McCann FitzGerald

Financial Services Regulatory Group

Bulletin

June 2015

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Introduction

Our latest Financial Services Regulatory Group bulletin contains new updates on significant developments in financial services regulation, including the implications of the Companies Act 2014 for credit institutions and insurance undertakings, the new client asset regulations and investor money regulations, the security of internet payments and universal jurisdiction clauses.

It also contains a new bi-annual regulatory tracker outlining the main legislative and regulatory developments in financial services since the beginning of the year. We hope that this will provide you with a useful tool for keeping track of these developments.

Because of the fast-moving nature of financial services regulation and the sheer volume of regulatory material being produced, we regularly upload briefings on the firm's website dealing with significant developments – in this bulletin we have included an easy way to access our more recent briefings, in case you have not had a chance to look at them yet.

Financial Services Regulatory Group

The Financial Services Regulatory Group forms part of McCann FitzGerald's wider Banking & Financial Services Group which is the leading practice in the Irish market. Our Financial Services Regulatory Group advises credit institutions, (re) insurance undertakings, and other clients on the complex regulatory and compliance issues that arise in the area of financial services including the administrative sanctions process, regulatory capital requirements, the provision of retail and wholesale financial services, insider dealing and market abuse issues, consumer credit matters and anti-money laundering issues.

Ambrose Loughlin
Partner, Head of Financial Services Regulatory Group

Financial Services Regulatory Group Bulletin

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General

In our first briefing below we focus on the Government's new five year strategy for Ireland's International Financial Services Sector, which seeks to consolidate and grow Ireland's position as the location of choice for specialist international financial services. The second briefing considers the Lobbying Act 2015, which regulates, for the first time, the activity of lobbying in Ireland. In our third briefing we focus on the implications of the Companies Act 2014 for lenders: for the most part, that Act commenced on 1 June 2015.

Link to briefing: *IFS 2020 - Ireland's New Strategy for International Financial Services*

Link to briefing: *Who Said What to Whom? – The Regulation of Lobbying Act 2015*

Link to briefing: *Companies Act 2014 - Lending to Companies - Key Issues for Lenders*

Banking

Over the last few months, we have published a number of briefings on both EU and domestic developments in financial services legislation. The first of these briefings outlines the main provisions of Regulation 2015/751 on interchange fees for card-based payment transactions, which entered into force on 8 June 2015. The second deals with recent amendments to the Consumer Protection (Regulation of Credit Servicing Firms) Bill 2015, one of which has significant implications for lending to small and medium enterprises. The third briefing is a Questions and Answers document on the Fourth Money Laundering Directive: Member States must transpose that Directive into national law by no later than June 2017.

Link to briefing: *Interchange Fees – Caps and Competition in Card-Based Payments*

Link to briefing: *New Developments on the Regulation of Credit Servicing Firms Bill*

Link to briefing: *Here at Last – The Fourth Money Laundering Directive*

Financial Services Regulatory Group Bulletin

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EMIR

Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) came into force on 16 August 2012 and has direct effect through the EEA, although its provisions take effect on a phased basis. Our briefings provide updates on implementing margin requirements for non-centrally cleared OTC derivatives (the proposed substance of the requirements and timing of implementation), proposed new rules on FX Contracts under MiFID II and on the application of the central clearing obligation to pension scheme arrangements.

Link to briefing: *Non-Centrally Cleared Derivatives – More Time to Implement Margin Requirements*

Link to briefing: *Proposed new Rules on FX Contracts under MiFID II*

Link to briefing: *Pension Scheme Arrangements – Possible Reprieve from EMIR Central Clearing Obligation*

Link to briefing: *Changes to the ESAs' Margin Rules for Non-Centrally Clearing OTC Derivatives*

Investment Management Updates

The Irish Collective Asset-management Vehicle Act 2015 entered into force in March this year and introduces a new corporate vehicle for funds structures, as outlined in the first briefing below. The second briefing focuses on developments at EU level, namely Regulation 2015/760 on European long-term investment funds, which entered into effect on 8 June 2015, and the proposed Regulation on Money Market Funds, which is still winding its way through the legislative process. The third briefing gives a funds-specific overview of the Fourth Money Laundering Directive while the fourth considers, among other things, the Central Bank of Ireland's feedback statement on its consultation on fund management company effectiveness – delegate oversight (CP 86).

Link to briefing: *New Irish Collective Asset-management Vehicle*

Link to briefing: *ELTIFs and MMFs: A Tale of Two Regulations*

Link to briefing: *The Companies Act 2014 – Implications for Funds and Fund Managers*

Link to briefing: *The Countdown Begins – EU Publishes Fourth Money Laundering Directive*

Link to briefing: *Ensuring Effective Governance of Fund Management Companies – Central Bank Update*

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Companies Act 2014 – Implications for Credit Institutions and Insurance Undertakings

The Companies Act 2014 (the "**2014 Act**") which, for the most part, came into effect on 1 June 2015, represents a significant overhaul of Irish company law. Its purpose is to consolidate, simplify and modernise company law in Ireland and so to improve Ireland's competitive position as a business investment location. The 2014 Act repeals all existing company law statutes and most related statutory instruments. It has a number of implications for credit institutions and insurance undertakings, the most significant of which are outlined in this briefing.

Overview

Although the 2014 Act emphasises efficiency and simplicity, it is in itself the largest piece of legislation in the history of the State. It provides for a number of new company types including, in particular, the private company limited by shares ("**LTD**") and the designated activity company ("**DAC**"). A private limited company that was incorporated under the earlier Companies Acts ("**EPC**") must re-register as an LTD, a DAC or another company type.

The 2014 Act introduces a number of changes which will facilitate the management of companies. These include: permitting paper-based annual general meetings in many circumstances; a "summary approval procedure" that will enable a company to undertake otherwise restricted transactions (such as financial assistance, returns of capital, and mergers with other Irish companies) without the approval of the courts; and the possibility of making an anticipatory filing of the intended creation of a charge by the company. The 2014 Act also codifies directors' fiduciary duties and reforms the law on corporate capacity.

The 2014 Act does not affect other requirements imposed on financial institutions under, for example, Central Bank of Ireland ("**Central Bank**") codes, which continue to apply unless otherwise stated.

Re-Registration

On and from 1 June 2015 every company formed in Ireland is/ will when formed be, and every company existing on 31 May 2015 must become, a company of a type recognised under the 2014 Act. In the case of a company existing on 31 May 2015:

- *a company of any type other than an EPC*: on 1 June 2015 the company became, automatically, a company of the relevant successor type for the type of pre-2014 Act company that it was, eg a public limited company under the former Companies Acts became a public limited company ("**PLC**") under the 2014 Act; and
- *an EPC*: from 1 June 2015 an EPC is given an intermediate status, being treated as though it were a DAC, until the EPC either elects to become another type of company that the 2014 Act recognises or the 2014 Act transition period ends (on 30 November 2016).

The 2014 Act prohibits any credit institution or insurance undertaking from being an LTD so such a company that is an EPC must re-register as another type of company that is appropriate to banks and insurers, such as a DAC or a PLC.

The PLC will be familiar to banks and insurers. However, of all the types of company recognised under the 2014 Act, the DAC bears the closest resemblance to the EPC. This is slightly anomalous as the suffix "Limited" to the company name of an EPC means, under the 2014 Act, an LTD and not a DAC. The name of a DAC must carry the suffix "Designated Activity Company" (which may be abbreviated to "DAC") or the Irish language equivalents.

Companies Act 2014 - Implications for Credit Institutions and Insurance Undertakings (continued)

A DAC must have a memorandum and articles of association ("**M&A**") and its activities remain governed by an objects clause. It must also hold a physical AGM, except in the case of a single-member company.

If it wishes to become a DAC, a credit institution or insurance undertaking that is an EPC may choose to do so at any time before 1 September 2016. The 2014 Act makes available a simple process for an EPC to re-register as a DAC during the transition period which started on 1 June 2015. During this transition period, until the EPC re-registers as a DAC or other company type, it will be treated as a DAC. An EPC will default to an LTD if it does not re-register as any other type of company before the transition period ends on 30 November 2016.

Prior to converting to a DAC, a credit institution or insurance undertaking should review its existing M&A and update them appropriately. While the 2014 Act provides that a DAC may have as few as two directors, the more onerous requirements of the Central Bank's revised Code of Conduct for Credit Institutions prevail: a regulated institution must have a minimum of five directors, the majority of whom must be independent non-executive directors.

Lending

The 2014 Act makes a number of changes to the law applicable to lending. The two principal changes concern the *ultra vires* rule and charges. However the re-registration requirements also have implications for lenders. More detailed information on lending, and on the Companies Act 2014, is available on our website (click here) .

Ultra Vires

The 2014 Act abolishes the *ultra vires* rule in respect of every LTD as it precludes an LTD from having an objects clause so that it has unlimited corporate capacity, including in relation to borrowing and other financial transactions.

While the other types of company provided for by the 2014 Act, including the DAC, retain an objects clause, the obligation to ensure that a company acts within its corporate powers rests with the directors. A third party dealing with such a company will not be prejudiced if the company exceeds its corporate capacity. This means that a lender should be able to sue a company for the return of a loan and/or enforce any securities given in connection with the loan, even if the borrowing is *ultra vires* the company. Nonetheless, it may be that the practice of banks in taking security or undertaking other types of transaction will, except in the case of a loan to or transaction with an LTD, remain that the bank will undertake due diligence of the corporate borrower's legal capacity.

Charges

The 2014 Act impacts on charges in a number of ways. Specifically, it introduces a new definition of a "charge" which excludes, among other things, charges created over an interest in cash, shares, and money credited to a bank account. When carrying out due diligence a lender should bear in mind that excluded charges may not appear on a company's file at the Companies Registration Office ("**CRO**"). Lenders should also be aware that third parties may not be put on notice of certain security interests granted in favour of a lender, as these will no longer require to be registered with the CRO.

While the 2014 Act substantially retains the familiar one-stage procedure for registering a charge, it also provides for a new, optional two-stage procedure. Under this new procedure, a preliminary notice is first filed with the CRO stating the company's intention to create a charge and containing the prescribed particulars of the charge. A second notice must then be filed within 21 days stating that the charge referred to in the preliminary notice has been created. In both procedures, all particulars of the charge must be completed online.

Companies Act 2014 - Implications for Credit Institutions and Insurance Undertakings *(continued)*

Under the 2014 Act, the priority of the charge is determined by the date/time of receipt by the CRO of the prescribed particulars of the charge (not, as previously, from the time of creation). Under the new two-stage procedure, priority can be achieved from the date of filing of a notice of intention to charge the relevant assets, provided the actual charge is executed and filed within 21 days of the notice of intention.

Re-Registration Requirements

As described above, an EPC must re-register as a new type of company before the end of the transition period. Re-registration will not of itself invalidate or prejudice any prior contractual commitment or any security entered into or created by it. In some cases, lenders may have the right to approve the EPC's choice of company. Moreover, as many loan agreements contain consent requirements on any changes to a corporate borrower's constitution, lenders will need to consider how to handle these requests.

From the perspective of insurance undertakings, it is noteworthy that, as many such undertakings have a condition attaching to their authorisations requiring them to notify the Central Bank of changes in their constitutional documents, and/ or to obtain the Central Bank's consent or non-objection to these changes, an insurance undertaking should discuss any proposed changes to constitutional documents with the Central Bank in advance.

Directors' Duties

The 2014 Act consolidates directors' fiduciary duties under Irish law for the first time as well as setting out directors' general duties. While the consolidation of directors' duties should provide directors, and others, with increased clarity regarding what is required of directors, it is noteworthy that the 2014 Act does not provide a comprehensive statement of all the duties to which directors are subject, as these also arise under other legislation.

The 2014 Act requires directors of certain companies, from the end of the first financial year that commences on or after 1 June 2015, to either make an annual compliance statement regarding aspects of the company's compliance with the 2014 Act and its tax obligations and to include this as part of their directors report for each financial year, or not to do so but specify the reasons for that decision. Further information on compliance statements is available in our briefing on the topic (click here).

Comment

Every credit institution and insurance undertaking should consider carefully the implications of the 2014 Act for its corporate structure and governance arrangements. A credit institution should also give careful consideration to its implications for lending activities. While the Act itself is, for the most part, in force, credit institutions and insurance undertakings should be aware that statutory instruments impacting various aspects of the Act are still being made and that market practice in respect of key aspects of the 2014 Act is not yet settled. Consequently, lenders in particular should scrutinise developments in this area closely over the coming months.

New Rules on Safeguarding Clients' Assets

Introduction

The Central Bank of Ireland ("**Central Bank**") has published new regulations on the safeguarding of client assets:

- Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Client Asset Regulations 2015 for Investment Firms ("**Client Asset Regulations**"); and
- Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Investor Money Regulations for Fund Service Providers ("**Investor Money Regulations**").

Both sets of Regulations are accompanied by separate guidance documents, respectively entitled "Guidance on Client Asset Regulations for Investment Firms" and "Guidance on Investor Money Regulations for Fund Service Providers".

The review of the existing Client Asset Requirements was prompted by a number of factors, including: the introduction of the Central Bank's new supervisory risk model (PRISM); experience of cases both in Ireland and elsewhere where client asset issues have arisen; pending changes to European directives; and industry feedback seeking the review of the current rules on the safeguarding of client assets. The review process ultimately culminated in the publication of the two sets of Regulations on 30 March 2015 and their related guidance.

Overview

The main purpose of both the Client Asset and Investor Money Regulations is to protect client assets in the event of insolvency. The Client Asset Regulations apply to firms authorised under the European Communities (Markets in Financial Instruments) Regulations 2007 ("**MiFID Regulations**"), or the Investment Intermediaries Act 1995 ("**IIA**") as well as certain UCITS and Alternative Investment Fund Managers ("**Firms**"). The Investor Money Regulations apply to Fund Service Providers ("**FSPs**") authorised under either the IIA or relevant credit institution legislation as administrators, or depositories. It also applies to fund managers authorised under UCITS or the Alternative Investment Fund Managers' Directive.

The Client Asset Regulations are organised around seven "core principles" which reflect the fundamental obligations on all Firms holding client assets. In brief, these principles are: segregation; designation and registration; reconciliation; daily calculation; client disclosure and client consent; risk management; and client asset examination. Six of these core principles are also central to the Investor Money Regulations, the exception being that of client disclosure and client consent.

New Rules on Safeguarding Clients' Assets (continued)

The main innovation of the revised client asset regime is the introduction of specific Regulations covering FSPs. While, the existing regime applies to investment business firms authorised under the IIA, including FSPs when holding cash in a demand deposit account, most FSPs do not apply that regime, principally because it is too impractical. Consequently, the Investor Money Regulations provide a bespoke set of requirements for FSPs in order to reflect the significant differences in their business model, including: the international nature and mobility of the Funds industry, the quantum of monies flowing through collection accounts and the indirect relationship that typically exists between FSPs and investors.

Many of the requirements set out in the Client Asset Regulations are similar to those contained in the existing Client Asset Requirements however the format for the revised framework is different. Specifically, the revised client asset regime provides for Regulations complemented by Guidance, whereas under the existing regime all the Client Asset Requirements are set out in legislation. The revised framework is intended to introduce greater flexibility into the framework and to make it easier to understand its objectives and rationale.

Moreover, as compared to the existing Client Asset Requirements, the Client Asset Regulations contain some notable additions, including a requirement to provide retail clients with a Client Asset Key Information Document ("**CAKID**"), to appoint a Head of Client Asset Oversight ("**HCAO**") and to put in place a Client Asset Management Plan ("**CAMP**"). With the exception of the requirement to provide a CAKID, these additions are also reflected in the Investor Money Regulations, in the form of a requirement to appoint a Head of Investor Money Oversight ("**HIMO**") and to put in place an Investor Money Management Plan ("**IMMP**").

The CAKID

Each Firm must provide their retail clients with a CAKID, explaining, in 'plain English' the key features and requirements of the Client Asset Regulations and providing certain other information regarding its arrangements for holding client assets. The purpose of the CAKID is to assist clients in understanding their risks in relation to client assets and to enable them to make properly informed decisions. It must be provided prior to a retail client signing a terms of business or investment agreement to open an account with the relevant Firm. A CAKID is not a requirement under the Investor Money Regulations.

Head of Client Asset Oversight

Each Firm/FSP must have an appropriate risk management system in place, which includes the appointment of a HCAO/HIMO, as the case may be. The HCAO/HIMO should be either a director or senior manager and is required to comply with the Central Bank's Fitness and Probity Standards.

While ultimate responsibility for safeguarding client assets/investor money remains with the Board, the HCAO/HIMO is responsible for ensuring compliance with the Firm's/FSP's obligations, including, in particular, reporting any breaches of the Regulations to the Board and notifying them to the Central Bank without delay.

According to the Central Bank, Firms/FSPs should make an early application for approval for the person to be appointed as HCAO/HIMO, through the Central Bank's normal Fitness & Probity processing arrangements, in order to prevent a backlog of last minute applications and to allow adequate time for processing.

New Rules on Safeguarding Clients' Assets *(continued)*

The CAMP/ IMMP

Under the new Client Asset Regulations and Investor Money Regulations, the CAMP/IMMP is a critical document in the context of the risk management system for client assets/investor money. One of its main purposes is to document where relevant client asset/investor information can be found in the event of the insolvency of the Firm/FSP. In this respect, a Firm/FSP should consider what information an insolvency practitioner would need in order to quickly account for all client assets held and arrange for their swift transfer or return.

Other purposes of the CAMP/IMMP include:

- demonstrating how the Firm/FSP complies with the client asset/investor money regimes and documenting how its business model contributes to the risks associated with safeguarding client assets/investor money and the controls it has in place to mitigate these risks; and
- documenting and monitoring any material changes to the business model of the Firm/FSP as well as any changes to controls and processes.

The Client Asset Regulations and Investor Money Regulations specify a number of matters which should be included in the CAMP/IMMP and the relevant Guidance contains further information in this respect. However, each CAMP/IMMP must also be tailored to the business model of the relevant Firm/FSP and its complexity.

The CAMP/IMMP must be reviewed and approved at least annually and otherwise if there is any change to the relevant business model which affects the manner in which client assets/investor money are held.

Next Steps

The Client Asset Regulations will come into operation on 1 October 2015, at which time the existing Client Asset Requirements will be revoked. The commencement date for the Investor Money Regulations is 1 April 2016.

Significantly, Firms/FSPs will have a further three month period to finalise and sign off the CAMP/IMMP, namely 1 January 2016 and 1 July 2016, respectively. With regard to IMMPs, it is noteworthy that the Central Bank intends to use thematic reviews post July 2016 to assess the standards of IMMPs and emerging practices in this regard. It will also consider industry feedback in order "to communicate good and bad practices and help assist industry in raising standards in relation to the quality of IMMPs."

Deadline Approaching - Payment Service Providers be Prepared!

Payment Service Providers ("**PSPs**") be prepared. The implementation deadline for the European Banking Authority's ("**EBA**") Final Guidelines on the Security of Internet Payments ("**Guidelines**") is fast approaching. By 1 August 2015 PSPs must have put in place the minimum security requirements outlined in those Guidelines. Most Member States have already informed the EBA that they intend to comply with the Guidelines, including Ireland.

Background

E-commerce is growing exponentially however, much of the existing growth is in domestic e-commerce markets. In contrast, the development of cross-border e-commerce is progressing at a much slower pace, with only 15% of people shopping online from another EU country. Research suggests that this is at least partially attributable to the risk of fraud. According to the latest ECB figures, in 2012 the total value of card fraud increased by 14.8%, reaching €1.33 billion. Moreover, some 60% of the value of the fraud resulted from card not present payments, including payments via the internet.

In January 2013 the European Central Bank ("**ECB**") released a set of recommendations to improve the security of internet payments. These recommendations were originally developed by the European Forum on the Security of Retail Payments ("**SecuRe Pay**"), which is a common platform for both the EBA and ECB focusing on the safety of electronic retail payment services, systems and schemes. Subsequently, SecuRe Pay concluded that the recommendations needed a more solid legal basis in order to ensure consistent implementation across all EU Member States and "to provide confidence to financial institutions that the required investments and system changes are not carried out in vain." Consequently, the EBA agreed to convert the recommendations into EBA guidelines.

On 20 October 2014 the EBA published a consultation paper on draft guidelines for the security of internet payments. The main purpose of this consultation was to address the relationship between the proposed guidelines and the ongoing negotiations on the proposed revisions to the Payment Services Directive ("**PSD 2**"), given that they both address the security of internet payments. A number of the respondents to the consultation argued that the final guidelines should not be issued until after the transposition of PSD 2. However, the EBA rejected this option in view of the high levels of fraud on internet payments, and instead opted for a two step approach: the implementation of the Guidelines on 1 August 2015 and the implementation of any potentially more stringent requirements under PSD 2 at a later stage.

Member States must implement the Guidelines on a 'comply or explain' basis. As of 21 May 2015, all EU Member States had informed the EBA that they intend to comply with the Guidelines, with the exception of Estonia, Slovakia and the UK. Cypus and Sweden intend to comply in part.

Deadline Approaching - Payment Service Providers be Prepared! *(continued)*

The Guidelines - Scope

The Guidelines apply to the provision of specified payment services offered through the internet by PSPs, including credit institutions, electronic money institutions, and legal persons authorised to provide and execute payment services throughout the EU.

The payment services covered are: the execution of card payments and credit transfers on the internet; the issuance and amendment of direct debit electronic mandates; and transfers of electronic money between two e-money accounts via the internet. The Guidelines only apply to browser-based mobile payments. They do not apply to payments where the instruction is given by post, telephone order, voice mail or using SMS-based technology. Neither do they apply to credit transfers where a third party accesses the customer's payment account.

Security Requirements

The Guidelines set out minimum requirements regarding the security of internet payments. However, PSPs may implement more stringent measures than those detailed in the Guidelines, and, in any event, remain responsible for monitoring, assessing and controlling the risks involved in their payment operations.

The Guidelines cover three main categories: the general control and security environment; specific control and security measures for internet payments; and customer awareness, education and communication.

General control and security environment

This category sets down general principles regarding: governance; risk assessment; incident monitoring and reporting; risk control and mitigation; and traceability.

Amongst other things, PSPs must have a formal security policy for internet payments which defines security objectives and the risk appetite. They must also carry out initial and on-going risk assessments regarding the security of internet payments and related services. Senior management must approve both the security policy and the risk assessments.

PSPs must ensure the consistent and integrated monitoring, handling and follow-up of security incidents. This includes having a process in place for dealing with such incidents and with security-related customer complaints as well as procedures for notifying and/or cooperating with the competent authorities in the event of a major payment security incident. PSPs must also implement robust and effective security measures to mitigate identified risks. These measures must incorporate multiple layers of security defences and be periodically audited.

PSPs should restrict the gathering and handling of sensitive personal data to an absolute minimum level. They must also have processes in place which ensure that all transactions, as well as the e-mandate process flow, are appropriately traced.

Specific control and security measures for internet payments

This category addresses: initial customer identification and customer information; strong customer authentication; authentication tools and/or software delivered to the customer; authentication attempts and validity; and protection of sensitive data.

Deadline Approaching - Payment Service Providers be Prepared! *(continued)*

Significantly, the Guidelines require PSPs to implement strong customer authentication, sometimes referred to as “Two-factor Authentication”. This type of authentication validates identity by at least two of the following elements:

- knowledge: something only the user knows, such as a static password, code, or personal identification number;
- possession: something only the user possesses, such as token, smart card, mobile phone; and
- inherence: something the user is, *eg*, biometric characteristic, such as a finger print.

Each of the elements must be independent, in that the breach of one does not compromise the reliability of the others. In addition, at least one of the elements should be non-reusable and non-replicable (except for inherence) and not capable of being surreptitiously stolen via the internet.

According to the Guidelines, both the initiation of internet payments and access to sensitive payment data should be protected by strong customer authentication. More specifically, with regard to the execution of card payments, all PSPs issuing cards should support strong authentication of the cardholder and allow their cardholders to bypass enrolment for strong authentication only in exceptional cases. All PSPs offering acquiring services should:

- support technologies allowing the issuer to perform strong authentication of the cardholder for the card payment schemes in which the acquirer participates; and
- require their e-merchant to support solutions allowing the issuer to perform strong authentication of the cardholder for card transactions via the internet.

The Guidelines also require PSPs to supply customers with specific details relating to the internet payment services and ensure that the framework contract with the customer specifies that the PSP may block a specific transaction or payment instrument on the basis of security concerns. In addition PSPs must limit the number of log-in or authentication attempts, define rules for internet payment services session “time-out” and set time limits for the validity of authentication. PSPs must also have in place transaction monitoring mechanisms.

Customer awareness, education and communication

This category contains requirements relating to: customer education and communication; notifications, setting of limits; and customer access to information on the status of payment initiation and execution.

PSPs must provide assistance and guidance to customers with regard to the secure use of internet payment services, including through the provision of at least one secure channel for on-going communication with customers regarding security issues and the initiation of customer education and awareness programmes. They must also set limits for internet payment services, confirm to the customers the payment initiation, and provide them in good time with the information necessary to check that a payment transaction has been correctly initiated and/ or executed.

Deadline Approaching - Payment Service Providers be Prepared! (continued)

Comment and Next Steps

According to the EBA, competent authorities to whom the Guidelines apply should incorporate them into their supervisory practises as appropriate. On 11 June 2015 the Central Bank of Ireland updated its website stating that all firms within the scope of the Guidelines will be expected to comply with them from 1 August 2015. The Central Bank has also updated its Credit Union Handbook to state that where a credit union provides internet payment services, it will be expected to comply with the Guidelines.

The implementation of the Guidelines will require some providers to make significant changes to their systems and controls. Moreover, PSPs may need to introduce additional changes once PSD 2 is finalised. PSPs need to give careful consideration to how they intend to approach compliance with the Guidelines and in particular, may wish to ensure that their preferred approach will also be compatible with any additional requirements imposed pursuant to PSD 2.

The Guidelines are very much an interim solution pending the adoption and transposition of PSD 2. Although PSD 2 is progressing through the EU's legislative process, it is still likely to be a number of months before it is finally adopted. Specifically, while on 5 May 2015 the European Parliament announced that it has reached an informal agreement with the Council of the EU on PSD 2, the agreed text must now be discussed in the context of trilogue negotiations between the Parliament, the Council and the Commission before being formally approved. Moreover, it is currently envisaged that, once PSD 2 enters into force Member States will have a two year period in which to transpose it into national law.

Financial Services Regulatory Group Bulletin

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Unilateral Jurisdiction Clauses - A Continuing Source of Controversy

The validity of unilateral jurisdiction clauses continues to be a matter of controversy, as illustrated by a recent decision by the French Supreme Court, the Cour de Cassation, in *Danne v Credit Suisse*. In that case, the Court held that a unilateral jurisdiction clause between a French company (Danne) and a Swiss Bank was invalid under the Lugano Convention. Other countries have also struck down such clauses, including Bulgaria and Russia. As against this, they have been accepted by the courts in the United Kingdom as well as in several other jurisdictions, including Italy and Luxembourg.

Overview of Unilateral Jurisdiction Clauses

Unilateral jurisdiction clauses, also known as "one-sided", "one-way" or asymmetrical jurisdiction clauses are widely used in credit and financing agreements. Such clauses provide that one party to an agreement can only bring proceedings in a specified jurisdiction, whilst one or more other contracting parties have the option to bring proceedings in that and in other jurisdictions. The option to sue in multiple jurisdictions is usually granted to a financing party.

The main advantage of a unilateral jurisdiction clause is that it permits the party vested with the option to choose the jurisdiction in which to bring proceedings after the dispute has arisen, when both the nature of the dispute and the identity of the other party are known. This enables a party to choose what it perceives to be the most favourable dispute resolution forum taking into account both the speed with which it needs the dispute to be resolved and the likely location of assets against which enforcement will eventually be required.

Unilateral jurisdiction clauses can play an important role in financial markets, and in particular may contribute to the willingness of banks to provide finance, by minimising the risk that the debtor's obligations will be unenforceable.

Validity Issues

On 26 September 2012 the French Supreme Court caused shock waves when it pronounced a unilateral jurisdiction clause invalid in *Mme 'X' v Banque Privée Edmond de Rothschild*. In that case, Mme X had opened a private bank account with the Luxembourg bank, Edmond de Rothschild via a French sister company of the bank. In doing so, she signed up to that bank's standard terms and conditions which provided that:

"The relations between the bank and the client are subject to the laws of Luxembourg. Any dispute between the client and the bank will be subject to the exclusive jurisdiction of the courts of Luxembourg. Notwithstanding the above, the bank reserves the right to start proceedings in the client's place of domicile or before any other competent court."

Unilateral Jurisdiction Clauses - A Continuing Source of Controversy *(continued)*

Notwithstanding this provision, Mme X commenced proceedings against the bank in France, seeking damages for a substantial lowering of the performance of her investments. Although the bank attempted to rely on the jurisdiction clause to prevent the French courts from hearing the case, the clause was found to be invalid both at first instance and on appeal. According to the French Supreme Court, the unilateral jurisdictional clause was void for being "potestativité" *ie*, discretionary: under French law, obligations conditional upon an event that one party totally controls are void. The French Supreme Court also found that unilateral jurisdiction clauses do not constitute an agreement conferring jurisdiction within the meaning of the Brussels Regulation, but rather the imposition of terms by one party on the other. According to that Court, such clauses contradict the rationale and purpose of Article 23 of the Brussels 1 Regulation, namely to provide finality.

The decision in Mme X followed a line of decisions invalidating unilateral jurisdiction clauses in countries such as Bulgaria, Poland, Romania and Russia. However, subsequently, in *Mauritius Commercial Bank v Hestia Holdings* and another, the UK courts took a different approach and upheld a unilateral jurisdiction clause under English law.

In that case, the claimant, a Mauritian-registered bank ("**MCB**") was seeking monies due by the first defendant under an agreement: the second defendant had guaranteed the payment of these monies. The dispute resolution clause provided for the exclusive jurisdiction of the English courts, but also stated that MCB should not "be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction". MCB sought to commence English court proceedings, but the defendants applied for an order setting these proceedings aside, partially on the basis of the Rothschild judgment. Specifically, the defendants argued that the jurisdiction clause remained subject to Mauritian law and that it was void under Mauritian law, as the Mauritian courts would follow Rothschild.

The Court dismissed the defendants' arguments on the basis that the clause in question was not in fact subject to Mauritian law but, even if it was, there was no compelling reason for the Mauritian courts to follow Rothschild. On the contrary, the Court considered that there was a good arguable case that under Mauritian law the clause would be treated as valid and effective.

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Unilateral Jurisdiction Clauses - A Continuing Source of Controversy *(continued)*

Danne v Credit Suisse

The French Supreme Court's most recent judgment on this issue, *Danne v Credit Suisse*, which was decided on 25 March 2015, concerned two loan agreements which were part of a financing structure involving several parties. The agreements each contained a unilateral jurisdiction clause in the following terms:

"The borrower recognises the exclusive forum for all disputes is Zurich or the place in which the branch of the Bank where the parties' agreement was made is located..... the bank however is entitled to take legal action against the borrower before any other competent court".

Danne brought an action in France against all the parties to the loan agreements and two of the banks involved challenged the jurisdiction of the French courts on the basis of the unilateral jurisdiction clause. While the French Court of Appeal upheld the validity of that clause, despite what it described as an imbalance between the parties rights, its decision was set aside by the French Supreme Court. According to that Court, the Court of Appeal had failed to consider whether the recognised imbalance was contrary to the aims of foreseeability and legal certainty in Article 23 of the Lugano Convention, and, as such, its decision was without legal basis. In reaching this decision, the French Supreme Court made specific reference to the fact that the clause gave the bank the competence to act against the borrower before any other competent court, without specifying the objective criteria on which this competence was based.

Comment

Parties contemplating including a unilateral jurisdiction clause in a contract should carefully consider whether there is a possibility of a dispute coming before the French courts, or any other courts that apply similar reasoning. If there is, then there is a high risk that the clause will be held to be invalid.

In the event that parties do decide to include such a clause, they should also consider setting out a list of the criteria on the basis of which the choice of jurisdiction is to be made. In this respect, as mentioned above, it is noteworthy that the French Supreme Court made specific reference to the absence of such criteria in setting aside the unilateral jurisdiction clause at issue in *Danne v Credit Suisse*.

Given the divergences in the approach taken by the courts in various EU Member States, it is only a matter of time before the EU's Court of Justice is asked to pronounce on the validity of unilateral jurisdiction clauses. Although the reasoning of the French courts is difficult to follow, it is impossible to foretell how the Court of Justice will approach this question. This is another factor which should be taken into consideration when deciding whether or not to include such a clause.

Financial Services Regulatory Group Bulletin

IN THIS ISSUE:

Regulatory Developments Tracker

A round-up of some of the significant financial services related EU and domestic regulatory developments between 1 January 2015 – 1 June 2015 (in alphabetical order).

Bank Recovery and Resolution Directive 2014/59 ("**BRRD**")	Commission Delegated Regulation 2015/63 on ex ante contributions to resolution financing arrangements, entered into force on 6 February 2015 and applies from 1 January 2015. The Delegated Regulation supplements the BRRD and determines how much individual credit institutions will have to pay each year to their respective resolution funds according to its size and risk profile. On 6 May 2015 the European Banking Authority ("**EBA**") published its final guidelines on the minimum list of qualitative and quantitative indicators under Article 9(2) of the BRRD for the purposes of recovery planning. The guidelines specify the requirements that credit institutions and investment firms should follow when developing their recovery plans. They will enter into force on 31 July 2015. On 20 May 2015 the EBA published final draft Guidelines on: • factual circumstances amounting to a material threat to financial stability and on the elements related to the effectiveness of the sale of the business tool under Article 39(4) of the BRRD; • the determination of when the liquidation of assets or liabilities under normal insolvency proceedings could have an adverse effect on one or more financial markets under Article 42(14) of BRRD; and • the minimum list of services or facilities that are necessary to enable a recipient to operate a business transferred to it under Article 65(5) BRRD. On 26 May 2015 the EBA published its final guidelines on the interpretation of different circumstances when an institution shall be considered as failing or likely to fail for the purposes of the BRRD.
Capital Markets Union ("**CMU**")	The European Commission ("**Commission**") published its CMU consultation on 18 February 2015. The consultation comprises a Green Paper, "Building a Capital Markets Union", as well as two further consultation papers, "An EU Framework for simple, transparent and standardised securitisation" and "Review of the Prospectus Directive". These are accompanied by two further documents, namely a questions and answers ("**Q&A**") on the Green Paper on building a CMU and a Commission Staff Working Paper. The CMU's fundamental goal is to improve the functioning of the EU's capital markets in order to diversify and improve sources of funding, particularly for small and medium enterprises. The Commission will publish an action plan on CMU later in 2015.

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Capital Requirements Directive 2013/36 Capital Requirements Regulation 575/2013 ("**CRR**")	Commission Delegated Regulation 2015/62 on the leverage ratio which supplements CRR, entered into force on 18 January 2015. ECB Recommendation 2015/2 on dividend distribution policies was published in the EU's Official Journal on 28 January 2015. Commission Delegated Regulation 2015/61 supplementing the CRR with regard to the liquidity coverage requirement for credit institutions came into force on 6 February 2015 and applies in Member States from 1 October 2015. This Delegated Regulation sets out rules governing what assets will qualify as high quality liquid assets: the CRR requires banks to have sufficient high quality assets in their liquidity buffer to cover net liquidity outflows over a 30 day stress period. ECB Decision 2015/656 on the conditions under which credit institutions are permitted to include interim or year-end profits in Common Equity Tier I capital in accordance with Article 26(2) of the CRR, entered into force on 6 February 2015 and applied from the reporting reference date of 31 December 2014. Commission Implementing Regulation 2015/79 amending Implementing Regulation 680/2014 laying down technical standards with regard to supervisory reporting of institutions according to the CRR as regards asset encumbrance, single data point model and validation rules, entered into force on 10 February 2015. Commission Implementing Regulation 2015/277 amending Implementing Regulation 680/2014 laying down implementing technical standards ("**ITS**") with regard to supervisory reporting of institutions according to the CRR, entered into force on 21 February 2015. ECB Regulation 2015/534 on reporting of supervisory information, entered into force on 1 April 2015. Commission Implementing Regulation 2015/233 laying down regulatory technical standards ("**RTS**") with regard to currencies in which there is an extremely narrow definition of bank eligibility under the CRR, entered into force on 6 March 2015. Commission Delegated Regulation 2015/488 amending Delegated Regulation 241/2014 as regards own funds requirements for firms based on fixed overheads, entered into force on 13 April 2015.

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Regulatory Developments Tracker (continued)

	Commission Delegated Regulation 2015/585 on RTS for the specification of margin periods of risk used for the treatment of clearing members' exposures to clients under the CRR, entered into force on 6 May 2015. On 22 May 2015 the EBA published its final guidelines on the management of interest rate risk arising from non-trading activities. The guidelines will apply from 1 January 2016.
Central Credit Register ("**CCR**")	On 17 April 2015 the Central Bank published a Consultation Paper on the CCR in which it is seeking views on key policy areas in advance of making regulations associated with the CCR's introduction. The consultation closed on 12 June 2015. The CCR will be a national mandatory database of credit intelligence and lenders will be obliged to check and report information associated with credit applications and agreements on a mandatory basis. The CCR is expected to provide an accurate picture of each borrower's total loans and guarantees and facilitate enhanced credit worthiness assessments and responsible lending.
Client Assets/Investor Money Regulations	The Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Client Asset Regulations 2015 and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Investor Money Regulations 2015 were published on 30 March 2015. These Regulations contain a number of requirements designed to strengthen the safeguards around client assets and investor money, respectively. The Central Bank also published guidance for Investment Firms and Fund Service Providers to assist them in interpreting the Regulations. The Client Asset Regulations will come into operation on 1 October 2015 and the Investor Money Regulations will come into operation on 1 April 2016.
Corporate Governance	On 5 May 2015 the Central Bank published a consultation paper on Corporate Governance Requirements for Investment Firms. The proposed requirements are intended to supplement those imposed under MiFID II and CRD IV and will apply to all MiFID firms and non-retail investment intermediaries licensed or authorised by the Central Bank, other than those which are designated as Low Impact under the Central Bank's Probability Risk Impact System (PRISM).

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Credit Rating Agencies	Commission Delegated Regulations 2015/1, 2015/2 and 2015/3 entered into force on 26 Jan 2015. These regulations set out RTS supplementing the Credit Rating Agencies Regulation 1060/2009, as amended regarding: periodic reporting on fees charged by credit rating agencies; the new European Rating Platform; and structured finance instruments.
Credit Unions	On 27 March 2015 the Central Bank Reform Act 2010 (Sections 20 and 22 – Credit Unions that are also authorised as Retail Intermediaries) Regulations 2015, was published in Irish Oifigiuil. These Regulations prescribe controlled functions and pre-approval controlled functions for credit unions that are also authorised as retail intermediaries in respect the part of the business that the credit union undertakes as a retail intermediary.
Credit Servicing Firms Bill 2015	The Consumer Protection (Regulation of Credit Servicing Firms) Bill 2015 was published on 14 January 2015. This Bill seeks to address concerns regarding the loss of regulatory protections for borrowers when loans are sold to an unregulated entity. In doing so it is proposing to amend the Central Bank Acts 1942 to 2014 in several respects. The Bill was amended in committee on 27 May 2015.
European Central Bank ("**ECB**")	On 28 March 2015 the ECB's Decision 2015/529 which amends its Decision 2004/3 on public access to ECB documents was published in the EU's Official Journal. Decision ECB/2004/3 as amended, defines the conditions and limits according to which the ECB must give public access to ECB documents. Decision ECB 2015/529 amends that earlier Decision in relation to documents relating to the prudential supervision of credit institutions drawn up or held by the ECB. The Decision entered into force on 29 March 2015. On 23 May 2015 ECB Decision 2015/811 on public access to ECB documents in the possession of national competent authorities was published in the EU's Official Journal. According to that Decision, where National Competent Authority ("**NCA**") receives a request for an ECB document in its possession, the NCA shall consult the ECB on the scope of access to be granted, prior to taking a decision on disclosure, unless it is clear that the document shall or shall not be disclosed. Alternatively, the NCA may refer the request to the ECB.

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European Market Infrastructure Regulation 648/2012 ("**EMIR**")	On 4 February 2015 ESMA published a feedback statement on its consultation on applying the EMIR clearing obligation to a class of foreign-exchange non-deliverable forward OTC derivatives. According to that statement, ESMA is not proposing to impose a clearing obligation on this class, at least for the moment. The Commission launched a consultation to enable it to judge market participants' experience in implementing EMIR on 21 May 2015. The Commission will use the feedback received to review and prepare a general report on EMIR for submission to the European Parliament and the Council of the EU by 17 August 2015. On 22 May 2014 ESMA published its Opinion on the impact of EMIR on Articles 50(1) (g) (iii) and 52 of the UCITS Directive (Directive 2009/65) for OTC financial derivative transactions that are centrally cleared. In this Opinion, ESMA calls for a modification of Articles 50(1) (g) (iii) and 52 of the UCITS Directive to take into account the clearing obligation of certain types of OTC financial derivative transactions required by EMIR.
Interchange Fees Regulation 2015/751	On 19 May 2015 the Regulation on interchange fees for card-based payment transactions was published in the EU's Official Journal. The Regulation came into force on Monday, 8 June 2015.
Investment Funds – Alternative Investment Fund Managers Directive 2011/61 ("**AIFMD**")	On 27 March 2015 Commission Delegated Regulation 2015/514 on the information to be provided by competent authorities to ESMA under Article 67(3) AIFMD was published in the EU's Official Journal. The relevant information must be supplied to ESMA to enable it to evaluate the functioning of the AIFMD passport, the operating conditions for alternative investment funds and their managers and the potential impact of an extension of the passport.
Investment Funds – European Long-Term Investment Funds ("**ELTIFs**")	On 19 May 2015 Regulation 2015/760 on ELTIFs was published in the OJ: it will apply from 9 December 2015. The ELTIF Regulation seeks to create a new form of widely accessible fund vehicle which is designed to promote investment in companies and projects which require long-term or "patient" capital. In doing so, it lays down uniform rules on the authorisation, investment policies and operating conditions of EU alternative investment funds that are marketed as ELTIFs.
Investment Funds – Irish Collective Asset-management Vehicle ("**ICAV**")	The ICAV Act 2015 commenced in its entirety on 12 March 2015 and provides for a new corporate vehicle for investment funds which is suitable for both UCITS and alternative investment funds.

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Investment Funds - European Social Entrepreneurship Funds ("**EuSEF**") and European Venture Capital Funds ("**EuVECA**")	The European Union (EuSEF) Regulations 2015 and European Union (EuVECA) Regulations 2015 have been published in the Irish Statute Book, having been signed by the Minister for Finance on 20 March 2015. The Regulations give full effect to the EU's EuSEF and EuVECA Regulations. In particular, they nominate the Central Bank as the competent authority in the State for the purpose of those Regulations and confer on it the power to impose conditions relevant to the conduct of business by EuSEF and EuVECA managers.
Markets in Financial Instruments Directive 2004/39 (MiFID)	On 6 May 2015 ESMA published guidelines on the definitions of commodity derivatives and their classification under C6 and C7 listed in Section C of Annex I of MiFID.
Money Laundering	On 17 February 2015 the Central Bank published its Report on Anti-Money Laundering/ Countering the Financing of Terrorism and Financial Sanctions Compliance in the Irish Banking Sector. On 21 May 2015 the Central Bank published a report of its observations in relation to Anti-Money Laundering/ Countering the Financing of Terrorism and Financial Sanctions compliance by Credit Unions in Ireland.
Mortgages	The Central Bank (Supervision and Enforcement) Act 2013 (Section 48) Housing Loan Requirements Regulations 2015 were published on 10 February 2015. These Regulations stipulate both loan to value and loan to income ratios for residential mortgage lending by regulated fund service providers in the Irish market.
Packaged Retail and Insurance-based investment products (PRIIPs)	On 26 March 2015 ESMA updated its PRIIPs Q&A to include a new Q&A on the treatment of past performance information in the event of a fund merger.
Short Selling Regulation 236/2012	Delegated Regulation 2015/97 correcting Delegated Regulation (EU) No 918/2012 as regards the notification of significant net short positions in sovereign debt, entered into force on 12 February 2015. This new Delegated Regulation amends Article 13(3) of the earlier Delegated Regulation to explicitly refer to the notification threshold of Article 7 of the Short Selling Regulation on significant net short positions in sovereign debts.

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Single Resolution Mechanism ("**SRM**")	Council Implementing Regulation 2015/81 specifying uniform conditions on the application of the SRM Regulation with regard to ex ante contributions to the single resolution fund came into force on 23 January 2015.
Single Supervisory Mechanism ("**SSM**")	Council Regulation 2015/159 amending Regulation 2532/98 concerning the ECB's powers to impose sanctions, entered into force on 4 February 2015. The amending Regulation seeks to establish a coherent regime for the imposition by the ECB of sanctions relating to the performance of its supervisory tasks under the SSM Regulation by adapting the framework already set out by Regulation 2532/98 for the purposes of monetary policy conduct. ECB Decision 2015/530 on the methodology and procedures for the determination and collection of data regarding fee factors used to calculate annual supervisory fees levied on credit institutions, entered into force on 29 March 2015. The Decision sets out the methodology and the procedures for the determination and collection of data regarding the fee factors used for the calculation of the annual supervisory fees to be levied in respect of supervised entities and supervised groups and the submission of the fee factors by the fee debtors. It also sets out procedures for the submission of such data by NCAs to the ECB. The Decision applies to fee debtors and NCAs. The ECB's Regulation on reporting of supervisory financial information, entered into force on 1 April 2015. The Financial Reporting Regulation 2015/534 applies to credit institutions in the SSM. It is intended to supplement Commission Implementing Regulation 680/2014, which sets out financial reporting requirements for firms within the scope of the CRR. The SSM Financial Reporting Regulation covers reporting requirements for credit institutions and sets out rules for the submission of information by NCAs to the ECB.
	ECB Decision 2015/727 on the total amount of annual supervisory fees for the first fee period and for 2015, entered into force on 29 April 2015. According to an ECB press release, banks in the SSM must supply data for calculating their specific fees by 1 July 2015. Invoices relating to the total fees for individual banks will be sent in late 2015.

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SME Code Of Conduct	The Central Bank published a consultation paper on 11 January 2015 on its proposed replacement of the Code of Conduct for Business Lending to Small and Medium Enterprises with the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) Lending to Small and Medium Enterprises Regulations. Overall, the proposed Regulations are considerably more detailed than the code and have a more extensive scope. Specifically, unlike the existing code, the Regulations will also apply to credit union lending and business credit cards.
Solvency II Directive (2009/138)	Commission Delegated Regulation 2015/35 supplementing the Solvency II Directive, entered into force on 18 January 2015 and sets out more detailed requirements for individual insurance undertakings and groups, based on the provisions set out in Solvency II. Commission Implementing Regulation 2015/460 laying down Implementing Technical Standards ("**ITS**") with regard to the procedure concerning the approval of an internal model, entered into force on 21 March 2015. Commission Implementing Regulation 2015/461 laying down ITS with regard to the process to reach a joint decision on the application to use a group internal model, entered into force on 21 March 2015. Commission Implementing Regulation 2015/462 laying down ITS with regard to the procedures for supervisory approval to establish special purpose vehicles, for the co-operation and exchange of information between supervisory authorities regarding special purpose vehicles as well as to set out formats and templates for information to be reported by SPVs, entered into force on 21 March 2015. Commission Implementing Regulation 2015/498 laying down ITS with regard to the supervisory approval procedure to use undertaking-specific parameters, entered into force on 26 March 2015. Commission Implementing Regulation 2015/499 laying down ITS with regard to the procedures to be used for granting supervisory approval for the use of ancillary own-fund items, entered into force on 26 March 2015.

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	Commission Implementing Regulation 2015/500 laying down ITS with regard to the procedures to be followed for the supervisory approval of the application of a matching adjustment, entered into force on 26 March 2015. The Central Bank published a consultation paper (CP92) on 2 April 2015 on the Domestic Actuarial Regime and Related Governance Requirements under Solvency II. According to the Central Bank, it intends to introduce specific domestic requirements regarding the actuarial function and related governance arrangements which will apply to all insurance and reinsurance undertakings subject to Solvency II. These requirements seek to retain a number of elements of the existing regime and in particular a number of the requirements introduced by the Reserving Requirements for Non-Life Insurers and Non-Life and Life Reinsurers. These include Peer Review, Reserving Policy and Reserving Committees.

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