

# Insurance Quarterly Legal and Regulatory Update

Period covered:  
1 October 2017 – 31 December 2017

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## ▣ INSURANCE QUARTERLY LEGAL AND REGULATORY UPDATE

### Solvency II

#### (i) **Corrigendum to Delegated Regulation amending Solvency II Delegated Regulation published in the Official Journal of the EU**

On 13 October 2017, a corrigendum to the Commission Delegated Regulation (EU) 2017/1542) of 8 June 2017 (the “**Amending Delegated Regulation**”) was published in the Official Journal of the EU (the “**OJ**”).

The Amending Delegated Regulation amends the Commission Delegated Regulation ((EU) 2015/35) (the “**Solvency II Delegated Regulation**”) concerning the calculation of regulatory capital requirements for certain categories of assets held by insurance and reinsurance undertakings. The Solvency II Delegated Regulation supplements Directive 2009/138/EC (the “**Solvency II Directive**”).

The corrigendum amends one of the equations in Article 1(4)(c) of the Amending Delegated Regulation. The Amending Delegated Regulation entered into force on 15 September 2017.

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

#### (ii) **EIOPA publishes Solvency II relevant risk free interest rate term structures**

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

In Quarter 4, EIOPA published the RFR as follows:

- ▣ With reference to the end of September 2017 on 6 October 2017;
- ▣ With reference to the end of October 2017 on 8 November 2017; and
- ▣ With reference to the end of November 2017 on 6 December 2017.

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) EIOPA publishes updated Solvency II questions and answers**

During Quarter 4, EIOPA published updated Solvency II questions and answers (“Q&A”) on the following:

- ▣ (EU) No 2015-2450 on the templates for the submission of information to the supervisory authorities;
- ▣ (EU) No 2015-2452 on the procedures, formats, and templates of the solvency and financial condition report; and
- ▣ Answers to questions on the Solvency II Delegated Regulation.

The EIOPA Solvency II Q&As can be accessed [here](#).

**(iv) EIOPA publishes its updated Risk Dashboard based on the second quarter 2017 data**

In October 2017, EIOPA published its risk dashboard for the second quarter of 2017. 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 with some slight improvements in the solvency ratios of groups and life solo undertakings. Profitability of the sector has shown some positive signs both for life and non-life. Despite some positive developments, the continuing low-yield environment and the observation that market fundamentals might not properly reflect the underlying credit risk are still important concerns for the European insurance industry.

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

**(v) EIOPA publishes update on Internal Model Consistency Projects**

On 25 October 2017, EIOPA published an update on the Internal Model Consistency Projects to strengthen supervisory consistency and convergence in the European Union. The activities are part of the follow-up on the Opinion on the preparation for Internal Model applications issued in April 2015.

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

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

**(vi) European Free Trade Association Court considers right to choose lawyer under legal expense insurance contracts in context of Solvency II**

On 27 October 2017, the European Free Trade Association Court (“EFTA court”) issued a judgement concerning the compatibility of certain provisions in a legal expense insurance

contract with an insured person's right of free choice of lawyer as provided for under Article 201(1)(a) of the Solvency II Directive.

The legal expense insurance contract in question contained a clause releasing the insurance company from its obligations if the insured person instructed a lawyer without the prior consent of the insurance company.

The EFTA court concluded that these terms in the contract were not compatible with Article 201(1)(a) under the Solvency II Directive. The EFTA court stated that under a legal expenses insurance contract, the insured person is entitled to have recourse to a lawyer of his choice to defend, represent or serve his interests in any inquiry or proceedings.

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

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

**(vii) EIOPA publishes final report on first set of technical advice on Solvency II Delegated Regulation**

On 31 October 2017, EIOPA published its final report (dated 30 October 2017) on the first set of advice to the European Commission on specific items in the Solvency II Delegated Regulation. The advice covers the following areas:

- ▣ Simplified calculations in the Solvency Capital Requirement (“**SCR**”) standard formula;
- ▣ Reducing reliance on external credit ratings in the standard formula;
- ▣ Treatment of guarantees, industry exposures guaranteed by third parties and exposures to regional governments and local authorities;
- ▣ Risk-mitigation techniques;
- ▣ Undertaking specific parameters;
- ▣ Look-through for investment related undertakings;
- ▣ Loss-absorbing capacity of deferred taxes, factual information only; and
- ▣ Impact assessment.

EIOPA had previously consulted on a first set of advice and the final report contains some modifications as a result of that consultation.

A copy of the first set of advices can be found [here](#).

A copy of the final report on the first set of advices can be found [here](#).

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

**(viii) EIOPA publishes consultation paper on a second set of technical advice on Solvency II Delegated Regulation**

On 6 November 2017, EIOPA published a consultation paper on a second set of technical advice to the European Commission on specific items in the Solvency II Delegated Regulation. The consultation is due to close on 5 January 2018.

The consultation focuses on those elements in the review of the SCR standard formula not addressed in the first set of technical advice, namely:

- ▣ Recalibration of standard parameters of premium and reserve risks;
- ▣ Mortality, longevity, health catastrophe, man-made catastrophe, natural catastrophe and interest rate risks;
- ▣ Market risk concentration;
- ▣ Unrated debt and unrated equity;
- ▣ Treatment of exposures to central counterparties under EMIR;
- ▣ Loss-absorbing capacity of deferred taxes; and
- ▣ Eligible capital instruments.

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

**(ix) 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 SCR standard formula to cover the risk arising from changes in the level of equity prices. This adjustment is regulated mainly in Article 106 of the Solvency II Directive; Article 172 of the Solvency II Regulation as well as in the Implementing Technical Standards on the equity index for the symmetric adjustment of the equity capital charge (Commission Implementing Regulation 2015/2016/EU).

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

- ▣ With reference to the end of September 2017 on 6 October 2017;
- ▣ With reference to the end of October 2017 on 10 November 2017; and

▣ With reference to the end of November 2017 on 6 December 2017.

The monthly symmetric adjustment of the equity capital charge can be accessed via the following [link](#).

**(x) European Commission Implementing Regulation on technical information for calculation of technical provisions and basic own funds published in OJ**

The European Commission Implementing Regulation (EU) 2017/2015 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 30 September 2017 to 30 December 2017 under the Solvency II Directive was published in the OJ on 14 November 2017.

The Implementing Regulation entered into force on 15 November 2017 and it applies from 30 September 2017 (the first reporting reference date to which the Implementing Regulation applies).

The Implementing Regulation can be found [here](#).

**(xi) Central Bank publishes Solvency II Information Note 10**

On 16 November 2017, the Central Bank published “Solvency II Information Note 10; Major Changes to Internal Models” (“**Information Note 10**”). Information Note 10 sets out the Central Bank’s expectations in respect of firms applying for approval for a major change to their approved internal models (possibly an accumulation of minor changes) under Solvency II or an extension of scope to an approved internal model (e.g. to cover new risks or new business units) under Solvency II. Information Note 10 also applies to changing the model change policy.

Section 3 of Information Note 10 sets out the Central Bank’s requirements as regards an application for a model change including the Central Bank’s expectations that firms give notice of their proposed model change application(s) as soon as firms consider an application likely. It also sets out the information which must be contained within the application, and it provides, inter alia, that the Central Bank expects model change applications to address previous Central Bank feedback (including from on-site inspections), past data audits, model limitations, improvements driven by ongoing use of the model, validation findings, and/or findings arising from the Central Bank’s supervisory review process. The Central Bank expects firms to submit no more than one model change application per year.

Section 4 of the Information Note 10 provides that following the submission of a model change application, a firm should continue to use its existing approved internal model when determining its SCR for formal Solvency II reporting purposes. The firm should use the version of the model that has been approved on or before the last day of the reporting period for the purposes of Solvency II reporting at that date. However, the firm can include minor changes implemented within the existing approved internal model as long as these fall

below the firm's threshold in respect of accumulating minor changes. Amongst other matters, Section 4 also provides that the Central Bank expects firms to have regard to the possibility that a model change application is not approved. This should include having contingency plans, where appropriate, and sharing these plans with the Central Bank.

A copy of Solvency II Information Note 10 can be found [here](#).

**(xii) Central Bank publishes revised Solvency II National Specific Template DPM and Taxonomy – Version 1.2.0**

In November 2017, the Central Bank published a revised version of the National Specific Template (the “NST”) Data Point Model (“DPM”) and Taxonomy (“Taxonomy”) - Version 1.2.0 (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 2.2.0 package (as published on 17 July 2017) 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, 2017 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](#).

**(xiii) Commission Implementing Regulations on implementing technical standards (“ITS”) on reporting and disclosure under Solvency II published in the OJ**

The following Commission Implementing Regulations were published in the OJ on 25 November 2017:

- ▣ Commission Implementing Regulation (EU) 2017/2189 amending Implementing Regulation (EU) 2015/2450 which lays down ITS with regard to the templates for the submission of information to the supervisory authorities under the Solvency II Directive; and
- ▣ Commission Implementing Regulation (EU) 2017/2190 amending Implementing Regulation (EU) 2015/2452 which lays down ITS with regard to the procedures, formats and templates of the solvency and financial condition report according to the Solvency II Directive.

The Commission Implementing Regulations entered into force on 15 December 2017.

A copy of the Implementing Regulation (EU) 2017/2189 can be found [here](#).

A copy of Implementing Regulation (EU) 2017/2190 can be found [here](#).



**(xiv) European Commission publishes report on the exercise of the power to adopt delegated acts conferred on the European Commission under Solvency II**

On 7 December 2017, the European Commission published a report to the European Parliament and the European Council on the exercise of the power to adopt various delegated acts conferred to it under the Solvency II Directive.

The European Commission reports that it has exercised the vast majority of empowerments under the Solvency II Directive in 2014 and it believes that the delegation of power should be retained.

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

**(xv) EIOPA publishes supervisory statement on solvency and financial condition reports under Solvency II**

Under Solvency II, (re)insurance undertakings and insurance groups are required to produce and publicly disclose the solvency and financial condition reports (“**SFCR**”). These reports were publicly disclosed by (re)insurance and insurance groups for the first time this year.

On 18 December 2017, EIOPA published a supervisory statement based on analysis of SFCRs of (re)insurance undertakings and insurance groups. EIOPA's analysis shows that the majority of reports were published on time and complied generally with the Solvency II requirements. EIOPA has identified areas where further improvements are needed as regards to the quality of the content of reports. These areas include:

- ▣ A better fit-for-purpose summary;
- ▣ Undertaking/group specific information about the own-risk and solvency assessment (“**ORSA**”);
- ▣ Better structured and comprehensive information on risk-sensitivity to different scenarios and stresses;
- ▣ More relevant information on bases, the methods and main assumptions used for the valuation of assets, liabilities and technical provisions and addressing the uncertainties around valuation; and
- ▣ Inclusion of comparative information in certain areas of the solvency and financial condition report (“**SFCR**”).

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

**(xvi) EIOPA publishes an opinion on supervisory assessment of internal models including dynamic volatility adjustment under Solvency II**

On 21 December 2017, EIOPA published an opinion addressed to NCAs on the supervisory assessment of internal models including dynamic volatility adjustment (“**DVA**”) under Solvency II.

The opinion considers internal models making use of DVA approaches that take the volatility adjustment (“**VA**”) into account in the SCR by allowing the VA to move in line with the modelled credit spreads during the 1-year forecast of basic own funds. In the standard formula or constant VA approaches, the VA is kept constant in the SCR calculation.

The VA is designed to stabilise the insurer's Solvency II balance sheet during short periods of high market volatility. It adds an extra spread component to the discount rate used to calculate technical provisions. Insurers need to provide an explanation of the DVA methodology in their SFCRs to comply with the disclosure requirements under the Solvency II Directive.

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

**(xvii) EIOPA publishes its annual report for 2017 on long-term guarantees measures and measures on equity risk**

On 21 December 2017, EIOPA published its annual report for 2017 on long-term guarantee (“**LTG**”) measures and measures on equity risk.

The annual report analyses the impact of measures on the financial position of all EEA (re)insurance undertakings. The report indicates that in the EEA, 783 insurance and reinsurance undertakings in 23 countries were using at least one of these measures on 31 December 2016.

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

**(xviii) EIOPA publishes its annual reports on the use of exemptions and limitations from regular supervisory reporting under Solvency II, and on the use of capital add-ons by NCAs**

On 21 December 2017, EIOPA published its annual reports on: (a) the use of exemptions and limitations from the regular supervisory reporting under Solvency II; and (b) the use of capital add-ons by NCAs.

- Report on exemptions and limitations: This report covers reporting on exemptions for the whole of 2016 and on limitations for the first quarter of 2017. The report indicates that the exemptions from annual reporting concern 134 undertakings and 8 groups, whilst limitations from quarterly reporting concern 703 undertakings and 21 groups.

The market share of undertakings benefiting from limitations stays below the maximum of 20% provided for under Solvency II.

- ▣ Report on Capital Add-Ons (“**CAOs**”): This report has been published for the first time by EIOPA. As at year-end 2016, four Member States have imposed a total of 20 CAOs at individual undertaking level and one Member State has imposed a total of 4 CAOs at group level. The CAOs set, vary from 2% to 85% as part of the total SCR of the undertaking.

A copy of the report on the use of limitations and exemptions from reporting 2017 can be found [here](#).

A copy of the report on the use of capital add-ons 2017 can be found [here](#).

## International Association of Insurance Supervisors (“**IAIS**”)

### (i) **IAIS agrees approach to implementation of ICS version 2.0**

On 2 November 2017, the International Association of Insurance Supervisors (“**IAIS**”) announced that it has agreed an approach to the implementation of the risk-based global insurance capital standard (“**ICS**”) version 2.0. This follows the announcement by the IAIS of the ICS Version 1.0 for extended field testing on 21 July 2017.

The IAIS appreciates that there are a number of practical implementation issues to consider for the ICS to be implemented. The ICS sets out the agreed approach for ICS version 2.0 and it explains that implementation will be conducted in two phases, namely, the monitoring phase and the implementation phase.

A copy of the ICS Version 2.0 and the corresponding IAIS press release can be found [here](#).

### (ii) **IAIS publishes consultation on draft revised ICPs 8, 15 and 16, integrated ComFrame material and proposed definitions of enterprise risk management terms**

On 8 November 2017, IAIS published a public consultation covering:

- ▣ Draft revised Insurance Core Principles (“**ICP**”) 8 regarding risk management and internal controls with additional ComFrame material integrated with ICP 8;
- ▣ Draft revised ICP 15 regarding investments and ComFrame material integrated with ICP 15;
- ▣ Draft revised ICP 16 regarding enterprise risk management (“**ERM**”) for solvency purposes with ComFrame material integrated with ICP 16. The IAIS have also published a table setting out a comparison of the standards in the current version (dated October 2011) and the draft revised ICP 16; and

- ▣ Proposed definitions of ERM-related terms, to be added to the IAIS glossary.

The IAIS held a public background teleconference session on 22 November 2017 to discuss the draft revised ICPs. Once the consultation has closed to responses, the IAIS will use them to further develop the draft revised ICPs and materials and finalise them.

The initial deadline for responses to the consultation was 8 January 2018 however on 24 November 2017, IAIS published a press release announcing that it will extend the deadlines for the consultation on the draft revisions to ICPs 8, 15 and 16 from 8 January, 2018 to (i) 15 January 2018 for ICP 8; and (ii) 31 January 2018 for ICPs 15 and 16.

A copy of the public consultation, clean version and redline versions and table of comparison can be found [here](#).

A copy of the first web tool can be found [here](#).

A copy of the second web tool can be found [here](#).

### **(iii) IAIS publishes draft revised ICPs for information purposes pending adoption at 2019 AGM**

On 8 November 2017, IAIS published draft revised ICPs for information purposes and a draft revised introduction and assessment methodology document:

- ▣ Draft revised ICP 1 regarding objectives, powers and responsibilities of the supervisor;
- ▣ Draft revised ICP 2 regarding supervisor;
- ▣ Draft revised ICP 3 regarding information sharing and confidentiality requirements;
- ▣ Draft revised ICP 9 regarding supervisory review and reporting;
- ▣ Draft revised ICP 10 regarding preventive measures, corrective measures and sanctions;
- ▣ Draft revised ICP 12 regarding exit from the market and resolution;
- ▣ Draft revised ICP 25 regarding supervisory co-operation and co-ordination; and
- ▣ Draft revised document regarding introduction and assessment methodology.

The IAIS explain that the draft revised ICPs have been endorsed by the IAIS Executive Committee but may be subject to future changes, (such as ComFrame additions) before being presented and adopted by the general membership at the IAIS 2019 annual general meeting.

A copy of the draft revised ICPs and the draft revised document regarding introduction and assessment methodology can be found [here](#).

**(iv) IAIS publishes updated version of its ICPs**

On 8 November 2017, IAIS published an updated version of its insurance core principles (“**ICPs**”) document which sets out the 26 ICPs. In the updated version, the following three ICPs were amended:

- ▣ ICP 13 (reinsurance and other forms of risk transfer);
- ▣ ICP 18 (intermediaries); and
- ▣ ICP 19 (conduct of business).

A copy of the updated version of the ICPs document can be found [here](#).

**(v) IAIS application paper on product oversight in inclusive insurance**

On 24 November 2017, the IAIS published an application paper on product oversight in inclusive insurance markets.

The application paper provides guidance to supervisors, regulators and policymakers when considering, designing and implementing regulations and supervisory practices on product oversight in inclusive insurance markets. For the purposes of the paper, "inclusive insurance" refers to all insurance products aimed at the excluded or under-served market.

The application paper is structured as follows:

- ▣ Section 2 explains the concept of product oversight;
- ▣ Section 3 describes the typical inclusive insurance market and customer;
- ▣ Section 4 explains the concept of proportionality with the impact on the implementation and application of the ICPs;
- ▣ Section 5 provides application guidance in respect of product oversight and the requirements an insurer is expected to meet;
- ▣ Section 6 provides application guidance in respect of product oversight and the implementation of supervisory oversight in this area; and
- ▣ Section 7 contains a summary and conclusions.

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

**(vi) IAIS publishes a consultation on a draft issues paper on index-based insurances**

On 1 December 2017, the IAIS published a consultation on a draft issues paper, dated 16 November 2017, on index-based insurances. The draft issues paper provides further detail on index-based insurances. It also identifies regulatory and supervisory issues arising in respect of, and the challenges faced by, index-based insurances.

The draft issues paper focuses on the insurances usually directed at weather related or natural disaster event risks. The paper looks specifically at insurance aimed at the low-income or lower middle income policyholders due to specific requirements in terms of service and consumer protection.

The paper provides background on the reasons that various promoters have sought to develop index based insurance and discusses the scope of index based insurances. It also considers the relevant stakeholders and how they may be different to other insurance related subject areas. The paper also considers certain consumer protection issues and other legal issues arising. It also considers how supervisors might approach them in a manner that reflects both a proportionate approach and provides for innovation

A copy of the draft issues paper can be found [here](#).

**(vii) IAIS publishes consultation paper on the development of an activities-based approach to mitigate systemic risk in the insurance sector**

On 8 December 2017, the IAIS published a consultation paper on the development of an activities-based approach (“**ABA**”) to mitigate systemic risk in the insurance sector. The consultation paper is designed to give stakeholders an opportunity to have an input into the development of the ABA and the structure of work that will follow, which includes the approach that the IAIS intends to adopt to derive the ABA policy measures. Comments can be made on the consultation paper until 15 February 2018.

The IAIS plans to launch a second consultation paper on its final proposals in this area by the end of 2018 after; (i) completing further work on developing policy measures to address potential systemically risk activities in the insurance sector; and (ii) completing a review the assessment methodology for the identification of global systemically important insurers (“**G-SIIs**”).

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

## Global Federation of Insurance Associations (“**GFIA**”)

**(i) GFIA publishes its annual report for 2016-2017**

On 3 November 2017, the GFIA published its annual report for 2016-2017. The report provides an overview of the GFIA’s activities over the past 12 months together with positions and opinions on all the current global insurance topics. Over the past 12 months,

the GFIA has commented on a range of issues including the developments of an insurance capital standard, the IAIS Insurance Core Principles and ComFrame revisions. Further details concerning GFIA's activities are set out in the report.

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

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

### (i) EIOPA publishes speech on highlighting future challenges and opportunities

On 10 October 2017, EIOPA published a speech (dated 9 October 2017) by Gabriel Bernardino, the EIOPA Chair that was given to the European Parliament's Economic and Monetary Affairs Committee (“ECON”) as part of the annual hearing of the chairs of the three European Supervisory Authorities (“ESAs”). In the speech, a number of points were made including:

- ▣ Mr. Bernardino indicated that the development of more coordinated supervision is essential to avoid regulatory arbitrage;
- ▣ Mr. Bernardino highlighted that the European wide stress tests are an essential tool in the area of financial stability;
- ▣ Mr. Bernardino noted that EIOPA welcomes the European Commission's proposals to reform the EU's supervisory architecture as published in September 2017;
- ▣ As regards future trends, challenges and opportunities, Mr. Bernardino referred to Brexit and to the ESMA opinion to support national supervisory authorities to secure sound and convergent practices linked to the relocation of UK-based undertakings in the EU;
- ▣ Mr. Bernardino noted that EIOPA welcomes the proposal to include sustainability as well as technological innovation, hence also InsurTech, in EIOPA's mandate;
- ▣ As regards cross-border activities, Mr. Bernardino highlighted that cross border activities should be strengthened with a mandate for EIOPA to act more intrusively when it detects signals of risks of cross-border failures and to allow EIOPA to act in a preventive manner; and
- ▣ Mr. Bernardino highlighted that EIOPA's role with regards to supervisory independence and conflict of interest should be strengthened.

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

EIOPA published a document with its main achievements from October 2016 until September 2017, which can be found [here](#).

**(ii) EIOPA publishes a new set of Solvency II statistics on the European insurance sector**

On 13 November 2017, EIOPA published comprehensive statistical information on the European insurance sector based on Solvency II regulatory reporting.

The statistics will be published on a quarterly basis and start with the third-quarter of 2016. This includes aggregated country-level information about:

- ▣ Balance sheet;
- ▣ Own funds;
- ▣ Capital requirements;
- ▣ Premiums;
- ▣ Claims; and
- ▣ Expenses.

EIOPA will increase the scope and level of detail of the statistics with future releases also providing year-end information with key profitability and financial stability indicators for the largest European insurance groups and undertakings on an aggregated level.

The press release can be found [here](#).

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

**(iii) EIOPA publishes a report on insurers' investment behaviour**

On 16 November 2017, EIOPA published a report analysing the results of a survey it carried out on the investment behaviour of insurers over the past five years which included the identification of a potential 'search for yield' where possible.

The survey was conducted in the first quarter of 2017 with a focus on the asset side of the balance sheet of insurance groups. The purpose of the survey was not to identify issues with individual groups or countries but to focus on the developments of investment behaviour across the industry.

The quantitative section of the survey contained an overview of the key investment categories of insurance groups under the Solvency I ("SI") regime for the years 2011, 2013 and 2015 and is complemented with Solvency II ("SII") data for the year 2016.

The qualitative section of the survey contained contains a number of questions regarding portfolio trends, investment allocation decisions and questions regarding the asset



management of insurers for the same period. The questions focus on investment and strategy decisions of the groups for the next three years.

The analysis led to the identification of trends such as:

- ▣ Lower credit rating quality fixed income securities;
- ▣ Illiquid investments such as non-listed equity and loans excluding mortgages can also be identified with a decrease in (the value of) property investments;
- ▣ An overall increase in average maturity of the bond portfolios;
- ▣ A tendency to invest in new asset classes such as infrastructure, mortgages; loans; and real estate; and
- ▣ A small decrease in the debt portfolio.

The report also found that the volume of unit linked business and index linked business has increased in the last number of years.

A related press release from the EIOPA Chair, commented that EIOPA “will continue to closely monitor the investment behaviour of insurers to ensure that it remain in line with their risk bearing capacity.”

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

A copy of the associated press release can be found [here](#).

#### **(iv) EIOPA publishes paper on common supervisory culture**

On 22 November 2017, EIOPA published a paper describing the basis of a common European supervisory culture titled “*A Common Supervisory Culture – Key characteristics of high-quality and effective supervisions*”.

The paper aims to define a common European supervisory culture to further enhance supervisory convergence in Europe. The paper discusses the main objectives of supervision and key characteristics of high-quality and effective supervision, governance of the supervisory review process and the basic tools that should be available to any NCA.

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

**(v) EIOPA publishes opinion on monetary incentives and remuneration between providers of asset management services and insurers**

On 11 December 2017, EIOPA published an opinion addressed to NCAs on monetary incentives and remuneration between providers of asset management services and insurers.

The aim of the opinion is to promote consistent supervisory practices that cover how existing and upcoming EU law applies to conflicts of interest from monetary practices and practical application of the principles under the Insurance Distribution Directive (“**IDD**”) and Solvency II in managing assets of unit-linked policies.

EIOPA is concerned that insurance undertakings may select underlying investment vehicles as investments for unit-linked policies on the basis that such vehicles provide the most attractive level of monetary incentives and remuneration to insurance undertakings.

NCAs are requested to take (and report back to EIOPA) necessary and proportionate supervisory actions to emphasis to insurance undertakings that monetary incentives from asset managers may be a source of conflict. As a result, NCAs should require that insurance undertakings take appropriate steps to prevent, identify, mitigate and manage such conflicts of interest in accordance with the principles set out in the **IDD**.

Further, the opinion indicates that NCAs should issue guidance to insurance undertakings on organisational or administrative arrangements to prevent conflicts of interest from adversely affecting the interests of policy holders. The opinion also recommends that NCAs should ensure that customers have the appropriate information on the nature and criteria used by insurance undertakings for the selection of underlying funds on offer.

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

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

**(i) Insurance Europe and EFAMA publish a revised template for PRIIPs information exchange**

Regulation (EU) No 1286/2014 of the European Parliament and of the Council (the “**PRIIPs Regulation**”) takes effect from 1 January 2018.

The objective of the PRIIPs Regulation is to improve the transparency of certain products manufactured by the financial services industry which are offered to retail investors. In brief, the PRIIPs Regulation introduces an obligation on the manufacturers of packaged retail and insurance-based investment products (“**PRIIPs**”) to produce a key information document (“**KID**”) for retail investors so that they can understand and compare the key features and risks of a PRIIP.

On 6 October 2017, Insurance Europe and the European Fund and Asset Management Association (“**EFAMA**”) published a press release announcing that they have updated their PRIIPs information exchange templates:

▣ **The European PRIIPs template (“EPT”)**

The template has been amended by two optional parts (82 to 101). The first addition is relevant only for funds or structured products offered in the German market and the second part amends the EPT for data fields related to structured products that were not addressed in the first version of the template.

▣ **The "Comfort" EPT (“CEPT”)**

The content of this template has not changed, but it now provides two possible methods for the VaR-equivalent volatility (“**VEV**”) calculation for regular premiums.

The templates seek to facilitate the exchange of information between insurers and asset managers, which is a requirement under the PRIIPs Regulation for multi-option products.

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

**(ii) ESAs publish updated Q&As on PRIIPs KID**

On 20 November 2017, the ESAs published an updated version of its questions and answers document on the KID requirements for PRIIPs under Commission Delegated Regulation (EU) 2017/653 (the “**PRIIPS Delegated Regulation**”) (the “**Q&As**”).

The PRIIPS Delegated Regulation supplements the PRIIPs Regulation by laying down the regulatory technical standards with regard to the presentation, content, review and revision of such a KID and the conditions for fulfilling the requirement to provide such a KID.

The updated Q&As comprise:

- ▣ General Topics: Q&A 2 concerns the requirement for a KID when an investment product is listed on a regulated market and Q&A 3 concerns the definitions of the terms "biometric risk premium" and "insurance premium";
- ▣ Market risk assessment (Annex II, Part 1): Q&A 8 concerns the correction for risk neutrality and Q&A 13 concerns the treatment of credit-linked notes;
- ▣ Market risk assessment (Annex II, Part 1): Q&A 8 concerns the correction for risk neutrality;
- ▣ Performance Scenarios (Annex IV): Q&A 3 concerns the number of trading periods and Q&A 4 concerns the application of the term "rolling";

- ▣ Derivatives: Q&A 4 concerns alterations of the prescribed wording in the KID template for OTC derivatives;
- ▣ Multi-option products: Q&A 1 concerns the presentation of information on the underlying options; and Q&A 2 concerns presentation of information on costs.

A copy of the updated Q&As can be found [here](#).

**(iii) EIOPA publishes a Q&A on the comprehension alert in KID for insurance-based investment products**

On 21 December 2017, EIOPA published a Q&A (dated 19 December 2017) on the comprehension alert in the KID for insurance-based investment products (“**IBIPs**”).

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

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

**(i) EIOPA publishes its final guidelines on complex insurance-based investment products under the Insurance Distribution Directive**

On 11 October 2017, EIOPA published its final guidelines on complex insurance-based investment products (“**IBIP**”) under the Directive on Insurance Distribution (EU) 2016/97 (the “**Insurance Distribution Directive**” or “**IDD**”).

The IDD is designed to improve European Union regulation in the insurance market by ensuring a level playing field among all participants that sell insurance products, to strengthen policyholder protection and to make it easier for firms to trade cross-border. The IDD repeals and replaces the Insurance Mediation Directive 2002/92/EC.

The guidelines have been developed in line with Articles 30(7) and (8) of the IDD and apply to execution-only sales. These are typically IBIPs sold via telephone or online and the insurance distributor does not provide advice or verify the customer's knowledge of the product and the risks involved. The guidelines aim to minimise the risk of consumer detriment arising from mis-selling of IBIPs. The guidelines will be translated into all EU official languages. Once the translations have been published, national competent authorities will have a period of two months wherein they will be required to confirm to EIOPA whether they comply or intend to comply with the guidelines.

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

A copy of the accompanying press release can be found [here](#).

**(ii) EIOPA publishes a template for the insurance product information document**

On 11 December 2017, EIOPA published a template for the insurance product information document (“**IPID**”). The IPID will accompany all non-life insurance policies and will provide consumers with all of the information they will need to make an informed decision when buying non-life insurance products.

The template follows the layout shown in the annex to the Commission Implementing Regulation (EU) 2017/1469 which lays down a standardised presentation format for the IPID under the IDD such as colours, fonts and logos.

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

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

**(iii) European Commission announces delay to the application date for the IDD and to the IDD Delegated Regulations**

On 20 December 2017, the European Commission announced on its website that it has adopted a legislative proposal delaying the IDD application date by seven months to 1 October 2018. This delay had been requested by 16 Member States and the European Parliament in order to enable smaller intermediaries to prepare for the new IDD regime.

Notwithstanding this delay, the Commission has indicated that Member States are still required to transpose the IDD into national law by 23 February 2018.

A copy of the legislative proposal to delay the IDD can be found [here](#).

In addition, on 20 December 2017, the European Commission announced on its website that it has adopted a legislative proposal delaying the application date for the following IDD Delegated Regulation by seven months to 1 October 2018:

- ▣ Commission Delegated Regulation (EU) 2017/ 2358 of 21 September 2017 supplementing the IDD with regard to product oversight and governance (“**POG**”) requirements for insurance undertakings and insurance distributors; and
- ▣ Commission Delegated Regulation (EU) 2017/ 2359 of 21 September 2017 supplementing the IDD with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products (“**IBIPs**”).

A copy of the POG Delegated Regulation (EU) 2017/2358 can be found [here](#).

A copy of the IBIP Delegated Regulation (EU) 2017/2359 can be found [here](#).

These IDD Delegated Regulations currently state that they will apply from 23 February 2018.

In order to delay the application date of these IDD Delegated Regulations, the European Commission has adopted a new Delegated Regulation amending this application date (to reflect the legislative proposal to delay the IDD application date to 1 October 2017).

A copy of the Delegated Regulation amending the application date can be found [here](#).

## European Markets Infrastructure Regulation (“EMIR”)

### (i) ESMA publishes updated version of EMIR Q&As

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers (“Q&As”) on Regulation (EU) No 648/2012 of the European Parliament and of the European Council on OTC derivatives, central counterparties and trade repositories (“EMIR”). The updated version of the Q&A contains updates on:

- ▣ Question 1 of Part I concerning the definition of “OTC derivatives”;
- ▣ Question 18b of Part I concerning the segregation level for indirect clearing accounts;
- ▣ Question 22 of Part II concerning the ongoing monitoring of collateral requirements for central counterparties (“CCPs”);
- ▣ Question 3a of Part III concerning the reporting of collateral to trade repositories;
- ▣ Question 24 of Part III concerning buy/sell indicators for swaps;
- ▣ Question 34 of Part III concerning contracts with no maturity date;
- ▣ Question 24 of Part III concerning reporting to TRs: Buy/Sell indicator for swaps;
- ▣ Question 40 of Part III concerning LEI changes due to mergers and acquisitions/ update of identification code to LEI; and
- ▣ Question 44 of Part III concerning transition to new EMIR technical standards on reporting.

A copy of the updated EMIR Q&A can be found [here](#).

**(ii) ESMA updates its list of recognised CCPs based in third countries**

On 9 October 2017, ESMA updated its list of recognised CCPs based in third countries. EMIR requires that third-country CCPs are to be recognised by ESMA in order to operate in the European Union.

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

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

**(iii) European Commission Implementing Decision on the equivalence of arrangements of US CFTC regime for purposes of Article 11 of EMIR published in the OJ**

On 14 October 2017, the European Commission Implementing Decision ((EU) 2017/1857) on the equivalence of the legal, supervisory and enforcement arrangements of the US for derivative transactions supervised by the Commodity Futures and Trading Commission (“CFTC”) for the purposes of Article 11 of EMIR was published in the OJ.

The Commission Implementing Decision entered into force on 3 November 2017.

A copy of the Commission Implementing Decision can be found [here](#).

**(iv) Revised RTS and ITS on EMIR trade reporting commence 1 November 2017**

The following revised European Commission Regulations concerning the technical standards on data reporting under Article 9 of EMIR commenced application as and from 1 November 2017:

- ▣ Commission Delegated Regulation (EU) 2017/104 amending Commission Delegated Regulation (EU) No 148/2013 supplementing EMIR with regard to regulatory technical standard (“RTS”) on the minimum details of the data to be reported to trade repositories (the “**Revised RTS on trade reporting**”); and
- ▣ Commission Implementing Regulation (EU) 2017/105 amending Implementing Regulation (EU) No 1247/2012 supplementing EMIR with regard to implementing technical standards with regard to the format and frequency of trade reports to trade repositories (“ITS”) (the “**Revised ITS on trade reporting**”).

The revised RTS and ITS on trade reporting are based on previous ESMA consultation papers and contain a number of amendments to the trade reporting to be carried out. The revised RTS and ITS were published in the OJ on 21 January 2017.

The Revised RTS on trade reporting can be found [here](#).

The Revised ITS on trade reporting can be found [here](#).

**(v) Updated EMIR validation rules commence 1 November 2017**

The updated EMIR validation rules, as published by ESMA on 3 October 2017, commenced application on 1 November 2017. The validation rules were updated by EMSA to accompany the Revised RTS on trade reporting and the Revised ITS on trade reporting (see above).

The updated EMIR validation rules can be accessed [here](#).

**(vi) Commission Delegated Regulation revising the RTS on access to data and aggregation and comparison of data under EMIR commences 1 November 2017**

Commission Delegated Regulation (EU) 2017/1800 was adopted by the European Commission on 29 June 2017. The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 151/2013 with regard to RTS specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing data under EMIR.

Commission Delegated Regulation (EU) 2017/1800 was published in the OJ on 7 October 2017 and commenced application on 1 November 2017. It revises the existing RTS by further specifying the operational standards required to aggregate and compare data across trade repositories.

A copy of the Commission Delegated Regulation (EU) 2017/1800 can be found [here](#).

**(vii) Commission Delegated Regulations on indirect clearing arrangements under EMIR and MiFIR published in the OJ**

The following Delegated Regulations were published in the OJ on 21 November 2017:

- ▣ Commission Delegated Regulation (EU) 2017/2154 which supplements MiFIR with regard to RTS on indirect clearing arrangements; and
- ▣ Commission Delegated Regulation (EU) 2017/2155 which amends Commission Delegated Regulation (EU) 149/2013 with regard to RTS on indirect clearing arrangements.

The Commission Delegated Regulations entered into force on 11 December 2017 and will apply from 3 January 2018.

A copy of Commission Delegated Regulation (EU) 2017/2154 can be found [here](#).

A copy of Commission Delegated Regulation (EU) 2017/2155 can be found [here](#).



**(viii) ESAs release joint statement regarding variation margin exchange for physically-settled FX forwards**

On 24 November 2017, the ESAs released a statement regarding variation margin exchange for physically-settled FX forwards under EMIR.

The ESAs announced that they were reviewing the Commission Delegated Regulation (EU) 2016/2251 (the “**Margin RTS**”) and developing draft amendments to “align the treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions”.

The ESAs reiterated their commitment to apply the international standards and to “require the exchange of variation margin for physically-settled FX forwards in a risk based and proportionate manner”.

In particular, the ESA’s indicated that “this would most likely imply that the scope should cover transactions between institutions (i.e. credit institutions and investment firms)” but suggested that certain transactions with end-users (i.e. institution to non-institution, which would include investment funds) could be brought outside scope.

In light of the difficulties certain end-users are facing, the ESAs referred to their expectation that EU national competent authorities should “*generally apply their risk based supervisory powers in their day to day enforcement of applicable legislation in a proportionate manner.*”

A copy of the ESA’s joint statement can be found [here](#).

**(ix) Update on the EMIR reform proposal**

On 4 May 2017, the European Commission published its proposal to amend EMIR. The proposal seeks to introduce a number of specific changes to EMIR seeking to simplify the applicable rules and eliminating burdens. The reforms included:

- ▣ Proposed changes to the counterparty classification under EMIR (such as including all alternative investment funds within the scope of the classification of financial counterparties);
- ▣ Proposed changes to the scope of reporting activities (such as reducing the reporting burden for non-financial counterparties who contract OTCs with financial counterparties by requiring the financial counterparties to report the trades on behalf of both parties);
- ▣ Proposed changes to the clearing obligation (such as reducing the clearing thresholds for small financial counterparties FCs and extending the exemption from clearing obligations for pension scheme arrangements); and
- ▣ Enabling clearing obligations to be temporarily suspended by the European Commission for up to 12 months in certain circumstances.

A copy of the European Commission's initial proposal can be found [here](#).

On 17 October 2017, the European Central Bank (“**ECB**”) published an opinion (dated 11 October 2017) on the proposed EMIR reform proposals.

A copy of the ECB's opinion can be found [here](#).

On 16 November 2017, the Council of the European Union published a second Council compromise proposal on the proposed EMIR reform proposal, while on 28 November 2017, it published its third Council compromise proposal on the proposed EMIR reform proposal.

A copy of the compromise proposal for 28 November 2017 can be found [here](#).

**(x) ESAs publish final draft RTS amending margin requirements for physically-settled foreign exchange (“FX”) forwards**

On 18 December 2017, the ESAs published a final report containing the text of their proposed amendments to the Margin RTS. The revisions to the Margin RTS exempt certain counterparties, including investment funds, from the variation margin requirement in respect of physically-settled FX forwards.

The draft RTS aims to align the treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions. The next step is for the draft amendments to the Margin RTS to be considered by the EU Commission.

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

**(xi) Central Bank issues statement on the variation margin requirements for physically-settled FX forwards**

The Central Bank issued a statement on 19 December 2017 in response to the ESAs joint statement on 24 November 2017 in respect of the requirement under the Margin RTS to exchange variation margin for physically-settled FX forwards from 3 January 2018.

This follows similar statements recently issued by, inter alia, the Financial Conduct Authority (“**FCA**”) in the UK on 7 December 2017 and the Federal Financial Supervisory Authority (“**BaFin**”) in Germany on 12 December 2017 in support of the ESAs joint statement.

The Central Bank's statement provides the following:

- ▣ It welcomed the ESAs joint statement;
- ▣ It noted that the ESAs are undertaking a review of the relevant requirements and will propose some targeted amendments which are likely to continue to require the exchange of variation margin for physically-settled FX forwards in a risk-based and

proportionate manner but to limit the scope to transactions between institutions (credit institutions and investment firms); and

- ▣ It confirmed that, in accordance with the recommendation from the ESAs and pending the outcome from their review, it will apply its risk-based supervisory powers in the day-to-day enforcement of applicable legislation in a proportionate manner.

Although not expressly stated, it may be inferred from the Central Bank's statement that investment funds do not need to comply with the relevant requirement to exchange variation margin for physically-settled FX forwards as and from 3 January, 2018.

For further information on EMIR, please refer to previous briefings issued by Dillon Eustace including the briefing entitled "Proposal for EMIR Reform – targeted changes with important consequences for AIFs, AIFMs and UCITS Management Companies" can be found [here](#).

A copy of the Central Banks statement can be found [here](#).

## Insurance Europe

### **(i) Insurance Europe welcome the recommendations made by the European Commission in the "Gear 2030" report**

On 19 October 2017, Insurance Europe released a statement that it welcomes the recommendations made by the European Commission in the "Gear 2030" report on the future of the EU automotive industry and in particular the conclusions relating to automated and connected vehicles.

Insurance Europe further stated that "We specifically welcome the report's recommendation on storage and access to the data necessary to establish the circumstances surrounding an accident. However, on the issue of access to data beyond the purpose of establishing liability, Insurance Europe regrets that the report does not recognise more explicitly the need for EU action to ensure consumers are in a position to decide who can access their in-vehicle data and for what purposes. Another key question is how to ensure the adequate protection of victims of road traffic accidents. Insurance Europe welcomes the report's conclusion that the Motor Insurance Directive will continue to play a key role in achieving this goal, for both highly and fully automated cars."

A copy of the statement from Insurance Europe can be found [here](#).

A copy of the European Commission "Gear 2030" report can be found [here](#).

### **(ii) Insurance Europe responds to the European Commission's consultation on the REFIT review of the Motor Insurance Directive**

On 24 October, 2017, Insurance Europe published its response to the European Commission's consultation of 28 July 2017 on the REFIT review of Directive 2009/103/EC

relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (the “**Motor Insurance Directive**”).

In the response, Insurance Europe indicates that it views the Motor Insurance Directive as already fit for its purpose.

Insurance Europe believes that the framework put in place through the Motor Insurance Directive for ensuring compulsory motor third party liability (“**MTPL**”) insurance market and the protection of road users is a system which works well.

Insurance Europe agrees that the cross-border exchange of information on number plates and linked insurance policies should be improved and/or streamlined between Member States.

In response to the European Commission’s query concerning the scope of the Motor Insurance Directive, Insurance Europe states that it agrees with the main findings of DG FISMA’s Inception Impact Assessment of 8 June 2016, namely, that the scope of the Motor Insurance Directive should relate only to accidents caused by motor vehicles in the context of traffic.

A copy of the response of Insurance Europe can be found [here](#).

## European Commission

### **(i) European Commission publishes a request to the ESAs to issue recurrent reports on the cost and past performance of the main categories of retail investment, insurance and pension products**

On 17 October 2017, the European Commission published a request to the ESAs to issue recurrent reports on the cost and past performance of the main categories of retail investment, insurance and pension products. The Commission states that the reporting is to be based on data and information originating from disclosures and reporting required under EU law such as the Insurance Distribution Directive (the “**IDD**”) and the Packaged Retail and Insurance-Based Investment Products Regulation (“**PRIIPs**”).

The European Commission believes that such reporting will provide retail investors with a broad overview of the performance and cost of retail investment products which should aid in comparing investment products and to better interpret the information available. The recurrent reports would also enhance competition and drive pricing disciplines in these markets.

The Commission has proposed a tentative timetable for the ESAs to implement the first report on the costs and performances and data availability by Quarter 3 / Quarter 4, 2018 but may revise or supplement its request and amend the timetable if necessary.

The European Commission’s request to the ESAs can be found [here](#).

**(ii) European Commission publishes report on consumers' decision-making in insurance services**

On 27 October 2017, the European Commission published a report dated May 2017 prepared by London Economics, IPSOS and VVA Europe that contains a study which examines consumers' decision making in the non-life insurance sector (including home insurance, motor insurance and car rental insurance) from a behavioural economics perspective.

The study had a threefold objective, namely, to collect data and evidence, to test a range of remedies to improve consumer decision-making and interest in cross-border offers, and to estimate savings consumers could make.

The report makes a number of recommendations which address a number of general and cross-border insurance issues, such as the provision of information to consumers, the purchasing process, and levels of awareness and understanding.

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

## Department of Finance

**(i) Cost Insurance Working Group releases its third quarterly progress report for 2017**

On 23 October 2017, the Cost Insurance Working Group within the Department of Finance (“**CIWG**”) released its third quarterly progress report on the cost of motor insurance for 2017. The progress report provides an update with regard to the implementation by it of the recommendations contained in the Action Plan set out in the Report on the Cost of Motor Insurance.

A copy of the quarterly progress report can be found [here](#).

## Market Abuse Regulation (“**MAR**”)

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

During the period 1 October 2017 to 31 December 2017, ESMA published updated versions of its questions and answers (“**Q&As**”) on the Markets Abuse Regulation (Regulation 596/2014) (“**MAR**”). The updates comprise:

- ▣ Question 7.8 (trading during closed periods and prohibition of insider dealing);
- ▣ Question 7.9 (types of transactions by person discharging managerial responsibilities (“**PDMRs**”) prohibited during closed periods); and
- ▣ Question 11.1 (calculations relating to emissions, allowances and emission allowances market participants (“**EAMPs**”)).

A copy of the Q&AS can be found [here](#).

## Prospectus Regulation

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

On 20 October 2017 ESMA published an updated versions of its questions and answers on prospectuses (“**Q&A on Prospectuses**”). The changes arise from the implementation of the Prospectus Regulation (EU) 2017/1129 (the “**Prospectus Regulation**”) on 20 July 2017.

The updates comprise:

- ▣ Question 27 (concerning convertible or exchangeable securities);
- ▣ Question 29 (concerning the conversion or exchange of non-transferable securities and exemption from publishing a prospectus);
- ▣ Question 31 (concerning the exemption for admission to trading);
- ▣ Question 32 (concerning exemptions from the obligation to publish a prospectus in Article 1(5) of the Prospectus Regulation as stand-alone exemptions); and
- ▣ Question 44 (concerning the obligation to publish a prospectus for admission of securities to trading on a regulated market).

A copy of the Q&A on prospectuses can be found [here](#).

### (ii) ESMA publishes consultation paper on draft RTS for the Prospectus Regulation

On 15 December 2017, ESMA published a consultation paper on proposed draft RTS under the Prospectus Regulation. The RTS sets out a number of requirements concerning the following areas:

- ▣ The key financial information that should appear in the summary of the prospectus;
- ▣ Data and machine readability information that provides the public with free of charge access, storage and search functions and for submitting data to ESMA;
- ▣ Advertisements relating to public offers or admission to trading;
- ▣ Situations which require the publication of a supplement to a prospectus; and
- ▣ Publication of a prospectus.

The consultation is open for comments until 9 March 2018.

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

## Central Bank of Ireland

### (i) **The Central Bank publishes feedback statement to Consultation Paper 108 (New methodology to calculate funding levies)**

On 27 March 2017, the Central Bank published Consultation Paper 108 entitled “New Methodology to Calculate Funding Levies: Credit Institutions, Investment Firms, Fund Service Providers and EEA Insurers” (“**CP 108**”). In CP 108, the Central Bank proposed to revise the way the current industry funding levy is calculated for credit institutions, investment firms, fund services providers and EEA insurers.

On 2 October 2017, the Central Bank published a feedback statement in response to CP 108 (the “**Feedback Statement**”). The Feedback Statement clarifies the changes which will be introduced which can be summarised as follows:

- ▣ **Credit institutions:** The Central Bank will proceed with the adapted ECB methodology for the calculation of the industry funding levies as outlined in CP 108. However, institutions that were admitted to the ELG scheme will continue to pay 100% of their levy contribution;
- ▣ **Irish Investment firms and fund service providers:** The proposed new levy methodology will be applied once the MiFID II implementation is complete and to facilitate changes to PRISM impact scores which will first apply from 3 January 2018;
- ▣ **EEA insurance companies:** In respect of EEA insurers, the Central Bank intends to proceed with the changes to levies based on three categories as highlighted in the consultation whereby:
  - ▣ Category 1: Large non-life and life insurers, to be levied at half the rate of medium high insurers;
  - ▣ Category 2: Non-life insurers not belonging to category 1 having written motor insurance in Ireland in 2016, to be levied at half the rate of medium low insurers;
  - ▣ Category 3: Insurers not belonging to category 1 or 2, to be levied as before; and
- ▣ **EEA Investment Firms and Fund Service Providers:** The Central Bank intends to proceed with introducing a fixed levy equal to the flat levy component of Irish investment firms and Irish fund service providers.

A copy of the Feedback Statement on CP 108 can be found [here](#).

**(ii) Director of Insurance Supervision of the Central Bank - speech on Brexit and Supervisory Convergence**

On 13 October 2017, Sylvia Cronin, the Director of Insurance Supervision delivered a speech to IDA Ireland on Brexit, in the context of insurance authorisation and supervisory convergence.

Ms. Cronin discussed the importance of a common understanding and interpretation of the Solvency II regulations by national regulators in order to ensure consistent supervision across the single market. In the wake of Brexit, Ms. Cronin indicated that the Insurance Directorate of the Central Bank has increased its authorisation unit and is prepared to deal with increased applications for insurance authorisation arising from Brexit.

In respect of firms relocating to Ireland, Ms. Cronin reiterated that it is important for the Central Bank to have a robust authorisation process. In this regard, the Central Bank expects to see strong local governance supported by a sound risk management framework. Central Bank must be satisfied that the outsourcing of critical functions such as underwriting, claims or distribution channels will be subject to frequent monitoring and review, to ensure adequate control. Ms. Cronin also highlighted that a high amount of reinsurance may indicate a lack of substance in the local entity or exposure to concentration risk and counterparty risk.

Ms. Cronin indicated that the Central Bank's authorisation process and approach to substance, reinsurance and outsourcing are aligned to the EIOPA's guidance.

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

**(iii) The Central Bank publishes consultation paper 114 on Non-Life Insurance Amendments to the Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) Regulations 2007**

On the 10 November 2017, the Central Bank published Consultation Paper 114 ("CP 114") seeking views from interested stakeholders on two recommendations from the action plan relating to proposed amendments to the Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) Regulations 2007 (S.I. No. 74) (Schedule 1).

The key recommendations of CP 114 include: (i) provision by insurers of additional information on the premium breakdown to consumers; and (ii) extension of the current renewal notification period from 15 working days to 20 working days to make it easier for motorists to compare pricing when purchasing insurance.

The Central Bank is also seeking views on whether the extended notification period should apply in the case of other classes of insurance covered by the legislation such as accident, health, fire, other damage to property and general liability insurance.



The closing date for submissions to CP 114 is 9 February 2018. Comments and queries can be emailed to [consumerprotectionpolicy@centralbank.ie](mailto:consumerprotectionpolicy@centralbank.ie).

CP 114 can be accessed [here](#).

**(iv) Deputy Governor of the Central Bank addresses the Association of Compliance Officers Ireland’s (“ACOI”) annual conference**

On 10 November 2017, the Deputy Governor of the Central Bank, Ed Sibley, addressed the Association of Compliance Officers of Ireland’s (“**ACOI**”) annual conference.

Amongst the topics discussed, the Deputy Governor referred to the Central Bank restructuring of the financial regulation function. Mr. Sibley also highlighted that the complexity of the work of the Central Bank continues to increase in light of growing rulebooks, increasing expectations, increasing pace of change and increasing complexity of business models/ organisational structures.

As regards the 2018 priorities, the Deputy Governor referred to the implementation of MiFID II; the preparation for Brexit and the need for the Central Bank to enhance and develop its approach to IT and cybersecurity risks. The risks generated by outsourcing were highlighted as an area for concern to the Central Bank. Mr. Sibley mentioned that the Central Bank will be undertaking firm-specific, sector-specific and cross-sector work to obtain a holistic view of the outsourcing landscape and the effectiveness of its management across the Irish financial services sector

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

**(v) The Central Bank publishes Consultation Paper 115 on the Authorisation and Supervision of Branches of Third-Country Insurance Undertakings**

On 13 November 2017, the Central Bank published consultation paper 115 (“**CP 115**”) on the authorisation and supervision of branches of third-country insurance undertakings under the Solvency II regime. This will be of interest in particular to UK insurers considering the option of establishing a branch in Ireland post Brexit.

The Appendices to CP 115 set out the proposed policy to be implemented by the Central Bank:

- ▣ Appendix 1 contains a proposed Policy Notice which describes the Central Bank’s position and expectation on the authorisation of Third Country Branches;
- ▣ Appendix 2 comprises a proposed handbook of requirements for Third Country Branches;

- ▣ Appendix 3 deals with proposed changes to the existing Domestic Actuarial Regime and related governance arrangements. It is currently proposed to impose the existing Domestic Actuarial Regime on third country branches; and
- ▣ Appendix 4 contains a proposed guidance and checklist for submission of an application for authorisation of a Third Country Branch.

Submissions should be emailed to [insurancepolicy@centralbank.ie](mailto:insurancepolicy@centralbank.ie) and the consultation will remain open for 12 weeks from 13 November 2017 until 5 February 2018. The Central Bank will make all submissions available on its website.

A copy of CP 115 can be found [here](#).

#### **(vi) Central Bank hosts Solvency II reporting workshop**

On 22 November 2017, the Central Bank hosted a Solvency II reporting workshop that addressed:

- ▣ Pillar 3 Reporting overview;
- ▣ Completion of template s.04.01 activity by country;
- ▣ Solvency II QRT data validation;
- ▣ Compilation of the ECB insurance statistical returns; and
- ▣ The reporting changes for year-end 2017.

The workshop focused on providing clarification around the reporting requirements relating to several reporting templates including: s04.01, s.05.01, s.05.02 s.12.02, s.17.02, s19.01 and S20.01.

A copy of the Solvency II reporting workshop presentation can be found [here](#).

#### **(vii) Central Bank's Deputy Governor delivers speech to Insurance Ireland on innovation and insurance**

On 29 November 2017, the Deputy Governor of the Central Bank, Ed Sibley, delivered a speech to Insurance Ireland. His speech focused on:

- ▣ The work of the Central Bank in the context of the European Supervisory Framework;
- ▣ The Central Banks' regulatory priorities for 2018;
- ▣ InsurTech and innovation.

By improving on these, insurance firms will be able to rise to challenges and opportunities arising from InsurTech & Innovation.

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

## Guidelines for the Prudential Assessment of Acquisition in the Financial Sector

### (i) Guidelines for the prudential assessment of acquisition in the financial sector

As from 1 October, 2017, potential acquirers of qualifying holdings in an EU credit institution, assurance, insurance or reinsurance undertaking or an investment firm should refer to the guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector under Directive 2007/44/EC (the **Acquisitions Directive**) (the **Guidelines**).

The Guidelines were jointly published by the EBA, ESMA, the European Insurance and Occupational Pensions Authority (**EIOPA**) and the ESAs in December 2016.

The purpose of the Guidelines is to set out a unified supervisory approach to the treatment of proposed acquirers throughout the financial sector in the EU and harmonise the approach to situations which will trigger a requirement for a proposed acquirer to notify its relevant competent authority of its proposed acquisition.

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

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

### (i) European Commission adopts Delegated Regulation amending the Commission's list of high-risk third countries under the Fourth Money Laundering Directive (**MLD4**)

On 27 October 2017, the European Commission adopted a Delegated Regulation amending the Commission's list of high-risk third countries under the Fourth Money Laundering Directive ((EU) 2015/849) (**MLD4**) to include Ethiopia.

The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing MLD4 by identifying high-risk third countries.

On 23 November 2017, the initial period for examining the delegated act was extended by one month, at the European Parliament's request and is awaiting a committee decision.

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

The progress of the Delegated Regulation can be viewed [here](#).

## (ii) Outcomes of the Joint Plenary of FATF/GAFILAT

In November 2017, FATF and the Financial Action Task Force of Latin America (“GAFILAT”), held the first joint plenary meeting in Buenos Aires.

According to FATF’s press release of 3 November 2017, the main issues dealt with at the plenary meeting were:

- ▣ Combatting terrorist financing, including the adoption of a report on the financing of recruitment for terrorist purposes;
- ▣ Information sharing and the adoption of revisions to Recommendations 18 and 21 on information sharing;
- ▣ Adoption of a supplement to the 2013 FATF Guidance on AML/CFT measures and financial inclusion;
- ▣ The mutual evaluation reports of Mexico and Portugal;
- ▣ The follow up report for the mutual evaluation of Austria;
- ▣ AML/CFT improvements in Uganda;
- ▣ Brazil's progress in addressing the deficiencies identified in its mutual evaluation reports since the June 2017 FATF report;
- ▣ Approval of a statement about the proliferation financing risk emanating from the Democratic People's Republic of Korea, which stresses the global obligations and the importance of a robust application of the FATF standards and relevant UN Security Council Resolutions;
- ▣ Revisions to methodology;
- ▣ Strengthening of FATF's institutional basis, governance and capacity;
- ▣ Outcomes of the meeting of the Forum of FATF Heads of Financial Intelligence Units (“FIUs”);
- ▣ Publication of a statement by FATF expressing its strong support for responsible financial innovation in line with FATF Standards and an exploration of the opportunities that new financial and regulatory technologies present for improving the effective implementation of AML/CFT measures;
- ▣ FATF/GAFILAT Outreach Prosecutorial Services and Criminal Justice Systems;
- ▣ GAFILAT Private Sector engagement;

- ▣ Training activities of the FATF Training and Research Institute in Busan, Korea; and
- ▣ Considering jurisdictions with strategic AML/CFT deficiencies or which a call for action applies, including an update on Iran's engagement with FATF and an update on AML/CFT improvements in Uganda.

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

**(iii) Central Bank publishes the third edition of the Anti-Money Laundering Bulletin**

In December 2017, the Central Bank published the third edition of the Anti-Money Laundering Bulletin with the purpose of providing guidance on customer due diligence (“CDD”) in relation to the discontinuation of a business relationship where: (i) a firm is unable to identify and verify its customers, or (ii) where there is insufficient documentation or information on file to verify a customer.

The Central Bank states that in such circumstances a “firm must not allow the situation to perpetuate”. It states that it expects that firms will have remediation plans in place in order to obtain the outstanding documentation and/or information.

In the bulletin, the Central Bank indicates that it has identified compliance deficiencies in the past which have arisen as a result of a firm acquiring a book of business and thereafter it is unable to verify the identity of these customers, and does not hold sufficient documentation or information to verify these customers. In such cases, the Central Bank indicates that the anti-money laundering function within the firm acquiring /transferring such a book of business should be involved in the due diligence process in order to assess the magnitude of any compliance deficiencies. This involvement will allow firms to commence a remediation exercise should the acquisition/transfer proceed.

The bulletin sets out certain steps to be considered by firms when conducting customer due diligence (“CDD”) in respect of new customers. The list is stated not to be exhaustive. The steps to be taken by a firm include:

- ▣ Implementation of policies and procedures which specify the defined timeframe in which CDD must be completed (if CDD is completed during the establishment of the business relationship). This is to minimize the risk that a firm should be unable to contact the customer or return the funds to the original source, should there be a requirement to discontinue the business relationship;
- ▣ Obtaining customer consent as part of the on-boarding process in order to deal with the requirement to discontinue the customer relationship should the need arise; and
- ▣ Implementation of processes that allow firms to return funds directly to the source from which they came. Firms should exercise caution when considering the means of doing this, so as not to appear to convert or legitimise such funds.

The bulletin also sets out steps to be considered by firms when conducting CDD measures in respect of existing customers. These include:

- ▣ Review of all customer records to ascertain the extent of any deficiencies in CDD;
- ▣ Creation of a comprehensive plan to address any failure of customers to provide the required CDD documentation and/or address circumstances in which there is insufficient information in respect of the customer for the firm to demonstrate that the CDD requirements are met. In circumstances where it will take a longer period of time to fully implement remediation plans, firms should consider prioritising remediating customers that would represent a higher risk of ML/TF before remediating other areas;
- ▣ Exploration of all options to source CDD, to include other types of identification documents and information which may be acceptable given the ML/TF risk profile of the customer. In cases where customers appear to be non-contactable, firms should employ all available methods that could be utilised in order to locate such customers, for example engaging with the customer's intermediary;
- ▣ Where CDD is not forthcoming from customers with whom the firm has been able to successfully correspond, firms must ensure that there are documented policies and procedures in place that outline the action required to discontinue the business relationship;
- ▣ In circumstances where there remains a cohort of customers for whom it has not been possible to obtain CDD despite all efforts to contact those customers, firms should design and document policies and procedures to be applied in order to ensure that the associated ML/TF risks are appropriately managed. This may include for example applying measures whereby these accounts are clearly identified as 'discontinued', ring fenced from normal accounts and flagged accordingly, subject to additional and more robust measures to be applied should the customer re-present;
- ▣ Consider whether there is any cause for suspicion in circumstances where CDD is not forthcoming and ensure suspicious transaction reporting obligations are fulfilled.

A copy of the third edition of the Anti-Money Laundering Bulletin can be found [here](#).

**(iv) ESAs publish a final report on draft RTS on strengthening group-wide management of money laundering and terrorist financing risk under MLD4**

On 6 December 2017, the ESAs published a final report on draft RTS on strengthening group-wide management of money laundering and terrorist financing risks under MLD4.

The final report on the draft RTS indicates that additional policies and procedures will be required to be taken by credit and financial institutions to manage money laundering and terrorist financing risks ("ML/TF Risk") where one or more branches or majority-owned subsidiaries are located in third countries whose laws do not permit some or all parts of a

group's AML and CTF policies and procedures to be implemented in full by such branches/subsidiaries.

The final report on draft RTS indicates that such additional policies and procedures should be risk-based. However in order to ensure a consistent EU wide approach, the RTS sets out the specific minimum actions which such credit and financial institutions should be required to take in those situations.

The report also indicates that if the relevant competent authority believes that the additional measures taken by a credit institution or financial institution are insufficient to manage that risk, the competent authority should be able to direct the credit institution or financial institution to take specific measures to ensure the credit institution's or financial institution's compliance with its AML/CFT obligations.

The final draft RTS will be sent to the European Commission for its review and approval.

A copy of the final draft RTS can be found [here](#).

**(v) European Commission adopts a further Delegated Regulation which further amends the Commission's list of high-risk third countries under MLD4**

On 13 December 2017, the European Commission adopted a further Commission Delegated Regulation amending the Commission's list of high-risk third countries. The Commission Delegated Regulation adds Sri Lanka, Trinidad, Tobago and Tunisia to the Commission's list of high-risk third countries.

The Commission Delegated Regulation amends Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing MLD4 by identifying high-risk third countries.

The Council of the European Union and the European Parliament will review the Commission Delegated Regulation and if neither of them objects, it will be published in OJ.

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

**(vi) Political agreement reached on MLD5**

On 15 December 2017, the European Commission published a press release confirming that the Council of the European Union and the European Parliament have reached a political agreement on the proposed MLD5. This was followed by similar press releases of the European Parliament and by, the Council of the European Union.

MLD5 sets out a series of measures to better counter the financing of terrorism and to ensure increased transparency of financial transactions. In particular MLD5 aims to:

- ▣ Increase transparency on who really owns companies and trusts by establishing beneficial ownership registers;

- ▣ Prevent risks associated with the use of virtual currencies for terrorist financing and limiting the use of pre-paid cards;
- ▣ Improve the safeguards for financial transactions to and from high-risk third countries; and
- ▣ Enhance the access of Financial Intelligence Units to information, including centralised bank account registers.

A copy of the European Commission’s press release and the accompanying factsheet can be found [here](#).

**(vii) MLD4 – Update as regards to Central Register for beneficial ownership in Ireland**

Under MLD4 each Member State is required to establish a central register of beneficial ownership of corporate and other legal entities, including trusts, by 26 June 2017. As a result of the ongoing discussions concerning the MLD5 proposals, the Department of Finance has indicated that it is envisaged that the central register of beneficial ownership is now expected to be launched in Quarter 1, 2018.

## Data Protection / GDPR

**(i) Article 29 Data Protection Working Party adopts draft Guidelines on personal data breach reporting**

On 3 October 2017, the Article 29 Working Party (the “**Working Party**”) adopted guidelines on personal data breach reporting (the “**Draft Breach Reporting Guidelines**”).

The Working Party is a collective of EU data privacy supervisory authorities (“**DPAs**”), including the Irish Data Protection Commissioner (“**DPC**”).

The Draft Breach Reporting Guidelines seek to provide clarity on data controller’s and processor’s notification obligations under the General Data Protection Regulation (Regulation (EU) 2016/679) (“**GDPR**”).

The Draft Breach Reporting Guidelines will be a useful tool for data controllers in light of the GDPR’s mandatory reporting requirements for all personal data breaches (save for those that are unlikely to result in a risk to the rights and freedoms of individuals) and in light of the potential ramifications for failing to report a breach.

In particular the Draft Breach Reporting Guidelines address the:

- ▣ Definition of a personal data breach;
- ▣ Timelines for reporting breaches to the Supervisory Authority and the data subject;



- ▣ Information that needs to be provided;
- ▣ Meaning of “risk,” and
- ▣ Role of the Data Protection Officer (“DPO”) in the context of breach notification reporting.

In addition, the Working Party has provided a flowchart illustrating the notification requirements along with the provision of practical examples of personal data breaches and who to notify.

Organisations are advised to develop an incident response plan in advance of the implementation of the GDPR, including processes to detect and promptly contain data breaches and to assess the risk to individuals arising from potential breaches.

The deadline for comments on the Draft Breach Reporting Guidelines passed on 28 November 2017. The Working Party are considering the comments received with a view to adopting a final version.

The Draft Breach Reporting Guidelines are available [here](#).

**(ii) Article 29 Data Protection Working Party adopts draft Guidelines on application and setting of administrative fines**

On 3 October 2017, the Working Party adopted the draft guidelines on the application and setting of the administrative fines under the GDPR (the “**Draft Administrative Fines Guidelines**”). The Draft Administrative Fines Guidelines are intended for use by supervisory authorities to ensure improved application and enforcement of the GDPR and to encourage its consistent and harmonised interpretation and application.

Administrative fines are a powerful part of the ‘enforcement toolbox’ of the supervisory authorities under the GDPR.

Under the GDPR, the scope and nature of administrative fines which can imposed has increased exponentially and may be up to €20 million or 4% of total worldwide annual turnover, whichever is greater.

The Draft Administrative Fines Guidelines state that supervisory authorities must assess each case individually to identify the most “effective, proportionate and dissuasive” corrective measure (or combination of measures) having regard to a number of assessment criteria (both aggravating and mitigating). These criteria include:

- ▣ The nature, gravity and duration of the infringement (including number, purpose of processing and level of damage suffered);
- ▣ The intentional or negligent character of the infringement;

- ▣ Any action taken by the controller or processor to mitigate the damage suffered by data subjects;
- ▣ The degree of responsibility of the controller or processor;
- ▣ Any relevant previous infringements by the controller or processor;
- ▣ The degree of cooperation with the supervisory authority;
- ▣ The categories of the personal data affected by the infringement;
- ▣ The manner in which the infringement became known to the supervisory authority;
- ▣ Whether, and if so to what extent, the controller or processor notified the infringement;
- ▣ Adherence to approved codes of conduct pursuant; and
- ▣ Any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

Dillon Eustace has published an article on Administrative Sanctions under the GDPR which is available [here](#).

The Draft Administrative Fines Guidelines are available for download [here](#).

**(iii) Insurance Europe publish a data breach notification template under GDPR**

On 6 October 2017, Insurance Europe published a data breach notification template which they would like the Article 29 Working Party to use as a guideline for data breach notification templates under the General Data Protection Regulation (Regulation (EU) 2016/679) (“**GDPR**”). Insurance Europe believes that the template would be suitable for insurers, easy to use and allows information to be compared across sectors and the data collected would be anonymised. GDPR will have direct effect in Member States from May 2018.

A copy of the data breach notification template can be found [here](#).

**(iv) Article 29 Data Protection Working Party adopts Guidelines on automated individual decision making and profiling**

On 17 October 2017, the Working Party adopted guidelines on automated individual decision making and profiling for the purpose of GDPR (the “**Draft Automated Decision Making Guidance**”). The Guidelines aim to clarify the GDPR’s provisions that address the risks arising from profiling and automated decision-making and cover the following areas:

- ▣ Definitions of profiling and automated decision-making and the GDPR approach to these in general;
- ▣ Specific provisions on automated decision-making;
- ▣ General provisions on profiling and automated decision-making;
- ▣ Children and profiling; and
- ▣ Data protection impact assessments.

The deadline for comments on the Draft Automated Decision Making Guidance passed on 28 November 2017.

The Draft Automated Decision Making Guidance is available [here](#).

**(v) Article 29 Data Protection Working Party November plenary meeting**

On 28 and 29 November 2017, the Working Party held its November plenary meeting (the “**Plenary**”) to examine certain critical matters with regards to the implementation of the GDPR and the Privacy Shield and to adopt certain key documents. In addition, discussions were held at the Plenary on:

- ▣ The preparation of guidelines on ‘certification’ and on ‘derogations for transfers’ under the GDPR, which are expected to be proposed for adoption at the February plenary;
- ▣ The organisation and structure of the European Data Protection Board (“**EDPB**”);
- ▣ The Working Party’s mandate to work on the development of a position relating to territorial scope of the GDPR; and
- ▣ The Working Party’s mandate to develop a new opinion on the proposal for an ePrivacy regulation and a statement on encryption.

Regarding the financial matters issues, discussions were held at the Plenary on the Working Party’s continued active collaboration with ESMA on the establishment of a framework for the exchange of information between European and non-European financial supervisory authorities and the implementation of revised Payment Services Directive (Directive EU 2015/2366) (“**PSD2**”) and its compatibility with the GDPR.

The public agenda for the Plenary is available [here](#).

The press release issued following the Plenary is available [here](#).

**(vi) Article 29 Data Protection Working Party adopts Guidelines on US Privacy Shield**

On 28 November 2017, the Working Party adopted a report on the EU-US Privacy Shield adequacy decision (the “**Privacy Shield**”) after the first Joint Annual Review which took place in September 2017 in Washington DC (the “**Privacy Shield Report**”).

The Privacy Shield Report acknowledges the progress of the Privacy Shield in comparison to the now invalid Safe Harbour Decision and the efforts made by US authorities and the European Commission to implement the Privacy Shield.

In the Privacy Shield Report, the Working Party identifies a number of significant concerns and it advises that such concerns need to be addressed by both the European Commission and the US authorities by setting up an action plan immediately in order to demonstrate that these concerns will be addressed.

The Working Party's concerns relate to:

- ▣ Lack of guidance and information;
- ▣ HR Data;
- ▣ Lack of oversight and supervision of compliance with the Principles;
- ▣ Application of the Privacy Shield to processors established in the US;
- ▣ Automated-decision making/Profiling; and
- ▣ Self-Certification Process and Cooperation between U.S. authorities in the Privacy Shield mechanism.

The Privacy Shield Report states that if these concerns are not adequately addressed the Working Party will take appropriate action, including the possibility of challenging the Privacy Shield adequacy decision before the national courts (who would refer the case to the European Court of Justice (“**CJEU**”) for a ruling.

The Privacy Shield Report is available [here](#).

The Working Party press release announcing the publication of the Privacy Shield Report is available [here](#).

**(vii) Article 29 Data Protection Working Party adopts Guidelines on transparency**

Following on from the Plenary, the Working Party published guidelines on the obligation of transparency under the GDPR in relation to the processing of personal data (the “**Transparency Guidelines**”). The transparency principle under the GDPR applies to three central areas:

- ▣ Provision of information related to fair processing to individuals;
- ▣ Communication with individuals in relation to their rights under the GDPR; and
- ▣ Facilitating the exercise by individuals of their data protection rights.

The Transparency Guidelines are vital for data controllers and data processors as they provide practical guidance and interpretive assistance on the principle of transparency, which has not defined within the GDPR.

Comments on the Transparency Guidelines can be submitted to the Working Party before the public consultation closes on 23 January 2018.

The Transparency Guidelines are available [here](#).

**(viii) Article 29 Data Protection Working Party adopts a working document on adequacy referential**

On 28 November 2017, the Working Party adopted a working document on adequacy referential (the “**Adequacy Referential Working Document**”) which is a means of ensuring an adequate level of protection during the transfer of personal data outside of the European Union.

The aim of the Adequacy Referential Working Document is to update the previously published working document on transfers of personal data to third countries (“**WP 12**”) as a result of the replacement of the EU Data Protection Directive by the GDPR with effect from 25 May 2018.

The Adequacy Referential Working Document is focused solely on adequacy decisions and it seeks to provide guidance primarily to the European Commission on the core data protection principles that have to be present in a third country legal framework or an international organisation in order to ensure essential equivalence with the European Union framework.

While the principles set out in the Adequacy Referential Working Document are not addressed directly to data controllers or data processors, third countries and international organisations seeking to obtain adequacy may use the working document as a guide.

Comments on the the Adequacy Referential Working Document can be submitted to the Working Party before the public consultation closes on 17 January 2018.

The Adequacy Referential Working Document is available [here](#).

**(ix) Article 29 Data Protection Working Party adopts Guidelines on consent**

On 28 November 2017, the Working Party adopted its Guidelines on consent under the GDPR (the “**Consent Guidelines**”).

In order for a data subject to give lawful consent to the processing of their personal data under the GDPR, a data controller must ensure that the consent meets all of the enhanced requirements as set out in the GDPR. To assist with this, the Working Party has published the Consent Guidelines, which provide a thorough analysis of the notion of consent under the GDPR and provides guidance on what constitutes a valid consent.

The Consent Guidelines should be read in conjunction with existing Working Party Opinions on consent, including Opinion 15/2011, where consistent with the GDPR.

Comments on the Guidelines on Consent can be submitted to the Working Party before the public consultation closes on 23 January 2018.

The Consent Guidelines are available [here](#).

**(x) Article 29 Data Protection Working Party adopts working documents setting up tables with the elements and principles to be found in binding corporate rules for controllers and for processors**

On 29 November 2017, the Working Party adopted two working documents setting up tables with the elements and principles to be found in binding corporate rules for controllers and for processors (the “**BCR Working Documents**”).

The aim of the BCR Working Documents is to amend the working document 153 (which was adopted in 2008 for controller transfers (“**BCR-C**”)) and the working document 195 (which was adopted in 2012 for processor transfers (“**BCR-P**”)) setting up a table with the elements and principles to be found in binding corporate rules in order to reflect the requirements referring to BCRs now expressly set out in the GDPR.

BCR-Cs and BCR-Ps allow a corporate group or a group of enterprises engaged in a joint economic activity to transfer personal data from organisations established in the European Union to organisations within the same group established outside the European Union.

BCR-Cs are suitable for framing transfers of personal data from controllers established in the European Union to other controllers or to processors (established outside the European Union) within the same group, whereas BCR-Ps apply to data received from a controller (established in the European Union) which is not a member of the group and then processed by the concerned group members as processors and/or sub-processors.

The aim of the BCR Working Documents is to:

- Clarify the necessary content of BCR-Cs and BCR-Ps;

- ▣ Provide a distinction on what must be included in the BCRs and what must be presented to the competent Supervisory Authority in the BCRs application; and
- ▣ Provide explanations/comments on each of the requirements.

Comments on the BCR Working Documents can be submitted to the Working Party before the public consultation closes on 17 January 2018.

The BCR-C Working Document is available [here](#).

The BCR-P Working Document is available [here](#).

## Mediation Act 2017

### (i) The Mediation Act 2017

On 2 October 2017, the Mediation Act 2017 (the “**Act**”) was signed into law and is expected to come into force in the coming weeks. The Act applies to all litigation disputes apart from arbitration and certain disputes under tax and customs legislation.

The Act encourages the use of mediation which may achieve a better outcome for parties while also reducing legal costs and therefore improving access to justice and easing the strain on the court system.

The Act is expected to increase the number of mediations which means that parties will need professional or expert advice, including financial expertise, at an earlier stage in the dispute process. This will ensure that parties are in a position to fully consider the financial and taxation ramifications of any settlement proposal. The Act also introduces an obligation on solicitors and barristers to advise their clients to consider using mediation as a means of resolving disputes.

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

**Dillon Eustace**  
**31 December 2017**

## CONTACT US

### Our Offices

#### Dublin

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

#### Cayman Islands

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

#### New York

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

#### Tokyo

12th Floor,  
Yurakucho Itocia Building  
2-7-1 Yurakucho, Chiyoda-ku  
Tokyo 100-0006, Japan  
Tel: +813 6860 4885  
Fax: +813 6860 4501

E-mail: [enquiries@dilloneustace.ie](mailto:enquiries@dilloneustace.ie)

Website: [www.dilloneustace.ie](http://www.dilloneustace.ie)

### Contact Points

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

#### Andrew Bates

*E-mail: [andrew.bates@dilloneustace.ie](mailto:andrew.bates@dilloneustace.ie)*

*Tel : + 353 1 673 1704*

*Fax: + 353 1 667 0042*

#### Breeda Cunningham

*E-mail: [breeda.cunningham@dilloneustace.ie](mailto:breeda.cunningham@dilloneustace.ie)*

*Tel : + 353 1 673 1846*

*Fax: + 353 1 667 0042*

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