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Briefing note

International Regulatory Update

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PSD2: EBA consults on fraud reporting guidelines

The European Banking Authority (EBA) has published a consultation paper (EBA/CP/2017/13) on its draft guidelines on reporting requirements for fraud data under Article 96(6) of the recast Payment Services Directive (EU) 2015/2366 (PSD2).

The EBA, in cooperation with the European Central Bank (ECB), is proposing two sets of guidelines on the reporting requirements of fraudulent payment transactions. The first set, applicable to all payment service providers other than account information service providers, proposes a methodology for collating and reporting data, with the expectation that high-level data will be provided on a quarterly basis and more detailed data on a yearly basis. The second set is applicable to all competent authorities and proposes requirements on data aggregation and reporting frequency.

The consultation closes on 3 November 2017. The guidelines will apply from 13 January 2018 to coincide with the commencement of PSD2.

EBA publishes reports on asset encumbrance and funding plans

The EBA has published two reports on EU banks' asset encumbrance and funding plans. The reports are intended to be read in conjunction with each other and aimed at providing information for EU supervisors to assess the sustainability of banks' main sources of funding.

The report on asset encumbrance finds, amongst other things, that although the modest uptick in the level of total asset encumbrance in 2016 is not a cause for concern, the following should be monitored:

- the availability of collateral for central bank funding as official sector funding is reduced; and
- the increase in the volume of over-the-counter derivatives as a source of encumbrance.

The report on funding plans analyses balance sheet forecasting for three years and other data submitted by 155 banks from all EU jurisdictions. Key findings include:

- a projected total asset growth by 3.9% between 2016 and 2019 driven by loans to households and non-financial corporates (NFCs);
- plans to increase issuances of debt securities, with the share of covered bonds as a source of asset encumbrance also continuing to rise; and
- that interest income remains under pressure and banks' forecasted reliance on it to improve profitability requires careful monitoring.

UK government responds to feedback to consultation on future legal framework for imposing and implementing sanctions

The UK government has published its response to comments received during its consultation on the legal powers the UK government needs to be able to impose, implement and amend United Nations (UN) and other multilateral sanctions regimes, as well as to introduce UK autonomous sanctions regimes once the UK leaves the EU.

Overall, respondents to the consultation were broadly supportive of the legal powers proposed by the government. In light of this response, the government intends to, amongst other things:

- create new powers to impose, implement and enforce sanctions regimes, based on the current EU model;
- provide clear guidance within the Sanctions Bill on the territorial application of UK sanctions, including clarifying the concept of a 'UK nexus';
- introduce an annual review of UK autonomous sanctions regimes to ensure that they remain appropriate and effective;
- ensure individuals and organisations can challenge any sanctions imposed on them;
- enable the government to issue exemptions when needed, for example in delivering humanitarian aid in regions affected by sanctions; and
- introduce a new power to allow law enforcement to seize and detain assets that are subject to an asset freeze.

The government intends to establish these powers through a new Sanctions Bill, which is expected to be introduced during the current Parliamentary session.

FAMR: FCA consults on rules and guidance

The Financial Conduct Authority (FCA) has launched a consultation (CP17/28) on rules and guidance that relate to two of the recommendations made by the Financial Advice Market Review (FAMR), guidance developed by the FCA's Advice Unit, and guidance on insistent clients.

The proposed guidance aims to:

- reflect an amendment to the scope of the regulated activity of 'advising on investments' in the Regulated Activities Order;

- support firms offering services that help consumers making their own investment decisions without a personal recommendation;
- benefit a broader spectrum of firms by providing new guidance as part of the Advice Unit's tools and resources; and
- aid firms dealing with 'insistent clients'.

CP17/28 also includes feedback to questions the FCA asked about the definition of a personal recommendation from GC17/4, and sets out how stakeholder responses have been incorporated into the new draft guidance.

Comments are due by 2 October 2017.

FCA consults on client money and unbreakable deposits

The FCA has published a consultation paper (CP17/29) on proposed changes to the Client Assets sourcebook (CASS) on depositing client money and unbreakable deposits (UD).

The proposals are relevant to certain regulated firms that hold client money in relation to investment business, and intended to address the difficulties some of these firms are experiencing depositing client money at banks in accordance with CASS requirements.

Proposed changes broadly relate to amending the 30-Day Rule (CASS 7) to introduce '90-Day UDs', which would permit firms to deposit an appropriate proportion of client money in client bank accounts with unbreakable terms or notice periods of between 31 and, up to a maximum, of 90 days, provided certain conditions are met. These conditions include:

- prior to using 90-Day UDs, producing a written policy and providing each client with a written explanation of the risks; and
- while using 90-Day UDs, taking appropriate measures to manage risk and keeping the written policy under review.

The proposals do not apply to general insurance intermediaries or debt management firms that only hold client money under CASS 5 and 11 respectively, nor to client money received by a firm in its capacity as a trustee firm.

The consultation closes on 1 November 2017. The FCA aims to publish a policy statement making final rules that will apply following the coming into force of MiFID2 on 3 January 2018.

Payments Strategy Forum consults on blueprint for future of UK payments

The Payments Strategy Forum (PSF), which was established by the Payment Systems Regulator (PSR) in October 2015 and comprises members from consumer groups, fintechs and UK banks and building societies, has launched a consultation on its proposed blueprint for the future of UK payments. The blueprint builds on proposals set out in the PSF's 2016 strategy, which included:

- developing a new payments architecture (NPA) to improve competition between payment service providers and the security, stability and resilience of payment systems;
- consolidating the interbank operator governance of Bacs, Cheque & Credit Clearing Company (C&CCC) and Faster Payments Scheme (FPS) into a single consolidated payment system operator (PSO); and
- other solutions aimed at preventing or reducing the impact of financial crime on payment service users.

Amongst other things, the forum is seeking feedback on:

- particular features of the NPA, such as the use of a push payment model for all payments and the layered approach (in which capabilities are separated into discrete layers, each providing a defined function in the payment value chain, based on an agreed standard);
- its approach to implementing and transitioning to the NPA;
- three end-user needs solutions, 'request to pay', 'assurance data' and 'enhanced data'; and
- two solutions aimed at reducing or preventing financial crime, 'payments transaction data sharing and analytics' and 'trusted know your client data sharing'.

The consultation paper also outlines the forum's activities for the remainder of 2017, which include producing a consultation report, handing over responsibility for the NPA to the new PSO and concluding the handover of financial crime solutions to the appropriate organisations.

Comments are due by 22 September 2017.

New remuneration ordinance published in German Federal Gazette

A revised version of the German remuneration ordinance for institutions (Institutsvergütungsverordnung) has been published in the German Federal Gazette. In principle, the revised ordinance implements the EBA guidelines on sound remuneration.

The revised remuneration ordinance for institutions entered into force on 4 August 2017.

Italian Parliament approves recognition of close-out netting for wholesale energy products

The Italian Parliament has approved the annual markets and competition law (legge annuale sul mercato e la concorrenza). The new law contains provisions recognising the enforceability of close-out netting clauses included in wholesale energy products, as defined in the EU Regulation on Wholesale Energy Market Integrity and Transparency (REMIT).

Close-out clauses in wholesale energy products are recognised to be effective in accordance with their terms even upon the opening of insolvency or pre-insolvency proceedings, and even when the relevant contract is not assisted by a financial collateral arrangement.

The new law will enter into force following its publication in the Italian Official Gazette.

Italian Council of Ministers approves Legislative Decree implementing MiFID2 and adapting national legislation to the provisions of MiFIR

The Italian Council of Ministers has approved a Legislative Decree implementing MiFID2 and adapting national legislation to the provisions of MiFIR. The new legislation replaces the previous legal and regulatory framework introduced by MiFID1 and also regulates new areas not previously covered. The key objective remains the creation of a single market for financial services in Europe, guaranteeing transparency and protection to investors.

Amongst other things:

- the Decree seeks to guarantee proper information for investors, in order to regulate potential conflicts of interest among parties and to ensure adequate checks on clients;
- the European and local authorities will have the power to deny or limit distribution of certain financial products, which may affect market stability and integrity, negotiations, and investors' interests; and
- with the transposition of MiFID2 a uniform system of rules relating to whistleblowing in the financial system has been adopted.

Consob consults on proposed amendments to markets and intermediaries regulation

The Commissione Nazionale per le Società e la Borsa (Consob) has launched a public consultation on a proposed set of amendments to Consob Regulation no. 16191/2007 on markets, aimed at implementing MiFID2 and, to the extent required, MiFIR.

The main amendments relate to:

- guidelines on trading venues;
- data communication services;
- position limits and controls on position management in derivatives on commodities; and
- trade transparency and reports on transactions concerning financial instruments.

Consob is also consulting on a proposed set of amendments to Consob Regulation no. 16190/2007 on intermediaries. The main amendments concern:

- authorisation procedures for Italian and foreign investment firms;
- procedural and organisational requirements applicable to investment managers engaging in the provision of investment services; and
- rules on marketing of collective investment schemes.

Comments on both consultations are due by 30 September 2017.

CSSF issues circular on the audit profession

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a circular (17/662) providing a general overview of the Law of 23 July 2016 concerning the audit profession (Audit Law) and related regulations. The Audit Law transposes Directive 2014/56/EU amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts and implements Regulation (EU) No 537/2014 on specific requirements regarding the statutory audit of public-interest entities.

The CSSF notes that the essential provisions of the repealed predecessor law of 18 December 2009 on the audit profession are replicated in the Audit Law. Certain other provisions which were previously contained in Directive 2006/43/EC are now included in the Regulation and are directly applicable in the Member States.

The CSSF further explains that the aim of the new legal framework is to improve the quality of statutory audit. The main measures include strengthening the independence of statutory auditors, improving the information value of the audit report and a better audit supervision. Furthermore, additional requirements apply to public-interest entities.

The circular provides supplemental information to the Audit Law and the related regulations.

The circular applies to all entities subject to public oversight for the audit profession by the CSSF. The circular repeals and replaces, as of 27 July 2017, circular 13/578 of 4 December 2013.

Anti-money laundering: CSSF issues circular on ESA risk factors guidelines

The CSSF has issued a new circular (17/661) to implement the guidelines issued by the Joint Committee of the European Supervisory Authorities under Articles 17 and 18(4) of the Fourth Anti-Money Laundering Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (Risk Factors Guidelines – JC 2017 37) into Luxembourg regulation.

The circular, addressed to all firms and entities subject to CSSF supervision, aims to draw relevant professionals' attention to the adoption of the Risk Factors Guidelines.

The CSSF notes that the Risk Factors Guidelines' objective is to set out factors firms and entities shall take into account when assessing the risk of money laundering and terrorist financing (ML/TF). The guidelines further detail how firms can adjust their customer due diligence (CDD) measures in a way that is commensurate to the ML/TF risk associated with a business relationship or an occasional transaction.

In addition, the Risk Factors Guidelines provide general information in relation to CDD measures and sector-specific risk factors that are of particular importance in certain sectors, and provide guidance on the risk-sensitive application of CDD measures by firms and entities in those sectors (e.g. correspondent banking relationships, retail banking, wealth management, trade finance or investment fund service providers).

Finally, the CSSF highlights that neither the risk factors nor the CDD measures set out in the Risk Factors Guidelines should be considered exhaustive, and may be further updated and completed as necessary following an assessment by the ESAs.

The Risk Factors Guidelines will enter into force on 26 June 2018.

Belgian Parliament adopts law creating new category of debt instruments for credit institutions and investment firms

The Belgian Parliament has adopted a law which introduces a new category of debt instruments into Belgian law. This new category of debt instruments is only available to credit institutions and investment firms, and will rank below ordinary unsecured creditors, but ahead of subordinated creditors.

The law also contain other measures, namely:

- the exclusion of set-off rights with respect to claims pledged to the National Bank of Belgium (NBB);
- the introduction of a lighter regulatory framework for institutions whose activities are limited to custody, account maintenance and financial instrument settlement services, settlement-related non-banking services and certain other limited activities;
- strengthening the set of macroprudential tools available to the NBB by empowering the NBB to impose additional funding and capital requirements on certain institutions; and
- empowering the NBB to impose additional solvency and liquidity requirements for branches of non-EEA credit institutions.

The relevant chapters of the new law will enter into force on the date of its publication in the Moniteur belge / Belgische Staatblad.

Belgian Parliament adopts new law implementing AMLD 4

The Belgian Parliament has adopted a new law on the prevention of money laundering and terrorist financing, implementing the Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849). The new law faithfully transposes the Directive into Belgian law. The Belgian legislator has, however, opted gradually to extend the retention period for information and records, from five years to ten years after the end of a business relationship or occasional transaction.

The law will enter into force on the 10th day following the date of its publication in the Moniteur belge/Belgische Staatblad, which should occur in the coming days or weeks.

Polish President sends draft amendment to Act On Support For Borrowers In A Difficult Financial Situation Who Took Out Housing Loans to Sejm

The President of Poland has sent a draft amendment to the Act On Support For Borrowers In A Difficult Financial Situation Who Took Out Housing Loans, the purpose of which was to facilitate the repayment of loan instalments by persons in difficult financial circumstances, to the Sejm. Under the Act, liabilities of up to PLN 1,500 per month could be covered for up to 18 months by the special Support Fund for Borrowers managed by Bank Gospodarstwa Krajowego.

The draft amendment provides for an increase in the maximum amount of support from PLN 1,500 to PLN 2,000 a month, and the time limit will be extended from the current 18 months to 36 months. There is also a proposal to extend the period of interest-free repayment from 8 to 12 years.

In addition, the Support Fund for Borrowers will be divided into two parts: a support fund and a restructuring fund. The former will continue to serve as financial aid for all persons in a difficult financial situation, and the latter will support the voluntary restructuring of foreign currency housing loans. This is to be credited with additional payments from banks (banks will pay 0.5% of the value of their portfolio of foreign currency housing loans towards restructuring).

SFC notifies industry of circularisation exercise on clients' accounts of selected securities brokers

The Securities and Futures Commission (SFC) has announced the commencement of a circularisation exercise on clients' accounts of selected securities brokers. An accounting firm has been engaged by the SFC to carry out the exercise, which comprises a high-level review of the brokers' client assets protection and obtaining direct written confirmation from selected clients.

Despite the SFC's reminder to brokers in its previous circular to protect client assets against internal misconduct, it has identified certain deficiencies in brokers' internal controls in its recent inspections. In view of the control deficiencies identified, an industry-wide and risk based circularisation exercise is considered appropriate, through which the SFC as well as brokers' management can obtain direct confirmations from investors on their account positions and identify any potential misconduct such as unauthorised transactions and misappropriation of client assets.

To facilitate the conduct of the exercise, brokers have been reminded to ensure that the personal information of their clients is accurate and up-to-date. Before sending out the letters of confirmation, the accounting firm engaged by the SFC may seek assistance from brokers to call the selected clients to confirm the clients' identities and contact details, request the clients to check their account positions, and sign and return their replies directly to the accounting firm.

Furthermore, the exercise will cover a high-level review of the brokers' internal control systems that are designed to protect client assets, such as controls over client information maintenance, client money and client securities reconciliation as well as account statements and trade documents distribution. Brokers are expected to have put in place effective and robust controls to protect client assets.

Where appropriate, the SFC may share the findings of the circularisation exercise with the industry.

SFC identifies irregularities in private funds and discretionary accounts

The SFC has issued a circular expressing its concerns about the management of some private funds and discretionary accounts. During the SFC's supervision of licensed corporations engaged in the asset management business, a number of private funds and discretionary accounts with concentrated, illiquid and interconnected investments were found to have irregular features.

Among the irregularities cited in the circular, discretionary account holders held sizeable concentrated stock positions in their accounts and asset managers acted solely at the direction of their clients without exercising investment discretion. Additionally, some cases were found to involve related-party acquisition or disposal of listed company shares by bought and sold notes.

The SFC also identified instances where fund investors or discretionary account holders were substantial shareholders, directors or affiliates of the listed companies invested by the funds or the discretionary accounts. In one case, a director of an asset manager was also a director or chief executive officer of listed companies in which funds under the management of the asset manager were invested.

The SFC expects the board and other senior management (including the managers-in-charge of core functions) of all asset managers to maintain adequate oversight of their firm's business activities. In particular, they should bear primary responsibility for ensuring the maintenance of appropriate standards of conduct, including but not limited

to acting fairly and in the best interests of their clients and the integrity of the market, as well as for ensuring adherence to proper procedures and the maintenance of proper risk management measures. They are advised to review the areas of concern discussed in the circular and give priority to strengthening their supervisory and compliance programmes to ensure compliance with all applicable regulatory requirements.

The SFC has further reminded asset managers to report any material breach, infringement or non-compliance with the market misconduct provisions of the Securities and Futures Ordinance (SFO) which they reasonably suspect may have been committed by their clients.

The SFC has also reminded investors to take precautionary measures before investing in a private fund.

OCC invites public comment on Volcker regulations

The Office of the Comptroller of the Currency (OCC) has issued a notice soliciting public input on whether any of the following aspects of the Volcker Rule's implementing regulation should be revised to better accomplish relevant policy purposes while decreasing compliance burdens:

- the scope of entities to which the Volcker Rule applies;
- proprietary trading restrictions;
- covered fund restrictions; and
- compliance program and metrics reporting requirements.

The OCC is in particular inviting input regarding ways to tailor these requirements and clarify key provisions that define prohibited and permissible activities.

The OCC's notice recognizes that it would need to consult and coordinate with four other US regulatory agencies that are also responsible for implementing the Volcker Rule regarding any amendments. The OCC is also seeking input on how these US regulators could implement the Volcker Rule more effectively without amending the implementing regulation.

The comment period will be open for 45 days after the OCC's notice is published in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

LIBOR – the beginning of the end?

Although a bedrock of the financial markets for over 30 years, LIBOR has been under pressure ever since the Wheatley Review, and a speech by Andrew Bailey, Chief Executive of the UK's Financial Conduct Authority on 27 July heralds its potential demise. Market participants need to prepare for the likelihood that LIBOR will cease to exist by the end of 2021.

This briefing paper explains why and assesses the practical and documentary implications.

https://www.cliffordchance.com/briefings/2017/07/libor_-_the_beginningoftheend.html

Initial Coin Offerings – Asking the right regulatory questions

Initial coin offerings or ICOs are growing rapidly. Essentially a method of crowdfunding facilitated through blockchain and cryptocurrency technologies, ICOs are reported to have raised almost USD 1.3 billion globally from the start of 2017 despite being denounced by some commentators as Ponzi schemes. Companies and financial institutions are keen to explore the possibilities of ICOs – whether as a fundraising method or to cash in by acting as advisers or arrangers – but what are the risks, how are ICOs regulated and how might this change?

This briefing paper discusses the key questions and what regulators are doing.

https://www.cliffordchance.com/briefings/2017/07/initial_coin_offerings-askingtherigh.html

Virtual Currencies with Real Implications – FinCEN's First Enforcement Action against a Foreign-Located Money Services Business

This briefing paper on enforcement action taken in the US against a foreign Money Services Business (MSB) and a virtual currency operator highlights the need for individuals and businesses not located in the US but engaging in virtual currency activities involving or effected through the country to ensure compliance with US laws and regulations.

https://www.cliffordchance.com/briefings/2017/07/virtual_currencieswithrealimplications.html

US considerations for transition away from LIBOR

This briefing paper assesses the practical and documentary implications of the end of LIBOR on the US markets.

https://www.cliffordchance.com/briefings/2017/08/us_considerationsfortransitionawayfromlibor.html