15 June 2019, with a view to avoiding disruptions to the market and to preventing institutions from being subjected to higher own funds requirements during the process of authorisation and recognition of existing CCPs.

The Regulation enters into force on 8 December 2018.

A copy of the Regulation can be found [here](#).

(xiv) **ISDA publish letter on the timing for implementation of the EMIR Refit and the proposal to remove the requirement to backload historical trades**

On 6 December 2018, ISDA published a letter written to ESMA in respect of the timing for implementation of the EMIR Refit and the proposal to amend Article 9 of EMIR to remove the obligation for counterparties to report historical derivative transactions that were entered into before 16 August 2012 and remained outstanding on that date, or that were entered into on or after 16 August 2012 but were no longer outstanding when the reporting obligation under EMIR commenced.

The EMIR Refit proposal aims to remove the requirement to report historic transactions, with reporting only required in respect of historical derivative transactions that:

- Were entered into before 12 February 2014 and remain outstanding on that date; or
- Were entered into on or after 12 February 2014.

However, ISDA highlights that, if the EMIR Refit is not published in the Official Journal and in effect before 12 February 2019, market participants will have to report all details of these historical derivative transactions even though the obligation to do so will be repealed shortly thereafter. Therefore, while ISDA welcomes the proposal, it urges ESMA to publish a statement to national competent authorities that, if the EMIR Refit does not come into effect in time, competent authorities will be expected not to prioritise supervisory action against counterparties that have not reported all details of historical derivatives transactions by the current deadline of 12 February 2019.

A full copy of the letter can be found [here](#).
(xv) **Update to Public Register for Clearing Obligations under EMIR**

On 6 December 2018, ESMA updated the ‘Public Register for the Clearing Obligations under EMIR’ as required under Article 6 of the Regulation on over the counter derivatives, central counterparties and trade repositories (EMIR) to ensure market participants are informed of their clearing obligations.

A copy of the register is available [here](#).

(xvi) **ISDA publish letter to European Commission and ESAs on time-limited derogations for intragroup transactions and equity options and indexes**

On 17 December 2018, ISDA published a letter to the European Commission and the ESAs on time-limited derogations under the Margin Regulatory Technical Standards (“Margin RTS”) for intragroup transactions and equity options and indexes.

In the letter, ISDA noted that the time-limited derogations under the Margin RTS are set to expire on 2 January 2020 and expressed its concern that, unless the derogations are extended, the transactions which currently benefit from the derogations will become subject to the margin rules even though the reasons for exempting them remain valid and have not yet been addressed.

With regard to the time-limited derogation for intragroup transactions, ISDA called on the ESAs and the Commission to confirm their intention to adopt regulatory technical standards which would extend the derogation by a further two years, in order to address the risk of market fragmentation and instability resulting from termination of the derogation in the absence of equivalence decisions.

In relation to the time-limited derogation for equity options and indices, ISDA also requested that, when the ESAs and the Commission are considering technical standards extending the derogation in relation to intragroup transactions, they will also consider using these technical standards to extend the derogation in relation to equity options and indices. ISDA believes that the reason for this derogation continues to exist and that it would be appropriate to extend the phase-in period.

For further detail, the letter can be read in full [here](#).
ESAs publish final draft RTS amending EMIR in the context of simple, transparent and standardised securitisations under the Securitisation Regulation

On 18 December 2018, the European Supervisory Authorities (“ESAs”) Joint Committee published its final draft regulatory standards (“RTS”) amending Delegated Regulation (EU) 2016/2251 in respect of risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (“CCP”) under Article 11(15) of EMIR in the context of simple, transparent and standardised (“STS”) securitisations under the Securitisation Regulation, together with a final report on amendments to the EMIR clearing obligation under the Securitisation Regulation.

The draft RTS in relation to risk-mitigation techniques aim to extend the type of exemption currently associated with covered bonds, which allows for no exchange of initial margins and only collection of variation margins, to STS securitisations. The exemption is only applicable where the OTC derivatives are used only for hedging purposes, and there are arrangements that adequately mitigate counterparty credit risk with respect to the OTC derivative contract.

The draft RTS set out in the final report detail the criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty risk with regards to the clearing obligation. The final report seeks to clarify the cases where the clearing obligation would not apply with respect to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a securitisation special purpose entity in connection with a securitisation. The draft RTS also amend the three Commission Delegated Regulations on the clearing obligation in relation to the covered bond provisions.

The final draft RTS amending Delegated Regulation (EU) 2016/2251 in respect of risk-mitigation techniques can be accessed here and the final report can be found here.

European Commission adopts Delegated Regulation regarding the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP in the context of Brexit

On 19 December 2018, the European Commission adopted a Delegated Regulation amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP (the “Regulation”).

The Regulation aims to avoid a situation whereby counterparties seeking to novate contracts to entities established and authorised in the EU27 in the event of a no-deal Brexit might be subject to margin requirements that did not apply at the time that the original contracts were entered into.

The Regulation amends the transitional provisions of Article 35 of Delegated Regulation (EU) 2016/2251 in the context of the withdrawal of the UK from the EU. The Regulation modifies the existing RTS on the margin requirements in order to permit contracts with a counterparty...
established in the UK currently subject to risk-management procedures established prior to the relevant dates of application of that Regulation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.

The Regulation shall apply from the date following that on which the Treaties cease to apply to and in the UK pursuant to Article 50(3) of the Treaty on European Union, but shall not apply where a withdrawal agreement concluded with the United Kingdom in accordance with Article 50(2) of the Treaty on European Union has entered into force by that date or where a decision has been taken to extend the two year period referred to in Article 50(3) of the Treaty on European Union.

The Regulation can be accessed here.

(xix) European Commission adopts Delegated Regulation extending the dates of the deferred application of the clearing obligation for certain OTC derivative contracts under EMIR

On 19 December 2018, the European Commission adopted a Delegated Regulation which amends Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 in order to extend the dates of the deferred application of the clearing obligation for certain OTC derivative contracts (the "Regulation").

The Regulation proposes to modify the three existing regulatory technical standards in the following manner:

- With regard to Commission Delegated Regulation (EU) 2015/2205 relating to interest rate derivative classes, the deferred date of application of the clearing obligation for intragroup transactions with a third-country group entity would be extended from 21 December 2018 to 21 December 2020;

- With regard to Commission Delegated Regulation (EU) 2016/592 relating to credit derivative classes, the deferred date of application of the clearing obligation for intragroup transactions with a third-country group entity would be extended from 9 May 2019 to 21 December 2020;

- With regard to Commission Delegated Regulation (EU) 2016/1178 relating to interest rate derivative classes, the deferred date of application of the clearing obligation for intragroup transactions with a third-country group entity would be extended from 9 July 2019 to 21 December 2020.

The Regulation will now be considered by the European Parliament and the Council of the European Union.

A full copy of the Regulation can be found here.
ESMA outlines plans for the recognition of UK CCPs and CSDs in a no-deal Brexit scenario

On 19 December 2018, ESMA issued a public statement in which it announced its plans for the recognition of UK CCPs and CSDs in a no-deal Brexit scenario. In the statement, ESMA communicates its support for continued access to UK CCPs and outlines its plans to recognise UK CCPs in a timely manner, provided the following four recognition conditions under Article 25 of EMIR are met:

- The adoption of an equivalence decision, which occurred on 19 December 2018;
- CCPs are to be authorised in the UK and are to be subject to effective supervisions and enforcement ensuring full compliance with the prudential requirements applicable – ESMA expects to receive a letter from the Bank of England ("BoE") providing these confirmations;
- Co-operation arrangements will be established between ESMA and the BoE – ESMA expects that a Memorandum of Understanding establishing the necessary arrangements will be agreed by the end of January;
- The UK is not on the list of third-country jurisdictions which have strategic deficiencies in their anti-money laundering and countering the financing of terrorism regimes – ESMA has no expectation that the UK will be added to this list upon Brexit date.

ESMA is now ready to review applications for recognition under EMIR from UK CCPs and aims to adopt the recognition decisions well ahead of the Brexit date, in order to ensure continued access to UK CCPs for EU clearing members and trading venues.

In the statement, ESMA also highlights its support for the continued access to the UK CSD and states that it will follow a similar process as that described for UK CCPs for the recognition of the UK CSD as a third-country CSD under the Central Securities Depositories Regulation in a no-deal Brexit scenario.

ESMA’s statement can be accessed [here](#).

Commission Implementing Decisions provide clarification on temporary equivalence of the UK regulatory framework for CCPs and CSDs

On 20 December 2018, the following two Commission Implementing Decisions were published in the Official Journal of the European Union:

- Commission Implementing Decision (EU) 2018/2030 determining, for a limited period of time, that the regulatory framework applicable to central securities depositaries ("CSDs") of the United Kingdom of Great Britain and Northern Ireland is equivalent in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council; and
Commission Implementing Decision (EU) 2018/2031 determining, for a limited period of time, that the regulatory framework applicable to central counterparties (“CCPs”) in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council. (together the “Decisions”)

The Decisions seek to ensure that the legal and supervisory arrangements governing UK CCPs and CSDs are determined as equivalent for a strictly limited period of time and under specific conditions so that those CCPs may continue to provide clearing services in the Union after 29 March 2019 if the UK leaves the EU without transitional arrangements in place.

The Decisions entered into force on 21 December 2018 and will apply from the date following that on which the Treaties cease to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union.

The Decisions shall not apply where a withdrawal agreement concluded with the UK in accordance with Article 50(2) of the Treaty on European Union has entered into force by that date or where a decision has been taken to extend the two year period referred to in Article 50(3) of the Treaty on European Union.

The Decision relating to CSDs will expire on 30 March 2021 and the Decision relating to CCPs will expire on 30 March 2020.

The Decision relating to CSDs can be accessed [here](#) and the Decision relating to CCPs can be found [here](#).

Securitisation Regulation

(i) **ESMA releases final report on draft technical standards on operational standards and on repositories application requirements under the Securitisation Regulation**

On 13 November 2018, ESMA released a final report which provides an overview of the feedback received from stakeholders during the public consultation initiatives relative to: (i) the ‘Draft technical standards on disclosure requirements, operational standards, and access conditions under the Securitisation Regulation’ (“Draft TS on Operational Standards”); and the ‘Draft technical standards on the application for registration as a securitisation repository under the Securitisation Regulation’ (“Draft TS on Repositories Application Requirements”).

The Draft TS on Operational Standards concern the information and templates to be provided as part of an application by a firm to register as a securitisation repository (“SR”) with ESMA, together with the operational standards and access conditions for information collected and maintained by the SR. ESMA has made the following modifications to the Draft TS on Operational Standards in light of the feedback received:

- The inclusion of an XML schema which is consistent with ISO standards;
The consolidation and further refinement of provisions relating to securitisation repository procedures to verify the completeness and consistency of data submitted to the repository;

The removal of detailed provisions as regards the written confirmation text to be used by the repository to confirm that securitisation documents provided to it are complete and consistent;

The inclusion of certain verifications for STS notifications submitted to the securitisation repository; and

The removal of certain provisions on data modifications set out in the draft technical standards contained in the consultation paper;

The Draft TS on Repositories Application Requirements concern the fees to be charged by ESMA for registering and supervising SRs under the Securitisation Regulation. ESMA has made the following modifications to the Draft TS on Repositories Application Requirements:

- The inclusion of a requirement for applications to contain detailed example test cases that demonstrate the applicant’s ability to perform a number of essential procedures;

- The clarification of provisions on demonstrating the operational separation between an applicant’s business lines that comprise the provision of securitisation repository services under the Securitisation Regulation and its remaining business lines, regardless of whether those business are run by the applicant, an affiliated entity, or another entity with which the applicant has concluded a material agreement in respect of its securitisation business line; and

- The inclusion of drafting provisions to allow ESMA to better understand the extent of the applicant’s arrangements that are manual or automated;

The final Draft TS on Operational Standards and Draft TS on Repositories Application Requirements are included in the Annex to the final report which will next be submitted to the European Commission for endorsement can be accessed here.

(ii) Joint Committee of ESAs consider disclosure requirements for EU securitisations and the consolidated application of securitisation rules for EU credit institutions

On 30 November 2018, the ESAs published a statement which clarifies the disclosure requirements for EU securitisations and the consolidated application of securitisation rules for EU credit institutions (the “Statement”).

The Statement seeks to respond to significant operational challenges for reporting entities in complying with both the transitional provisions of the disclosure requirements under the Securitisation Regulation, particularly for reporting entities that have never provided information according to the CRA3 templates. The ESAs and the competent authorities
envisage that these difficulties will be resolved with the future adoption of ESMA disclosure templates and the resultant expiry of the transitional arrangements involving CRA3 templates in the Securitisation Regulation. In light of these challenges, the ESAs have expressed the expectation that competent authorities will apply their supervisory powers in their day-to-day supervision and enforcement of applicable legislation in a proportionate and risk-based manner.

The Statement also identifies difficulties facing EU banking entities with respect to compliance with specific provisions of the proposed Regulation amending the Capital Requirements Regulation. These difficulties particularly relate to the scope of Chapter 2 (due-diligence, risk retention, transparency, re-securitisation and criteria for credit-granting) requirements in the Securitisation Regulation.

The ESAs again expect competent authorities to adopt a generally proportionate approach to the application of their risk-based supervisory powers in assessing compliance with the Securitisation Regulation. The ESAs and the competent authorities envisage these issues being resolved through the adoption of the proposed Regulation amending the Capital Requirements Regulation which, based on the latest Trilogue Agreement, will replace references to Chapter 2 with references to Article 5 (due diligence requirements) only, reducing its scope.

A copy of the Statement can be accessed here.

(iii) EBA publishes final guidelines on the STS criteria in securitisation

On 12 December 2018, the European Banking Authority ("EBA") published final guidelines on the simple, transparent and standardised ("STS") criteria for both asset-backed commercial paper ("ABCP") securitisations and non-ABCP securitisations (the "Guidelines").

The Guidelines aim to provide a single point of consistent interpretation of the STS criteria and to ensure a common understanding of them by the originators, original lenders, sponsors, securitisation special purpose entities ("SSPEs"), investors, competent authorities and third parties verifying STS compliance in accordance with Article 28 of Regulation (EU) 2017/2402, throughout the Union.

Under the new securitisation framework, the Guidelines will be applied on a cross-sectoral basis throughout the EU, with the objective of facilitating the adoption of the STS criteria. The Guidelines for non-ABCP securitisation provide detail on the simplicity, transparency and standardisation criteria, whilst the Guidelines for ABCP securitisation focus on the provision of guidance related to transaction-level and programme-level criteria.

The application date for the Guidelines is 15 May 2019, although market participants are expected to apply the approach set out in the Guidelines from 1 January 2019, when the Securitisation Regulation comes into force.

For further information, the Guidelines can be accessed here and here.
European Commission discusses the value of the new securitisation rules

On 30 December 2018, the European Commission issued a press release in which it discussed the common EU rules on securitisation under the Securitisation Regulation that will become directly applicable in all EU Member States as of 1 January 2019.

The new harmonised securitisation rules set out criteria for simple, transparent and standardised securitisation in the EU, with the objectives of ensuring financial stability and investor protection and facilitating the issuance of and investment in securitisations in the EU.

The Commission notes that the rules will ensure high standards of process, legal certainty and comparability across securitisation instruments through a higher degree of standardisation of products, which should increase the transparency, consistency and availability of key information for investors and increase liquidity. The rules will permit institutional investors to perform a thorough due diligence to assist in identifying the products that match their asset diversification, return and duration needs and the Commission views the legislation as a vital building block of the Capital Markets Union.

The press release also outlines other financial rules that will come into effect in 2019, including:

- A revised Directive on occupational pension funds, known as IORP2, which will come into effect on 13 January 2019;
- The revision of the Shareholders' Rights Directive, which will come into effect from 10 June 2019; and
- The new Prospectus Regulation, which will apply from 21 July 2019.

For further information, the press release can be accessed in full [here](#).

European Commission

The European Economic and Social Committee express opinion on European Commission’s Fintech Action Plan

On 10 October 2018, the European Economic and Social Committee (the “Committee”) published its opinion on the Communication from the European Commission with regards to a Fintech action plan (the “Plan”).

The Committee supports the Plan and acknowledged the potential benefits that the development of FinTech can have on the European market. The Committee is of the view that FinTech firms should be subject to the same rules as the financial sector in respect of resilience, cyber security and supervision. The Committee makes the following recommendations:
The European Commission to ensure that the measures on improving cyber security and the resilience of the financial sector are supplemented by rules to ensure uniformity in the development of Fintech in the EU;

The European Commission to ensure that the right to portability of personal data be implemented in a manner consistent with the Payment Services Directive II ("PSD2");

The European Commission should monitor the uptake of crypto-assets with a view to implementing measures that will protect the financial stability of the European Union;

Member States should design and implement labour market measures to enable workers displaced by technologies in the financial sector to access new jobs as soon as possible; and

The European Commission to identify possible rules for companies offering cloud services with regard to their responsibility for securing the data they host.

The Committee’s opinion can be accessed here.

(ii) European Commission establishes technical expert group on sustainable finance

On 15 October 2018, the European Commission announced by way of an update to its webpage on sustainable finance, that a technical expert group ("TEG") has been established and is in operation since July 2018.

The TEG is comprised of 35 members from a cross-section of disciplines across various sectors. The members will work with additional observers to assist the European Commission with the development of (i) a unified classification system for sustainable economic activities; (ii) an EU green bond standard; (iii) methodologies for low-carbon indices; and (iv) metrics for climate-related disclosure.

On 7 December 2018, the TEG published a webpage in which it called for feedback on the sustainable finance taxonomy, which will be established under the proposed Regulation on the establishment of a framework to facilitate sustainable investment. The TEG invited feedback on the first group of economic activities it proposed be deemed as contributing substantially to climate change mitigation and on the usability of the taxonomy in practice. The deadline for feedback is 22 February 2019.

The webpage can be accessed here, while further information about the TEG can be found here.
(iii) Priorities relative to the finance sector in the European Commission’s 2019 work programme

On 23 October 2018, the European Commission published a communication entitled ‘Commission Work Programme 2019: Delivering what we promised and preparing for the future’ (the “Communication”). In the Communication, the European Commission highlights a number of its legislative proposals it wishes the European Parliament and the Council of the European Union to further advance in 2019. These proposals include:

- The sustainable finance proposal;
- The cross-border investment funds proposal;
- The crowdfunding services proposal;
- The pan-European personal pension product proposal;
- The banking proposal;
- The recovery and resolution of central counterparties proposal;
- The European deposit insurance scheme; and
- The anti-money laundering proposal.

Once adopted, the European Commission intends to continue to work with the European Parliament and the Council of the European Union to implement the proposals.

The Communication can be accessed in full [here](#).

(iv) European Commission issues news article on the EU Blockchain Industry Roundtable

On 21 November 2018, the European Commission published a news article discussing the highlights of the EU Blockchain Industry Roundtable (the “Roundtable”), which took place on 20 November 2018. The objective of the Roundtable is to assist in the creation of a European community to support the development of blockchain technology in the EU.

A number of participants at the Roundtable outlined their support for the establishment of the “International Association for Trusted Blockchain Applications” (the “Association”), which will work closely with the European Commission and Member States grouped within the European Blockchain partnership in supporting interoperability, developing specifications, promoting standards and regulatory convergence to support the development and exploitation of innovative blockchain technologies.
The Association will be based in Europe and will be open to any organisations willing to work on the deployment of blockchain and distributed ledger technologies to transform digital services.

A copy of the European Commission’s article on the EU Blockchain Industry Roundtable can be found here.

(v) European Commissions issues two communications re the Single Market

On 22 November 2018, the European Commission published the following communication “The Single Market in a changing world, a unique asset in need of renewed political commitment”. The communication outlines three main areas where further efforts are required to deepen and strengthen the Single Market:

- The need for the European Parliament and Council to adopt proposals from the Commission directly relevant for the proper functioning of the Single Market which are yet to be adopted;

- The need for Member States to effectively implement, apply and enforce EU Single Market rules;

- The need to adapt the Single Market in light of a changing geopolitical context and for further economic integration in the areas of services, products, taxation and network industries.

The communication can be accessed here and a related press release can be accessed here.

On 22 November 2018, the European Commission also published the following communication “Harmonised standards: Enhancing transparency and legal certainty for a fully functioning Single Market”.

The communication describes four key actions that the Commission will immediately undertake to improve the efficiency, transparency and legal certainty for the actors involved in the development of harmonised standards, namely:

- Eliminate the remaining backlog of harmonised standards that are not yet published in the Official Journal of the European Union as soon as possible;

- Streamline internal decision making processes, in particular the decision of publishing the references to harmonised standards in the Official Journal,

- Prepare a guidance document on practical aspects of implementing the Standardisation Regulation,

- Reinforce, on an on-going basis, the system of consultants to support swift and robust assessments of harmonised standards and timely publication in the Official Journal.

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The communication is available [here](#) and a related press release can be found [here](#).

(vi) European Council publishes progress report on the 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 23 November 2018, the European Council published a progress report (the “**Progress Report**”) from the Presidency on the 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 (the “**Proposal**”). The Proposal aims to increase cross-border transactions in claims and, thereby, facilitate access to finance.

The Progress Report identifies the following areas of the Proposal where further negotiations and substantial amendments are required:

- Article 1 (Scope) and the list of exclusions from the scope of the Regulation;
- Article 2 (Definitions), particularly with regard to the definitions of 'credit institution', 'cash' and 'financial instrument';
- Article 4 (Applicable law): The analysis of the general conflict-of-law rule (habitual residence of the assignor) proposed by the Commission showed that it would be necessary to consider adding more exceptions to it. In particular, the Progress Report highlights the need to identify the appropriate connecting factor depending on the type of claim subject to an assignment; and
- Article 10 (Relationship with other provisions of Union law): Possible amendments should aim to avoid any possible overlap or inconsistencies between the conflict-of-law rules of the Insolvency Regulation, the three Directives on securities (Financial Collateral Directive, Final Settlement Directive, and Winding-Up Directive) and the Proposal.

A full copy of the Progress Report can be accessed [here](#).

(vii) European Commission publishes communication calling on the European Parliament and the European Council to increase efforts on completing the capital markets union

On 28 November 2018, the European Commission published a communication (the “**Communication**”) in which it called on European Parliament and European Council to accelerate work on completing the capital markets union (“**CMU**”).

In the Communication, the Commission highlighted the important role that completion of the CMU will play in making the economy of Member States and the Economic and Monetary Union more resilient, in fostering convergence, in safeguarding financial stability and in strengthening the international role of the euro. The Commission notes that successful CMU will enable companies to seek more funding across the Union and would assist in the development of local capital markets and in improving access the finance for businesses. The
CMU will also provide more investment opportunities, offering greater choice to consumers and enabling them to buy cheaper and better investment products.

The Commission outlines thirteen legislative proposals which it tabled to put in place the key building blocks of the CMU, only three of which have been agreed by the European Parliament and the Council (i.e. the Prospectus Regulation, the Regulations on European venture capital and social entrepreneurship funds and the Regulation on Simple, Transparent and Standardised securitisations. As a result, the Commission calls on the co-legislators to act before the European Parliament elections in 2019, in order to put in place the required building blocks for a complete CMU.

The European Commission's full Communication can be accessed here.


On 29 November 2018, Council Decision (EU) 2018/1867 on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee, concerning the amendment of Annex IX (Financial Services) to the EEA Agreement (Omnibus II) was published in the Official Journal of the European Union (the “Decision”).

The Decision amends Annex IX to the EEA Agreement in order to incorporate the Omnibus II Directive into the EEA Agreement. The Decision entered into force on the date of its adoption, 26 November 2018. A full copy of the Decision can be accessed here.

(ix) European Economic and Social Committee issue opinion on the European Commission’s proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services

On 26 April 2018, the European Commission published a proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services.

The proposed Regulation seeks to address a number of potentially harmful trading practices that may arise as a result of the dependence of businesses on certain online services such as e-commerce market places, software application stores and social media. For example, the European Commission notes that the providers of such services have a scope to engage in practices that may limit business users’ sales through them and risk undermining their trust. Such practices include making unexplained changes in terms and conditions without prior notice and the delisting of goods or services and the suspension of accounts without a clear statement of reasons.

The proposed Regulation also seeks to address the potential for harmful ranking practices as a result of the dependence of businesses on online general search engines. Points of note within the proposed Regulation include:
Providers of online intermediation services will be required to ensure that their terms and conditions for professional users are easily understandable and easily available; and

Providers of online intermediation services will be required to set up an internal complaint-handling system.

The proposal may be accessed [here](#).

On 6 December 2018, the European Economic and Social Committee (the “Committee”) issued an opinion on the proposal, in which it recommended that the proposal be approved swiftly so that it can fill a clear legislative gap in the regulation of online intermediation services.

The Committee stressed that the regulation alone cannot resolve all the digital market’s problems and that disparities in the strength between global players and business users can only be addressed by establishing clearer boundaries and relationships between stakeholders and combating abuse of a dominant position.

The Committee recommended including a ban on price parity clauses in the regulation to combat oligopolies and monopolies. The Committee is also in favour of spelling out any differentiated treatment (such as ranking) giving preference to certain businesses as part of the contractual terms and conditions.

The Committee highlighted the benefit of settling disputes out of court and in establishing harmonised criteria to guarantee the independence of mediators.

The opinion is accessible [here](#).

(x) **Opinion on proposals for a directive to amend the Motor Insurance Directive (2009/103/EC)**

On 6 December 2018, the European Economic and Social Committee (“EESC”) published an opinion on the proposal for a Directive amending Directive 2009/103/EC as regards insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability (the “Motor Insurance Directive”) (the “Opinion”).

In the Opinion, the EESC welcomes the European Commission proposals amending the Motor Insurance Directive, which relate to:

- Enhancing protection of traffic accident victims in the event of insolvency of the insurer;
- Improving recognition of claims history statements, especially in a cross-border context;
- Insurance checks to combat uninsured driving;
- Harmonisation of minimum amounts of cover; and
The scope of the directive.

The EESC noted however that the European Commission has not taken this opportunity to anticipate the changes connected to driverless motor vehicles, despite the comments included in the impact assessment accompanying the proposal.

A copy of the opinion can be found here.

(xi) European Commission launches evaluation of EU rules on the Distance Marketing of Financial Services

On 7 December 2018, the European Commission published a webpage and a related “evaluation roadmap” which announced that it would carry out an evaluation of the Distance Marketing of Financial Services Directive (the “Directive”). The Directive has the aim of ensuring the free movement of financial services in the single market by harmonising consumer protection rules governing this area.

The evaluation will assess whether the original objectives of the Directive have been achieved, how the Directive is functioning from a cost/benefits and burden reduction perspective and how the Directive works with other legislation in the areas of retail financial services, consumer protection and data protection. It will also consider whether the tools of the Directive correspond to original and current needs and whether EU measures have added value. The evaluation roadmap identifies the following aspects on which the evaluation will gather evidence regarding the functioning of the Directive:

- Scope of services covered;
- Information disclosure;
- Right of withdrawal;
- Unsolicited services and communications;
- Regulatory choices by Member States; and
- Interplay with product-specific legislation in the field of retail financial services, the e-commerce framework and horizontal consumer protection rules.

The European Commission aims to conclude the evaluation by the end of 2019.

The webpage and the evaluation roadmap can be accessed here.
(xii) European Committee of the Regions publish opinion on two directive proposals for a “New Deal for Consumers”

On 21 December 2018 an Opinion of the European Committee of the Regions (“ECR”) on two directive proposals in respect of the Commission’s ‘New Deal for Consumers’ (“New Deal”) was published in the Official Journal of the European Union.

The New Deal is an initiative to ensure European consumers are benefiting from their rights granted under European Union law. The inadequacy of the current regime was brought to light in the ‘Dieselgate’ scandal and in two reports – Regulatory Fitness and Performance Programme Fitness Check of European Union Consumer and Marketing law (“Fitness Check”) and Consumer Rights Directive evaluation (“CRD Evaluation”) published in May 2017, which conducted an extensive evaluation on existing consumer rules. The two proposals are based on the recommendations made in the Fitness Check and CRD Evaluation and build on the current legislative framework by amending existing Directives.

Proposal 1

The first proposal is for a “Directive on better enforcement and modernisation of European Union consumer protection rules” (“Proposal 1”). Greater online protection for consumers, effective penalties for infringements calculated by percentage of turnover and individual remedies for victims of unfair commercial practices such as aggressive marketing are some of the amendments proposed for the directive. A copy of Proposal 1 can be accessed [here]; and

Proposal 2

The second proposal is for “a Directive on representative actions for the protection of the collective interests of consumers, and repealing the Injunctions Directive 2009/22/EC” (“Proposal 2”). Proposal 2 will remedy the shortcomings of the Injunctions Directive by introducing stronger sanctions, enabling ‘qualified entities’ launch representative actions to protect the collective interests of consumers and facilitating redress for consumers who are victims of such infringements by mechanisms such as requiring traders found in judicial proceedings to have breached consumer rights to inform consumers affected by such breaches and explaining to them how to benefit from redress among other actions. Proposal 2 also contains safeguards to prevent the abuse of process by ‘qualified entities’. A copy of Proposal 2 can be accessed [here].

The ECR has recommended a number of amendments to both proposals. In particular, it recommends that collective redress mechanisms be extended to other cases of mass harm, including cases of mass environmental damage, harm done to common goods, and in respect of health and safety regulations or violations of employment rights, to bring about easier access to justice for all citizens.

Further detail on the ECR’s recommendations is provided in the opinion, which can be accessed [here].
(i) European Parliament resolution on the action plan on retail financial services

On 4 October 2018, the European Parliament resolution of 14 November 2017 on the action plan on retail financial services (the “Resolution”) was published in the Official Journal of the European Union. The following issues are addressed in the Resolution:

- Lower charges on non-euro transactions;
- Transparency in currency conversion;
- Easier product switching;
- Quality comparison websites;
- Better motor insurance;
- Transparent pricing of car rentals;
- Deeper single market for consumer credit;
- Fair consumer protection rules;
- Better creditworthiness assessments;
- Fintech for retail financial services;
- Digital identity checks; and
- Online selling of financial services.

The Resolution on the action plan on retail financial services can be accessed here.

(ii) ECON publish draft report on proposed sustainable investment framework regulation

On 21 November 2018, the European Parliament’s Committee on Economic and Monetary Affairs (“ECON”) published a draft report on the proposal for a regulation on the establishment of a framework to facilitate sustainable investment (the “Proposed Regulation”). The Proposed Regulation seeks to establish an EU-wide taxonomy with the objective of providing businesses and investors with uniform language to determine what degree economic activities can be considered environmentally-sustainable.

On 12 December 2018, the European Banking Federation (“EBF”) published a number of general comments on the Proposed Regulation. The EBF’s observations include the following:
The EBF underlined its support for the Proposed Regulation’s holistic and harmonised approach, but stressed the need to balance transparency on the one hand and the operational feasibility to allow its usage by companies to improve their sustainable actions and reach the objectives set out in the Paris agreement on the other hand;

The EBF advocated a forward-looking perspective that would pave the way for a gradual shift towards increased sustainability of activities, companies and assets;

The EBF recommended the extension of the scope of the Proposed Regulation to cover other sustainability objectives from the earliest possible stage;

The EBF suggested that efforts in building a taxonomy should be concentrated for sustainable activities and the aim of the Proposed Regulation should be to facilitate sustainable finance by focusing on the positive and not the negative environmental impact;

The EBF recommended that requiring credit institutions to disclose their corporate lending that funds environmentally sustainable activities should not be in the scope of this regulation.

The Proposed Regulation can be accessed here and the EBF’s comments are available here.

(iii) European Commission publishes Vice-President’s speech on the stability of the financial markets

On 29 November 2018, the European Commission published a speech made by its Vice-President Valdis Dombrovskis on the stability of the financial markets. In the speech, Mr. Dombrovskis calls on the co-legislators to take action on the following issues:

To make progress on the legislative package aimed at reducing non-performing loans;

To reach an agreement on the backstop to the single resolution fund and to make further steps towards a European Deposit Insurance Scheme;

To put in place the main building blocks for the Capital Markets Union, with a particular focus on 10 of the original 13 proposals that remain on the desks of the co-legislators;

To adopt the proposed review of the European Supervisory Authority in order to strengthen the European anti money laundering framework and the powers of the ESAs.

In addition, Mr. Dombrovskis states that the European Commission is expecting advice from ESAs on a number of important topics in line with the Fintech Action Plan, including crypto-assets. Based on this advice, the Commission will assess whether regulatory action is required at EU level.

A full copy of the Vice-President’s speech can be accessed here.
(iv) Political agreement reached on the proposed Regulation on cross-border payments and currency conversion charges

On 19 December 2018, the Council of the European Union issued a press release in which it communicated that it had reached an agreement with the European Parliament on the proposed Regulation amending the Regulation on cross-border payments with regard to certain charges on cross-border payments in the European Union and currency conversion charges (the “Regulation”).

The Regulation will align the charges for cross-border payments in euros for services such as credit transfers, card payments or cash withdrawals with the charges for corresponding national payments of the same value in the national currency of the Member State where the payment service provider of the payment service user is located. It also increases the transparency requirements relating to the charges for currency conversion services by introducing an obligation to disclose the charges applied as a percentage mark-up of all currency conversion charges over the latest available exchange rate of the ECB.

The final compromise text of the Regulation is incorporated within an “I” item note published by the Council of the European Union, which is available here.

Parliament and Council will be called on to adopt the proposed Regulation at first reading following a legal linguistic revision of the text.

The Council’s press release can be accessed here.

(v) Council of the EU agrees position on the proposed regulation on disclosures relating to sustainable investments and sustainability risks

On 19 December 2018, the Council of the European Union issued a press release in which it announced that it had agreed a position on the proposed regulation on disclosures relating to sustainable investments and sustainability risks and a proposed regulation amending the Benchmarks Regulation to create a new category of financial benchmarks aimed at giving greater information on an investment portfolio’s carbon footprint.

The proposed regulation on disclosures will introduce a harmonised EU approach to the integration of sustainability risks and opportunities into the procedures of institutional investors. It will require such institutional investors to disclose:

- The procedures they have in place to integrate environmental and social risks into their investment and advisory process;
- The extent to which those risks might have an impact on the profitability of the investment;
- Where institutional investors claim to be pursuing a “green” investment strategy, information on how this strategy is implemented and the sustainability or climate impact of their products and portfolios.
The proposed regulation amending the Benchmarks Regulation aims to provide a reliable tool to pursue low-carbon investment strategies by establishing two new types of financial benchmarks namely:

- Low carbon benchmarks which aim to lower the carbon footprint of a standard investment portfolio; and
- Positive-carbon impact benchmark, which aims to select only components that contribute to attaining the 2°C set out in the Paris climate agreement.

A copy of the press release is available [here](#).

A copy of the proposed regulation on disclosures can be accessed [here](#) and the proposed regulation amending the Benchmarks Regulation can be accessed [here](#).

**European Systemic Risk Board ("ESRB")**

(i) **ESRB publishes report on macroprudential provisions, measures and instruments for insurance**

On 26 November 2018, the European Systemic Risk Board ("ESRB") published a report on macroprudential provisions, measures and instruments for insurance. The report serves to inform the ongoing discussions and review of Solvency II on strengthening the regulatory framework for (re)insurers from a macroprudential perspective and complements work undertaken by EIOPA.

The Report outlines two key systemic risk types for (re)insurance and also identifies a shortlist of options for additional provisions, measures and instruments that would address these key systemic risk types by targeting several significant systemic amplifiers, sectoral vulnerabilities and transmission channels. The shortlisted options would form part of a comprehensive regulatory framework as follows:

- In order to make (re)insurers safer to protect policyholders, the shortlisted options include a proportionate extension and enhancement of micro-prudential reporting requirements;
- In order to provide legal certainty in case an (re)insurer runs into difficulties and to ensure that any failure is orderly, they confirm the financial stability benefits of a harmonized European Union-wide recovery and resolution framework; and
- As part of a macro-prudential toolkit to target systemic risks, they include the possibility for the following:
  - A power for authorities to impose, entity-based and/or activity/behavior-based market-wide capital increases and dividend restrictions in situations in which (re)insurance market developments could generate systemic risk;
- Symmetric capital requirements for cyclical risks;
- Liquidity requirements for (re)insurers with a vulnerable liquidity profile;
- A discretionary power for authorities to intervene in cases of mass lapses; and
- Instruments to target bank-like activities to ensure cross-sectoral consistency of macro-prudential policy.

The implementation of these options at the European Union level would provide all authorities with the necessary tools and flexibility to address a wide range of systemic risks, but given that national (re)insurance markets differ, the modalities of certain options could differ across jurisdictions to reflect differences in national (re)insurance markets.

A copy of the report can be accessed here.

Pensions

(i) The Pensions Authority publishes considerations for trustees arising from the IORP II Directive

On 1 October 2018, the Pensions Authority published information to give trustees an understanding of the extent of their responsibilities arising from the provisions of the IORP II Directive and to assist in their preparation for its transposition into Irish law. The deadline for transposition of the IORP II Directive into the laws of all EU Member States is 13 January 2019.

The Directive provides for EU-wide pension scheme standards including:

- An effective system of governance;
- Communications with active, prospective and deferred members, those nearing retirement and pensioners;
- General principles of prudential supervision with a focus on a risk-based and forward-looking approach, with increased interventionist powers provided to the regulator.

The Pensions Authority outlined the following areas of focus for trustees arising from the IORP II Directive:

- **Governance** – All significant activities of trustees should have documented policies and procedures, the reasoning for the various decisions should be recorded and all material should be retained and available for inspection and audit by the Pensions Authority.

- **Role and Composition of the trustee board** – The trustee board must ensure the effective, prudent and ethical oversight of the management of the scheme.
Fit and proper requirements – The Directive requires that trustees meet fit and proper criteria and trustees are expected to conduct and document their own due diligence when assessing a prospective trustee for such a role.

Meetings – The trustee board should meet at least four times per calendar year and at least once in every six-month period, or more frequently if necessary to fulfil its responsibilities prudently. An agenda and minutes of the previous meeting should be circulated to trustees prior to the meeting and detailed minutes of all board meetings should be kept.

Committees of the trustee board – The trustee board may consider establishing committees to consider specific issues but remains responsible for all decisions taken on its behalf and should monitor the exercise of delegated functions.

Governance and scheme management – Trustees must have policies and procedures in place for all significant activities and must be able to demonstrate compliance with these.

Policies – The Pensions Authority will pay particular attention to the quality of comprehensive written policies in the following areas (i) Scheme administration, (ii) Risk management, (iii) Internal control framework, (iv) Outsourcing activities (where relevant) (v) Remuneration (vi) Actuarial and funding matters. The policies and procedures should be reviewed and updated at least every three years and documentary evidence of the review and update should be retained.

Key Functions – The trustee board must ensure that there is a risk management function, an internal audit function and for defined benefit schemes, an actuarial function.

Supervision – A forward-looking, risk-based approach to supervision will be adopted by the Pensions Authority, focusing on the risks of non-compliance and poor member outcomes.

A copy of the Pension Authority’s information note can be accessed here.

(ii) EIOPA publishes Pensions Information Taxonomy


The taxonomy aims to provide NCAs with the technical means to submit harmonized information of all pension funds in the EEA to EIOPA. The technical templates and means developed by EIOPA enable NCAs to report both the information required by EIOPA and the European Central Bank (“ECB”) by means of a single submission.
In the press release, EIOPA highlights that the integrated taxonomy could also be adopted by the NCAs for the collection of information from the pension funds to NCAs, improving efficiency in the process.

The XBRL Taxonomy can be accessed [here](#) and the related press release is available [here](#).

**EIOPA publishes report on the principles and guidance for the pension benefit statement**

On 13 November 2018, EIOPA published a report on the principles and guidance for the design of the pension benefit statement ("PBS") (the "Report"), which is required under Directive (EU) 2016/2341 on the activities and supervision of institutions for occupation retirement provision ("IORP II"). The PBS is a concise document which should be made available to each member at least annually. The Report aims to provide principles and guidance in respect of the PBS based on the national practices existing prior to the implementation of IORP II.

The Report begins with a discussion of the goals of the PBS, providing an overview of the behavioral and legal aspects surrounding pension communication, the trend from defined benefit to defined contribution and the importance of providing adequate information to help members make informed decisions. It then considers pension projections, presenting the different possible approaches and the assumptions that are currently taken into account in the projections’ methodologies. It also examines issues relating to the disclosure of costs in the PBS and considers how best to design a PBS.

With regard to the design and content of a PBS, EIOPA outlines the following principles:

- The design of the PBS should be based on a behavioural approach to facilitate a member’s decisions about his/her retirement savings. It should be effective, attractive, easy-to-read and the information should be layered to help the member find key information at a glance and navigate easily through the content to find answers to his/her questions;

- The PBS should present pension projections in real terms and in relation to the current income of the member in order to better understand his/her purchasing power after retirement;

- The PBS should enable the member to understand the impact of costs on his/her pension entitlements and to compare pension scheme cost levels;

- The PBS should integrate and complement the communication tools already in place within the Member State to enable insight into the full retirement situation; and

- Information contained in a PBS should be comparable to other PBSs at national level, to allow for financial planning.
The Report can be accessed in full [here](#) and a related press release is available [here](#).

(iv) **Pensions Authority publishes FAQs on the Occupational Pensions Scheme (Investment) Regulations, 2005**

On 23 November 2018, the Pensions Authority published a number of FAQs on the Occupational Pensions Scheme (Investment) Regulations, 2005 (the “Investment Regulations”).

The Investment Regulations apply to all schemes and all assets of a scheme, except for single member schemes and personal retirement savings accounts. All schemes except small schemes (those with less than 100 active or deferred members) must also prepare a Statement of Investment Policy Principles (“SIPP”). The FAQs provides responses to the following questions:

- To what schemes do the investment regulations apply?
- What is a single member scheme?
- What borrowing is allowed?
- What information should be provided in a Statement of Investment Policy Principles?
- What, if any, additional requirements are imposed by article 7(3)?
- What restrictions are imposed by the obligation to invest in regulated markets?
- What restrictions are there on self-investment?
- Is investment in derivatives permitted?
- How do the regulations apply to schemes invested in insurance policies or pooled investments?
- How will these regulations affect defined contribution schemes?
- How quickly must schemes apply the new regulations?

The full responses to the FAQs can be accessed [here](#).
(v) EIOPA promotes greater transparency towards IORPs on cross-border activities

On 27 November 2018, EIOPA published a press release in which it announced that it had published a decision on the cross-border collaboration of NCAs with respect to the IORP II Directive (the “Decision”).

The Decision repeals the Budapest Protocol with effect from 13 January 2019 and aims to foster supervisory convergence and identify good practices for seamless and efficient cross-border transfers between institutions for occupational retirement provision (“IORPs”) and for the cross-border activities of IORPs, while offering adequate protection for members and beneficiaries. It outlines different situations and possibilities for NCAs to exchange information about cross-border activities in relation to the “fit and proper” assessment and the outsourcing of key functions, both new provisions of the IORP II Directive.

The Decision promotes greater transparency towards IORPs to be duly informed by the NCAs about their expectations, such as the justification and decision linked with the provision of information to the NCAs. The appendices to the Decision include useful material such as templates, flow charts, and examples of cross-border activities with the aim of providing further clarity on the procedures to be followed for the cross-border activities.

The press release can be accessed here and the Decision, together with its Annex and appendices, can be accessed here.

(vi) The Social Welfare, Pensions and Civil Registration Bill 2018

On 18 December 2018, the Social Welfare, Pensions and Civil Registration Bill 2018 (the “Bill”) is currently before Seanad Eireann at Fourth Stage, where amendments arising out of the Committee stage are considered.

The Bill is designed primarily to give legislative effect to a range of social welfare measures announced in the expenditure report of 9 October 2018 including increases in weekly welfare rates of pensions, benefits and allowances and proportionate increases for qualified adult dependants.

The Bill contains 24 sections in 5 Parts together with 3 Schedules and can be accessed here.
Report on the feasibility of an insurance claim-by-claim register

On 18 October 2018, the Department of Finance (the “Department”) published its report on the feasibility of an insurance claim-by-claim register. The report follows that of the Cost of Insurance Working Group (the “Working Group”) in 2017, which recommended that the feasibility of a longer-term claim-by-claim register be considered as part of efforts to increase transparency around the reasons for the increase in the cost of insurance premiums in recent times.

A Data Sub-group of the Working Group was established to consider the practicalities of the claim-by-claim register and undertook a public consultation to seek the views of stakeholders on the key considerations. Respondents were asked to comment on the purpose of the register and the added value it might bring over other databases such as the National Claims Information Database (“NCID”) and the Fraud Database.

According to the Data Sub-group, no unified view was put forward in the public consultation as to what the primary purpose of the register would be and what added value it would bring over the other databases. The report found that the respondents were unable to provide concrete examples of the additional value that a claim-by-claim register would bring in the insurance environment.

The Data Sub-group also highlighted that the establishment and administration of such a register would entail significant data protection requirements. Given the limited added value of a claim-by-claim register, the Data Sub-group noted that it would be difficult to justify the implementation of the necessary data protection requirements from a financial resource point of view.

The report concluded that a cogent case had not been put forward for the establishment of a claim-by-claim register at this time. Instead it was recommended that every effort is made to have the NCID and the Fraud Database operationalised as soon as possible.

The full report can be accessed here.
The Central Bank publishes findings of Managing General Agents Thematic Inspection and Motor Insurance Research

On 7 November 2018, the Central Bank released the findings of its Managing General Agents ("MGAs") thematic inspection and motor insurance research. The objective of the work was to better understand the Irish private motor MGA market, the manner in which MGAs operate and their engagement with insurers and underlying retail intermediaries.

The main findings of the thematic inspection were as follows:

- Some MGAs failed to adhere to the Central Bank’s original deadline to fully implement the provision of key information changes to policy and associated documentation and MGAs generally failed to make consumers sufficiently aware of key information;

- In a majority of cases, MGAs had not formally documented contingency plans to deal with an insurer exiting the market; and

- MGAs were unable to demonstrate sufficient preparedness for the new Product Oversight and Governance Requirements subsequently introduced on 1 October 2018.

The findings of the thematic inspection were supported by consumer research commissioned by the Central Bank, which found the following:

- Consumer’s knowledge of the identity of their motor insurance company was mixed;

- Price, rather than the insurer, was the primary driver of choice; and

- Satisfaction with the service of current motor insurers was high and the majority stayed with their current provider at last renewal.

The Central Bank’s press release is available [here](#) and the consumer research paper can be accessed [here](#).

Publication of the Cost of Insurance Working Group’s Seventh Quarterly Progress Update

On 12 November 2018, the Cost of Insurance Working Group published its Seventh Progress Update. The quarterly report is the third to provide details on the implementation of both the Report on the Cost of Employer and Public Liability Insurance and the Report on the Cost of Motor Insurance.

The Seventh Progress Update provides details on how the implementation of the recommendations are progressing in overall terms and notes that 62 of a total of 78 separate applicable deadlines relate to actions that have now been completed which equates to an 80%
‘completion rate’. In relation to 7 particular actions which were due for completion during the third quarter from both Reports, 4 of these actions were completed in this quarter.

A copy of the Seventh Progress Update can be accessed here.

(iii) Central Bank releases 2019-2021 Strategic Plan

On 12 November 2018, the Central Bank released its 2019-2021 Strategic Plan in accordance with Section 32B of the Central Bank Act 1942. The Strategic Plan identifies the key longer-term priorities the Central Bank intends to undertake in order to meet its objectives for the three-year period. The Central Bank will pursue the following strategic themes for the period 2019-2021:

- **Strengthening Resilience**: Involves monitoring the threats to financial stability and calibrating macro-prudential policy tools, delivering effective supervision of firms and markets that pose a threat, continuing to address existing vulnerability remaining from the financial crisis, enhancing financial crisis preparedness and management capabilities and preparing for and managing the failure of relevant regulated firms in a manner that minimises disruption to the economy;

- **Brexit**: Involves continued research and evidence-based analysis of the potential risks arising from Brexit, enhancing regulatory tools and supervisory approaches to ensure the stability of the Irish financial system, ensuring regulated firms are prepared for the full range of Brexit scenarios and ensuring a robust and effective authorisation process of all firms seeking authorisation in light of Brexit;

- **Strengthening Consumer Protection**: Involves strengthening conduct risk regulation; developing consumer protection supervision, embedding a culture that aspires towards fair outcomes for consumers within regulated firms, enhancing confidence and trust in the financial system through high quality regulation and supporting the fight against money laundering and related activity;

- **Enhancing Influence**: Involves transparent engagement with the public and key domestic stakeholders directly and online, actively contributing to the European System of Central Banks/Eurosystem, and engaging strategically with the Single Supervisory Mechanism and the European Supervisory Authorities; and

- **Enhancing Organisational Capability**: Involves implementing the Central Bank’s people strategy, investing in the delivery of a Data Strategy to support data analytics and data management, ensuring the appropriate structure, competencies and resources are in place to support the successful delivery of organisational objectives, strengthening internal governance and risk management and reviewing and embedding organisational principles and priority behaviours throughout the organisation.

The full 2019-2021 Strategic Plan can be read here.
(iv) Central Bank publishes its Funding Strategy and Guide to the 2018 Industry Funding Regulation

On 13 November 2018, the Central Bank Act 1942 (Section 32D) Regulations 2018 (the “Regulations”) was enacted. The Regulations sets out the framework for that year’s levying process and the basis on which individual financial service providers’ levies will be calculated.

Following on from the enacted Regulations, the Central Bank also published its ‘Funding Strategy and Guide to the 2018 Industry Funding Regulations’ (the “Guide”). The publication is intended to provide a user-friendly guide as to how the Industry Funding levy for 2018 is calculated and provides important information on the 2019 levy year. The Guide consists of:

- **Section 1 - Funding Strategy**: an overview of the Central Bank’s Funding strategy and important changes to the 2019 levy cycle;
- **Section 2 - Background to the 2018 Industry Funding Regulations**: set out the background to the levy and summarises the 2018 Industry Funding Regulations;
- **Section 3 - Significant Changes in 2018**: sets out the significant changes to the levy in 2018;
- **Section 4 - Calculation of the Industry Funding Levy**: explains how the levy is calculated for each industry funding category; and
- **Section 5 - Financial Information for Industry Sectors**: sets out the calculation of the levy rates for individual financial service providers, provides analysis of the cost of Financial Regulation in 2018 and explains how the net Annual Funding Requirement (“nAFR”) is determined.

A copy of the Regulations can be accessed [here](#) and the Guide can be accessed [here](#).

(v) Central Bank publishes discussion paper on outsourcing

On 19 November 2018, the Central Bank published its discussion paper on outsourcing (the “Paper”). The Paper provides a summary of the key outsourcing issues and risks specifically identified in the Central Bank’s review which require urgent attention.

Part A of the paper sets out the Central Bank’s findings and focuses on the Central Bank’s minimum supervisory expectations on how firms should manage outsourcing risks. The Paper’s findings outline particular weaknesses in the implementation by regulated firms of relevant outsourcing regulatory requirements in the areas of governance, risk management and business continuity management.

Part B discusses a number of key evolving risks and trends which are arising and outlines key issues that regulated firms must consider in order to mitigate these risks effectively. It sets out a number of key questions which must be considered and actioned by the risk management
functions of regulated firms on the issues of sensitive data risk, concentration risk, offshoring and chain outsourcing risk and substitutability risk. The Central Bank expects regulated firms to:

- Take appropriate action to address the issues outlined in the Paper and to be in a position to evidence same to the Central Bank if necessary;
- Ensure that the risk management function in the regulated firm conducts a review of outsourcing arrangements already in place and where relevant, assess any potential new arrangements;
- Implement appropriate policies, procedures and controls or update their existing risk management frameworks to ensure that the findings have been addressed; and
- Maintain comprehensive and universal risk registers to enable the regulated firm to understand the key threats to their organisation and to ensure appropriate risk assessments and monitoring is performed regularly and routinely.

The Central Bank’s discussion paper on outsourcing can be accessed [here](#).

(vi) **Thematic Inspection of Gadget Insurance**

On 22 November 2018, the Central Bank published its findings of a thematic inspection on the sale of gadget insurance in a ‘Dear CEO’ industry letter. The thematic inspection examined the manufacturing and distribution of gadget insurance products and assessed a number of areas including:

- Product oversight and governance;
- Timeliness and clarity of information provided to consumers; and
- A review of policy terms, conditions and exclusions and their impact on a policyholder’s ability to make a claim.

The thematic inspection was supplemented by consumer research which examined consumers’ attitudes, behaviours and experiences when purchasing gadget insurance products.

In the industry letter, the Central Bank expresses concerns that a consumer centric approach has not been adopted in relation to certain aspects of the gadget insurance product design such as ensuring that the insurance product sold meets the needs of consumers and in how the cost of insurance is presented at the point of sale.

The Central Bank’s main findings are identified in the industry letter and related action points are as follows:
Inadequate information is provided to consumers of gadget insurance policies – the Central Bank expects all insurers to issue an annual statement reminding consumers that the gadget insurance product remains in force, setting out the total cost of the insurance for the next 12 months, highlighting the key features and exclusions of the policy, providing details of how to make a claim, and providing consumers with relevant contact details should they wish to cancel or discuss any aspect of the policy.

Inadequate identification of target market and suitability assessment – The Central Bank notes that insurers should exclude from the target market consumers who hold an existing insurance product that covers the gadget being purchased. This relevant information should be sought at the point of sale when assessing the suitability of the gadget insurance product for the consumer. Regular reviews and appropriate updates must be made to the product information/documentation provided to consumers at the point of sale. Front-line staff distributing gadget insurance products should be provided with appropriate and relevant training and information in relation to the product so that the staff are in a position to clearly explain the product features to consumers and to properly assess suitability.

Inadequate provision of information about price – the price of the gadget insurance product was usually presented to consumers as a monthly figure rather than on an annualised basis or based on the maximum possible duration of the insurance contract, ensuring that consumers have a full understanding of the true cost of the insurance product.

Non-Compliance with claims handling provisions of the Consumer Protection Code 2012 (the “Code”) – the Code requires all insurers to have appropriate procedures in place for the effective and proper handling of claims. The thematic inspection determined that all of the insurers inspected have procedures and processes in place to enable compliance with these requirements and that while generally firms were meeting the required standards, a number of areas where firms need to improve were identified. Such areas include settlement offers, declined claims, documentation issued to customers at point of sale and thereafter and details of internal appeals mechanisms available. Insurers should review their claims policies and procedures to ensure that they are meeting with the requirements of the Code.

Risk that gadget insurance may not meet consumers’ expectations – insurers must take the necessary steps to ensure that clear and understandable information is provided to consumers on the product being sold, including the cost of the product, at the point of sale so that consumers can make an informed decision. The thematic inspection identified that there is a risk of a gap between what consumers believe their gadget insurance covers and what it actually covers.

Firms are required to consider the issues identified in the letter and must also take remedial actions to ensure that they are acting in the best interests of consumers and in line with the Central Bank’s expectations. The Central Bank expects boards to discuss and consider its
‘Dear CEO’ letter at its next meeting and that the minutes of the relevant board meeting to record this.

Where issues have been identified for specific firms, the Central Bank has imposed supervisory requirements on such firms with specific timelines for remediation of same.

A copy of the ‘Dear CEO’ industry letter can be accessed here.

(vii) Central Bank publishes updated explanation note on Insurance Compensation Fund

On 30 November 2018, the Central Bank published an updated explanation note on the Insurance Compensation Fund (the “Fund”).

The Fund was established under the Insurance Act 1964 (the “Act”) which has been amended by the Insurance (Amendment) Act 2011 (the “2011 Act”) and the Insurance (Amendment) Act 2018 (the “2018 Act”). The 2018 Act provided for the transfer of the administration of the Fund from the Accountant of the High Court to the Central Bank.

The Fund is primarily designed to facilitate payments to policyholders in relation to risks in the State where an Irish authorised non-life insurer or a non-life insurer authorised in another Member State goes into liquidation.

The updated explanation note provides information on payments from the fund in the event of liquidations and administrations, contributions to the Fund and the role of the Central Bank under the Act.

A copy of the updated explanation note can be accessed here.

(viii) Central Bank comments on the role of RegTech in financial services

On 4 December 2018, the Central Bank published a speech made by its Director of Securities Markets, Colm Kincaid, on the role of RegTech in financial services, which has grown rapidly over the last number of years. In light of this development, the Central Bank recognises the need to ensure that users of financial services are protected regardless of the technology used when using the services. As a result, the Central Bank’s Strategic Plan 2019-2021 identifies the development of data analytics capabilities and related technology infrastructure as a key priority.

Mr. Kincaid also outlines the importance of developing the Central Bank’s data analytics capabilities and technology infrastructure in ensuring an effectively regulated securities market, specifically one that:

- Provides a high level of protection for investors and market participants.
- Is transparent as to the features of products and their market price.
- Is well governed (and comprises firms that are well governed).
- Is trusted, by both those using the market to raise funds and those seeking to invest.
- Is resilient enough to continue to operate its core functions in stressed conditions and to innovate appropriately as markets evolve.

Mr. Kincaid also references a recent report published by the Financial Industry Regulatory Authority ("FINRA"), which found that the increased use of RegTech has the potential to lead to new sources of security risks and recommended that security risk management should be an integral part of the evaluation and implementation of RegTech tools.

The speech calls on financial service providers to invest in technology and to make sure that their technology ambitions are based on firm technical foundations, targeted at bringing about real benefits for the financial system and its users while being resilient to failure and cyber-attack.

The speech can be read in full [here](#).

(ix) Central Bank (National Claims Information Database) Bill 2018

On 20 December 2018, the Central Bank (National Claims Information Database) Bill 2018 (the “Bill”) entered the Committee and Remaining stages in the Seanad. The purpose of the Bill 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 Bill.

The Bill also provides for the Central Bank to produce a report, at least once a year, based on its findings and subject to certain restrictions, to share information with requesting persons and other related matters.

A copy of the Bill can be accessed [here](#).

(x) Central Bank issues troubleshooting document to aid the industry in completing high quality IQ submissions

In December 2018, following the Irish Funds and the Central Bank quarterly meeting, the Central Bank has issued a troubleshooting document in relation to the Individual Questionnaire (“IQ”) application process, as an additional guide to aid external parties in the submission of high quality IQ applications in order to minimise applications being returned as incomplete or clarifications/additional information being sought.

IQ applications are mainly returned due to lack of information being provided in certain areas relating to time commitments for proposed and/or existing concurrent roles and lack of
supporting information demonstrating how the applicant meets the Fitness and Probity Standards

A copy of the troubleshooting document can be found here.

Personal Injuries Assessment Board (Amendment) (No. 2) Bill 2018

(i) Personal Injuries Assessment Board (Amendment) (No. 2) Bill 2018

On 4 December 2018, the Personal Injuries Assessment Board (Amendment) (No. 2) Bill 2018 (the "Bill") is currently before Dáil Éireann at Fourth Stage (whereby amendments arising out of Committee stage are known as Report Stage).

The purpose of the Bill is to amend the Personal Injuries Assessment Board Acts 2003 and 2007 to strengthen the PIAB in terms of operational issues 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.

A copy of the Bill can be accessed here.

Health Insurance (Amendment) Act 2018

(i) Health Insurance (Amendment) Act 2018

On 24 December 2018, the Health Insurance (Amendment) Act 2018 was signed into Irish law (the "Act").

The main purpose of the Act is to specify the amount of risk equalisation credits to be paid from the risk equalisation fund in respect of age, gender and level of cover from 1 April 2019 and to make consequential amendments to the Stamp Duties Consolidation Act 1999 to revise the community rating stamp duty levies required to fund the risk equalisation credits.

The Act provides for some necessary amendments to the existing health insurance legislation such as governing legislation for the VHI and will also provide for an amendment to the provision of the Health Insurance Act relating to the Board of the Health Insurance Authority.

A copy of the Act can be accessed here.
European Deposit Insurance Scheme ("EDIS")

(i) **EFDI published report on technical considerations for design of EDIS**

On 18 December 2018, the European Forum of Deposit Insurers ("EFDI") published a report on the technical considerations for the design of the European Deposit Insurance Scheme ("EDIS") (the "Report"). The purpose of Report is to provide a more in-depth discussion of elements of the potential frameworks for an EDIS and technical issues related to the EDIS on the basis of criteria that determine the effectiveness of the system. The EDIS should:

(i) Increase depositors’ confidence;

(ii) Ensure the capability to reimburse depositors within 7 working days;

(iii) Maintain or improve the availability of financial means for individual pay-outs;

(iv) Contain requirements that are relevant and feasible and not affect depositor confidence; and

(v) Provide full alignment with the Deposit Guarantee Schemes Directive ("DGSD").

The Report also makes 15 recommendations relating to the:

- General provisions and arrangements within the EDIS framework;
- The interaction between Deposit Guarantee Schemes ("DGSs") and EDIS during and after a DGS event; and
- Other issues.

A copy of the Report can be accessed [here](#).

Market Abuse Regulation ("MAR")

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

During the period 1 October 2018 to 31 December 2018, ESMA published updated versions of its questions and answers ("Q&As") on the Markets Abuse Regulation (Regulation 596/2014) ("MAR"). The updates comprise:

- **Question 5.3**: Specifies the elements that credit and or financial institutions should consider when considering delaying disclosure of inside information under Article 17(5) of the MAR;

- **Question 5.4**: Clarifies that credit and or financial institutions are required to notify the national competent authority of the expected duration of the delay under Article 17(5) of the MAR;
Question 5.5: Clarifies that credit or financial institutions cannot resort to Article 17(4) of the MAR where the national competent authority does not consent to the delay of disclosure under Article 17(5) of the MAR; and

Question 7.10: Clarifies that Article 19(11) of the MAR does not prohibit transactions of the issuer relating to its own financial instruments since the actions of the Person Discharging Managerial Responsibilities (“PDMR”), in their capacity of director or employee of the issuer, are not PDMR transactions for the account of a third party but transactions of the issuer itself.

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

(ii) ESMA publishes annual report on administrative and criminal sanctions and other administrative measure under MAR

On 15 November 2018, ESMA published its first annual report on administrative and criminal sanctions and other administrative measures under the Market Abuse Regulation (“the Report”). The report is published pursuant to Article 33 of MAR, which requires ESMA to publish an annual report relating to aggregated information on all administrative sanctions and other administrative measures imposed by national competent authorities (“NCAs”), together with criminal sanctions imposed, in a given year. The Report's highlights include the following:

- No sanctions or supervisory measures were imposed from 3 July to 31 December 2016;
- Seven criminal pecuniary sanctions were imposed in 2017, all of which concerned market manipulation cases in Germany.

In respect of administrative sanctions, the Report also outlines the below:

- Two other than pecuniary measures were imposed for the infringement of insider dealing and unlawful disclosure of inside information, by the Slovenian Agencija za trg vrednostnih papirjev, and by the Lithuanian Lietuvos Bankas;
- Thirty-five pecuniary sanctions and seven other than pecuniary measures were imposed for the infringement of market manipulation;
- One hundred and seven pecuniary sanctions and one hundred and eleven other than pecuniary measures were imposed for other infringements.

A full copy of the Report can be accessed here.
Transparency Directive

(i) **Central Bank publishes 2018 Transparency Rules**


A copy of the Central Bank’s Transparency Rules is available [here](#).

(ii) **ESMA publishes information on the European Single Electronic Format**

On 19 November 2018, ESMA published the script of its video tutorial (the “Script”) on the European Single Electronic Format (“ESEF”) reporting regime, which will come into force in 2020 and will impact all issuers within the meaning of the Transparency Directive. The Script sets out the following key requirements of the ESEF:

- All annual financial reports shall be prepared in xHTML or Extensible Hypertext Markup Language;

- Where annual financial reports contain consolidated IFRS financial statements, issuers shall mark up the consolidated financial statements using eXtensible Business Reporting Language (“XBRL”) tags. Tagging means attributing to financial data the most appropriate element chosen from a taxonomy;

- XBRL tags shall be embedded in the xHTML document using the Inline XBRL technology. The inline XBRL allows the XBRL benefits of tagged data to be combined with a human-readable presentation of a report, which is under the control of the preparer;

Only detailed tagging of the primary financial statements is required by ESEF, whilst for the notes the only requirement is to apply block tags to the relevant text. Where a preparer is marking up its disclosures, ESEF requires that preparers shall mark them up with the taxonomy element having the closest accounting meaning to marked-up disclosure. If the closest taxonomy element misrepresents the accounting meaning of the disclosure, issuers shall create a so-called extension taxonomy element. When creating an entity specific extension taxonomy element, the ESEF also requires that those extension taxonomy elements are anchored or “linked” to the core taxonomy element that has the closest accounting meaning through an XBRL relationship.

Detailed tagging of the primary financial statements will be mandatory for annual financial reports containing financial statements for financial years beginning on or after 1 January 2020, whilst the requirement to block tag the notes will only be coming into force in 2022.

The full script of the video tutorial on the European Single Electronic Format can be accessed [here](#).
(iii) **Draft Commission delegated regulation on the specification of a single electronic reporting format published**

On 17 December 2018, the European Commission published a draft delegated regulation supplementing the Transparency Directive (as amended) with regard to regulatory technical standards on the specification of a single electronic reporting format.

The draft delegated regulation specifies the single electronic reporting format, as referred to in Article 4(7) of the Transparency Directive (as amended), to be used for the preparation of annual financial reports by issuers from 1 January 2020 in XHTML format.

The draft delegated regulation enters into force on the twentieth day following its publication in the Official Journal of the European Union.

A copy of the draft delegated regulation can be accessed [here](#).

**Prospectus Regulation**

(i) **ESMA publishes annual report on prospectus approvals and passporting activity for 2016-2017 period**

On 15 October 2018, ESMA released its annual report on the number of prospectuses approved and passported by the national competent authorities of the European Economic Area ("EEA") within the European Union prospectuses regime (the "Report"). The purpose of the Report is to provide information about trends within the prospectus regime in terms of general approval and passporting activity as well as the structure of approved prospectuses and the types of securities they cover.

The Report shows that in 2017 the amount of prospectus approvals across the EEA increased by 1.9% when compared to 2016, while the overall passporting of prospectuses increased by around 2.6% over the period 2016 - 2017. Germany and Luxembourg continue to be amongst the top EEA countries passporting prospectuses to other EEA countries.

Stakeholders can search for additional detailed information in relation to prospectuses approved and transported via ESMA’s Prospectus Register available on their website.

The press release announcing the publication of the Report is accessible [here](#) and the Report can be accessed in full [here](#).
(ii) **Central Bank publishes guidance on submitting a debt submission template and Q&A on submission of a new debt submission template**

On 19 November 2018, the Central Bank published guidance on submitting a debt submission template (the “Guidance Document”) and a Q&A on submission of a new debt submission template (the “Q&A”). The Central Bank’s guidance document sets out a step-by-step guide for submitting a debt submission template, which is to be used in the following submissions scenarios:

- New Debt Submission;
- Redraft;
- Submission for Approval;
- Update to an Existing Submission; and
- Subsequent Passporting Request.

In addition, the Central Bank recommends that the submitter has regard to the provision of the Prospectus Handbook, which provides details of the Central Bank submission process.

The Central Bank’s Q&A also provides information on the new debt submission template which replaces the email submission template previously used to make debt submissions to the Central Bank.

The Central Bank’s Guidance Document can be accessed [here](#) and the Q&A is available [here](#).

(iii) **Prospectus Handbook – A Guide to Prospectus Approval in Ireland**

On 19 November 2018, the Central Bank published the published the latest version of its Prospectus Handbook (the “Handbook”), which provides a practical guide for market participants as to the procedures and practice of the Central Bank in order to provide the market with a clear, transparent and comprehensive overview of the prospectus review, approval and publication process.

The Handbook is relevant for issuers of transferable securities which are subject to the Prospectus Directive and certain law firms, listing agents, stockbrokers and investment banks who act as service providers to those issuers.

The Handbook is effective from 19 November 2018.

A copy of the Handbook is available [here](#).
(iv) European Commission publishes draft regulation on the format, content, scrutiny and approval of prospectuses

On 28 November 2018, the European Commission published its draft regulation supplementing the Prospectus Regulation (the “Draft Regulation”). The regulation will apply from 21 July 2019, the date of application of the Prospectus Regulation and provides further clarity on the format, content, scrutiny and approval of prospectuses. In particular, 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;
- 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.

A full copy of the Draft Regulation can be found here.

(v) The Central Bank publishes CP 127 Consultation on amendments to Prospectus Rules and consolidation into Central Bank (Investment Market Conduct) Rules

On 10 December 2018, the Central Bank published a ‘CP 127 Consultation on amendments to Prospectus Rules and consolidation into Central Bank (Investment Market Conduct) Rules’ (the “Consultation Paper”). The Consultation Paper consist of:

- Section I - contains details of proposed additional requirements to be contained in the Central Bank (Investment Market Conduct) Rules (“IMC Rules”) in relation to prospectuses.
- Section II - contains details of proposed key amendments to the Prospectus Rules.
- Schedule A - contains the Proposed Part 4 of the IMC Rules (setting out only the Prospectus Rules) and accompanying definitions.
The Consultation Paper proposes to amend the Prospectus Rules in light of the changes to Irish prospectus law as a result of the Prospectus Regulation and consolidate the Prospectus Rules into the IMC Rules. These proposed amendments and consolidation are intended to occur when the Prospectus Regulation is fully in application.

The Central Bank notes that the Rules attached to the Consultation Paper may be subject to further change depending on the final text of the European Commission delegated acts and ESMA guidance under the Prospectus Regulation.

The Central Bank’s Prospectus Handbook will also be updated in to take account of the Prospectus Regulation and revised Central Bank Rules.

The Central Bank invites stakeholders to provide comments on the questions raised in the Consultation Paper and in particular on key material amendments or additions proposed to be made to existing Rules on or before 11 March 2019.

A copy of the Consultation Paper can be accessed here.

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

(i) FATF publishes new Mutual Evaluations and Consolidated Ratings

For the period 1 October 2018 to 31 December 2018, 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 using the 2013 Assessment Methodology. 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) FATF Recommendations October 2018 Update

During the period 1 October to 31 December 2018, the Financial Action Task Force (“FATF”) updated the FATF Recommendations. The FATF Recommendations set out the international standard for anti-money laundering (“AML”) measures and combating the financing of terrorism (“CFT”) and terrorist acts.

The October update to the FATF Recommendations include a revision to the FATF’s policy on new technologies. The FATF expects countries to ensure that “virtual asset service provers are regulated for AML/CFT purposes and subject to effective systems for monitoring and ensuring compliance with the relevant measured call for in the FATF Recommendations.”

The definition of ‘virtual asset’ and ‘virtual asset service provider’ were also added to the glossary in order to clarify how AML/CFT requirements apply in the context of virtual assets.
The revised FATF Recommendations can be accessed here.

(iii) FSB determines Crypto-assets are not immediate concern for global financial stability but continued monitoring is required

On 10 October 2018, the Financial Stability Board ("FSB") published a report on the implications of crypto-assets for global financial stability (the "Report"). The Report includes an assessment of the primary risks present in crypto-assets and their markets, such as low liquidity, the use of leverage, market risks from volatility and operational risks.

The FSB has concluded that the crypto-assets market capitalisation: (i) remains small; (ii) lacks the key attributes of sovereign currencies; (iii) does not serve as a common means of payment; (iv) does not serve as a mainstream unit of account; and therefore does not pose a material risk to global financial stability at present.

The Report does indicate however, that trends suggest a growing interest in crypto-assets trading by retail investors and cautions that continued monitoring is necessary in light of: (i) the speed of market developments; and (ii) the gaps in the information on the extent of leverage in crypto-markets, and on direct and indirect exposures of financial institutions.

The Report is accessible in full here.

(iv) Proposal for a decision of the Council of the European Union on incorporating MLD4 and WTR into EEA Agreement adopted by the European Commission

On 12 October 2018, the European Commission adopted a proposal for a Decision of the Council of the European Union on the position to be adopted, on behalf of the European Union within the European Economic Area ("EEA") concerning an amendment to Annex IX (Financial Services) to the EEA Agreement (the "Decision").

The draft Decision amends Annex IX (Financial Services) to the EEA agreement by:

- Incorporating the revised Wire Transfer Regulation (EU) 2015/847 ("WTR"), the Fourth Money Laundering Directive ((EU) 2015/849) ("MLD4") and the Commission Delegated Regulation supplementing MLD4; and

- Extending the existing European Union policy under the WTR and MLD4 to Norway, Iceland and Liechtenstein.

On 27 December 2018, the Decision was adopted within the EEA Joint Committee amending Annex IX (Financial Services) to the EEA Agreement and was published in the Official Journal of the European Union.

The Decision can be accessed here.
(v) Calls for ESMA to produce guidelines to contain the risks of ICOs and crypto-assets

On 19 October 2018, the European Securities and Markets Stakeholder Group ("SMGS") published an own initiative report on initial coin offerings ("ICO") and crypto-assets. The purpose of the report is to advise ESMA on steps it can take to contain the risks for investors of ICOs and crypto-assets. The SMSG calls on ESMA to provide level 3 guidelines or supervisory convergence on:

- The interpretation of the MiFID definition of ‘transferable securities’ and ‘commodities’ clarifying whether transferable asset tokens that have features of transferable securities are, in certain situations, subject to the MiFID II Directive and the Prospectus Regulation;
- The interpretation of the multilateral trading facilities ("MTF") and organised trading facilities ("OTF") concepts, clarifying whether the organisation of a secondary market in asset tokens in certain situations is an MTF or an OTF;
- Whether asset tokens are MiFID financial instruments if the issuers organise a secondary market;
- The fact that when issuers of asset tokens are to be considered to organise an MTF or an OTF the Markets Abuse Regulation ("MAR") applies to such MTFs and OTFs;
- The fact that in all situations in which an asset token is to be considered a MiFID II financial instrument, persons giving investment advice on those asset tokens or executing orders in those asset tokens, are to be considered investment firms, which should have a license as such unless they qualify for an exemption.

The SMSG calls on ESMA to send a letter to the European Commission requesting the addition of these tokens to the MiFID list of financial instruments. The SMSG also urges ESMA to provide guidelines with minimum criteria for national authorities that operate or seek to operate a sandbox or innovation hub.

The SMGS’s full report can be accessed here.

(vi) Fourth quarter update on Proposal for a Directive on the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences

For the period 1 October to 31 December 2018, the European Commission published updates to the Proposal for a Directive of the European Parliament and of the Council laying down rules for facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision (the “Directive”). The update is in the form of an opinion from the European Economic and Social Committee ("EESC") addressed to the Council of the European Union.
The EESC is of the view that the proposal should strike a better balance between the fundamental rights of individuals and the need for better law enforcement in combating and prosecuting crime. The EESC called on the European Commission to regulate the purpose of access to the data contained in the national centralised bank account registries by: (i) limiting access to the data for preventive purposes to crimes that affect the collective and individual security of European citizens; and (ii) allowing access to the data for the purposes of detecting, investigating and prosecuting or recovering the proceeds of offences for all serious crimes.

The EESC also proposed that: (i) Article 17 of the Directive be supplemented with procedural provisions in respect of other European legislation on judicial cooperation and the exchange of financial information with third countries and (ii) for the definitions of ‘law enforcement information’ and ‘serious criminal offences’ in Article 2(f) and (l) to be amended to allow certainty and proportionality of the rules establishing the mechanisms for access to the financial data of EU citizens.

The EESC’s opinion can be accessed here.


The amended draft incorporates the proposals from the EESC referred to above, with the exception of Article 2 (l), which maintains the definition of ‘serious criminal offences’ as meaning the forms of crime listed in Annex I to Regulation (EU) 2016/794 of the European Parliament and of the Council.

The latest draft of the Directive can be accessed here.

(vii) Final Version of guidance documents for securities and insurance sectors published by FATF

On 25 October 2018, FATF released the final version of its guidance on a risk-based approach (“RBA”) for the securities sector and the final version of its guidance on a RBA for its insurance sector (the “Guidance Documents”). The purpose of the Guidance Documents is to support each respective sector in implementing a RBA. The Guidance Documents:

- Highlight the key principles involved in applying RBA to anti-money laundering (“AML”) and counter-terrorist financing (“CFT”);

- Assists countries, supervisors, providers of securities products and services and intermediaries with the risk-based design and implementation of applicable AML and CFT measures; and

- Supports development of a common understanding of what RBA to AML and CFT entails in the context of the sector.
The Guidance Documents were created in conjunction with the private sector following a consultation period in July 2018 and is to be read alongside other FATF papers and the FATF international standards.

The guidance relative to the securities sector can be accessed here and the guidance relative to the insurance sector can be accessed here.

(viii) **FATF publishes its annual report for 2017-2018**

On 29 October 2018, FATF published its annual report for 2017-2018. Particular focus areas of the report included:

- The agreement of a new Counter-Terrorist Financing Operational Plan in February 2018, to understand and respond to new and emerging threats;
- Financial innovation and its impact on AML/CFT, particularly focusing on the benefits of FinTech and RegTech;
- The importance of transparency and the availability of beneficial ownership information in combatting evolving AML/CFT risks and threats;
- The greater role which judges and prosecutors can adopt in combatting AML/CFT;
- A discussion on the implementation of international standards on combatting AML/CFT, including financial inclusion, information sharing, de-risking and countering proliferation financing;

The report also highlights the mutual evaluations which were undertaken in the 2017-2018 period and summarises the findings of these reports, including the FATF mutual evaluation report in respect of Ireland, which was published in September 2017 and can be found here.

FATF’s 2017-2018 report is accessible here.

(ix) **FATF publishes updated methodology for assessing technical compliance with the FATF recommendations and the effectiveness of AML/CFT systems**

On 30 October 2018, 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. The methodology is comprised of two components:
The technical compliance assessment, which addresses the specific requirements of the FATF Recommendations as they relate to the particular legal and institutional framework of a country and the powers and procedures of its competent authorities;

The effectiveness assessment, which aims to assess the extent to which a country has produced results which comply with FATF standards and how successful it is in maintaining a strong AML/CFT system.

The FATF’s updated methodology can be accessed here.

(x) **Egmont Group publishes strategic plan for 2018-2021**

On 30 October 2018, Egmont Group (“EG”) published their second strategic plan covering the period from 2018-2021. In the plan, EG outlines the following four strategic objectives which it will pursue during this period:

- Facilitating bilateral and multilateral exchanges of financial information – EG will focus on the development of multilateral exchange mechanisms, with the objective of promoting an operational database that would be accessible to all members in the long term;

- Strengthening the capabilities of Financial Intelligence Units (“FIUs”) by adapting the programmes and activities of the Egmont Centre of FIU Excellence and Leadership to the diversity of regional and national realities;

- Expanding EG’s field of knowledge to keep up-to-date with the changing financial landscape, including the introduction of new technologies and new actors outside of the regulatory framework, the reduction of cash transactions and the emergence of cryptocurrencies;

- The development of new partnerships, including working towards expanding exchanges of views with private sector institutions.

The strategic plan for 2018-2021 is accessible here.

(xi) **ESAs launches consultation on guidelines on co-operation and information exchange between NCAs under MLD4**

On 8 November 2018, the European Supervisory Authorities (“ESAs”) published a consultation paper on draft joint guidelines on co-operation and information exchange between national competent authorities (“NCAs”) supervising credit and financial institutions for the purposes of the Fourth Money Laundering Directive (“MLD4”).

The purpose of the guidelines is to clarify the differences in supervisory cooperation and information exchange and create a framework that supports the effective anti-money laundering (“AML”) and counter terrorist financing (“CFT”) cross-border supervision of firms.

The proposed guidelines make the following provisions:
That all NCAs identify those firms that require AML/CFT guidelines to be established;

That a forum for co-operation and information exchange is established for a firm that operates in multiple jurisdictions; and

Defines the process for bilateral exchanges of information between NCAs supervising firms only operating in two Member States;

The deadline for the feedback is on 8 February 2019.

The consultation paper can be accessed here.

(xii) Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union


In particular, the Regulation imposes obligations with regard to the declaration of accompanied cash and the disclosure of unaccompanied cash and provides national competent authorities with powers to verify compliance with these obligations. The Regulation also makes provision for the exchange of information between competent authorities of Member States and with the Commission and for the exchange of information with third countries.

The Regulation will apply from 2 June 2021, with the exception of Article 16 concerning the adoption of implementing acts by the European Commission, which applies from 2 December 2018.

The full Regulation can be accessed here.


The Combating Money Laundering Directive introduces the following measures to fight the financing of terrorism:
Minimum rules on the definition of criminal offences and sanctions across Member States;

Provisions for holding legal entities liable for certain money laundering activities; and

Elimination of obstacles to cross-border judicial and police cooperation.

The Combating Money Laundering Directive does not apply to money laundering with regard to property derived from criminal offences affecting the European Union’s financial interests, which is subject to specific rules laid down in Directive (EU) 2017/1371 on the fight against fraud to the European Union’s financial interests by means of criminal law.

In terms of next steps, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Combating Money Laundering Directive by 3 December 2020. The European Commission will:

- By 3 December 2022, submit a report to the European Parliament and the Council, assessing the extent to which Member States have taken the necessary measures to comply with this Directive; and

- By 3 December 2023, submit a report to the European Parliament and the Council assessing the added value of this Directive with regard to combating money laundering as well as its impact on fundamental rights and freedoms.

The Combating Money Laundering Directive can be accessed here.

(xiv) **Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018**

On 14 November 2018, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 was signed into Irish law (the “Act”). The Act transposes the remainder of the Fourth Money Laundering Directive into Irish law by amending the existing Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The Act applies to designated persons, which includes any person trading in goods that involve cash transactions of at least €10,000. The Act introduces significant amendments to Irish anti-money laundering legislation, including with respect to the following:

- **Business risk assessments** – The Act introduces a new stand-alone requirement to carry out business risk assessments, independent of the requirement to have AML policies. Designated persons must now assess the level of risk of money laundering or terrorist financing ("ML/TF") involved in carrying out their own business activities. Designated persons must have regard to a variety of sources of guidance, such as National Risk Assessments. The business risk assessment must be approved by senior management, documented and kept up-to-date;

- **Customer Due Diligence** (“CDD”) – A designated person is obliged to carry out CDD prior to establishing a business relationship or carrying out a transaction or at any time
where the risk of ML/TF warrants their application. Regard must be had to a variety of matters, such as the business risk assessment, the National Risk Assessment and any guidelines issued by the ESAs. There is also a duty to verify the identity of persons acting on behalf of customers;

- **Simplified Due Diligence (“SDD”)** – The Act departs from the previous approach, where SDD could be applied to specific categories of customers which had been identified as presenting low ML/TF risk by the relevant national authority. The Act now places the onus on the designated person to satisfy themselves that the customer presents a low ML/TF risk;

- **Enhanced Due Diligence (“EDD”)** – The Act sets out an amended range of criteria for when EDD must be applied, including where the transaction is complex or unusually large, where the customer is a Politically Exposed Person (domestic or non-domestic), where the customer is established or resides in a high risk country or where the factors indicate a higher degree of risk;

- **Policies, Controls and Procedures** – The Act increases the list of matters which must be included in a designated person’s ML/TF policies, controls and procedures and now requires groups of companies to have group-wide policies, controls and procedures in place.

The full Act can be accessed [here](#).

(xv) **European Commission publishes statement on regulating virtual currencies and ICOs**

On 19 November 2018, the European Commission published a statement from Vice-President Valdis Dombrovskis on the regulation of virtual currencies and Initial Coin Offerings (“ICOs”).

In the statement, Mr. Dombrovskis noted that the scope of EU anti-money laundering and anti-terrorism finance legislation has already been expanded to cover crypto-asset exchanges and wallet providers by virtue of the 5th Anti-Money Laundering Directive. However, he explained that whether the current EU financial regulatory framework applies to crypto-assets depends on the specific characteristics of each crypto asset and how EU law is applied and supervised in national law.

Mr. Dombrovskis concludes that variances in the application of the existing laws across Member States is not good for the Single Market, investor protection and market integrity and states that the Commission will assess a possible way forward after the ESA’s legal mapping exercise.

The Vice-President’s statement can be found [here](#).
EBA publishes speech on its ongoing work in an AML/CFT context

On 21 November 2018, the EBA published a speech made by its Executive Director, Adam Farkas at the Tax3 Special Committee of the European Parliament. In the speech, Mr. Farkas provides an update on the work being carried out by the EBA in the context of AML/CFT.

The speech highlights the work being done jointly by the EBA, EIOPA and ESMA in fostering a common approach to risk based AML supervision under the Fourth Money Laundering Directive, with existing policy products including:

- Guidelines on AML Risk factors and simplified and enhanced customer due diligence;
- Risk-based supervision guidelines for competent authorities;
- An opinion on innovative solutions available for customer due diligence.

The EBA is currently reviewing the Risk Factor Guidelines and will review the Guidelines on the risk-based approach next year. The EBA is also developing a cooperation agreement between ECB and national authorities and own initiative guidelines on cooperation between AML competent authorities in order to facilitate effective cooperation and information sharing across the EU.

With regard to the EBA’s future role, the EBA welcomed a number of proposals made by the European Commission in a September 2018 communication, including:

- The centralisation of resources and expertise currently divided across the three ESAs at the EBA;
- The need for the EBA to be provided with an explicit mandate to specify the modalities of cooperation and information exchange;
- The proposal for the EBA to carry out periodic independent reviews on AML issues and to report its finding to the Council, Commission and Parliament;
- The proposal for the EBA to become the data-hub on AML supervision in the Union;
- The proposal that the EBA will carry out a risk assessment exercise to test strategies and resources in the context of the most important emerging AML risks.

A copy of the speech can be accessed here.
(xvii) **New statutory requirement for certain “Schedule 2 firms” to register with the Central Bank for anti-money laundering purposes**

On 26 November 2018, Section 108A of the Criminal Justice (Money Laundering and Terrorist Financing), (Amendment) Act 2018 introduced a new statutory requirement for certain firms, identified as "Schedule 2 firms", to register with the Central Bank for anti-money laundering purposes.

The new requirement obliges unregulated entities engaging in any of the below “Schedule 2 Activities” to register with the Central Bank unless they qualify for an exemption:

- Lending including inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting).
- Financial leasing.
- Issuing and administering other means of payment (e.g. travellers’ cheques and bankers’ drafts) insofar as such activity is not covered by point 3.
- Guarantees and commitments.
- Trading for own account or for account of customers in any of the following:
  
  a. Money market instruments (cheques, bills, certificates of deposit, etc.)
  b. Foreign exchange
  c. Financial futures and options
  d. Exchange and interest-rate instruments
  e. Transferable securities.
- Participation in securities issues and the provision of services relating to such issues.
- Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings.
- Money broking.
- Portfolio management and advice.
- Safekeeping and administration of securities.
Safe custody services.

Issuing electronic money.

Unregulated entities do not have to register with the Central Bank for anti-money laundering purposes where they fall into any of the following two exemptions:

- If the firm is one which only carries out Schedule 2 Activity 6 above (i.e. trading on own account) and the firm’s customers (if any) are members of the same group as the firm; or

- If, cumulatively:
  
  a. The firm’s annual turnover is less than €70,000, and
  b. The total of any single transaction, or serious of linked transactions in relation to the firm’s Schedule 2 activities does not exceed €1,000, and
  c. The firm’s Schedule 2 activities do not exceed 5% of the firm’s total turnover, and
  d. The firm’s Schedule 2 activities are directly related to and ancillary to the firm’s main business activities, and
  e. The firm only provides Schedule 2 activities to customers of their main business activities, rather than the public in general.

Where a firm engages in any of the above Schedule 2 Activities and does not qualify for an exemption from the obligation to register, the firm must complete a Schedule 2 Registration Form for Anti-Money Laundering Purposes, which can be accessed here.

The Central Bank has published guidance for completion of the form, which can be accessed here.

Further information on the requirement can be found in a Dillon Eustace article titled “AML/CTF: New Registration Requirements”, which can be accessed here.


On 27 November 2018, the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Section 25) (Prescribed Class of Designated Person) Regulations 2018 [S.I. No. 487 of 2018] was published in Iris Oifigiúil (the “Regulations”).

The Regulations modify the definition of “occasional transaction” in section 24 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) so that the reference in paragraph (a) of that definition to “a person referred to in section 25(1)(h)" is to be read as including providers of gambling services. For the purposes of the Regulations, “gambling services” means gambling services within the meaning of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 other than:
Poker games provided at a physical location other than a casino or private members’ club;

Lotteries within the meaning of the Gaming and Lotteries Act 1956; and

Gaming machines (within the meaning of section 43 of the Finance Act 1975) or amusement machines (within the meaning of section 120 of the Finance Act 1992) provided in accordance with section 14 of the Gaming and Lotteries Act 1956.

The Regulations can be accessed in full here.


On 28 November 2018, Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders (the “Regulation”) was published in the Official Journal of the European Union. The Regulation governs the manner in which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State. Features of the Regulation include the introduction of:

- A single set of rules on freezing and confiscation orders directly applicable throughout the European Union;
- A deadline of 45 days for the recognition of a confiscation order and in urgent cases a deadline of 48 hours for the recognition and 48 hours for the execution of freezing orders; and
- The general principle of mutual recognition, meaning that all judicial principles in criminal matters taken in one European Union country will normally be directly recognised and, enforced by another Member State.

In particular, the Regulation sets down rules relating to the transmission, recognition and execution of freezing orders, the grounds for non-recognition, non-execution or postponement of execution of freezing orders, time limits for recognition and execution of freezing orders and the duration of freezing orders. It then deals with similar issues with respect to the transmission, recognition and execution of confiscation orders. Annex 1 and Annex 2 to the Regulation set out a standard form freezing certificate and confiscation certificate, which the issuing authority shall complete when transmitting a freezing or confiscation order.

The Regulation shall apply from 19 December 2020, with the exception of Article 24 (the obligation on Member States to notify the Commission of the identification of the issuing authority and the executing authority), which applied from 18 December 2018.

The full Regulation can be accessed here.
(xx) FATF Report to the G20 Leaders’ Summit

On 3 December 2018, FATF published its report to the G20 Leaders’ Summit (the “Report”). The Report highlights work conducted or to be conducted by FATF in a number of areas, including:

- The initiation of the mid-term review of the 2012-2020 Mandate in 2016, with the view to strengthening FATF’s institutional basis, governance and legal status – FATF Ministers will have an opportunity to consider the revised mandate in April 2019;

- FATF’s work programme on virtual assets – FATF will consider whether and how to provide further clarifications about which activities the FATF standards apply to in this context in February 2019 and will update its *2015 Risk-based Approach Guidance on Virtual Currencies* by June 2019;

- FATF will prioritise work on implementation, guidance and training, in support of the new Operational Plan enhancing global efforts against terrorist financing published in February 2018. FATF will also improve the implementation of the FATF standards by holding countries accountable for failures to address their deficiencies;

- FATF will consider whether and how to expand the FATF standards to include a wider range of measures applicable to countering proliferation financing;

- FATF will publish guidance on the risk-based approach for lawyers, accountants and trust and companies service providers by June 2019, to clarify when such professionals should apply safeguards in a risk-based manner to prevent the misuse of their services by criminals;

- FATF is preparing guidance on the application of the FATF Recommendations in a digital ID context;

- FATF is conducting a global survey to analyse measures taken by countries to improve their supervisory practices, domestic co-ordination and co-operation and risk-based approach in the remittance sector;

The full Report can be accessed [here](#).

(xx) European Council adopts conclusions on AML Action Plan

On 4 December 2018, the European Council published a press release setting out its conclusions on an Anti-Money Laundering Action Plan (“AML Action Plan”). The press release outlines the following 8 key objectives which are addressed by the short-term legislative actions:

- Identification of the factors that contributed to the recent money laundering cases in EU banks, to better inform possible additional actions in the medium and long term;
Mapping of relevant money laundering and terrorist financing risks and the best prudential supervisory practices to address them;

Enhancement of supervisory convergence and improvement of procedures to take into account AML aspects in the prudential supervisory process;

Enabling effective cooperation between prudential and money laundering supervisors;

Clarification of aspects related to the withdrawal of a bank's authorisation in case of serious breaches;

Improvement of supervision and exchange of information between relevant authorities;

Sharing of best practices and finding grounds for convergence among national authorities;

Improvement of the European supervisory authorities' capacity to make better use of existing powers and tools.

In particular, the Council’s conclusions:

Urge all Member States to swiftly complete the implementation of the 4th AML Directive and to transpose the 5th AML Directive before the 2020 deadline;

Underline the importance of strengthening the EU legislative framework as well as the need to take non-legislative actions, including proceeding with the AML action plan as set out in the Annex to the conclusions.

Invite the Commission to propose longer-term actions to bring about further improvements in the prudential and AML frameworks identified on the basis of a thorough assessment. This assessment should be presented to the Council, at the latest in Q3 2019;

Welcome the Commission's communication and proposal of 12 September 2018 on an EU framework for prudential and AML supervision for financial institutions.

A copy of the press release can be accessed [here](#) and the Council's full conclusions can be found [here](#).
BPFI declare support for Europol's EMMA campaign to combat money laundering

On 5 December 2018, the Banking & Payments Federation Ireland ("BPFI") issued a press release in which it communicated its support for Europol’s European Money Mule Action ("EMMA") campaign.

The EMMA campaign involves a combination of the financial sector, law enforcement agencies and other key stakeholders such as the European Banking Federation joining forces in order to tackle the illegal activity of money muling across borders. The press release sets out the following facts about Europol’s fourth EMMA campaign:

- 168 people have been arrested and 1,504 money mules and 140 money mule organisers identified.
- The action took place over the course of three months (September-November 2018).
- 30 Member States took part in EMMA, alongside Europol, Eurojust, the European Banking Federation and more than 300 banks.

The press release can be accessed here.

ECB publishes opinion on the amended proposal for an Omnibus Regulation

On 7 December 2018, the ECB published an opinion on the amended proposal for an Omnibus Regulation (the “Opinion”). The Opinion is in response to requests received by the ECB from the European Parliament and the European Council on 11 October and 14 November for an opinion on the amended proposal. In particular, the Opinion outlines the following observations from the ECB:

- The ECB fully supports the amended proposal’s objective of reinforcing the European Banking Authority ("EBA") in the prevention of the use of the financial system for money laundering ("ML") and terrorist financing ("TF") purposes;
- The ECB highlights the need for clarification that the new reporting requirement captures any material weaknesses that increase the risk that the financial system could be used for ML or TF;
- The EBA should develop guidelines to facilitate reporting, including templates;
- The amended proposal should clarify that reporting to the EBA and the subsequent dissemination of information by the EBA does not replace the direct exchange of information among competent authorities;
- The amended proposal should clarify the manner in which the EBA should be coordinating with the Financial Intelligence Units in respect of the provision of information to the EBA;
The amended proposal should provide further clarification on the EBA’s role in promoting convergence of supervisory processes and risk assessments on competent authorities; and

The amended proposal should grant the EBA the power to assist the competent authorities in cooperating with relevant authorities in third countries where relevant, although it should not require the EBA to automatically assume a leading role in facilitating such cooperation.

The ECB’s Opinion can be read in full here.

(xxiv) Council of the European Union agrees position on revised AML proposal for Omnibus Regulation

On 19 December 2018, the Council of the European Union published a press release reporting that it has agreed its negotiating position in relation to the revised legislative proposal for the Omnibus Regulation on reforms to the European System of Financial Supervision (“ESFS”). The press release states, that the EBA will be given responsibility for the following tasks:

- Collect information from National Competent Authorities (“NCAs”) relating to weaknesses identified to prevent or fight money laundering and terrorist financing;
- Enhance the quality of supervision by developing common standards and co-ordinating between national supervisory authorities;
- Perform risk assessments on NCAs to evaluate their strategies and resources to address the most important emerging AML risks;
- Facilitate co-operation with non-European Union countries; and
- Address decisions directly to individual banks, if national authorities do not act.

A copy of the press release can be accessed here.

(xxv) EFAMA welcomes Council of the European Union agreement on enhanced EBA

On 20 December 2018, the European Fund and Asset Management Association (“EFAMA”) issued a press release welcoming the agreement reached by the Council of the European Union on enhanced EBA powers in order to reinforce consistent implementation of the European Union AML legislative framework and monitoring of the risks posed to the financial sector by money laundering activities and supports the Council of the European Union’s suggestion to require the prior consent of ESMA for any decision affecting financial market participants falling within its mandate.

A copy of the press release can be accessed here.
Central Bank publishes Consultation Paper on Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector

On 21 December 2018, the Central Bank published its ‘Consultation Paper on Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector’ (‘CP 128’).

The Central Bank is proposing to introduce guidelines (the “Guidelines”) in order to assist credit and financial institutions in understanding their AML/CFT obligations, following the enactment of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018.

The Central Bank invites general feedback on the Guidelines and responses to the specific questions contained in CP 128 from interested stakeholders. The consultation period commenced on 21 December 2018 and will close on 5 April 2019.

A copy of CP 128 can be accessed here and the Guidelines can be accessed here.

Anti-Corruption Legislation & Law Reform

(i) Law Reform Commission launches report on regulatory powers and corporate offences

On 23 October 2018, the Law Reform Commission announced the launch of its report on Regulatory Powers and Corporate Offences (the “Report”). The Report acknowledges the effectiveness of legislative reforms at national and European Union level in the aftermath of the 2008 global financial crisis and makes over 200 further recommendations for reform on regulatory powers and offences. The recommendations set out in the Report include:

- The establishment of a fully resourced multidisciplinary Corporate Crime Agency with powers to: (i) investigate corporate offences; (ii) impose administrative financial sanctions; and (iii) enter into regulatory settlements;
- The amendment of the Criminal Justice (Theft and Fraud Offences) Act 2001, to expressly include recklessness in order to address egregiously reckless risk-taking behavior on the part of senior banking executives;
- The introduction of deferred prosecution agreements (“DPA”) modelled after the United Kingdom’s DPA system;
- The introduction of a condition which provides that senior managers can only be convicted for corporate offences of a regulatory nature where the senior managers have not implemented suitable risk management policies and procedures;
- The introduction of provisions that allows legal advice obtained by a corporate body in advance of taking a certain action to be considered as a mitigating factor in sentencing rather than a defense to prosecution;
The establishment of a Regulatory Guidance Office that functions in a manner similar to the Better Regulation Unit in the Office of the Toaiseach; and

The retention of the current system where most corporate trials on indictment are dealt with in the Circuit Criminal Court.

The Report underscored the importance of financial and economic regulators having robust and comprehensive powers to discharge their functions effectively while also acknowledging that a significant number of convictions of senior bank executives have been obtained under the current legal framework.

Dillon Eustace has published more expansive commentary on the Report which can be accessed here and the Law Commission’s Report can be accessed in full here.

(ii) Financier Worldwide interview Dillon Eustace on the Criminal Justice (Corruption Offences) Act 2018

In its December edition, Financier Worldwide published the text of an interview (the "Interview") conducted with Muireann Reedy from Dillon Eustace on the Criminal Justice (Corruption Offences) Act 2018 (the “Act”). The objective of the Act is to modernise Ireland’s anti-corruption laws to assist in tackling white-collar crime in Ireland.

The Interview highlights the key provisions of the Act, such as section 18, which introduces a strict liability offence whereby a company can be criminally liable for corruption offences committed by certain personnel, employees, subsidiaries and agents where the act was done with the intention of obtaining business or business advantage for the firm. In a departure from the previous framework, the Act now provides for criminal liability where personnel within or connected to a firm commit an offence to benefit the company.

Companies are recommended to have clear and comprehensive anti-bribery and anti-corruption policies in place, which should be reviewed and approved by senior management regularly. The Interview also details the need to provide all personnel working for a company with training on anti-corruption policies and on how to respond to suspected corruption.

Where a company has acted contrary to the provisions of the Act, the Interview highlights the importance of co-operation in the investigation or prosecution. Anti-corruption policies and procedures may also assist in the defence of a charge, but only if they are sufficiently comprehensive and have been complied with. In the event of prosecution, the Interview also outlines potential sanctions which may be faced by non-compliant parties.

A full copy of the interview is available here.
(i) Non-legislative resolution on distributed ledger technologies and blockchains adopted by European Commission

On 3 October 2018, the European Parliament adopted a non-legislative Resolution on distributed ledger technologies ("DLT") and blockchains (the "Resolution") in a plenary sitting. The Resolution considers the potential benefits that DLT-based applications could have on various sectors of the economy including the energy, transport, healthcare, education and the financial services sector and recommends a regulatory approach.

With respect to the public sector, the Resolution calls on the European Commission to assess the potential scenarios of a wider uptake of public DLT-based networks on the structure of public governance and the role of public sector institutions.

The Resolution highlights the potential impact DLT-based applications can have on digital identification and calls on the European Commission and/or the European Data Protection Supervisor to, amongst other things, provide further guidance to ensure that DLT users are compliant with EU legislation and the General Data Protection Regulation.

The Resolution also emphasises the volatility and uncertainty relating to cryptocurrencies. It calls on the European Commission and the ECB to explore the sources of volatility, identify dangers and consider the possibility of incorporating cryptocurrencies into the European payment system.

With respect to smart contracts, the Resolution recognizes the potential for DLT-based applications to facilitate a wide uptake in the use of smart contracts and calls on the European Commission to, in particular, promote the development of technical standards with relevant international organisations.

The Resolution invites the European Commission to examine ways to enhance investor protection as it relates to initial coin offerings ("ICO"), with a particular focus on the disclosure requirements and obligations. The European Parliament calls on the European Commission to create an Observatory for the monitoring of ICOs and suggests the development of a model framework of regulatory sandboxes and a code of conduct.

Finally, the Resolution underscores the importance of enlightening European Union citizens about DLT-based applications and urges the European Commission to adopt a proactive approach towards inclusive participation of all European citizens in the paradigm shift.

The Resolution can be read in full here.
CyberScams Awareness Campaign gleans the support of the Banking & Payment Federation Ireland

On 17 October 2018, the Banking & Payments Federation Ireland ("BPFI") published a press release announcing its support of Europol and the ‘European Banking Federation in the Pan-European #CyberScams Awareness Campaign’ (the “Campaign”) as part of European Cyber Security Month. The Campaign aims to raise awareness among the general public on how to identify the various deception techniques used by cybercriminals to scam victims.

The Campaign warns that cybercriminals are increasingly turning to social engineering to obtain personal data and financial account information. Victims are also regularly being lured into making illegitimate payments and a host of other activities that could harm the victims and or their finances.

The Campaign has listed the following tactics as the most common techniques used by cybercriminals:

- **CEO Fraud**: The scammer impersonates a victim’s Chief Executive Officer or another senior representative of the firm and instructs the victim to make an illegitimate payment or transfer of funds;

- **Invoice Fraud**: The scammer impersonates a legitimate client/vendor and instructs a victim to pay illegitimate invoices into a different bank account;

- **Phishing/Smishing/Vishing**: The scammer calls, sends and email or text message that requests a victim’s personal, financial or security information;

- **Spoofed bank website fraud**: The scammer sends an email with a link to the spoofed website. The spoofed website appears to be legitimate with only small differences. Once the victim clicks on the link, various methods are used to collect a victim’s personal and financial data;

- **Romance scam**: The scammer pretends to have a romantic interest in the victim. Various platforms are used to lure victims, including dating websites, social media or email;

- **Personal data theft**: The scammer harvests the victim's personal data via social media channels; and

- **Investment and online shopping scams**: The scammer presents the victim with smart investment opportunities or other great online offers which are fake.

The Campaign recommends the following steps to stay safe while using the internet:

- Be cautious about the amount of personal information shared on social network sites;
Check online accounts regularly;

Be mindful that phishing (i.e. via email), smishing (i.e. via sms) and vishing (i.e. via voice call) are the most common social engineering attacks targeting bank customers;

Check bank account activity and balances regularly and report any suspicious activity;

Perform online payments only on secure websites (check the URL bar for the padlock and https) and using secure connections (choose a mobile network instead of public WiFi);

Remember that a bank will never ask a customer for sensitive information (e.g. online account credentials);

Remember that if an offer sounds too good to be true, it’s almost always a scam;

Keep personal information safe and secure; and

If you believe you have provided your account details to a scammer, contact your bank immediately. Always report any suspected fraud attempt to the police, even if you did not fall victim to the scam.

The press release can be accessed in full here.

(iii) Financial industry groups launch the financial data exchange to enhance consumer financial data protection

On 18 October 2018, financial institutions, Fintech firms and industry groups launched a non-profit organisation, the Financial Data Exchange ("FDX"), to unify the financial sectors’ efforts around the secure exchange of financial data. The FDX introduces an interoperable standard and operating framework centred on an application programming interface ("API"), referred to as the Durable Data API ("DDA").

The DDA grants consumers increased control over the use of their personal financial data through improved access authorisation options. Financial institutions will then be able to share that data with Fintech companies through a simplified and secure process. The result being that Fintech companies will only have access to consumer financial data that is essential to the services they provide.

Financial institutions, Fintech companies and other industry groups who wish to support the development of protocols for data sharing, security standards and other FDX activities are now invited to join the FDX.

The press release announcing the launch of FDX can be access here.

The objective of the Regulation is to bring the data protection rules for EU institutions and bodies in line with the standards imposed on organisations and businesses by the GDPR. The Regulation requires EU institutions to process personal data fairly, lawfully and only for legitimate purposes. It details a number of specific rights for data subjects, reflecting the rights enumerated in the GDPR. These rights include:

- A right to transparent information, communication and modalities for the exercise of the rights of the data subject;
- A right to access personal data processed by an EU institution or body;
- A right to rectification of inaccurate or incomplete information;
- A right to be informed about the fact that the data subject’s data has been processed, the purpose for which it was processed and the identity of the controller;
- A right to erasure of personal data;
- A right to restriction of processing in certain circumstances;
- A right to data portability;
- A right to object to the processing of personal data concerning a data subject;
- A right not to be subject to a decision based solely on automated processing, including profiling.

The European Data Protection Supervisor is responsible for monitoring the application of the provisions of the Regulation to all processing operations carried out by an EU institution or body and welcomed the adoption of the Regulation in a press release which can be accessed here.

The Regulation can be accessed in full here.
**EBF issues response to EC Proposal for a regulation establishing the European Cybersecurity Competence Centre**

On 12 November 2018, the European Banking Federation (the “EBF”) issued a response to the European Commission’s proposal for a regulation establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres.

The EBF highlighted the potential for the initiative to play an important part in Europe’s cyber independence and to be a strong lever to help increase the maturity of the IT security market and related users. The EBF outlined the following issues for EU institutions to take into account when establishing the centre:

- The objectives and tasks of the centre should include the supporting of European training networks to train more experts at national level and increase the general cybersecurity awareness level of workforces and businesses;

- The strong advantage that can be gained from establishing a steady dialogue between the financial industry, the Competence Centre, the National Coordination Centres and the Cybersecurity Competence Community (the “Community”). The EBF therefore requested a confirmation that associations representing sectors of the financial industry are included in the scope of the criteria for membership to the Community.

- The EBF also requested clarification as to whether subsidiaries of non-EU companies can be accepted as members of the Community and, if not, it proposed that a process should be created whereby the input of non-EU companies as main current leaders in the field can be incorporated within the new scheme.

The EBF’s response can be accessed [here](#).

**European Commission updates questions and answers document on the framework for the free flow of non-personal data**

On 14 November 2018, Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (the “Regulation”) was published in the Official Journal of the European Union. The Regulation aims to remove obstacles to the free movement of non-personal data and to ensure:

- The free movement of non-personal data across borders;

- The availability of data for regulatory control purposes;

- The development of European Union codes of conduct in respect of the conditions under which users can port data between cloud service providers and back into their own IT environments to facilitate switching of cloud service providers for professional users;
The Regulation entered into force on 4 December 2018 and applies six months after the publication date.

For the period 1 October to 31 December 2018, the European Commission updated its questions and answers document on the Regulation. The update comprises responses to the following four questions in relation to:

- **What will change with the newly agreed Regulation?** – Clarifies that once the Council of the European Union adopts the proposal, Member States will have six months to apply the new rules.

- **Why is the scope of the Regulation limited to non-personal data?** - Clarifies that the General Data Protection Regulation ("GDPR") already provides for the free movement and portability of personal data within the European Union.

- **Are data flows with non-European Union countries also covered?** - Clarifies that the Regulation on the free flow of non-personal data does not extend beyond the European Union; and

- **How will the Regulation affect the public sector?** – Clarifies that: (i) public authorities have the choice but are not forced to outsource data to cloud service providers; (ii) public authorities should refrain from requiring the localisation of data processing on their own territory, except when clearly justified for reasons of public security; and (iii) the Regulation does not apply to the internal organisation of data processing among public authorities and bodies without contractual remuneration of private parties.

The revised questions and answers document can be accessed in full here and the Regulation can be accessed here.

(vii) **Data Protection Commission publishes list of types of data processing operations which require a Data Protection Impact Assessment**

On 15 November 2018, the Data Protection Commission ("DPC") published a report which outlines the types of data processing operations which require a Data Protection Impact Assessment ("DPIA").

Article 35 of the General Data Protection Regulation ("GDPR") requires that a DPIA is conducted by a controller where a type of data processing is likely to result in a high risk to the rights and freedoms of individuals. The DPC has declared that a DPIA is mandatory for the following types of processing operation where a documented screening or preliminary risk assessment indicates that the processing operation is likely to result in a high risk to the rights and freedoms of individuals:

- Use of personal data on a large-scale for a purpose(s) other than that for which it was initially collected pursuant to GDPR Article 6(4);
- Profiling vulnerable persons including children to target marketing or online services at such persons;
- Use of profiling or algorithmic means or special category data as an element to determine access to services or that results in legal or similarly significant effects;
- Systematically monitoring, tracking or observing individuals' location or behaviour;
- Profiling individuals on a large-scale;
- Processing biometric data to uniquely identify an individual or individuals or enable or allow the identification or authentication of an individual or individuals in combination with any of the other criteria set out in WP29 DPIA Guidelines;
- Processing genetic data in combination with any of the other criteria set out in WP29 DPIA Guidelines;
- Indirectly sourcing personal data where GDPR transparency requirements are not being met, including when relying on exemptions based on impossibility or disproportionate effort;
- Combining, linking or cross-referencing separate datasets where such linking significantly contributes to or is used for profiling or behavioural analysis of individuals, particularly where the data sets are combined from different sources where processing was/is carried out for difference purposes or by different controllers; and
- Large scale processing of personal data where the Data Protection Act 2018 requires “suitable and specific measures” to be taken in order to safeguard the fundamental rights and freedoms of individuals.

The report also lists a number of exemptions to the requirement that the controller conduct a DPIA, where:

- Processing operations do not result in a high risk to the rights and freedoms of individuals;
- Processing was previously found not to be at risk by DPIA;
- Processing has already been authorised by supervisory authority;
- Processing pursuant to point (c) or (e) of Article 6(1) already has an existing clear and specific legal basis in EU or Member State law and where a DPIA has already been carried out as part of the establishment of that legal basis as per Article 35(10);
- Processing is performed as part of an impact assessment arising from a public interest basis and where a DPIA was an element of that impact assessment (Art 35(10)); and/or
Where a supervisory authority chooses to enumerate the processing operation in accordance with GDPR Article 35(5).

The DPC’s publication can be accessed here.

(viii) EDPB publishes updated guidelines regarding certification criteria under the GDPR

On 23 November 2018, the European Data Protection Board (the “EDPB”) published an updated version of its ‘Guidelines on certification and identifying certification criteria in accordance with Articles 42 and 43 of the 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.

According to the Guidelines, the advice therein is relevant for:

- Competent supervisory authorities and the EDPB when approving certification criteria;
- Certification bodies when drafting and revising certification criteria prior to submission to the competent supervisory authority for approval;
- Supervisory authorities, when drafting their own certification criteria;
- The European Commission, which is empowered to adopt delegated acts for the purpose of specifying the requirements to be taken into account for certification mechanisms;
- The EDPB when providing the European Commission with an opinion on the certification requirements;
- National accreditation bodies, which will need to take into account certification criteria with a view to the accreditation of certification bodies; and
- Controllers and processors when defining their own GDPR compliance strategy and considering certification as a means to demonstrate compliance.

A copy of the updated Guidelines is available here.
(ix) Data Protection Commissioner’s Final Report published

On 23 November 2018, the Data Protection Commissioner’s Final Report (the “Report”) was published. The Report covers the period from 1 January 2018 to 24 May 2018 at which point the office of the Data Protection Commissioner (the “Commissioner”) ceased and the new Data Protection Commission (“DPC”) was established under the Data Protection Act 2018. The highlights of the Report included:

- 1,249 complaints were received by the Commissioner, with the largest single category being access rights. 12 formal decisions were made and 1,198 valid data security breaches were recorded;
- The Special Investigations Unit completed its investigation into the processing of patient sensitive personal data in areas of hospitals in Ireland to which patients and the public have access and its investigation examining the governance by TUSLA of the handling of personal data concerning child protection cases.
- Prosecutions were concluded for offences in respect of direct marketing;
- 23 audits/inspections were carried out;
- The High Court requested a preliminary ruling from the Court of Justice of the European Union on specific questions related to the validity of standard contractual clauses facilitating EU-US data transfers;
- A dedicated GDPR Awareness and Training Unit continued to raise awareness of GDPR requirements and a May 2018 survey highlighted that over 90% of businesses were aware of the GDPR.

A copy of the full Final Report can be accessed here.

(x) EDPB publishes draft guidelines on the territorial scope of the GDPR

On 23 November 2018, the EDPB published its draft guidelines on the territorial scope of the GDPR for public consultation (the “Guidelines”). The objective of the Guidelines is to ensure a consistent application of the GDPR when assessing whether particular processing by a controller or a processor falls within the scope of the EU legal framework.

Article 3 of the GDPR defines the territorial scope of the Regulation on the basis of the “establishment” criterion in Article 3(1) and the “targeting” criterion in Article 3(2). The provisions of the GDPR will apply to the processing of personal data by the controller or processor where either criterion is met.

The Guidelines begin by discussing the application of the establishment criterion by examining the definition of an ‘establishment’ in the EU, what is meant by processing personal data “in
the context of the activities of an establishment in the EU. The EDPB clarifies that the GDPR will apply regardless of whether the processing takes place in the EU or elsewhere.

The EDPB then assesses the application of the “targeting” criterion and recommends a twofold approach, whereby it is firstly determined whether the processing relates to personal data of data subjects who are in the EU and, secondly, whether it relates to the offering of goods or services or to the monitoring of data subjects’ behaviour in the EU. The EDPB notes that the requirement that the data subject be located in the EU must be assessed at the moment when the relevant trigger activity takes place, regardless of the duration of the offer made or monitoring undertaken. The processing of personal data of an individual in the EU alone is not sufficient for the GDPR to apply to processing activities of a controller or processor not established in the EU and the element of “targeting” individuals in the EU is required.

The Guidelines confirm the application of the GDPR to personal data processing carried out by EU Member States’ embassies and consulates, insofar as such processing falls within the material scope of the GDPR, as defined in Article 2. The EDPB also provides guidance on the obligation imposed on data controllers or processors who are not established in the EU to designate a representative in the EU, particularly in respect of the process of designation, exemptions from the obligation, establishment obligations and the obligations and responsibilities of the representative.

The EDPB welcomes comments on the Guidelines which should be addressed to the EDPB no later than 18 January 2019 via EDPB@edpb.europa.eu, a full copy of the Guidelines is available here.

(xi) Joint industry letter on the ePrivacy Regulation published

On 28 November 2018, Insurance Europe joined a coalition of 66 other associations in publishing a joint industry letter addressed to the European Council to express strong concerns about the discussions on the proposal for an ePrivacy Regulation ahead of the Transport, Telecommunications and Energy Council meeting of 4 December 2018.

The ePrivacy proposal aims to ensure stronger privacy in electronic communications and aligns the rules with the GDPR. However, the letter warned that the current scope of the ePrivacy proposal would create a large overlap with GDPR and it would effectively replace GDPR for a vast majority of data processing activities as it would apply broadly to all products and services in the European Union’s connected society.

The associations call on the European Council to closely consider the legal bases in the proposal for both electronic communications data and terminal equipment data and align them with those available under the GDPR, in order to achieve a more robust, balanced and future-proof ePrivacy text. Consequently, the European Council should not rush into trialogue discussions on the basis of a flawed text, as this would have serious repercussions for the European economy.

A copy of the joint industry letter can be accessed here.
European Payments Council publish 2018 Payment Threats and Fraud Trends Report

On 1 December 2018, the European Payments Council ("EPC") published its Payment Threats and Fraud Trends Report for 2018 (the "Report"). The Report provides an overview of the most significant threats in the payments landscape, including social engineering and phishing, malware, Advanced Persistent Threats ("APTs"), mobile device related attacks, (Distributed) Denial of Service ("(D)DoS"), botnets and threats related to cloud services, big data, Internet of Things ("IoT") and virtual currencies.

The Report analyses the impact and context of each threat and outlines the main controls and mitigation measures to deal with them. The Report also considers fraud related to payment instruments such as cards, SEPA Credit Transfers and SEPA Direct Debit.

The Report’s main conclusions include the following:

- Social engineering attacks and phishing attempts are still increasing and they remain instrumental often in combination with malware, with a shift from consumers, retailers, SMEs to company executives, employees, financial institutions and payment infrastructures.
- Malware remains a major threat. In particular, ransomware has been on the rise during the past year, requiring new mitigating measures.
- APTs have developed into one of the most lucrative types of payment fraud;
- The number of (D)DoS attacks is still growing and they are frequently targeting the financial sector; and
- For SEPA Credit Transfer and Direct Debit transactions, the criminals’ use of impersonation and deception scams, as well as online attacks to compromise data, continue to be the primary factors behind fraud losses.

A full copy of the Report is available here.

EDPB publishes its Rules of Procedure

On 3 December 2018, the EDPB published its Rules of Procedure (the "Rules"). The Rules detail the EDPB’s responsibility for ensuring the consistent application of the GDPR and for promoting cooperation between supervisory authorities throughout the EU.

In particular, the Rules set down guiding principles for the EDPB to adhere to in achieving its objectives and provide information on the composition of the EDPB, its working methods and its procedures with regard to the adoption of documents.

A full copy of the Rules can be accessed here.
Basel Committee on Banking Supervision publishes report on cyber-resilience practices

On 4 December 2018, the Basel Committee on Banking Supervision ("BCBS") published a report which details and compares observed bank, regulatory and supervisory practices across jurisdictions (the "Report").

The Report begins with a high-level overview of current approaches taken by different jurisdictions when issuing cyber-resilience guidance standards and an assessment of the range of practices regarding governance arrangements for cyber-resilience. It then focuses on current approaches on cyber-risk management, testing, incident response and recovery and examines the differing types of communications and information-sharing mechanisms established in jurisdictions. In addition, it analyses expectations and practices related to interconnections with third-party services provided in the context of cyber-resilience.

As part of its assessment of varying cyber-resilience practices, the Report summarises 10 key findings in respect of:

- The general cybersecurity landscape;
- Regulators’ expectations in respect of cyber strategies;
- Cyber-risk management across jurisdictions;
- The articulation of cyber-resilience across technical, business and strategic lines;
- Workforce skills shortages for cyber-related functions;
- Testing;
- Incident response capabilities;
- Assessment metrics for cyber-resilience;
- Information-sharing mechanisms;
- Third-party risk.

The full Report can be accessed here.
EU institutions reach political agreement on the Cybersecurity Act

On 10 December 2018, the European Commission issued a press release in which it announced that it had reached a political agreement with the Council of the European Union and the European Parliament on the Cybersecurity Act.

The Cybersecurity Act has the objective of putting in place wide-ranging measures to deal with cyber-attacks and to build strong cybersecurity in the EU. It includes a permanent mandate for the EU Cybersecurity Agency ENISA and provides a stronger basis for ENISA in the new cybersecurity certification framework to assist Member States in effectively responding to cyber-attacks with a greater role in cooperation and coordination at Union level.

The Act also creates a framework for European Cybersecurity Certificates for products, processes and services that will be valid throughout the EU, which will enable their users to establish the level of security assurance.

In connection with the press release, the European Commission published a cybersecurity factsheet which details the proposed measures aimed at building strong cybersecurity in the EU. These measures include:

- The establishment of a European Competence Centre to drive cybersecurity research and innovation;
- The establishment of a Network of National Coordination Centres with each Member State nominating one coordination centre to lead the network;
- The establishment of a Competence Community comprised of a diverse group of cybersecurity stakeholders from research and the private and public sectors.

The cybersecurity factsheet can be accessed here and the press release is available here.

EDPB publishes draft guidelines on the accreditation of certification bodies under Article 43 of the GDPR

On 14 December 2018, the EDPB published draft guidelines on the accreditation of certification bodies under Article 43 of GDPR (the “Guidelines”). The Guidelines are addressed to Member States, national accreditation bodies, stakeholders providing for certification criteria and procedures and relevant competent supervisory authorities.

The Guidelines set out the purpose of accreditation in the context of the GDPR and provide for an interpretation of the term for the purposes of Article 43 of the GDPR. The routes for accreditation in accordance with Article 43(1) are then discussed, with three options identified:
Accreditation conducted solely by the supervisory authority, on the basis of its own requirements;

Accreditation conducted solely by the national accreditation body named in accordance with Regulation (EC) 765/2008 and on the basis of ISO/IEC 17065/2012 and with additional requirements established by the competent supervisory authority; or

Accreditation conducted by both the supervisory authority and the national accreditation body.

The Guidelines also provide a framework for establishing additional accreditation requirements when the accreditation is handled by the national accreditation body and for establishing accreditation requirements when the accreditation is handled by the supervisory authority.

An Annex to the Guidelines has also been published separately, which provides guidance on how to identify additional accreditation requirements. The Annex outlines suggested requirements that supervisory authorities and national accreditation bodies should consider to ensure compliance with the GDPR.

The EDPB welcome comments on the Guidelines which should be addressed to the EDPB no later than 1 February 2019 via EDPB@edpb.europa.eu.

The EDPB’s guidelines are available here and the Annex can be accessed here.

(xvii) Data Sharing and Governance Bill 2018 Update

On 18 December 2018, the Data sharing and Governance Bill 2018 (the “Bill”) is currently before Dáil Eireann at the Fifth stage (where final statements on the Bill are made). The Bill was published in June 2018 following approval by the Government. The Bill has the objective of:

- Regulating the sharing of information, which includes personal data, between public bodies which occurs extensively at present;
- Regulating the management of information by public bodies;
- Establishing a base of registries;
- Collecting public service information;
- Establishing a data governance board; and
- Providing for related matters.

A copy of the Bill, as initiated on 12 June 2018, is available here.
The Bill can be tracked [here](#).

(xviii) **European Union – United States Privacy Shield report**


The report shows that the United States continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the European Union to participating companies in the United States. The steps taken by the United States authorities to implement the recommendations made by the European Commission in last year’s report have improved the functioning of the framework.

The European Commission expects the United States authorities to nominate a permanent Ombuds-person by 28 February 2019 as the Ombuds-person is an important mechanism that ensures complaints are addressed.

The report will be sent to the European Parliament, the Council, the European Data Protection Board and to the United States authorities.

A copy of the press release and the report can be accessed [here](#).

(xix) **Data Protection Commission issues preliminary guidance on personal data transfers to and from the United Kingdom in event of a ‘no deal’ Brexit**

On 21 December 2018, the Data Protection Commission (“DPC”) issued preliminary guidance on personal data transfers to and from the United Kingdom in event of a ‘no deal’ Brexit.

Irish entities will require a transfer mechanism to be in place from 30 March 2019 in order to continue to lawfully transfer personal data to the United Kingdom which will become a “third country” for the purposes of European Union personal data transfers. The preliminary guidance provides for:

- Data flows from Ireland to the United Kingdom after March 2019 if there is no deal;
- Data flows from the United Kingdom to the European Union after March 2019; and
- Data flows from the United Kingdom to non-European Union countries after March 2019

A copy of the preliminary guidance can be accessed [here](#).
Brexit

(i) **EIOPA releases statement on service continuity of cross-border insurance post Brexit**

On 5 November 2018, EIOPA released a statement on the need to ensure service continuity in cross-border insurance contracts between the United Kingdom and the European Economic Area (“EEA”) post Brexit.

In the statement, EIOPA noted that there are 124 insurance undertakings from the UK and Gibraltar with cross-border business in EEA jurisdictions which have no or inadequate contingency plans in place to ensure continuity in the event that the UK withdraws from the EU without an agreement with the EU. This may mean that 9.1 million EEA policyholders could face uncertainty and delays in receiving payments, with the majority of affected contracts being with non-life insurers.

EIOPA highlights that, as a matter of law, insurance undertakings have to ensure continuity and regularity in the performance of their activities, including the development of contingency plans and supervisory authorities have to ensure compliance. EIOPA also highlights that insufficient contingency planning that may result in consumer detriment is a severe governance failure. EIOPA is meeting with NCAs to address the residual risk.

EIOPA’s overall assessment is that the service continuity issue does not give rise to financial stability risks, but it will nevertheless continue to closely monitor and assess potential financial stability risks.

The full statement can be accessed [here](#).

(ii) **ESMA raises awareness on CRA and TR readiness in the event of no-deal Brexit**

On 9 November 2018, ESMA issued a public statement with a view to raising awareness on the readiness of credit rating agencies (“CRA”) and trade repositories (“TR”) for the possibility of there being no agreement reached between the United Kingdom and the European Union with respect to the United Kingdom’s withdrawal from the European Union.

In a no-deal Brexit scenario, CRAs and TRs established in the United Kingdom will lose their European Union registration with effect from the date of the United Kingdom’s withdrawal from the European Union. In light of this, ESMA is engaging on a continuous basis with the relevant supervised entities to ensure that the agreed Brexit contingency plans are fully executed by March 2019. These contingency plans include the finalisation of pending applications for registration.

ESMA also intend to execute a memorandum of understanding (“MOU”) with the Financial Conduct Authority in the United Kingdom to allow for information to be exchanged in order to ensure effective supervision and enforcement. ESMA aims to have the MOU in place by the end of March 2019.
ESMA noted that significant preparatory steps have been taken by both industry sectors but calls upon market participants to take the following action:

- European Union counterparties and central counterparties must ensure that they continue to fulfil the requirement that details of derivatives contracts are reported to a registered European Union established TR or a recognised third-country TR;

- CRAs need to have a legal entity registered in the European Union and supervised by ESMA, in order for their ratings to be used for regulatory purposes in the European Union; and

- Counterparties should ensure that they and their reporting entities fully adhere to the most recent reporting requirements to better enable any potential transfer of data and ensure their continuous compliance with the EMIR reporting obligation.

ESMA encourage all market participants to continue to monitor the public disclosures made by CRAs and TRs in the context of Brexit.

The statement can be read in full here.

(iii) **Central Bank publishes updated Brexit Task Force Report**

In November 2018, the Central Bank published its Brexit Task Force Report for September 2018 (the “Report”).

The Report provides updated information regarding economic and financial market developments, risks arising for firms supervised by the Central Bank and issues arising for the Central Bank itself, particularly with respect to authorisations.

The fourth section of the Report provides an overview of the latest sectoral developments with respect to banks, insurance and asset management firms, payments institutions and market infrastructures. Section six of the Report also provides an overview of the work conducted by the various European Supervisory Authorities, the European Central Bank and the Single Supervisory Mechanism in relation to Brexit.

A full copy of the Report can be accessed here.
European Commission Communication - Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan

On 13 November 2018, the European Commission published a communication titled “Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan” (the “Communication”). The Communication identifies the key actions to be taken in the event of a no-deal scenario and provides a structure for discussions and Member State coordination.

In the area of financial services, the Commission states that it is unnecessary to adopt contingency measures in respect of not-cleared over-the-counter (“OTC”) derivative contracts between EU and UK counterparts which will, in principle, remain valid and executable until maturity. However, the Commission noted that certain life-cycle events could potentially imply the need for an authorisation or an exemption where the counterparty will no longer be an EU firm, so market participants should take actions such as transferring contracts and seeking relevant authorisations in preparation for this situation. The Commission also deemed it unnecessary to adopt contingency measures in respect of insurance.

Regarding cleared derivatives, the Commission highlighted that a no-deal scenario may present risks to financial stability, deriving from a disorderly close-out of positions of EU clearing members in UK central clearing counterparties. It also identified potential risks relating to certain services provided to EU operators by UK central security depositories that cannot be replaced in the short term. In the event that the UK withdraws without a deal, the Commission will adopt temporary and conditional equivalence decisions, under existing equivalence regimes, to ensure there will be no disruption in central clearing and depositories services. These decisions will also be complemented by recognition of UK-based infrastructures, which are encouraged to pre-apply to ESMA for recognition.

In addition, the Commission recommended that the European Supervisory Authorities begin preparing cooperation agreements with UK supervisors, in order to facilitate the immediate exchange of information related to financial institutions and actors after the withdrawal date in a no-deal scenario.

A full copy of the European Commission’s Communication can be accessed here.

European Council endorses draft UK-EU withdrawal agreement and political declaration on framework for future relationship

On 25 November 2018, the European Council endorsed the draft agreement for the withdrawal of the UK from the EU and the draft political declaration on EU-UK relations, which accompanies the withdrawal agreement and is referred to throughout. The EU27 leaders then invited the European Commission, the European Parliament and the Council to take the necessary steps to ensure that the withdrawal agreement can enter into force on 30 March 2019.
The draft withdrawal agreement includes additional transition provisions (Article 132), which permit the joint UK-EU committee to adopt a one-off decision to extend the transition period before 1 July 2020. It also obliges the EU and the UK to use their best endeavours to conclude an agreement on the future relationship between Ireland and Northern Ireland by 31 December 2020, which would supersede the current backstop plan to avoid a hard border in Ireland.

The draft political declaration on future EU-UK relations establishes the parameters of the relationship between the EU and the UK in areas including trade and economic cooperation, law enforcement and criminal justice, foreign policy, security (including cyber-security) and defence. In particular, the draft political declaration proposes an economic partnership between the EU and the EU that will encompass a free trade area which will facilitate trade and investment between the parties to the extent possible, while respecting the integrity of the EU’s Single Market and the Customs Union as well as the UK’s internal market, and recognising the development of an independent trade policy by the UK beyond this economic partnership. The precise legal form of the future relationship between the EU and the UK will be determined as part of the post-Brexit negotiations.

The draft political declaration also details the agreement of the EU and the UK to ensure a close and structured cooperation on regulatory and supervisory matters in the area of financial services. It notes that both the EU and the UK will have equivalence frameworks in place that allow them to declare a third country’s regulatory and supervisory regimes equivalent for relevant purposes. It calls on both parties to start assessing equivalence with respect to each other under these frameworks as soon as possible after the UK’s withdrawal from the Union, endeavouring to conclude these assessments before the end of June 2020.

In a statement published on 15 November 2018, the European Banking Federation (“EBF”) announced its support for the manner in which the agreement recognises the importance of financial services and called on the European Council and all other stakeholders to create further clarity as soon as possible. The EBF also noted that the transition period will assist in resolving most of the immediate risks of Brexit in the short run, but that further public action will be needed to address other specific risks to complement the financial sector’s own preparation.

The EBF’s statement can be read in full here.

The draft withdrawal agreement can be accessed here and the draft political declaration on future EU-UK relations is available here.

In a press release published on 12 December 2018, available here, the European Parliament stressed that the withdrawal agreement and the political declaration are the only deals possible and are not open to renegotiation.
Central Bank issues Brexit FAQ for consumers

On 6 December 2018, the Central Bank issued an updated Brexit related FAQ document providing general information to consumers on the potential implications of Brexit. The Central Bank’s FAQ 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 document can be found here.

Central Bank’s second Macro-Financial Review of 2018 discusses the risks posed by Brexit to the Irish economy

On 7 December 2018, the Central Bank published its second Macro-Financial Review for 2018 (the “Review”). The Review identifies Brexit as the main risk facing the Irish economy, particularly in the event of a “no deal” Brexit. The Review highlights the following risks to the Irish economy posed by Brexit:

- A further weakening of sterling would make Irish exports to the UK more expensive and could coincide with an increase in tariffs on those exports;
- Large and persistent currency movements could result in increased competition for Irish firms with a direct trading relationship to the UK;
- Any economic shocks arising from Brexit could reduce bank profitability and have a material impact on the credit quality of banks’ loan portfolios.

For further information, the full Review can be accessed here and a related press release can be found here.
Central Bank issues updated Brexit FAQ for financial services firms

On 10 December 2018, 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 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 document can be found here.

European Commission due to publish series of notices relating to a no-deal Brexit

On 19 December 2018, the European Commission issued a press release on a series of notices relating to a no-deal Brexit. After a thorough examination of the risks linked to a no-deal scenario in the financial sector, the European Commission has found that only a limited number of contingency measures is necessary to safeguard financial stability in the EU27. The European Commission has therefore adopted the following acts:

- A temporary and conditional equivalence decision for a fixed, limited period of 12 months to ensure that there will be no immediate disruption in the central clearing of derivatives;
- A temporary and conditional equivalence decision for a fixed, limited period of 24 months to ensure that there will be no disruption in central depositaries services for EU operators currently using UK operators; and
- Two Delegated Regulations facilitating novation, for a fixed period of 12 months, of certain over-the-counter derivatives contracts, where a contract is transferred from a UK to a EU27 counterparty.

A copy of the press release can be found here.
(x) Contingency Action Plan published by the Government of Ireland

In December 2018, the Irish Government published the ‘Preparing for the withdrawal of the United Kingdom from the European Union on 29 March 2019 Contingency Action Plan’ (the “Contingency Action Plan”).

The Contingency Action Plan sets out the Irish Government’s approach to dealing with a no deal Brexit. Work continues at a national and European Union level with further information on no deal preparedness expected to follow in January and February 2019.

Chapter 8 deals with financial services and notes that the Central Bank is working closely with financial services firms to ensure that they have contingency plans in place for end March 2019 and confirms that it expects firms to “ensure they have robust contingency plans in place to minimise the impact on customers, investors and markets”.

The Contingency Action Plan also refers to the work being carried out by the supervisory teams at the Central Bank and the contingency arrangements announced by the European Commission and states that “financial services are being actively encouraged to inform clients about the steps that they have taken to prepare for Brexit”.


Dillon Eustace  
31 December 2018
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