Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 October 2018 – 31 December 2018

DILLON EUSTACE

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Table of Contents

INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

MiFID II - Irish Developments

(i) Markets in Financial Instruments Act 2018

On 29 October 2018, the Markets in Financial Instruments Act 2018 (the "**2018 Act**") was enacted. The 2018 Act sets out the maximum sanctions available for certain offences under the European Union (Markets in Financial Instruments) Regulations 2017 (as amended) (the "**MiFID Regulations**") where a person is convicted on indictment. The sanctions set out in the 2018 Act are higher than those provided for under the European Communities Act 1972 (as amended) (the "**1972 Act**").

Summary proceedings for offences under the MiFID Regulations may be brought and prosecuted by the Central Bank, whereas the Director of Public Prosecutions is responsible for prosecuting indictable offences.

Firms should be aware that breaches of the MiFID Regulations also fall within the remit of the Central Bank's Administrative Sanctions Procedure and that administrative sanctions can also be applied to entities which are not "regulated financial service providers" in certain circumstances.

The 1972 Act provides that where an offence is committed under regulations made pursuant to the 1972 Act, the maximum sanctions available on conviction on indictment shall be a fine of €500,000 and a prison term of up to three years.

The 2018 Act, lists various provisions of the MiFID Regulations, a contravention of which will constitute a "relevant offence". The 2018 Act states that a person who is guilty of a "relevant offence" shall be liable, on conviction on indictment, to a fine not exceeding €10 million and/or to a prison term not exceeding ten years. This is a continuation of the criminal sanctions regime that existed in Irish law under the MiFID I regime. The maximum available sanctions for a conviction on indictment for a "relevant offence" are therefore significantly greater than the maximum sanctions for indictment, provided for under the 1972 Act.

The 2018 Act also seeks to make an amendment to the definition of "long term contract" under the Financial Services and Pensions Ombudsman Act 2017, as well as seeking to amend certain definitions provided for under the Credit Reporting Act 2013.

A copy of the 2018 Act can be found here.

For further information regarding the '*Markets in Financial Instruments Act 2018 - sanctions specified for certain offences under the MiFID Regulations*' the full Dillon Eustace article can be accessed here.

MiFID II - European Developments

(i) ESMA updates Q&A on Commodity Derivatives

On 2 October 2018, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR commodity derivatives topics" ("**Q&A on Commodity Derivatives**"). The updates to the Q&A on Commodity Derivatives are as follows:

- **Question ID: Part 2 – Question 18** (as updated on 2 October 2018) which relates to whether position limits also apply to positions in contracts that have been entered into prior to 3 January 2018 and are traded on a trading venue, including an organised trading facility ("**OTF**"), or are economically equivalent over the counter ("**OTC**") contracts to those traded on a trading venue;

- **Question ID: Part 3 – Question 3** (as modified on 2 October 2018) which asks can the parent undertaking notify its national competent authority ("**NCA**") for the whole group or do the subsidiary undertakings also have to notify their local NCA;

- **Question ID: Part 3 – Question 10** (as modified on 2 October 2018) which asks should the denominator in the capital test under Article 3(9) of the Delegated Regulation (EU) 2017/592 ("**RTS 20**") be calculated using consolidated accounts and whether firms should use capital on a worldwide basis or just capital employed within the European Union ("**EU**");

- **Question ID: Part 3 – Question 13** (as modified on 2 October 2018) this question has now been removed; and

- **Question ID: Part 4 – Question 22** (as updated on 2 October 2018) asks what types of firm fall within each of the Implementing Regulation (EU) 2017/1093 ("**ITS 4**") categories for the purposes of the weekly Commitment of Trader reports.

A copy of the updated Q&A on Commodity Derivatives can be accessed here.

(ii) ESMA publish Opinion on Calculating Market Size of ancillary activity under MiFID II

On 2 October 2018, ESMA published an opinion on calculating the overall market trading activity under MiFID II (the "**Opinion**"). The Opinion is a response to a request from NCAs and market participants for guidance from ESMA on how to determine the market size figures to ensure the correct application of Article 2(3) of RTS 20.

By way of background RTS 20 sets out the criteria to determine whether an activity is ancillary under Article 2(1)(j) of the MiFID II Directive (2014/65/EU) (the "**MiFID II Directive**"), which provides for an exemption for persons dealing on own account or providing investment services in specific areas, only insofar as the activity which they are engaging in, is ancillary to their main business.

The Opinion provides an estimate of the market size of different commodity derivatives such as metals, oil and coal, as well as emission allowances by using data collected from trading venues and data reported to trade repositories.

A copy of the Opinion can be found here.

(iii) ESMA publishes speech on MiFID II Implementation and preparing for Brexit

On 3 October 2018, ESMA published a speech given by its Chair, Stephen Maijoor, relating to Brexit preparations and the implementation of MiFID II. Some of the following points were discussed:

- The importance of a coordinated and consistent EU system for third country trading venues under MiFID II and the methods which could best achieve this;
- An overview of the changes brought about by MiFID II, specifically in relation to secondary markets, in terms of transparency, the double volume cap, trading obligation derivatives and systematic internalisers;
- The fact that ESMA is working to identify the effects on the EU financial markets of a no-deal Brexit arising from the impact of MiFID II calculations performed at the EU level and also is seeking to find the most efficient way to limit the potential impact on the markets; and
- In terms of Brexit, the efficient introduction of regulatory and supervisory standards to the relocation of undertakings and their activities from the UK to the rest of the EU was looked at, as was the need to improve third country regimes in securities markets legislation. The consequences of a no-deal Brexit was also discussed. It was pointed out that ESMA had in July of this year reminded UK-based regulated entities of the importance of the timely submission of authorisation requests to be able to continue providing services in the EU.

A copy of the speech can be viewed here.

(iv) ESMA updates Q&A on Investor Protection

On 3 October 2018, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR investor protection and intermediaries topics" ("**Q&A on Investor Protection**"). The updates to the Q&A on Investor Protection are as follows:

- **Question ID: Part 1 – Question 19** (as updated on 3 October 2018) which relates to cases where investment firms use the request for quote ("**RFQ**") system of a trading venue and deals with where an investment firm agrees to trade via such systems, and asks should the investment firm identify the counterparty with whom the transaction was agreed with or the trading venue used to ultimately conclude the transaction for its Delegated Regulation (EU) 2017/576 ("**RTS 28**") reporting; and

- **Question ID: Part 5 – Question 2** (as updated on 3 October 2018) which relates to the circumstances in which an investment firm can hold itself out as providing investment advice on an independent basis.

A copy of the updated Q&A on Investor Protection can be accessed here.

(v) ESMA Chair highlights progress on MiFID II implementation at ECON hearing

On 8 October 2018, Steven Maijoor the Chair of ESMA delivered a statement to the Economic & Monetary Affair Committee ("**ECON**") at the European Parliament as part of the annual hearing of the Chairs of the three European Supervisory Authorities ("**ESAs**"). In his speech, Mr. Maijoor focused on the work of ESMA in progressing the implementation of MiFID II, which has included:

- Providing around 400 opinions to NCAs on both pre-trade transparency waivers and position limits in commodity contracts;

- The assignment of new product intervention powers to ESMA regarding Binary Options and Contracts for Differences ("**CFDs**") as well as ESMAs overall contribution to investor protection; and

- Working on preparing for the withdrawal of the United Kingdom from the EU – as was set out in the Mr. Maijoor's speech, ESMA as the supervisor of Credit Rating Agencies and Trade Repositories in the EU, with a number of them headquartered in London, has required appropriate contingency planning be undertaken by the relevant individual supervised entities in order that they meet all requirements in case of a no deal Brexit by the end of March 2019.

A copy of the speech can be accessed here.

(vi) ESMA publishes decisions on Assessments of Third Country Trading Venues under MiFID II

On 11 October 2018, ESMA issued two decisions made by the Board of Supervisors in relation to the delegation to the ESMA Chair of assessments of third country trading venues.

These two decisions are listed below:

- Decision on the assessment regarding third country trading venues for the purposes of Articles 20 and 21 of MiFIR; and

- Decision on the assessment regarding third country trading venues for the purposes of Article 57(4) of the MiFID II Directive.

The decisions relate specifically to how the assessment of third country trading venues for the purposes of these provisions are to take place. The decisions also lay down specific

criteria that the Chair of ESMA will use for assessing whether to consider a third-country entity as a trading venue for the purpose of the relevant provisions set out in MiFIR and the MiFID II Directive. Please note, however, that the assessment of controversial assessments of third country trading venues will remain with ESMA's Board of Supervisors.

These decisions can be found here and here.

(vii) Contact points of National Supervisory Authorities for communication in the MiFID II framework on Supervisory Cooperation, Authorisation, Acquisitions and Passporting

On 15 October 2018, ESMA published a list of the contact points of national competent authorities ("**NCAs**") for communication in the MiFID II framework on supervisory cooperation, authorisation, acquisitions and passporting (the "**List**"). The List provides information on contact points to facilitate communication on the following topics:

- Cooperation and exchange of information between NCAs;
- Consultation of other competent authorities prior to the authorisation of an investment firm;
- The consultation process between the relevant competent authorities in relation to a proposed acquisition of a qualifying holding in an investment firm; and
- Passporting of investment services.

The List provides that the relevant information relating to the NCAs which is set out in Annex 1 of the document, will be updated by ESMA to reflect any changes made.

A copy of the List can be accessed here.

(viii) Double Volume Cap System - Reporting Instructions

On 22 October 2018, ESMA published reporting instructions for the double volume cap system (the "**Reporting Instructions**"). The purpose of the Reporting Instructions is to provide instructions for the reporting entities such as NCAs, trading venues and Consolidated Tape Providers ("**CTPs**") to submit the double volume cap data to the ESMA system for processing.

In order to ensure that the use of waivers from pre-trade transparency does not unduly harm price formation, MiFIR introduces, in Article 5, the double volume cap mechanism that caps the amount of trading as measured by the volume, carried out under:

- Systems matching orders based on a trading methodology by which the price is determined in accordance with a reference price; and

- Negotiated transactions in liquid instruments carried out under limb (i) of Article 4(1)(b) of MiFIR.

The Reporting Instructions aim to specify the mechanism for reporting entities to submit the double volume cap data to the ESMA system for processing.

As part of upcoming system updates, ESMA has provided that it will update to XML Schema v1.1.0. ESMA plans to open testing with version 1.1.0 of the XML Schema in January 2019 in an environment dedicated to testing, separate from the production environment and plans to go live with the version 1.1.0 of the XML Schema in March 2019 in the production environment. Until the go live date in march 2019, ESMA has provided that the current XML Schema 1.0.0 should continue to be used to report data to ESMA in the production environment.

A copy of the Reporting Instructions can be found here.

(ix) ESMA Renews Intervention Measures which restrict the sale of CFDs & Binary Options

On 23 October 2018, ESMA adopted a decision under Article 40 of MiFIR to restrict the marketing, distribution or sale of contracts for differences ("**CFDs**") to retail clients (the "**Decision**"), in effect from 1 August to 1 November 2018 for a further three-month period. The Decision renews and amends the ESMA Decision (EU) 2018/796.

Under MiFIR, ESMA can introduce temporary prohibitions or restrictions concerning certain financial instruments, financial activities or practices to address consumer protection measures in the EU.

The renewal was agreed by ESMA's Board of Supervisors on 26 September 2018 in response to investor protection concerns regarding the offer of CFDs to retail clients. CFDs have continued to attract regulatory scrutiny, both from ESMA and other regulatory bodies (including the Central Bank of Ireland (the "**Central Bank**")).

CFDs are considered to give rise to significant investor protection concerns due to their complexity, lack of transparent information at the point of sale, risk of significant loss for investors and the deployment of aggressive marketing techniques by providers and distributors of the products. The Decision includes renewing the following:

1. Leverage limits on the opening of a position by a retail client from 30:1 to 2:1, which vary according to the volatility of the type of underlying:

    - 30:1 for major currency pairs;
    - 20:1 for non-major currency pairs, gold and major indices;
    - 10:1 for commodities other than gold and non-major equity indices;

- 5:1 for individual equities and other reference values; or
- 2:1 for cryptocurrencies.

2. A margin close out rule on a per account basis. This will standardise the percentage of margin (at 50% of minimum required margin) at which providers are required to close out one or more retail client's open CFDs;

3. Negative balance protection on a per account basis. This will provide an overall guaranteed limit on retail client losses;

4. A restriction on the incentives offered to trade CFDs; and

5. A standardised risk warning, including the percentage of losses on a CFD provider's retail investor accounts.

In addition to renewing the requirements set out in the original measures, ESMA has agreed to introduce the following reduced character risk warning:

"[insert percentage per provider] % of retail CFD accounts lose money."

This follows technical difficulties encountered by CFD providers in using the risk warnings due to the character limitations imposed by third party marketing providers.

The restrictions set out, are directly applicable in EU Member States, and compliance with these restrictions will be supervised by the NCAs. The Central Bank in a press release published back in March 2018 welcomed ESMA's CFD measures and stated that "the measures will provide greater investor protection across the European Union by ensuring a common minimum level of protection for retail investors."

On 31 October 2018, the Decision was published in the Official Journal of the European Union and started to apply from 1 November 2018 for a period of three months. Under MiFIR, ESMA can only introduce the temporary intervention measures on a three month basis and has confirmed that it will consider, before expiry, the need to extend the intervention for a further three months. Further information on the Decision can be found in a Dillon Eustace article located here.

On 19 December 2018, ESMA published a press release in which it announced that it has agreed to renew the restriction on the marketing, distribution or sale of CFDs to retail clients for a further three-month period from 1 February 2019, due to the continued existence of a significant investor protection concern related to the offer of CFDs to retail clients.

The press release can be accessed here.

Furthermore on 21 December 2018, ESMA published the ESMA Decision (EU) 2018/2064 (the "**Binary Options Decision**") a renewal decision, which ESMA had adopted on 14

December. The Binary Options Decision renews the ESMA Decision (EU) 2018/795 on the same terms as the previous Decision of 21 September 2018 which prohibits the marketing, distribution or sale of binary options to retail clients.

On 27 December, the Binary Options Decision was published in the Official Journal of the European Union and applies from 2 January 2019 for a period of three months until 1 April 2019.

A copy of the Binary Options Decision can be accessed here.

(x) ESMA publishes data for the Systematic Internaliser Calculations for Equity, Equity-like instruments and Bonds

On 31 October 2018, ESMA published data for the systematic internaliser calculations for equity, equity-like instruments and bonds under the MiFID II Directive and MiFIR.

ESMA had announced on 12 July 2018 that it would publish the necessary EU wide data, for the first time by 1 August 2018 for equity and equity-like and bond instruments. Publication of the data for systematic internaliser calculations for derivatives and other instruments is set to start on 1 February 2019.

Under Article 4(1)(20) of the MiFID II Directive, investment firms dealing on own account when executing client orders OTC on an organised, frequent systematic and substantial basis are subject to the rules applicable to a systematic internaliser. The Commission Delegated Regulation (EU) No 2017/565 specifies thresholds determining what constitutes frequent, systematic and substantial OTC trading. An investment firm must assess whether they are a systematic internaliser in a specific instrument (such as equity and equity-like instruments or bonds) or for a class of instruments (derivatives, securitised derivatives and emission allowances) on a quarterly basis based on data provided relating to the previous six months.

For each specific instrument or class, an investment firm must compare the trading it undertakes on its own account to the total volume and number of transactions executed in the EU. If the investment firm exceeds the relevant thresholds it will be deemed a systematic internaliser. ESMA has computed the total volume and number of transactions executed in the EU to help market participants carry out the test.

A copy of the press release and the relevant data can be accessed here.

(xi) ESMA publishes updated Q&As on Temporary Product intervention Measures on the Marketing, Distribution or Sale of CFDs and Binary Options to Retail Clients

During the period 1 October 2018 to 31 December 2018, ESMA published an updated version of its questions and answers publication "on ESMA's temporary product intervention measures on the marketing, distribution or sale of CFDs and Binary options to retail clients" ("**Q&A on Temporary Product Intervention Measures**"). The updates to the Q&A on Temporary Product Intervention Measures are as follows:

- **Question ID: Payments – Question 5.2** (modified as of 9 November 2018) asks what is considered "payments for the purposes of entering into a CFD"; and

- **Question ID: Risk warning prominence – Question 5.13** (updated as of 9 November 2018) asks how a firm should ensure the prominence of the appropriate risk warning specified in Annex II of the CFD Decision.

A copy of the updated Q&As on Temporary Product Intervention Measures can be accessed here.

(xii) ESMA makes new Bond Liquidity data available

On 31 October 2018, ESMA published updated liquidity assessment data on its data register in respect of bonds which are subject to pre-trade and post trade requirements under the MiFID II Directive and MiFIR. The first communication was published on 27 September 2018.

ESMA's liquidity assessment for bonds is based on a quarterly assessment of quantitative liquidity criteria, which include the daily average trading activity (trades and notional amount) and percentage of days traded per quarter. ESMA is set to update its bond market liquidity assessments quarterly.

The transparency requirements for bonds deemed liquid will apply from 16 November 2018 until the 15 February 2019. From 16 February, the next quarterly assessment, to be published on 1 February 2019, will become applicable.

The list of bonds assessed for liquidity are available through the register system which can be found here.

(xiii) ESMA publishes official translations of final guidelines on Suitability Requirements Guidelines under MiFID II

On 6 November 2018, ESMA published the official translations of its guidelines on certain aspects of the MiFID II suitability requirements (the "**Guidelines**"). The Guidelines apply to the provision of investment advice and portfolio management under MiFID II and apply from 7 March 2019. The previous ESMA guidelines on certain aspects of the MiFID I suitability requirements will cease to apply on the same date.

Member State NCAs to which the Guidelines apply must notify ESMA whether they will comply or intend to comply with the Guidelines within two months of the date of publication by ESMA of the Guidelines in all of the EU's official languages.

The official translations of the Guidelines can be found here.

(xiv) Proposal for a Regulation on European Crowdfunding Service Providers and a Directive amending the MiFID II Directive

On 9 November 2018, the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published a report adopting a proposal for a regulation on crowdfunding service providers (the "**Crowdfunding Regulation**") with the aim of helping crowdfunding platforms overcome the barriers they face when providing services on a cross border basis. It also aims to provide safeguards to EU investors availing of crowdfunding services.

ECON have provided that some Member States have introduced their own national regimes on crowdfunding and that bespoke national regimes bring different regulatory approaches and that under the current approach being followed, platform business models are not easily passportable across the EU.

ECON has called on the European Commission to refer the matter to European Parliament again if it replaces, substantially amends or intends to substantially amend its proposal. To complement the proposed Crowdfunding Regulation, the European Commission has also adopted a proposal for a Directive which would amend the MiFID II Directive whereby the MiFID II Directive would not apply to persons authorised as crowdfunding service providers.

The European Commission is seeking to have the Crowdfunding Regulation adopted by mid-2019.

The proposal for the Crowdfunding Regulation and the proposal for a Directive amending the MiFID II Directive can be accessed here and the report is accessible here.

(xv) ESMA publishes updated Supervisory Briefing on MiFID II Suitability Rules

On 13 November 2018, ESMA published an updated version of its supervisory briefing on the suitability requirements under the MiFID II Directive (the "**Supervisory Briefing**"). The updated version of the Supervisory Briefing takes into account the content of ESMA's guidelines on certain aspects of the MIFID II suitability requirements which were published on 28 May 2018.

The Supervisory Briefing is aimed at NCAs and is meant to give market participants indications of compliant implementation of the MiFID II suitability provisions and to promote common supervisory approaches and practices in the application of the MiFID II

suitability rules. The Supervisory Briefing is designed to help NCAs make judgements around the following elements that are covered in the topics listed below:

- **Determining situations where the suitability assessment is required**

  When providing investment advice or portfolio management services investment firms must ensure that the specific transaction to be recommended, or entered into is suitable for the client in question.

- **Information to clients about the purpose of the suitability assessment**

  Investment firms must not create any ambiguity or confusion about their responsibilities in the process when assessing the suitability of investment services or financial instruments and will inform their clients or potential clients, clearly and simply, that the reason for assessing suitability is to enable the investment firm to act in the client's best interest.

- **Obtaining information from clients**

  When providing investment advice or portfolio management services investment firms must obtain the necessary information in order to understand the essential facts about the client so that they can assess whether the specific transaction to be recommended, or entered into during the course of providing a discretionary portfolio management service, is suitable for the client in question.

- **Arrangements necessary to understand investment products**

  Investment firms should have and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, costs and risks of investment services and financial instruments selected for their clients and that they assess the cost and complexity of equivalent investment services or financial instruments that can meet their client's profile.

- **Arrangements necessary to understand the suitability of an investment**

  When providing investment advice or portfolio management services investment firms must ensure that the specific transaction to be recommended, or entered into is suitable for the client in question.

- **Suitability Report**

  When providing investment advice, investment firms should, before the transaction is made, provide retail clients with a statement on suitability (the "**Suitability Report**") in a durable medium specifying the advice given and how that advice meets the preferences, objectives and other characteristics of the retail client. In addition, where an investment firm provides portfolio management services or has informed its retail

clients that it will carry out a periodic assessment of suitability, the periodic report shall contain an updated statement of how the investment meets the clients' preferences, objectives and other characteristics.

- **Qualifications of firm staff**

  Investment firms are expected to ensure that staff involved in material aspects of the suitability process have an adequate level of skills, knowledge and expertise.

- **Record keeping**

  Investment firms should maintain adequate record-keeping arrangements in relation to all material aspects of the suitability process, including information to and from clients, information on recommendations made to the client and investment (or disinvestment) decisions taken on behalf of the client, as well as related Suitability Reports.

A copy of the Supervisory Briefing can be accessed here.

(xvi) ESMA updates Q&A on Transparency Topics

On 14 November 2018, ESMA published an updated version of its questions and answers publication "on MiFID II and MiFIR transparency topics" ("**Q&A on Transparency Topics**"). The updated questions are listed below:

- **Question ID: Part 4 – Question 13** (as updated on 4 October 2018) which asks how should derivatives on derivatives be treated pursuant to the Delegated Regulation (EU) 2017/583 ("**RTS 2**") for the purpose of determining whether they have a liquid market and, accordingly, the size-specific to the instrument ("**SSTI**") and large-in-scale ("**LIS**") thresholds;

- **Question ID: Part 4 – Question 14** (as updated on 4 October 2018) which relates to the types of derivatives that can benefit from the pre-trade transparency waiver provided under Article 9(1)(c) of the Markets in Financial Instruments Regulation (600/2014) ("**MiFIR**");

- **Question ID: Part 2 – Question 7** (as modified on 14 November 2018) two new parts have been added to this question. Firstly, 7(b) which asks what quotes should be made public in a RFQ system; and secondly, 7(c) which asks can an RFQ system be construed as a two-step process where (i) an RFQ is initiated and quotes are received in response to that RFQ, and (ii) the transactions are ultimately executed following a bilateral confirmation with one of the respondents;

- **Question ID: Part 2 – Question 10** (as modified on 14 November 2018) which asks how should trading venues, APAs and CTPs, make data (pre-and/or post-trade data) available free of charge 15 minutes after publication and ensure non-discriminatory

access to the information and what practices are not compatible with the requirement to make data available free of charge and ensure non-discriminatory access to the information; and

- **Question ID: Part 7 – Question 11** (as updated on 14 November 2018) which asks if it is possible for investment firms to qualify as a systematic internaliser in instruments that are not traded on a trading venue ("**Non-TOTV instruments**") and if possible, are systematic internalisers in non-TOTV instruments subject to the quoting obligations under Articles 14-18 of MiFIR.

A copy of the updated Q&As on Transparency Topics can be accessed here.

(xvii) ESMA updates Q&A on Market Structures Topics

On 14 November 2018, ESMA published an updated version of its questions and answers publication "On MiFID II and MiFIR market structures topics" (the "**Q&A on Market Structure Topics**"). The updates to the Q&A on Market Structures Topics are as follows:

- **Question ID: Part 3 – Question 26** (as updated on 4 October 2018) relates to Article 6 of the Delegated Regulation (EU) 2017/578 ("**RTS 8**") which requires trading venues to set the incentives and the requirements that must be met by investment firms in order to access those incentives under stressed market conditions and asks what are the types of incentives to be provided under stressed market conditions by the trading venues in order to comply with this requirement;

- **Question ID: Part 3 – Question 27** (as updated on 4 October 2018) which relates to the order-counting methodology for bulk quotes, in the context of the Delegated Regulation (EU) 2017/566 (the "**RTS 9**");

- **Question ID: Part 3 – Question 28** (as updated on 4 October 2018) which asks whether the provisions of Article 17(6) of MiFID II and of Chapter IV of the Delegated Regulation (EU) 2017/589 ("**RTS 6**") apply to all general clearing members or only to those clearing members having algorithmic traders as clients;

- **Question ID: Part 5 – Question 7** (as updated on 4 October 2018) which asks can a trading venue use its trading systems and platforms to arrange transactions that are then reported and ultimately executed on another trading venue;

- **Question ID: Part 5 – Question 8** (as updated on 4 October 2018) which asks can a market operator or an investment firm operating an multilateral trading facility ("**MTF**") apply for a single segment of the MTF to be registered as an SME growth market;

- **Question ID: Part 5 – Question 9** (as updated on 4 October 2018) which asks would any payment received from a trading venue in respect of market making activity or liquidity provision require the conclusion of a market making agreement; and

- **Question ID: Part 3 – Question 29** (as updated on 14 November 2018) which asks does the requirements imposed on market markers to post simultaneous two-way quotes of comparable size restrict the ability of market makers to voluntarily post additional liquidity on either side of the order book.

A copy of the updated Q&As on Market Structures Topics can be accessed here

(xviii) ESMA publishes latest Double Volume Cap Data

ESMA published the updates of the latest set of data regarding the double volume cap ("**DVC**") under the MiFID II Directive on the following dates in the fourth quarter of 2018, specifically on the 8 October, 9 November and 7 December.

The MiFID II Directive introduced the DVC to limit the amount of dark trading in equities allowed under the reference price waiver and the negotiated transaction waiver. The DVC mechanism is set out in Article 5 of MiFIR with the aim of limiting the trading under the reference price waiver (Article 4(1)(a) of MiFIR) and the negotiated transaction waiver for liquid instruments (Article 4(1)(b)(i) of MiFIR) in an equity instrument.

The data files published by ESMA provide the information needed for the implementation of the DVC mechanism. This includes the identifiers of the instruments and trading venues associated with a suspension of the relevant waivers, and the period in which the DVC will be applicable.

In the update published on the 9 November, ESMA amended the suspension file relating to the DVC data which it had originally published on 7 August 2018. The suspension file, which is required under MiFIR, contains a list of International Securities Identification Numbers ("**ISIN**"), which are suspended from trading. Furthermore, as of 7 December, there was a total of 637 instruments suspended.

The data files can be accessed here and the suspension files can be found here.

(xix) Industry letter on Investment Firm Regulation - Third Country Firm Regime

On 15 November 2018, the International Swaps and Derivatives Association ("**ISDA**") along with six other trade bodies (Futures Industry Association ("**FIA**"), Deutsches Aktieninstitut, Association for Financial Markets in Europe ("**AFME**"), Electronic Debt Markets Association Europe ("**EDMA**"), International Capital Market Association ("**ICMA**") and the Swiss Finance Council) (together the "**Associations**") published an '*Industry Letter on Investment Firm Regulation – third country firm regime*' (dated 8 November 2018) (the "**Industry Letter**") to EU policy-makers to warn that some of the provisions being contemplated relating to non-EU investment firms' ability to do business with EU firms could be to the detriment of EU financial and non-financial counterparties and EU venues.

In the Industry Letter, the Associations have set out their support to the targeted amendments being made to the existing MiFIR equivalence regime for third country firms proposed by the European Commission and believe that these amendments will ensure the provision of cross-border services into the EU will provide a level playing field for the industry.

In the Industry Letter it was also stated by the Associations that any far-reaching changes to the equivalence regime, that would remove the ability to provide certain investment services on a cross-border basis to European clients by third-country firms would be strongly opposed. The Letter also stated that authorities should continue to strengthen global cooperation channels to address common challenges and risks to financial stability as trends of regulatory and supervisory divergence threatens to undermine the progress made in recent years.

The Associations provided in the Industry Letter that "the European Union equivalence approach is a key component of regulating relationships with third countries in financial services and should remain fit for purpose and continue to balance the need of preserving the financial stability and market integrity of the European Union on the one hand and with the benefits of maintaining an open, competitive and globally integrated financial markets on the other".

The Industry Letter can be accessed here.

(xx) European Commission adopts Delegated Regulation under MiFIR relating to Systematic Internalisers' quote obligations

On 12 December 2018, the European Commission adopted the Commission Delegated Regulations amending and correcting Commission Delegated Regulation (EU) 2017/587 ("**RTS 1**") to specify the requirement for prices to reflect prevailing market conditions and to update and correct certain provisions (the "**Delegated Regulation**").

By way of background, Article 14(7) of the MiFIR requires ESMA to develop regulatory technical standards to specify, in the context of the quoting obligation for systematic internalisers ("**SIs**") in respect of the determination of whether prices reflect prevailing market conditions.

The Delegated Regulation will enter into force on the twentieth day following its publication in the Official Journal of the European Union. The next step is for the Delegated Regulation to be considered by the European Parliament and Council of the EU.

A copy of the Delegated Regulation can be accessed here.

(xxi) European Commission adopts Delegated Regulation amending the MiFID II Delegated Regulation to promote use of SME growth markets

On 13 December 2018, the European Commission adopted the Commission Delegated Regulation amending Delegated Regulation (EU) 2017/565 (the "**MiFID II Delegated Regulation**") as regards certain registration conditions to promote the use of small and medium-sized enterprise ("**SME**") growth markets for the purposes of the MiFID II Directive (the "**Delegated Regulation**").

The Delegated Regulation which supplements the MiFID II Delegated Regulation, includes requirements that an SME issuer must meet in order to qualify as an SME and for its securities to be traded on an SME growth market. The previous requirements were considered too restrictive and the Delegated Regulation amends Articles 77 and 78 of the MiFID II Delegated Regulation to address this.

The Delegated Regulation will enter into force on the day after its publication in the Official Journal of the European Union. It will apply from three months after its entry into force. The next step is for the Delegated Regulation to be considered by the European Parliament and Council of the EU.

A copy of the Delegated Regulation can be accessed here.

(xxii) ESMA Final Report on Tick Size Regime under MiFID II

On 14 December 2018, ESMA published a Final Report – Amendment to Commission Delegated Regulation (EU) 2017/588 (RTS 11) (the "**Final Report**") which relates to the tick size regime under the MiFID II Directive.

Under RTS 11, the minimum tick size applicable to shares and depositary receipts is calibrated to the average daily number of transactions ("**ADNT**") on the most liquid market in the EU. In the Final Report ESMA provides that this metric may not be well suited to instruments where the main pool of liquidity is located outside the EU (third-country instruments) as in these cases the mandatory tick size may be calculated based only on a subset of the overall trading activity. Accordingly, ESMA has drafted amendments to RTS 11 to ensure that the tick sizes that apply to third-country instruments are adequate and appropriately calibrated.

ESMA has submitted the draft RTS (in Annex II to the Final Report) to the European Commission for endorsement. The European Commission has three months to decide whether or not to endorse the proposed amendments.

A copy of the Final Report can be located here.

(xxiii) ESMA publishes Consultation Paper on integrating sustainability risks and factors into MiFID II

On 19 December 2018, ESMA published a consultation paper on draft technical advice for the integration of sustainability risks and factors into the MiFID II Directive (the "**Consultation Paper**").

By way of background, in July 2018 ESMA and the European Insurance and Occupational Pensions Authority ("**EIOPA**") received a formal request from the European Commission to provide technical advice with regard to the integration of sustainability risks and sustainability factors into various legislative regimes (e.g. MiFID II Directive and the Solvency II Directive 2009/138/EC).

The Consultation Paper relates to the topics which the European Commission has requested ESMA to provide technical advice, which includes: organisational requirements; risk management; product governance. It also provides suggested amendments to the ESMA guidelines on MiFID II product governance requirements and the ESMA guidelines on certain aspects of the MiFID II suitability requirements.

The closing date for responses to the Consultation Paper is 19 February 2019 and ESMA intends to finalise draft technical advices in light of responses received for submission to the European Commission by the end of April 2019.

The Consultation Paper can be accessed here.

(xxiv) ESMA update on the assessment of Third-Country Trading Venues for purpose of post-trade transparency and position limits

On 20 December 2018, ESMA published an update on its assessment of third country trading venues ("**TCTVs**") for the purpose of post-trade transparency and position limits under the MiFID II Directive and MiFIR. By way of background, EMSA had published two opinions on TCTVs in 2017, which sought to clarify:

- Investment firms trading instruments within the scope of the MiFID II Directive on TCTVs meeting a set of criteria are not required to make transactions public in the EU via an Approved Publication Arrangement ("**APA**"); and

- Commodity derivative contracts traded on TCTVs meeting a set of criteria are not considered as Economically Equivalent Over-The-Counter ("**EEOTC**") contracts for the purpose of the position limit regime.

Since the publication of the opinions, ESMA has received requests to assess more than 200 TCTVs against the criteria set out in these opinions. ESMA has set out that to date, it has not reviewed a sufficient number of TCTVs to publish a complete list and accordingly in order to ensure that all TCTVs receive the same treatment it will delay publication of the lists until a more significant number of TCTVs have been assessed.

ESMA confirms that pending publication of the lists, investment firms do not have to make public their transactions concluded on TCTVs via an APA and has stated that commodity derivatives contracts traded on TCTVs are not considered as EEOTC contracts for the purpose of the position limit regime.

A copy of the updated assessment can be accessed here.

(xxv) Implementing Decision on equivalence of Swiss stock exchanges under MiFID II

On 20 December 2018, the Commission Implementing Decision (EU) 2018/2047 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with the MiFID II Directive (the "**Implementing Decision**") was published in the Official Journal of the European Union.

The German Financial Supervisory had requested the European Commission to renew its assessment of the Swiss legal and supervisory framework and adopt an equivalence decision for the Swiss stock exchanges in July 2018.

Under the Implementing Decision, the European Commission recognises the legal and regulatory framework applicable to SIX Swiss Exchange AG and BX Swiss AG as equivalent to the requirements resulting from the MiFID II Directive, MiFIR, the Market Abuse Regulation (596/2014), and the Transparency Directive (2004/109/EC). The European Commission also considers that the two stock exchanges are subject to effective supervision and enforcement in Switzerland.

The Implementing Decision will come into force on 1 January 2019 and expire on 30 June 2019 and will replace the Commission Implementing Decision (EU) 2017/2441 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with the MiFID II Directive, which expires on 31 December 2018.

A copy of the Implementing Decision can be accessed here.

(xxvi) ESMA publishes amended Guidelines on commodity derivatives definitions under MiFID II

On 21 December 2018, ESMA published amended guidelines (the "**Guidelines**") on the application of C6 and C7 of Annex I of the MiFID II Directive. ESMA originally adopted guidelines on definitions of commodity derivatives and their classification in 2015.

The Guidelines update the original guidelines to adapt them to the MiFID II regulatory framework, the substance of which has not been changed, which is why ESMA provides that the Guidelines did not undergo the consultation process.

The Guidelines clarify that Article 4(1)(2) of the MiFID II Directive should be read in conjunction with points 6 and 7 of Annex I to the MiFID II Directive and Article 7 of the MiFID II Delegated Regulation.

The Guidelines will apply two months after the date of their publication on ESMA's website in all EU official languages and NCAs must notify ESMA whether they comply or intend to comply with the Guidelines, NCAs that do not intend to comply must notify ESMA of their reasons for not complying with the Guidelines.

A copy of the Guidelines can be accessed here.

Capital Requirements Directive IV / V / CRR / CRR II

(i) EBA releases a revised version of the Single Rulebook Q&A - CRR

During the period 1 October 2018 to 31 December 2018, the European Banking Authority ("**EBA**") has updated its Single Rulebook Q&A – Regulation (EU) No. 575/2013 (CRR) (the "**CRR Q&A**"). The CRR Q&A contains Q&As relating to the provisions/requirements set out in the CRR. We have set out below the questions added to the CRR Q&A in the last quarter:

Topic - Supervisory Reporting

- **Question ID: 2018 3723** (as updated on 5 October 2018): This question relates to Annexes III and IV to Regulation (EU) No 680/2014 – ITS on supervisory reporting of institutions (as amended) (the "**Supervisory Reporting Regulation**") and specifically to the validation rules v0985_m and v0986_m;

- **Question ID: 2018 3670** (as updated on 5 October 2018): This question relates to the Supervisory Reporting Regulation and specifically to the discrepancies between the annotated table layout and EBA validation rules;

- **Question ID: 2018 3858** (as updated on 5 October 2018): This question relates to Annexes III and IV to the Supervisory Reporting Regulation and specifically to the inconsistencies in validation rules v1974_h, v5447_m, v5475_m and v5443_m;

- **Question ID: 2015 2125** (as updated on 5 October 2018): This question relates to Annexes I and II to the Supervisory Reporting Regulation and specifically to the validation rule v0008_h;

- **Question ID: 2018 3814** (as updated on 5 October 2018): This question relates to Annexes III and IV to the Supervisory Reporting Regulation and specifically to rule v5443_m (to be amended);

- **Question ID: 2018 3787** (as updated on 5 October 2018): This question relates to Annexes III and IV to the Supervisory Reporting Regulation and specifically to the validation rule v2707_m;

- **Question ID: 2018 3788** (as updated on 5 October 2018): This question relates to Annexes III and IV to the Supervisory Reporting Regulation and specifically to the validation rule v3129_m;

- **Question ID: 2016 2633** (as updated on 5 October 2018): This question relates to the funding plans of credit institutions – Recommendation of the European Systemic Risk Board of 20 December 2012 on funding of credit institutions and specifically in relation to validation rules EBA_V4399 and EBA_V4400;

- **Question ID: 2017 3618** (as updated on 9 November 2018): This question relates to Annex V to the Supervisory Reporting Regulation and specifically to the IFRS 9, validation rule v1386_m;

- **Question ID: 2017 3527** (as updated on 9 November 2018): This question relates to the Supervisory Reporting Regulation and specifically to the validation rules v5014 and v5015;

- **Question ID: 2018 3774** (as updated on 9 November 2018): This question relates to the Annexes I and II to the Supervisory Reporting Regulation and specifically to validation rule v5739h;

- **Question ID: 2018 3884** (as updated on 9 November 2018): This question relates to the Supervisory Reporting Regulation and specifically to the validation rule v5468_m;

- **Question ID: 2018 3763** (as updated on 9 November 2018): This question relates to Annex XXII to the Supervisory Reporting Regulation and relates specifically to the reporting of memorandum items behavioural outflow/inflow in the ALMM maturity ladder; and

- **Question ID: 2018 3763** (as updated on 14 December 2018): The question relates to Annex III to the Supervisory Reporting Regulation and relates specifically to the reporting of financial asset sales and write-offs in the FINREP template F 02.00.

Topic - Liquidity Risk

- **Question ID: 2018 3820** (as updated on 5 October 2018): This question relates to Annex XXI to the Supervisory Reporting Regulation and is follow up to a previous Q&A (2016_2609) relating to Template C 71.00; and

- **Question ID: 2015 1962** (as updated on 9 November 2018): This question relates to the Delegated Regulation (EU) 2015/61 – with regard to liquidity coverage

requirement and relates specifically to the treatment of a securities lending and borrowing service with regard to the liquidity coverage requirement.

Topic - Own Funds

- **Question ID: 2018 3932** (as updated on 5 October 2018): This question relates to Article 473a.2 of the CRR and the consideration of accounting provisions for FVOCI debt instruments; and

- **Question ID: 2018 4417** (as updated on 21 December 2018): This question deals with Articles 52 and 63 of the CRR which relates to the reclassification of own funds instruments from a grandfathered category to a fully eligible category and purpose of grandfathering provisions.

Topic - Operational Risk

- **Question ID: 2018 3772** (as updated on 23 November 2018): This question asks when applying prudential consolidation, does Article 315(4) of the CRR apply to the indicator on a consolidated level or at entity level.

Topic – Credit Risk

- **Question ID: 2017 3649** (as updated on 21 December 2018): This question relates to Article 134(4) of the CRR and asks what would the risk weight be if gold bullion is held on behalf by other institutions and where such investment is not backed by gold bullion liabilities; and

- **Question ID: 2017 3279** (as updated on 21 December 2018): This question relates to Article 166 of the CRR and relates to the treatment of a loan signed well in advance of a contractually agreed utilisation date.

Topic – Large Exposures

- **Question ID: 2018 3665** (as updated on 21 December 2018): This question deals with Article 400(2)(c) of the CRR which relates to the treatment of connected clients principle on exposures to other group entities outside the prudential scope of consolidation.

An updated version of the CRR Q&A can be found here.

(ii) European Commission adopts Implementing Regulation on ITS amending CRR Supervisory Reporting ITS concerning Prudent Valuation

On 9 October 2018, the EBA announced by way of a press release that the European Commission had adopted an Implementing Act amending Regulation (EU) No 680/2014 (Implementing Technical Standards on Supervisory Reporting) with regard to the inclusion of prudent valuation into the COREP as well as other amendments (the "**Amending Implementing Act**").

The aim of the Amending Implementing Act is to keep CRR reporting requirements in line with changes in the regulatory framework and with the evolving needs for supervisory authorities' risk assessments. In particular, it introduces additional reporting obligations for prudent valuation requirements, securitisation positions and the geographical distribution of exposures. It reflects a mandate given to the European Commission under Articles 99(5), 99(6), 394(4), 415(3) and 430(2) of the CRR.

The Amending Implementing Act appies from 31 December 2018.

The relevant press release issued by the EBA can be located here.

(iii) Regulation on ITS amending CRR Supervisory Reporting ITS concerning Prudent Valuation published in Official Journal of the European Union

On 9 November 2018, the Commission Implementing Regulation (EU) 2018/1627 (the "**Amending Regulation**"), which amends Commission Implementing Regulation on supervisory reporting of institutions (Regulation 680/2014) (the "**Implementing Regulation**") under the CRR in relation to prudent valuation for supervisory reporting, was published in the Official Journal of the European Union.

The purpose of the Amending Regulation is to amend to the Implementing Regulation to reflect the gradual supplementation and amendment of elements of the CRR reporting requirements by the adoption of further regulatory technical standards. The Amending Regulation amends the Implementing Regulation to set out:

- Additional requirements relating to prudent valuation adjustments of fair-valued positions;
- Additional requirements to accommodate the reporting on securitisation positions subject to the revised securisation framework; and
- Minor changes to the reporting requirements on the geographical distribution of exposures.

The Amending Regulation entered into force on 29 November 2018 and applies directly across the EU from 1 December 2018.

A link to the Amending Regulation can be found here.

(iv) The Central Bank publishes its 2018 review of Other Systemically Important Institutions and associated capital buffers

On 12 November 2018, the Central Bank published the outcome of its 2018 review of Other Systemically Important Institutions ("**O-SIIs**") and associated capital buffers. The Central Bank completes this review on an at least an annual basis to ensure that any changes in the financial sector landscape is incorporated into the Central Bank's O-SII stance.

By way of background, O-SIIs are institutions, which are systemically important to the domestic economy or to the economy of the EU and the objective of the buffer is to reduce the probability of an institution's failure and potential impact of failure on the domestic economy. O-SIIs are identified on the basis of the following criteria:

- **The size of the Institution -** The total assets of an institution are taken into consideration as the buffer aims to mitigate systemic risk associated with financial institutions that are considered too big to fail.

- **The importance for the economy of the EU or the EU Member State -** Importance is considered from a domestic and European perspective, taking into account the substitutability of the activities of the institution with respect to its role in the payments system, the provision of loans to, and the taking of deposits from the private sector.

- **The significance of cross-border activities -** Cross-border activities are used to assess the complexity criteria.

- **The interconnectedness of the institution or group with the financial system -** The interconnectedness of an institution or group is reviewed considering intra-financial system assets and liabilities.

The Central Bank takes the criteria set out above into consideration and calculates a score for each Irish entity with a standard threshold being set out in the EBA Guidelines. Under Article 123(2) of the European Union (Capital Requirements) Regulations 2014 (as amended) (the "**CRD Regulations**") the Central Bank may require each O-SII to maintain a O-SII buffer of up to 2 per cent of the total risk exposure amount calculated.

Buffers are set by peer review of other authorities in Europe for similar institutions and expert judgement is used to assign buffers to each O-SII. The higher buffer requirements are applied to institutions with a higher degree of systemic importance to the economy with the maximum buffer of 2 per cent being available. This provides the Central Bank with scope to tighten the O-SII buffer for all institutions, if so required.

The 2018 review is consistent with the 2017 review and means that there will not be a policy change or new requirements for institutions, the 2018 review identified six Irish

authorised institutions as O-SIIs in line with the EBA Guidelines. The six identified institutions are:

- AIB Group plc;
- Bank of Ireland Group plc;
- Citibank Holdings Ireland Limited;
- Ulster Bank Ireland DAC;
- Depfa Bank plc; and
- Unicredit Bank Ireland plc.

A separate assessment was carried out for investment firms under the scope of the CRD Regulations and which deal on own account or underwrite on a firm commitment basis. The analysis has been completed in accordance with the EBA Guidelines using indicators appropriate for investment firms. This assessment led to no investment firms being identified as O-SIIs.

A copy of the press release can be accessed here and the 2018 review can be accessed here.

(v) ECB general topics chapter of guide to Internal Models under SSM

On 15 November 2018, the European Central Bank ("**ECB**") published its Guide to Internal Models – General Topics (the "**Guide**") along with an associated Feedback Statement, following its consultation in March 2018.

By way of background under the Capital Requirements Regulation (575/2013) ("**CRR**"), institutions are permitted to use internal models for credit risk, counterparty credit risk and market risk where the requirements set out in the corresponding chapters of the CRR are met by those institutions.

The Guide provides clarity regarding the ECB's understanding of the most relevant aspects, for the institutions it directly supervises, of the applicable regulations on internal models. Furthermore, the Guide was drafted in close co-operation with the NCAs and draws on the experience gained in the context of the ECB's targeted review of internal models project.

In respect of the Feedback Statement, part 2 of this document summarises the key comments received and the resulting amendments to the Guide.

A copy of the Guide can be accessed here and the Feedback Statement can be accessed here.

(vi) EBA final report on RTS on estimation and identification of economic downturns

On 16 November 2018, the EBA published the final draft regulatory technical standards on the specification of the nature, severity, and duration of an economic downturn in accordance with Articles 181(3)(a) and 182(4)(a) of the CRR (the "**RTS**").

Under Article 181(3)(a) and Article 182(4)(a) of the CRR, the EBA was required to produce draft RTS specifying the economic downturn conditions with which institutions must estimate the downturn loss given default ("**LGD**") and conversion factors ("**CF**") as is set out in the relevant Articles of the CRR.

Accordingly the RTS has set out the approach that institutions should follow when identifying the nature, the severity and the duration of an economic downturn for the purposes of Articles 181 and 182 of the CRR. The RTS have set out that institutions are required to consider relevant macroeconomic and credit factors when specifying the nature of an economic downturn.

The RTS has been submitted to the European Commission for endorsement. The EBA intends for the RTS to apply from 1 January 2021 to allow institutions time to prepare for the implementation of the RTS and to integrate the approach into existing modelling practices.

A copy of the RTS can be accessed here.

(vii) EBA provides overview on the implementation and transposition of the CRD IV package

On 30 November 2018, the EBA announced in a press release that it has updated information in relation to an overview on the implementation of the CRD IV legislative package.

In the release the EBA stated that it published in an aggregated format, all the information disclosed by EU Competent Authorities according to its Implementing Technical Standards ("**ITS**") on supervisory disclosure, which was published in the Official Journal of the European Union on 4 June 2014.

This information provides an overview on the implementation and transposition of the CRD IV Directive and the CRR across the EU. It also provides a detailed picture on the use of options and national discretions by each NCA as well as information on the general criteria and methodologies used for the purpose of the supervisory review and evaluation process.

A copy of the updated supervisory disclosure information can be accessed here.

(viii) Council of EU invited to endorse banking package trilogies

On 3 December 2018, the Council of the EU published a note (dated 30 November 2018) from its Permanent Representatives Committee ("**COREPER**") regarding the banking package which consists of the European Commission's proposed revisions to the:

- The Capital Requirements Regulation ("**CRR**");
- The Capital Requirements Directive IV ("**CRD IV Directive**");
- The Bank Recovery and Resolution Directive ("**BRRD**"); and
- The Single Resolution Mechanism Regulation ("**SRM Regulation**") as regards to loss-absorbing and recapitalisation capacity for credit institutions and investment firms.

The note from COREPER explains that there are still a number of outstanding issues that have to be addressed relating to matters such as:

- Remuneration;
- Off-balance sheet guarantees to collective investment undertakings; and
- Treatment of shadow-banking or market-based finance.

On 4 December 2018, the Council of the EU published a press release announcing that it has agreed its position on the banking package and that work will continue on the remaining outstanding issues with a view to finalising the negotiations by the end of 2018. The European Parliament and the Council of the EU will then be called on to adopt the package at first reading.

A copy of the Council of the EU's note can be accessed here and the press release announcing the Council's agreed position can be accessed here.

(ix) ISDA FAQs on RTS on Exclusion of Transactions with Third Country NFCs from CVA Risk Charge under CRR

On 13 December 2018, the International Swaps and Derivatives Association ("**ISDA**") published FAQs on the procedures for excluding non-EU non-financial counterparties ("**NFCs**") under the CRR.

The FAQs relate to the regulatory technical standards ("**RTS**") set out in the Commission Delegated Regulation (EU) 2018/728 on the procedures for excluding transactions with NFCs established in a third country from the own funds requirement for credit valuation adjustment ("**CVA**") risk (the "**Regulation**"). The Regulation was published in the Official Journal of the European Union in May 2018.

In the FAQs, ISDA sets out guidance on:

- The scope of the RTS and which NFCs can be excluded from CVA capital calculation;
- The requirements that apply as a result of the RTS and from when does the RTS apply; and
- The potential impact of the EMIR Refit Regulation (that is, the proposed Regulation amending EMIR (648/2012) and Brexit.

A copy of the FAQs can be located here.

(x) EBA consults on amending ITS on Benchmarking of Internal Models under CRD IV Directive

On 18 December 2018, the EBA published a consultation paper entitled "Draft Implementing Technical Standards amending Commission Implementing Regulation (EU) 2016/2070 with regard to benchmarking of internal models (the "**Consultation Paper**").

By way of background, Article 78 of the CRD IV Directive requires competent authorities to carry out an annual assessment of the quality of internal approaches used for calculating own funds requirements. To help competent authorities with this assessment, the EBA calculates and distributes benchmark values against which individual firms' risk parameters can be compared. These benchmark values are based on data submitted by firms, as set out in the Implementing Regulation (EU) 2016/2070 (the "**Implementing Regulation**").

The EBA is proposing to adjust the benchmarking portfolios and reporting requirements in the light of the benchmarking exercise it is set to carry out in 2020. The EBA explains that the proposed changes are designed to simplify the portfolio's structure for the credit risk part of the exercise, and get more insights into the model used for pricing for the market risk part of the exercise. The EBA is also proposing minor consistency updates, as well as a data collection of the sensitivities aiming at further improving the data quality.

Stakeholders have until 31 January 2019 to comment on the proposals set out in the Consultation Paper.

A copy of the Consultation Paper can be located here.

(xi) Compliance with Articles 404 – 409 of the CRR 2017 Review

On 21 December 2018, the Central Bank issued its review of compliance with Articles 404 – 409 of the CRR for the year 2017 (the "**Review**"). The Review provided that there were six credit institutions and three investment firms that had assumed securitisation exposures which fell under Articles 404 - 409 of the CRR. Detailed analysis was provided to the Central Bank to confirm compliance with the relevant requirements of the CRR. The Central Bank provided that it had not identified any cases of non-compliance.

A copy of the Review can be accessed here.

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

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

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

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

The ESAs considers the impending regime unsatisfactory given that the retail investors who are intended to benefit from this information will be reluctant to rely on these KIIDs due to the overlapping and seemingly conflicting information used in the presentation of risks, performance and costs.

In pursuit of legislative changes to the Delegated Regulation, the ESAs published a consultation paper on 8 November 2018 that contains the following proposed amendments to the PRIIPs Delegated Regulation:

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

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

- **Section 4.3**: considers possible changes in view of the forthcoming expiry of the exemption in Article 32 of the PRIIPs Regulation and the possible use of the PRIIPS KIID by UCITS and relevant non-UCITS funds from 1 January 2020.

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

The ESAs letter can be accessed in full here and the consultation paper can be accessed here.

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

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

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

- The market risk measure calculation for regular investment of premium PRIIPs;
- Products with autocallable features;
- Narratives for the summary risk indicator;
- Narratives for performance fees.

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

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

(iii) SMSG reply to the Joint Consultation Paper concerning amendments to the PRIIPs KID

On 5 December 2018, ESMA published a response from its Securities and Markets Stakeholder Group ("**SMSG**") in which it called on the European Commission to initiate a review of the Commission Delegated Regulation (EU) 2017/653 on key information documents ("**KIDs**") for packaged retail and insurance-based investment products ("**PRIIPs**") (the "**Regulation**"), supplementing the PRIIPS Regulation.

In the response, the SMSG highlight a number of concerns which it holds regarding the PRIIPs framework, including:

- The current design of the PRIIPs KIDs, which does not fulfil the requirements of the PRIIPs Regulation;
- The need to begin the review of the Level 1 PRIIPs Regulation, as the ESA's efforts alone are insufficient to remedy the Regulation's faults;
- Issues with the scope of the PRIIPs framework, cost information about funds and performance scenarios – The SMSG expresses its regret that the current consultation only addresses concerns relating to performance scenarios;
- The lack of time to conduct any consumer testing before the European Parliament elections in May 2019;
- The amount of changes identified by the ESAs, which the SMSG believes will not be scrutinised appropriately by stakeholders due to the rushed schedule.

In light of these concerns, the SMSG recommended that the current exemption of UCITS funds and certain AIFs from PRIIPs should be extended until the review of the level 1 PRIIPs Regulation has been fully completed, and its conclusion been fully reflected in EU rules. The SMSG also note that the level 1 review is legally required and should be initiated as soon as possible. The response can be read in full here.

(iv) EFAMA publishes comments on the ESAs' Joint Consultation Paper concerning amendments to the PRIIPs KID

On 7 December 2018, the EFAMA published its comments on the ESAs' Joint Consultation Paper concerning amendments to the PRIIPs KID. While EFAMA welcomes the ESAs' initiative to begin to address the shortcoming of the current PRIIP KID, it expresses its concern over the very limited scope of the consultation.

In the comments, EFAMA calls on the ESAs to commence and complete the full review of the PRIIPs Regulation as soon as possible to remedy deficiencies in the current rules. With regard to the ESAs' approach to the UCITS KIID, EFAMA contends that the Commission's intention to "phase out" the UCITS KIID by the end of 2019, ahead of the full review would require "quick fixes" to be introduced with insufficient time to consider any technical and practical issues that will arise. Such quick fixes followed by a larger review would adversely impact retail investors' comprehension about and trust in investment products and financial markets.

In response to these issues, EFAMA underlines the need for a full review of all the issues of detriment to retail investors. In addition, EFAMA has called on the co-legislators to extend the exemption for UCITS until 2021, in order to reinstate the original timelines and to allow time for a proper review of the PRIIP KID.

The comments also contain a Questions and Answers section addressing specific issues relating to the PRIIPs KID.

EFAMA's comments can be read in full here.

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

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

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

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

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

The policy can be accessed here.

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

On 8 November 2018, ESMA released a final report which contains new draft regulatory technical standards ("**RTS**") on the clearing obligation that ESMA has developed under Article 5(2) of Regulation (EU) No 48/2012 of the European Parliament and Council of the European Union on over-the-counter ("**OTC**") derivatives, central counterparties and trade repositories ("**EMIR**").

The draft RTS relate to the treatment of OTC derivative contracts novated from a United Kingdom counterparty to a counterparty established in another Member State, as a result of Brexit. The draft RTS amends three Commission Delegated Regulation on the clearing obligation under EMIR in order to facilitate these novations.

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

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

The report can be read in full here.

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

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

The latest version can be accessed in full here.

On 27 November 2018, the Council of the EU published an 'I' item note (the "**Note**") from the Presidency and General Secretariat of the Council to COREPER in respect of the Regulation. The Note indicates that the latest Presidency compromise proposal is now

supported by a vast majority of delegations representing a clear qualified majority. The Council Presidency and General Secretariat therefore recommended that COREPER:

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

A complete copy of the Note is available here.

(iv) FSB publish report on trade reporting legal barriers

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

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

- **Barriers to full trade reporting** – The report highlights that the recommendations on removing or addressing barriers to full trade reporting have been implemented in all but three of the FSB's 25 member jurisdictions (Mexico, Saudi Arabia and China);
- **Masking** – Five FSB member jurisdictions allow masking of counterparty identifiers for some transactions, although specific dates have been identified for masking relief to expire in Singapore and Australia. Canada, Hong Kong and the US have indicated that masking will discontinue once legal barriers are removed;
- **Regulators' access to TR data** – Changes have been made or are underway in twelve jurisdictions to remove barriers to access to TR data by foreign authorities and/or non-primary domestic authorities.

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

The report can be accessed here.

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

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

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

- **Central Clearing** – Eighteen member jurisdictions have in force comprehensive standards or criteria for assessing when standardised OTC derivatives should be centrally cleared, as opposed to seventeen jurisdictions in the previous reporting period;

- **Margin requirements for non-centrally cleared derivatives** ("**NCCDs**") – Sixteen jurisdictions have comprehensive margin requirements for NCCDs in force, as opposed to fourteen in the last reporting period;

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

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

The FSB's thirteenth progress report is available here.

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

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

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

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

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

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

- The provision of client clearing services is concentrated in a relatively small number of bank-affiliated clearing firms;

- Some aspects of regulatory reform may not incentivise provision of client clearing services.

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

The findings of the report can be found here.

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

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

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

- Contract design principles;

- Principles for market surveillance;

- Principles to address disorderly commodity derivatives markers;

- Principles for enforcement and information sharing;

- Principles for enhancing price discovery on derivatives markets.

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

The report can be accessed here.

(viii) LEI ROC publishes second consultation paper on fund relationships in the Global LEI System

On 19 November 2018, LEI ROC published its second consultation paper on fund relationships in the GLEIS. The objective of the paper is assist in the consistent implementation of data throughout the GLEIS and to facilitate a standardised collection of fund relationship information at the global level. The paper advocates a limited update to the way relationships affecting funds are recorded in the GLEIS in order to achieve these objectives.

LEI ROC proposes to replace the current optional reporting of a single "fund family" with the following relationships, each of which is individually defined:

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

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

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

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

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

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

(ix) ESMA publish statement on managing the risks of a no-deal Brexit in the area of central clearing

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

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

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

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

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

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

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

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

The Report sets out a limited time window of 12 months following the UK's withdrawal from the EU for the novation of OTC derivative contracts that fall within the scope of the

amending Delegated Regulation. As a result, the Report recommends that parties should begin negotiating the novations of any transactions within the scope of the amending regulation as soon as possible and to consider repapering their contracts ahead of the application date.

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

A copy of the Report is available here.

(xi) European Council agrees stance on proposed Regulation amending EMIR supervisory regime for EU and third-country CCPs

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

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

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

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

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

(xii) ESMA updates Q&As on the implementation of EMIR

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

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

The updated Q&As can be accessed in full here.

(xiii) Commission Implementing Regulation ((EU) 2018/1889) on the extension of the transitional periods related to own funds requirements for CCP exposures

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

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

The Regulation enters into force on 8 December 2018.

A copy of the Regulation can be found here.

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

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

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

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

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

A full copy of the letter can be found here.

(xv) Update to Public Register for Clearing Obligations under EMIR

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

A copy of the register is available here.

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

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

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

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

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

For further detail, the letter can be read in full here.

(xvii) ESAs publish final draft RTS amending EMIR in the context of simple, transparent and standardised securitisations under the Securitisation Regulation

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

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

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

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

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

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

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

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

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

The Regulation can be accessed here.

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

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

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

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

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

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

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

A full copy of the Regulation can be found here.

(xx) ESMA outlines plans for the recognition of UK CCPs and CSDs in a no-deal Brexit scenario

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

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

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

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

ESMA's statement can be accessed here.

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

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

- Commission Implementing Decision (EU) 2018/2030 determining, for a limited period of time, that the regulatory framework applicable to central securities depositories ("**CSDs**") of the United Kingdom of Great Britain and Northern Ireland is equivalent in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council; and

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

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

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

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

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

The Decision relating to CSDs can be accessed here and the Decision relating to CCPs can be found here.

Securitisation Regulation

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

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

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

- The inclusion of an XML schema which is consistent with ISO standards;
- The consolidation and further refinement of provisions relating to securitisation repository procedures to verify the completeness and consistency of data submitted to the repository;
- The removal of detailed provisions as regards the written confirmation text to be used by the repository to confirm that securitisation documents provided to it are complete and consistent;
- The inclusion of certain verifications for STS notifications submitted to the securitisation repository; and
- The removal of certain provisions on data modifications set out in the draft technical standards contained in the consultation paper;

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

- The inclusion of a requirement for applications to contain detailed example test cases that demonstrate the applicant's ability to perform a number of essential procedures;
- The clarification of provisions on demonstrating the operational separation between an applicant's business lines that comprise the provision of securitisation repository services under the Securitisation Regulation and its remaining business lines, regardless of whether those business are run by the applicant, an affiliated entity, or

another entity with which the applicant has concluded a material agreement in respect of its securitisation business line; and

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

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

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

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

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

The Statement also identifies difficulties facing EU banking entities with respect to compliance with specific provisions of the proposed Regulation amending the Capital Requirements Regulation. These difficulties particularly relate to the scope of Chapter 2 (due-diligence, risk retention, transparency, re-securitisation and criteria for credit-granting) requirements in the Securitisation Regulation. The ESAs again expect competent authorities to adopt a generally proportionate approach to the application of their risk-based supervisory powers in assessing compliance with the Securitisation Regulation. The ESAs and the competent authorities envisage these issues being resolved through the adoption of the proposed Regulation amending the Capital Requirements Regulation which, based on the latest Trilogue Agreement, will replace references to Chapter 2 with references to Article 5 (due diligence requirements) only, reducing its scope.

A copy of the Statement can be accessed here.

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

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

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

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

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

For further information, the Guidelines can be accessed here and here.

(iv) European Commission discusses the value of the new securitisation rules

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

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

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

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

- A revised Directive on occupational pension funds, known as IORP2, which will come into effect On 13 January 2019;

- The revision of the Shareholders' Rights Directive, which will come apply from 10 June 2019; and

- The new Prospectus Regulation, which will apply from 21 July 2019.

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

The Securities Financing Transactions Regulation ("**SFTR**")

(i) European Commission adopts Delegated Regulations concerning trade repositories within the scope of SFTR

On 13 December 2018, the European Commission adopted the following Delegated Regulations amending the existing position regarding trade repositories under the Securities Financing Transactions Regulation ("**SFTR**"):

- Delegated Regulation C(2018) 8330 final supplementing the STFR with regard to regulatory technical standards ("**RTS**") on access to details of securities financing transactions held in trade repositories, which can be accessed here;

- Delegated Regulation C(2018) 8331 final supplementing the STFR with regard to regulatory technical standards specifying the details of the application for registration and extension of registration as a trade repository, which can be accessed here;

- Delegated Regulation C(2018) 8335 final amending Delegated Regulation (EU) No 151/2013 with regard to access to the data held in trade repositories, which can be accessed here; and

- Delegated Regulation C(2018) 8336 final amending Delegated Regulation (EU) 150/2013 with regard to RTS specifying the details of the application for registration as a trade repository, which can be accessed here.

(collectively the "**Regulations**")

The Regulations are currently before the Council for consideration, however it is expected that the Council will not raise objections. The Regulations will enter into force on the twentieth day following their publication in the Official Journal of the European Union.

(ii) European Commission adopts two implementing regulations laying down implementing technical standards under the SFTR

On 13 December 2018, the European Commission adopted the following implementing regulations laying down implementing technical standards under the Securities Financing Transactions Regulation ("**SFTR**"):

- Implementing Regulation C(2018) 7658 final laying down implementing technical standards with regard to the format and frequency of reports on the details of securities financing transactions to trade repositories in accordance with the SFTR and amending Implementing Regulation (EU) No 1247/2012 with regard to the use of reporting codes in the reporting of derivative contracts – The Regulation seeks to ensure that details reported by securities financing transaction counterparties to trade repositories or ESMA should be submitted in a harmonised format in order to facilitate data collection, aggregation and comparison across trade repositories; and

- Implementing Regulation C(2018) 7659 final laying down implementing technical standards with regard to the procedures and forms for exchange of information on sanctions, measures and investigations in accordance with the SFTR – The Regulation seeks to ensure that ESMA receives complete and accurate information regarding administrative and criminal measures imposed and criminal investigations undertaken in relation to infringements of the SFTR.

  (collectively the "**Regulations**")

The Regulations enter into force on 2 January 2019, twenty days following their publication in the Official Journal of the European Union.

Implementing Regulation C(2018) 7658 final can be accessed here and Implementing Regulation C(2018) 7659 final can be found here.

(iii) European Commission adopts Delegated Regulations in respect of trade repositories under the SFTR

On 13 December 2018, the European Commission adopted the following three Delegated Regulations relating to trade repositories under the Securities Financing Transactions Regulation ("**SFTR**"):

- Delegated Regulation C(2018) 8332 final supplementing the SFTR with regard to regulatory technical standards ("**RTS**") on the collection, verification, aggregation, comparison and publication of data on securities financing transactions ("**SFTs**") by trade repositories, which can be accessed here.

  The Regulation is accompanied by two annexes; Annex 1, which specifies in three tables (i) the data fields to be reconciled for SFTs, including their tolerance levels where applicable, (ii) the different categories explaining why a SFT has been rejected,

and (iii) the different reconciliation categories including their allowable values; and Annex 2, which specifies the tabular format in which aggregate position data has to be published by trade repositories. Both Annexes can be accessed here.

- Delegated Regulation C(2018) 8333 final supplementing the SFTR with regard to fees charged by ESMA to trade repositories, which can be accessed here.

  The Regulation is accompanied by an Annex which specifies the calculation method and payment terms for the first-year interim supervisory fees. The Annex is available here.

- Delegated Regulation C(2018) 8334 final supplementing the SFTR with regard to RTS specifying the details of SFTs to be reported to trade repositories, which can be accessed here.

  The Regulation is accompanied by an Annex which specifies the details of the SFTs to be reported relating to (i) counterparty data, (ii) loan and collateral data, (iii) margin data and (iv) re-use, cash reinvestment and funding sources data. The Annex can be accessed here.

  (collectively the "**Regulations**")

The Regulations are currently before the Council for consideration, however it is expected that the Council will not raise objections. The Regulations will enter into force on the twentieth day following their publication in the Official Journal of the European Union.

Central Securities Depositories Regulation ("**CSDR**")

(i) ESMA publishes guidelines compliance table in respect of its guidelines on the cooperation between authorities under Articles 17 and 23 of the CSDR

On 18 October 2018, ESMA published a guidelines compliance table (the "**Table**") which indicates the countries that comply or have expressed the intention to comply with ESMA guidelines on the cooperation between authorities under Articles 17 and 23 of the CSDR (the "**Guidelines**").

The cooperation requirements in the Guidelines apply to competent authorities which are involved in the procedure for granting authorisation to an applicant CSD under Article 17 of the CSDR, or in the procedure relating to the provision of services in another Member State in Article 23.

According to the Table, the Central Bank intends to comply with the Guidelines, when a CSD is authorised in Ireland or when any of the documents listed in Section 4.2.3 of the Guidelines are received.

The Table can be accessed here and the Guidelines are available here.

(ii) Update to CSD Register

On 19 October 2018, ESMA updated the information required to be provided by relevant authorities to the Central Securities Depositories ("**CSD**") register documenting information required under Article 21 and 58 of the Central Securities Depositories Regulation ("**CSDR**").

The register contains the following information:

- CSDs authorised under Article 16 of the CSDR;
- Parties allowed by Member States under Article 31 of the CSDR to provide certain core services and related information.

Competent authorities are required to inform ESMA of any changes to the information as it is contained in the register.

For further information a copy of the register is available here.

(iii) ESMA publishes compliance table regarding the Guidelines on CSD Access to the trading feeds of CCPs and trading venues

On 19 October 2018, ESMA published a compliance table regarding the Guidelines on central securities depositories access to trading feeds of central counterparties ("**CCPs"**) and trading venues (the "**Guidelines**"). Each national competent authority is obliged to inform ESMA whether they comply or intend to comply with the Guidelines and this information is detailed in the table. The Central Bank has confirmed that it complies with the Guidelines.

The compliance table is available here.

(iv) ESMA publishes updated Q&As on CSDR

On 12 November 2018, ESMA updated its Q&As regarding the implementation of the Regulation on improving securities settlement and regulating CSDs.

ESMA has added to its existing Q&A on the provision of services in another Member State. This Q&A now confirms that the programme of operations to be provided by the CSD should cover both the core and ancillary services it intends to provide in the host Member State. The Q&A also clarifies that, where relevant, the CSD should provide an assessment of the measures it intends to take to allow its users to comply with the applicable law at least for each type of financial instruments for which it intends to provide the services.

ESMA has also included an additional Q&A on settlement discipline and the calculation of cash penalties. This Q&A clarifies that the cash rate should be applied if the reason for the settlement fail is applicable to the leg of the transaction which delivers the cash, while the

securities rate should be applied in case the reason for the fail is applicable to the leg of the transaction which delivers the securities. It also confirms that cash penalties should be applied in the case of settlement fails where the instructions are put on hold by the receiving participant and clarifies that the penalty rates for SME growth market instruments should only apply if the particular trade has actually taken place on an SME growth market.

ESMA's updated Q&As on CSDR can be found here.

(v) ESMA publishes consultation papers on standardised procedures and messaging protocols and on settlement fails reporting under the CSDR

On 20 December 2018, ESMA published the following consultation papers requesting public feedback on proposed guidelines under the CSDR:

- A consultation paper in respect of Guidelines on Standardised Procedures and Messaging Protocols used between investment firms and their professional clients under Article 6(2) of CSDR.

  The Guidelines are set out in Section 3 of the paper and have the objective of contributing to (a) the early settlement of transactions on the intended settlement date; and to (b) the reduction of the number of instructions that fail to settle on the intended settlement date. The Guidelines aim to assist investment firms in their obligation to take measures to limit the number of settlement fails. The consultation paper can be accessed here.

- A consultation paper in respect of Guidelines on Settlement Fails Reporting under Article 7(1) of CSDR.

  The Guidelines, which are contained in Section III of the paper, aim to clarify the scope of the data to be reported by CSDs and the type of transactions and operations which are to be included. They provide information on the scope, reporting architecture and exchange of information between ESMA and the competent authorities regarding settlement fails, based on the reports submitted by CSDs. The consultation paper can be read in full here.

The deadline for receipt of comments in response to both consultation papers is 20 February 2019.

Credit Rating Agencies Regulation ("**CRAR**")

(i) ESMA publishes report on CRA Market Share Calculation

On 4 December 2018, ESMA published a report (the "**Report**") providing details of its annual market share calculation for EU Credit Rating Agencies ("**CRAs**").

The objective of the Report is to assist issuers or related third parties in complying with Article 8d of the CRA Regulation, which requires issuers or related third parties who intend to appoint two or more CRAs to rate an issuance or entity to consider appointing at least one CRA with no more than 10% of the total market share in the EU. In particular, the Report provides the following guidance:

- Section 6 of the Report provides a list of all CRAs registered in the EU and identifies those with no more than 10% total market share;
- Section 7 provides a table to enable issuers or related third parties to evaluate whether particular CRAs with less than 10% total market share are capable of providing the type of credit rating they require;
- Section 8 assists issuers or related third parties to assess the market presence of CRAs in different asset classes.

A copy of the Report can be accessed here.

(ii) ESMA publishes updated Q&As on the implementation of CRA III

On 18 December 2018, ESMA published its updated Q&As on the implementation of Regulation (EU) No 462/2013 on Credit Rating Agencies ("**CRA III Regulation**"). The objective of the Q&As is to provide clarity on the requirements and practice in the application of the CRA III Regulation and to provide transparency on ESMA's supervisory approach and practice under the CRA III Regulation.

The updated Q&As now contain a modified Question 8 which outlines ESMA's determination as to what constitutes an error within the scope of Article 8(7) of CRA III Regulation and the notification requirements that must be complied with by CRAs in the event of an error.

Article 8(7)(b) provides that ESMA considers an error resulting from a model having been implemented in a way that does not comply with a methodology to constitute an example of an error in the application of a methodology. Consequently, such an error should be notified to ESMA and all affected rated entities without prejudice to point (c).

Article 8(7)(c) provides that ESMA considers that an error should be notified to ESMA and all affected rated entities pursuant to Article 8(7)(a) in cases where the error triggers a need

to review an issued credit rating, regardless of whether the review results in a change of that credit rating.

The updated Q&As can be accessed here.

(iii) ESMA publishes consultation paper on guidelines on disclosure requirements applicable to credit ratings

On 19 December 2018, ESMA published a consultation paper on guidelines on disclosure requirements applicable to credit ratings in the context of the CRAR (the "**Guidelines**").

Under the CRAR, CRA's are obliged to comply with a number of disclosure requirements relating to the issuance of credit ratings or credit rating outlooks, in order to ensure an adequate level of transparency around CRA's credit ratings. The Guidelines are detailed in Annex II of the paper and have the objective of improving the quality and consistency of the information that is disclosed alongside the issuance of a credit rating in a publicly available press release.

According to ESMA, at a minimum, a credit rating or rating outlook should at least include:

- A statement as to whether or not the credit rating has been endorsed for use for regulatory purposes in the EU in accordance with the CRA Regulation;
- A clear statement as to whether the credit rating is an unsolicited credit rating;
- The names, job titles and contact details for the persons responsible for the credit rating together with the name and address of the legal entity responsible for the credit rating;
- A reference to all substantially material sources used for the report should be listed at the end of the report;
- For each methodology or associated model a direct web-link should be provided to that document on the CRA's website;
- A section clearly identified as addressing actions or events that could lead to an upgrade or downgrade of the credit rating accompanied by best- and worst-case scenario credit ratings, with dedicated paragraphs addressing factors that could lead to an upgrade, and actions or events that could lead to a downgrade;
- An explanatory paragraph outlining where the user of the rating can find information on the definition of each rating category;
- A statement explaining whether or not the rating was disclosed to the rated entity and amended following that disclosure.

Chapter 3 of the consultation paper provides guidance as to how ESMA expects that CRAs may best meet their disclosure obligations, whilst Chapter 4 aims to improve how CRAs disclose the consideration of environmental, social or governance factors when they are a key underlying element behind the issuance of a credit rating.

The closing date for responses to the consultation paper is 19 March 2019.

The consultation paper can be accessed here.

Benchmarks Regulation

(i) Ten Delegated Regulations setting out the RTS under the Benchmark Regulation published in the Official Journal of the European Union

On 10 November 2018, ten Delegated Regulations setting out regulatory technical standards ("**RTS**") under the Benchmarks Regulation ("**BMR**") were published in the Official Journal of the European Union. The Delegated Regulations supplement the BMR with regard to the following:

- RTS further specifying the contents of, and cases where updates are required to, the benchmark statement to be published by the administrator of a benchmark;
- RTS specifying further criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements;
- RTS specifying further how to ensure that input data is appropriate and verifiable, and the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark has to ensure are in place where the input data is contributed from a front office function;
- RTS for the procedures and characteristics of the oversight function;
- RTS determining the minimum content of co-operation arrangements with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent;
- RTS specifying further the criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements;
- RTS for the form and content of the application for recognition with the competent authority of the Member State of reference and of the presentation of information in the notification to ESMA;

- RTS specifying further the governance and control requirements for supervised contributors;

- RTS specifying for the information to be provided in an application for authorisation and in an application for registration, plus annex; and

- RTS specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology.

On 9 October 2018, the Council of the European Union indicated that it had no objection to the RTS. The minutes of that meeting can be accessed here.

The Delegated Regulations will enter into force on 25 November 2018 and apply from 25 January 2019.

(ii) ESMA updates its Q&A on the Benchmarks Regulation

During the period 1 October to 31 December 2018, ESMA published an updated version of the "Questions and Answers – on the Benchmarks Regulation" ("**Q&A**"). The update can be summarised as follows:

- **Question 5.1: Bilateral Agreement on Exchanged Collateral – Article 3(1)(7) Benchmarks Regulation** – The Q&A clarified that a reference to an index in a bilateral agreement on the interest to be paid on exchanged collateral under various over-the-counter ("OTC") derivatives does not amount to "use of a benchmark"; and

- **Question 5.12 and 5.13: Methodology and input data** – has been modified on the subject of methodology and input data clarifying the parameters to be considered as input data.

The Q&A document can be accessed here.

(iii) ISDA publishes preliminary results of consultation on benchmark fallbacks

On 27 November 2018, ISDA published the preliminary results of its consultation (the "**Consultation**") on technical issues related to new benchmarks fallbacks for derivatives contracts that reference certain interbank offered rates ("**IBORs**").

The Consultation examines proposed methodologies for certain methodologies that would apply to the fallback rate if IBORs are permanently discontinued. It found that an overwhelming majority of respondents preferred the "compounded setting in arrears rate" for the adjusted risk-free rate ("**RFR**") and a significant majority of respondents preferred the "historical mean/median approach" for the spread adjustment.

The majority of respondents also indicated their preference for using the same adjusted RFR and spread adjustment across all benchmarks covered by the consultation.

ISDA has indicated its intention to proceed with the development of fallbacks for inclusion it its standard definitions based on the compounded setting in arrears rate and the historical mean/median approach to the spread adjustment for all of the benchmarks covered by the consultation.

The results of the Consultation can be accessed here.

(iv) ISDA publishes 2018 Benchmarks Supplement Protocol, Questionnaire and FAQs

On 11 December 2018, ISDA published its 2018 Benchmarks Supplement Protocol (the "**Protocol**"), together with a questionnaire and FAQ document. The Protocol aims to assist market participants to incorporate the ISDA Benchmarks Supplement into their interest rate, FX, equity and commodity derivatives transactions.

The ISDA Benchmarks Supplement covers a broad range of benchmarks which complement the IBOR fallback work. In particular, it enables firms to agree interim fallback arrangements should an IBOR cease to exist before the IBOR fallbacks are implemented and provides for primary triggers and fallbacks if a benchmark does not qualify for use in a relevant jurisdiction or if qualification is subsequently suspended or withdrawn. Market participants who incorporate the ISDA Benchmarks Supplement into the terms of their transactions will be able to ensure that these events are taken into account in their contracts and specify the fallback arrangements that would apply.

The Protocol does not oblige parties to incorporate the ISDA Benchmarks Supplement into transactions with all of their counterparties that adhere to the Protocol unless they wish to do so, thereby supporting both a counterparty-by-counterparty and an all-counterparties approach.

Entities that adhere to the Protocol can also choose whether the ISDA Benchmarks Supplement should only apply to new transactions under existing Master Agreements or whether they also want it to apply to existing transactions. Until both parties elect for it to apply to their legacy transactions, the Protocol will only apply to new transactions. The 2018 Benchmarks Supplement Protocol also requires that adherents must exchange completed Questionnaires for amendments to be effective between them.

For further information, the Protocol can be accessed here.

ISDA has also published a related questionnaire and FAQ document, which can be found here and here respectively.

(v) Council of the EU agrees position on the proposed regulation amending the Benchmarks Regulation on low carbon benchmarks and positive carbon impact benchmarks

On 19 December 2018, the Council of the European Union issued a press release in which it announced that it had agreed a position on the Proposal for a Regulation of the European Parliament and of the Council amending the Benchmarks Regulation on low carbon benchmarks and positive carbon impact benchmarks (the "**Proposed Regulation**").The announcement follows the publication of a Presidency compromise text by the Council on 17 December 2018.

The Proposed Regulation will amend the Benchmarks Regulation in order to provide a reliable tool to pursue low-carbon investment strategies by establishing a new category, comprising two types of financial benchmarks:

- A low-carbon benchmark, where the underlying assets are selected so that the resulting benchmark portfolio has less carbon emissions in comparison with assets that comprise a standard capital-weighted benchmark; and

- A positive carbon impact benchmark, where the underlying assets are selected on the basis that their carbon emissions savings exceed the asset's carbon footprint.

Negotiations between the Council and the Parliament on the Proposed Regulation are now in a position to begin.

A copy of Presidency compromise text can be accessed here and the press release is available here.

(vi) ESMA publishes final report on guidelines on non-significant benchmarks

On 20 December 2018, ESMA published a final report discussing its guidelines for non-significant benchmarks under the Benchmarks Regulation ("**BMR**") (the "**Guidelines**"). The Guidelines, which are detailed in Annex III of the report, aim to ensure common, uniform and consistent application, for non-significant benchmarks ("**NSBs**") of:

- The oversight function requirements in Article 5 of BMR;

- The input data provision in Article 11 of BMR;

- The transparency of the methodology provision in Article 13 of BMR; and

- The governance and control requirements for supervised contributor's provision in Article 16 of BMR.

The final report highlights the general support of respondents to ESMA's proposed guidelines on each of the above categories of guidelines. On the subject of the oversight

function requirements, respondents stressed that the proposals were not mandatory and that administrators can decide on the composition of the oversight function most fit for their benchmarks. With regard to the proposed guidelines on the input data provision, respondents stressed that no compromise should be made on the data quality and that the BMR already includes the right level of proportionality in Article 24 in relation to the verifiability of input data.

The final report again found that there is general support for ESMA's proposal on the transparency of the methodology, although one respondent expressed concern that too much transparency could result in benchmarks being manipulated as all components needed for their creation would be published. The report also highlighted general support for ESMA's proposed guidelines on the governance and control requirements for supervised contributors and, in particular, respondents supported the deletion of the sign off process for non-significant benchmarks as the supervised contributors will need to comply with the code of conduct.

Competent authorities must notify ESMA whether they (a) comply, (b) intend to comply or (c) do not comply and do not intend to comply with the guidelines within two months of the date of publication of the guidelines on ESMA's website in all EU official languages.

The final report can be accessed in full here.

Short Selling Regulation ("**SSR**")

(i) ESMA publishes updated list of market makers and authorised primary dealers who are using the exemption under the Short Selling Regulation

During the period 1 October 2018 to 31 December 2018, ESMA published an updated list of market makers and authorised primary dealers who are using the exemption under the Short Selling Regulation.

According to Article 17(13) of the Short Selling Regulation, ESMA shall publish and keep up to date on its website a list of market makers and authorised primary dealers who are using the exemption under the Short Selling Regulation.

The data provided in this list have been compiled from notifications of Member States' competent authorities to ESMA under Article 17(12) of the Short Selling Regulation.

The list is available here.

(ii) ESMA updates Q&As on the implementation of the Short Selling Regulation

During the period 1 October 2018 to 31 December 2018, ESMA published an updated Question & Answers ("**Q&As**") on the implementation of the Short Selling Regulation (Regulation 236/2012) ("**SSR**").

The updated Q&As include a new Q&A 4.10, which now provides that, with the application of the MiFID II/MiFIR regime, the identification of the relevant competent authority is now made under Commission Delegated Regulation (EU) 2017/590 for the reporting of transactions to competent authorities, rather than under Commission Implementing Regulation 1287/2006.

A copy of the updated Q&As on the implementation of the Short Selling Regulation can be accessed here.

The Bank Recovery and Resolution Directive ("**BRRD**")

(i) European Commission adopts draft Delegated Regulation setting out RTS specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions

On 25 October 2018, the European Commission adopted a draft Delegated Regulation supplementing the BRRD with regard to regulatory technical standards ("**RTS**") specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions (the "**Draft Regulation**").

The Draft Regulation aims to facilitate cooperation between the competent and resolution authorities and to promote convergence of practices among the authorities by creating a common framework for assessing institutions' eligibility for simplified obligations. It sets out a two-stage approach based on quantitative and qualitative criteria for competent authorities to employ in order to assess whether an institution is eligible.

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

(ii) ITS on reporting for resolution plans under BRRD published in the Official Journal of the EU

On 7 November 2018, the Commission Implementing Regulation (EU) 2018/1624 laying down technical standards with regard to procedures and standard forms and templates for the provision of information for the purposes of resolution plans for credit institutions and investment firms pursuant to Directive 2014/59/EU ("**BRRD**") of the European Parliament and of the Council, and repealing Commission Implementing Regulation (EU) 2016/1066 was published in the Official Journal of the European Union (the "**Implementing Regulation**").

The Implementing Regulation transforms the data items set out in the Commission Implementing Regulation (EU) 2016/1066 into a single data point model which identifies all relevant business concepts that firms subject to the BRRD are expected to provide for the purposes of resolution planning.

The Implementing Regulation repeals and replaces the Commission Implementing Regulation (EU) 2016/1066 and enters into force on 27 November 2018. Provisions are made in the Implementing Regulation for transition periods for firms that will apply to financial years ending on dates in 2018 and 2019.

The Implementing Regulation can be accessed in full here.

(iii) European Parliament and Council reach an agreement on BRRD II Directive and the SRM II Regulation

On 4 December 2018, the European Parliament and the European Council both published press releases in which they announced that they had reached a provisional agreement on the proposed BRRD II and SRM II Directives.

The European Commission's legislative proposals for the BRRD II Directive and the SRM II Regulation contain revisions to the BRRD and the Regulation establishing the Single Resolution Mechanism ("**SRM Regulation**") respectively.

The objective of the proposals is to implement the reforms agreed at international level following the financial crisis in order to strengthen the banking sector and to address challenges relating to financial stability. The European Parliament identifies the following three key objectives which the agreed measures deliver on:

- The enhancement of the framework for bank resolution, particularly the necessary level and quality of the subordination of liabilities to ensure an effective and orderly "bail-in" process;

- The introduction of the "moratorium tool", enabling resolution authorities to suspend a bank's payments and/or contractual obligations when it is under resolution, so as to stabilise the bank's situation;

- The strengthening of bank capital requirements, in order to reduce incentives for excessive risk taking by including a binding leverage ratio, a binding net stable funding ratio and setting risk sensitive rules for trading in securities and derivatives.

The proposals also contain measures to improve the lending capacity of banks and to facilitate a greater role for banks in the capital markets, such as reducing the administrative burden for smaller and less complex banks. In addition, the agreement provides for a framework for the cooperation and information sharing among authorities involved in the supervision and resolution of cross-border banking groups, together with measures aimed at

improving cooperation between competent authorities on matters related to the supervision of anti-money laundering activities.

The European Parliament's press release is available here, whilst the Council's press release can be accessed here.

(iv) Central Bank publishes Consultation Paper 126 on the Central Bank's Approach to Resolution for Banks and Investment Firms

On 6 December 2018, the Central Bank published a Consultation Paper entitled 'Consultation on the Central Bank's Approach to Resolution for Banks and Investment Firms (First Edition)' ("**CP 126**").

CP 126 sets outs the proposed approach of the Central Bank in respect of the mandates and discretions provided under the Single Resolution Mechanism Regulation (EU No 806/2014) (the "**Single Resolution Mechanism Regulation**") and the European Union (Bank Recovery and Resolution) Regulations 2015 (as amended) (the "**BRR Regulations**").

By way of background the Central Bank acts as the national resolution authority for credit institutions and certain investment firms under the BRR Regulations and for the purposes of the Single Resolution Mechanism Regulation within the Banking Union Area Single Resolution Mechanism.

CP 126 outlines the Central Bank's resolution mandates, powers and intended approaches for:

- Banks and building societies that are less significant institutions ("**LSIs**") and do not have a subsidiary within the Banking Union Area, or a parent entity which is subject to consolidated supervision by the European Central Bank ("**ECB**"); and

- Investment firms (that are not themselves subsidiaries of credit institutions subject to the direct oversight of the Single Resolution Board ("**SRB**")) subject to the €730,000 initial capital requirement in Regulation 26(2) of the European Union (Capital Requirements) Regulations 2014 (as amended) (the "**CRD Regulations**").

CP 126 is broken down into four parts, which are detailed below:

- **Part I** – Provides an overview of the resolution framework within which the Central Bank operates;

- **Part II** – Details the Central Bank's general perspectives on resolution planning;

- **Part III** – Sets out the Central Bank's intended approaches towards setting the minimum requirement for own funds and eligible liabilities ("**MREL**") and related issues; and

- **Part IV** - Illustrates how the Central Bank would generally expect to conduct resolutions.

The deadline for responses to CP 126 closes on 17 January 2019 and the Central Bank has highlighted that stakeholders should note that there will be limited scope for change in areas where the Central Bank proposes to align with the SRB guidance.

A copy of CP 126 can be accessed here.

Financial Stability Board ("**FSB**")

(i) FSB publish Progress Report on Reforming Major Interest Rate Benchmarks

On 14 November 2018, the FSB published its latest progress report entitled 'Reforming major interest rate benchmarks' (the "**Progress Report**"), which relates to the implementation of its recommendations to reform major interest rate benchmarks. The Progress Report sets out the headway made on the development of overnight nearly risk-free reference rates ("**RFRs**") and further reforms to key offered rates ("**IBORs**").

Previously in 2014, the FSB had published the 'Reforming Major Interest Rate Benchmarks' report (the "**2014 Report**"), which set out a series of recommendations for strengthening existing benchmarks for IBORs in the unsecured lending markets and for promoting the development and adoption of alternative nearly RFRs where appropriate.

The Progress Report details the progress made in implementing the recommendations of the FSB that were set out in the 2014 Report as well as an additional work stream launched by the FSB in 2016 to improve contractual robustness to the risk of major interest rate benchmarks' discontinuation. The Progress Report considers three key issues:

- **IBORs** – The Progress Report sets out that although LIBOR have strengthened in recent times, authorities have warned that the publication of LIBOR may cease once official sector support for the benchmark is withdrawn at the end of 2021. Furthermore that work has continued on the major IBORs (EURIBOR and TIBOR) to strengthen existing methodologies in order to make them more grounded in actual transactions.

- **Identification of and Transition to Alternative Reference Rates** – The Progress Report provides that though there has been important steps made to strengthen IBORs, FSB member authorities set out that in certain markets, they face the disappearance of IBORs, especially markets reliant on LIBOR. Accordingly the FSB member authorities provide there needs to be an orderly transition to new reference rates.

- **Enhancing Contractual Robustness** – The Progress Report provides that significant work is being undertaken by the FSB member authorities as well as the International Swaps and Derivatives Association ("**ISDA**") and other trade

associations on the important task of strengthening contractual robustness to the risk of discontinuation of major interest rate benchmarks. The Progress Report provides that this matter goes beyond derivatives markets and applies to many types of cash products including syndicated loans, bonds and mortgages.

The Progress Report provides information on a large number of benchmarks across the markets and currency areas. Appendix A of the Progress Report sets out an overview of the major interest rate benchmarks and the relevant RFRs or other alternative reference rates identified.

A copy of the press release and the Progress Report can be accessed here. The FSB is set to publish a further progress report in late 2019.

(ii) FSB publishes discussion paper on resources to support CCP resolution and treatment of CCP equity in resolution

On 15 November 2018, the FSB published a discussion paper for public consultation entitled 'Financial resources to support CCP resolution and the treatment of CCP equity in resolution' (the "**Discussion Paper**").

The purpose of the Discussion Paper is to consider whether there is a need for further guidance on the treatment of CCP equity in resolution. Part 1 of the Discussion Paper sets out considerations that could guide relevant authorities in assessing the nature and quality of financial resources needed to absorb losses and other costs and to achieve orderly CCP resolution. Whereas part 2 of the Discussion Paper covers the treatment of CCP equity in resolution.

The Discussion Paper builds on the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions and the FSB's Guidance on Central Counterparty Resolution and Resolution Planning.

The deadline for responses to the Discussion Paper is 1 February 2019.

A copy of the Discussion Paper can be accessed here.

(iii) FSB publish Recommendations on Compensation Data Reporting

On 23 November 2018, the FSB published its finalised recommendations on compensation data reporting to address potential misconduct risk entitled 'Recommendations for national supervisors: Reporting on the use of compensation tools to address potential misconduct risk' (the "**Recommendations**").

The Recommendations are directed to the relevant NCAs from all financial sectors, with the relevant contents seeking to build on national supervisory work and existing international efforts including the Basel Committee Pillar III disclosures on compensation.

The FSB have stated that the Recommendations are aimed at “significant” financial institutions, however, they have given the relevant national/regional authorities discretion as to whether the Recommendations should be applied more broadly.

The Recommendations are part of the FSB's action plan to address misconduct risk, which includes a toolkit for firms and supervisors for strengthening governance frameworks to mitigate misconduct risk.

While the Recommendations provide a tool for possible use by NCAs, firms are expected by the FSB to develop supporting processes, including structured approaches to data gathering. The Recommendations set out that the information collected should help supervisors to understand and review the following:

- The importance of conduct within the firm’s incentive compensation framework and the role of compensation policy in establishing a sound risk and conduct culture; and

- The use of compensation tools in practice and their role in ensuring accountability when misconduct occurs.

A copy of the press release for the Recommendations can be accessed here and the Recommendations can be accessed here.

(iv) FSB letter to G20 leaders on progress made in 2018 and issues ahead

On 27 November 2018, the FSB published a letter from its Chair to the G20 leaders dated 26 November 2018 (the “**Letter**”). In the Letter it details the progress made in 2018 and highlights the main issues that lie ahead.

The FSB Chair describes 2018 as a "year of transition" which is taking place against a backdrop of important structural changes in the financial system, as fintech and non-bank finance sectors bring diversity but are also in turn creating potential vulnerabilities. The Letter reports on FSB’s four priorities from 2018:

- **Addressing Emerging Vulnerabilities –** The Letter provides that there is a continued vigilance required to contain the risks of non-bank finance and to implement the FSB’s recommendations to address structural vulnerabilities in the asset management sector. Measures to assist include the FSB’s publication of a cyber lexicon and the development of effective practices for financial institutions to respond to and recovery from major cyber incidents.

- **Completion and implementation of the G20's reform priorities –** It is set by the FSB Chair that after a decade of work, policies are now in place to address the majority of the G20’s financial reform priorities. For example it is set out that the last remaining elements of Basel III were finalised a year ago and that this milestone marks completion of one of the most significant areas of post-crisis reform.

- **Pivoting to policy evaluation** – The Letter provides that the FSB is now beginning to pivot from the work to fix the fault lines that caused the financial crisis towards dynamic implementation and rigorous evaluation of the effects of the agreed G20 reforms. The FSB Chair provided that this step will ensure that the G20 reforms remain fit for purposes amidst changing circumstances.

- **Optimising how the FSB works** – The FSB Chair stated that in order to ensure that the FSB is fit for the next phase, the organisation has reviewed how it works and will in time take a number of steps to improve its process and transparency which includes an enhanced approach to prioritization of work focused on promoting financial stability and outreach with external stakeholders.

The Letter ends by the FSB Chair noting that both the G20 and the FSB bear heavy responsibilities to safeguard recent progress made and address the new risks arising and to seize new opportunities presented by the major transitions underway in the global economy and financial system.

A copy of the Letter can be accessed here.

(v) FSB Fourth Annual Report to G20 leaders on implementation and effects of Financial Regulatory Reforms

On 28 November 2018, the FSB published its fourth annual report entitled "Implementation and Effects of the G20 Financial Regulatory Reforms" (the "**Annual Report**"). The FSB delivered the Annual Report to the G20 summit in Buenos Aires, which took place on 30 November and 1 December 2018.

The Annual Report takes stock of the progress made by FSB members in implementing the relevant financial reforms. It also provides an assessment of their effects on the global financial system to date.

The Annual Report details some of the following points:

- **Consistent Implementation of Reforms** – The FSB sets out in the Annual Report that regulatory and supervisory bodies should lead by example and promote the timely, full and consistent implementation of remaining reforms to Basel III, resolution regimes, OTC derivatives and non-bank financial intermediation in order to support a level playing field and avoid regulatory arbitrage.

- **More Resilience at the Core of the Financial System** – The Annual Report discusses how reforms have contributed to the core of the financial system becoming more resilient to economic and financial shocks. The FSB provides some of the following examples to re-enforce this point (i) large internationally active banks are better capitalised, less leveraged and more liquid; (ii) progress has been made in addressing risks associated with systemically important banks; and (iii) OTC

derivatives markets are more transparent and have been simplified, including through the use of central clearing.

- **Benefits of Co-operation between Jurisdictions** – The Annual Report provides that cross-jurisdictions co-operation is critical as memories of the crisis fade. The FSB state that financial supervisory and regulatory authorities need to be able to share information through effective legal and other arrangements and that strong common standards and close co-operation will help to avoid market fragmentation and provide the basis on which to build open and integrated markets.

The Annual Report also includes an implementation dashboard which summarises the status of implementation across FSB jurisdictions for priority reform areas based on information collected by FSB and standard-setting bodies ("**SSBs**") monitoring mechanisms.

A copy of the Annual Report can be located here and a copy of the implementation dashboard here.

(vi) FSB 5th Annual Report - 1 April 2017 - 31 March 2018

On 1 December 2018, the FSB published its fifth annual report (the "**Annual Report**"), which provides an update on the key activities of the FSB for the 12 month period ended 31 March 2018. The Annual Report also details the activities undertaken by FSB as well as the publications and decisions made by FSB during the course of the year.

This first section of the Annual Report provides an update on the work the FSB delivered during the financial year from 1 April 2017 to 31 March 2018. The publication details that the post-crisis policy reform agenda coordinated by the FSB focuses on four core areas:

- **Building Resilient Financial Institutions** – The Annual Report provides that the FSB has continued to co-ordinate the work of SSBs in developing, monitoring and publicly reporting on implementation of reforms to strengthen the resilience of financial institutions;

- **Ending Too-Big-To-Fail –** The Annual Report details the work undertaken on the identification of Global Systemically Important Financial Institutions and FSB support of the implementation of its Key Attributes of Effective Resolution Regimes for Financial Institutions.

- **Promoting Resilient Non-Bank Financial Intermediation –** The Annual Report provides that the FSB's policy framework for strengthening oversight and regulation of non-bank financial intermediation ("**NBFI**") is designed to address bank-like financial stability risks for NBFI, while not inhibiting sustainable non-bank financing models.

- **Making Derivatives Markets Safer –** The FSB states that in the lead up to the global financial crisis, weaknesses in the OTC derivatives markets contributed to the

increase in systemic risk and the damage caused by the crisis. Accordingly, the FSB view improvements to the OTC derivatives markets as a key pillar of the G20 financial regulatory reforms.

A copy of the Annual Report can be found here.

European Central Bank ("**ECB**")

(i) ECB publishes quarterly survey findings on credit terms and conditions

On 29 October 2018, the European Central Bank issued a press release announcing the results of a qualitative survey on credit terms and conditions in euro-denominated securities financing and over-the counter ("**OTC**") derivatives market. This survey is conducted on a quarterly basis as part of an international initiative to collect information on trends and drivers in the credit terms offered by firms in the wholesale markets.

The survey is targeted at senior credit officers of large banks and dealers active in targeted euro-denominated markets. Credit terms are reported from the perspective of the firm as a supplier of credit to customers. Highlights of the survey findings include:

- Credit terms tightened for both securities financing and OTC derivative transactions over the three-month reference period from June to August 2018;
- Banks and dealers increased the level of resources and attention devoted to the management of concentrated exposures; and
- Liquidity in general trading conditions for the underlying collateral improved slightly, following several quarters of deterioration.

The results reflect the responses from a panel of 28 banks, including banks within the euro area and banks outside the euro area. The press release can be read here and the detailed survey results can be accessed here.

(ii) ECB issues 2019 supervisory priorities for the single supervisory mechanism

On 30 October 2018, the ECB published its risk assessment for 2019 (the "**Risk Assessment**") and its supervisory priorities for the single supervisory mechanism ("**SSM**") for 2019 (the "**Supervisory Priorities**"). The Supervisory Priorities sets out the areas of focus for 2019 in light of the challenges facing the banking sector, as identified in the Risk Assessment by the ECB Banking Supervision in conjunction with the Joint Supervisory Teams, ECB microprudential and macroprudential analyses and other international bodies.

The three most prominent risk drivers affecting the euro area banking system include: (i) geopolitical uncertainties; (ii) the stock of non-performing loans ("**NPL**"); and (iii) cybercrime and information technology disruptions. The high-level priority areas for the 2019 SSM comprise of the following:

- Credit risk, including further work to address the stock of NPLs in the euro area, assessment of the quality of banks' underwriting criteria and examination of the quality of specific asset class exposures;

- Risk management, including the continuation of the targeted review of internal models, the continued assessment of the information technology and cyber risks facing banks and the assessment of bank's resilience against liquidity shocks under the 2019 supervisory stress test; and

- Activities comprising multiple risk dimensions, including monitoring the implementation of banks' Brexit plans to ensure that they comply with supervisory expectations and ongoing supervisory dialogue with significant institutions to gauge their state of preparation for the envisaged fundamental review of the trading book rules.

A number of further risks to the banking sector that the ECB believe warrants further scrutiny is set out in the Risk Assessment which can be accessed here.

The Supervisory Priorities details a number of supervisory activities that correspond with its focus areas which the ECB will carry out in 2019 and beyond and can be accessed here.

(iii) The Chair of the Supervisory Board clarifies the ECB's supervisory role in relation to credit institutions not established in a participating Member States

On 31 October 2018, the Chair of the Supervisory Board of the European Central Bank ("**ECB**"), Mr Danièle Nouy (the "**Chair**"), wrote a letter to Member of European Parliament, Mr Flanagan (the "**MEP**"), regarding the supervision of banks' internal governance (the "**Letter**"). The ECB's Letter was in response to a letter from the MEP dated 8 October 2018, regarding fit and proper assessments in relation to Danske Bank A/S Eesti filiaal.

In the Letter, the Chair clarified that the ECB is not generally responsible for the prudential supervision of credit institutions which are not established in participating Member States. The Chair explained that where a credit institution operates a branch within a participating Member State, certain supervisory tasks, such as the assessment of internal governance arrangements and the suitability of members of the management body and key function holders, are carried out at branch level, by either the ECB or the national competent authority ("**NCA**"). The Chair further explained that the relevant supervisory entity is determined by the size of the branch. Where a branch is not classified as significant, the Chair indicated that it is the NCA who is the relevant supervisory entity, pursuant to Article 52(3) of the CRD IV.

In light of the fact that Danske Bank A/S Eesti filiaal is: (i) a credit institution; (ii) licensed by the Danish Financial Supervisory Authority; (iii) operating as an Estonian branch of Danske Bank A/S; and (iv) not classified as a significant branch; the Chair confirmed that it was the Estonian Financial Supervision Authority who was responsible for conducting fit and proper assessments. The Chair therefore directed all related questions to the Danish Financial Supervisory Authority or the Estonian Financial Supervision Authority.

The Letter can be accessed in full here.

(iv) ECB speech on the rising role of the investment fund sector for financial stability in the euro area

On 12 November 2018, the ECB published a speech given its Vice-President Luis de Guindos on the rising role of the investment fund sector for financial stability in the euro area. In his speech, Mr. de Guindos outlines the following regulatory actions that could be taken in the future in order to mitigate risks associated with liquidity, leverage and interconnectedness in the investment fund sector:

- Further evaluation of regulatory action must be undertaken in light of the rapid growth of exchange-traded funds ("**ETFs**"), coupled with their potential to transmit and accentuate risks to financial stability. Work is required on the different layers of interconnectedness between ETFs and their counterparties, including enhanced rules to limit counterparty risk exposure of ETF investors and measures that provide more transparency around ETF liquidity provision;

- The macroprudential framework should be extended beyond banks to encompass the asset management sector, due to the sector's rising role in shaping the financial cycle and the potentially systemic nature of its risk;

- Macroprudential authorities should be equipped with the necessary tools to address systemic risks both ex ante and ex post. The toolkit available to macroprudential authorities should include additional ex ante requirements such as minimum liquidity buffers and redemption notice periods;

- The case for bringing investment fund supervision and the potential activation of macroprudential tools to the European level should be further examined, to strengthen European supervision of investment funds, while also ensuring a globally consistent approach to monitoring.

The Vice-President's speech can be accessed here.

(v) ECB publishes cyber resilience oversight expectations for financial market infrastructures

On 3 December 2018, the ECB published guidance clarifying its cyber resilience oversight expectations ("**CROEs**") for financial market infrastructures ("**FMIs**") (the "**Guidance**"). The purposes of the Guidance include:

- To provide FMIs with detailed steps on how to operationalise the Guidance, ensuring that they are able to foster improvements and enhance their cyber resilience over a sustained period of time;

- To provide overseers with clear expectations to assess FMIs under their responsibility;

- To provide a basis for a meaningful discussion between the FMIs and their respective overseers.

The CROEs are presented in chapters that set out five primary risk management categories and three overarching components that should be addressed across an FMI's cyber resilience framework. The risk management categories are governance, identification, protection, detection, and response and recovery. The overarching components are testing, situational awareness, and learning and evolving.

The ECB also published a document outlining the responses it received to its public consultation on the CROEs. The ECB notes that comments in the public consultation predominantly focused on the following aspects:

- Concerns over the overly prescriptive nature of the CROEs;

- The need for further clarity on how the CROEs' levels of maturity correspond to other international cybersecurity frameworks that already incorporate maturity models;

- The need for further clarity on how the CROE would be used to conduct oversight assessments of the relevant FMIs;

- The importance of harmonising the expectations with other international frameworks and engaging with other key regulators to agree on and standardise a common framework and assessment process.

A full copy of the ECB's Guidance can be accessed here.

A full copy of the ECB's CROEs can be accessed here and a copy of the responses to the ECB's public consultation can be accessed here.

(vi) ECB publishes crisis communication exercise report

On 14 December 2018, the ECB published its crisis communication exercise report. The exercise sought to raise awareness of data integrity issues and crisis communication following cyber-attacks or other major operational disruptions. The findings of the report include the following:

- Each type of financial infrastructure faced different types of challenges;

- Recovery from cyber-attacks or operation disruptions requires all stakeholders to come together and to use a range of possible solutions to ensure that a coordinated reconciliation can take place in an efficient and timely manner;

- Information sharing (including incident data and threat intelligence) at the European level could be enhanced and crisis management arrangements could be improved by

introducing clear structures, agreements and communication protocols based on a deeper understanding of the operational interdependencies.

In response to the findings of the report, the Euro Cyber Resilience Board ("**ECRB**") will consider how to further enhance European crisis management arrangements and take into account best practices around training and awareness.

The ECRB will also consider how best to conduct a coordinated recovery and reconciliation process and will establish or update existing oversight memoranda of understanding with other authorities and relevant stakeholders and establish arrangements for the reporting and sharing of threats (and threat intelligence more broadly).

A copy of the report is available here.

European Commission

(i) Council of European Union Presidency compromise proposals on proposed Investment Firms Directive and Regulation

On 9 October 2018, the Council of the EU published two Presidency compromise proposals relating to the European Commission's proposals for a Regulation on the prudential supervision of investment firms and a Directive on the prudential supervision of investment firms, which seeks to amend the CRD IV Directive and the MiFID II Directive.

The compromise proposals have been published ahead of a working party meeting to be held on 15 October 2018, with new text being marked in underlined bold and deletions being indicated in strikethrough.

The titles of the two Presidency proposals are the following:

- Presidency compromise proposal (12940/18 ADD 1) on the European Commission's proposal for a Directive on the prudential supervision of investment firms, which seeks to amend the CRD IV Directive and the MiFID II Directive (the "**Proposed Investment Firms Directive**"); and

- Presidency compromise proposal (12940/18 ADD 2) on the European Commission's proposals for a Regulation on the prudential supervision of investment firms (the "**Proposed Investment Firms Regulation**").

A copy of the Proposed Investment Firms Directive can be accessed here and the Proposed Investment Firms Regulations can be accessed here.

(ii) The European Economic and Social Committee express opinion on European Commission's Fintech Action Plan

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

The Committee supports the Plan and acknowledged the potential benefits that the development of FinTech can have on the European market. The Committee is of the view that FinTech firms should be subject to the same rules as the financial sector in respect of resilience, cyber security and supervision. The Committee makes the following recommendations:

- The European Commission to ensure that the measures on improving cyber security and the resilience of the financial sector are supplemented by rules to ensure uniformity in the development of Fintech in the EU;
- The European Commission to ensure that the right to portability of personal data be implemented in a manner consistent with the Payment Services Directive II ("**PSD2**");
- The European Commission should monitor the uptake of crypto-assets with a view to implementing measures that will protect the financial stability of the European Union;
- Member States should design and implement labour market measures to enable workers displaced by technologies in the financial sector to access new jobs as soon as possible; and
- The European Commission to identify possible rules for companies offering cloud services with regard to their responsibility for securing the data they host.

The Committee's opinion can be accessed here.

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

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

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

On 7 December 2018, the TEG published a webpage in which it called for feedback on the sustainable finance taxonomy, which will be established under the proposed Regulation on

the establishment of a framework to facilitate sustainable investment. The TEG invited feedback on the first group of economic activities it proposed be deemed as contributing substantially to climate change mitigation and on the usability of the taxonomy in practice. The deadline for feedback is 22 February 2019.

The webpage can be accessed here, while further information about the TEG can be found here.

(iv) Draft Report published on the proposal for a Regulation of the European Parliament and of the Council on sovereign bond-backed securities

On 19 October 2018, the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published a draft report on the proposal for a Regulation of the European Parliament and of the Council on sovereign bond-backed securities ("**Proposed Regulation**"). Previously the European Commission published a Proposed Regulation in May 2018.

By way of background sovereign bond-backed securities ("**SBBS**") are euro-denominated debt securities, created by private entities and backed by a pre-determined, diverse pool of bonds issued by euro-area national governments. Similar to securitisation bonds, this new type of financial instrument is designed to be issued in tranched notes, appealing to a range of risk appetites. Senior ranking notes would pay a lower return than junior notes, in exchange for a lower risk profile. Junior notes would bear losses before senior notes but would be rewarded with a higher coupon.

Rather than being subject to the same regulatory treatment as securitisation bonds, the Proposed Regulation seeks to grant SBBS the same regulatory treatment as national euro-area sovereign bonds denominated in euro reflecting the relatively low risk and high liquidity of the pre-determined and diverse underlying portfolio of sovereign debt.

A copy of the draft report on the Proposed Regulation can be accessed here.

On 21 November 2018, the Central Bank published its response (dated 15 November 2018) to the Oireachtas Finance Committee's letter dated 27 September 2018, which had requested the views of the Central Bank on the European Commission Proposal COM (2018) 339 – Proposal for a Regulation of the European Parliament and of the Council on sovereign bond-backed securities ("**SBBS**").

In the Letter the Central Bank highlighted the work of the European Systemic Risk Board's ("**ESRB**") High Level Task Force on Safe Assets ("**Task Force**") on the subject and provided that the analysis undertaken by the Task Force had indicted SBBS's potential for a positive contribution to the financial stability and financial integration of the European system.

The Letter also sets out the Central Bank's view that regulation is required in order for an SBBS market to emerge. The Central Bank provided its support to the findings of the

analysis undertaken by the Task Force, and welcomed the European Commission's proposal for a regulation on SBBS that had been published in May 2018.

A copy of the Letter can be accessed here.

(v) Priorities relative to the finance sector in the European Commission's 2019 work programme

On 23 October 2018, the European Commission published a communication entitled *'Commission Work Programme 2019: Delivering what we promised and preparing for the future'* (the "**Communication**").

In the Communication, the European Commission highlights a number of its legislative proposals it wishes the European Parliament and the Council of the European Union to further advance in 2019. These proposals include:

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

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

The Communication can be accessed in full here.

(vi) Opinion on the proposal for a regulation of the European Parliament and of the Council establishing the InvestEU Programme

On 7 November 2018, an opinion of the European Economic and Social Committee ("**EESC**") was published on the proposal for a Regulation of the European Parliament and of the Council establishing the InvestEU Programme (the "**Opinion**").

The Opinion welcomes the package of Regulations in relation to the proposed future financial framework which includes the proposal to strengthen investment activity in the EU while maintaining a sustainable development criteria.

The InvestEU programme seeks to promote sustainable infrastructure, small and medium-sized enterprises ("**SMEs**"), research, and innovation while also focusing on social investment and skills which demonstrates the importance of social investment for future EU development. The EESC supports a strong link between InvestEU's social investment and skills programme and the standard social policy support instruments.

The InvestEU programme consists of three parts:

- The InvestEU fund, whose main aim is to mobilise public and private sources for investment purposes, using an EU budget guarantee;
- The InvestEU Advisory Hub, which complements to the fund providing technical advice for investment projects seeking funding; and
- The InvestEU Portal, which is a complement to the fund in the form of an easily accessible and user-friendly database that connects investors and supported projects.

The EESC sees the InvestEU programme as one way of developing financial market institutions in the Member States and for implementing partners at national level, as it is crucial that implementing partners are able to help meet InvestEU objectives over the long term, to ensure the smooth functioning.

In the Opinion, the EESC stresses the importance of investing in human capital and social infrastructure, which in its view contributes to achieving long-term growth potential as well as to ensuring the competitiveness of the EU's economic system.

A copy of the Opinion can be accessed here.

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

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

A number of participants at the Roundtable outlined their support for the establishment of the "International Association for Trusted Blockchain Applications" (the "**Association**"), which will work closely with the European Commission and Member States grouped within the European Blockchain partnership in supporting interoperability, developing specifications, promoting standards and regulatory convergence to support the development and exploitation of innovative blockchain technologies.

The Association will be based in Europe and will be open to any organisations willing to work on the deployment of blockchain and distributed ledger technologies to transform digital services.

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

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

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

- The need for the European Parliament and Council to adopt proposals from the Commission directly relevant for the proper functioning of the Single Market which are yet to be adopted;
- The need for Member States to effectively implement, apply and enforce EU Single Market rules;
- The need to adapt the Single Market in light of a changing geopolitical context and for further economic integration in the areas of services, products, taxation and network industries.

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

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

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

- Eliminate the remaining backlog of harmonised standards that are not yet published in the Official Journal of the European Union as soon as possible;
- Streamline internal decision making processes, in particular the decision of publishing the references to harmonised standards in the Official Journal of the European Union;
- Prepare a guidance document on practical aspects of implementing the Standardisation Regulation; and
- Reinforce, on an on-going basis, the system of consultants to support swift and robust assessments of harmonised standards and timely publication in the Official Journal of the European Union.

The communication is available here and a related press release can be found here.

(ix) European Council publishes progress report on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims

On 23 November 2018, the European Council published a progress report (the "**Progress Report**") from the Presidency on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (the **"Proposal**"). The Proposal aims to increase cross-border transactions in claims and, thereby, facilitate access to finance.

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

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

Collateral Directive, Final Settlement Directive, and Winding-Up Directive) and the Proposal.

A full copy of the Progress Report can be accessed here.

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

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

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

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

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

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

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

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

The proposed Regulation also seeks to address the potential for harmful ranking practices as a result of the dependence of businesses on online general search engines. Points of note within the proposed Regulation include:

- Providers of online intermediation services will be required to ensure that their terms and conditions for professional users are easily understandable and easily available; and

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

The proposal may be accessed here.

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

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

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

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

The opinion is accessible here.

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

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

The evaluation will assess whether the original objectives of the Directive have been achieved, how the Directive is functioning from a cost/benefits and burden reduction perspective and how the Directive works with other legislation in the areas of retail financial services, consumer protection and data protection. It will also consider whether the tools of

the Directive correspond to original and current needs and whether EU measures have added value.

The evaluation roadmap identifies the following aspects on which the evaluation will gather evidence regarding the functioning of the Directive:

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

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

The webpage and the evaluation roadmap can be accessed here.

(xiii) European Committee of the Regions publish opinion on two directive proposals for a "New Deal for Consumers"

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

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

- **Proposal 1**

  The first proposal is for a "Directive on better enforcement and modernisation of European Union consumer protection rules" ("**Proposal 1**"). Greater online protection for consumers, effective penalties for infringements calculated by percentage of turnover and individual remedies for victims of unfair commercial practices such as

aggressive marketing are some of the amendments proposed for the directive. A copy of Proposal 1 can be accessed here; and

- **Proposal 2**

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

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

Further detail on the ECR's recommendations is provided in the opinion, which can be accessed here.

European Parliament

(i) European Parliament resolution on the action plan on retail financial services

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

- Lower charges on non-euro transactions;
- Transparency in currency conversion;
- Easier product switching;
- Quality comparison websites;
- Better motor insurance;
- Transparent pricing of car rentals;

- Deeper single market for consumer credit;
- Fair consumer protection rules;
- Better creditworthiness assessments;
- Fintech for retail financial services;
- Digital identity checks; and
- Online selling of financial services.

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

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

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

On 12 December 2018, the European Banking Federation ("**EBF**") published a number of general comments on the Proposed Regulation. The EBF's observations include the following:

- The EBF underlined its support for the Proposed Regulation's holistic and harmonised approach, but stressed the need to balance transparency on the one hand and the operational feasibility to allow its usage by companies to improve their sustainable actions and reach the objectives set out in the Paris agreement on the other hand;
- The EBF advocated a forward-looking perspective that would pave the way for a gradual shift towards increased sustainability of activities, companies and assets;
- The EBF recommended the extension of the scope of the Proposed Regulation to cover other sustainability objectives from the earliest possible stage;
- The EBF suggested that efforts in building a taxonomy should be concentrated for sustainable activities and the aim of the Proposed Regulation should be to facilitate sustainable finance by focusing on the positive and not the negative environmental impact;
- The EBF recommended that requiring credit institutions to disclose their corporate lending that funds environmentally sustainable activities should not be in the scope of this regulation.

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

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

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

- To make progress on the legislative package aimed at reducing non-performing loans;
- To reach an agreement on the backstop to the single resolution fund and to make further steps towards a European Deposit Insurance Scheme;
- To put in place the main building blocks for the Capital Markets Union, with a particular focus on 10 of the original 13 proposals that remain on the desks of the co-legislators;
- To adopt the proposed review of the European Supervisory Authority in order to strengthen the European anti money laundering framework and the powers of the ESAs.

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

A full copy of the Vice-President's speech can be accessed here.

(iv) ECON Committee and Council agree stance on proposed EU framework for covered bonds

On 29 November 2018, the European Council published a press release announcing that it has reached an agreement with the European Parliament on a harmonised framework for covered bonds.

The proposed framework seeks to set minimum harmonisation requirements that all covered bonds across Europe will have to meet. The objective of the framework is to increase security for investors and open up new opportunities, particularly where markets are less developed. The proposed framework:

- Provides a common definition of covered bonds;
- Defines the structural features of the instrument;
- Defines the tasks and responsibilities for the supervision of covered bonds;

- Sets out the rules allowing the use of the 'European Covered Bonds' label;
- Strengthens the conditions for granting preferential prudential treatment to covered bonds under the Capital Requirement Regulation.

The Council compromise text on the Covered Bonds' Directive and the Council compromise text on the Covered Bonds' Regulation will now form the basis for the European Institutions' upcoming trilogue discussions. Both documents can be accessed here.

(v) Political agreement reached on the proposed Regulation on cross-border payments and currency conversion charges

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

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

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

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

The Council's press release can be accessed here.

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

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

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

- The procedures they have in place to integrate environmental and social risks into their investment and advisory process;

- The extent to which those risks might have an impact on the profitability of the investment;

- Where institutional investors claim to be pursuing a "green" investment strategy, information on how this strategy is implemented and the sustainability or climate impact of their products and portfolios.

The proposed regulation amending the Benchmarks Regulation aims to provide a reliable tool to pursue low-carbon investment strategies by establishing two new types of financial benchmarks namely:

- Low carbon benchmarks which aim to lower the carbon footprint of a standard investment portfolio; and

- Positive-carbon impact benchmark, which aims to select only components that contribute to attaining the 2°C set out in the Paris climate agreement.

A copy of the press release is available here.

A copy of the proposed regulation on disclosures can be accessed here and the proposed regulation amending the Benchmarks Regulation can be accessed here.

ESMA, EBA and ESAs

(i) ESMA designates national authorities to be notified in insolvency proceedings

On 3 October 2018, in accordance with Article 6(2) of the Directive on Settlement Finality, ESMA published a list of designated authorities within each European Union Member State that is to be notified in the event insolvency proceedings are commenced in respect of a participant to a system.

The list provides the contact details for primary contacts within each designated authority.

The full list of designated authorities is accessible here.

(ii) ESMA publishes 2019 Work Programme

On 3 October 2018, ESMA published its 2019 work programme (the "**Programme"**). The Programme sets outs ESMA's strategic objectives for 2019 which takes into account the new supervisory responsibilities ESMA will inherit under the Securities Financing Transactions Regulation ("**SFTR**") and the Securitisation Regulation.

ESMA will maintain its focus on its activities of supervisory convergence and assessing risks in financial markets in line with its mission to enhance investor protection and promote stable and orderly financial markets. General objectives outlined in the Programme include:

- Supporting the consistent application of the Markets in Financial Instruments Directive ("**MiFID II**"), the Markets in Financial Instruments Regulation ("**MiFIR**"), the Prospectus Regulation and the Securitisation Regulation by market participants and national competent authorities;

- Utilising the data gathered under MiFID II/MiFIR to support its work on stable and orderly markets;

- Contributing to the implementation of the Capital Markets Union action plan and of the Fintech action plan; and

- Enhancing the effectiveness of its supervisory activities for credit rating agencies and trade repositories, while preparing for the registration and supervision of new entities under the Securitisation Regulation and SFTR.

The development of a questions and answers ("**Q&A**") document, guidelines, opinions and statements on MIFID II, as well as peer to peer reviews on MiFID topics related to investor protection and intermediaries are amongst ESMA's specific objectives for 2019. ESMA also intend on providing feedback on the implementation of the packaged retail investment and insurance products ("**PRIIP**") regime and establishing the securitisation repository regime along with the framework for their ongoing supervision.

ESMA notes that it may have additional work as a result of the upcoming reviews of the UCITS Directive and the AIFM Directive by the European Commission. If the EMIR Refit is adopted, ESMA intend to review and revise the technical and reporting standards accordingly. It will also be responsible for establishing the securitisation repository regime and setting up the framework for their ongoing supervision.

Full details of the press release is accessible here.

(iii) European Supervisory Authorities publish guidance on complaint-handling procedures for securities and banking sector

On 4 October 2018, the European Supervisory Authorities ("**ESA's**") published its *'Guidance on complaints' handling for the securities and banking sectors'* document (the "**Guidelines**"). The Guidelines set out both ESMA's and the EBA's views of appropriate supervisory practices and how they should be applied.

Under the Guidelines, competent authorities are required to ensure that firms:

- Implement a written complaints management policy which is accessible to all staff;
- Establish a complaints management function to investigate complaints and identify possible conflicts of interest;
- Register, internally, complaints in accordance with national timing requirements;
- Provide information on complaints and complaints-handling to competent authorities or ombudsman;
- Analyse complaints handling data with a view to addressing any recurring or systemic problems;
- Maintain documented complaints-handling procedures that are readily accessible;
- Maintain the ability to provide written information regarding their complaints-handling procedure on request;
- Investigate all complaints thoroughly and expeditiously with a view to providing a response without delay or at least within the time limits set at a national level; and
- Notify the complainant who is not fully satisfied with a final decision of the options to escalate the complaint through another complaint resolution mechanism.

Competent authorities are required to notify ESMA and/or the EBA whether they intend to comply with the guidelines within two months of the date of publication of the translated versions by ESMA and the EBA. A template for notifications is available on ESMA and EBA websites.

The Guidelines can be accessed here.

(iv) Joint Committee of the ESAs 2019 Work Programme

On 9 October 2018, the Joint Committee of the European Supervisory Authorities ("**ESAs**") published its 2019 work programme. The work of the ESAs is focused on the areas of risks and vulnerabilities for financial stability and micro-prudential analysis of cross-sectoral developments, retail investment products, supervision of financial conglomerates, accounting and auditing and anti-money laundering ("**AML**").

Key deliverables in the area of consumer protection and financial innovation that the ESAs expect will be achieved under its 2019 work program include:

- Delivery of technical advice or proposals for amendments to the European Commission in relation to the PRIIPs Commission Delegated Regulation 2017/653;
- Provision of information to the European Commission to support the review of the PRIIPs Regulation 1286/2014 as well as the development of a questions and answers document on the implementation of the new PRIIP rules for the benefit of competent authorities;
- Development of the regulatory technical standards ("**RTS**") on pre-contractual disclosure should the Proposal for a Regulation on disclosure relating to sustainable investments and sustainability risks receive approval from the European co-legislators;
- Issuance of a joint report on an assessment of how: (i) the EBA and ESMA '*Guidelines for complaints handling for securities and banking sectors'*; and (ii) the EIOPA '*Guidelines for insurance undertakings'*; have been implemented by financial institutions;
- Conduct of an assessment of the risks and benefits associated with the Fintech phenomenon; and
- Issuance of a joint report on risks and vulnerabilities to the European Council's Economic and Financial Committee's Financial Stability Table.

The ESAs key objectives in the area of AML include:

- Update of ESA Risk Factor Guidelines originally issued in June 2017 to reflect changes introduced by the 5th Anti-Money Laundering Directive;
- Preparations of guidelines to enhance the collaboration and cooperation of national competent authorities in relation to the AML / CFT supervision of banks and other financial institutions that operate on a cross-border basis;
- Revision of technical standards, as appropriate; and

- Implementation of the agreed proposals for (i) improving the framework for cooperation between AML/CFT and prudential supervision and (ii) AML supervisory practices within the EU; as set out in the Reflection Paper issued by the Joint Working Group on AML Supervision;

The 2019 outputs expected in the area of financial conglomerates include:

- Issuance of a 2019 list of identified Financial Conglomerates; and

- Draft implementing technical standards and regulatory technical standards on specific reporting formats for conglomerates.

The ESAs also envisages, as a key 2019 objective in the area of securitisation, developing publications comprising the outcomes from discussions held by the new Securitisation Committee that is to be established under Article 36(3) of the Securitisation Regulation. These publications will likely be in the form of opinions, joint positions, questions and answers documents, reports and or training programmes.

The full details of the ESAs 2019 work programme can be accessed here.

(v) EBA releases 2019 work programme

On 23 October 2018, the EBA released its 2019 work programme. The EBA's strategic objectives for 2019 include:

- Leading the implementation of Basel III across the European Union;

- Focusing on policy areas including prudential risks for institutions and the impact of FinTech on the business models of institutions;

- Functioning as a European Union wide data hub for competent authorities and the public;

- Relocating the EBA to Paris France with minimal disruptions to the service it provides;

- Fostering the increase of the loss-absorbing capacity of the EU banking system;

- Continuing its co-ordination of competent authorities' work on firms' contingency planning and preparedness and analysis of risks and policy implications for European Union institutions; and

- Continuing its coordination efforts on the supervisory coordination between the authorities post-Brexit, including their development of memorandum of understanding ("**MOU**") templates.

The EBA's 2019 work programme also details specific activities the EBA will undertake in 2019.

The EBA's work programme can be accessed here.

(vi) Update to ESMA Guidelines – State of Play

On 6 November 2018, ESMA published its guidelines outlining the current 'State of play' which summaries its progress in relation to preparing guidelines for various directives including AIFMD, CSDR, CRAR, EMIR etc.

A copy of the chart is available here.

(vii) ESMA develops a status overview of NCA compliance with ESMA Guidelines

On 7 November 2018, ESMA published a press release that provides an overview of the level of compliance declared by national competent authorities with ESMA guidelines adopted under Article 16 of Regulation 1095/2010 ("**ESMA Regulation**") (the "**Compliance Table**").

The individual status of each jurisdiction as declared by the relevant national competent authority is already available on ESMA website. The compliance table consolidates this information to provide an overview of which jurisdictions comply, intend to comply or do not intent to comply with ESMA guidelines as required pursuant to Article 16(3) of ESMA Regulations.

ESMA Regulations also provide that where a jurisdiction does not intend to comply with ESMA Guidelines, the reasons for non-compliance must also be provided. Where applicable, this information is also presented in the Compliance Table.

The press release and the Compliance Table can be accessed here.

(viii) ESMA publishes list of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons

On 7 November 2018, ESMA published a list of national competent authorities that have increased the thresholds for the notification of transactions of persons discharging managerial responsibilities and closely associated persons.

In accordance with Article 19(9) of MAR, competent authorities that raise the threshold to €20,000 must inform ESMA and provide a justification for adopting the higher threshold prior to its application, referring to specific market conditions.

Denmark, France and Italy are the three countries for whom notifications and justifications were received from national competent authorities regarding the increase of the threshold under Article 19(9) of MAR.

ESMA's list can be found here.

(ix) ESMA solicits stakeholder feedback on frequent batch auctions for equity instruments

On 9 November 2018, ESMA launched a public consultation initiative aimed at collecting feedback on periodic auctions for equity instruments. ESMA released a 'call for evidence' document as part of the public consultation campaign.

This call for evidence was prompted by concerns raised by stakeholders that a new type of periodic trading systems for equity instruments consisting of auctions of a very short duration during the trading day ("**frequent batch auctions**") is being used to circumvent the suspension of trading under the double volume capital ("**DVC**"). The operation of these systems similarly raises questions as to their compatibility with the MiFID II Directive.

In response to the concerns, ESMA has completed a fact finding exercise on frequent batch auctions for equity instruments operating in the European Union and have presented their findings in this call for evidence document. ESMA invites stakeholders input as to: (i) whether stakeholders agree with the main characteristics of frequent batch auctions identified in the call for evidence; (ii) whether these characteristics serve to circumvent the DVC; and (iii) what measures ESMA can take to avoid such circumvention, if it exists.

ESMA intend to use the feedback to assess whether these systems can be used to circumvent the MiFID II Directive and develop appropriate policy measures. The deadline for receipt of feedback is 11 January 2019.

The call for evidence document can be accessed here.

(x) ESMA publishes speech on new financial technologies and regulation

On 12 November 2018, ESMA published a speech given by its executive director Verena Ross on the challenges arising from financial technology ("**FinTech**") and its use in the securities sector. In the speech, Ms. Ross outlines the following examples of how ESMA has approached recent challenges in the FinTech space:

- **Binary Options/Contracts for Difference** – ESMA took the action of banning binary options and restricting contracts for difference for retail investors due to their potential to create significant detriment to retail customers as a result of their complexity and lack of transparency;

- **Innovation Facilitators** – ESMA has worked to facilitate exchange of information and best practices amongst national supervisors in order to support national competent authorities ("**NCAs**") in setting up innovation hubs;

- **Crowd Funding** – ESMA drafted an opinion to the 28 NCAs on how they should consider supervising crowd funding and to the European Institutions on how they should consider regulating it in order to provide enhanced investor protection in respect of investment-based crowd funding platforms operating outside of MiFID rules;

- **Distributed Ledger Technology** ("**DLT**") – ESMA published a report on the feedback gathered from the market on the potential uses, benefits and risks of DLT applied to securities markets. ESMA believes that DLT might help to rethink some of the functions of financial intermediation in the future and will act to ensure that the regulatory framework provides relevant safeguards to investor protection, financial stability and orderly markets at all times;

- **Crypto Assets** – ESMA is currently analysing the characteristics of crypto assets relative to existing European regulation to assess whether they are financial instruments, and for those deemed not, whether a separate regulatory regime is needed.

A full copy of the speech can be accessed here.

(xi) Regulation on the relocation of the European Banking Authority published in the Official Journal of the European Union

On 15 November 2018, the Regulation (EU) 2018/1717 (the "**Regulation**") was published in the Official Journal of the European Union. The Regulation amends Article 7 of the EBA Regulation (EU) 1093/2010 which provides that the European Banking Authority ("**EBA**") will now be seated in Paris.

The European Parliament adopted the Regulation on 25 October 2018 with the Council of the EU in its configuration as the Foreign Affairs Council adopting the Regulation on the relocation of the EBA on the 9 November 2018.

The Regulation entered into force on 16 November 2018 and will apply from 30 March 2019.

A copy of the Regulation can be accessed here.

(xii) ESMA publishes updated Risk Dashboard Data for Quarters 3 and 4, 2018

On 29 November 2018, ESMA published its risk dashboard for Quarters 3 and 4, 2018 (the "**Risk Dashboard**"). The Risk Dashboard provides details of the risks in the EU's securities markets for that period, the sources of such risks and summarises how these risks affected market systems, investors and infrastructure and services.

The Risk Dashboard sets out some key findings, which include the following:

- While equity markets increased slightly over the course of Quarter 3, market nervousness and sensitivity are rising, evidenced by a global equity market sell-off at the beginning of Quarter 4;
- Sovereign bond market volatility remains high;
- Market risk remains very high, due also to generally high market valuations coupled with market uncertainty as the period of ultra-low interest rates is drawing to a close;
- The outlook for liquidity, contagion and credit risk remains unchanged;
- Operational risk remains elevated with a negative outlook, as cyber threats and Brexit-related risks to business operations continues to be a major concern;
- Concerns over a potential no-deal Brexit increasingly weigh on economic and market expectations.

A copy of the Risk Dashboard may be found here.

(xiii) EBA publishes consultation paper containing draft guidelines on ICT and security risk management

On 13 December 2018, the European Banking Authority ("**EBA**") published a consultation paper incorporating draft guidelines on information and communication technology ("**ICT**") and security risk management (the "**Guidelines**"). The aim of the Guidelines, which are set out in section 4 of the paper, is to outline how financial institutions should manage the ICT risks that they are exposed to and to provide financial institutions with a better understanding of the supervisory expectations for the management of ICT risks.

The Guidelines detail the obligations of institutions in the areas of ICT governance and strategy, operational risk assessment processes, information security, the management of ICT operations, ICT project and change management, business continuity management and the development of response and recovery plans.

In addition, payment service providers ("**PSPs**") are obliged to comply with further requirements in respect of payment service users ("**PSUs**") relationship management, which require PSPs to establish and implement processes to enhance PSUs' awareness of security risks linked to the payment services by providing PSUs with assistance and guidance.

The closing date for the public consultation is 13 March 2019.

The Guidelines can be accessed here.

(xiv) ESMA publishes the outcomes of its Board of Supervisors meeting for SMSG

On 21 December 2018, ESMA published the Securities and Markets Stakeholder Group ("**SMSG**") summary of conclusions following its Board of Supervisors meeting held in November 2018. The management board discussed the following matters at that meeting:

- Stress testing scenarios for Money Market Funds ("**MMF**");
- Making the Q&A tool more transparent;
- Guidelines on non-significant benchmarks final report would be finalised before the end of the year;
- Setting up of a working group to respond to consultation paper on UCITS and PRIIPs developments;
- Risk management needed in the event of a 'No Deal scenario' around 30 March 2019 in the area of financial services;
- MiFID II Implementation observations; and
- FinTech, the SMSG work on ICOs and crypto assets.

The summary of conclusions can be accessed here and here.

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

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

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

- **Question 5.3**: Specifies the elements that credit and or financial institutions should consider when considering delaying disclosure of inside information under Article 17(5) of the MAR;
- **Question 5.4**: Clarifies that credit and or financial institutions are required to notify the national competent authority of the expected duration of the delay under Article 17(5) of the MAR;
- **Question 5.5**: Clarifies that credit or financial institutions cannot resort to Article 17(4) of the MAR where the national competent authority does not consent to the delay of disclosure under Article 17(5) of the MAR; and

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

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

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

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

- No sanctions or supervisory measures were imposed from 3 July to 31 December 2016;

- Seven criminal pecuniary sanctions were imposed in 2017, all of which concerned market manipulation cases in Germany.

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

- Two other than pecuniary measures were imposed for the infringement of insider dealing and unlawful disclosure of inside information, by the Slovenian Agencija za trg vrednostnih papirjev, and by the Lithuanian Lietuvos Bankas;

- Thirty-five pecuniary sanctions and seven other than pecuniary measures were imposed for the infringement of market manipulation;

- One hundred and seven pecuniary sanctions and one hundred and eleven other than pecuniary measures were imposed for other infringements.

A full copy of the Report can be accessed here.

Transparency Directive

(i) Central Bank publishes 2018 Transparency Rules

On 19 November 2018, the Central Bank issued its 2018 Transparency Rules under Section 1383 of the Companies Act 2014. The Transparency Rules set out procedural and administrative requirements and guidance in respect of the Transparency (Directive 2004/109/EC) Regulations 2007, as amended.

A copy of the Central Bank's Transparency Rules is available here.

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

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

- All annual financial reports shall be prepared in xHTML or Extensible Hypertext Markup Language;
- Where annual financial reports contain consolidated IFRS financial statements, issuers shall mark up the consolidated financial statements using eXtensible Business Reporting Language ("**XBRL**") tags. Tagging means attributing to financial data the most appropriate element chosen from a taxonomy;
- XBRL tags shall be embedded in the xHTML document using the Inline XBRL technology. The inline XBRL allows the XBRL benefits of tagged data to be combined with a human-readable presentation of a report, which is under the control of the preparer;

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

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

The full script of the video tutorial on the European Single Electronic Format can be accessed here.

(iii) Draft Commission delegated regulation on the specification of a single electronic reporting format published

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

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

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

A copy of the draft delegated regulation can be accessed here.

Prospectus Regulation

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

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

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

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

The press release announcing the publication of the Report is accessible here and the Report can be accessed in full here.

(ii) Central Bank publishes guidance on submitting a debt submission template and Q&A on submission of a new debt submission template

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

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

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

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

The Central Bank's Guidance Document can be accessed here and the Q&A is available here.

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

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

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

The Handbook is effective from 19 November 2018.

A copy of the Handbook is available here.

(iv) European Commission publishes draft regulation on the format, content, scrutiny and approval of prospectuses

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

- The minimum information to be included in the registration documents and in the securities notes and additional information to be included in prospectuses;
- The format of a prospectus and a base prospectus, the categories of information to be included in the base prospectus and the requirements of a prospectus summary;
- The key information which must be contained in the specific summary for the EU Growth prospectus, the required contents of the EU Growth registration document and of the EU Growth securities note and the format of the EU Growth prospectus;
- The criteria for the scrutiny of the completeness of information contained in the prospectus and for the scrutiny of comprehensibility and consistency of the information;
- The proportionate approach to be taken in the scrutiny of draft prospectuses and the review of the universal registration document, the requirements for submission of draft prospectuses for approval and the steps that must be taken where there are changes to a draft prospectus during the approval procedure.

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

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

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

- Section I - contains details of proposed additional requirements to be contained in the Central Bank (Investment Market Conduct) Rules ("**IMC Rules**") in relation to prospectuses.
- Section II - contains details of proposed key amendments to the Prospectus Rules.
- Schedule A - contains the Proposed Part 4 of the IMC Rules (setting out only the Prospectus Rules) and accompanying definitions.

The Consultation Paper proposes to amend the Prospectus Rules in light of the changes to Irish prospectus law as a result of the Prospectus Regulation and consolidate the Prospectus Rules into the IMC Rules. These proposed amendments and consolidation are intended to occur when the Prospectus Regulation is fully in application.

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

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

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

A copy of the Consultation Paper can be accessed here.

Central Bank of Ireland

(i) Central Bank fifth edition of questions and answers document on investment firms

On 8 October 2018, the Central Bank released the fifth edition to its question and answer document on investment firms.

The updated version contains a newly inserted question 'ID 1039', concerning the scope of the Markets in Financial Instruments Regulations 2017 ("**MiFID Regulations**") as it relates to the transferability of securities. In response to queries on the matter, the Central Bank has indicated that a determination as to whether securities are 'transferable securities' within the scope of the MiFID Regulations, requires an assessment of the services provided in light of the definition of 'investment instruments' in Section 2 of the Investment Intermediaries Act 1995. The Central Bank emphasised that in its view, the fact that the transferability of securities is restricted alone would not exclude those securities from the provisions of the MiFID Regulations.

The full question and answer document can be accessed here.

(ii) Central Bank issues Guidance Note on Completing an Application for Authorisation as a Retail Intermediary

On 12 October 2018, the Central Bank published a Guidance Note on Completing an Application for Authorisation as a Retail Intermediary (the "**Guidance Note**"). The Guidance Note will be of relevance to any applicant seeking authorisation as a retail intermediary to act as:

- An investment intermediary under the Investment Intermediaries Act 1995 (as amended);

- An insurance intermediary, ancillary insurance intermediary or reinsurance intermediary under the European Union (Insurance Distribution) Regulations 2018;

- A mortgage credit intermediary under the European Union (Consumer Mortgage Credit Agreements) Regulations 2016; or

- A mortgage intermediary under the Consumer Credit Act 1995 (as amended).

The Guidance Note provides a useful step by step guide on how to complete the different parts of the relevant Central Bank application form before submitting same via the Online Reporting System.

A copy of the Guidance Note can be found here.

(iii) Publication of Corporate Governance Requirements for Investment Firms and Market Operators 2018

On 5 November 2018, the Central Bank published its Corporate Governance Requirements for Investment Firms and Market Operators 2018 (the "**CG Requirements**"). The CG Requirements should be read in conjunction with the ESMA Guidelines on the management body of market operators and data reporting service providers of 28 September 2017, as well as the relevant legislative framework.

The CG Requirements will apply to:

- All firms and market operators authorised by Central Bank under - the European Union (Markets in Financial Instruments) Regulations 2017 (as amended); and

- Non-retail investment intermediaries authorised under the Investment Intermediaries Act, 1995 (as amended)

provided that the relevant firm is designated as either high impact, medium high impact or medium low impact by the Central Bank's Probability Risk Impact System ("**PRISM**") (each a "**Relevant Firm**").

Firms designated by the Central Bank as low impact are not obliged to comply with the CG Requirements, although the Central Bank encourages them to do so. Similarly, the CG Requirements will not apply to foreign subsidiaries of Irish firms. They are encouraged to adopt equivalent good corporate governance practices.

The CG Requirements will apply to Relevant Firms from July 1, 2019, and are stated to be conditions to which Relevant Firms are subject. We assume that the Central Bank will write to currently authorised Relevant Firms formally imposing such conditions in due course.

The CG Requirements impose new rules relating to board composition, the chairperson and board committees. The main obligations are addressed below.

- **Board Composition**: The Central Bank requires the board of a Relevant Firm to be of "sufficient size and expertise to adequately" oversee the operations of the Relevant Firm. It also requires that the board be made up of a majority of independent non-executive directors;

The CG Requirements define "director independence" as "the ability to exercise sound judgement and decision making independent of the views of management, political interests or inappropriate outside interests". The following criteria should be considered and given reasonable weight when assessing a director's independence under the CG Requirements:

- Any financial or other obligation the individual may have to the Relevant Firm or its directors;

- Whether the individual is or has been employed by the Relevant Firm or a group entity in the past and the post(s) so held;

- Whether the individual is or has been a provider of professional services to the Relevant Firm in the recent past;

- Whether the individual represents a significant shareholder;

- Circumstances where the individual has acted as an independent non-executive director of the Relevant Firm for extended periods;

- Any additional remuneration received in addition to the director's fee, related directorships or shareholdings in the Relevant Firm; and

- Any close business or personal relationship with any of the Relevant Firm's directors or senior employees.

By way of exception to the majority independent requirement, for Relevant Firms which are subsidiaries of groups, the majority of the board may be composed of a following combination subject to the PRISM Impact of the Relevant Firm:

- **High Impact Firms** - the majority of the board may be composed of group directors and independent non-executive directors provided that in all cases the Firm shall have at least three independent non-executive directors;

- **Medium High Impact Firms** - the majority of the board may be composed of group directors and independent non-executive directors provided that in all cases the Firm shall have at least two independent non-executive directors;

- **Medium Low Impact Firms** - the majority of the board may be composed of group directors and independent non-executive directors provided that in all cases the Firm shall have at least one independent non-executive director.

It should be noted that the Central Bank retains the discretion to require that the Relevant Firm to have a greater number of independent non-executive directors than specified above. Group directors are required to act critically and independently so as to exercise objective and independent judgement.

- **Chairperson**: A Chairperson must be appointed to the board and must have the "relevant financial services expertise, qualifications and experience, or be required to undertake comprehensive, relevant and timely training". The position must be filled by an independent non-executive director or, if the Relevant Firm is a subsidiary, a group director can be appointed as Chairperson.

- **Committees of the Board**: All Relevant Firms are required to establish an Audit Committee and a Risk Committee. Where a Relevant Firm is categorised as High Impact it must also establish a Remuneration Committee. The requirements applicable to each Committee varies, based on the PRISM rating of the Relevant Firm.

  For Medium Low and Medium High Impact firms, where the board comprises five or less members, the full board, including the Chairperson and the Chief Executive Officer, may act as the Audit Committee and/or the Risk Committee once that has been approved in advance and in writing by the Central Bank. The minutes of those meetings must reflect that the board was sitting as the Audit Committee or as the Risk Committee, as the case may be.

Relevant Firms should now commence preparation to make any necessary changes to their governance arrangements so that they can be fully implemented in the first half of 2019 while noting that a contravention of the CG Requirements may result in the imposition of administrative sanctions or the exercise of certain powers under the Fitness and Probity Regime by the Central Bank.

A copy of the CG Requirements can be accessed here.

(iv) Central Bank releases 2019-2021 Strategic Plan

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

- **Strengthening Resilience**: Involves monitoring the threats to financial stability and calibrating macro-prudential policy tools, delivering effective supervision of firms and markets that pose a threat, continuing to address existing vulnerability remaining from

the financial crisis, enhancing financial crisis preparedness and management capabilities and preparing for and managing the failure of relevant regulated firms in a manner that minimises disruption to the economy;

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

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

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

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

The full 2019-2021 Strategic Plan can be read here.

(v) Central Bank publishes its Funding Strategy and Guide to the 2018 Industry Funding Regulation

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

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

- **Section 1 - Funding Strategy**: an overview of the Central Bank's Funding strategy and important changes to the 2019 levy cycle;

- **Section 2 - Background to the 2018 Industry Funding Regulations**: set out the background to the levy and summarises the 2018 Industry Funding Regulations;

- **Section 3 - Significant Changes in 2018**: sets out the significant changes to the levy in 2018;

- **Section 4 - Calculation of the Industry Funding Levy**: explains how the levy is calculated for each industry funding category; and

- **Section 5 - Financial Information for Industry Sectors**: sets out the calculation of the levy rates for individual financial service providers, provides analysis of the cost of Financial Regulation in 2018 and explains how the net Annual Funding Requirement ("**nAFR**") is determined.

A copy of the Regulations can be accessed here and the Guide can be accessed here.

(vi) Central Bank updates on Technical Reporting arrangements for Transaction Reporting under MiFIR

On 15 November 2018, the Central Bank published an updated version of its operational and technical arrangements relating to transaction reporting under MiFIR (version 9.0) (the "**Transaction Reporting under MiFIR Guide**").

The Transaction Reporting under MiFIR Guide sets out the operational and technical arrangements for submitting transaction reports under MiFIR to the Central Bank systems.

The Central Bank notes that these instructions should be read in conjunction with the reporting instructions that are published on ESMA's website.

The Transaction Reporting under MiFIR Guide can be accessed here.

(vii) Central Bank publishes discussion paper on outsourcing

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

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

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

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

The Central Bank's discussion paper on outsourcing can be accessed here.

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

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

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

- Provides a high level of protection for investors and market participants.
- Is transparent as to the features of products and their market price.
- Is well governed (and comprises firms that are well governed).
- Is trusted, by both those using the market to raise funds and those seeking to invest.

- Is resilient enough to continue to operate its core functions in stressed conditions and to innovate appropriately as markets evolve.

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

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

The speech can be read in full here.

(ix) New Additional Supervisory Levy for Asset Management Firms

On 10 December 2018, the Central Bank announced that, with effect from 1 January 2019, it will apply an Additional Supervisory Levy ("**ASL**") to any Asset Management Firms authorised on or after that date, including MiFID firms, IIA firms, AIFMs or UCITS management companies.

The rate of the ASL payable by the relevant firm will depend on its PRISM rating which will be issued to the relevant firm by the Central Bank following its authorisation. The ASL must be paid in the first year of authorisation or approval by the Central Bank.

Further information relating to the new ASL is provided in an article published by Dillon Eustace entitled '*Central Bank of Ireland announces introduction of additional supervisory levy for asset management firms'*, which can be accessed here.

(x) Central Bank publishes updated Guidance and Questions & Answers on Investor Money Requirements

On 10 December 2018, the Central Bank published updated Guidance and Questions & Answers ("**Q&As**") on Investor Money Requirements. The investor money regime safeguards investor money by ensuring fund service providers adhere to general principles and prescriptive requirements.

The investor money requirements were updated to be consistent with Part 7 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2017 (SI 604 of 2017).

A copy of the Guidance on Investor Money Requirements can be accessed here and the Q&As on Investor Money Requirements can be accessed here.

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

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

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

A copy of the troubleshooting document can be found here.

Euronext (formerly the Irish Stock Exchange ("**ISE**"))

(i) Dillon Eustace publishes guide to listing investment funds on Euronext Dublin

On 30 October 2018, Dillon Eustace published a guide to listing investment funds on Euronext Dublin (the "**Guide**"). The Guide sets out a number of advantages that listing on Euronext Dublin offers, including:

- Distribution – Classification as "a security listed or traded on a regulated market" where listed on the Main Securities Market for pension funds, institutional investors and UCITS, or as a listed security for Global Exchange Market listings;
- Profile of the fund, Investment Manager and fund performance on Euronexts professional investor portal Fundhub;
- Transparency - All NAVs, financial reports and announcements of ongoing operational changes and other relevant market notifications made by listed funds are disseminated through Euronexts data feed to information vendors;
- Cost benefits - Low cost listing which also provides independent publication of NAVs for listed securities at no extra charge. Fees structured based on number of sub-funds rather than securities listed or capitalization;
- For ETF issuers – A passport to trading on the London Stock Exchange;
- A comprehensive set of listing rules;
- A commitment to aggressive timings on processing listing applications;
- Flexible and approachable listing regime;

- Provides a "stamp of regulation" for funds which may be domiciled in unregulated jurisdictions. The level of scrutiny imposed by Euronext on an initial and ongoing basis provides the market with a significant level of transparency and investor protection;

- A significant element of prestige and visibility, particularly as Ireland is a member of both the OECD and the EU; and

- Enables the security to be marked to market, i.e. to allow investors to refer to a quoted market price for their securities.

The Guide also provides a summary of the listing process, conditions for listing and the obligations imposed on listed funds by Euronext listing rules and various EU Directives, including the Market Abuse Directive.

For further information on listing investment funds on Euronext Dublin, Dillon Eustace's Guide can be accessed here.

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

(i) FATF publishes new Mutual Evaluations and Consolidated Ratings

For the period 1 October 2018 to 31 December 2018, FATF updated the consolidated assessment ratings which provide a summary of (1) the technical compliance and (2) the effectiveness of the compliance of the assessed parties against the 2012 FATF Recommendations using the 2013 Assessment Methodology. FATF also released new mutual evaluations for the same period.

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

(ii) FATF Recommendations October 2018 Update

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

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

The definition of '*virtual asset*' and '*virtual asset service provider*' were also added to the glossary in order to clarify how AML/CFT requirements apply in the context of virtual assets.

The revised FATF Recommendations can be accessed here.

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

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

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

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

The Report is accessible in full here.

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

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

The draft Decision amends Annex IX (Financial Services) to the EEA agreement by:

- Incorporating the revised Wire Transfer Regulation (EU) 2015/847 ("**WTR**"), the Fourth Money Laundering Directive ((EU) 2015/849) ("**MLD4**") and the Commission Delegated Regulation supplementing MLD4; and

- Extending the existing European Union policy under the WTR and MLD4 to Norway, Iceland and Liechtenstein.

On 27 December 2018, the Decision was adopted within the EEA Joint Committee amending Annex IX (Financial Services) to the EEA Agreement and was published in the Official Journal of the European Union.

The Decision can be accessed here.

(v) Calls for ESMA to produce guidelines to contain the risks of ICOs and crypto-assets

On 19 October 2018, the European Securities and Markets Stakeholder Group ("**SMGS**") published an own initiative report on initial coin offerings ("**ICO**") and crypto-assets. The purpose of the report is to advise ESMA on steps it can take to contain the risks for investors of ICOs and crypto-assets. The SMSG calls on ESMA to provide level 3 guidelines or supervisory convergence on:

- The interpretation of the MiFID definition of '*transferable securities*' and '*commodities*' clarifying whether transferable asset tokens that have features of transferable securities are, in certain situations, subject to the MiFID II Directive and the Prospectus Regulation;

- The interpretation of the multilateral trading facilities ("**MTF**") and organised trading facilities ("**OTF**") concepts, clarifying whether the organisation of a secondary market in asset tokens in certain situations is an MTF or and OTF;

- Whether asset tokens are MiFID financial instruments if the issuers organise a secondary market;

- The fact that when issuers of asset tokens are to be considered to organise an MTF or an OTF the Markets Abuse Regulation ("**MAR**") applies to such MTFs and OTFs;

- The fact that in all situations in which an asset token is to be considered a MiFID II financial instrument, persons giving investment advice on those asset tokens or executing orders in those asset tokens, are to be considered investment firms, which should have a license as such unless they qualify for an exemption.

The SMSG calls on ESMA to send a letter to the European Commission requesting the addition of these tokens to the MiFID list of financial instruments. The SMSG also urges ESMA to provide guidelines with minimum criteria for national authorities that operate or seek to operate a sandbox or innovation hub.

The SMGS's full report can be accessed here.

(vi) Fourth quarter update on Proposal for a Directive on the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences

For the period 1 October to 31 December 2018, the European Commission published updates to the Proposal for a Directive of the European Parliament and of the Council laying down rules for facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision (the "**Directive**").The update is in the form of an opinion from the European Economic and Social Committee ("**EESC**") addressed to the Council of the European Union.

The EESC is of the view that the proposal should strike a better balance between the fundamental rights of individuals and the need for better law enforcement in combating and prosecuting crime. The EESC called on the European Commission to regulate the purpose of access to the data contained in the national centralised bank account registries by: (i) limiting access to the data for preventive purposes to crimes that affect the collective and individual security of European citizens; and (ii) allowing access to the data for the purposes of detecting, investigating and prosecuting or recovering the proceeds of offences for all serious crimes.

The EESC also proposed that: (i) Article 17 of the Directive be supplemented with procedural provisions in respect of other European legislation on judicial cooperation and the exchange of financial information with third countries and (ii) for the definitions of 'law enforcement information' and 'serious criminal offences' in Article 2(f) and (l) to be amended to allow certainty and proportionality of the rules establishing the mechanisms for access to the financial data of EU citizens. The EESC's opinion can be accessed here.

On 5 December 2018, the General Secretariat of the Council published its "Mandate for negotiations with the European Parliament", with the amended draft Directive set out in the Annex.

The amended draft incorporates the proposals from the EESC referred to above, with the exception of Article 2 (l), which maintains the definition of 'serious criminal offences' as meaning the forms of crime listed in Annex I to Regulation (EU) 2016/794 of the European Parliament and of the Council. The latest draft of the Directive can be accessed here.

(vii) Final Version of guidance documents for securities and insurance sectors published by FATF

On 25 October 2018, FATF released the final version of its guidance on a risk-based approach ("**RBA**") for the securities sector and the final version of its guidance on a RBA for its insurance sector (the "**Guidance Documents**"). The purpose of the Guidance Documents is to support each respective sector in implementing a RBA. The Guidance Documents:

- Highlight the key principles involved in applying RBA to anti-money laundering ("**AML**") and counter-terrorist financing ("**CFT**");
- Assists countries, supervisors, providers of securities products and services and intermediaries with the risk-based design and implementation of applicable AML and CFT measures; and
- Supports development of a common understanding of what RBA to AML and CFT entails in the context of the sector.

The Guidance Documents were created in conjunction with the private sector following a consultation period in July 2018 and is to be read alongside other FATF papers and the FATF international standards.

The guidance relative to the securities sector can be accessed here and the guidance relative to the insurance sector can be accessed here.

(viii) FATF publishes its annual report for 2017-2018

On 29 October 2018, FATF published its annual report for 2017-2018. Particular focus areas of the report included:

- The agreement of a new Counter-Terrorist Financing Operational Plan in February 2018, to understand and respond to new and emerging threats;
- Financial innovation and its impact on AML/CFT, particularly focusing on the benefits of FinTech and RegTech;
- The importance of transparency and the availability of beneficial ownership information in combatting evolving AML/CFT risks and threats;
- The greater role which judges and prosecutors can adopt in combatting AML/CFT;
- A discussion on the implementation of international standards on combatting AML/CFT, including financial inclusion, information sharing, de-risking and countering proliferation financing;

The report also highlights the mutual evaluations which were undertaken in the 2017-2018 period and summarises the findings of these reports, including the FATF mutual evaluation report in respect of Ireland, which was published in September 2017 and can be found here.

FATF's 2017-2018 report is accessible here.

(ix) FATF publishes updated methodology for assessing technical compliance with the FATF recommendations and the effectiveness of AML/CFT systems

On 30 October 2018, FATF published its updated methodology for assessing compliance with the FATF recommendations and the effectiveness of AML/CFT systems.

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

- The technical compliance assessment, which addresses the specific requirements of the FATF Recommendations as they relate to the particular legal and institutional framework of a country and the powers and procedures of its competent authorities;

- The effectiveness assessment, which aims to assess the extent to which a country has produced results which comply with FATF standards and how successful it is in maintaining a strong AML/CFT system.

The FATF's updated methodology can be accessed here.

(x) Egmont Group publishes strategic plan for 2018-2021

On 30 October 2018, Egmont Group ("**EG"**) published their second strategic plan covering the period from 2018-2021. In the plan, EG outlines the following four strategic objectives which it will pursue during this period:

- Facilitating bilateral and multilateral exchanges of financial information – EG will focus on the development of multilateral exchange mechanisms, with the objective of promoting an operational database that would be accessible to all members in the long term;

- Strengthening the capabilities of Financial Intelligence Units ("**FIUs**") by adapting the programmes and activities of the Egmont Centre of FIU Excellence and Leadership to the diversity of regional and national realities;

- Expanding EG's field of knowledge to keep up-to-date with the changing financial landscape, including the introduction of new technologies and new actors outside of the regulatory framework, the reduction of cash transactions and the emergence of crypto-currencies;

- The development of new partnerships, including working towards expanding exchanges of views with private sector institutions.

The strategic plan for 2018-2021 is accessible here.

(xi) ESAs launches consultation on guidelines on co-operation and information exchange between NCAs under MLD4

On 8 November 2018, the European Supervisory Authorities ("**ESAs**") published a consultation paper on draft joint guidelines on co-operation and information exchange between national competent authorities ("**NCA**") supervising credit and financial institutions for the purposes of the Fourth Money Laundering Directive ("**MLD4**").

The purpose of the guidelines is to clarify the differences in supervisory cooperation and information exchange and create a framework that supports the effective anti-money

laundering ("**AML**") and counter terrorist financing ("**CFT**") cross-border supervision of firms. The proposed guidelines make the following provisions:

- That all NCAs identify those firms that require AML/CFT guidelines to be established;
- That a forum for co-operation and information exchange is established for a firm that operates in multiple jurisdictions; and
- Defines the process for bilateral exchanges of information between NCAs supervising firms only operating in two Member States;

The deadline for the feedback is on 8 February 2019.

The consultation paper can be accessed here.

(xii) Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union

On 12 November 2018, Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005 was published in the Official Journal of the European Union (the "**Regulation**"). The Regulation provides for a system of controls on cash entering or leaving the European Union, to complement the Fourth Anti-Money Laundering Directive.

In particular, the Regulation imposes obligations with regard to the declaration of accompanied cash and the disclosure of unaccompanied cash and provides national competent authorities with powers to verify compliance with these obligations. The Regulation also makes provision for the exchange of information between competent authorities of Member States and with the Commission and for the exchange of information with third countries.

The Regulation will apply from 2 June 2021, with the exception of Article 16 concerning the adoption of implementing acts by the European Commission, which applies from 2 December 2018.

The full Regulation can be accessed here.

(xiii) New Combating Money Laundering Directive published in the Official Journal of the European Union

On 12 November 2018, a new money laundering directive on combating money laundering by criminal law ("**Combating Money Laundering Directive**") was published in the Official Journal of the European Union. The Combating Money Laundering Directive complements the criminal law aspects of the Directive (EU) 2018/843, which amended Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

The Combating Money Laundering Directive introduces the following measures to fight the financing of terrorism:

- Minimum rules on the definition of criminal offences and sanctions across Member States;
- Provisions for holding legal entities liable for certain money laundering activities; and
- Elimination of obstacles to cross-border judicial and police cooperation.

The Combating Money Laundering Directive does not apply to money laundering with regard to property derived from criminal offences affecting the European Union's financial interests, which is subject to specific rules laid down in Directive (EU) 2017/1371 on the fight against fraud to the European Union's financial interests by means of criminal law.

In terms of next steps, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Combating Money Laundering Directive by 3 December 2020. The European Commission will:

- By 3 December 2022, submit a report to the European Parliament and the Council, assessing the extent to which Member States have taken the necessary measures to comply with this Directive; and
- By 3 December 2023, submit a report to the European Parliament and the Council assessing the added value of this Directive with regard to combating money laundering as well as its impact on fundamental rights and freedoms.

The Combating Money Laundering Directive can be accessed here.

(xiv) Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018

On 14 November 2018, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 was signed into Irish law (the "**Act**"). The Act transposes the remainder of the Fourth Money Laundering Directive into Irish law by amending the existing Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The Act applies to designated persons, which includes any person trading in goods that involve cash

transactions of at least €10,000. The Act introduces significant amendments to Irish anti-money laundering legislation, including with respect to the following:

- **Business risk assessments** – The Act introduces a new stand-alone requirement to carry out business risk assessments, independent of the requirement to have AML policies. Designated persons must now assess the level of risk of money laundering or terrorist financing ("**ML/TF**") involved in carrying out their own business activities. Designated persons must have regard to a variety of sources of guidance, such as National Risk Assessments. The business risk assessment must be approved by senior management, documented and kept up-to-date;

- **Customer Due Diligence** ("**CDD**") – A designated person is obliged to carry out CDD prior to establishing a business relationship or carrying out a transaction or at any time where the risk of ML/TF warrants their application. Regard must be had to a variety of matters, such as the business risk assessment, the National Risk Assessment and any guidelines issued by the ESAs. There is also a duty to verify the identity of persons acting on behalf of customers;

- **Simplified Due Diligence** ("**SDD**") – The Act departs from the previous approach, where SDD could be applied to specific categories of customers which had been identified as presenting low ML/TF risk by the relevant national authority. The Act now places the onus on the designated person to satisfy themselves that the customer presents a low ML/TF risk;

- **Enhanced Due Diligence** ("**EDD**") – The Act sets out an amended range of criteria for when EDD must be applied, including where the transaction is complex or unusually large, where the customer is a Politically Exposed Person (domestic or non-domestic), where the customer is established or resides in a high risk country or where the factors indicate a higher degree of risk;

- **Policies, Controls and Procedures** – The Act increases the list of matters which must be included in a designated person's ML/TF policies, controls and procedures and now requires groups of companies to have group-wide policies, controls and procedures in place.

The full Act can be accessed here.

(xv) European Commission publishes statement on regulating virtual currencies and ICOs

On 19 November 2018, the European Commission published a statement from Vice-President Valdis Dombrovskis on the regulation of virtual currencies and Initial Coin Offerings ("**ICOs**"). In the statement, Mr. Dombrovskis noted that the scope of EU anti-money laundering and anti-terrorism finance legislation has already been expanded to cover crypto-asset exchanges and wallet providers by virtue of the 5th Anti-Money Laundering Directive. However, he explained that whether the current EU financial

regulatory framework applies to crypto-assets depends on the specific characteristics of each crypto asset and how EU law is applied and supervised in national law.

Mr. Dombrovskis concludes that variances in the application of the existing laws across Member States is not good for the Single Market, investor protection and market integrity and states that the Commission will assess a possible way forward after the ESA's legal mapping exercise.

The Vice-President's statement can be found here.

(xvi) EBA publishes speech on its ongoing work in an AML/CFT context

On 21 November 2018, the EBA published a speech made by its Executive Director, Adam Farkas at the Tax3 Special Committee of the European Parliament.

In the speech, Mr. Farkas provides an update on the work being carried out by the EBA in the context of AML/CFT. The speech highlights the work being done jointly by the EBA, EIOPA and ESMA in fostering a common approach to risk based AML supervision under the Fourth Money Laundering Directive, with existing policy products including:

- Guidelines on AML Risk factors and simplified and enhanced customer due diligence;
- Risk-based supervision guidelines for competent authorities;
- An opinion on innovative solutions available for customer due diligence.

The EBA is currently reviewing the Risk Factor Guidelines and will review the Guidelines on the risk-based approach next year. The EBA is also developing a cooperation agreement between ECB and national authorities and own initiative guidelines on cooperation between AML competent authorities in order to facilitate effective cooperation and information sharing across the EU.

With regard to the EBA's future role, the EBA welcomed a number of proposals made by the European Commission in a September 2018 communication, including:

- The centralisation of resources and expertise currently divided across the three ESAs at the EBA;
- The need for the EBA to be provided with an explicit mandate to specify the modalities of cooperation and information exchange;
- The proposal for the EBA to carry out periodic independent reviews on AML issues and to report its finding to the Council, Commission and Parliament;
- The proposal for the EBA to become the data-hub on AML supervision in the Union;

- The proposal that the EBA will carry out a risk assessment exercise to test strategies and resources in the context of the most important emerging AML risks.

A copy of the speech can be accessed here.

(xvii) New statutory requirement for certain "Schedule 2 firms" to register with the Central Bank for anti-money laundering purposes

On 26 November 2018, Section 108A of the Criminal Justice (Money Laundering and Terrorist Financing), (Amendment) Act 2018 introduced a new statutory requirement for certain firms, identified as "Schedule 2 firms", to register with the Central Bank for anti-money laundering purposes.

The new requirement obliges unregulated entities engaging in any of the below "Schedule 2 Activities" to register with the Central Bank unless they qualify for an exemption:

- Lending including inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting).

- Financial leasing.

- Payment services as defined in Article 4(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

- Issuing and administering other means of payment (e.g. travellers' cheques and bankers' drafts) insofar as such activity is not covered by point 3.

- Guarantees and commitments.

- Trading for own account or for account of customers in any of the following:

  a. Money market instruments (cheques, bills, certificates of deposit, etc.)
  b. Foreign exchange
  c. Financial futures and options
  d. Exchange and interest-rate instruments
  e. Transferable securities.

- Participation in securities issues and the provision of services relating to such issues.

- Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings.

- Money broking.

- Portfolio management and advice.
- Safekeeping and administration of securities.
- Safe custody services.
- Issuing electronic money.

Unregulated entities do not have to register with the Central Bank for anti-money laundering purposes where they fall into any of the following two exemptions:

- If the firm is one which only carries out Schedule 2 Activity 6 above (i.e. trading on own account) and the firm's customers (if any) are members of the same group as the firm; or
- If, cumulatively:

  a. The firm's annual turnover is less than €70,000, and
  b. The total of any single transaction, or serious of linked transactions in relation to the firm's Schedule 2 activities does not exceed €1,000, and
  c. The firm's Schedule 2 activities do not exceed 5% of the firm's total turnover, and
  d. The firm's Schedule 2 activities are directly related to and ancillary to the firm's main business activities, and
  e. The firm only provides Schedule 2 activities to customers of their main business activities, rather than the public in general.

Where a firm engages in any of the above Schedule 2 Activities and does not qualify for an exemption from the obligation to register, the firm must complete a Schedule 2 Registration Form for Anti-Money Laundering Purposes, which can be accessed here.

The Central Bank has published guidance for completion of the form, which can be accessed here.

Further information on the requirement can be found in a Dillon Eustace article titled "*AML/CTF: New Registration Requirements*", which can be accessed here.

(xviii) Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Section 25) (Prescribed Class of Designated Person) Regulations 2018 [S.I. No. 487 of 2018]

On 27 November 2018, the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Section 25) (Prescribed Class of Designated Person) Regulations 2018 [S.I. No. 487 of 2018] was published in Iris Oifigiúil (the "**Regulations**").

The Regulations modify the definition of "occasional transaction" in section 24 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) so that the reference in paragraph (a) of that definition to "*a person referred to in section*

25(1)(h)" is to be read as including providers of gambling services. For the purposes of the Regulations, "*gambling services*" means gambling services within the meaning of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 other than:

- Poker games provided at a physical location other than a casino or private members' club;
- Lotteries within the meaning of the Gaming and Lotteries Act 1956; and
- Gaming machines (within the meaning of section 43 of the Finance Act 1975) or amusement machines (within the meaning of section 120 of the Finance Act 1992) provided in accordance with section 14 of the Gaming and Lotteries Act 1956.

The Regulations can be accessed in full here.

(xix) Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders

On 28 November 2018, Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders (the "**Regulation**") was published in the Official Journal of the European Union. The Regulation governs the manner in which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State.Features of the Regulation include the introduction of:

- A single set of rules on freezing and confiscation orders directly applicable throughout the European Union;
- A deadline of 45 days for the recognition of a confiscation order and in urgent cases a deadline of 48 hours for the recognition and 48 hours for the execution of freezing orders; and
- The general principle of mutual recognition, meaning that all judicial principles in criminal matters taken in one European Union country will normally be directly recognised and, enforced by another Member State.

In particular, the Regulation sets down rules relating to the transmission, recognition and execution of freezing orders, the grounds for non-recognition, non-execution or postponement of execution of freezing orders, time limits for recognition and execution of freezing orders and the duration of freezing orders. It then deals with similar issues with respect to the transmission, recognition and execution of confiscation orders. Annex 1 and Annex 2 to the Regulation set out a standard form freezing certificate and confiscation certificate, which the issuing authority shall complete when transmitting a freezing or confiscation order.

The Regulation shall apply from 19 December 2020, with the exception of Article 24 (the obligation on Member States to notify the Commission of the identification of the issuing authority and the executing authority), which applied from 18 December 2018.

The full Regulation can be accessed here.

(xx) FATF Report to the G20 Leaders' Summit

On 3 December 2018, FATF published its report to the G20 Leaders' Summit (the "**Report**"). The Report highlights work conducted or to be conducted by FATF in a number of areas, including:

- The initiation of the mid-term review of the 2012-2020 Mandate in 2016, with the view to strengthening FATF's institutional basis, governance and legal status – FATF Ministers will have an opportunity to consider the revised mandate in April 2019;

- FATF's work programme on virtual assets – FATF will consider whether and how to provide further clarifications about which activities the FATF standards apply to in this context in February 2019 and will update its *2015 Risk-based Approach Guidance on Virtual Currencies* by June 2019;

- FATF will prioritise work on implementation, guidance and training, in support of the new Operational Plan enhancing global efforts against terrorist financing published in February 2018. FATF will also improve the implementation of the FATF standards by holding countries accountable for failures to address their deficiencies;

- FATF will consider whether and how to expand the FATF standards to include a wider range of measures applicable to countering proliferation financing;

- FATF will publish guidance on the risk-based approach for lawyers, accountants and trust and companies service providers by June 2019, to clarify when such professionals should apply safeguards in a risk-based manner to prevent the misuse of their services by criminals;

- FATF is preparing guidance on the application of the FATF Recommendations in a digital ID context;

- FATF is conducting a global survey to analyse measures taken by countries to improve their supervisory practices, domestic co-ordination and co-operation and risk-based approach in the remittance sector;

The full Report can be accessed here.

(xxi) European Council adopts conclusions on AML Action Plan

On 4 December 2018, the European Council published a press release setting out its conclusions on an Anti-Money Laundering Action Plan ("**AML Action Plan**"). The press release outlines the following 8 key objectives which are addressed by the short-term legislative actions:

- Identification of the factors that contributed to the recent money laundering cases in EU banks, to better inform possible additional actions in the medium and long term;
- Mapping of relevant money laundering and terrorist financing risks and the best prudential supervisory practices to address them;
- Enhancement of supervisory convergence and improvement of procedures to take into account AML aspects in the prudential supervisory process;
- Enabling effective cooperation between prudential and money laundering supervisors;
- Clarification of aspects related to the withdrawal of a bank's authorisation in case of serious breaches;
- Improvement of supervision and exchange of information between relevant authorities;
- Sharing of best practices and finding grounds for convergence among national authorities;
- Improvement of the European supervisory authorities' capacity to make better use of existing powers and tools.

In particular, the Council's conclusions:

- Urge all Member States to swiftly complete the implementation of the 4th AML Directive and to transpose the 5th AML Directive before the 2020 deadline;
- Underline the importance of strengthening the EU legislative framework as well as the need to take non-legislative actions, including proceeding with the AML action plan as set out in the Annex to the conclusions.
- Invite the Commission to propose longer-term actions to bring about further improvements in the prudential and AML frameworks identified on the basis of a thorough assessment. This assessment should be presented to the Council, at the latest in Q3 2019;
- Welcome the Commission's communication and proposal of 12 September 2018 on an EU framework for prudential and AML supervision for financial institutions.

A copy of the press release can be accessed here and the Council's full conclusions can be found here.

(xxii) BPFI declare support for Europol's EMMA campaign to combat money laundering

On 5 December 2018, the Banking & Payments Federation Ireland ("**BPFI**") issued a press release in which it communicated its support for Europol's European Money Mule Action ("**EMMA**") campaign. The EMMA campaign involves a combination of the financial sector, law enforcement agencies and other key stakeholders such as the European Banking Federation joining forces in order to tackle the illegal activity of money muling across borders.

The press release sets out the following facts about Europol's fourth EMMA campaign:

- 168 people have been arrested and 1,504 money mules and 140 money mule organisers identified.
- The action took place over the course of three months (September-November 2018).
- 30 Member States took part in EMMA, alongside Europol, Eurojust, the European Banking Federation and more than 300 banks.

The press release can be accessed here.

(xxiii) ECB publishes opinion on the amended proposal for an Omnibus Regulation

On 7 December 2018, the ECB published an opinion on the amended proposal for an Omnibus Regulation (the "**Opinion**"). The Opinion is in response to requests received by the ECB from the European Parliament and the European Council on 11 October and 14 November for an opinion on the amended proposal. In particular, the Opinion outlines the following observations from the ECB:

- The ECB fully supports the amended proposal's objective of reinforcing the European Banking Authority ("**EBA**") in the prevention of the use of the financial system for money laundering ("**ML**") and terrorist financing ("**TF**") purposes;
- The ECB highlights the need for clarification that the new reporting requirement captures any material weaknesses that increase the risk that the financial system could be used for ML or TF;
- The EBA should develop guidelines to facilitate reporting, including templates;
- The amended proposal should clarify that reporting to the EBA and the subsequent dissemination of information by the EBA does not replace the direct exchange of information among competent authorities;

- The amended proposal should clarify the manner in which the EBA should be coordinating with the Financial Intelligence Units in respect of the provision of information to the EBA;

- The amended proposal should provide further clarification on the EBA's role in promoting convergence of supervisory processes and risk assessments on competent authorities; and

- The amended proposal should grant the EBA the power to assist the competent authorities in cooperating with relevant authorities in third countries where relevant, although it should not require the EBA to automatically assume a leading role in facilitating such cooperation.

The ECB's Opinion can be read in full here.

(xxiv) Council of the European Union agrees position on revised AML proposal for Omnibus Regulation

On 19 December 2018, the Council of the European Union published a press release reporting that it has agreed its negotiating position in relation to the revised legislative proposal for the Omnibus Regulation on reforms to the European System of Financial Supervision ("**ESFS**"). The press release states, that the EBA will be given responsibility for the following tasks:

- Collect information from National Competent Authorities ("**NCAs**") relating to weaknesses identified to prevent or fight money laundering and terrorist financing;

- Enhance the quality of supervision by developing common standards and co-ordinating between national supervisory authorities;

- Perform risk assessments on NCAs to evaluate their strategies and resources to address the most important emerging AML risks;

- Facilitate co-operation with non-European Union countries; and

- Address decisions directly to individual banks, if national authorities do not act.

A copy of the press release can be accessed here.

(xxv) EFAMA welcomes Council of the European Union agreement on enhanced EBA

On 20 December 2018, the European Fund and Asset Management Association ("**EFAMA**") issued a press release welcoming the agreement reached by the Council of the European Union on enhanced EBA powers in order to reinforce consistent implementation of the European Union AML legislative framework and monitoring of the risks posed to the financial sector by money laundering activities and supports the Council

of the European Union's suggestion to require the prior consent of ESMA for any decision affecting financial market participants falling within its mandate.

A copy of the press release can be accessed here.

(xxvii) Central Bank publishes Consultation Paper on Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector

On 21 December 2018, the Central Bank published its 'Consultation Paper on Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector' ("**CP 128**").

The Central Bank is proposing to introduce guidelines (the "**Guidelines**") in order to assist credit and financial institutions in understanding their AML/CFT obligations, following the enactment of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018.

The Central Bank invites general feedback on the Guidelines and responses to the specific questions contained in CP 128 from interested stakeholders.

The consultation period commenced on 21 December 2018 and will close on 5 April 2019.

A copy of CP 128 can be accessed here and the Guidelines can be accessed here.

Anti-Corruption Legislation & Law Reform

(i) Law Reform Commission launches report on regulatory powers and corporate offences

On 23 October 2018, the Law Reform Commission announced the launch of its report on Regulatory Powers and Corporate Offences (the "**Report**"). The Report acknowledges the effectiveness of legislative reforms at national and European Union level in the aftermath of the 2008 global financial crisis and makes over 200 further recommendations for reform on regulatory powers and offences. The recommendations set out in the Report include:

- The establishment of a fully resourced multidisciplinary Corporate Crime Agency with powers to: (i) investigate corporate offences; (ii) impose administrative financial sanctions; and (iii) enter into regulatory settlements;

- The amendment of the Criminal Justice (Theft and Fraud Offences) Act 2001, to expressly include recklessness in order to address egregiously reckless risk-taking behavior on the part of senior banking executives;

- The introduction of deferred prosecution agreements ("**DPA**") modelled after the United Kingdom's DPA system;

- The introduction of a condition which provides that senior managers can only be convicted for corporate offences of a regulatory nature where the senior managers have not implemented suitable risk management policies and procedures;

- The introduction of provisions that allows legal advice obtained by a corporate body in advance of taking a certain action to be considered as a mitigating factor in sentencing rather than a defense to prosecution;

- The establishment of a Regulatory Guidance Office that functions in a manner similar to the Better Regulation Unit in the Office of the Toaiseach; and

- The retention of the current system where most corporate trials on indictment are dealt with in the Circuit Criminal Court.

The Report underscored the importance of financial and economic regulators having robust and comprehensive powers to discharge their functions effectively while also acknowledging that a significant number of convictions of senior bank executives have been obtained under the current legal framework.

Dillon Eustace has published more expansive commentary on the Report which can be accessed here and the Law Commission's Report can be accessed in full here.

(ii) Financier Worldwide interview Dillon Eustace on the Criminal Justice (Corruption Offences) Act 2018

In its December edition, Financier Worldwide published the text of an interview (the "**Interview**") conducted with Muireann Reedy from Dillon Eustace on the Criminal Justice (Corruption Offences) Act 2018 (the "**Act**"). The objective of the Act is to modernise Ireland's anti-corruption laws to assist in tackling white-collar crime in Ireland.

The Interview highlights the key provisions of the Act, such as section 18, which introduces a strict liability offence whereby a company can be criminally liable for corruption offences committed by certain personnel, employees, subsidiaries and agents where the act was done with the intention of obtaining business or business advantage for the firm. In a departure from the previous framework, the Act now provides for criminal liability where personnel within or connected to a firm commit an offence to benefit the company.

Companies are recommended to have clear and comprehensive anti-bribery and anti-corruption policies in place, which should be reviewed and approved by senior management regularly. The Interview also details the need to provide all personnel working for a company with training on anti-corruption policies and on how to respond to suspected corruption.

Where a company has acted contrary to the provisions of the Act, the Interview highlights the importance of co-operation in the investigation or prosecution. Anti-corruption policies

and procedures may also assist in the defence of a charge, but only if they are sufficiently comprehensive and have been complied with. In the event of prosecution, the Interview also outlines potential sanctions which may be faced by non-compliant parties.

A full copy of the interview is available here.

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

(i) Non-legislative resolution on distributed ledger technologies and blockchains adopted by European Commission

On 3 October 2018, the European Parliament adopted a non-legislative Resolution on distributed ledger technologies ("**DLT**") and blockchains (the "**Resolution**") in a plenary sitting. The Resolution considers the potential benefits that DLT-based applications could have on various sectors of the economy including the energy, transport, healthcare, education and the financial services sector and recommends a regulatory approach.

With respect to the public sector, the Resolution calls on the European Commission to assess the potential scenarios of a wider uptake of public DLT-based networks on the structure of public governance and the role of public sector institutions.

The Resolution highlights the potential impact DLT-based applications can have on digital identification and calls on the European Commission and or the European Data Protection Supervisor to, amongst other things, provide further guidance to ensure that DLT users are compliant with EU legislation and the General Data Protection Regulation.

The Resolution also emphasises the volatility and uncertainty relating to cryptocurrencies. It calls on the European Commission and the ECB to explore the sources of volatility, identify dangers and consider the possibility of incorporating cryptocurrencies into the European payment system.

With respect to smart contracts, the Resolution recognizes the potential for DLT-based applications to facilitate a wide uptake in the use of smart contracts and calls on the European Commission to, in particular, promote the development of technical standards with relevant international organisations.

The Resolution invites the European Commission to examine ways to enhance investor protection as it relates to initial coin offerings ("**ICO**"), with a particular focus on the disclosure requirements and obligations. The European Parliament calls on the European Commission to create an Observatory for the monitoring of ICOs and suggests the development of a model framework of regulatory sandboxes and a code of conduct.

Finally, the Resolution underscores the importance of enlightening European Union citizens about DLT-based applications and urges the European Commission to adopt a proactive approach towards inclusive participation of all European citizens in the paradigm shift.

The Resolution can be read in full here.

(ii) CyberScams Awareness Campaign gleans the support of the Banking & Payment Federation Ireland

On 17 October 2018, the Banking & Payments Federation Ireland ("**BPFI**") published a press release announcing its support of Europol and the *'European Banking Federation in the Pan-European #CyberScams Awareness Campaign'* (the "**Campaign**") as part of European Cyber Security Month. The Campaign aims to raise awareness among the general public on how to identify the various deception techniques used by cybercriminals to scam victims.

The Campaign warns that cybercriminals are increasingly turning to social engineering to obtain personal data and financial account information. Victims are also regularly being lured into making illegitimate payments and a host of other activities that could harm the victims and or their finances.

The Campaign has listed the following tactics as the most common techniques used by cybercriminals:

- **CEO Fraud**: The scammer impersonates a victim's Chief Executive Officer or another senior representative of the firm and instructs the victim to make an illegitimate payment or transfer of funds;

- **Invoice Fraud**: The scammer impersonates a legitimate client/vendor and instructs a victim to pay illegitimate invoices into a different bank account;

- **Phishing/Smishing/Vishing**: The scammer calls, sends and email or text message that requests a victim's personal, financial or security information;

- **Spoofed bank website fraud**: The scammer sends an email with a link to the spoofed website. The spoofed website appears to be legitimate with only small differences. Once the victim clicks on the link, various methods are used to collect a victim's personal and financial data;

- **Romance scam**: The scammer pretends to have a romantic interest in the victim. Various platforms are used to lure victims, including dating websites, social media or email;

- **Personal data theft**: The scammer harvests the victim's personal data via social media channels; and

- **Investment and online shopping scams**: The scammer presents the victim with smart investment opportunities or other great online offers which are fake.

The Campaign recommends the following steps to stay safe while using the internet:

- Be cautious about the amount of personal information shared on social network sites;
- Check online accounts regularly;
- Be mindful that phishing (i.e. via email), smishing (i.e. via sms) and vishing (i.e. via voice call) are the most common social engineering attacks targeting bank customers;
- Check bank account activity and balances regularly and report any suspicious activity;
- Perform online payments only on secure websites (check the URL bar for the padlock and https) and using secure connections (choose a mobile network instead of public WiFi);
- Remember that a bank will never ask a customer for sensitive information (e.g. online account credentials);
- Remember that if an offer sounds too good to be true, it's almost always a scam;
- Keep personal information safe and secure; and
- If you believe you have provided your account details to a scammer, contact your bank immediately. Always report any suspected fraud attempt to the police, even if you did not fall victim to the scam.

The press release can be accessed in full here.

(iii) Financial industry groups launch the financial data exchange to enhance consumer financial data protection

On 18 October 2018, financial institutions, Fintech firms and industry groups launched a non-profit organisation, the Financial Data Exchange ("**FDX**"), to unify the financial sectors' efforts around the secure exchange of financial data. The FDX introduces an interoperable standard and operating framework centred on an application programming interface ("**API**"), referred to as the Durable Data API ("**DDA**").

The DDA grants consumers increased control over the use of their personal financial data through improved access authorisation options. Financial institutions will then be able to share that data with Fintech companies through a simplified and secure process. The result being that Fintech companies will only have access to consumer financial data that is essential to the services they provide.

Financial institutions, Fintech companies and other industry groups who wish to support the development of protocols for data sharing, security standards and other FDX activities are now invited to join the FDX.

The press release announcing the launch of FDX can be access here.

(iv) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC

On 23 October 2018, Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by EU institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC was published in the Official Journal of the European Union (the "**Regulation**").

The objective of the Regulation is to bring the data protection rules for EU institutions and bodies in line with the standards imposed on organisations and businesses by the GDPR. The Regulation requires EU institutions to process personal data fairly, lawfully and only for legitimate purposes. It details a number of specific rights for data subjects, reflecting the rights enumerated in the GDPR. These rights include:

- A right to transparent information, communication and modalities for the exercise of the rights of the data subject;
- A right to access personal data processed by an EU institution or body;
- A right to rectification of inaccurate or incomplete information;
- A right to be informed about the fact that the data subject's data has been processed, the purpose for which it was processed and the identity of the controller;
- A right to erasure of personal data;
- A right to restriction of processing in certain circumstances;
- A right to data portability;
- A right to object to the processing of personal data concerning a data subject;
- A right not to be subject to a decision based solely on automated processing, including profiling.

The European Data Protection Supervisor is responsible for monitoring the application of the provisions of the Regulation to all processing operations carried out by an EU institution or body and welcomed the adoption of the Regulation in a press release which can be accessed here.

The Regulation can be accessed in full here.

(v) EBF issues response to EC Proposal for a regulation establishing the European Cybersecurity Competence Centre

On 12 November 2018, the European Banking Federation (the "**EBF**") issued a response to the European Commission's proposal for a regulation establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres. The EBF highlighted the potential for the initiative to play an important part in Europe's cyber independence and to be a strong lever to help increase the maturity of the IT security market and related users.

The EBF outlined the following issues for EU institutions to take into account when establishing the centre:

- The objectives and tasks of the centre should include the supporting of European training networks to train more experts at national level and increase the general cybersecurity awareness level of workforces and businesses;

- The strong advantage that can be gained from establishing a steady dialogue between the financial industry, the Competence Centre, the National Coordination Centres and the Cybersecurity Competence Community (the "**Community**"). The EBF therefore requested a confirmation that associations representing sectors of the financial industry are included in the scope of the criteria for membership to the Community.

- The EBF also requested clarification as to whether subsidiaries of non-EU companies can be accepted as members of the Community and, if not, it proposed that a process should be created whereby the input of non-EU companies as main current leaders in the field can be incorporated within the new scheme.

The EBF's response can be accessed here.

(vi) FSB publishes Cyber Lexicon

On 12 November 2018, the FSB published the final version of its Cyber Lexicon, which comprises of a set of approximately 50 core terms related to cyber security and cyber resilience in the financial sector. The Cyber Lexicon is intended to support the work of the FSB, regulators and financial institutions in the following areas:

- Cross-sector common understanding of relevant cyber security and cyber resilience terminology;

- Work to assess and monitor financial stability risks of cyber risk scenarios;

- Information sharing; and

- Work by the FSB and/or other standard setting bodies to provide guidance related to cyber security and cyber resilience, including identifying effective practices.

The Annex to the Cyber Lexicon contains a full list of terms and definitions to assist the work of standard-setting bodies as well as financial sector regulators, supervisors and private sector participants to address cyber security and cyber resilience in the financial sector.

A copy of the Cyber Lexicon can be accessed here.

(vii) European Commission updates questions and answers document on the framework for the free flow of non-personal data

On 14 November 2018, Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (the "**Regulation**") was published in the Official Journal of the European Union. The Regulation aims to remove obstacles to the free movement of non-personal data and to ensure:

- The free movement of non-personal data across borders;
- The availability of data for regulatory control purposes;
- The development of European Union codes of conduct in respect of the conditions under which users can port data between cloud service providers and back into their own IT environments to facilitate switching of cloud service providers for professional users;

The Regulation entered into force on 4 December 2018 and applies six months after the publication date.

For the period 1 October to 31 December 2018, the European Commission updated its questions and answers document on the Regulation. The update comprises responses to the following four questions in relation to:

- **What will change with the newly agreed Regulation?** – Clarifies that once the Council of the European Union adopts the proposal, Member States will have six months to apply the new rules.
- **Why is the scope of the Regulation limited to non-personal data?** - Clarifies that the General Data Protection Regulation ("**GDPR**") already provides for the free movement and portability of personal data within the European Union.
- **Are data flows with non-European Union countries also covered? -** Clarifies that the Regulation on the free flow of non-personal data does not extend beyond the European Union; and
- **How will the Regulation affect the public sector?** – Clarifies that: (i) public authorities have the choice but are not forced to outsource data to cloud service

providers; (ii) public authorities should refrain from requiring the localisation of data processing on their own territory, except when clearly justified for reasons of public security; and (iii) the Regulation does not apply to the internal organisation of data processing among public authorities and bodies without contractual remuneration of private parties.

The revised questions and answers document can be accessed in full here and the Regulation can be accessed here.

(viii) Data Protection Commission publishes list of types of data processing operations which require a Data Protection Impact Assessment

On 15 November 2018, the Data Protection Commission ("**DPC**") published a report which outlines of the types of data processing operations which require a Data Protection Impact Assessment ("**DPIA**").

Article 35 of the General Data Protection Regulation ("**GDPR**") requires that a DPIA is conducted by a controller where a type of data processing is likely to result in a high risk to the rights and freedoms of individuals. The DPC has declared that a DPIA is mandatory for the following types of processing operation where a documented screening or preliminary risk assessment indicates that the processing operation is likely to result in a high risk to the rights and freedoms of individuals:

- Use of personal data on a large-scale for a purpose(s) other than that for which it was initially collected pursuant to GDPR Article 6(4);
- Profiling vulnerable persons including children to target marketing or online services at such persons;
- Use of profiling or algorithmic means or special category data as an element to determine access to services or that results in legal or similarly significant effects;
- Systematically monitoring, tracking or observing individuals' location or behaviour;
- Profiling individuals on a large-scale;
- Processing biometric data to uniquely identify an individual or individuals or enable or allow the identification or authentication of an individual or individuals in combination with any of the other criteria set out in WP29 DPIA Guidelines;
- Processing genetic data in combination with any of the other criteria set out in WP29 DPIA Guidelines;
- Indirectly sourcing personal data where GDPR transparency requirements are not being met, including when relying on exemptions based on impossibility or disproportionate effort;

- Combining, linking or cross-referencing separate datasets where such linking significantly contributes to or is used for profiling or behavioural analysis of individuals, particularly where the data sets are combined from different sources where processing was/is carried out for difference purposes or by different controllers; and

- Large scale processing of personal data where the Data Protection Act 2018 requires "suitable and specific measures" to be taken in order to safeguard the fundamental rights and freedoms of individuals.

The report also lists a number of exemptions to the requirement that the controller conduct a DPIA, where:

- Processing operations do not result in a high risk to the rights and freedoms of individuals;

- Processing was previously found not to be at risk by DPIA;

- Processing has already been authorised by supervisory authority;

- Processing pursuant to point (c) or (e) of Article 6(1) already has an existing clear and specific legal basis in EU or Member State law and where a DPIA has already been carried out as part of the establishment of that legal basis as per Article 35(10);

- Processing is performed as part of an impact assessment arising from a public interest basis and where a DPIA was an element of that impact assessment (Art 35(10)); and/or

- Where a supervisory authority chooses to enumerate the processing operation in accordance with GDPR Article 35(5).

The DPC's publication can be accessed here.

(ix) EDPB publishes updated guidelines regarding certification criteria under the GDPR

On 23 November 2018, the European Data Protection Board (the "**EDPB**") published an updated version of its 'Guidelines on certification and identifying certification criteria in accordance with Articles 42 and 43 of the GDPR' (the "**Guidelines**").

The objective of the Guidelines is to identify overarching criteria that may be relevant to all types of certification mechanisms issued in accordance with Articles 42 and 43 of the GDPR. The Guidelines:

- Explore the rationale for certification as an accountability tool;

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

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

According to the Guidelines, the advice therein is relevant for:

- Competent supervisory authorities and the EDPB when approving certification criteria;
- Certification bodies when drafting and revising certification criteria prior to submission to the competent supervisory authority for approval;
- Supervisory authorities, when drafting their own certification criteria;
- The European Commission, which is empowered to adopt delegated acts for the purpose of specifying the requirements to be taken into account for certification mechanisms;
- The EDPB when providing the European Commission with an opinion on the certification requirements;
- National accreditation bodies, which will need to take into account certification criteria with a view to the accreditation of certification bodies; and
- Controllers and processors when defining their own GDPR compliance strategy and considering certification as a means to demonstrate compliance.

A copy of the updated Guidelines is available here.

(x) Data Protection Commissioner's Final Report published

On 23 November 2018, the Data Protection Commissioner's Final Report (the "**Report**") was published. The Report covers the period from 1 January 2018 to 24 May 2018 at which point the office of the Data Protection Commissioner (the "**Commissioner**") ceased and the new Data Protection Commission ("**DPC**") was established under the Data Protection Act 2018. The highlights of the Report included:

- 1,249 complaints were received by the Commissioner, with the largest single category being access rights. 12 formal decisions were made and 1,198 valid data security breaches were recorded;
- The Special Investigations Unit completed its investigation into the processing of patient sensitive personal data in areas of hospitals in Ireland to which patients and the public have access and its investigation examining the governance by TUSLA of the handling of personal data concerning child protection cases.
- Prosecutions were concluded for offences in respect of direct marketing;

- 23 audits/inspections were carried out;

- The High Court requested a preliminary ruling from the Court of Justice of the European Union on specific questions related to the validity of standard contractual clauses facilitating EU-US data transfers;

- A dedicated GDPR Awareness and Training Unit continued to raise awareness of GDPR requirements and a May 2018 survey highlighted that over 90% of businesses were aware of the GDPR.

A copy of the full Final Report can be accessed here.

(xi) EDPB publishes draft guidelines on the territorial scope of the GDPR

On 23 November 2018, the EDPB published its draft guidelines on the territorial scope of the GDPR for public consultation (the "**Guidelines**"). The objective of the Guidelines is to ensure a consistent application of the GDPR when assessing whether particular processing by a controller or a processor falls within the scope of the EU legal framework.

Article 3 of the GDPR defines the territorial scope of the Regulation on the basis of the "establishment" criterion in Article 3(1) and the "targeting" criterion in Article 3(2). The provisions of the GDPR will apply to the processing of personal data by the controller or processor where either criterion is met.

The Guidelines begin by discussing the application of the establishment criterion by examining the definition of an 'establishment' in the EU, what is meant by processing personal data "in the context of the activities of" an establishment in the EU. The EDPB clarifies that the GDPR will apply regardless of whether the processing takes place in the EU or elsewhere.

The EDPB then assesses the application of the "targeting" criterion and recommends a twofold approach, whereby it is firstly determined whether the processing relates to personal data of data subjects who are in the EU and, secondly, whether it relates to the offering of goods or services or to the monitoring of data subjects' behaviour in the EU. The EDPB notes that the requirement that the data subject be located in the EU must be assessed at the moment when the relevant trigger activity takes place, regardless of the duration of the offer made or monitoring undertaken. The processing of personal data of an individual in the EU alone is not sufficient for the GDPR to apply to processing activities of a controller or processor not established in the EU and the element of "targeting" individuals in the EU is required.

The Guidelines confirm the application of the GDPR to personal data processing carried out by EU Member States' embassies and consulates, insofar as such processing falls within the material scope of the GDPR, as defined in Article 2. The EDPB also provides guidance on the obligation imposed on data controllers or processors who are not established in the EU to designate a representative in the EU, particularly in respect of the process of

designation, exemptions from the obligation, establishment obligations and the obligations and responsibilities of the representative.

The EDPB welcomes comments on the Guidelines which should be addressed to the EDPB no later than 18 January 2019 via EDPB@edpb.europa.eu, a full copy of the Guidelines is available here.

(xii) European Payments Council publish 2018 Payment Threats and Fraud Trends Report

On 1 December 2018, the European Payments Council ("**EPC**") published its Payment Threats and Fraud Trends Report for 2018 (the "**Report**"). The Report provides an overview of the most significant threats in the payments landscape, including social engineering and phishing, malware, Advanced Persistent Threats ("**APTs**"), mobile device related attacks, (Distributed) Denial of Service ("(**D)DoS**"), botnets and threats related to cloud services, big data, Internet of Things ("**IoT**") and virtual currencies.

The Report analyses the impact and context of each threat and outlines the main controls and mitigation measures to deal with them. The Report also considers fraud related to payment instruments such as cards, SEPA Credit Transfers and SEPA Direct Debit.

The Report's main conclusions include the following:

- Social engineering attacks and phishing attempts are still increasing and they remain instrumental often in combination with malware, with a shift from consumers, retailers, SMEs to company executives, employees, financial institutions and payment infrastructures.

- Malware remains a major threat. In particular, ransomware has been on the rise during the past year, requiring new mitigating measures.

- APTs have developed into one of the most lucrative types of payment fraud;

- The number of (D)DoS attacks is still growing and they are frequently targeting the financial sector; and

- For SEPA Credit Transfer and Direct Debit transactions, the criminals' use of impersonation and deception scams, as well as online attacks to compromise data, continue to be the primary factors behind fraud losses.

A full copy of the Report is available here.

(xiii) EDPB publishes its Rules of Procedure

On 3 December 2018, the EDPB published its Rules of Procedure (the "**Rules**"). The Rules detail the EDPB's responsibility for ensuring the consistent application of the GDPR and for promoting cooperation between supervisory authorities throughout the EU.

In particular, the Rules set down guiding principles for the EDPB to adhere to in achieving its objectives and provide information on the composition of the EDPB, its working methods and its procedures with regard to the adoption of documents.

A full copy of the Rules can be accessed here.

(xiv) Basel Committee on Banking Supervision publishes report on cyber-resilience practices

On 4 December 2018, the Basel Committee on Banking Supervision ("**BCBS**") published a report which details and compares observed bank, regulatory and supervisory practices across jurisdictions (the "**Report**").

The Report begins with a high-level overview of current approaches taken by different jurisdictions when issuing cyber-resilience guidance standards and an assessment of the range of practices regarding governance arrangements for cyber-resilience. It then focuses on current approaches on cyber-risk management, testing, incident response and recovery and examines the differing types of communications and information-sharing mechanisms established in jurisdictions. In addition, it analyses expectations and practices related to interconnections with third-party services provided in the context of cyber-resilience.

As part of its assessment of varying cyber-resilience practices, the Report summarises 10 key findings in respect of:

- The general cybersecurity landscape;
- Regulators' expectations in respect of cyber strategies;
- Cyber-risk management across jurisdictions;
- The articulation of cyber-resilience across technical, business and strategic lines;
- Workforce skills shortages for cyber-related functions;
- Testing;
- Incident response capabilities;
- Assessment metrics for cyber-resilience;

- Information-sharing mechanisms;
- Third-party risk.

The full Report can be accessed here.

(xv) EU institutions reach political agreement on the Cybersecurity Act

On 10 December 2018, the European Commission issued a press release in which it announced that it had reached a political agreement with the Council of the European Union and the European Parliament on the Cybersecurity Act.

The Cybersecurity Act has the objective of putting in place wide-ranging measures to deal with cyber-attacks and to build strong cybersecurity in the EU. It includes a permanent mandate for the EU Cybersecurity Agency ENISA and provides a stronger basis for ENISA in the new cybersecurity certification framework to assist Member States in effectively responding to cyber-attacks with a greater role in cooperation and coordination at Union level.

The Act also creates a framework for European Cybersecurity Certificates for products, processes and services that will be valid throughout the EU, which will enable their users to establish the level of security assurance.

In connection with the press release, the European Commission published a cybersecurity factsheet which details the proposed measures aimed at building strong cybersecurity in the EU. These measures include:

- The establishment of a European Competence Centre to drive cybersecurity research and innovation;
- The establishment of a Network of National Coordination Centres with each Member State nominating one coordination centre to lead the network;
- The establishment of a Competence Community comprised of a diverse group of cybersecurity stakeholders from research and the private and public sectors.

The cybersecurity factsheet can be accessed here and the press release is available here.

(xvi) EDPB publishes draft guidelines on the accreditation of certification bodies under Article 43 of the GDPR

On 14 December 2018, the EDPB published draft guidelines on the accreditation of certification bodies under Article 43 of GDPR (the "**Guidelines**"). The Guidelines are addressed to Member States, national accreditation bodies, stakeholders providing for certification criteria and procedures and relevant competent supervisory authorities.

The Guidelines set out the purpose of accreditation in the context of the GDPR and provide for an interpretation of the term for the purposes of Article 43 of the GDPR. The routes for accreditation in accordance with Article 43(1) are then discussed, with three options identified:

- Accreditation conducted solely by the supervisory authority, on the basis of its own requirements;
- Accreditation conducted solely by the national accreditation body named in accordance with Regulation (EC) 765/2008 and on the basis of ISO/IEC 17065/2012 and with additional requirements established by the competent supervisory authority; or
- Accreditation conducted by both the supervisory authority and the national accreditation body.

The Guidelines also provide a framework for establishing additional accreditation requirements when the accreditation is handled by the national accreditation body and for establishing accreditation requirements when the accreditation is handled by the supervisory authority.

An Annex to the Guidelines has also been published separately, which provides guidance on how to identify additional accreditation requirements. The Annex outlines suggested requirements that supervisory authorities and national accreditation bodies should consider to ensure compliance with the GDPR.

The EDPB welcome comments on the Guidelines which should be addressed to the EDPB no later than 1 February 2019 via EDPB@edpb.europa.eu.

The EDPB's guidelines are available here and the Annex can be accessed here.

(xvii) Data Sharing and Governance Bill 2018 Update

On 18 December 2018, the Data sharing and Governance Bill 2018 (the "**Bill**") is currently before Dáil Eireann at the Fifth stage (where final statements on the Bill are made). The Bill was published in June 2018 following approval by the Government. The Bill has the objective of:

- Regulating the sharing of information, which includes personal data, between public bodies which occurs extensively at present;
- Regulating the management of information by public bodies;
- Establishing a base of registries;
- Collecting public service information;
- Establishing a data governance board; and
- Providing for related matters.

A copy of the Bill, as initiated on 12 June 2018, is available here.

The Bill can be tracked here.

(xviii) European Union – United States Privacy Shield report

On 19 December 2018, the European Commission published its report on the second annual review of the functioning of the European Union – United States Privacy Shield.

The report shows that the United States continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the European Union to participating companies in the United States. The steps taken by the United States authorities to implement the recommendations made by the European Commission in last year's report have improved the functioning of the framework.

The European Commission expects the United States authorities to nominate a permanent Ombudsperson by 28 February 2019 as the Ombudsperson is an important mechanism that ensures complaints are addressed.

The report will be sent to the European Parliament, the Council, the European Data Protection Board and to the United States authorities.

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

(xix) Data Protection Commission issues preliminary guidance on personal data transfers to and from the United Kingdom in event of a 'no deal' Brexit

On 21 December 2018, the Data Protection Commission ("**DPC**") issued preliminary guidance on personal data transfers to and from the United Kingdom in event of a 'no deal' Brexit.

Irish entities will require a transfer mechanism to be in place from 30 March 2019 in order to continue to lawfully transfer personal data to the United Kingdom which will become a "third country" for the purposes of European Union personal data transfers. The preliminary guidance provides for:

- Data flows from Ireland to the United Kingdom after March 2019 if there is no deal;
- Data flows from the United Kingdom to the European Union after March 2019; and
- Data flows from the United Kingdom to non-European Union countries after March 2019.

A copy of the preliminary guidance can be accessed here.

The International Swaps and Derivatives Association ("**ISDA**")

(i) ISDA Whitepaper on Smart Contracts

The International Swaps and Derivatives Association ("**ISDA**") in conjunction with the King & Wood Mallesons ("**KWM**") law firm have published a Whitepaper on *'Smart Derivatives Contracts*' (the "**Whitepaper**").

The Whitepaper examines some of the legal issues that need to be considered if smart contracts are to significantly increase efficiency in the derivatives market. The Whitepaper also proposes a framework, referred to in the Whitepaper as the ISDA Common Domain Model ("**ISDA CDM**") that from a legal perspective, ensures a shared, standardised representation of events and actions that occur through the derivatives lifecycle, is applied across the industry.

In accordance with the ISDA CDM the steps in developing smart derivatives contracts include:

- Selecting the parts of a derivatives contract for which automation would be both effective and efficient;
- Changing the expression of legal terms of a derivatives contract into a more formalised form;

- Breaking the formalised expression into component parts for representation as functions;

- Combining the functions into templates for use with particular derivatives products; and

- Validating the template as having the same legal effect as legal terms of derivatives contracts.

The Whitepaper acknowledges that further work is needed, such as determining principles for selecting which parts of the ISDA documentation framework lend themselves to automation and recognises that the legal complexity involved requires coordination of expertise in technology market practice and in law.

An ISDA smart contracts group is focusing on the legal, regulatory and governance issues related to smart contracts and distributed ledger technology, while an ISDA legal technology working group has been established to explore and discuss opportunities for further standardisation. A separate design group is working on further developing the ISDA CDM and identifying opportunities for proofs of concept.

The Whitepaper is accessible here.

(ii) ISDA and GFMA publishes response to FSB's request for feedback on its thematic peer review on the implementation of the Legal Entity Identifier

On 3 October 2018, ISDA and the Global Financial Markets Association ("**GFMA**") (together the "**Associations**") published their joint response to the FSBs request for feedback from stakeholders as part of its recently launched thematic peer review on implementation of the Legal Entity Identifier ("**LEI"**). In its response, the Associations provided feedback on the following areas of LEI implementation:

- With regard to LEI mapping efforts, the Associations noted that the use of the LEI as a single identifier is preferable, but recognised that replacement of other counterparty identifiers globally may not be immediately practicable for every scenario. The response recommends the mapping of other counterparty identifiers to the LEI to provide a bridge to full adoption of LEI where it cannot yet be achieved;

- The response highlights where LEI adoption is occurring unrelated to mandatory regulatory reporting, including the following: enhancing compliance support functions, data vendor adoption and enrichment and improved internal client reference date management;

- The response identifies types of private sector uses of the LEI, such as the implementation of risk management frameworks, supporting financial integrity, reducing operational risks and supporting higher quality financial data;

- The Associations discuss the challenges and costs faced in acquiring and maintaining LEIs, particularly for legal entities that transact infrequently;

- The response outlines the main obstacles to adoption and implementation of the LEI, including the lack of regulatory mandates, diverging regulatory adoption across jurisdictions, a general lack of awareness and issues relating to data quality;

- The feedback concludes with an analysis from the Associations of the different ways of promoting further adoption of the LEI, including specific areas where increased LEI uses would be the most favourable from a cost-benefit perspective, such as LEI use to facilitate KYC/AML due diligence.

The full response can be accessed here.

(iii) Industry Group addresses impact of no-deal Brexit on the derivatives markets

On 9 October 2018, ISDA in conjunction with the Association of German Banks, the Italian Financial Markets Intermediaries Association, the Banking and Payments Federation Ireland, the Danish Securities Dealers Association, the Dutch Banking Association and the Swedish Securities Dealers Association (the "**Industry Group**"), published a paper on the potential impact that a no-deal Brexit would have on the derivatives markets (the "**Paper**").

The Paper examines the adverse effects on the derivatives markets under a scenario where the United Kingdom becomes a third country under European Union law, after the United Kingdom exits the European Union.

The Industry Group offers the following mitigating action steps to avoid the regulatory restrictions that would immediately impact the ability of European Union 27 firms to transact derivatives with United Kingdom entities and infrastructure in the event of a no-deal Brexit:

- The European Commission and other European Union authorities should take all available preparatory steps to accept applications and adopt advance formal decisions that take effect on the date the United Kingdom leave the European Union;

- The European Securities and Markets Authority ("**ESMA**") should work with relevant central counterparties, trade repositories, credit rating agencies and benchmark administrators in advance to facilitate applications for recognition, endorsement or registration that could take effect from the date the United Kingdom leaves the European Union;

- The European Community should consider proposing legislation adapting European Union law in advance of Brexit to create a temporary regime to minimize disruption to the derivatives market in a hard Brexit scenario; and

- The European Union should consider providing early transparency to market participants about the mitigating action steps it is pursuing to minimize the risky, costly and irreversible steps market participants might otherwise take independently.

On 6 November 2018, ISDA issued a statement conveying appreciation for the recent indications from the European Union authorities that European Union firms will be temporarily allowed to continue accessing United Kingdom central counterparties following a no-deal scenario.

In the statement, ISDA sought for more details to be provided about the temporary recognition regime and called for greater clarity in order to avoid a wide-scale migration of affected contracts to European Union recognised counterparties.

The Paper can be accessed in full here and the November press release can be read here.

(iv) ISDA publishes industry model and guide for close-out netting legislation

On 16 October 2018, ISDA released an updated 2018 Model Netting Act (the "**2018 MNA**") and a Netting Guide (the "**Guide**"). The purpose of netting legislation is to ensure the enforceability of close-out netting upon the occurrence of an event of default or termination event under the netting agreement, both prior to and following the commencement of insolvency proceedings, in accordance with the terms of the netting agreement between the parties.

The 2018 MNA is a model law intended to set out, by example, the basic principles necessary to ensure the enforceability of bilateral close-out netting. The revised 2018 MNA reflects: (i) recent developments in the financial markets, including the widespread adoption of bank and other financial institution resolution regimes; (ii) the phased introduction of mandatory initial and variation margin requirements for most of the wholesale derivatives markets; and (iii) the continued growth of Islamic finance derivatives.

The Guide was prompted by an increasing number of jurisdictions seeking guidance on the implementation of netting legislation and will also provide practical advice and guidance to government officials and other policy makers in countries that are considering implementing netting legislation.

Both the 2018 MNA and the Guide are accessible here.

(v) ISDA publishes paper on clearing incentives, systemic risk and margin requirements for non-cleared derivatives

On 17 October 2018, ISDA published a paper entitled '*Clearing Incentives, Systemic Risk and Margin Requirements for Non-cleared Derivatives*' (the "**Paper**"). The Paper sets out to answer the following questions relating to: (i) clearing incentives; and (ii) margining:

(i) Does the scope of the current margin framework for non-cleared derivatives appropriately support the goal of systemic risk mitigation? Or does it impose costs on firms that pose little or no systemic risks, and can it potentially have an adverse impact on their risk management activities?

In answering this question, ISDA finds that certain rules related to the initial margin ("**IM**") do not align with their stated goals of mitigating systemic risk and promoting central clearing, but rather impose unnecessary costs and may impede economic and risk management activity. ISDA is of the view that IM should not be required for counterparties that pose little or no systemic risk. The systemic risk issues could be appropriately addressed by raising the current threshold of €8 billion in notional outstanding to €100 billion.

(ii) Does margining of non-cleared derivatives (which is higher than margining for cleared derivatives) incentivize central clearing? If and when it is not a major factor, then are the higher margin costs for non-cleared derivatives versus cleared derivatives appropriate, especially in situations where the risks of both may be similar?

In answering this questions, ISDA finds that there is substantial evidence that other economic incentives, such as: (i) the lower regulatory capital requirements for cleared versus non-cleared swaps; and (ii) the ability to net large, diverse swaps portfolios with a single counterparty; have a significantly greater impact than the initial margin for non-cleared swaps. ISDA recommends that the role of margin as a clearing incentive is re-calibrated, with consideration given for the existing inherent benefits of clearing, such as multilateral netting.

The Paper can be accessed in full here.

(vi) ISDA publishes Disclosure Annex for Credit Derivative Transactions

On 19 October 2018, ISDA published its disclosure annex for credit derivative transactions (the "**Annex**"). The Annex applies to credit transactions which are subject to:

- The 2003 ISDA Credit Derivatives Definitions (as amended); or
- The 2014 ISDA Credit Derivatives Definitions published by ISDA.

The Annex describes the operation of credit transactions and discusses certain material risks, terms and characteristics of some common types of credit transactions, including:

- Fixed Recovery Credit Default Swaps (**CDS**);
- Credit transactions involving sovereign governments;
- Municipal debt securities issued by U.S. states, counties, cities, special tax districts and local governments;
- Tranche CDSs;
- Loan CDSs;
- Index CDSs;
- CDS Swaptions;
- 'N'th-to-Default CDSs;
- Credit Transactions with non-US underliers;
- Contingent CDSs;
- Preferred CDSs;
- Index Skew Credit Transactions; and
- Total Return Swaps.

The Annex also outlines numerous factors which can influence the value of a credit transaction, such as the actual or perceived creditworthiness and credit ratings of each reference entity and any guarantors or other supporters of its relevant obligations.

The Annex can be accessed here.

(vii) Calls for ISDA to address market fragmentation

On 26 October 2018, ISDA published a speech on *'Market Fragmentation'* delivered at the 2018 ISDA Annual Japan Conference, by the Vice Minister of International Affairs of the Financial Services Agency, Japan (the "**Vice Minister**").

The speech was aimed at cautioning global regulators about the adverse effects of a financial system that is fragmented along national borders. Notably, the Vice Minister identified the following four sources of harmful regulatory fragmentation which, unduly increase the risk of market fragmentation:

- **Discrepancies**: where there are inconsistencies and or conflicts between the home and host regulations;

- **Overlaps**: where external application of national rules impose different regulatory requirements on the two counterparties of a single transaction;

- **Dysynchronization**: where the implementation of an internationally agreed standard is executed by jurisdictions at different timings; and

- **Competition**: where national authorities take regulatory action to secure resources or activities within their own jurisdiction.

Having cautioned global regulators to appreciate that not all forms of financial regulation requires the same degree of harmonisation, the Vice Minister called on ISDA to explore ways to address the risks of harmful market fragmentation.

The Vice Minister's speech can be accessed in full here.

(viii) ISDA publishes Disclosure Annex for Foreign Exchange Transactions

On 30 October 2018, ISDA published its disclosure annex for foreign exchange transactions (the "**Annex**"). The Annex refers to transactions in which the underliers are foreign currencies and involve the exchange of one or more currencies against other currencies or settlement in a single currency based on the rates of exchange between one or more currency pairs.

The Annex describes the operation of foreign exchange transactions and discusses certain material risks, terms and characteristics of some common types of foreign exchange transactions, including:

- Foreign exchange forward contracts;

- Non-deliverable foreign exchange forward contracts;

- Dealer-poll currency rates;

- Barrier foreign exchange options;

- Complex or exotic foreign exchange options and other structured foreign exchange products;

- Volatility and variance-linked foreign exchange transactions such as variance swaps, volatility swaps and forward volatility agreements; and

- Correlation swaps.

The Annex also discusses the volatility of foreign currency exchange rates and how they may be subject to intermittent market disruptions or distortions due to factors such as government regulation and intervention, lack of liquidity and actions taken by, or force majeure events affecting, foreign exchange dealers, relevant exchanges or price sources.

The consequences of these disruption events are also discussed, such as the possibility that the price sources used by the calculation agent under a foreign exchange transaction for determining any affected currency exchange rates may not be the same as those used prior to the disruption event.

The Annex can be accessed here.

(ix) ISDA and EBF call on the European Commission to issue broader exemptions under the digital services tax proposal

On 2 November 2018, ISDA published a letter to the European Commission on behalf of the financial services industry (the "**Letter**") in relation to the proposed digital services tax ("**DST**") set out in the European Commission's proposal for a Council directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (COM(2018) 148 final / 2018/0073 (CNS)) (the "**Proposal**").

The Proposal aims to address the misalignment between the place where the profits of large digital businesses are taxed and the place where the value is created.

The Letter conveys the industry groups' discontent with the purported unintended consequences arising from the limited set of exemptions provided for in the DST proposal. The industry group are of the opinion that under the proposed regime, key elements of European Union and non-European Union infrastructure and service providers serving in Europe's capital markets would be subject to a disproportionate double-taxation and the international competitiveness of EU participants in trading venues, other financial market infrastructure and service providers would also be diminished.

The Letter calls upon the European Commission to ensure that the text of the proposed DST makes provisions for the full spectrum of activities linked to capital markets to be exempt and offer to provide further information to assist in this regard.

On 15 November 2018, the European Banking Federation ("**EBF**") published further comments on the EU proposal for a DST. The EBF similarly contends that the proposal is too limited in scope and it suggests that a clear exemption must be provided not only for ad hoc payments, trading venues or crowdfunding, but for all types of financial and banking services.

The EBF also recommends that the calculation of thresholds should only take into account the activities and commissions targeted by the taxation and not the global turnover of companies, as an alternative for ensuring that only large digital service providers would be subject to the DST.

ISDA's Letter can be read in full here and the EBF's comments are accessible here.

(x) ISDA publishes interest rate benchmarks review for Q3 2018 and nine months ended 30 September 2018

On 8 November 2018, ISDA published its interest rate benchmarks review for the third quarter of 2018 and for the nine months ended 30 September 2018 (the "**Review**").

The Review analyses the trading volumes of interest rate derivative ("**IRD**") transactions, with reference to the Secured Overnight Financing Rate ("**SOFR**"), and selected alternative risk-free rates, such as the Sterling Overnight Interbank Average ("**SONIA**"), the Swiss Average Rate Overnight ("**SARON**") and the Tokyo Overnight Average Rate ("**TONA**"). Once the Euro Short-Term Rate ("**ESTER**") is published and traded, ISDA has expressed its intention to add it to its analysis.

With regard to the key highlights for Q3 2018 and the nine months ended 30 September 2018, ISDA stated that transactions referencing alternative RFRs accounted for less than 5% of total IRD traded notional during the third quarter of 2018. The majority of the transactions referencing RFRs involved SONIA swaps, whilst trading volumes of IRD referencing SOFR were found to be miniscule.

ISDA's full review can be found here.

(xi) ISDA publishes Disclosure Annex for Equity Derivative Transactions

On 9 November 2018, ISDA published its disclosure annex for equity derivative transactions (the "**Annex**"). The Annex relates to transactions in which the underliers are corporate equity securities or baskets or indexes of equity securities.

The Annex describes the operation of equity derivative transactions, including the valuation of equity transactions, market disruption events, dividends under equity transactions, early termination upon the occurrence of certain events and regulation of underlying markets. It also discusses certain material risks, terms and characteristics of some common types of equity transactions, including:

- Equity swaps;
- Equity transactions with depository receipts as underliers;
- Variance swaps;
- Volatility swaps;
- Variance dispersion swaps;
- Correlation swaps;

- Dividend swaps;
- Equity transactions with forward or option-like features or economics; and
- Equity transaction which may involve delivery of an underlie or component;

The Annex can be accessed here.

(xii) ISDA publishes report of Benchmark Fallbacks Consultation

On 20 December 2018, ISDA published a report summarising the final results of a consultation on technical issues related to new benchmark fallbacks for derivatives contracts that reference certain interbank offered rates ("**IBORs**").

The report was prepared for ISDA by the Brattle Group and confirms the preliminary findings published by ISDA at the end of November.

The report highlighted that the overwhelming majority of respondents preferred the 'compounded setting in arrears rate' for the adjusted risk-free rate ("**RFR**") and a significant majority across different types of market participants preferred the 'historical mean/median approach' for the spread adjustment. The majority of the respondents preferred to use the same adjusted RFR and spread adjustment across all benchmarks covered by the consultation and potentially other benchmarks (US dollar LIBOR, euro LIBOR and EURIBOR). ISDA expects to launch a supplemental consultation in early 2019 to gather feedback regarding US dollar LIBOR and potentially other benchmarks not covered by the recent consultation.

ISDA will proceed with developing fallbacks for inclusion in its standard definitions based on the compounded setting in arrears rate and the historical mean/median approach to the spread adjustment for all of the benchmarks covered by the consultation and will publish the results of the sensitivity analyses to provide market participants with a better understanding of the range of parameters in the historical mean/median approach.

A copy of the report can be accessed here.

Brexit

(i) ESMA raises awareness on CRA and TR readiness in the event of no-deal Brexit

On 9 November 2018, ESMA issued a public statement with a view to raising awareness on the readiness of credit rating agencies ("**CRA**") and trade repositories ("**TR**") for the possibility of there being no agreement reached between the United Kingdom and the European Union with respect to the United Kingdom's withdrawal from the European Union.

In a no-deal Brexit scenario, CRAs and TRs established in the United Kingdom will lose their European Union registration with effect from the date of the United Kingdom's withdrawal from the European Union. In light of this, ESMA is engaging on a continuous basis with the relevant supervised entities to ensure that the agreed Brexit contingency plans are fully executed by March 2019. These contingency plans include the finalisation of pending applications for registration.

ESMA also intend to execute a memorandum of understanding ("**MOU**") with the Financial Conduct Authority in the United Kingdom to allow for information to be exchanged in order to ensure effective supervision and enforcement. ESMA aims to have the MOU in place by the end of March 2019.

ESMA noted that significant preparatory steps have been taken by both industry sectors but calls upon market participants to take the following action:

- European Union counterparties and central counterparties must ensure that they continue to fulfil the requirement that details of derivatives contracts are reported to a registered European Union established TR or a recognised third-country TR;

- CRAs need to have a legal entity registered in the European Union and supervised by ESMA, in order for their ratings to be used for regulatory purposes in the European Union; and

- Counterparties should ensure that they and their reporting entities fully adhere to the most recent reporting requirements to better enable any potential transfer of data and ensure their continuous compliance with the EMIR reporting obligation.

ESMA encourage all market participants to continue to monitor the public disclosures made by CRAs and TRs in the context of Brexit.

The statement can be read in full here.

(ii) Central Bank publishes updated Brexit Task Force Report

In November 2018, the Central Bank published its Brexit Task Force Report for September 2018 (the "**Report**").

The Report provides updated information regarding economic and financial market developments, risks arising for firms supervised by the Central Bank and issues arising for the Central Bank itself, particularly with respect to authorisations.

The fourth section of the Report provides an overview of the latest sectoral developments with respect to banks, insurance and asset management firms, payments institutions and market infrastructures. Section six of the Report also provides an overview of the work conducted by the various European Supervisory Authorities, the European Central Bank and the Single Supervisory Mechanism in relation to Brexit.

A full copy of the Report can be accessed here.

(iii) European Commission Communication - Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan

On 13 November 2018, the European Commission published a communication titled "Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan" (the **"Communication"**). The Communication identifies the key actions to be taken in the event of a no-deal scenario and provides a structure for discussions and Member State coordination.

In the area of financial services, the Commission states that it is unnecessary to adopt contingency measures in respect of not-cleared over-the-counter ("**OTC**") derivative contracts between EU and UK counterparts which will, in principle, remain valid and executable until maturity. However, the Commission noted that certain life-cycle events could potentially imply the need for an authorisation or an exemption where the counterparty will no longer be an EU firm, so market participants should take actions such as transferring contracts and seeking relevant authorisations in preparation for this situation. The Commission also deemed it unnecessary to adopt contingency measures in respect of insurance.

Regarding cleared derivatives, the Commission highlighted that a no-deal scenario may present risks to financial stability, deriving from a disorderly close-out of positions of EU clearing members in UK central clearing counterparties. It also identified potential risks relating to certain services provided to EU operators by UK central security depositories that cannot be replaced in the short term. In the event that the UK withdraws without a deal, the Commission will adopt temporary and conditional equivalence decisions, under existing equivalence regimes, to ensure there will be no disruption in central clearing and depositories services. These decisions will also be complemented by recognition of UK-based infrastructures, which are encouraged to pre-apply to ESMA for recognition.

In addition, the Commission recommended that the European Supervisory Authorities begin preparing cooperation agreements with UK supervisors, in order to facilitate the immediate exchange of information related to financial institutions and actors after the withdrawal date in a no-deal scenario.

A full copy of the European Commission's Communication can be accessed here.

(iv) European Council endorses draft UK-EU withdrawal agreement and political declaration on framework for future relationship

On 25 November 2018, the European Council endorsed the draft agreement for the withdrawal of the UK from the EU and the draft political declaration on EU-UK relations, which accompanies the withdrawal agreement and is referred to throughout. The EU27 leaders then invited the European Commission, the European Parliament and the Council to take the necessary steps to ensure that the withdrawal agreement can enter into force on 30 March 2019.

The draft withdrawal agreement includes additional transition provisions (Article 132), which permit the joint UK-EU committee to adopt a one-off decision to extend the transition period before 1 July 2020. It also obliges the EU and the UK to use their best endeavours to conclude an agreement on the future relationship between Ireland and Northern Ireland by 31 December 2020, which would supersede the current backstop plan to avoid a hard border in Ireland.

The draft political declaration on future EU-UK relations establishes the parameters of the relationship between the EU and the UK in areas including trade and economic cooperation, law enforcement and criminal justice, foreign policy, security (including cyber-security) and defence. In particular, the draft political declaration proposes an economic partnership between the EU and the EU that will encompass a free trade area which will facilitate trade and investment between the parties to the extent possible, while respecting the integrity of the EU's Single Market and the Customs Union as well as the UK's internal market, and recognising the development of an independent trade policy by the UK beyond this economic partnership. The precise legal form of the future relationship between the EU and the UK will be determined as part of the post-Brexit negotiations.

The draft political declaration also details the agreement of the EU and the UK to ensure a close and structured cooperation on regulatory and supervisory matters in the area of financial services. It notes that both the EU and the UK will have equivalence frameworks in place that allow them to declare a third country's regulatory and supervisory regimes equivalent for relevant purposes. It calls on both parties to start assessing equivalence with respect to each other under these frameworks as soon as possible after the UK's withdrawal from the Union, endeavouring to conclude these assessments before the end of June 2020.

In a statement published on 15 November 2018, the European Banking Federation ("**EBF**") announced its support for the manner in which the agreement recognises the importance of financial services and called on the European Council and all other stakeholders to create

further clarity as soon as possible. The EBF also noted that the transition period will assist in resolving most of the immediate risks of Brexit in the short run, but that further public action will be needed to address other specific risks to complement the financial sector's own preparation.

The EBF's statement can be read in full here.

The draft withdrawal agreement can be accessed here and the draft political declaration on future EU-UK relations is available here.

In a press release published on 12 December 2018, available here, the European Parliament stressed that the withdrawal agreement and the political declaration are the only deals possible and are not open to renegotiation.

(v) Central Bank publishes speech on the impact of Brexit on the asset management sector

On 3 December 2018, the Central Bank published a speech made by its Director of Asset Management & Investment Banking, Michael Hodson, titled "Brexit and the evolving landscape of the asset management sector".

In the speech, Mr. Hodson discusses the potential impact of Brexit on the asset management sector and outlines the Central Bank's expectations of firms should there be a transitional period. In the event of a hard Brexit, the following cliff effects are identified as being most relevant to the asset management sector:

- There is a risk of UK fund managers losing their passport which enables them to act on behalf of Irish funds – The Central Bank recommends that boards of underlying funds put in place contingency plans for this in the event of a hard Brexit;

- The loss of the ability of Irish AIFMs, UCITS management companies and Irish funds to delegate their portfolio management to UK investment managers – The Central Bank believes that the required level of work is on-going to ensure that the necessary Memoranda of Understanding will be in place by the end of March 2019, which should give the industry comfort;

- Ireland presently has no indigenous securities settlement systems infrastructure, with all Irish equity transactions and a proportion of ETFs settled through the CREST Central Securities Depository which is operated out of the UK – The Central Bank states that it will continue its work in this area, but responsibility ultimately rests with each individual firm to ensure they can continue to operate in compliance with applicable EU laws.

Mr. Hodson also references the potential transitional period which the sector could be presented with from March 2019 until the end of December 2020 and notes that this would give the industry more time to prepare for Brexit. However, Mr. Hodson stresses that

engagement with the Central Bank will still be required early in the transitional period and there will be little sympathy from regulators if firms have not made the necessary arrangements to continue to service EU27 clients by December 2020.

A full copy of the speech is available here.

(vi) Central Bank issues Brexit FAQ for consumers

On 6 December 2018, the Central Bank issued an updated Brexit related FAQ document providing general information to consumers on the potential implications of Brexit. The Central Bank's FAQ discusses a variety of topics including:

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

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

(vii) Central Bank's second Macro-Financial Review of 2018 discusses the risks posed by Brexit to the Irish economy

On 7 December 2018, the Central Bank published its second Macro-Financial Review for 2018 (the "**Review**"). The Review identifies Brexit as the main risk facing the Irish economy, particularly in the event of a "no deal" Brexit.

The Review highlights the following risks to the Irish economy posed by Brexit:

- A further weakening of sterling would make Irish exports to the UK more expensive and could coincide with an increase in tariffs on those exports;
- Large and persistent currency movements could result in increased competition for Irish firms with a direct trading relationship to the UK;
- Any economic shocks arising from Brexit could reduce bank profitability and have a material impact on the credit quality of banks' loan portfolios.

For further information, the full Review can be accessed here and a related press release can be found here.

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

On 10 December 2018, the Central Bank issued an updated Brexit related FAQ document providing general information to financial services firms considering relocating their operations from the UK to Ireland. The Central Bank's FAQ addresses a number of topics including:

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

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

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

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

(ix) European Commission due to publish series of notices relating to a no-deal Brexit

On 19 December 2018, the European Commission issued a press release on a series of notices relating to a no-deal Brexit. After a thorough examination of the risks linked to a no deal scenario in the financial sector, the European Commission has found that only a limited number of contingency measures is necessary to safeguard financial stability in the EU27.

The European Commission has therefore adopted the following acts:

- A temporary and conditional equivalence decision for a fixed, limited period of 12 months to ensure that there will be no immediate disruption in the central clearing of derivatives;
- A temporary and conditional equivalence decision for a fixed, limited period of 24 months to ensure that there will be no disruption in central depositaries services for EU operators currently using UK operators; and

- Two Delegated Regulations facilitating novation, for a fixed period of 12 months, of certain over-the-counter derivatives contracts, where a contract is transferred from a UK to a EU27 counterparty.

A copy of the press release can be found here.

(x) Contingency Action Plan published by the Government of Ireland

In December 2018, the Irish Government published the '*Preparing for the withdrawal of the United Kingdom from the European Union on 29 March 2019 Contingency Action Plan*' (the "**Contingency Action Plan**").

The Contingency Action Plan sets out the Irish Government's approach to dealing with a no deal Brexit. Work continues at a national and European Union level with further information on no deal preparedness expected to follow in January and February 2019.

Chapter 8 deals with financial services and notes that the Central Bank is working closely with financial services firms to ensure that they have contingency plans in place for end March 2019 and confirms that it expects firms to "*ensure they have robust contingency plans in place to minimise the impact on customers, investors and markets*".

The Contingency Action Plan also refers to the work being carried out by the supervisory teams at the Central Bank and the contingency arrangements announced by the European Commission and states that "*financial services are being actively encouraged to inform clients about the steps that they have taken to prepare for Brexit*".

A copy of the Contingency Action Plan can be accessed here.

(xi) ESMA statement on firms' Brexit disclosure

On 19 December 2018, ESMA issued a statement reminding investment firms of their MiFID obligations on the disclosure of information to clients in the context of Brexit. The European Commission published a range of contingency measures to mitigate against the most severe consequences of a "no-deal" Brexit.

ESMA has also issued a statement to remind investment firms and credit institutions providing investment services ("**firms**") of their legal obligations under MiFID II to inform clients of (i) the impact that Brexit may have on existing and new contracts and (ii) the impact of Brexit-related measures which the firms have already taken or plan to take. ESMA's statement will be of interest also to UCITS Management Companies and AIFMs who provide MiFID services to clients.

The statement is addressed to (i) UK firms which provide investment services to EU27 countries and (ii) EU27 firms that interact with clients based in the UK. The statement reminds firms of the need to finalise and implement suitable plans in order to mitigate any risks which arise from Brexit. Once finalised, firms should provide appropriate information on

such arrangements to clients whose contracts and services may be affected by Brexit as soon as possible.

ESMA advises that the information provided to clients should, at a minimum, address the following areas:

- **Impact of Brexit**: This should focus on the impact of Brexit for the given firm and its business and the implications that this will have for the relationship between the firm and its clients

- **Actions that the firm is taking:** This should outline the steps being taken to properly inform clients of the impact of Brexit and to prevent any detriment to clients arising from Brexit. In this regard, ESMA notes that clients should be informed of:

  (a) organisational arrangements put in place to deal with client inquiries relating to Brexit. Such arrangements may include the publications of FAQ for clients, provision of contact details, helplines etc;
  (b) if contracts are being transferred to another firm or the firm is relocating to an EU27 country as a result of Brexit, the jurisdiction and contact details of the relevant competent authorities; and
  (c) where client contracts are being transferred to a firm located in another jurisdiction, the firm should outline any change in the protection afforded to its clients under the existing national investor compensation scheme.

- **Implications of any corporate restructuring**: Clients should be advised of any change to contractual terms which arise as a result of corporate restructuring which is being implemented in light of Brexit.

- **Contractual rights:** Existing clients should be informed of any contractual and statutory rights of clients in such circumstances, including for example the ability to cancel the contract and, where applicable, the right of recourse. ESMA advises that any changes to contractual terms with the firm resulting from Brexit should also be explained.

In its concluding paragraph, ESMA re-emphasises that both it and national competent authorities will continue to engage with firms to assess whether they are "Brexit-ready" and to ensure that clients are provided with appropriate information in respect of Brexit arrangements. ESMA notes that any such communications should *"be clear and in plain language and should attempt not to cause undue concern".*

A copy of the statement can be found here and a Dillon Eustace article on the topic can be accessed here.

Dillon Eustace
31 December 2018

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