Abstract

The Insurance (Amendment) Bill 2018 seeks to address the complications which arose following Setanta Insurance entering into liquidation. An issue arose regarding which of two funds would be liable to cover claims against the company; the Insurance Compensation Fund (ICF) which covers 65% of a claim or the Motor Insurers’ Bureau of Ireland (MIBI) which covers 100% for a claim.

The Bill seeks to make various amendments to the Insurance Acts to transfer the functions for the maintenance of the ICF from the Accountant to the High Court to the Central Bank, for payment in full in respect of personal injury to people who are no longer able to recover from a liquidated insurance provider and; the establishment of a new Motor Insurers Insolvency Compensation Fund to fund the difference between the ICF and the MIBI for third party claims.
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This Digest may be cited as:

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Summary

The *Insurance (Amendment) Bill 2018* was published on 19 June 2018. The Bill proposes to amend certain elements of the *Insurance Acts* to clarify the role of the Insurance Compensation Fund (ICF), following the liquidation of Setanta Insurance Company in April 2014.¹

Following Setanta’s liquidation, it became unclear which of two funds would be liable to cover claims against the company. Complications arose concerning the remits of the Motor Insurers’ Bureau of Ireland (MIBI) and the ICF, specifically due to the broad language used in Clause 4.1.1 of the 2009 Agreement between the Minister for Transport and the MIBI.²

**Textbox 1: Insurance Compensation Fund versus the Motor Insurers’ Bureau of Ireland**

<table>
<thead>
<tr>
<th>Insurance Compensation Fund (ICF) versus the Motor Insurers’ Bureau of Ireland (MIBI)</th>
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<tr>
<td>There are two insurance guarantee schemes operating in Ireland: (1) The Insurance Compensation Fund (ICF) provides a capped level of compensation for liabilities in respect of non-life insurance policyholders in the event that an insurance firm fails; (2) The Motor Insurers’ Bureau of Ireland (MIBI) provides compensation to victims of road traffic accidents caused by uninsured drivers or unidentifiable vehicles.</td>
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The ICF covers 65% of a claim or €825,000 (whichever is the lesser). However, the MIBI covers 100% for a personal injury claim, with a €1,220,000 limit per claim for property. To compensate claimants for the additional 35% of the claim, an additional fund would be required.

On 25 May 2017, the Supreme Court determined that liability for claims against Setanta should be met from the ICF, and not the MIBI. On 30 January 2018, the Minister for Finance, Public Expenditure and Reform, Deputy Paschal Donohoe announced agreement in principle³ that the State would ensure full compensation for Setanta third party claimants.

**What the Bill proposes to do**

The aim of the Bill is threefold:

1. To clarify the role of the ICF in light of the Setanta Judgment;

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² Agreement between the Minister of Transport and MIBI. Available here: [https://www.mibi.ie/_fileupload/Signed_MIBI_Agreement_29_Jan_09.pdf](https://www.mibi.ie/_fileupload/Signed_MIBI_Agreement_29_Jan_09.pdf)

(2) To implement some of the recommendations from the Review of the Framework for Motor Insurance Compensation in Ireland (June 2016); and

(3) To provide compensation, retrospectively, to third-party claimants of insurers in liquidation since 30 September 2011.

The central changes proposed in this Bill proposes the transfer of functions for the maintenance of the Insurance Compensation Fund (ICF) from the Accountant to the High Court to the Central Bank; the provision for payment in full in respect of personal injury and property damage who are no longer able to recover from an insolvent insurance provider and; the establishment of a new Motor Insurers Insolvency Compensation (MIIC) Fund.

One of the main recommendations from the Review of the Framework for Motor Insurance Compensation in Ireland is to extend the level of cover provided by the ICF to 100% for third party claims. The Bill proposes to enact this recommendation through the MIIC Fund which is to be maintained by the MIBI. The purpose of the fund is to increase the level of cover provided under the ICF, to compensate third party claimants for the additional 35% of the claim that is not currently covered by the ICF. This would allow for recouping 100% of a personal injury and property damage claim.

This will allow for equivalent outcomes between those making a claim with MIBI, who compensate those who have been injured by an uninsured or unidentified driver, and those who make a third party claim with the ICF. However, first party claims made with the ICF will still be subject to the 65% limit meaning policyholders whose insurer has entered into liquidation when making a claim will not be entitled to the full 100% compensation.

The Bill also provides for retrospective payments to third-party claimants where their insurer has gone into liquidation on or after the 30 September 2011. The purpose of these payments is to “top up” payments made out of the ICF between this date and the coming into operation of the proposed Act. This would bring the payments into line with the motor Insurance Bureau of Ireland (MIBI) limits. It is worth noting that these payments will be made out of the ICF and not the MIIC Fund.

The Bill provides for the payment of contributions by insurers in the Irish market into the MIIC Fund. It provides for a general contribution rate of 2% of gross written premiums (GWP) and a maximum contribution rate of 3% of GWP. Following consultation with the MIBI and the Central Bank, the Minister may review the percentage rate, and by way of Ministerial Order specify a new rate as follows:

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4 For more information on the recommendations in the report, see appendix 2
2% until such time as the MIIC Fund reaches €150 million;
1% where the MIIC Fund has reached a level over €150 million but less than €200 million;
3% of GWP if it is determined by the MIBI that there is insufficient monies in the Fund to cover a payment made by the Central Bank out of the Fund. This 3% rate will apply up to such a time as the Fund reaches €50 million.

Payment into the Fund may be suspended at such time as the MIIC Fund reaches above €200 million.

The Bill does not state how insurers will absorb the extra cost due to the new MIIC levy, and so it is the choice of each insurance company how they shall apply the levy. Insurance companies can absorb the cost internally or pass the cost on to policy holders via increased premiums. This is due to European legislation which “prevents the Central Bank and the Government from interfering in that commercial decision of an insurance company”.6

Pre-legislative scrutiny

The General Scheme of an Insurance (Amendment) Bill 2017 was approved by Government on 5 July 2017. The draft heads were sent to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on 17 July 2017. The Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach undertook Pre-legislative Scrutiny (PLS) of the General Scheme of the Data Sharing and Governance Bill in 2018. As part of its scrutiny of the General Scheme, the Committee met in public session on 8 February 2018, 1 March 2018, and 8 March 2018.

In 19 June 2018 the Joint Committee published its report on its pre-legislative scrutiny of the General Scheme. The report makes eleven recommendations.7

As part of research work in preparation for Bill Digests, the Library & Research Service asks the relevant Department, in this case the Department of Finance, to indicate to what extent, if any, the Bill reflects the recommendations put forward by the Joint Committee. However, an Insurance (Amendment) Bill was initiated on 15 June 2018 and published the same day as the Joint Committee report, 19 June 2018. Therefore, it was not possible to receive a response from the Department of Finance regarding the Joint Committee’s eleven recommendations made in its PLS report on the General Scheme of the Bill before the Bill’s publication.

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6 Statement by Mr Gerry Cross (Central Bank of Ireland) during scrutiny of the General Scheme 8 March 2018.
7 See chapter on Pre-legislative Scrutiny.
Introduction

The Insurance (Amendment) Bill 2018 (hereafter ‘the Bill’) was published on 19 June 2018. According to the Explanatory Memorandum for the Bill, its purpose is:

“...to repeal and replace certain provisions of the Insurance Act 1964, as amended, to clarify the role of the Insurance Compensation Fund (ICF) and to implement the recommendations of the Review of the Framework for Motor Insurance Compensation in Ireland Report (2016). The Bill also provides for the retrospective compensation of third-party claims in respect of motor insurers who have gone into liquidation since 30 September 2011, which fell outside the scope of the 2016 review, in line with the motor Insurance Bureau of Ireland (MIBI) limits. In personal injury cases this will mean 100% compensation.”

The Bill makes the following proposals:

- to provide for the transfer of the administration of the Insurance Compensation Fund to the Central Bank of Ireland;
- to provide for the conferral of certain functions on the Central Bank of Ireland and the National Treasury Management Agency relating to the Insurance Compensation Fund and payments to certain persons in the case of insolvent insurers;
- to provide for the establishment of a fund to be known as the Motor Insurers Insolvency Compensation Fund and the manner in which that fund shall be administered, controlled and managed by the Motor Insurers’ Bureau of Ireland;
- to provide for the making of contributions by vehicle insurers to that fund, the rate of the contribution to be made and adjustments to that rate; and
- to provide for enforcement of the provisions relating to the making of those contributions; for those purposes to amend and extend the Insurance Act 1964 and the National Treasury Management Agency (Amendment) Act 2000.

The Bill contains seventeen sections split into five parts, and aims to amend certain elements of the Insurance Acts in order to clarify the role of the Insurance Compensation Fund (ICF), following the liquidation of Setanta Insurance Company in April 2014, and the publication of the Review of the Framework for Motor Insurance Compensation in Ireland (July 2016). The report made several key recommendations for the industry including issues such as coverage, eligibility and limits; funding; and governance and administration.

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8 Taken from the Bill’s Explanatory Memorandum.
9 Taken from the Bill.
10 See appendix 2.
Textbox 2. Insurance Compensation Fund (ICF) versus the Motor Insurers’ Bureau of Ireland (MIBI)

There are two insurance guarantee schemes operating in Ireland:

(1) The Insurance Compensation Fund (ICF) provides a capped level of compensation for liabilities in respect of non-life insurance policyholders in the event that an insurance firm fails. The ICF is designed to facilitate payments in respect of non-life insurance policyholders in the event that an insurance company fails and is administered on behalf of the President of the High Court by the Accountant. The ICF covers 65% of a claim or €825,000 (whichever is the lesser).

(2) The Motor Insurers Bureau of Ireland (MIBI) compensates victims of road traffic accidents that were caused by uninsured or unidentified drivers. MIBI was established in 1955 by Agreement between the Government and motor insurance companies in Ireland. Subsequent agreements were later signed in 1964, 1988, 2004 and 2009 (the ‘Agreements’). MIBI covers 100% for a personal injury claim, with a €1,220,000 limit per claim for property.


Following Setanta’s liquidation, it became unclear which of two funds would be liable to cover claims against the Company. Complications arose concerning the remits of the Motor Insurers’ Bureau of Ireland (MIBI) and the ICF, specifically due to the broad language used in Clause 4.1.1 of the 2009 Agreement between the Minister for Transport and the MIBI.11

The ICF is designed to facilitate payments in respect of non-life insurance policyholders in the event that an insurance company fails and is administered on behalf of the President of the High Court by the Accountant. The ICF covers 65% of a claim or €825,000 (whichever is the lesser).

On 25 May 2017, the Supreme Court determined that liability for claims against Setanta would be met from the ICF, and not the MIBI. The ICF covers 65% of a claim or €825,000 (whichever is the lesser). However, the MIBI covers 100% for a personal injury claim, with a €1,220,000 limit per claim for property (regardless of the number of claimants).

In effect, this discrepancy between the amounts covered by the ICF and the MIBI means that greater coverage is afforded in respect of those without insurance policies, than those with insurance policies taken out from an insurer who subsequently goes into liquidation.

11 Agreement between the Minister of Transport and MIBI. Available here: https://www.mibi.ie/_fileupload/Signed_MIBI_Agreement_29_Jan_09.pdf
Policy Background

Setanta Insurance Company Limited (the ‘Company’) was incorporated in Malta in June 2007 and operated under the supervision of the Malta Financial Services Authority (MFSA). Authorisation was provided to the Company to sell private and commercial motor vehicle insurance in Ireland due to EU passporting rights. The Central Bank of Ireland (Central Bank) was responsible for supervision of the Company in respect to consumer protection obligations. However, the Central Bank was not responsible for supervision over the firm’s financial position.

In January 2014 the Board of Directors resolved that the Company would cease writing new business, and offer renewals beyond close of business on 24 January 2014. In April 2014, it was resolved that the Company would surrender its insurance business licence to the MFSA and be immediately dissolved. The liquidator was appointed on 30 April 2014.

Court Case

Before payment can be made out of the ICF, the Accountant of the High Court (the ‘Accountant’) must first consider if eligible claims can be met elsewhere. The Law Society of Ireland, on behalf of the Accountant, pursued the case against and argued that MIBI rather than the ICF was liable for outstanding claims, alleging that the scope of the MIBI’s remit includes insolvent insurers.

The High Court (and subsequently the Court of Appeal) accepted that MIBI was liable to pay outstanding claims against Setanta meaning that policyholders would have been covered for up to 100% compensation rather than the 65% that would apply were the ICF found to be liable.

However, the Supreme Court overturned the Court of Appeal judgement regarding the liability of the MIBI, arguing that although the MIBI Agreements contain a number of ambiguities, they were not intended to extend in such a manner to cover liability for claims against drivers whose insurance company has become insolvent. This meant, in effect, that claims against Setanta would have to be met from the ICF.

Liquidation

At the time of being placed in liquidation, the Company’s statement of affairs, drawn up in April 2014, showed a deficiency (net liabilities exceeding assets) in excess of €17 million. The outstanding claims reserve at the time was €28 million.13

12 For more information on passporting, see Appendix 5.
13 Setanta Insurance Company Limited - In Liquidation; Report of the Liquidator to the Joint Committee on Finance, Public Expenditure and Reform: Available here.
The Company had approximately 75,000 policy holders in Ireland at the time. Approximately two thirds of these being commercial policies and one third of which were private motor insurance policies.

A liquidator was appointed at a meeting of the creditors of the Company in April 2014 and policyholders were advised that their policies would be cancelled in due course. All private vehicle insurance policies were cancelled on 26 May 2014 and commercial vehicle policies cancelled on 29 May 2014. The costs of the liquidation process amounted to €6 million as of May 2016. This included €2.3 million in legal and professional fees, €1.1 million in salaries and €2.4 million in claims handling.

An actuarial report, commissioned by the liquidator, estimated the claims reserves at between €87.7 million and €95.2 million in 2014. However, an updated actuarial report has since estimated the claims reserves at 30 June 2017 at between €105.9 million and €112.9 million.\textsuperscript{14}

1,576 active claims were recorded as of September 2017, of which 573 claimants received compensation through the ICF. It is expected that a proportion of the balance of money due to third party claimants will be met from the proceeds of the distribution of Setanta’s assets on completion of the liquidation process. This proportion is over and above the 65% ICF payment.

Approximately 30% of each claim would be available from the liquidation process according to estimates by the Liquidator. However, as a consequence of the increased estimates of claim reserves in the updated actuarial report, the liquidator now estimates that they will be unable to meet more than 22% of the claims out of the assets of the liquidation. This leaves a shortfall of between €15 million and €20 million.\textsuperscript{15}

To date, there have been three applications to the High Court for the payment of compensation from the ICF in relation to Setanta Insurance.\textsuperscript{16} Orders were granted in the High Court in November 2016, July 2017 and May 2018 at a total cost to the ICF of €14.6 million.

On 30 January 2018, the Minister for Finance, Public Expenditure and Reform, Deputy Paschal Donohoe announced agreement in principle that the State would ensure that Setanta third party claimants would be receive full compensation.

\textsuperscript{14} Written Answers, Insurance Compensation Fund, 29 May 2018.
\textsuperscript{15} Dáil Debates, Insurance Industry, 30 November 2017.
\textsuperscript{16} Written Answers, Insurance Compensation Fund, 29 May 2018.
Insurance Compensation Fund (ICF) and the Motor Insurers Bureau of Ireland (MIBI)

There are currently two insurance guarantee schemes operating in Ireland; the ICF and the MIBI:

1. The ICF provides a capped level of compensation for liabilities in respect of non-life insurance policyholders in the event that an insurance firm fails.
2. The MIBI provides compensation to victims of road traffic accidents caused by uninsured or unidentifiable vehicles.\(^{17}\)

Insurance Compensation Fund (ICF)

The ICF was established under the Insurance Act 1964 (1964 Act). This Act was most recently amended by the Insurance (Amendment) Act 2011 to provide for a host-based compensation scheme rather than a home-based scheme.\(^{18}\) The ICF is currently maintained and administered under the control of the President of the High Court, who acts through the Accountant of the High Court.\(^{19}\)

The ICF facilitates compensation payments to policyholders (natural persons only) in cases where an Irish authorised non-life insurer (or a non-life insurer authorised in another EU or EEA Member State which is providing insurance against risks within the State) goes into liquidation or administration.\(^{20}\) Approval must be obtained from the High Court before these payments can be made and payments are only made from the ICF if the High Court determines that it is unlikely that the claim can be met elsewhere.

The ICF is funded on an ex-post basis. Contributions are paid to the fund by Insurance companies after insolvency occurs. Therefore the insolvent firm does not contribute to the Fund, presenting the risk of moral hazard. Industry representatives have argued in favour of the establishment of an ex-ante fund, given the certainty that this provides regarding their future funding obligations.\(^{21}\) The merits of ex-post and ex-ante funding are considered by the Working Group in their report, but the Working Group ultimately recommended that the ICF be funded on an ex-post basis.\(^{22}\)


\(^{18}\) Under a home-based scheme, compensation is paid by the guarantee scheme of the regulator of the insurance firm. Under a host-based scheme, this compensation is paid in by the country in which the risk is located.

\(^{19}\) The Accountant provides an annual report on the accounts of the Fund to the Minister for Finance and this is laid before the Houses of the Oireachtas.

\(^{20}\) Additional exclusions from ICF coverage include dental and health insurance, and large commercial policies relating to marine and aviation.

\(^{21}\) Regulatory Impact Analysis (RIA) in relation to the General Scheme of the Insurance (Amendment) Bill 2017, Department of Finance, Public Expenditure and Reform, and Taoiseach.

\(^{22}\) Ex-post funds take time to build, and results in opportunity costs as these funds cannot be used elsewhere. To have an ex-ante fund reach sufficient size to cover the estimated cost of Setanta’s failure (approximately €100 million) would require 10 years an additional 0.25% levy on motor premiums in Ireland and it would take over 3 years if a 1% additional
Payments from the ICF are capped at 65% of the total claim amount, or a maximum of €825,000, whichever is the lowest. However, the Fund pays out 100% of the amount due in the form of general payments to firms in administration if; the company was authorised in Ireland; and a minimum of 70% of its business over the preceding 3 years was related to risk in Ireland. Previous payments from the fund have been made in respect of the administration of Primor / PMPA, Icarom, and Quinn Insurance.

The level of deficit for the ICF is approximately €811.25 million as indicated by the report for the fund for the year ending 31 December 2016. €73.28 million was collected by the Fund during the year and repayments were made to the Exchequer of €106.61 million. €21.40 million in interest on this loan was paid in addition. Payments were also made from the Fund in respect of the liquidation of Setanta Insurance of €608,085. By the end of 2016 the outstanding amount owed to the Exchequer was €833.74 million.

The Central Bank, as provided for in the 1964 Act, undertakes an assessment of the financial position of the ICF each year. The Central Bank then makes a recommendation on the required level of contribution to be paid by non-life insurance firms based on this assessment.

The Central Bank determines the appropriate contribution that the industry must pay, of up to 2% of gross written premiums. Depending on the level of the Fund, the Central Bank may discontinue, increase or reduce the size of the levy. In addition, the Central Bank engages with the Department of Finance regarding the interest rate and repayment conditions on the loan amount provided to the ICF by the Exchequer.

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23 In the event that the amount of business in relation to risk in Ireland over the preceding three years prior to the company going into administration was less than 70%, and the company was put into administration in another EU / EEA jurisdiction, the ICF can only pay the expenses of the company administrator in relation to the insurance claims and not the actual claims.

24 The report for year ending on 31 December 2016 is available here.

25 This represents the 65% that the ICF is obligated to pay in respect of the total sum of €935,516 due under policies of insurance issued by Setanta.

26 The levy is collected by the Revenue Commissioners.

27 The Central Bank may make recommendation to the Minister for Finance to advance a loan to the ICF to allow for hastier payments from the ICF to meet liabilities, particularly when it is deemed that the annual contribution from companies envisaged would not be sufficient to discharge an insolvent company's liabilities within a short space of time. These loans are repaid to the Exchequer through industry contributions.
An overview of the statutory bodies associated with the ICF is provided in textbox 3 below.

**Textbox 3. Current statutory roles in relation to the ICF**

| **The High Court** | The High Court approves all amounts to be paid out of the ICF and to whom, in line with the provisions of the legislation.  
| | The High Court approves the appointment of an administrator or a liquidator to an insurance company. |
| **The President of the High Court** | The President of the High Court, acting through the Accountant of the High Court, controls the maintenance and administration of the Fund. He/she is required to keep proper and usual accounts of moneys paid into or out of the Fund and to furnish an annual report to the Minister for Finance. |
| **The Central Bank of Ireland** | The Central Bank determines the amount of the insurance levy, not exceeding 2% of non-life premiums received and advises insurance companies as to how the payments of the levy should be made.  
| | It has significant powers to seek the appointment of an administrator to an insurance company. It makes recommendations to the Minister for Finance as to whether it expects advance sums will be required to be made to the ICF by the Minister. |
| **The Minister for Finance** | The Minister advances funds to the ICF, appoints the collector of the levy and publishes the annual report of the ICF as prepared by the Accountant of the Courts of Justice. |
| **The Office of the Revenue Commissioners (Revenue)** | Revenue collects the levy and advises the Central Bank in cases where the full amount due may not have been paid. |
| **The Liquidator of an insurance company** | Where the insurer is authorised in Ireland, the liquidator applies to the High Court for approvals in respect of the persons to whom sums are payable and makes payments to persons accordingly upon receipt of these amounts from the ICF.  
| | The Insurance Act 1964 does not place any such obligations on a liquidator where the insolvent insurer is not authorised in Ireland and the liquidator is appointed in another Member State. |
| **The Administrator of an insurance company** | The role of the administrator is to carry on the business of an insurance company on a going concern basis and meet policy obligations as they arise. |

**Source.** Adapted from the report of the Review of Insurance Compensation Framework, June 2016
Motor Insurers Bureau of Ireland (MIBI)

Member States of the European Union are required by law to establish a compensation body responsible for providing compensation for victims of road traffic accidents caused by uninsured or unidentified drivers. In Ireland, the body responsible for delivering Ireland’s obligations under the relevant EU Directives is the MIBI.

In March 1955 an Agreement was signed between the Government and 44 motor insurers in the State to establish a compensation mechanism for the victims of uninsured driving, and was signed in November 1955. MIBI was then established under the Companies Act 1955 (since consolidated in the Companies Act 2014) as a private company.

Subsequent agreements were later signed in 1964, 1988, 2004 and 2009 (the ‘Agreements’). The current role of the MIBI (as of the 2009 Agreement with the Minister for Transport, Tourism and Sport) is to financially compensate innocent third party victims of uninsured and unidentified vehicles.

Financial compensation is provided by the MIBI for injury (or death) to a person, or damage to property, which is covered under section 56 of the Road Traffic Act 1961 (specifically, mandatory motor insurance) by an approved insurance policy. The MIBI pays out 100% up to a maximum limit of €1,220,000 per claim for property. This limit does not apply in the case of personal injury.

Financial compensation paid out by the MIBI is funded via payments levied on motor insurance policies in the State on an ex-post basis similar to the ICF. Claimants are compensated as their claims become settled and estimates from the insurance industry indicate that this equates to approximately €30 per premium sold.

Clause 62 of the MIBI Memorandum and Articles of Association, sets out that the MIBI is funded by reference to each motor insurer’s share of the market. Clause 62 states that ‘any such levy apportioned between Members pro rata to the Gross Written Premium (GWP) of each Member transacted in the State during the preceding calendar year’. GWP is defined as ‘A Member’s total gross written premiums receivable (less rebates and refunds) arising from the insurance of motor vehicle risks in the State as required to be made by the Member to the Financial Regulator or any other appropriate regulatory authority responsible for the regulation of motor vehicle insurance in the State’.

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29 Ibid.
In 2014, the aggregate amount paid out by the MIBI was €51.4 million (€47.9 million for domestic and untraced claims and €3.5 million for foreign related claims). The total amount paid out by the MIBI in 2013 was €61 million.

Between 2011 and 2013 the level of uninsured driving remained below 5% throughout the period. However, MIBI figures indicate an increase in the level of uninsured driving to 7.1% in 2015, and partial figures for 2016 estimate a further increase to 7.4%. The Working Group argues that a factor in the increasing number of uninsured drivers is the recent hike in motor insurance premiums.

Claims made to the MIBI are investigated and handled by four of the major insurers on MIBI’s behalf (FBD, Aviva, Alliance and Zurich) in proportion to their GWPs in Ireland. These four ‘Handling Offices’ settle claims for MIBI in accordance with their own claims handling procedures.

A further function of the MIBI is to settle foreign-related claims through the Green Card system. The Green Card System allows claims to made in the event that a motorist from another jurisdiction causes damage or injury which would be covered under the compulsory insurance laws of the visited country.

The handling of Green Card claims is governed by the European Council of Bureaux, of which the MIBI is a Member, and allows the injured party to make a claim against the bureau of the visited country (handling bureau). Once the handling bureau has paid the claim, repayment is sought from the bureau of the visiting motorist (the paying bureau). The paying bureau will then seek recovery from the insurer of the visiting motorist. However, many claims do not require this process, as the paying bureau (with the permission of the handling bureau) can appoint an agent in the country visited. The agent has will deal directly with the paying bureau but has the powers of the handling bureau.

The MIBI does not have access to a central fund and all payments of claims are funded on an ex-post basis. Once all claims are settled by the relevant ‘Handling Offices’ on MIBIs behalf, the MIBI levies all motor insurers for reimbursement of the cost.

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30 Based on figures provided to the Working Group by MiBI for inclusion in the Report on the Cost of Motor Insurance.
Ex-ante versus ex-post funding

Ex-ante

The majority of insurance compensation schemes internationally are funded through levies on insurance companies.

Many schemes are ex-ante funded (e.g., Canada, Denmark, Estonia, France, Germany, Israel, Italy, Japan, Korea, Norway, Poland, Portugal, Spain, and Turkey). In these countries an annual levy is charged, which depends on the level of funding available in the scheme. For instance, Estonia, Greece, Israel, Japan, Korea, Poland and Turkey charge annual levies as a percentage (ranging from 0.038% to 2%) of gross premiums.

Italy has a high funding requirement at 5% of premiums. Countries also vary in how they charge levies. Australia’s motor scheme’s levies depend on the number and types of cars insured. Meanwhile France charges a percentage of mathematical provisions (0.15%) as levies, while in Ireland, Norway and the UK, contributions are based on premium income.

Additional contributions may be imposed in many ex-ante schemes, such as Canada, Denmark, France, Germany, Korea and Poland. In Estonia a loan may be taken out in cases of insufficient funding, which can be funded ex-post.

In Japan, schemes may access government funding if the funds are depleted and the annual levy is not sufficient. In Spain, ex-ante funds are collected from policyholders, rather than insurers. For instance, there is a charge of 0.15% of premiums on non-life insurance policies for the purpose of the policyholder protection scheme.

Ex-post

Where insurers fail, the pay-out of claims by a scheme may take place over a number of years. Ex-post funding allows the insurance industry to stretch its collection of funds over several years.

Ex-post schemes are in place in a number of countries (e.g., Australia, Belgium, Finland, Ireland, Poland, United Kingdom and the United States). How it applies in each country varies. In Finland, Poland, Ireland and the UK, ex-post funding can be allocated based on the gross premiums of each insurer. The United States National Association of Insurance Commissioners recommends basing levies on market share in the State, recommending that levies be capped at 2% of annual average premiums.
Pre-legislative Scrutiny

The General Scheme of an Insurance (Amendment) Bill 2017 was approved by Government on 5 July 2017. The draft heads were sent to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on 17 July 2017. The Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach undertook Pre-legislative Scrutiny (PLS) of the General Scheme of the Data Sharing and Governance Bill in 2018. As part of its scrutiny of the General Scheme, the Committee met in public session on 8 February 2018, 1 March 2018, and 8 March 2018.

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Table 1 below has been compiled by the Oireachtas Library & Research Service (L&RS) and sets out the Joint Committee’s summary of each of the key issues identified by the Committee (in relation to the General Scheme of the Bill).

<table>
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<th>Recommendation</th>
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<tr>
<td><strong>Recommendation 1:</strong> Auditing the ICF and the MIBI</td>
<td>In accordance with section 5 of the Insurance Act 1964, in the event that the ICF does not have sufficient funds to meet a payment approved by the High Court, the Minister for Finance may, on the recommendation of the Central Bank, advance monies to the ICF from the Central Fund (the Exchequer) to enable payments out of the ICF to be made. The Comptroller and Auditor General (C&amp;AG) is responsible for auditing and reporting on the use of public funds to ensure legal</td>
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Recommendation 1: Head 4 of the General Scheme proposes to transfer the administration of the ICF from the Accountant of the Courts of Justice to the Central Bank. This potentially places the ICF within the remit of the C&AG for auditing / reporting. In addition, Head 6 provides a legislative basis for contributions to be made to the ICF by the MIBI. The MIBI fund consists of private monies contributed by industry. Given their expanded role in supplementing the ICF as laid out in the General Scheme, and the importance of the proposed MIBI contribution, the Committee recommended that consideration should be given to the oversight and auditing of these funds.

### Recommendation 2: Impact on the cost of motor insurance

Head 6 of the General Scheme provides the legislative basis for a contribution by the MIBI to the ICF. The existing 65% limit in relation to pay-outs from the ICF will be maintained, with the additional 35% being funded by the establishment of an *ex-ante* MIBI fund raised via contributions equivalent to 2% of gross written motor insurance premiums.

Data from the CSO on the cost of motor insurance in Ireland, show, that while the period between October 2013 and October 2016 saw substantial increases in the price of motor insurance, October 2017 has seen a fall in prices of over 7%.

Given the above, the extent to which the decision to fund the extended coverage of the ICF through industry contributions will impact on the cost of motor insurance for Irish consumers should be considered.

The committee recommended that consideration should be given to exploring an alternative approach that could prevent this potential rise in the cost of motor insurance would involve the State funding the additional upfront cost, and recouping the payment long-term via the existing ICF levy.

### Recommendation 3:

Head 4 provides for compensation for expenses to be provided to
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<td>Resource implications for the State Claims Agency, the Motor Insurers' Bureau of Ireland and the Central Bank</td>
<td>the Central Bank and the State Claims Agency (SCA) for their work in relation to the ICF. Consideration should be given to the level of expenses that would be required to be drawn down from the ICF by the Central Bank and the SCA in the fulfilment of their duties as outlined in this General Scheme, and whether this is the most efficient means to compensate these bodies for their work. Head 6 provides the statutory basis for the MIBI contribution to the Fund in the case of third party motor insurance claims, where an insurer is in liquidation. The committee recommended that consideration should be given to the ability of the MIBI to recover any reasonable expenses occurred in administration of the Fund, and consideration should be given to including a provision in the Bill stating that the MIBI shall never be obliged to contribute more monies to the ICF than it has available.</td>
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**Recommendation 4:** *Ex-post versus ex-ante funding*

The ICF is funded on an *ex-post* basis. This means that insurance companies pay a contribution to the Fund after insolvency occurs. The insolvent firm does not contribute to the Fund, presenting the risk of moral hazard.\(^\text{32}\)

The Working Group recommended funding the increased exposure to the ICF via an *ex-post* fund. Further consideration might be given to the decision to adopt an *ex-ante* means of funding rather than *ex-post* as recommended by the Working Group. However, industry representatives have argued in favour of the establishment of an *ex-ante fund*, given the certainty that this provides regarding their future funding obligations.\(^\text{33}\)

The committee recommended that further consideration might be given to the decision to adopt an *ex-ante* means of funding rather than an *ex-post* as recommended by the Working Group.

**Recommendation 5:**

Head 6 provides for a contribution by members of the MIBI

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\(^{32}\) Moral hazard describes a situation in which a party engages in risky behaviour knowing that they are protected from that risk and another party will bear the cost.

\(^{33}\) Regulatory Impact Analysis (RIA) in relation to the General Scheme of the *Insurance (Amendment) Bill 2017*, Department of Finance, Public Expenditure and Reform, and Taoiseach.
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| Justifying the level of the industry contribution  | equivalent to 2% of gross written motor premiums per annum, with flexibility to revise this figure upwards or downwards depending on the level of the funds.  
A clearer justification for these figures could be provided. In particular, the committee recommended that consideration be given as to whether or not the figures grant sufficient flexibility to the MIBI to change the levy in response to changes in the level of the fund. |
| Recommendation 6: Order of claims on the assets of the insurance firm entering liquidation | The General Scheme does not make reference to the priority status of policyholders in relation to claims on the assets of the insurance firm in liquidation. Prioritising policyholders in terms of claims against the assets of the insurance company could reduce the amount of funding required to be paid out from the MIBI via the ICF, as some claims could potentially be met from the proceeds raised from a sale on the assets of the firm. |
| Recommendation 7: Prudential supervision           | The European passporting framework provides that if a firm is authorised in the EEA it is entitled to sell insurance throughout the EU / EEA. A number of insurance firms provide motor insurance in Ireland on this basis, and likewise a number of Irish firms offer insurance in other markets.  
The Committee recommended that Government assure that there is sufficient oversight of foreign incorporated insurance firms currently operating in Ireland. |
| Recommendation 8: Merging of the funds             | In certain other jurisdictions, a single fund is used to compensate victims in the event that the liable driver is uninsured or unidentifiable (For example: Switzerland, Austria and Belgium).  
The Committee recommended that consideration should be given to the potential efficiency gains from a merging of the ICF and the MIBI contributions into a single fund. |
<p>| Recommendation 9: The legal status of the MIBI     | Under Section 9 of the Investment Intermediaries Act, 1995 (IIA), “it is an offence for a company registered in the Irish State to act as an “investment business firm” unless that person (including a |</p>
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<td>corporate) is acting under and within the terms of an authorisation to do so.”^{34}</td>
<td>It is unclear if proposed future activities of the MIBI fall under the IIA, but for the purpose of clarity, the Committee recommended that consideration should be given to providing the MIBI with an exemption from the scope of the IIA.</td>
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**Recommendation 10:**
Possible trust structure

The General Scheme does not make reference to how the funds will be held by the MIBI. The MIBI is of the understanding that the final Bill will require monies to be held in a Trust, to be opened and maintained by the MIBI, but believe that funds should be held in a separate bank account.

The Committee recommended that further consideration might be given to the manner in which monies for the fund are held by the MIBI.

**Recommendation 11:**
Collection of Fund from insurers in liquidation

Head 6 of the General Scheme provides the statutory basis for the MIBI to collect, from its members, a contribution equivalent to 2% of Gross Written Motor Premiums.

The Committee recommended that consideration should be given to how the fund is collected by the MIBI from insurers that have entered into liquidation, as the insurer in question may have collected the 2% levy from policy-holders earlier in the financial year, but upon entering into liquidation, the levy may not be collected by the MIBI.


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^{34} Motor Insurers’ Bureau of Ireland (22 February 2018) Correspondence Item No: 2018/595.
What does the Bill propose?

The Bill proposes the creation of a new *ex-ante fund*, to be known as the Motor Insurers Insolvency Compensation (MIIC) Fund, maintained by the MIBI. The purpose of the fund is to increase the level of cover provided under the ICF, to compensate third party claimants for the additional 35% of the claim that is not currently covered by the ICF. This would allow for recouping 100% of a personal injury claim. At present, the ICF allows recovery for 65% of a claim, and provides compensation for those whose insurance provider has gone into liquidation or administration.

This will allow for equivalent outcomes between those making a claim with MIBI and those who make a claim with the ICF. However, first party claims under the ICF will still be subject to the 65% limit meaning policyholders whose insurer has entered into liquidation when making a claim will not be entitled to the full 100% compensation.

The Bill also provides for retrospective payments to third-party claimants where their insurer has gone into liquidation on or after the 30 September 2011. The purpose of these payments is to “top up” payments made out of the ICF between this date and the coming into operation of the proposed Act. This would bring the payments into line with the motor Insurance Bureau of Ireland (MIBI) limits. It is worth noting that these payments will be made out of the ICF and not the MIIC Fund.

Administration of the ICF will be transferred from the Accountant to the High Court to the Central Bank of Ireland. The States Claims Agency provides a supporting role to the Accountant to the High Court under the current framework and will provide a similar role in relation to the Central Bank. The Agency will assist the Bank in the settlement and management of individual claims. While the role of the Agency currently fulfils is largely informal, this Bill will place certain obligations of the State Claims Agency on a statutory basis, including the duty to provide written reports to the High Court on the sums appropriate to a relevant claim.

The Bill provides for the payment of contributions by insurers in the Irish market into the MIIC Fund. It provides for a general contribution rate of 2% of gross written premiums (GWP) and a maximum contribution rate of 3% of GWP. Following consultation with the MIBI and the Central Bank, the Minister may review the percentage rate, and by way of Ministerial Order specify a new rate as follows:

- 2% until such time as the MIIC Fund reaches €150 million;
- 1% where the MIIC Fund has reached a level over €150 million but less than €200 million;
- 3% of GWP if it is determined by the MIBI that there is insufficient monies in the Fund to cover a payment made by the Central Bank out of the Fund. This 3% rate will apply up to such a time as the Fund reaches €50 million.

Payment into the Fund may be suspended at such time as the MIIC Fund reaches above €200 million.

It should be noted that the Bill, if enacted, will allow the ICF to compensate claimants to a higher level than the existing 65% and as such a higher cost will have to be borne by insurers. This cost can either be absorbed by the insurer or passed on to the policy holder via higher premiums. The Bill does not seek to address how insurers should absorb the extra cost arising from the proposed MIIC levy. As pointed out to the Joint Committee:

“European legislation prevents the Central Bank and the Government from interfering in that commercial decision of an insurance company”.  

It is worth noting that one of the recommendations of the Committee was that consideration be given to “the extent to which the decision to fund extended coverage of the ICF through industry contributions will impact on the cost of motor insurance for Irish consumers.”

In evidence to the Joint Committee, Minister of State, Deputy Michael D’Arcy stated that “it is a matter for each company to make its determination as to whether to pass on the 2% levy to their policy holders.

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35 Statement by Mr Gerry Cross (Central Bank of Ireland) during scrutiny of the General Scheme 8 March 2018.
36 Mr Kevin Thompson (Insurance Ireland) confirmed that Insurance Ireland does not have the authority to oblige insurance companies to absorb the extra cost and so it is for each individual company to decide how to apply the 2% levy. Mr Thompson went on to state that uncertainty in the market, due in part to the issue with Setanta Insurance, was one of the main reasons for the recent price increase in premiums and bringing certainty to the industry, premiums should begin to fall. Statement by Mr Kevin Thompson (Insurance Ireland) during scrutiny of the General Scheme 8 March 2018.
38 Ibid
Principal Provisions

This section of the Digest will focus on the central changes proposed in the Bill. These concern:

- the transfer of functions from the Accountant to the High Court (“the Accountant”) to the Central Bank of Ireland (“the Bank”) and the State Claims Agency;
- provision for the payment of claims in full from the ICF (“the Fund”) where a vehicle insurance provider has gone into liquidation or administration;
- the establishment of a new Motor Insurers Insolvency Compensation Fund (“the MIIC Fund”).

Transfer of functions from the Accountant to the High Court to the Central Bank of Ireland

The Bill proposes the transfer of responsibilities in respect of the Fund from the Accountant to the Bank and the State Claims Agency.

- **Transfer to Central Bank**

Section 6 of the Bill provides that the Accountant must within a specified time-frame pay to the Bank any moneys owing to the Fund.

Section 9 of the Bill proposes amendments to the Insurance Act 1964 that reflect the transfer from the Accountant to the Bank of the maintenance and administration of the Fund. In particular, it proposes substituting a new section 2(3) which will permit the Bank to borrow money for the Fund. However, the Bank will be precluded from providing monies to the ICF from its own resources and (as provided for in a new section 2(9)) will not have any liability arising from the Fund.

Under the proposed provisions, the Bank must keep accounts in respect of all monies paid into and out of the Fund, and furnish to the Minister an annual abstract of the accounts and a report on the Fund. Annual accounts must also be required to be furnished to the Comptroller and Auditor General (the “C&AG”) for audit. The audited accounts and a report of the C&AG must then be furnished to the Minister and laid before the Houses.

The Bank already carries out a number of functions associated with the ICF. These include petitioning the High Court for the appointment of an administrator or liquidator of an insurance company, deciding the rate at which the ICF levy is set, and recommending to the Minister for Finance to advance funds to the ICF.

The transfer of functions to the Bank was recommended by a Joint Working Group of the Department of Finance on the basis that the Bank has “significant knowledge and experience of
the insurance sector which is not available in the Office of the Accountant to the Courts of Justice.\(^{39}\)

- **Transfer to State Claims Agency**

While the State Claims Agency has supported the Accountant’s work relating to the Fund, the current framework permits it to do so only on an informal basis. The Bill therefore proposes to place the State Claims Agency’s role on a statutory basis.

Section 11 of the Bill proposes amending section 3A of the 1964 Act so that a liquidator must, prior to applying to the High Court for payments from the Fund, provide to the Agency specified information about the claims involved so that the Agency can assess and verify whether such sums are in fact payable. The relevant payments are those due to a person, other than a refund of premium, under a policy issued by the insurer in liquidation). Section 12 of the Bill proposes amending section 3B of the 1964 Act so that these information provisions will also apply in respect of insolvent insurers that are authorised in another Member State.

Section 12 of the Bill further proposes an amendment to the 1964 Act which would reduce the minimum interval between applications by the Agency to the High Court for approvals for payment out of the Fund in respect of insolvent insurers authorised in other Member States. At present, the Agency may apply only once in every 6 month period. Section 12 of the Bill proposes to reduce that interval to not more than once in every 3 month period.

The amendments contained in sections 11 and 12 will require the State Claims Agency to prepare a written report in support of any application to the High Court by a liquidator for payment out of the Fund. This Report must:

(i) set out the information provided to the Agency and the process by which it verified it, and

(ii) confirm that the sums requested are appropriate.

Part 5 of the Bill proposes additional amendments to the **National Treasury Management Agency (Amendment) Act 2000** to provide for the additional functions for the State Claims Agency in relation to the Fund, including:

- applying to the High Court for approval of payments out of the Fund relating to insolvent insurers that are authorised in another Member State;
- assessment and verification of information provided by an insolvent insurer in respect of the amount payable out of the Fund;
- preparation of reports in support of any application to the High Court by the liquidator; and
- the payment to appropriate persons of sums approved for payment out of the Fund.

The Working Group took the view that oversight of the claims assessment and settlement process should be assigned to one body, and it recommended the State Claims Agency. The Working Group was of the view that Agency was best suited in terms of “experience and expertise in dealing with the settlement and management of claims on a micro level”. The Bank, on the other hand, was best equipped from a supervision perspective to deal with issues on a “macro” level (i.e. examining claims to determine if an insurer is provisioning correctly and has sufficient capital to meet future liabilities). 

- **Transitional provisions**

Section 4 of the Bill provides that anything commenced but not completed by the Accountant relating to the functions transferred to Bank or the State Claims Agency be carried on and completed by them.

Section 7 provides for the transfer of all records held in relation to the Fund from the Accountant to the Bank on the coming in to operation of Part 2 of the proposed Act. Similarly, it provides for transfer to the State Claims Agency of all records of the Accountant relating to applications to the High Court for approvals and payments out of the Fund.

**Increase in level of cover under ICF**

Section 10 of the Bill proposes amendments to section 3 of the 1964 Act that would significantly change the current limits on payments from the ICF.

Under the current framework, payments from the ICF are limited to 65% of the total claim value or €825,000, whichever is less. The proposed amendments would make claims against insolvent vehicle insurers equivalent to claims against the MIBI. Payments from the ICF could therefore be made for:

- 100% of personal injury claims, and
- up to €1,220,000 in respect of claims for injury to property.

This amendment was recommended by the Review of the Framework for Motor Insurance in Ireland Report as necessary to ensure confidence in the motor insurance system and to remove disincentives for motorists to have insurance in place.

The proposed changes relate to claims arising from an **insured person’s liability to third parties** – that is, persons other than the insured. Claims against the ICF that the insured makes on his or her own account would remain subject to the 65% or €825,000 limit.

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40 Ibid. at 33
The amendment proposed in **section 10(b) of the Bill** relates to section 3(3) of the Principal Act and requires claims to be satisfied, as far as possible, from available assets of the insolvent insurer: only amounts not so available may be claimed from the ICF.

**Section 10(c) of the Bill** proposes to replace section 3(5) of the Principal Act. The effect is that, where a person makes a claim on the ICF relating to third-party liabilities under a vehicle insurance policy, the claim is not subject to the 65% or €825,000 limits that apply to other claims.

**Section 10(d) of the Bill** proposes to insert a new subsection (5A) in section 3 of the Principal Act. This new subsection brings third-party claims under vehicle policies into line with claims under the MIBI:

- **Paragraph (a) of the proposed new subsection (5A)** defines the conditions for bringing claims into line with those against MIBI. The claim must:
  - relate to a third-party liability under a vehicle insurance policy, and
  - the liquidator (or equivalent in another Member State) was appointed on or after 30 September 2011, when the ICF was established in its current form.

- **Paragraph (b) deals the amounts payable under the claim:**
  - If the claim is for personal injuries, the full amount is payable.
  - Claims relating to property are limited to the amount provided for in **section 56(2)(a) of the Road Traffic Act 1961** – that is, €1,220,000.

- **Paragraph (c) deals with payments from the MIIC to the ICF.** The effect of new provision is to require the MIIC to make a payment to the ICF equal to 35% of any claim for which the ICF pays out up to €825,000. If more than €825,000 is payable, the MIIC must pay to the ICF the full amount of that excess.

- **Paragraph (d) deals with ICF payments that pre-date** the coming into effect of the provisions proposed by the Bill. These payments would have been subject to the 65% or €825,000 limits under the current scheme. The effect of the new paragraph (d) is to provide – subject to approval by the High Court – for payments to persons of “any sum that remains due” to the person concerned under the relevant vehicle policy, together with their reasonable costs and expenses incurred in recovering that sum. It is worth noting that such additional payments will be paid out of the ICF and not the MIIC Fund.

**Section 10(e) of the Bill** proposes to amend section 3(6) of the Principal Act. This deals with cases where a claim against the ICF is for a payment to a body corporate (such as a company) or an unincorporated body of persons (such as a club). Section 3(6) currently prevents payments
from the ICF to such bodies unless it is in respect of liability to a natural person, or the liability of a natural person to such a body. The effect of the proposed amendment is to maintain that prohibition in respect of claims covered by the new section 3(5A) – that is, third-party claims under policies issued by insolvent vehicle insurers.

Section 10(f) of the Bill proposes to delete section 3(7) of the Principal Act, which deals with cases where a payment has been made by MIBI. As currently in effect, subsection (7) provides that no payment in respect of a policy is payable from the ICF if that sum has already been paid by MIBI; if only part of a sum due under a policy is paid by MIBI, then the ICF is liable only for the balance. The effect of the proposed deletion appears to be that no account will be taken of any MIBI payments made to claimants against the ICF.

Establishment of Motor Insurers Insolvency Compensation Fund (MIIC Fund)

Section 16 of the Bill proposes inserting a new section 3D into the Act of 1964 to provide for the establishment of a new Motor Insurers Insolvency Compensation Fund (MIIC Fund). The MIIC Fund will be established and maintained by the Motor Insurance Bureau of Ireland. Unlike the ICF and the MIBI, the MIIC Fund will be an ex ante fund operated on the basis of contributions paid by vehicle insurers in advance of an insolvency. The purpose of the MIIC Fund will be to cover the increase in the level of payments paid out by ICF (i.e. 35%) in respect of claims against insolvent vehicle insurers. MIBI must create a separate account for moneys paid into the MIIC Fund and can invest any monies not immediately required.

Section 3D provides that the MIBI must prepare an annual report for the Minister detailing:

- the total amount of contributions paid into the MIIC Fund in the reporting year;
- the total amount (if any) paid to the ICF during the reporting year;
- the total anticipated amount due to the ICF in respect of the year based on notifications from the Bank;
- the total amount standing to the credit of the MIIC Fund at the end of the reporting year;
- the total amount standing to the credit of the MIIC Fund on a date specified but not being 7 days earlier than the date of the report;
- any amounts due and owing to the ICF during the reporting year and remaining unpaid;
- the total expenses incurred by the MIBI in the performance of its functions for the year.

Section 3D further provides that the Minister may at any time request information from the MIBI regarding the performance of its functions under the proposed Act, and may also seek a statement of the total amount standing to the credit of the MIIC Fund.
• **Payments out of the MIIC Fund**

The new section 3E, proposed in section 16 of the Bill, provides for payments out of the MIIC Fund. It provides for the MIIC Fund to pay to the ICF any amounts paid in excess of the prescribed limit under the 1964 Act (i.e. 65% of an individual claim or €825,000, whichever is the less) in the event of a vehicle insurer (including one authorised in another Member State) going into liquidation or administration.

Any expenses incurred by MIBI in the performance of its functions under the proposed Act must be paid before any monies can be paid to the ICF.

Section 3E(2) provides that, where a payment from the ICF exceeds the prescribed limits set out above, the Bank must notify the MIBI in writing within 28 days. The Bank must also sent to the MIBI a notice, in writing, not later than 3 months after the end the relevant period specified in the Bill setting out:

- a statement of the total amount of payments notified to MIBI during that period;
- where no payment has been notified, a nil statement;
- where applicable, a request for payment out of the MIIC Fund of any notified amounts and any amounts remaining due and owing from previous periods.

Section 3E(4) provides that the MIBI must, not later than 28 days following the receipt of such notice, determine its ability to make such payments out of the MIIC Fund. Payment must be made not later than 2 months after receipt of this notice.

Where there are insufficient funds to pay the full amount, MIBI must notify the Bank confirming the amount (if any) which will be paid, and notify the Minister of the shortfall.

• **Contributions to the Fund**

Section 16 of the Bill proposes inserting a new section 3F into the 1964 Act. This would provide for annual contributions to the MIIC Fund by vehicle insurers operating in the Irish market (including vehicle insurers authorised in another Member State). Every year, a vehicle insurer must provide to MIBI a statement certified by an auditor setting out the gross premiums paid in respect of all vehicle insurance policies issued by it covering risks in the State (this is referred to as “the assessable amount”). The insurer’s contribution to the MIIC Fund is calculated as a percentage of the assessable amount. While a percentage rate of 2% is stipulated in the Bill, this rate may be reviewed and changed by way of Ministerial order following receipt of MIBI’s annual report and consultation with the MIBI and the Bank. The Bill provides for varying rates, subject to a maximum of 3%, as set out below:

- 2% of the assessable amount where the amount in the MIIC Fund is less than €150m;
1% of the assessable amount where the amount in the MIIC Fund is more than €150m but less than €200m;

0% of assessable amount where the amount in the MIIC Fund is more than €200m; and

3% until the amount in the MIIC Fund exceeds €50m, where the Minster has received a notification from the MIBI that there are insufficient monies in the Fund to meet authorised payments.

Subject to the maximum rate, the Minister may specify a percentage rate other than those set out above if her or she considers it appropriate, having regard to the following:

- The total amount standing to the credit of the MIIC Fund;
- An estimate of the total contributions payable before 30th June the following year;
- Any sums due and owing to the ICF; and
- The desirability of ensuring that the total amount standing to the credit of the MIIC Fund is likely to be sufficient to meet any payments that may become due to the ICF.

The MIBI must pay into the MIIC Fund all contributions received from insurers.

Ministerial orders changing the contribution rates must be laid before the Houses of the Oireachtas and published on the MIBI website.

It is expected that the proposed 2% regular contribution will generate between approximately €34 million and €40 million a year. As €90 million is currently required for the liquidation of Setanta Insurance, the proposed 2% contribution should cover that amount within three years. However, the total deficit of the ICF currently stands at about €870 million, owing to the administration of Quinn Insurance. The Central Bank therefore calculates that about 11 years of contributions at the 2% rate are required for the Fund to recover the total deficit.

This approach uses an ex-ante basis of accumulation – that is, the accumulation of a “rainy day” fund from regular contributions, as opposed to an ex-post approach, whereby insurers are required to contribute only after a company goes into liquidation. The ex ante approach has the benefit of bringing greater stability to the marketplace. However, the ICF is, and will continue to be, funded by ex-post contributions. The result is a hybrid approach to industry contribution to the funding of the compensation scheme.

**Failure to make a contribution to the MIIC Fund**

Section 16 of the Bill proposes inserting a new section 3H into the 1964 Act to authorise MIBI to enforce the payment of contributions to the MIIC Fund. It provides that the MIBI may:

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42 See statement by Mr. Kevin Thompson (CEO Insurance Ireland) during Pre-legislative Scrutiny of the “General Scheme of the Insurance (Amendment) Bill 2017: Discussion (Resumed)”. 08 March 2018
• recover unpaid contributions as a simple contract debt;
• notify the Bank of the non payment, setting out the steps taken to recover the monies and a copy of any court order.

Where the Bank receives a notification from the MIBI in respect of non-payment by a vehicle insurer (but not a vehicle insurer authorised in another Member State), the Bank may suspend the insurer’s authorisation until it is satisfied that all outstanding contributions have been paid.

If a non-compliant insurer is authorised in another Member State, the Bank may inform that Member State’s supervisory authority of the non-payment. If the insurer persists in its failure to pay the contributions, despite measures taken by the relevant supervisory authority, the Bank may (after informing said authority and on giving 21 days notice to the insurer) take such measures as are necessary to prevent further failure, including preventing the insurer from issuing any vehicle insurance policies in the State.

• **Offence of failing to make contribution to the MIIC Fund**

In addition to the administrative and civil law sanctions available, section 16 of the Bill proposes to insert a new section 3I into the 1964 Act to make it an offence for a vehicle insurer not to contribute to the MIIC Fund. An insurer found guilty of such an offence will be liable:

• on summary conviction, to a class A fine (up to €5,000) and/or up to 12 months’ imprisonment; or
• on conviction on indictment, to a fine and/or up to 5 years’ imprisonment.

Where an offence is committed with the consent, connivance or wilful neglect of a director, manager, secretary or other officer, both that person and the body corporate will be guilty of the offence. This provision permitting the piercing of the corporate veil will also apply to those in management roles where a body corporate is managed by its members.

Summary offences may be prosecuted by or on behalf of the Bank.

**Liability of MIBI officers and employees**

Section 16 of the Bill proposes a new section 3J of the 1964 Act. This provides that a director or other officer or employee of MIBI will not be liable in damages for anything done or not done by that person in the performance of any of MIBI’s functions, unless the act or omission was done in bad faith.

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43 Before suspension, the Bank must give at least 21 days’ notice to the vehicle insurer to pay the outstanding MIIC Fund contributions.
Appendices

Appendix 1: Motor Insurance in Ireland

It is a legal requirement in Ireland that motorists hold third-party motor insurance. In 2015 the Irish risk non-life market (excluding Accident & Health) had a total gross written premium (GWP) of €2.9 billion, of which, motor (both private and commercial) is the largest non-life segment. Motor insurance accounted for 47% of Irish risk premium in 2015.

An insurance undertaking can operate within the Irish market under the following conditions:

- by establishing a head office in Ireland (authorised by Central Bank of Ireland);
- by establishing a branch in Ireland via Freedom of Establishment (FOE); or
- by operating on a Freedom of Services basis (FOS).

98% of motor premiums in Ireland are underwritten by eight insurance companies, excluding FOS business, as follows:

- AXA Insurance Limited;
- Aviva Insurance Limited (Branch);
- Allianz plc;
- FBD Insurance plc;
- RSA Insurance Ireland;
- Liberty Insurance Limited;
- AIG Europe Limited (Branch); and
- Zurich Insurance plc.

These insurance undertakings listed above are either authorised by the Central Bank to sell motor insurance, or are availing of EU passporting rights. The financial position of six of the eight undertakings listed is supervised by the Central Bank, while Aviva and AIG are supervised by the Prudential Regulatory Authority (PRA) in the UK and are authorised to sell motor insurance through the FOE (branch basis).

74% of motor insurance gross written premiums are accounted for by private motor business. The remaining 26% are derived from commercial motor business. By law, all insurance undertakings

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45 Insurance in respect of risks related to damage to a third-party involved in a motor accident.
46 Department of Finance, Report on the Cost of Motor Insurance, 2017
48 The establishment of a branch of an insurance undertaking in an EEA State.
49 Insurance Ireland Factfile, 2015
that underwrite motor insurance in Ireland must be members of the MIBI and must also contribute to funding for claims as a proportion of their market share.

Figure 1 below illustrates profitability in the Irish motor insurance market from 2005 to 2015. Profitability in the insurance sector can be analysed using the combined ratio, which measures the proportion of costs to premium. A ratio below 100% indicates that the company is making underwriting profit while a ratio above 100% means that it is paying out more money in claims that it is receiving from premiums, resulting in an underwriting loss.\(^5\)

**Figure 1. Profitability in the Irish motor insurance sector**

![Ireland Motor Profitability 2005 - 2015](image)

*Source: Report on the Cost of Motor Insurance*, January 2017

A total of €2.2 billion in underwriting profits was recorded in the sector between 2005 and 2008. Following 2008, intense competition in the market and a challenging economic environment have put downward pressure on rates resulting in total underwriting losses of €1.3 billion between 2009 and 2015. Of the €1.3 billion in losses during this period, motor insurance accounted for €900 million. The insurance industry has suffered significant underwriting losses between 2008 and 2015 (other than 2011) as illustrated in Figure 2 overleaf.\(^5\)

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\(^5\) Department of Finance, *Report on the Cost of Motor Insurance*, 2017

\(^5\) Ibid.
In considering profitability, it is important to analyse investment returns over the period. Between 2005 and 2008 the average investment return was €317 million per year, reducing to €168 million per year between 2012 and 2015. This latter figure has been insufficient to cover underwriting losses in 2013, 2014 and 2015, as illustrated in Figure 3 overleaf, which provides an overview of net technical income i.e. an aggregation of the underwriting result and investment income for the period between 2005 and 2015.\(^{52}\)

CSO data shows that private car insurance prices had increased by 19% from January 2003 to July 2016 (an average increase of 1.3% per annum). Since mid-2014, motor insurance rates have been on the increase, this followed twelve years of benign pricing (from a consumer standpoint). Figure 4 overleaf is based on CSO data, and demonstrates the evolution of costs in the industry against the backdrop of key moments in the Irish economy and Irish insurance sector.\(^{53}\)

\(^{52}\) Ibid.
\(^{53}\) Ibid.
Figure 3. Examining investment income

Source: Report on the Cost of Motor Insurance, January 2017

Figure 4. CSO data on motor insurance prices with timeline of events

Of particular interest:

- Private car insurance fell by 40% between January 2003 and January 2008, associated in part with the introduction of significant cost-cutting measures in the industry. This included the tackling of legal costs, fraud and driver behaviour (speeding etc.), and increased competition in the market; and,

- Between January 2010 and January 2014, private car insurance prices rose by just 1%.

- Between January 2014 and July 2016, private car insurance prices rose by 70%. This is associated with companies reacted to deteriorating profitability positions; increased claims uncertainty arising from the proposed introduction of periodic payment orders; and increased uncertainty due to the MIBI / Setanta rulings.\(^ {54}\)

The Working Group identified several factors that may have contributed to the increased cost of motor insurance, including.\(^ {55}\)

1. **Under-pricing**: A number of insurance companies may have been under-pricing between 2010 and 2014 by not fully taking into account potential future losses;

2. **Increased frequency and cost of settled claims**: increased claims inflation and claims frequency was flagged by the industry as a primary reason for the rise in the cost of insurance in recent years; and

3. **Reserving**: data collected by the Central Bank indicates an increase in the levels of reserving. These are costs insurance companies set aside for claims they expect to pay but which have not yet been settled.

Upward pressure on levels of reserving can be heightened by uncertainty. The Report by the Working Group has identified several factors as contributing to heightened uncertainty in the industry. These are considered below.\(^ {56}\)

**Court Jurisdictional Changes**: following an increase in Court jurisdictional limits in February 2014; insurers stated that increases in permissible court awards have the potential to result in the average court award increasing significantly.

**High Awards for Personal Injury Claims**: high awards given in Ireland for certain soft tissue injuries in comparison to other jurisdictions was referred to by a number of stakeholders.

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\(^ {54}\) Ibid.
\(^ {55}\) Ibid.
\(^ {56}\) Ibid.
Civil Liability (Amendment) Act 2017: this Act provides for the introduction of Periodic Payment Orders (PPOs) which the insurance industry has stated has increased uncertainty around the likely future cost of catastrophic claims on business currently written.

Legal challenge in relation to Setanta Insurance: A number of insurers stated that the legal uncertainty with regard to the payment of Setanta claims has impacted on the cost of motor insurance.

Discount Rate: the Gill Russell versus HSE case resulted in a reduction of the discount rate from 3% to 1%. It is argued that this is having an inflationary impact on premiums due to the impact this change may have on existing and future claims reserves.

Regulatory Requirements: The industry has cited the introduction of the Solvency II Directive (2009/138/EC) since the start of 2016 as another factor as companies have had to revise their reserving models to reflect its new requirements. The Working Group does not consider that this has had a material impact.

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57 Periodic Payment Orders (PPOs) are payments made at regular intervals to compensate for catastrophic injury. They are an alternative to lump-sum payments and are intended to last the lifetime of the injured person, compensating for future losses on an ongoing basis. Payments may vary with changes in circumstance.

58 Solvency II was transposed into Irish law via statutory instrument: SI 485 of 2015.

Membership: Representatives from the Department of Finance and the Department of Transport, Tourism and Sport.

Remit: In January 2016, a Joint Working Group was established to review the motor insurance compensation framework in Ireland, following representations on the matter to both the Minister for Finance and the Minister for Transport, Tourism and Sport in December 2015.

Recommendations: The report makes 10 recommendations. Below is a summary of these recommendations, as adapted from the text of the report.59

Coverage, eligibility and limits
- The scope of coverage of the ICF to non-life lines of business will remain unchanged and the limitation of cover to natural persons in the event of a liquidation will also remain unchanged.
- Amend the Insurance Act 1964 and the 2009 MIBI Agreement to provide that the ICF is the port-of-call in the event of a failure of an insurance company and that the MIBI is liable for claims relating to uninsured and unidentified drivers.
- Extend the level of cover provided by the ICF for third party motor insurance from 65% to 100% and to the equivalent limits provided for under the MIBI scheme.

Funding
- The ICF is to remain an ex-post compensation scheme.
- The liability for the payment of claims in respect of mandatory third party motor insurance where the insurer is insolvent and in liquidation, is shared 35% to 65% between the MIBI and the ICF, subject to the limits which currently apply under each scheme.
- The new procedures that will be developed for the operation of the new arrangement will ensure that claimants will have a single point of contact when submitting a claim and a single payment to them from the ICF.

Governance and administration
- The administration of the ICF to be transferred from the Accountant of the Courts of Justice to the Central Bank of Ireland. This will include all of the roles previously carried out by the Accountant, with the Central Bank maintaining its current roles relating to the Fund.
- The responsibility for the collection of the ICF levy will remain with the Revenue Commissioners.
- The role in relation to oversight of the claims assessment and settlement process should be clearly assigned to the State Claims Agency.

Reporting obligations to establish an efficient motor insurance database

- Amend the provisions contained in section 78A of the Road Traffic Act 1961 through the Road Traffic Bill 2016 in order to provide greater clarity on what is meant by the term ‘details’. This amendment (summarised below) will require insurers to supply the following information to the Minister for Transport, Tourism and Sport:
  - Particulars, including the name and address, of the holder of a motor insurance policy,
  - The period of cover of the policy,
  - Any limitations as to the use of a mechanically propelled vehicle under the policy,
  - The persons or the classes of persons whose liability is covered under the policy,
  - The vehicle (including the unique identification mark) or class of vehicle, the use of which is covered under the policy, and
  - The names of any driver or the class of driver whose driving is covered under the policy. A more robust enforcement by An Garda Síochána of uninsured driving, using the above information through the Garda ANPR technology (Automatic Number Plate Recognition) should result in significant annual savings to the MIBI in terms of compensation paid to victims of collisions involving uninsured vehicles/drivers.

Membership: representatives from the Department of Finance, the Department of Jobs, Enterprise and Innovation, the Department of Justice and Equality, the Department of Transport, Tourism and Sport, the Central Bank of Ireland, the Personal Injuries Assessment Board and the State Claims Agency.

Remit: this report sets out a detailed set of recommendations and actions to tackle those factors that are influencing the increasing cost of motor insurance by introducing a comprehensive suite of reforms for the insurance sector.

Recommendations: The report makes 33 recommendations, below is a summary of these recommendations, as adapted from the text of the report.60

Improving data availability

- The Working Group recommends the creation of a national claims information database by the middle of 2018. In advance of the realisation of a national claims information database, there will be a requirement for industry to provide key metrics in relation to the market for publication by the Department of Finance at regular intervals.

Improving the personal injuries claims environment

- A Personal Injuries Commission will be established in January and begin immediately to review a number of key issues that speak directly to the cost of personal injuries. This Personal Injuries Commission will produce its first report to the Minister of State by the end of 2017. Its terms of reference will, inter alia, include conducting a review of the average awards in other relevant jurisdictions, as well as the grading of personal injuries.

Reducing the costs in the claims process

- The Working Group makes recommendations to strengthen the Book of Quantum, including exploring with the judiciary how future reviews of the Book might involve appropriate judicial involvement in its compilation or adoption, introducing more granularity in the Book, and updating it every 3 years at a minimum.

- The Working Group also makes a number of recommendations to maximise the Personal Injuries Assessment Board process, including that the current review of the PIAB legislation addresses cases of non-co-operation such as non-attendance at medicals and refusal to provide details of special damages.

Reducing insurance fraud and uninsured driving

- The Working Group makes recommendations on improving data sharing to identify patterns of suspected fraud, through the development of a database that takes into account data

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protection concerns. The Working Group also recommends that further cooperation between the insurance industry and An Garda Síochána be developed.

- In relation to uninsured driving the Working Group recommends that a fully functioning insurance database, to allow An Garda Síochána to check insurance compliance through the use of technology such as Automatic Number Plate Recognition, be finalised. Much work has already been done in this area, however it is important that the rollout of such a database is expedited. A further recommendation in this area includes reviewing Section 30 of the Civil Liability and Courts Act 2004.

Promoting road safety and reducing collisions

- Road safety remains an important societal issue and one that is relevant to the cost of insurance. While advances have been made in this area in the last 20 years, it is important that all stakeholders remain vigilant. In this respect, the Working Group makes a number of recommendations around the use of technology while acknowledging its constraints.
Appendix 4: Supervision

The prudential supervision for insurance and reinsurance companies with gross premium income exceeding €5 million are covered by the Solvency II Directive (2009/138/EC), as transposed into Irish law by the European Union (Insurance and Reinsurance) Regulations 2015.

The Solvency II framework is based on three interlinked “pillars”:

1. Pillar 1 covers financial requirements and aims to ensure firms are adequately capitalised with risk-based capital with two capital requirements; the Solvency Capital Requirement (SCR) and the Minimum Capital Requirement (MCR).

2. Pillar 2 covers governance and supervision and requires insurers are to carry out an Own Risk and Solvency Assessment (ORSA) and this is required to be reviewed by the supervisor.

3. Pillar 3 covers reporting and disclosure requirements and requires a public Solvency and Financial Condition Report (SFCR) and a private Regulatory Supervisory Report (RSR) to be disclosed.

The Central Bank of Ireland has a statutory responsibility for the proper and effective regulation of financial service providers and markets while protecting the best interests of consumers.

The Consumer Protection Code supplements the legislative framework and includes statutory Codes and Regulations, which all firms must follow, including requiring insurers to provide consumers with accurate information when selling and renewing insurance policies. This consumer protection framework also applies to European insurers that sell insurance policies in Ireland on an FOS or FOE basis.
Appendix 5: Passporting

Once an insurer is authorised to sell insurance in an EEA Member State, that insurer may also sell insurance throughout the EU/EEA via the European passporting framework.

There are two methods in which business may be conducted in the jurisdiction of other Member States via the European passporting framework – if the undertaking:

i) establishes a branch operation and conducts business on a ‘freedom of establishment’ (FOE) basis, or

ii) writes business from the Home State to the Host State on a ‘freedom of services’ (FOS) basis.

Responsibility for the prudential supervision of an insurance undertaking is the responsibility of the Member State in which the insurance undertaking is authorised (Home State), regardless of the State in which the FOE or FOS business is being conducted (Host State). The sole responsibility of the Host State supervisor is the supervision of the conduct of business.

The Central Bank of Ireland acts as a Host Supervisor for any insurance undertaking authorised in another EU/EEA country which wishes to do business in Ireland. Once notified, they are added by the Central Bank of Ireland to its register of service providers or branch establishments (Host Register). Such companies are then advised of the Central Bank of Ireland’s General Good Requirements for Insurance and Reinsurance Undertakings. This includes membership of the Motor Insurers’ Bureau of Ireland (MIBI)\(^6\).

\(^{6}\) Central Bank of Ireland, General Good Requirements for Insurance and Reinsurance Undertakings, (2012).
Appendix 6: Insurance Guarantee Schemes in Other Jurisdictions

This section uses information taken from OECD and European Commission reports to provide an overview of insurance guarantee schemes in international jurisdictions.

Insurance guarantee schemes


The OECD study found that a motor guarantee scheme, providing compensation to motor accident victims in cases where an insurer fails or where the owner of the vehicle at fault is not insured or cannot be identified, was in place in 22 EU Member States.

Coverage

Australia, Belgium, Denmark, Finland, France, Israel, Japan and the UK offer unlimited protection for non-life contracts. Of countries where limits are applied, Ireland had the highest maximum coverage level of €825,000.

In countries where unlimited coverage is provided, the OECD states that insurance companies usually transfer policies to another firm. Consequently, a pay-out from the fund is less likely. In these instances the guarantee fund acts as a backstop should transferring liabilities to another firm prove difficult.

In a number of countries, such as Canada, Estonia, France, Ireland, Japan, Norway, Poland, and the UK, policy-holders must share the burden of an insurance provider’s failure. Some commentators argue that this model of co-insurance encourages consumers to consider the financial condition of prospective insurers and therefore make better choices, warding against “moral hazard.”

Home versus host state principle

A home state principle means that foreign resident policyholders would be protected by the compensation scheme in the home countries. Denmark, France, Germany, Israel, and Spain operate a home state principle.

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In Spain, if the insurance undertaking of a branch established in Spain is headquartered outside the EU/EEA, the policyholders of that branch are protected by the Spanish compensation scheme.

In a host state principle scheme all insurers, regardless of origin, are required to participate in the compensation scheme. A host state principle is in operation in Australia, Austria, Belgium, Estonia, Finland, Greece, Ireland, Italy, Japan, Korea, Norway, the UK and the US.

The systems in Ireland, the UK and Greece are based on the location of the risk. According to the OECD, this is a useful way to deal with factors, such as origin of insurer and location of policyholder, so that protection is clear.
Appendix 7: Relevant legislation

A time line of various EU Motor Insurance Directives, including their key provisions, is provided below. These directives have since been codified into and replaced by a single Motor Insurance Directive 2009/103/EC.

First Motor Insurance Directive (1972)

- Provides that mandatory motor third party liability insurance (MTPL) which is taken out in a Member State should also cover incidents occurring in another Member State.
- For incidents occurring in another Member State the insurance bureau where the incident occurred should obtain insurance information from the state in which the vehicle is registered.


- Set out minimum indemnity levels for not just damage to persons but also damage to property.
- Required that a compensation body should be set up to compensate victims where the mandatory MTPL insurance was not in place. Such a body, the Motor Insurers’ Bureau of Ireland (MIBI), had already been set up in Ireland by agreement between the Government and the insurance industry in 1955.


- Compulsory MTPL insurance policies must cover the whole of the EU on the basis of a single premium and the policy should guarantee cover at the greater of the levels required in the state where the vehicle is registered or the state where the accident occurred.
- Passenger liability must be included in motor insurance policies.


- Insurance companies must designate a local representative in each Member State to enable a victim to be able to consult with a representative of the insurer in their own Member State and language.
- A Member State must establish an information centre to provide information to entitled persons, e.g., claimants, regarding the relevant insurer of a vehicle in that Member State. The MIBI are the appointed body in Ireland.


- Revised the minimum levels of compensation cover for damage to persons and property and provides that these amounts will be updated regularly in line with the Harmonised Index of Consumer Prices.

- Obliged insurers to provide a statement of claims record to facilitate a person wishing to take out a new motor insurance contract with another insurer.

‘Sixth’ Motor Insurance Directive (2009/103/EC)

This Directive codifies the previous directives into a single Directive (2009/103/EC) and repeals the previous Motor Insurance Directives.\(^{65}\)

\(^{65}\)Ibid.