



Client
Newsletter
Winter 2009

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FINANCIAL SERVICES

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COMPROMISE PROPOSAL PUBLISHED BY THE COUNCIL OF THE EUROPEAN UNION ON THE DRAFT AIFM DIRECTIVE

Introduction

On 30 April 2009, the EU Commission ("EC") published an initial draft of the Directive on Alternative Investment Fund Managers (the "Directive"). Since the publication of the Directive, the provisions of the Directive have been the subject of considerable debate (and criticism) amongst interested parties and have been discussed at numerous meetings of the EU Council working group, most recently under the Swedish Presidency. On 25 November 2009 the Swedish Presidency published a compromise proposal for the Directive. Details of the latest compromise proposal are set out below.

Scope

The Directive will apply to alternative investment fund managers ("AIFM") established in the EU that manage or market non-UCITS funds with assets under management exceeding €100 million. Accordingly, managers of hedge funds, private equity funds, real estate funds, commodity funds, infrastructure funds and any other alternative investment funds (hereinafter "AIF") will come within the scope of the Directive.

Under the Directive the EU Home State regulator is required to ensure that no AIFM manages an AIF unless it has been authorised in accordance with the Directive.

The Directive will:

- ▣ Adopt an 'all encompassing' approach to ensure that no significant AIFM is outside of regulation and oversight, while providing exemptions for smaller managers. It will only apply to AIFM managing a portfolio of €100 million plus. A higher threshold of €500 million applies to AIFM not using leverage (and having a five year lock-in period for their investors) as they are not regarded as posing systemic risks.
- ▣ Aim to regulate major sources of risks in the alternative investment value chain by ensuring that AIFM are authorised and subject to ongoing regulation;
- ▣ The original draft of the Directive would have required the AIFM to ensure that each AIF it manages appoints an independent valuation agent. The Directive as amended no longer requires the appointment of an independent valuation agent, however, the Directive sets out rules in relation to the valuation of investments;
- ▣ Both the original and second draft of the Directive impose certain obligations as regards “depositories”. An AIFM is required to ensure that a “depository” holds all financial instruments that can be kept and which are subject to regular trading in a segregated account opened or held in the name of one or more AIF (and not in the name of the depository or its agents). The original draft of the Directive imposed strict liability on depositories for its own failures and for those of any sub-custodians which it appointed. The compromise proposal contained in the latest draft Directive modifies the strict liability position in a manner which is not entirely clear;
- ▣ Increase the transparency of AIFM and the funds they manage for supervisors, investors and other key stakeholders;
- ▣ The new draft of the Directive includes entirely new and detailed provisions relating to the remuneration policies and practices followed by AIFM. Details of the remuneration paid to the AIFM's employees (together with carried interest) will need to be disclosed to investors in the annual report. Such requirements were not contained in the initial draft;
- ▣ Ensure that all regulated entities are subject to governance standards and have robust systems in place for the management of risks, liquidity and conflicts of interest;
- ▣ A regulatory authority is required to impose limits on leverage that an AIFM may employ and may employ such other restrictions on the management of the AIF with respect to the collective investment schemes under its management;

- ▣ Impose a number of requirements in relation to the delegation of functions by an AIFM;
- ▣ Permit AIFM to market funds to professional investors throughout the EU subject to compliance with regulatory standards; and
- ▣ Grant access to the European market to third country funds after a transitional period of three years. The EC have said this is to allow the EU to check whether the necessary guarantees are in place in the countries where the funds are domiciled (with respect to among others equivalence of regulatory and supervisory standards and exchange of information on tax matters).

The Directive is still undergoing the legislative process (Level 1) and is therefore subject to further amendment. Interest groups such as AIMA, the City of London and international pension funds are lobbying EU politicians and policy makers for further amendments to the Directive. In the general opinion of those working within the hedge fund industry, although the latest draft of the Directive contains significant improvements, many of the current provisions are still objectionable and require further amendment.

UCITS IV

Adoption of the Directive

On 22 June 2009, the European Council of Ministers adopted the UCITS IV Directive which had been approved by the European Parliament on 13 January, 2009. This represents the culmination of an extensive period of debate and assessment of EU investment funds aimed at modernising the UCITS regulatory framework. The Directive is required to be transposed into national law to take effect by 1 July 2011.

CESR open hearing on UCITS IV

On 1 September 2009, the Committee of European Securities Regulators (CESR) held an open hearing on its draft advice on UCITS IV covering;

- ▣ Key Information Document;
- ▣ Organisational requirements and conflicts of interest;
- ▣ Rules of conduct; and
- ▣ Risk management.

The deadline for responses to the UCITS IV consultations was extended to 10 September, 2009.

CESR consultation paper on UCITS IV

In September, CESR published a further consultation paper in relation to Level 2 technical advice for certain of the other UCITS IV provisions. The paper sets out draft advice on:

- ▣ The content and format of the information that should be provided to unitholders of funds proposing to merge, in order to allow the unitholders to make informed judgements about the impact of the merger on their investment, including a specified format of the information letter to be provided to unitholders regarding the merger.
- ▣ Measures relating to master-feeder structures including: (a) the content of information-sharing agreements between the funds and which legal regime should apply to cross-border agreements; (b) measures to avoid market timing or other arbitrage issues; (c) alternative courses of action for feeder funds in the event of a master fund's liquidation, merger or division; (d) information sharing agreements between like-service providers (depositories and auditors) if the master and feeder UCITS have different service providers, and (e) types of irregularities impacting negatively on the feeder UCITS that must be reported by the master UCITS' depository.
- ▣ Measures relating to the notification procedures for cross-border marketing of UCITS, including: (a) the scope of the information required to be published by each Member State in relation to laws, regulations and other provisions relating to the marketing of UCITS established in another Member State within the host's territories; (b) the definition of common standards and the content of procedures for facilitating the host State access to supporting documentation sent with the notification letter, and in particular the need for databases at national of EU level; (c) common standards and procedures for notification by UCITS to host States of amendments to the relevant documents; (d) the exhaustive content and a proposed format of the standard notification letter and attestation to be sent by the UCITS to the competent authority of its home state when it wishes to passport into another Member State, and
- ▣ Procedures and technical arrangements for facilitating the electronic communication and exchange of information required during the notification procedure and procedures to deal with the situation where there are technical problems or the host State competent authority establishes the notification file is incomplete.

REDOMICILING AN INVESTMENT FUND TO IRELAND

The Irish government has now introduced new draft legislation to allow for a more efficient system for re-domiciling non-Irish domiciled corporate funds into Ireland. The new system is expected to be in place by the end of 2009 or early in 2010.

The new system will enable corporate funds established and registered in certain jurisdictions to apply to the Register of Companies in Ireland (“CRO”) to continue as a company under the laws of Ireland and to apply to the Financial Regulator to be authorised as a fund in Ireland. This re-domiciliation regime will enable re-domiciled funds to be authorised in Ireland as either a non-UCITS or UCITS funds provided that they meet the relevant criteria for the chosen fund structure.

Most likely, redomiciliation will be used by promoters wishing to utilise the UCITS product or the Irish QIF product (the vehicle most used for hedge funds, FoHF and less liquid/highly leveraged products) with the new redomiciliation opportunity making the process more straight forward and, most importantly, avoiding any necessity of having to liquidate a portfolio or engage in asset for share swap arrangements.

Should you require any additional information on the re-domiciliation process, please see the Dillon Eustace publication entitled “Re-Domiciling an Investment Fund to Ireland”

EU REGULATION OF PACKAGED RETAIL INVESTMENT PRODUCTS

In July, 2009 the European Council of Economics and Finance Ministers (“ECOFIN”) published its conclusions on packaged retail investment products against a background of EC work to consolidate product information requirements and rules on product sales for investment products (including investment funds) bought by retail investors. It is expected that the EU Commission will issue proposals for a regulatory environment for the sale and disclosures of packaged retail investment products.

EUROPEAN COMMISSION PUBLIC CONSULTATION ON UCITS DEPOSITARIES

In July, 2009 the EC launched a public consultation on UCITS depositaries. This public consultation was part of a comprehensive review of the existing European regulatory principles applicable to depositary functions. The objective was to clarify and strengthen the regulation and supervision of UCITS depositaries, with a view to increasing the level of the protection of UCITS investors. The areas of particular interest related to safe keeping and supervisory duties and the responsibility regime. This consultation closed on 15 September 2009.

CESR issued a response to the EC's consultation in late September. In its letter to Commissioner McCreevy, CESR stated that it *“expresses support for greater clarity, legal certainty and harmonisation in the duties and responsibility of UCITS depositaries. These entities play a key role in the UCITS framework, particularly in the promotion of investor protection. As such, the design and implementation of a robust and transparent legal framework is to be encouraged.”*

CESR also made specific recommendations as to the definition of safekeeping in that it could be composed of overall control of assets and segregation. CESR stated that a key requirement of the overall control of assets *“would be that the assets could not be transferred by the manager/management company without prior knowledge or consent of the depositary.”* In terms of segregation, CESR believes in *“imposing explicit controls on re-hypothecation and clarifying that the sub-custodian should also be obliged to put in place proper segregation arrangements.”*

CESR also stated its concern about the EC's desire to apply certain elements of the Alternative Investment Fund Managers Directive (“AIFM”) to the UCITS sphere as regards depositaries. CESR Members do not think the current draft of the AIFM represents a solid basis for the requirements that should apply to UCITS depositaries.

CESR sees the proposals in its consultation response as a good starting point for an improved legislative framework for depositaries.

IFIA AND AIMA LAUNCH REVISED GUIDE TO SOUND PRACTICES OF HEDGE FUND ADMINISTRATORS

On 18 September, 2009 the IFIA announced the publication of the revised Guide to Sound Practices for Hedge Fund Administrators in conjunction with AIMA. THE IFIA commented that the Guide, originally published in 2004, has benefited from significant updating by the industry Alternative Investment Committee to reflect various industry developments in areas such as valuations, tax and anti-money laundering.

The section on valuation, one of the most crucial and topical subjects in the industry, includes the IFIA Sample Pricing Policy Document as an appendix. This document also prepared by the Alternative Investment Committee provides detailed guidance and examples of what a sample pricing policy might contain. The Guide includes sections on a fund's start up phase; how administrators interact with a fund's investors; how the net asset value is calculated; and the additional services and support functions that administrators provide.

THE PAYMENT SERVICES REGULATIONS 2009

On 30 September the Minister for Finance brought Directive 2007/64/EC into law through the implementation of S.I. No. 383 of 2009 the European Communities (Payment Services) Regulations, 2009 (the "Regulations"). Part 1 and 2 come into operation on 1 October, 2009 with the remainder of the Regulations coming into operation on 1 November, 2009. It establishes a harmonised legal framework for payments services in the EU and EEA.

The Regulations essentially deal with three issues:

- ▣ it establishes who may provide payments services;
- ▣ it establishes transparency requirements to ensure that payment service providers give requisite information to their customers as related to payments; and
- ▣ it sets out the relative rights and obligations of payment service providers and payment service users.

The Regulations cover payments made by electronic means but excludes payments made by cash and cheque.

The six categories of payment service provider covered by the Regulations are:

- ▣ Credit Institutions;

- ▣ Electronic Money Institutions;
- ▣ Post Office Giro Institutions;
- ▣ Payment Institutions;
- ▣ European/National Central Banks; and
- ▣ Member States or Regional/Local Authorities.

The Regulations create a new class of regulated firm known as Payment Institutions which must obtain authorisation from the Financial Regulator in order to provide payment services. Payment Service Providers are also permitted to provide payment services under the Regulations and must comply with certain provisions of the Regulations but are not required to seek authorisation.

The Financial Regulator previously stated that any person who provides payment services without an appropriate authorisation may risk committing a criminal offence. Payment Institutions that require authorisation are required to contact the Financial Regulator (Clare Ahern or Shane Howe, Financial Institutions and Funds Authorisation, Financial Regulator, PO Box 9138, College Green, Dublin 2, Telephone: (01) 2244308 or (01) 2244386 Email: clare.ahern@financialregulator.ie or shane.howe@financialregulator.ie).

LEHMAN'S CLIENT MONEY RULING

On 15 December, 2009, the High Court of England and Wales ruled on an application by the administrators of Lehman Brothers International (Europe) (LBIE) concerning client money which ought to have been segregated and protected in Lehman's hands in the event of insolvency. The client money protection is provided under both European legislation and UK domestic regulation.

The High Court had been asked to determine whether clients of LBIE whose money should have been segregated by LBIE, but had not been, still benefited from the protection of the statutory trust established by the FSA's CASS rules.






In summary, the High Court decided that the client money pool is to be distributed to those clients for whom LBIE had segregated client money at the time of its administration. There was no question of the pool being topped-up either to make good past failures, or to bring the pool up to date (so that it contained at the point of administration what would have been segregated had LBIE not gone into administration).

As a result, clients entitled to client money protection but for whom LBIE failed to comply with its obligation to segregate that money, will not be entitled to participate in the pool of client money controlled by the administrators.

The respondents have been given permission to appeal the decision to the Court of Appeal. No date has yet been fixed for the hearing of this appeal, but, given the obligation on the administrators to distribute the client money pool as soon as possible, it is expected to be heard early in 2010.

BANKING AND CAPITAL MARKETS

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NEW GOVERNMENT BANK GUARANTEE SCHEME – THE ELG SCHEME

The current Credit Institutions (Financial Support) Scheme 2008 provides that the Minister for Finance of Ireland (the “Minister”) will guarantee certain types of liabilities (“covered liabilities”) of participating named institutions (“covered institutions”) for the period 30th September, 2008 – 29th September, 2010 inclusive (the “CIFS Scheme”). Please see our other *Banking & Capital Markets* publications for further information.

Under the CIFS Scheme, if a covered institution defaults on a covered liability, the Minister would pay to the creditor, on demand, an amount equal to the unpaid covered liabilities. Once the guarantee expires after the 29th September, 2010, it will no longer be effective and no call can be made on the guarantee after that date. Accordingly, the Department of Finance has issued draft text of the proposed Credit Institutions (Eligible Liabilities Guarantee) Scheme 2009 (the “ELG Scheme”) which is intended to be implemented under the Credit Institutions (Financial Support) Act, 2008 (the “Act”) and to supersede the CIFS Scheme. In addition, a draft set of rules which will be applicable to participating institutions participating in the ELG Scheme are also in circulation. The ELG Scheme was given EU State Aid approval on 20th November, 2009. It is intended that the Scheme will be brought into law in the near future and that the Minister will issue a delegation order to appoint the National Treasury Management Agency as the scheme operator during the course of December.

The Guarantee

The ELG Scheme is intended to facilitate and permit credit institutions in Ireland to issue debt securities and take deposits with a maturity of post-September 2010 on a guaranteed basis.

The guarantee will be given by the Minister on an unconditional and irrevocable basis and will provide for timely payment of the “eligible liabilities” (see below). The Minister may, at his or her discretion and at the request of the relevant participating institution, limit the application of the guarantee given to that participating institution to certain types or categories of deposits.

Credit institutions will be eligible to join the ELG Scheme if they are “systemically important”, solvent and have been specified or are already specified by the Minister under section 6(1) of the Credit Institutions (Financial Support) Act, 2008. The participating institutions can apply for a programme to be guaranteed or can apply on an issuance by issuance basis.

The guarantee will terminate at midnight on the date falling 5 years after the end of the “issuance period” (see below) unless extended at the discretion of the Minister in compliance with EU State Aid requirements.

Eligible Liabilities

The eligible liabilities under the new guarantee will include:-

- ▣ all deposits (to the extent not covered by deposit guarantee schemes in the State (other than the CIFS Scheme) or any other jurisdiction);
- ▣ senior unsecured certificates of deposit;
- ▣ senior unsecured commercial paper;
- ▣ other senior unsecured bonds and notes

In addition, a blanket guarantee will apply to all relevant deposits incurred or rolled-over by a participating institution from the time such participating institution avails of a guarantee under the ELG Scheme for the first time, regardless of type, nature or the identity of the depositor.

In respect of other eligible liabilities other than deposits, the participating institutions may apply to the Minister for such eligible institutions to be guaranteed by the Minister and an eligible liability guarantee certificate will be given in respect of same at the Minister’s

discretion. This may be done on a stand-alone basis for particular eligible liabilities or for all of the eligible liabilities issued under a programme. As such, the ELG Scheme will permit participating institutions to issue eligible liabilities on a non-guaranteed basis.

In addition, eligible liabilities under the ELG Scheme will have to satisfy certain eligibility criteria such as:-

- ▣ an eligible liability (including deposits) must not have a maturity in excess of 5 years;
- ▣ an eligible liability must be incurred during an “issuance window” from the commencement date of the ELG Scheme to 29th September, 2010 (i.e. the final date of the CIFS Scheme) subject to the approval of the EU Commission at 6 monthly intervals that the issuance window can remain open. The Minister may also amend the issuance period pursuant to the Act.

Liabilities not covered by the ELG Scheme

Specifically, dated subordinated debt (Lower Tier 2) and asset covered securities (i.e. covered bonds issued under the Irish Asset Covered Securities Acts 2001(as amended)) are not covered by the ELG Scheme. In addition, it seems that “*senior unsecured debt*” under the CIFS Scheme will be replaced with “*other senior unsecured bonds and notes*” which would appear to have a potentially narrower interpretation and limited application.

Dated subordinated debt (Lower Tier 2) and asset covered securities (i.e. covered bonds issued under the Asset Covered Securities Acts) and other forms of covered bonds issued by a covered institution before the commencement date of the ELG Scheme will continue to be guaranteed under the CIFS Scheme.

Interaction with the CIFS Scheme

All liabilities guaranteed under the CIFS Scheme as at the commencement date of the ELG Scheme (and in respect of a participating institution, as of the date it avails of the guarantee for the first time under the ELG Scheme) will remain unconditionally and irrevocably guaranteed by the Minister under and in accordance with the CIFS Scheme.

From the time that a participating institution avails of a guarantee for the first time under the ELG Scheme, only covered liabilities of that participating institution in existence or contracted for prior to that time will continue to be guaranteed under the CIFS Scheme and any liabilities incurred or contracted thereafter can only be guaranteed under the ELG Scheme.

Fees

It is expected that the ECB pricing recommendations on government guarantees for bank debt dated 20th October, 2008 will apply to liabilities guaranteed under the ELG Scheme.

RECENT IRISH DEVELOPMENTS IN RELATION TO THE FVC REGULATION

Reduced Reporting Requirements for Small Financial Vehicle Corporations

Further to our update in our Summer Newsletter, the Irish Central Bank & Financial Services Authority of Ireland (“Central Bank”) has issued a further derogation under Regulation EC No. 24/2009 of the European Central Bank concerning statistics on the assets and liabilities of financial vehicle corporations (“FVCs”) engaged in securitisation transactions (ECB/2008/30) (the “FVC Regulation”).

Under the FVC Regulation, a national central bank may reduce the reporting for some FVCs so long as the sum of total assets/liabilities of the vehicles using the derogation is less than 5 per cent of the population's total assets/liabilities. The Central Bank have announced that they will allow reduced reporting for smaller FVCs whose total assets/liabilities are under €180 million. Therefore FVCs with balance sheets under this threshold (i.e. with assets or liabilities under this amount) will only need to supply total assets/liabilities and the list of securities with ISIN codes issued on a quarterly basis.

This derogation does not apply to FVCs which are initially beneath the threshold (e.g. during a ramping up or warehousing period) but then exceed it when they have fully taken up business. It should be noted that the derogation for reduced reporting requirements is at the Central Bank's discretion and, in some cases, full reporting may be necessary for some FVCs who are in fact below the threshold (e.g. those set up by euro-area banks to securitise mortgages).

The Central Bank has confirmed that the appropriateness of the threshold will be monitored and is subject to annual review.

Guidance issued by the Central Bank in relation to the application of the FVC Regulation

The Central Bank has also issued formal guidance to provide additional information on the scope of the FVC definition as well as instructions for completing the forms provided in order to streamline communications regarding FVCs with the Central Bank.

In terms of the scope of the definition of FVC, the Central Bank has issued a non-exhaustive list of typical entities and structures which fall within the meaning of a “financial vehicle corporation” under the FVC Regulation and have indicated that these examples should not be construed as being mutually exclusive as a number of features may apply to a particular vehicle:-

- ▣ securitisations in which an entity which purchases loans from an original lender financed by the issuance of debt securities, securitisation fund units, loans, other debt instrument or financial derivatives;
- ▣ securitisations in which the credit risk is transferred through the use of credit derivatives, or similar mechanism, to an entity which is financed by the issuance of debt securities, securitisation fund units, loans, other debt instrument or financial derivatives;
- ▣ entities set up for the purposes of “internal” securitisations by banks (for example to create eligible assets to use as collateral in refinancing operations with a central bank) in which the sponsor bank purchases the securities issued by the entity;
- ▣ an entity which is financed by a loan from its sponsor as part of preparatory measures related to a securitisation (e.g. warehousing of assets);
- ▣ an entity which issues securities and uses the proceeds to purchase loans in the secondary market as part of an active investment strategy, (e.g. a “managed” CLO);
- ▣ an entity which is used for the securitisation of assets other than loans, such as corporate bonds, sovereign debt, or future cash flows from trade receivables, tax receivables, whole-business securitisations etc;
- ▣ entities which form part of a securitisation transaction involving multiple vehicles are included, for example in a structure whereby an “issuing company” issues securities (or securitisation fund units, etc) and passes the proceeds as a loan to an “asset purchasing company” which holds the assets. One or both must register with the Central Bank if they are resident in Ireland. If, for example, the issuing company is resident in the US and the asset purchasing company is resident in Ireland, then the Irish-resident entity should register;
- ▣ an entity which issues securities to finance the purchase (“repackaging”) of assets that have already been securitised;

- ▣ master trusts, which hold a pool of assets, often a changing or revolving portfolio of assets such as credit card debt, which is financed by a loan from an FVC which issues securities;
- ▣ conduits, which finance securitisations through issuance of commercial paper backed by assets (ABCP); and
- ▣ multi-issuance vehicles which contractually “ring-fence” a pool of assets to a particular issuance through limited recourse arrangements are included in the definition insofar as these activities are securitisations under the FVC Regulation. A multi-issuance vehicle is regarded as a single FVC for the purposes of registration on the list of FVCs and for reporting purposes.

In addition, they have confirmed that the definition does not, in principle, include the following:

- ▣ an entity which solely grants loans to third parties on its own account as part of an investment strategy – i.e. the entity is the “first” or “original” lender of the loans and, therefore, they have not been transferred to the entity from another lender. Where an entity which grants a loan to an FVC as part of a multi-vehicle securitisation structure the Central Bank has confirmed that it is still included in the definition;
 - ▣ an entity which issues notes to investors and uses the proceeds to grant loans to its sponsor;
 - ▣ a “dormant” vehicle has ceased to be an FVC for the purposes of the FVC Regulation and reporting requirements, and should be removed from the list of FVCs. This may be because the vehicle has matured, been redeemed, or was established with the intention of partaking in a securitisation, but such activities are no longer foreseeable; and
 - ▣ entities (“option” companies) which are contracted to carry out certain activities in following a specified a trigger event, e.g. a downgrade or default, but is otherwise dormant. If, following the trigger event, the activities of the company fall under the definition of securitisation, then the company is an FVC from the point that the securitisation activity is foreseeable – i.e. it is not an FVC until after the occurrence of the trigger event.
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RECENT DEVELOPMENTS IN RELATION TO THE NATIONAL ASSET MANAGEMENT AGENCY

The heavily debated National Asset Management Agency Bill, 2009, (the “NAMA Bill”), establishing NAMA, has been approved by Dáil Eireann (Irish parliament) and the Seanad (the Senate). The NAMA Bill was signed into law by President Mary McAleese on 22 November, 2009. The signing of the NAMA Bill will allow the banks participating in the scheme to approve their involvement in NAMA.

NEW AMENDMENTS TO RATING REQUIREMENTS FOR ASSET-BACKED SECURITIES IN EUROSISTEM CREDIT OPERATIONS

The European Central Bank (ECB) has announced the tightening of the rules relating to certain asset backed securities which it accepts as collateral against its loans to credit institutions. From March 1, 2010, all asset backed securities issued as of that date will require at least two ratings from an accepted external credit assessment institution (ECAI) in order to be eligible as collateral. This amends the previous position where the ECB previously required one rating at the triple-A level.

In determining the eligibility of ABS as collateral, the ECB has confirmed that the Eurosystem will apply the 'second-best' rule, meaning that not only the best, but also the second-best-available rating must comply with the minimum threshold applicable to ABS.

As of 1 March 2011, the second-best rule and the requirement to have at least two ratings will be applied to all ABS, regardless of their date of issue.

Due to the grandfathering provisions applicable until 1 March 2011, the number of required rating opinions will differ depending on the date of issuance of the ABS transaction. The following table provides an overview of the applicable rating rules:

Requirement	ABS issued before 01 March 09	ABS issued between 01 March 2009 and 28 February 2010	ABS issued as of 01 March 2010
Rating requirement at issuance	A-/A3/AL	AAA/Aaa	AAA/Aaa
Rating requirement over the lifetime	A-/A3/AL	A-/A3/AL	A-/A3/AL

number of required ratings until 28 Feb. 2011	single rating/first best rule	single rating/first best rule	two ratings/second best rule
number of required ratings as of 01 March 2011	two ratings/second best rule	two ratings/second best rule	two ratings/second best rule

In the event that an ABS initially has only a rating from one rating agency, the second rating opinion that needs to be obtained is considered as a “rating at issuance”. As can be seen in the table above, this second rating opinion at issuance must be at the AAA/Aaa level for ABS issued as of 1 March 2009 in order for the ABS transaction to remain eligible. For ABS issued before 1 March 2009, this second rating opinion at issuance should be equal to or higher than A-/A3/AL in order for the ABS transaction to remain eligible.

Furthermore, under the “General documentation on Eurosystem monetary policy instruments and procedures” (section 6.3.1), the Eurosystem reserves the right to determine whether an issue, issuer, debtor or guarantor fulfils its requirements for high credit standards on the basis of any information it may consider relevant, and may reject or limit the use of assets or apply supplementary haircuts if required to ensure adequate risk protection of the Eurosystem, in line with Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank.

CASE LAW UPDATE: CONDITIONAL PRIORITY PROVISIONS UPHeld BY THE UK COURT OF APPEAL

Conditional priority provisions, which apply to many structured finance and securitisation transactions, were recently upheld by the UK Court of Appeal as being valid and enforceable: see *The Perpetual Trustee Co Ltd, Belmont Park Investments PTY LTD v BNY Corporate Trustee Services Limited, Lehman Brothers Special Financing Inc* [2009] EWCA Civ 1160. The appeal was considered with *Butters and others v BBC Worldwide Ltd and others* [2009] EWHC 1954 (Ch) as both cases concerned the “anti-deprivation” principle and, in both cases, the appeals were dismissed.

While the judgement is not binding in Ireland, it is a welcome development in an area where there has been a dearth of Irish case law.

Background

The initial High Court case related to a multi-issuer secured obligation programme referred to as the ‘Dante Programme’ which was established by Lehman Brothers International (Europe) (“LBIE”) in 2002 in order to, in effect, provide a form of credit insurance in respect of loans or other obligations owed to LBIE or another company in the Lehman Brothers Group by debtors or “reference entities”. The claimants were, or represented, the noteholders in respect of issues made under the Programme by three issuers, namely Saphir Finance plc (an Irish public limited company), Zircon Finance Ltd and Beryl Finance Ltd (each established in the Cayman Islands). The first defendant was BNY Corporate Trustee Services (“BONY”), the trustee for each of the relevant issues and chargee in respect of the charges granted by the issuers. The second defendant was Lehman Brothers Special Financing Inc (“LBSF”), the counterparty under the swap pursuant to which LBSF paid the issuer the amounts due by the issuer to the noteholders in exchange for the sums equal to the yield on the government bonds or other secure investments purchased by the issuer with the proceeds of the notes.

Although the claim was initially brought against BONY as trustee of the notes, LBSF intervened and elected to join the proceedings to argue that the relevant provisions are unenforceable, both under English law and pursuant to certain provisions of the US Bankruptcy Code. The proceedings were brought by Perpetual as the holder of certain credit-linked notes (the “Notes”) issued as part of the “Dante” Note Programme sponsored by LBSF and its affiliates. BONY maintained a neutral stance throughout the proceedings.

The action concerns a variety of issues, including whether BONY should be prevented from applying “*Noteholder Priority*” in relation to the distribution of the proceeds of the Collateral over which it was directed to enforce security following an acceleration of the Notes held by Perpetual. The documents (which were governed by English law) provided for a reversal of the priority of payments to allow Perpetual (as holder of the Notes) to be paid ahead of LBSF (as Swap Counterparty) if there was an Event of Default in relation to LBSF under the Swap Agreement. An Event of Default under the Swap Agreement had occurred as a result of the Chapter 11 Bankruptcy filings of LBSF and its parent company in the United States and other events.

LBSF maintained at first instance that provisions of the U.S. Bankruptcy Code (the so-called “*ipso facto*” rule) and, in the alternative, provisions of English law, operated to make the reversal of the priority of payments ineffectual as a matter of law. LBSF appealed the High Court’s decision that the reversal of the priority of payments was not ineffectual under English law under the so-called “anti-deprivation principle.”

Appeal

The Court of Appeal unanimously upheld the English High Court's decision at first instance, confirming that provisions in contracts governed by English law that subordinate the rights or beneficial entitlements of the swap counterparty on an insolvency or other default will not generally be prohibited by English law. The Master of the Rolls, Lord Neuberger, commented that LBSF's prior ranking right to the proceeds of the collateral under the documents was always contingent, and given that LBSF had never unconditionally owned a prior ranking right, it could not be said to have been "deprived" of such a right contrary to the English law anti-deprivation principle.

LBSF has applied for permission to appeal to the newly formed English Supreme Court and the Court of Appeal's decision on whether to grant such permission is expected shortly.

Also at issue in the proceedings is whether the English Court will permit the application of foreign insolvency laws (by virtue of an application under the Cross Border Insolvency Regulations 2006 ("CBIR")) to invalidate these subordination provisions. That issue was not the subject of the hearing before the Court of Appeal, having been adjourned by the English High Court to permit an appropriate application for recognition and assistance under the CBIR to be made by LBSF.

LITIGATION AND DISPUTE RESOLUTION

In this issue:-

The Defamation Act, 2009

DEFAMATION ACT, 2009

Introduction

Up to now it the area of defamation was governed by the decisions of courts and the Defamation Act 1961. The Defamation Act 2009 (“the Act”), upon its introduction, will reform, restate and clarify the law in this area.

The Act was signed into Law on the 23rd July 2009. The Act repeals The Defamation Act 1961 and makes several important changes to the law of defamation in Ireland. The Order bringing the Act into force has now been signed.





The tort of defamation

Previously “Libel” and “Slander” were separate causes of action. The Act discontinues the use of the terms libel and slander and they will be replaced by the single term “Defamation”.

Under the Act defamation will mean *publication*, by any means of a *defamatory* statement concerning a person to one or more than one person other than (other than the first mentioned person).

A “defamatory statement” is defined as a statement that tends to injure a person’s reputation in the eyes of reasonable members of society.

The Act does not define “statement” but rather states that it includes:-

-  A statement made orally or in writing.
-  Visual images, sounds, gestures and any other methods of signifying meaning.
-  A statement: - (i) broadcast on radio or television; or (ii) published on the internet.
-  An electronic communication. An electronic communication includes communication of information in the form of data text, images or sounds or any combination of these

by means of guided or unguided electronic magnetic energy or both. This takes into account the modern developments in communication.

The Act says that if the defamatory statement concerned is published to the person to whom it relates and to another person and it was not intended that the statement would be published to the second person and it was not reasonably foreseeable that the publication of the statement to the first person would result in it being published to the second person then for the purposes of the Act, no publication has occurred.

A person will have one cause of action only in respect of the publication of a defamatory statement, even if it has more than one defamatory meaning.

Where publication of the defamatory statement to two or more persons is made, the person has only one cause of action arising from that publication. However, a Court may allow a person to bring more than one defamation action in respect of a multiple publication where it considers that the interests of justice so require.

The Act also clarifies the position in relation to companies and defamation by providing that a company may bring a defamation action in exactly the same manner as an individual.

The Act states that if the statement has more than one imputation there is only one cause of action.

The Act introduces a new requirement for verifying affidavits which must now be sworn by both the Plaintiff and the Defendant within two months of pleadings. Where the Plaintiff or Defendant is a company, the person signing the verifying affidavit must say that they honestly believe the assertions or allegations to be true. If a person makes a statement in the verifying affidavit which is false or misleading in any material respect and that the person knows the statement to be false or misleading that person will be guilty of an offence and liable upon summary conviction of a fine not exceeding €3,000 or for imprisonment for a term not exceeding six months or both. If the conviction is on indictment then the penalty could be a fine not exceeding €50,000 or imprisonment for a term not exceeding five years or both.

Defences

The Defences which existed under the 1961 Act have been repealed and new Defences have been established in this Act. However many of the defences have a familiar ring to them.

- ▣ Truth;

- ▣ Absolute Privilege;
- ▣ Qualified Privilege;
- ▣ Honest Opinion;
- ▣ Consent to Publish;
- ▣ Fair and Reasonable Publication on a matter of Public Interest;
- ▣ Innocent Publication;
- ▣ Offer to Make Amends;
- ▣ Apology

Remedies

Where a publication is found to be defamatory, the Act outlines a number of remedies which are set out below: -

- ▣ Declaratory Order;
- ▣ Lodgement of Money in Settlement of Action;
- ▣ Correction Order;
- ▣ Damages;
- ▣ Prohibition Order;
- ▣ Summary Disposal of Action;
- ▣ Criminal Liability

Time Limits of Actions

The Act provides that a defamation action must be brought within one year from the date of the first publication of the defamatory statement unless the Court extends up to two years. The Court will allow an extension if the interests of justice so require and the Defendant does not suffer undue prejudice when compared with the prejudice the Plaintiff would suffer if the

time was not extended. In making a decision the Court will examine why the proceedings were not issued within one year and whether any evidence is no longer available.

Survival of Cause of Action on Death

Under the Act an action in defamation survives the Plaintiff or Defendant's death but in respect of special damages only. This only applies where there is a cause of action existing at the time of death of the Plaintiff or Defendant.

Jurisdiction of Courts

Under the Act the Circuit Court's authority to award damages is raised to €50,000 in defamation actions.

Press Council

The Act provides for the recognition of the Press Council on a statutory basis. A Voluntary Press Council has been in existence since 2008 comprising of thirteen Directors responsible for the code of practice for the press industry and the appointment of the Press Ombudsman.

Agreements for Indemnity

A person may have insurance against Civil Liability for defamation in respect of the publication of any statement unless at the time of the publication that person knows that the statement is defamatory and does not reasonably believe there is a Defence to any action brought upon it that would succeed.

Conclusion

The implementation of the Act is awaited. It will be some time after the Act has come into effect before we know whether the impact of the Act will be to alter the defamation landscape as dramatically as some of the provisions would suggest.

REAL ESTATE/PROPERTY LAW UPDATE

In this issue:-





-  **Banning Upwards Only Rent Reviews**
 -  **Land and Conveyancing Law Reform Act, 2009**
-

BANNING UPWARDS ONLY RENT REVIEWS

The Minister for Justice Dermot Ahern signed an order on the 1st of December, 2009, banning upwards only rent review provisions pursuant to Section 132 of the Land and Conveyancing Law Reform Act, 2009 ("2009 Act"). The Section will come into force on the 28th February, 2010, however, it shall not apply to a lease or agreement to lease entered into prior to the commencement of the section.

LAND AND CONVEYANCING LAW REFORM ACT 2009

The Land and Conveyancing Law Reform Act 2009 provides for fundamental reform of land law and conveyancing law in Ireland. The changes will take effect as and from 1st December, 2009 unless otherwise highlighted below. The key features of the Land and Conveyancing Law Reform Act 2009 are:

-  Future interests in all kinds of property are affected in that the rule known as the rule against perpetuities is abolished both for real and personal property.
-  The rule providing that any future interest in land had to conform with the rule against perpetuities has been abolished.
-  Mortgages over land shall be created by way of a charge on the land (rather than by a conveyance of the legal estate or interest in the land by mortgage as has been the case historically).
-  With effect from 1st October, 2009, all standard banking documentation relating to home mortgages will need to be reviewed and updated in light of the new provisions relating to housing loan mortgages which:
 - (i) allow a mortgagor, in relation to a housing loan mortgage, to apply to court, among other, for time for redemption or payment of the mortgage debt or to

direct a sale of the mortgaged property or to make a vesting order conveying the mortgaged property to a purchaser;



- (ii) the Lender will not be entitled to take possession of mortgaged property without a court order unless the mortgage holder gives written consent to the taking of possession of the property;
- (iii) the power of sale of a Lender is subject to a proviso that 28 days notice must be served on the mortgage holder warning him of the possibility of sale.

These provisions relate only to housing loan mortgages and in the case of all other mortgages, such as commercial mortgages, the obligations, powers and rights of a mortgagee will take effect subject to the terms of the mortgage.

- ▣ "Upward only" rent review clauses in leases are rendered ineffective.
 - ▣ The 2009 Act provides that registration of a judgment mortgage against the interest of one co-owner will not sever the joint tenancy. Joint tenancies in relation to real property can no longer be unilaterally severed and the consent of all joint tenants will be required.
 - ▣ Concepts such as feudal tenure (estates in fee tail and fee farm grants) will be abolished.
 - ▣ Any rule of law which requires (a) a seal for the valid execution of a deed by an individual, or (b) authority to deliver a deed to be given by deed has been abolished.
 - ▣ The 2009 Act clarifies and updates the law in respect of judgment mortgages – a procedure by which a court judgment for an amount of money may be registered on the title of the debtor's land as a mortgage for that sum. The precise method of registration of a judgment mortgage will be prescribed by regulations. The changes are designed to streamline the process of registering, enforcing and releasing this specialist sub-set of mortgages.
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LISTINGS

In this issue:-

-  **Admission of Irish ETFs to trading on the London Stock Exchange**
-  **Changes to Irish Stock Exchange Continuing Obligation Requirements**

ADMISSION OF IRISH ETFs TO TRADING ON THE LONDON STOCK EXCHANGE

One of the main objectives in structuring Exchange Traded Funds (ETFs) is accessing large capital markets. Many ETFs consider a main market listing on the London Stock Exchange (LSE) as the best means of accessing liquidity and increasing their profile. However an LSE listing involves significant time and financial considerations.

There is now an alternative way to access the Main Market of the LSE, reducing costs and time significantly.

The introduction of EU Directives has resulted in a distinction between the concepts of being “listed” and “admitted to trading”. A security that is “listed” on an exchange has been vetted by the relevant exchange and is compliant with the suitability standards and conditions for listing laid down by that exchange. A security that is “admitted to trading” has been approved by a competent authority in another EU jurisdiction and must be recognised by the “host” exchange, with the relevant securities being allowed to trade on the host exchange.

In a recent change, securities which have been “admitted to trading” by the LSE may be traded on their Main Market trading platform. Therefore it is now possible to access the LSE Main Market without an LSE listing. This eliminates the requirement to appoint UK listing advisors, reduces the approval timescale and involves significant cost efficiencies.

In order to have an ETF admitted to trading on the Main Market of the LSE the fund must be approved for listing on the Irish Stock Exchange (ISE). An ISE listing is a straightforward process for any Irish regulated fund, which can be undertaken by Dillon Eustace during the regulatory approval process, with no timing implications. The cost of an ISE listing is small. A further requirement of admission to trading is that the ETF complies with the provisions of UCITS III.

Admission to trading enables an ETF to have its securities traded on the Main Market of the LSE, without the additional requirements and costs associated with seeking a full LSE listing.

The application for admission to trading may be made by the ETF itself or by Dillon Eustace, without the need to appoint a separate UK listing sponsor.

The admission is contingent on the ETF registering for and obtaining recognition from the FSA for admission and marketing into the UK.

The approval process is straightforward, involving the filing of the following with the LSE:

- ▣ Admission forms
- ▣ Certificate of UCITS compliance from the Irish Financial Regulator
- ▣ Evidence of FSA recognition status
- ▣ Prospectus, and
- ▣ Listing Particulars stamped by the ISE

The ISE approval listing is obtained within the regulatory approval timeframe.

Following approval of the listing document, the admission documentation is filed with the LSE 11 business days prior to the proposed admission date.

For most funds the ISE listing and LSE admission can be finalised within the initial offer period.

An ETF listed on the ISE and admitted to trading on the LSE may trade on both exchanges. The market for ETFs is an order driven environment facilitated through a market maker(s) appointed by the ETF. Trades are settled through CREST.

CHANGES TO THE IRISH STOCK EXCHANGE CONTINUING OBLIGATIONS REQUIREMENTS

The Irish Stock Exchange has issued an updated set of requirements which include specific amendments to the reporting obligations imposed on listed open ended funds. These changes are positive and reflect market practice, incorporate legislative changes and clarify anomalies between the previous guidelines and evolved practice. The changes affect Chapter 5 - "Financial Information" and Chapter 8 – "Continuing Obligations" of the Listing Requirements and Procedures rulebook for open ended funds.

Summary of changes to Interim Reports

- ▣ The interim report must include a condensed balance sheet or statement of net assets (including a statement of realised gains and losses) instead of an income statement.

- ▣ The interim report must include details of the net asset value per unit at the period end.
- ▣ Existing requirements for interims to include an explanatory report on the results in the period, special factors and an outlook for the current financial year remain unchanged.
- ▣ Comparative figures for the interim period are no longer required.
- ▣ The requirement for consistency of accounting policy and presentation for interim and annual reports has been removed.
- ▣ Funds authorised by the Irish Financial Regulator (the “Financial Regulator”) are deemed to have complied with the content requirements for interim reports.

Summary of changes to Annual Reports

- ▣ The commentary on the results and performance may be provided by either the directors or the investment manager.
- ▣ The requirement to disclose directors’ fees has been removed.
- ▣ The requirement to name any subsidiaries has been removed.
- ▣ The requirements to disclose fee or dividend waivers have been removed.
- ▣ The requirement to disclose material contracts has been removed.
- ▣ The requirement to disclose small related party transactions has been removed.
- ▣ The requirement to disclose service contracts with directors has been removed.
- ▣ Provisions relating to closed ended funds have been removed.
- ▣ Other existing requirements remain unchanged.

Summary of changes to Financial Information

- ▣ Annual and Interim accounts may be circulated to shareholders and the ISE electronically. Where prudent due to the size of the attachment, this notification may include a link to where the report is available on the Issuers website. The ISE must continue to receive all reports as attachments to electronic communications or in hard copy.

- ▣ In the case of an umbrella fund - where a sub-fund benefits from a legal segregation of liability within the umbrella, the accounts of the listed sub-funds alone may be published.
- ▣ Where a fund has subsidiaries, the annual reports and accounts may be prepared in single or consolidated form, at the funds discretion, or both where one form contains significant additional information.
- ▣ References to qualified auditors reports and associated requirements have been removed.
- ▣ Provisions relating to closed ended funds have been removed.

Summary of changes in Reporting Requirements





- ▣ Circulars may now be circulated to Unitholders 10 business days, or such shorter period as allowed under the fund's constitutive documents, prior to the date of the proposed vote. This replaces the previous 15 business day timeline.
- ▣ References to the Market Abuse Directive, and resulting amendments to directors' dealings provisions have been included. Further details on the specific requirements are set out in Dillon Eustace's Market Abuse publication.
- ▣ Clarifications and guidance have been included in relation to the equal treatment of Unitholders and the use of fee rebates and side letters.
- ▣ Material changes in a funds trading strategy require prior ISE approval and announcement.
- ▣ Proposed changes or appointments of prime brokers require prior ISE approval and announcement.
- ▣ Proposed delistings require prior ISE approval.
- ▣ In specific circumstances the ISE may require prior shareholder approval for a proposed delisting where the delisting may lead to a substantial change in the nature or substance of the listed fund.
- ▣ Changes in a funds redemption policy must be announced.
- ▣ Announcements relating to changes in directors must state whether the relevant director acts in an independent capacity.

- ▣ Any change in the name of a fund, sub-fund or class must be announced.
- ▣ Provisions relating to closed ended funds have been removed.

The changes were effected on the 23rd September 2009, with the exception of the changes to the content of interim reports which is effective for funds with financial years after 1st October 2009.

INSURANCE LAW

In this issue:-

-  **Solvency II Framework Directive – 2007/44 EC**
 -  **European Commission Reviews the Insurance Block Exemption**
 -  **Proposed New European System of Financial Supervision**
 -  **Health Insurance (Miscellaneous Provisions) Act, 2009**
-

SOLVENCY II FRAMEWORK DIRECTIVE - 2007/44EC

The Solvency II Framework Directive will introduce a risk based capital regulatory regime for insurers, reinsurers and captive companies with more than €5 million in gross premium volume that operate in the European Union. This Directive is due to be implemented no later than 31 October 2012.

Following approval by the European Parliament of the framework principles (Level 1) in May 2009, progress is now underway to develop Level 2, the more detailed Implementing Measures. The Level 2 Implementing Measures are required to take account of advice from the Committee of European Insurance and Occupational Pension Scheme Supervisors (“CEIOPS”) whose advice is due by the end of 2009.

CEIOPS has released the third set of consultation papers relating to Level 2 implementation measures for Solvency II. The 16 papers, which cover topics including partial internal models, calibration of non-life underwriting risk and advice on simplifications have a response deadline of 1200 CET on 11 December 2009.

EUROPEAN COMMISSION REVIEWS THE INSURANCE BLOCK EXEMPTION

The insurance block exemption exempts certain agreements between insurers from scrutiny under the European rules on agreements between competitors (Article 81 of the EC Treaty). However, the current block exemption introduced in 2003 expires in March 2010 and the European Commission is currently consulting on its renewal.

The Insurance Block Exemption

The current block exemption was introduced in 2003. It exempts, subject to conditions, certain categories of agreement from Article 81, which prohibits anticompetitive agreements. The categories of agreement that are currently covered by the block exemption are:

- ▣ joint calculations, tables and studies;
- ▣ standard policy conditions;
- ▣ insurance and reinsurance pools; and
- ▣ standards for security devices.

This exemption was introduced before the 2004 reforms, which removed the possibility of obtaining individual exemptions for particular agreements from the Commission. In certain industries, such as insurance, block exemptions were introduced to provide certainty without the need for a multiplicity of notifications. However, since those reforms, the possibility of obtaining explicit exemptions has been removed and the Commission expects companies to 'self-assess' their agreements to conform with competition law. Thus, under the new regime, even if the block exemption were to be removed entirely, it would not mean that the agreements covered by it would cease being legal. Rather, they would simply have to be assessed on a case-by-case basis as happens in other industries.

The Commission's review of the block exemption

Having conducted a wide-ranging business insurance sector inquiry in 2007, the Commission began its formal review of the block exemption's operation in 2008 and received responses to its consultation paper from a range of insurers and other interested parties.

In March 2009, the Commission followed this up with its formal report to the European Parliament and Council on the functioning of the block exemption, setting out its recommendations.

The Commission's Recommendations

The Commission recommends that the exemption for joint calculations, tables and studies should, in one form or another, be renewed. The Commission considers this helps smaller insurers and new entrants, which would otherwise lack the statistics to allow them to price the risks they insure.

However, the Commission does not rule out making amendments to the terms of this exemption.

The Commission proposes to drop the exemption for standard policy conditions. It concludes that in many cases, the block exemption is not necessary for it to be clear that the conditions are permissible and that many or most would exist even without it.

Insurance pools

The Commission leaves open the possibility of renewing the block exemption for insurance pools, albeit possibly on a more restricted or clarified basis.

Standards for security devices

Finally, the Commission indicates that it does not propose to renew the exemption for standards for security devices. The Commission considers that this sort of standard setting is far from unique to the insurance industry and a specific block exemption is therefore not needed.

The final proposal will be put out to consultation in the autumn with a view to the revised block exemption (if any) being put in place in 2010.

Effects of the Commission's proposals

At a general level, a clear message emerges from the Commission's report: some insurers have claimed too quickly that the block exemption applies to their agreement. The Commission is clear that detailed scrutiny needs to be given to whether the conditions that attach to each category of exemption are met in each particular case. Given that the renewed parts of the block exemption are likely to be subject to even more significant caveats and restrictions, any new block exemption will be more closely scrutinised. Similarly, for those insurers participating in agreements that cease to be exempted, existing agreements will not have to be abandoned – but will require examination to confirm whether they fall outside Article 81(1) altogether or can be justified under Article 81(3) on the basis of the benefits they create. This will require some detailed case by case analysis.

PROPOSED NEW EUROPEAN SYSTEM OF FINANCIAL SUPERVISION

On the 24 September 2009, the European Commission adopted an important package of draft legislation to significantly strengthen the supervision of the financial sector in Europe. The aim of these enhanced cooperative arrangements is to sustainably reinforce financial stability throughout the EU; to ensure that the same basic technical rules are applied and enforced consistently; to identify risks in the system at an early stage; and to be able to act together far more effectively in emergency situations and in resolving disagreements among supervisors. The legislation will create a new European Systemic Risk Board (“ESRB”) to detect risks to the financial system as a whole with a critical function to issue early risk warnings to be rapidly acted on. It will also set up a European System of Financial Supervisors (“ESFS”), composed of national supervisors and three new European Supervisory Authorities for the banking, securities and insurance and occupational pensions sectors.

The current financial crisis has highlighted weaknesses in the EU's supervisory framework, which remains fragmented along national lines despite the creation of a European single market more than a decade ago and the importance of pan-European institutions.

These legislative proposals address those weaknesses both at the macro- and micro-prudential supervision levels by creating:

- ▣ an **ESRB** will have the power to issue recommendations and warnings to Member States (including the national supervisors) and to the European Supervisory Authorities, which will have to comply or else explain why they have not done so. The heads of the ECB, national central banks, the European Supervisory Authorities, and national supervisors, will participate in the ESRB. The creation of the ESRB is in line with several initiatives at multilateral level or outside the EU, including the creation of a Financial Stability Board by the G20.

- ▣ an **ESFS** for the supervision of individual financial institutions (“micro-prudential supervision”), consisting of a network of national financial supervisors working in tandem with new European Supervisory Authorities, created by the transformation of existing Committees for the banking securities and insurance and occupational pensions sectors. There will be a European Banking Authority (“EBA”), a European Insurance and Occupational Pensions Authority (“EIOPA”), and a European Securities and Markets Authority (“ESMA”).

Regarding micro-prudential supervision, currently there are three financial services committees for micro-financial supervision (supervision of individual financial institutions) at EU level, with advisory powers only: the Committee of European Banking Supervisors

(“CEBS”), Committee of European Insurance and Occupational Pensions Committee (“CEIOPS”) and the Committee of European Securities Regulators (“CESR”).

The new Authorities will take over all of the functions of those committees, and in addition have certain extra competences, including the following:

- ▣ developing proposals for technical standards, respecting better regulation principles;
- ▣ resolving cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree;
- ▣ contributing to ensuring consistent application of technical Community rules (including through peer reviews);
- ▣ the European Securities and Markets Authority will exercise direct supervisory powers for Credit Rating Agencies; and
- ▣ a coordination role in emergency situations.

The proposals have been the subject of extensive consultation both after the publication of the recommendations by a group of experts mandated by President Barroso and chaired by former IMF Managing Director Jacques de Larosière and between the end of May and mid July, after the Commission outlined its proposals to the European Council. The June EU Summit endorsed the new supervisory framework and called for the rapid adoption of the necessary legislative texts, with a view to having the framework fully in place by 2010.

HEALTH INSURANCE (MISCELLANEOUS PROVISIONS) ACT, 2009

Following clearance by the European Commission in June 2009 of a new Irish health insurance scheme (“the scheme”) that includes both levies and tax relief measures designed to decrease the risk differentials for health insurers between old and young customers, the new Health Insurance (Miscellaneous Provisions) Act, 2009 which sets out the mechanics of the scheme has been brought into law with effect from 19 July 2009.

The scheme gives insured individuals tax relief that increases with age and is paid directly to that person’s insurer. This relief is financed by a flat rate levy on all insurers for each of their adult and child customers. The net effect of the scheme is that the insurance of older people will become cheaper for insurance companies and the cost of insuring younger people will become more expensive for insurance companies. The VHI, having a worse than average

risk profile due to its large number of ageing customers, stands to benefit the most from the scheme.

The Health Insurance (Miscellaneous Provisions) Act, 2009 also includes certain additional powers for the Health Insurance Authority, the independent body charged with overseeing the operation of the Irish health insurance market and the implementation of the new Irish health insurance scheme.

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