

# International Regulatory Update

7 – 11 August 2017

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- Australia finalises substituted compliance for margin requirements
- Recent Clifford Chance briefings: Reform of Volcker Rule regulations; Direct actions against insurers under Brussels I; and more. [Follow this link to the briefings section.](#)

### EBA consults on its approach to fintech

The European Banking Authority (EBA) has published a [discussion paper](#) on its approach to financial technology (fintech).

The discussion paper sets out the EBA's proposals for future work on:

- authorisation and sandboxing regimes;
- the impact on prudential and operational risks for credit institutions, electronic money institutions and payment institutions;
- the impact of fintech on the business models of these institutions;
- consumer protection and retail conduct of business issues;
- the impact of fintech on the resolution of financial firms; and
- the impact of fintech on anti-money laundering and countering the financing of terrorism.

The discussion paper also sets out the results of the first EU-wide fintech mapping exercise, which took place in spring 2017.

Comments are due by 6 November 2017.

### Brexit: PRA writes to Chair of Treasury Committee on firms' contingency planning

The Bank of England (BoE) Deputy Governor, Prudential Regulation and Chief Executive Officer of the Prudential Regulation Authority (PRA), Sam Woods, has [responded](#) to a [request](#) from the Chair of the House of Commons Treasury Committee, the Rt. Hon. Nicky Morgan MP, for information on financial services firms' contingency planning for the UK's withdrawal from the EU. Woods wrote to PRA-regulated firms undertaking cross-border activities between the UK and the rest of the EU on 7 April 2017 to request a summary of their contingency plans for Brexit. Morgan wrote to Woods on 24 July requesting details of the outcome of the exercise in preparation for the formation of the Treasury Committee, which may wish to

consider the implications of exiting the EU for financial services.

Overall, the Deputy Governor confirmed that the BoE received 401 responses to its letter, 147 from banks and 254 from insurers, and that all UK firms and material branches of EEA firms who received the letter, with the exception of a small number of very small insurers, responded. Some responses were also received from firms that use freedom of services permissions under EU law to offer services in the UK. The BoE intends to conduct analysis of the responses received, which will be considered by the Prudential Regulation Committee (PRC) and Financial Policy Committee (FPC) in autumn 2017. However, Woods has set out certain points prior to the analysis being completed, in particular relating to:

- potential risks to financial stability arising from Brexit, due to potential fragmentation of market-based finance and the possibility of broader disruption to the UK real economy that could test the resilience of the financial system;
- potential cross-sectoral risks relating to continued servicing and performance of existing contracts and restrictions on data transfers;
- the possibility of increased complexity arising from firms restructuring to mitigate risks to their business; and
- a material extra burden on the PRA's resources arising from the authorisation, and ongoing supervision, of a significant number of additional firms.

The letter sets out that the BoE will be happy to provide further information to the Committee once the exercise has been completed.

### MiFID2: LSE consults on amendments to rules

The London Stock Exchange (LSE) has issued a [market notice](#) announcing a consultation on amendments to its rules in preparation for MiFID2 and a general rulebook review. Overall, the LSE intends to continue its policy of maintaining a generic rule book. It proposes to insert specific cross references to MiFID2 where it is both useful and necessary, and proposes additional amendments as a result of a review of the validity of its rules more generally.

The market notice sets out a summary of the notable changes to the rules, in particular relating to:

- core rules;
- gilt inter dealer brokers and wholesale dealer brokers;

- conformance testing and the testing of algorithms deployed by member firms;
- order book trading rules;
- direct electronic access;
- liquidity providers in order driven securities;
- off order book trading rules;
- trade reporting;
- gilt-edged and fixed interest markets;
- market maker rules for registration;
- market making arrangements and schemes for algorithmic trading;
- settlement, clearing and benefit rules; and
- default rules.

The revised rules in [marked-up form](#) have been published alongside the market notice, as well as a [cross-referencing tracker document](#) between the current rulebook and proposed revised rule book. The LSE has also announced that it intends to implement its Members Portal later in 2017, which will include functionality for member firms to manage certain MiFID2 obligations, such as the ability to provide the relevant information for short codes entered on order messages and the ability to register as a market maker for algorithmic trading.

Comments on the consultation are due by 15 September 2017.

#### **MiFID2: FCA updates guidance on position limits and reporting regime for commodity derivatives**

The Financial Conduct Authority (FCA) has updated its [webpage](#) setting out guidance on the introduction of position limits and the reporting regime for commodity derivatives under Articles 57 and 58 of MiFID2.

A position limit is the maximum size of a position held by a person in any commodity derivative traded on an EEA trading venue and economically equivalent over-the-counter (EEOTC) contracts.

MiFID2 requires competent authorities to establish and apply position limits on the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and EEOTC contracts.

From 3 January 2018, trading venues are required to notify the FCA by email when the total open interest of any commodity derivative reaches any of the amounts of lots or number of securities in issue as required under Article 15 of Commission Delegated Regulation (EU) 2017/591 (RTS 21) over a three month period.

As of 1 August 2017, the FCA expects the following notifications:

- multilateral trading facilities (MTFs) and applicants for organised trading facilities (OTFs) authorisation to inform of any new commodity contracts prior to launch;
- regulated investment exchanges (RIEs) continuing notification of any new commodity contracts prior to their launch; and
- all trading venues should share the contract specifications, specifically the commodity derivative name, market identifier code (MIC), venue product code (VPC) and the relevant unit of measurement.

Non-financial entities (NFEs) can apply to the FCA for a position limit exemption. The exemptions application will be an uncapped exemption based on an assessment of the application, although the FCA will monitor the reported positions against the information provided in the application form. If there is a significant change in the nature or value of the NFE's commercial or trading activities they should submit a new application.

Position reporting obligations apply to all trading venues in the UK that facilitate the trading of commodity derivatives, emission allowances and their derivatives, and to all investment firms trading EEOTC contracts on these financial instruments. Trading venues and investment firms will be able to submit position reports through the FCA's new market data processor (MDP) system. The MDP onboarding application form is available on the FCA's website.

#### **BoE publishes its approach to conflicts of interest at the Bank**

The Bank of England has published a [document](#) on its approach to conflicts of interest, following a review by the BoE's Non-Executive Directors. The review was initiated in March 2017 in light of the resignation of the Deputy Governor for Markets and Banking and Chief Operating Officer.

The review considered the policies and processes in place at the BoE for managing conflicts of interest, what the BoE should do to ensure full and timely compliance with those policies, and supporting governance arrangements. The review identified priority areas for change, including:

- the establishment of a Conflicts Officer to be responsible under the Senior Managers Regime (SMR) for management of the Bank's conflict arrangements and reporting those arrangements to the Court;

- clarification of the reporting requirements for personal relationships;
- strengthening the practical understanding and awareness of conflict risk, especially for perceived conflicts;
- ensuring a consistent approach to deciding on conflicts; and
- strengthening conflict checks at appointment.

Overall the Governors and the Chair of the Court have welcomed the review and intend to implement all of its recommendations.

#### **BoE consults on levying fees on financial market infrastructures**

The Bank of England has launched a [consultation](#) on proposals to introduce a new funding structure for the supervision of financial market infrastructures (FMIs). The consultation paper sets out the BoE's broad approach, including the fee-levying model, drivers for the proposal, the powers that the BoE intends to utilise and certain key aspects regarding the implementation of the approach.

The BoE currently funds its supervision of FMIs through Cash Ratio Deposit revenue. The BoE is proposing to charge fees to FMIs supervised under the Banking Act 2009 or the Financial Services and Markets Act 2000 (FSMA); it also proposes to charge fees for applications under FSMA, the Uncertified Securities Regulations 2001 (USRs), Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SFRs) and Section 170B of the Companies Act 1989. The consultation paper sets out proposals to levy the fee based on the systemic importance of the FMI to the financial system, with reference to the allocation of supervisory resource costs across the different types of FMIs based on the categories the BoE already uses to categorise FMIs' potential capacity to cause disruption to the financial system.

Fees will cover the costs of the BoE's FMI supervisory activity and policy activity as permitted by the BoE's fee-levying powers, with other areas of activity undertaken by the FMI Directorate not within the scope of the powers being funded by Cash Ratio Deposit revenue. The consultation paper is mainly of interest to FMIs currently supervised by the BoE but also includes proposals to levy a fee on any FMIs who may make certain applications, including for authorisation under the European Market Infrastructure Regulation (EMIR) in accordance with FSMA or to become a designated system under the SFRs.

Comments are due by 6 October 2017.

#### **BaFin publishes revised draft of MaSanV and guidance note on recovery planning**

The German Federal Financial Supervisory Authority (BaFin) has published a [revised version](#) of the Ordinance on Minimum Requirements for the Contents of Recovery Plans (MaSanV) and a [draft guidance note](#) on recovery planning (Sanierungsplanung).

The MaSanV requires all institutions which are potentially systemically relevant to draw up recovery plans in accordance with the requirements laid down in the MaSanV. Some provisions of Commission Delegated Regulation (EU) 2016/1075 are amended and further specified by the MaSanV.

BaFin's draft guidance note on recovery planning contains in particular BaFin's guidance on the provisions of Commission Delegated Regulation (EU) 2016/1075.

BaFin has launched a consultation and will accept submissions until 29 September 2017.

#### **MiFID2: AMF publishes guide on new rules governing funding of research**

The French Autorité des marchés financiers (AMF) has published a [guide](#) to support relevant market participants in the operational implementation of the new research funding measures arising from MiFID2 and to respond to a number of their questions, while summing up the current state of the regulation of the funding of research.

The guide is set out in the following seven subject matter sections, which can be consulted independently and cover topics in the form of Q&As, with references to the relevant legal texts and a presentation of the key underlying principles:

- scope of application of the funding of research;
- definition of research;
- minor non-monetary benefits;
- macroeconomic analysis;
- corporate access;
- operation of the research budget; and
- research payment account.

#### **Spain holds public hearings on draft securities market bill and draft royal decree**

A [draft securities market bill](#) will be subject to a public hearing until 18 September 2017. The bill is intended to implement MiFID2 in Spain and adapt Spanish law to MiFIR, the Market Abuse Regulation (MAR) and the delegated acts

made under those regulations and MiFID2. The project has been approached through a new securities market law, which will replace the existing one.

A separate public hearing, which will also last until 18 September 2017, is taking place on a [draft royal decree](#) developing the securities market law and amending Royal Decree 217/2008, of 15 February, on the legal regime applicable to investment services companies and other entities that provide investment services. The draft royal decree is secondary legislation which is required for the implementation of MiFID2 and the adaptation of Spanish law to the abovementioned regulations.

#### **Italian Treasury consults on new regulation concerning fit and proper requirements for credit and financial institutions' key managers and officers**

The Treasury (a department of the Ministry of Economy and Finance) has published a [consultation document](#) setting out a new proposed regulation governing professional integrity and independence requirements to be met by key managers and officers of credit and financial institutions pursuant to Article 26 of Legislative Decree No. 385 of 1993 (Italian Banking Act).

The new provisions also take into account the policies and provisions adopted by the European Central Bank and the European Banking Authority (EBA) in this respect.

Comments are due by 22 September 2017.

#### **Bank of Italy publishes new resolution amending its regulation on transparency**

The Bank of Italy has published a new [resolution](#) amending the Bank of Italy regulation on transparency and intended to implement the Payment Accounts Directive 2014/92/EU (PAD). The main amendments relate to the need to enhance transparency for customers (including, for instance, comparability of fees and payment accounts) and continuity of the provision of payment services in the event of a transfer of the relevant contractual relationship.

The new regulation will come into force 15 days after its publication in the Official Gazette.

#### **Benchmarks Regulation: implementing bill published in Luxembourg**

A [new bill \(no. 7164\)](#) implementing the EU Benchmarks Regulation has been lodged with the Luxembourg Parliament. The bill appoints the Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), as competent

authority for benchmark administrators and supervised entities pursuant to the Benchmarks Regulation, with the exception of insurance sector entities, for which the Luxembourg insurance sector regulator, the Commissariat aux Assurances (CAA) will be the competent authority for the purposes of the Benchmarks Regulation.

The bill further provides for the necessary supervision and investigation powers for the CSSF and the CAA and foresees a sanctions regime.

Finally, the bill modifies the Luxembourg Consumer Code in order to implement the changes made by the Benchmarks Regulation to Directives 2008/48/EC and 2014/17/EU.

#### **CSSF issues circular concerning survey on staff expenses and taxes**

The CSSF has issued a new circular ([17/664](#)) concerning a survey on staff expenses and taxes.

The circular is addressed to all credit institutions and issued further to CSSF Circular 17/663 updating the reporting requirements for credit institutions. It sets out information on the annual survey on staff expenses and tax income and expenses. The circular provides that the data are collected for statistical purposes and need to be established in the IFRS accounting standards. The data are to be provided via the reporting tables B 2.5 B (Staff expenses) and B 2.5 E (Details on taxes). The circular contains detailed explanations on the applicable reporting period, reporting deadlines, scope and different reporting items in the reporting tables.

Technical instructions on the transmission of the reporting are set out in the paper 'Reporting requirements for credit institutions' published on the CSSF's website.

#### **CSSF issues circular amending CSSF Circular 14/593 on supervisory reporting requirements applicable to credit institutions**

The CSSF has issued a new circular ([17/663](#)) amending CSSF Circular 14/593 on supervisory reporting requirements applicable to credit institutions.

The circular is addressed to all credit institutions and amends CSSF Circular 14/593 in order to introduce the latest developments in terms of reporting requirements.

The CSSF has, following a request to cover statistical data at national level, reintroduced several additional reporting requirements, in particular:

- L and S versions of the FINREP/ITS reporting for Luxembourg credit institutions with foreign branches, which are to be established in three different versions as of 31 December 2017; and
- tables B 2.5 B (Staff expenses) and B 2.5 E (Details on taxes), which are to be established on an annual basis as of 31 December 2017.

Additional details on the tables on staff expenses and details on taxes may be found in CSSF Circular 17/664.

#### **CSSF sets out findings related to ESMA guidelines on alternative performance measures**

The CSSF has issued a [press release](#) on its findings related to ESMA's guidelines on alternative performance measures (ESMA/2015/1415), following an examination of the compliance of issuers subject to the law of 11 January 2008 on transparency requirements for issuers with the guidelines, in particular in relation to financial communications published for 2016.

The CSSF identified a series of misstatements and omissions, the most significant being issues related to press releases, identification of alternative performance measures (APMs), and recurring breaches regarding the definition of APMs used and reconciliations of APMs to the most directly reconcilable line item, subtotal or total presented in the financial statements, and explanations on the use of APMs.

Accordingly, the press release draws issuers' attention to the fact that the CSSF will continue closely to monitor how issuers comply with the guidelines in their future financial communications, in particular the 2017 half-yearly financial report and press release.

#### **CSSF issues circular on ESMA guidelines on assessment of knowledge and competence**

The CSSF has issued a new circular ([17/665](#)) on ESMA's guidelines on the assessment of knowledge and competence.

The aim of the circular is to implement the guidelines and to comply with paragraphs 21 and 22 of the guidelines requiring national competent authorities to publish certain information on their websites. In this context the CSSF has specified, amongst other things, the following:

- the maximum period during which a staff member/employee without the required qualifications or experience is authorised to work under supervision is fixed at four years;
- the period required for gaining appropriate experience is fixed at a minimum of one year full-time job experience; and
- the verification of knowledge and minimum competence can be done through either (i) an internal evaluation, through all means at the professional's disposal, in line with a formal procedure which the CSSF can verify a posteriori, or (ii) an external professional training certified by the CSSF.

Any person/entity wishing to offer external professional training will need to apply for certification from the CSSF on the basis of an application demonstrating the adequacy of the means and expertise required for the purposes of the assessment. The minimum criteria to be included in the external training will be fixed at a later stage by way of CSSF circular. The list of entities that have obtained a certification from the CSSF will be published on the CSSF's website.

The circular applies to all professionals subject to prudential supervision by the CSSF who provide investment services and activities listed in Annex II, Section A of the law of 5 April 1993 on the financial sector (FSL), or who market or advise clients in relation to structured deposits or who provide ancillary services listed in Annex II, Section C of the FSL.

The circular entered into force on the date of its publication on the CSSF's website (i.e. 3 August 2017) and professionals are required to comply with the provisions thereof as of 3 January 2018.

#### **MAS consults on proposed amendments to Payment and Settlement Systems (Finality and Netting) Act**

The Monetary Authority of Singapore (MAS) has launched a public [consultation](#) on proposed amendments to the Payment and Settlement Systems (Finality and Netting) Act (FNA). Amongst other things, the MAS proposes to:

- extend insolvency protection to transfer orders, netting and settlement in a designated system (DS) by one additional business day after the day of insolvency;
- confer protection from personal liability on the officers and employees of the DS operators, settlement institution and collateral holders for anything done or omitted to be done with reasonable care and in good

- faith in the course of carrying out their functions, duties or powers in accordance with the FNA or the DS' rules;
- accord protection to collateral security by the DS;
  - include broad designation criteria for systemically important payment systems and system-wide important payment systems to provide clarity and certainty to the industry and stakeholders;
  - prohibit an undesignated system and its entities from claiming to be a DS;
  - identify the settlement institution in the designation order, and indicate the powers and obligations under the FNA that will apply to the settlement institution;
  - introduce standard regulatory powers on information gathering, direction making and an obligation to inform the MAS of certain events;
  - impose a requirement on a DS operator, settlement institution and collateral holder to obtain the MAS' approval before implementing or amending any DS rules; and
  - introduce a general penalty to ensure compliance with the FNA where a FNA provision does not have a specific penalty set out therein.

Comments on the consultation are due by 31 August 2017.

#### **MAS consults on proposed enhancements to Deposit Insurance Scheme and legislative amendments to Deposit Insurance and Policy Owners' Protection Schemes Act and Regulations**

The MAS has launched a public [consultation](#) on proposed enhancements to the Deposit Insurance Scheme and legislative amendments to the Deposit Insurance and Policy Owners' Protection (PPF) Schemes Act and Regulations.

Amongst other things, the MAS proposes to:

- enhance depositor protection by raising the deposit insurance coverage limit from SGD 50,000 to SGD 75,000 per depositor per scheme member;
- achieve the target deposit insurance fund size within a reasonable period by extending the build-up period of the Deposit Insurance Fund to 2028, and revise the annual premium rates to between 2.5 basis points (bps) and 8bps;
- provide legal protection and indemnification for former and current directors, officers, agents and employees for reasonable legal costs and expenses incurred in connection with actions taken or omissions in good faith, in the normal course of their duties;
- require the liquidator to cooperate with Singapore Deposit Insurance Corporation (SDIC) in respect of both the Deposit Insurance and PPF Schemes by imposing a general statutory obligation on the liquidator to cooperate and empowering the MAS to specify in a written notice the assistance required from the liquidator;
- clarify that the SDIC can create charges over the assets in the Deposit Insurance Fund and PPF Funds, for the purposes of securing loans for making compensation payouts under the Deposit Insurance and Policy Owners' Protection Schemes Act (Deposit Insurance-PPF Act);
- prohibit entities and agents working on behalf of the SDIC or the MAS from purchasing assets of failed Deposit Insurance and PPF Scheme members, except with the approval of the MAS;
- amend Sections 64 and 84 of the Deposit Insurance-PPF Act to require scheme members to take reasonable care to ensure that any information disclosed pursuant to those provisions is accurate; and
- allow the SDIC to submit three-year block estimates of the income and expenditure of the SDIC, the Deposit Insurance Fund, the PPF Life Fund and the PPF General Fund.

Comments on the consultation are due by 4 September 2017.

#### **China Banking Regulatory Commission publishes opinion on close-out netting**

The China Banking Regulatory Commission (CBRC) has published its [response](#) to a suggestion on close-out netting raised during the Fifth Session of the Twelfth National People's Congress. The response notes that:

- the CBRC recognises the uncertainties under the PRC Enterprise Bankruptcy Law and the PRC Contracts Law, but takes the view that the close-out netting mechanism is not inconsistent with China's legal system, adding that PRC courts reserve the discretion to review close-out netting arrangements and will revoke transactions where close-out netting is exercised in bad faith. The CBRC does not believe this is contradictory with the relevant rules in the ISDA documentation;
- the CBRC is drafting the 'Administrative Regulation on the Bankruptcy Risk Resolution of Commercial Banks', which considers the administrative power to suspend close-out netting in the ISDA agreement for risk

disposal purposes. While keeping communication with ISDA and PRC commercial banks, the CBRC is also actively communicating with other legislative authorities to obtain sufficient legal support and recognition for close-out netting; and

- the CBRC also recognises close-out netting in terms of capital measurement and risk management.

#### **Australia finalises substituted compliance for margin requirements**

The Australian Prudential Regulation Authority (APRA) has released the final revised Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives ([CPS 226](#)), which permits substituted compliance with respect to the margin requirements or provisions of the following foreign bodies:

- Canada's Office of the Superintendent of Financial Institutions;
- the EU Commission;
- the Hong Kong Monetary Authority;
- Japan's Financial Services Agency;
- Japan's Ministry of Economy, Trade and Industry and Ministry of Agriculture, Forestry and Fisheries;
- the Monetary Authority of Singapore;
- the Swiss Financial Market Supervisory Authority;
- the United States Commodity Futures Trading Commission; and
- the United States Farm Credit Administration, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Board of Governors of the Federal Reserve System and Office of the Comptroller of the Currency.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Direct actions against insurers under Brussels I Regulation**

This briefing paper discusses the determination of jurisdiction in insurance claims following the recent judgment of the European Court of Justice (ECJ) in *Assens Havn v Navigators Management (UK) Ltd* [2017] ECLI:EU:C:2017:546. The court held that a third party is not bound by an agreement on jurisdiction concluded between the insurer and insured, which serves as a

warning to liability insurers that they cannot be confident that their jurisdiction clauses will be given effect.

[https://www.cliffordchance.com/briefings/2017/08/claimants\\_unbound-directactionsagains.html](https://www.cliffordchance.com/briefings/2017/08/claimants_unbound-directactionsagains.html)

### **US national bank regulator consults on reform of Volcker Rule regulations**

The US Office of the Comptroller of the Currency (OCC) has issued a notice soliciting public input on key aspects of the implementing regulations for Section 13 of the US Bank Holding Company Act (commonly known as the Volcker Rule). This regulatory action represents an important step toward implementing a number of reform recommendations included in a June 2017 report issued by the US Department of the Treasury. The comment period will be open until 21 September 2017.

This briefing paper discusses the OCC's proposals.

[https://www.cliffordchance.com/briefings/2017/08/u\\_s\\_national\\_bankregulatorseekssupportfo.html](https://www.cliffordchance.com/briefings/2017/08/u_s_national_bankregulatorseekssupportfo.html)

### **Key Australian issues for foreign lenders**

This briefing paper provides an updated high level overview of key issues for foreign lenders lending into the Australian market. The key changes in this briefing relate to certain withholding tax exemptions available to foreign lenders, as well as the inclusion of an analysis of certain licensing requirements which a foreign lender may be subject to when lending into the Australian market.

[https://www.cliffordchance.com/briefings/2017/08/key\\_austrian\\_issuesforforeignlenders.html](https://www.cliffordchance.com/briefings/2017/08/key_austrian_issuesforforeignlenders.html)

### **Legal and practical implications of Australia's criminal cartel laws**

This briefing paper highlights the importance of compliance with Australia's cartel laws following the first judgment under the criminal cartel provisions of the Competition and Consumer Act 2010. Amongst other things, it notes the extraterritorial operation of the provisions and the significant penalties that will be imposed by the courts on those convicted of criminal cartel conduct.

[https://www.cliffordchance.com/briefings/2017/08/legal\\_and\\_practicalimplicationssofaustralia.html](https://www.cliffordchance.com/briefings/2017/08/legal_and_practicalimplicationssofaustralia.html)



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