

International Regulatory Update

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- CFTC and SEC issue joint statement on virtual currency enforcement actions
- Recent Clifford Chance briefings: GDPR and its impact for both European and US companies; Belgian tax reform; legal privilege in the US; & more. [Follow this link to the briefings section.](#)

EU Commission publishes impact assessment on sovereign bond-backed securities for consultation

The EU Commission has published an [inception impact assessment](#) on enabling a regulatory framework for the development of sovereign bond-backed securities (SBBS). The impact assessment relates to a planned legislative proposal to remove regulatory impediments to the development of SBBS by the private sector in order to advance the completion of the Banking Union and to deepen the Economic and Monetary Union (EMU), in particular by enabling the diversification of banks' sovereign exposures.

SBBS would consist of securitisation tranches issued against a portfolio of euro area central government bonds. Under the current regulatory framework, SBBS would be treated as securitisation products and would carry higher regulatory charges and larger liquidity discounts than the underlying portfolio of government bonds. However, the Commission notes that SBBS would not carry any of the risky features that justify less favourable treatment along several dimensions, and the underlying assets would be transparent, liquid and tradable securities themselves. The impact assessment highlights that EU legislative provisions govern the regulatory treatment of securitisations, including the Capital Requirements Regulation (CRR), and, as such, action is required at EU level to remove the regulatory impediments that the Commission has identified.

The forthcoming EU proposal will aim to ensure a regulatory level playing field between SBBS and their underlying bonds. The legislative proposal will introduce a legal definition of SBBS, including a list of features required for the securitisation of euro area national government bonds to qualify as SBBS. The impact assessment also sets out that the proposal will need to treat investments in SBBS and government bonds consistently, and that choices will be required on the scope of the applicability of the legislation and the extent to which the benchmark regulatory treatment for sovereign bonds should be granted to tranches.

Comments on the impact assessment are due by 20 February 2018. The indicative date for the proposal to be brought forward is the second quarter of 2018.

CRR: EU Commission publishes proposed amendments to LCR Delegated Regulation

The EU Commission has published a draft Delegated Act amending Delegated Regulation (EU) 2015/61 on the Liquidity Coverage Ratio (LCR), which supplements the Capital Requirements Regulation (CRR). The [proposal](#) is intended to make limited amendments to the LCR Delegated Regulation to improve its practical application.

The proposed amendments relate to:

- the calculation of expected liquidity outflows and inflows on repos, reverse repos and collateral swaps transactions, in order to fully align them with international liquidity standards development by the Basel Committee on Banking Supervision (BCBS);
- the treatment of certain reserves with central banks and non-EU public sector entities that are not rated at least ECAI 1;
- the waiver of the minimum issue size for certain non-EU liquid assets by waiving for consolidated purposes any applicable minimum issue size requirements for third country liquid assets held by a non-EU subsidiary;
- the application of the unwind mechanism for the calculation of the liquidity buffer, among other things, to align it more closely with the Basel standard by removing collateral received through derivatives transactions from the mechanism; and
- the integration of simple, transparent and standardised (STS) criteria for securitisation into the LCR Delegated Regulation.

The Commission also proposes to retain its power to review the Delegated Regulation for an indeterminate period, in order to ensure it remains relevant to market changes.

Comments on the consultation are due by 21 February 2018.

CRR: EU Commission adopts RTS on transactions with non-financial counterparties

The EU Commission has adopted a delegated regulation setting out [regulatory technical standards \(RTS\)](#) for procedures for excluding transactions with non-financial counterparties established in a third country from the own funds requirements for credit valuation adjustment (CVA) risk under the CRR.

In the particular, the RTS specify that an institution should verify, either at the inception of each new trade with the counterparty or on a periodic basis, that:

- the counterparty would qualify as a non-financial counterparty under the European Market Infrastructure Regulation (EMIR); and
- that for each class of OTC derivatives, the gross notional value of the OTC derivative contracts of that counterparty within the class does not exceed the relevant clearing threshold referred to in Article 11 of the EMIR RTS on indirect clearing (Regulation (EU) 149/2013).

The RTS will enter into force on the twentieth day following publication in the Official Journal.

PRIIPs Regulation: FCA issues statement on performance scenarios in KIDs

The Financial Conduct Authority (FCA) has published a [statement](#) on performance scenarios in key information documents (KIDs). Under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation, PRIIPs manufacturers must prepare and publish a standalone, standardised document, a KID, for each of their PRIIPs.

The KID sets out risks, performance scenarios, costs and other pre-contractual information in a manner that is designed to be accurate, fair, and not misleading.

The FCA is aware that some firms are concerned that, for a minority of PRIIPs, the required information on performance scenarios may appear too optimistic and may have the potential to mislead consumers. In these circumstances, the FCA is comfortable with manufacturers providing explanatory materials to put the calculation into context and to set out their concerns for investors to consider.

Client assets: FCA sets out new rule on 90-day unbreakable deposits

The FCA has published a [policy statement \(PS18/2\)](#) setting out feedback to its consultation on client money and unbreakable deposits (UDs) (CP17/29) and the final rules. The 30-day rule in CASS 7 prevents firms from placing client money in bank accounts with unbreakable terms of longer than 30 days.

Firms had reported increasing difficulty in depositing client money at banks, with banks citing the cost of the liquidity coverage ratio (LCR) which requires banks to have highly liquid assets to cover 100% of their potential net cash

outflows over 30 days. The FCA viewed it as necessary to consult on amending the rule, which was introduced in 2014, in order to ensure consumer protection and to avoid client money being returned to clients. As such, the FCA has finalised the rules consulted on, which change the 30-day rule to allow a firm to deposit an appropriate proportion of client money in a UD of up to 90 days, subject to certain conditions.

The rules set out in the annex to the policy statement came into force on 22 January 2018.

FCA consults on small business and guarantor access to Financial Ombudsman Service

The FCA has published a [consultation paper \(CP18/3\)](#) on allowing small businesses and guarantors to refer complaints against financial services firms to the Financial Ombudsman Service.

To achieve this aim, the FCA proposes to introduce two new categories of eligible complainant within the 'Dispute resolution: complaints' (DISP) section of the FCA Handbook: a 'small businesses' category and a 'guarantor' category.

To fall within the 'small businesses' category, the following three threshold criteria are proposed: the business has an annual turnover of less than GBP 6.5m, an annual balance sheet total of less than GBP 5m, and fewer than 50 employees. Charities with income of up to GBP 6.5m and trusts with net assets up to GBP 5m would also become eligible.

The FCA also proposes to introduce rules whereby a guarantor would be an eligible complainant if their complaint involves matters relevant to a guarantee or security they have given for the liabilities of a micro-enterprise or small business.

The consultation closes on 22 April 2018. A policy statement making final rules is expected this summer, with the changes coming into effect on 1 December 2018.

MMF Regulation: FCA consults on changes to Handbook and fees

The FCA has published a [consultation paper \(CP18/4\)](#) on proposed changes to its Handbook and fees relating to the EU Money Market Funds (MMF) Regulation. The MMF Regulation, which came into force on 21 July 2017, applies to new MMFs from 21 July 2018 and existing MMFs from 21 January 2019.

The FCA is seeking feedback on its proposals to:

- amend its Handbook to ensure it is consistent with the requirements of the MMF Regulation;
- introduce application fees for the authorisation of MMFs under the Regulation; and
- introduce periodic fees to help meet the cost of supervising MMFs' adherence to the Regulation.

Comments are due by 23 March 2018.

Investment services providers: AMF recognises equivalence between certain British suitability requirements and certified French examination

In line with the Agility programme, the Autorité des Marchés Financiers (AMF) Board has decided to grant an [equivalence](#) with the certified examination of minimum knowledge that may be awarded to certain employees or officers of investment services providers (ISPs) or the incoming branches of ISPs in the UK coming to work in France as part of a transfer of business activities or the relocation of their employer or principal to France.

This equivalence may be granted to the employees or officers of an ISP or the incoming branch of an ISP in the UK where they have carried out certain activities for which they can claim 'suitable qualifications' and they are led to hold certain functions at an ISP or the incoming branch of an ISP in France.

BaFin to set position limits for specific commodity derivatives

The German Federal Financial Supervisory Authority (BaFin) has published [draft general decrees \(Allgemeinverfügungen\)](#) intended to set position limits for the following commodity derivatives:

- PXE Czech Financial Future (Base) contracts;
- Phelix Power DE Future (Base) contracts and Phelix Power DE Option (Base) contracts; and
- Phelix Power DE Future (Peak) contracts.

Comments on the draft general decrees are due by 5 February 2018.

Consumer credit: Italian Ministry of Economy and Finance consults on new draft decree

The Ministry of Economy and Finance has launched a [public consultation](#) on a new draft ministerial decree pursuant to Article 120-quinquiesdecies (5) of the Italian Banking Act (Legislative Decree no. 385/1993), which sets

out provisions on a particular security scheme (known as 'patto marciano').

Legislative Decree no. 72 of 21 April 2016 – implementing Directive 2014/17/EU on credit agreements for consumers – introduced Article 120-quinquiesdecies of the Italian Banking Act, on consumer default. This provision – which provides for the possibility for the parties to a loan agreement to include a clause whereby, in case of a consumer's default, the debt can be extinguished by contributing or transferring to the creditor the relevant real estate property (subject to certain limitations) – delegates power to the Minister of Economy and Finance to adopt implementing provisions by means of ministerial decree.

Comments are due by 5 February 2018.

Consob publishes resolution on communication of non-financial information

The Commissione Nazionale per le Società e la Borsa (Consob) has issued [Resolution no. 20267](#) of 18 January 2018, setting out new provisions intended to implement Legislative Decree no. 254 of 30 December 2017 relating to the communication of non-financial information.

In particular, the resolution regulates the methods of publication, verification and supervision of such information. Different methods of communicating to Consob also depend on whether the relevant company is listed on a regulated market or not.

Polish Council of Ministers adopts bill on prevention of money-laundering and terrorist financing

The Polish Council of Ministers has adopted a [bill implementing the Fourth Anti-Money Laundering Directive of 2015 \(AMLD 4\)](#).

The bill provides for, among other things, new categories of institutions obliged to apply the law on the prevention of money-laundering and terrorist financing, and also for the establishment of the Central Register of Beneficial Owners.

The bill will now be sent to the Sejm.

HKEX lays out key plans for 2018

Hong Kong Exchanges and Clearing Limited (HKEX) has announced its [key plans for 2018](#). According to the HKEX, the initiatives will build on the progress already made in its Strategic Plan 2016-2018. Amongst other things, the HKEX will focus on the following in 2018:

- making the initial public offering (IPO) market more relevant by reforming the listing regime;

- making the cash market more connected by enhancing the Stock Connect;
- making the derivatives market more competitive by launching A-share derivatives and reforming trading regimes;
- launching new trading systems in the securities and derivatives markets; and
- strengthening risk management and exploring market structure enhancements.

SFC announces formal adoption of enhanced post authorisation process

The Securities and Futures Commission (SFC) has announced that, with effect from 1 February 2018, the [revamped process](#) for applications for the approval of post authorisation changes (including scheme changes, termination, merger and withdrawal of authorisation) and the authorisation of revised offering documents for SFC-authorized funds will be formally adopted.

The revamped post authorisation process was introduced by the SFC with a view to increasing the transparency and efficiency of its approval process without compromising investor interest and protection. The SFC introduced the launch of the pilot revamped post authorisation process in its [June 2017 circular](#).

Accordingly the SFC has updated various frequently asked questions (FAQs), forms and confirmations. For the forms and confirmations, there will be a transition period until 14 February 2018 during which applicants may choose to use either the existing or updated forms and confirmation in support of their applications. For all applications received by the SFC after 14 February 2018, applicants must complete the updated forms and confirmations.

Specifically, the changes to the [FAQs on Post Authorisation Compliance Issues](#) of SFC-authorized Unit Trusts and Mutual Funds are the following:

- under 'Section 1 (For applications received on or after 1 August 2017): FAQ in respect of the revamped post authorisation process', questions 13A, 20 and 21 have been added and questions 1, 15 and 16 have been updated; and
- under 'Section 2: Others' question 16B has been updated.

SFC identifies compliance failures in distribution of fixed-income and structured products

The SFC has identified a number of [compliance failures](#) during its on-site inspections and investigations of the

distribution of complex bonds and structured products by licensed corporations (LCs). Amongst other things, the SFC has reminded LCs to:

- maintain adequate management oversight and effective compliance monitoring to ensure product due diligence is properly conducted;
- put in place appropriate measures, systems and controls to ensure that the features and risks of each investment product are duly considered;
- provide staff with adequate training on the investment products they distribute;
- implement proper policies and procedures, ensure sufficient guidance is provided to staff;
- regularly perform a holistic assessment of the suitability framework, which includes management supervision, know your client, product due diligence, suitability assessment, the sales process, record retention and staff training; and
- maintain adequate records to ensure compliance with the suitability obligations and to enable reviews or investigations to be carried out by the LCs, their auditors and the SFC.

The SFC has further elaborated its expected standards in the accompanied [Appendix](#). LCs are advised to review the areas of concern discussed in the circular and take immediate action to rectify any deficiencies.

FSA publishes summary of directions and priorities for 2017-2018

The Financial Services Agency (FSA) has published the [summary points](#) of its strategic directions and priorities for 2017-2018. The summary report indicates what goals the FSA aims to attain during the period from July 2017 to June 2018, and how. The summary report is an English translation of an announcement originally made by the FSA in Japanese on 10 November 2017.

The key priorities for 2017-2018 include:

- transforming the FSA's culture, governance, organisational structure and its supervisory approaches for better financial stability, market integrity and consumer protection;
- a holistic approach for contemplating better financial flow;
- transforming the flow of funds in the economy;
- effective financial intermediation and financial stability; and

- strategic policy measures for financial innovation led by information technology development.

FSC proposes amendments to Banking Act

The Financial Services Commission (FSC) has [proposed amendments](#) to the Banking Act. The amendments are intended to relax certain compliance and capital requirements, and remove investment limits on certain classes of debt securities.

The key proposals include the following:

- banks will be exempted from ex-ante reporting for concurrent businesses that are registered, approved, or authorised pursuant to legislation other than the Banking Act;
- investment limits on low-risk debt securities such as municipal bonds will be removed; and
- banks will be required to accumulate at least 10% of their cash dividend as an 'earned surplus reserve' until the aggregate reserve amount reaches half of their capital as required under the Commercial Act.

Comments on the proposed amendments are due by 25 February 2018.

FSC announces financial measures to curb speculation in cryptocurrency trading

The FSC has announced [financial measures](#) to curb speculation in cryptocurrency trading. Under the measures, only accounts with a user's real name will be allowed to be used in cryptocurrency trading and a guideline to prevent cryptocurrency-related money laundering will be introduced for banks.

Under the real name policy, users who want to make cryptocurrency transactions must have a bank account under their real name at the same bank with cryptocurrency exchanges. Minors under the age of 18 and foreign nationals will not be allowed to open new bank accounts to deposit new money for cryptocurrency trading. The policy is intended to ensure that banks identify their customers and comply with their anti-money laundering (AML) obligations in cryptocurrency transactions.

The cryptocurrency-related guideline, based on the results of joint inspections by the Korea Financial Intelligence Unit (KoFIU) and the Financial Supervisory Service (FSS), clarifies the obligations and responsibilities of financial institutions to prevent cryptocurrency-related money laundering. Amongst other things, the guideline requires high-level due diligence by financial institutions in transactions with cryptocurrency exchanges and suggests

types of financial transactions that can be suspicious in relation to cryptocurrency-related money laundering. Further, the guideline requires financial institutions to strengthen their internal controls related to cryptocurrencies and share information about cryptocurrency exchanges with each other.

The measures are effective from 30 January 2018.

MAS revises notices on definition of capital funds, and submission of statistics and returns by banks and merchant banks

The Monetary Authority of Singapore (MAS) has [amended Notice 601](#), which is issued to banks under the Banking Act (BA), and [Notice 1001](#), which is issued to merchant banks under the Monetary Authority of Singapore Act.

The amended Notices exclude the following as 'capital funds' under sub-paragraph (a) of the definition of 'capital funds' under section 2(1) of the BA and Paragraph 4 of Notice 1001:

- revaluation reserves;
- unrealised fair value gains or losses on equity securities held at fair value through other comprehensive income;
- unrealised fair value gains or losses on debt securities and loans held at fair value through other comprehensive income; and
- cumulative fair value gains or losses on cashflow hedges of financial instruments that are measured at amortised cost.

The amended Notice 601 further provides that for the purposes of sub-paragraph (b) of the definition of 'capital funds' in section 2(1) of the BA, the expression 'such other liabilities' shall exclude:

- unrealised fair value gains or losses on equity securities held at fair value through other comprehensive income;
- unrealised fair value gains or losses on debt securities and loans held at fair value through other comprehensive income; and
- cumulative fair value gains or losses on cashflow hedges of financial instruments that are measured at amortised cost.

The amendments to the Notices take effect on the following dates:

- in the case of a bank that has its annual period commencing on or before 22 January, with immediate effect; and
- in the case of a bank that has its annual period commencing after 22 January, with effect from the day on which that annual period commences in 2018.

The MAS has also [revised Notice 610](#) and [Notice 1003](#), which provide for the submission of statistics and returns by banks and merchant banks respectively.

Among other things, banks and merchant banks are now required under the amended Notice 610 and Notice 1003 respectively to report, in accordance with the measurement bases specified in the Singapore Financial Reporting Standard (FRS) 109 on Financial Instruments:

- all notes, bonds, debentures and other debt securities (including subordinated debt) issued by the bank;
- amounts due to the banks and Asian Currency Units;
- loans and advances to non-bank customers, before the deduction of any loss allowance for credit-impaired and non-credit-impaired exposures; and
- additional information in the format specified under an amended Annex 11.

The amendments to the notices take effect on the following dates:

- in the case of a bank or merchant bank that has its annual period commencing on or before 22 January, with immediate effect; and
- in the case of a bank or merchant bank that has its annual period commencing after 22 January, with effect from the day on which that annual period commences in 2018.

FINRA publishes 2018 Regulatory and Examination Priorities Letter

The Financial Industry Regulatory Authority (FINRA) has published its [Annual Regulatory and Examination Priorities Letter](#) to highlight issues of ongoing importance to its regulatory programs. Among the topics featured in the 2018 FINRA Priorities Letter are fraud, high-risk firms and brokers, operational and financial risks – including technology governance and cybersecurity – and market regulation.

Other areas of priority in 2018 include:

- initial coin offerings and cryptocurrencies;

- sales practice risks (e.g., suitability), including recommendations of complex products to vulnerable unsophisticated investors;
- protection of customer assets and the accuracy of firms' financial data; and
- market integrity, including best execution, manipulation across markets and products, and fixed income data integrity.

The 2018 FINRA Priorities Letter also highlights important new rules coming into effect this year, including FINRA Rule 4512 (Customer Account Information), FINRA Rule 2232 (Customer Confirmation), and FINRA Rules 1210 and 1240 (Consolidated Registration Rules).

CFTC and SEC issue joint statement on virtual currency enforcement actions

The Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) have issued a [joint statement](#) by SEC Co-Enforcement Directors Stephanie Avakian and Steven Peikin and CFTC Enforcement Director James McDonald warning market participants that should they engage in fraud under the guise of offering digital instruments – whether characterized as virtual currencies, coins, tokens, or the like – the SEC and the CFTC will look beyond form, examine the substance of the activity and prosecute violations of the federal securities and commodities laws. The statement demonstrates an increasing focus on using enforcement to regulate these emerging technologies.

The joint statement was issued on the same day that the CFTC announced the filing of two enforcement actions in federal court in Colorado and New York respectively. The [Colorado action](#) alleges that the defendants misappropriated virtual currency from investors in exchange for trading advice that was never provided. The [New York case](#) alleges that the defendants solicited Bitcoin as part of a binary options trading Ponzi scheme.

RECENT CLIFFORD CHANCE BRIEFINGS

GDPR with its high penalties is almost here

The General Data Protection Regulation (the GDPR) becomes effective on 25 May 2018. It is the biggest shift in data protection and privacy legislation in Europe for a generation, with extra-territorial effect, so a US company may have to comply even if not based in Europe. Failure to comply exposes a company to unprecedented regulatory

risk, and huge penalties for serious breaches – up to EUR 20 million or 4% of global turnover – whichever is higher!

This briefing outlines the key issues raised by the GDPR, alongside possible actions business can take to comply.

https://www.cliffordchance.com/briefings/2018/01/gdpr_with_its_highpenaltiesalmosttherema.html

The Asia Pacific top ten FCPA cases of 2016

Asia-Pacific played a significant role in 2016's record-breaking enforcement actions of the US Foreign Corrupt Practices Act (FCPA), regionally contributing the largest percentage of cases in terms of both numbers and penalties and accounting for almost one-third of the total fines and penalties assessed. Many of the companies charged were operating in China, but some of the alleged misconduct also took place in Bangladesh, India, Indonesia and Thailand.

This briefing discusses the top ten FCPA enforcement actions.

https://www.cliffordchance.com/briefings/2017/01/the_asia_pacifictopentfcpcasesof2016.html

Poland — a summary of selected investment opportunities in 2018

In 2018, Poland's GDP is set to grow by 4.3%, unemployment to fall to 6.3% and inflation to reach 2.2%. Interest rates are likely to remain unchanged. According to most market analysts, 2018 is going to be another successful year of stable growth for the Polish economy, offering interesting investment opportunities for foreign investors in various sectors, including energy and infrastructure, real estate, as well as financial services and private equity.

This briefing highlights selected investment opportunities in Poland. These include large-scale infrastructure projects, a new business entity type for real estate investment, and transactional opportunities in the banking and private equity sectors.

https://www.cliffordchance.com/briefings/2018/01/poland_-_a_summaryofselectedinvestmen.html

Belgian tax reform — what's the impact on the investment fund sector?

Aside from the general 2018 Belgian corporate tax reform, which was addressed in our previous briefing, several other specific measures have been introduced with a particular impact on the investment funds sector. These include:

- increased taxation for investors in debt investment companies/funds;
- increased taxation on stock exchange transactions;
- clarification of participation exemption rules applicable to participations in investment companies;
- (anticipated) changes to private pricaf/pricaf privée tax and regulatory regime;
- new interest deductibility limitation regime potentially applicable to certain investment companies; and
- new withholding tax exemption for Belgian and foreign dividends and decrease of tax exemption of interest received on savings deposits for Belgian tax resident individuals.

This briefing explains these measures.

https://www.cliffordchance.com/briefings/2018/01/belgian_tax_reform-whatstheimpactonth.html

Consultation on new Hong Kong legislation for continuing powers of attorney

The Department of Justice published its long-awaited consultation paper on the Continuing Powers of Attorney Bill on 28 December 2017. It is proposed that a Continuing Powers of Attorney Ordinance be enacted to introduce a new continuing power of attorney regime covering decisions in relation to an individual's personal care as well as their property and financial affairs.

This briefing provides a high-level overview of the key proposals relating to the continuing powers of attorney regime.

https://www.cliffordchance.com/briefings/2018/01/consultation_on_newhongkonglegislationfo.html

Privilege under attack — vulnerabilities of legal privilege claims in criminal and regulatory investigations

Recently, a lawyer for former Trump campaign advisor Paul Manafort and his associate Richard Gates was compelled to testify before a grand jury in the Special Counsel's Office (SCO) investigation. The SCO sought the lawyer's testimony to determine whether Manafort and Gates had 'intentionally misled [the Department of Justice] about their work on behalf of a foreign government and foreign officials' when they submitted letters to the Department's Foreign Agent Registration Unit. In ordering the attorney to testify, the federal district court determined that the attorney-client relationship had been used to 'further a criminal scheme' – making false or misleading submissions to the Department

of Justice – so the attorney’s communications with her clients fell within the crime-fraud exception to privilege. While the crime-fraud exception is well established, the district court’s decision in the Manafort case is just one example of recent aggressive efforts to pierce attorney-client privilege in criminal and regulatory investigations.

This briefing summarises the scope of attorney-client and work-product doctrines, and discusses several recent US

court decisions that have found documents and communications created in connection with internal investigations to be discoverable. It also reviews key privilege-related developments in foreign jurisdictions that will affect many cross-border investigations.

https://www.cliffordchance.com/briefings/2018/01/privilege_under_attackvulnerabilitiesoflega.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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