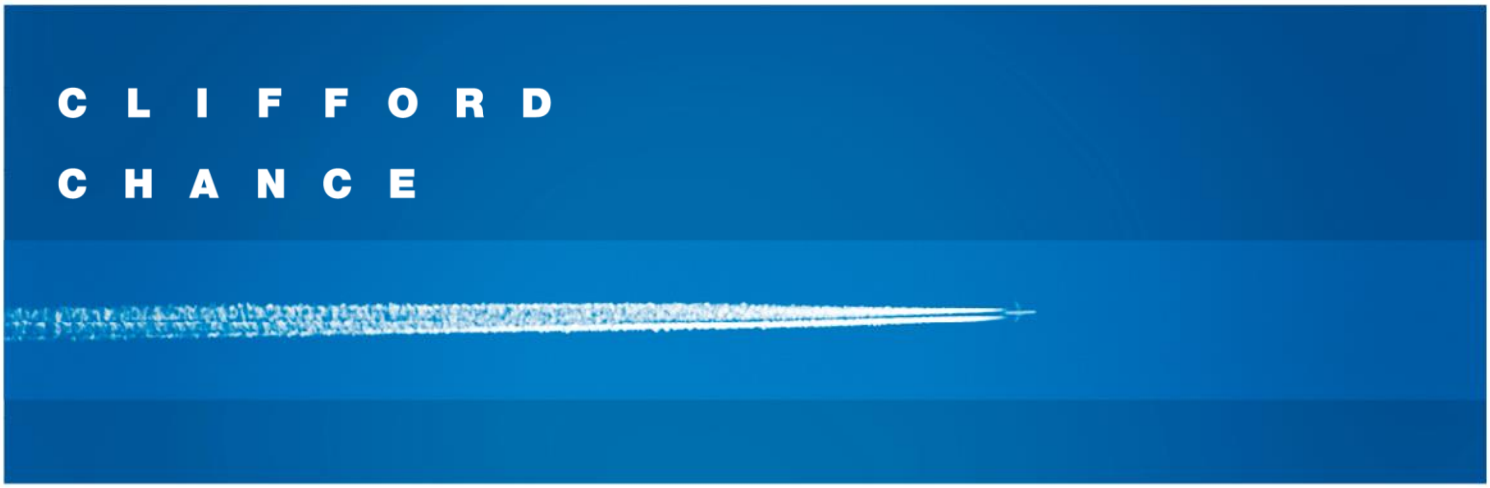

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Capital Markets Union: ECON Committee publishes draft report on sustainable finance

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published a draft own-initiative report on the High Level Expert Group's (HLEG's) final report on sustainable finance, lending its political support to the HLEG's recommendations. Amongst other things, the draft report:

- calls on EU Member States, in coordination with the EU Commission and the European Investment Bank, to evaluate their national and collective public investment needs to ensure that the EU is on track to meet its climate change goals within the next five years;
- calls on the Commission to lead a multi-stakeholder process to establish by the end of 2019 a robust and credible green taxonomy, including a 'Green Finance Mark', through a legislative initiative;
- calls on the Commission to adopt a regulatory strategy aimed, amongst other things, at measuring sustainability risks within the framework of capital adequacy rules;
- calls on the European Supervisory Authorities (ESAs) to develop guidelines for model contracts between asset owners and asset managers, which would incorporate the transmission of the beneficiary interest as well as clear expectations as regards the identification and integration of environmental, social and governance (ESG) risks on behalf of the asset manager; and
- calls on the Commission to establish a legally binding labelling system for personal bank accounts, investment funds, insurance, and financial products indicating their level of conformity with the Paris Agreement and ESG goals.

ESRB publishes recommendation on liquidity and leverage risks in investment funds

The European Systemic Risk Board (ESRB) has published a recommendation addressed to the European Securities and Markets Authority (ESMA) and the EU Commission on action to address systemic risks related to liquidity mismatches and the use of leverage in investment funds.

The recommendation focuses on five areas where the ESRB sees a need for ESMA to provide supervisory authorities with guidance on applying the macroprudential elements of the current regulatory framework and for the EU Commission to propose additional legislative measures. It aims to create a proportionate framework for managing the systemic risks that can arise in the investment funds sector while maintaining the key redemption features that attract investors to open-ended investment funds and facilitate collective investment.

The five areas of focus in the recommendation are:

- liquidity management tools for redemption;
- additional provisions to reduce the likelihood of excessive liquidity mismatches;
- stress testing;

- undertakings for collective investment in transferable securities (UCITS) reporting; and
- guidance on Article 25 of the Alternative Investment Fund Managers Directive (AIFMD).

ESAs warn consumers on virtual currencies

The European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA) have published a joint communication warning consumers on the risks of virtual currencies (VCs).

In particular, the three European Supervisory Authorities (ESAs) have warned consumers of the risks of buying VCs, which include:

- extreme price volatility and the risk of a pricing bubble;
- the absence of protection, as VCs are unregulated under EU law;
- possible lack of exit options, which may lead consumers to suffer losses while they seek to trade VCs for traditional currencies;
- a lack of transparency with regard to price formation;
- operational disruptions on VC exchanges;
- potentially incomplete, complex information being made available to consumers that may not properly disclose all of the risks of VCs and may therefore be misleading; and
- the unsuitability of VCs for most purposes, including investment and retirement planning.

The communication follows previous publications published by the EBA on VCs and communications on ICOs published by ESMA.

IOSCO consults on retail OTC leveraged products

The International Organization of Securities Commissions (IOSCO) has published a consultation report proposing policy measures for its members to consider when addressing risks arising from the offer and sale of OTC leveraged products to retail clients.

The report covers the offer and sale by intermediaries of rolling spot forex contracts, contracts for differences (CfDs), and binary options. IOSCO sets out for comment policy measures that are designed to:

- help reduce risks to investors caused by certain features of these products;
- improve the practices of licensed firms that sell them;
- improve the likelihood that the products are sold to an appropriate target market; and
- reduce the likelihood that the products are sold without the firm holding the necessary licence to do so.

Comments are due by 27 March 2018. IOSCO will consider the feedback and prepare a final report incorporating other policy measures on investor education and enforcement approaches.

Algorithmic trading: PRA consults on risk management and governance and FCA publishes report on supervision

The Prudential Regulation Authority (PRA) has launched a consultation on a proposed supervisory statement setting out expectations for the prudential aspects of risk management and governance of algorithmic trading at PRA regulated firms. Amongst other things, the PRA is proposing that:

- a firm's governing body must explicitly approve the governance framework for algorithmic trading and that its management body must identify the relevant senior management functions with responsibility for algorithmic trading;
- firms will be expected to have robust algorithm approval processes and a minimum set of risk controls;
- algorithm testing must involve all relevant risk and control functions and be carried out with frequency and rigour commensurate with the potential risks;
- firms should have and maintain algorithm and risk control inventories;
- risk management and other systems and control functions must understand and have oversight over the risks of algorithmic trading; and
- risk management must have the authority to challenge existing risk controls and impose additional risk controls on algorithmic trading where appropriate.

Comments are due by 7 May 2018.

The Financial Conduct Authority (FCA) has also published a report on the supervision of algorithmic trading in wholesale markets. The report identifies five key areas of focus for algorithmic trading compliance with consideration of MiFID2 requirements (defining algorithmic trading, the development and testing process, risk controls, governance and oversight and market conduct). It also highlights areas of good and bad practice observed within previous cross-firm reviews.

German Federal Ministry of Finance publishes draft law relating to options under EU Prospectus Regulation

The German Federal Ministry of Finance (BMF) has published a draft law (Referentenentwurf) to implement the options given to EU Member States under the Prospectus Regulation (EU) 2017/1129 and to further amend the German financial markets regulation.

The draft amends, amongst others, the following German laws:

- Securities Prospectus Act (Wertpapierprospektgesetz);
- Securities Prospectus Fee Ordinance (Wertpierprospektgebührenverordnung);
- Commercial Code (Handelsgesetzbuch);
- Securities Trading Act (Wertpapierhandelsgesetz);
- Investment Products Act (Vermögensanlagengesetz);
- Banking Act (Kreditwesengesetz);

- Capital Investment Code (Kapitalanlagegesetzbuch); and
- Anti-Money Laundering Act (Geldwäschegesetz).

With regard to the option under Article 1 para 3 of the Prospectus Regulation, the draft proposes to introduce a securities information sheet (Wertpapier-Informationsblatt) for the issuance of securities with an aggregate value of over EUR 100,000 and less than EUR 1,000,000 over a twelve month period instead of a fully-fledged prospectus. These amendments to the WpPG shall enter into force on 21 July 2018.

The securities information sheet - which is very similar to the PRIIPs KID and the already existing investment product information sheet (Vermögensanlagen-Informationsblatt) under the Investment Products Act - are limited to three pages and must contain a standardised overview of the key features of the relevant security. The new law also aims to introduce corresponding sanctions for violations of the obligation to produce a securities information sheet.

The intended amendment of the German Banking Act mainly reflects revisions to the Bank Recovery and Resolution Directive (BRRD) as revised by Directive (EU) 2017/2399.

Comments on the draft bill may be submitted to the Federal Ministry of Finance via e-mail (VIIB5@bmf.bund.de) until 23 February 2018.

BaFin publishes interpretation guidelines on new German Remuneration Ordinance

The German Federal Financial Supervisory Authority (BaFin) has published its revised interpretation guidelines on the German remuneration ordinance for institutions (Institutsvergütungsverordnung). The remuneration ordinance was revised with effect from August 2017 to implement the European Banking Authority (EBA) guidelines on sound remuneration.

MiFID2: Consob publishes new regulation on intermediaries

The Commissione Nazionale per le Società e la Borsa (Consob) has issued a new regulation on intermediaries intended fully to implement MiFID2, MiFIR and the Italian primary legislation (i.e., Legislative Decree no. 58/1998, as recently amended – Italian Financial Act) in Italy.

In particular, the new regulation introduces new regimes governing investor protection related provisions, financial advisors and the authorisation/passporting procedures applicable, as the case may be, to Italian, EU and third country firms other than banks.

The new regulation repeals and replaces, amongst others, Consob Regulation no. 16190/2007 and comes into force the day after its publication in the Italian Official Gazette.

Bank of Italy issues communication on prudential supervision and large exposures of Italian investment firms

A Bank of Italy communication containing amendments to provisions on the prudential supervision and large exposures applicable to Italian investment

firms and groups of Italian investment firms has been published in the Italian Official Gazette (no. 32 of 8 February 2018).

In particular, amendments have been made to the Bank of Italy's communication of 31 March 2014 on the application to Italian investment firms and groups of Italian investment firms of the CRD 4/CRR provisions for the purpose of aligning them to those governing credit institutions.

Bank of Italy consults on EBA guidelines on product oversight and governance in context of banking products

The Bank of Italy has launched a public consultation on a set of proposed amendments to its Regulation on the transparency of banking and financial services and the fairness of relations between intermediaries and clients (Resolution of 29 June 2009) in order to give full implementation to the European Banking Authority (EBA) guidelines on product oversight and governance.

Comments are due within 60 days of the publication of the consultation document.

Bank of Italy consults on first set of level two provisions intended to implement PSD2

The Bank of Italy has launched two public consultations intended to:

- introduce second-level provisions implementing Article 37 of the recast Payment Services Directive (EU) 2015/2366 (PSD2); and
- give full implementation to Regulation (EU) 2015/751 on interchange fees for card-based payment transactions (MIF Regulation).

Comments are due by 12 March 2018.

Bank of Italy publishes guidelines on anti-money laundering obligations

The Bank of Italy has issued a communication providing guidance on how compliance with the new regime on anti-money laundering obligations – as provided for under Legislative Decree no. 231 of 21 November 2007, as amended by Legislative Decree no. 90/2017 implementing Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing – must be ensured before the publication of second-level regulations.

The guidelines apply from the date following the publication of the communication, throughout the transitional period set out under the primary legislation and up to the publication of the new implementing regulations by the Bank of Italy.

Bank of Spain issues circular amending previous circulars on calculation of contributions to Credit Institutions Deposits Guarantee Fund

The Bank of Spain has issued Circular 1/2018, of 31 January, which amends Circular 5/2016, of 27 May, and Circular 8/2015, of 18 December. Circular 1/2018 is intended to incorporate a new factor into the calculation methodology included in Circular 5/2016 for risk-based contributions to the Credit Institutions Deposits Guarantee Fund.

The new factor was introduced by Royal Decree Law 11/2017, of 23 June, on urgent measures on financial matters, through the amendment of article 6.3 of Royal Decree-Law 16/2011, of 14 October, by virtue of which the Credit Institutions Deposits Guarantee Fund (Fondo de Garantía de Depósitos de entidades de crédito) (DGS) was created.

The new factor differs depending on the credit institutions to which the amendment applies (i.e. those belonging to an Institutional Protection System (Sistema Institucional de Protección) (SIP)):

- credit institutions belonging to SIPs known as reinforced or full mutualisation SIPs, for which the calculation method uses consolidated data for the calculation of the contributions to the DGS; or
- credit institutions belonging to regulatory SIPs, which may make lower contributions to the DGS if they have created a fund in advance which may help to reinforce the liquidity and solvency and prevent the resolution of the members of the SIP.

In addition, Circular 1/2018 modifies Circular 8/2015, of 18 December, on the information required to establish the calculation basis for contributions to the Credit Institutions Deposits Guarantee Fund, in order to gather information on the volume and annual provisions to the fund created in advance.

Circular 1/2018 entered into force on 10 February 2018.

FINMA consults on revised circular on video and online identification

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on the revision of Circular 2016/7 'Video and online identification'.

The due diligence requirements for client onboarding via digital channels have been updated to reflect advances in technology. The revisions are intended to take into account new risks whilst encouraging innovation, ensuring that measures are technology neutral and ensuring effective anti-money laundering. The main revisions include:

- enhanced security features in the video identification process;
- relaxation of due diligence requirements for online identification; and
- likeness detection as a further security measure for checking photographs.

Comments are due by 28 March 2018.

SFC issues circular to licensed corporations on client facilitation

The Securities and Futures Commission (SFC) has issued a circular to licensed corporations on client facilitation. The circular sets out guidance on the standards of conduct and internal controls the SFC expects of licensed corporations providing client facilitation services. The circular follows a thematic review of selected licensed corporations which assessed the effectiveness and adequacy of management supervision and controls with regard to client facilitation services.

The circular notes that, typically, clients use facilitation services to obtain liquidity or achieve a guaranteed execution price and that, as the nature of the client relationship may change in a facilitation transaction due to the fact that

licensed corporations assume a risk-taking principal position rather than an agency position, conflicts of interest may arise.

The SFC notes that such conflicts of interest are a recurring regulatory concern. In 2014, the SFC held a supervisory briefing session to draw the industry's attention to common deficiencies and vulnerabilities associated with client facilitation. More recently, a number of inconsistent practices were identified in routine inspections by the SFC.

The circular reminds licensed corporations that the Code of Conduct for Persons Licensed by or Registered with the SFC requires that a licensed or registered person should act in the best interests of clients, disclose conflicts of interest and take all reasonable steps to ensure fair treatment of clients if conflicts of interest cannot be avoided.

The appendix to the circular contains the SFC's detailed observations from the thematic review and highlights good industry practices for licensed corporations to consider. Amongst other things, licensed corporations are advised to do the following:

- sufficient management oversight must be in place to ensure that trade exceptions and other matters related to client facilitation are brought to management's attention for timely review;
- to protect sensitive client information and avoid conflicts of interest, the physical work locations of agency and client facilitation traders should be segregated; and
- indications of interest should only be disseminated when they are based on a genuine client or proprietary intent to trade.

Bankruptcy (Amendment) Rules 2018 amending form of security given by trustee and deleting transmission of dividend by post gazetted

The Bankruptcy (Amendment) Rules 2018 have been gazetted.

The amendments are as follows:

Rule 54(a) of the Bankruptcy Rules in relation to the form of security to be provided by a trustee of a bankrupt's estate has been amended. It now allows the trustee to provide security in the form of a performance bond or guarantee issued by an insurer licensed under the Insurance Act, in addition to providing security in the form of a banker's guarantee; and

Rule 233 of the Bankruptcy Rules, which permitted dividends to be transmitted by post at the request and risk of the creditor, has been deleted.

The Bankruptcy (Amendment) Rules 2018 are effective from 1 February 2018. However, the amendment in respect of Rule 233 of the Bankruptcy Rules is not applicable to any request by a creditor made before 1 February 2018 for the transmission of the dividend to him by post.

MAS consults on proposed e-payments user protection guidelines

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposed guidelines to protect users of electronic payments (e-payments), which are intended to encourage wider adoption of e-payments

by setting standards on the responsibilities of financial institutions and e-payment users.

Under the proposed guidelines, individuals and 'micro-enterprises' (defined as any business employing fewer than 10 persons or with annual turnover of no more than SGD 1 million) who hold e-payment accounts can expect financial institutions to provide timely notifications of all e-payment transactions. Financial institutions will be expected to set clear resolution processes for unauthorised or erroneous payment transactions. The proposed guidelines also set out the responsibilities of e-payments users, including good security practices for protecting their passwords and e-payment accounts.

Amongst other things, the proposed guidelines set out:

- the extent of the account holder's liability for losses arising from unauthorised payment transactions in different scenarios, including scenarios where fraud or negligence by the financial institution(s) is involved or where the account holder's recklessness (if any) was the primary cause of loss arising from an unauthorised transaction;
- the duties of account holders and account users, which include the duty to provide financial institutions with such contact details required by financial institutions to comply with their duty to send transaction notifications, to protect access codes and access to protected accounts, and to report and provide information on unauthorised transactions;
- the duties of financial institutions, which include the duty to clearly inform account holders of user protection duties, to provide transaction notifications to account holders in the specified manner, to provide onscreen opportunities for any account users of a protected account to confirm the payment transaction and recipient credentials before the financial institution executes any payment transaction, and to provide a reporting channel for reporting of unauthorised or erroneous payment transactions; and
- resolution processes for both unauthorised payment transactions and mistaken payment transactions, including completing an investigation of any claims within 21 business days or in exceptional circumstances, 45 business days of the account holder's report of the transactions.

The proposed guidelines will be applicable to banks and non-bank credit card issuers under the Banking Act, finance companies under the Finance Companies Act and widely accepted stored value facility holders under the Payment Systems (Oversight) Act.

Comments on the consultation paper are due by 16 March 2018.

RECENT CLIFFORD CHANCE BRIEFINGS

Brexit — implications for contract continuity and repapering

One of the key questions firms need to consider in their Brexit planning is how to deal with cross-border financial services contracts. In a scenario where the UK leaves the Single Market and no deal covering financial services is agreed, firms will lose the right to passport financial services activities between the UK and EU27. This raises uncertainties and a potential cliff-edge risk for the

continuity of existing cross-border contracts, which currently underpin many firms' businesses.

This briefing highlights some practical implications to assist firms considering whether and how risks to contract continuity may be mitigated, covering, amongst other things:

- contingency planning;
- uncertainties for continuity of existing contracts;
- reasons for leaving business behind;
- potential solutions to secure contract continuity; and
- repapering considerations and transfer methods.

https://www.cliffordchance.com/briefings/2018/02/brexit_implicationsforcontractcontinuityan.html

Second Circuit vacates jury verdict in ATA case

On 9 February 2018, in Linde v. Arab Bank, the United States Court of Appeals for the Second Circuit issued an important decision making it more difficult for plaintiffs to hold financial institutions primarily liable under the Anti-Terrorism Act (ATA) for injuries they sustain in terror attacks.

As a result of this decision, ATA lawsuits against financial institutions and other commercial defendants will be less likely to succeed based on primary liability theories, but rather will focus on secondary liability theories of aiding and abetting and conspiracy, which Congress created through the 2016 Justice Against Sponsors of Terrorism Act.

This briefing reviews the case, discussing its background, primary and secondary liability under the ATA, the issue of causation, and ramifications for ATA liability.

https://www.cliffordchance.com/briefings/2018/02/second_circuit_vacatesjuryverdictinatacase.html

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