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### **Capital Markets Union: EU Commission publishes communication on completing action plan**

The EU Commission has published a [communication](#) setting out its intention to put in place all of the necessary building blocks for the Capital Markets Union (CMU) by mid-2019.

The communication proposes additional measures to develop new products and labels and to integrate capital markets, in particular:

- a European label for investment-based and lending-based crowdfunding platforms to enable cross-border activity and address risks for investors in a proportionate manner;
- an EU-enabling framework for covered bonds; and
- measures to reduce regulatory barriers to the cross-border distribution of investment funds in the EU.

The Commission calls on the co-legislators to work together so that the proposals can be presented by May 2018 and adopted before the European Parliament elections in 2019. Among other things, the communication also sets out the Commission's view that progressing with the CMU has become more pressing given the UK's future withdrawal from the EU.

### **Capital Markets Union: EU Commission publishes action plan on financing sustainable growth**

The EU Commission has published an [action plan](#) on financing sustainable growth as part of the CMU. The plan has been developed following the publication of a report by the Commission's High-Level Expert Group on sustainable finance in January 2018.

The action plan sets out an EU strategy on sustainable finance and provides a roadmap for future work across all relevant financial systems. The recommendations include:

- establishing a taxonomy to define what is sustainable and identify areas where sustainable investment can make the biggest impact;
- creating labels for green financial products on the basis of the taxonomy allowing investors to easily identify green investments;
- clarifying the duty of asset managers and institutional investors to take sustainability into account in the investment process;
- requiring insurance and investment firms to advise clients on sustainability;

- incorporating sustainability into prudential requirements for banks and insurance companies; and
- enhancing transparency in corporate reporting in line with the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD).

The Commission intends to discuss the action plan further at a conference on 22 March 2018.

## **EU Commission launches fintech action plan and legislative proposal on crowdfunding**

The EU Commission has published an [action plan](#) on how it can better enable the financial sector to make use of new technologies, and a proposed regulation on European crowdfunding services providers.

The action plan forms part of the EU Commission's Capital Markets Union (CMU) initiative, the creation a single market for consumer financial services, and relates to the Digital Single Market. The action plan sets out 23 steps that are intended to enable innovative business models to scale up, supporting the uptake of new technologies, and increasing cybersecurity and the integrity of the financial system. The steps include:

- hosting an EU fintech laboratory where European and national authorities can engage with tech providers in a neutral, non-commercial space;
- reporting on the challenges and opportunities of crypto-assets later in 2018;
- working on a strategy for distributed ledger technology and blockchain addressing all sectors of the economy;
- consulting on how best to promote the digitisation of information published by listed companies in Europe, including the use of innovative technologies to interconnect national databases;
- running workshops to improve cybersecurity information-sharing; and
- presenting a blueprint with best practices on regulatory sandboxes, based on guidance from European Supervisory Authorities (ESAs).

The EU Commission has also adopted a [legislative proposal](#) to make it easier for crowdfunding platforms to offer their services and improve access to innovative forms of finance for businesses. The proposed regulation would allow platforms to apply for an EU label based on a single set of rules, in order to offer their services across the EU. The proposal also includes measures to protect investors on crowdfunding platforms by setting clear rules on information disclosures, rules on governance and risk management and a coherent approach to supervision. Additionally, the Commission has adopted a [proposed Directive](#) to amend MiFID2, in order that it would not apply to persons authorised as crowdfunding service providers as defined in the proposed regulation on European crowdfunding services providers.

## **BRRD: ITS on resolution authorities transmitting information to EBA on MREL published in Official Journal**

A Commission Implementing Regulation (2018/308) laying down implementing technical standards (ITS) with regard to formats, templates and definitions for the identification and transmission of information by resolution authorities to

the European Banking Authority on minimum requirement for own funds and eligible liabilities (MREL) under the Bank Recovery and Resolution Directive (BRRD) has been published in the [Official Journal](#).

Resolution authorities are required to set MREL for each institution and inform the EBA, in coordination with competent authorities, of the requirements they have set. The ITS set out the templates to be used by resolution authorities in order to strengthen the monitoring role of the EBA on MREL decisions.

The ITS will enter into force on 22 March 2018.

### **EBA consults on draft guidelines on non-performing and forborne exposures**

The European Banking Authority (EBA) has published a [consultation paper](#) (EBA/CP/2018/01) on draft guidelines on the management of non-performing exposures (NPEs) and forborne exposures (FBEs).

The guidelines are in response to the EU Council's 2017 action plan for tackling non-performing loans (NPLs) in Europe, and have been designed with the primary aim of reducing NPEs on banks' balance sheets. To that end, the guidelines are intended to provide both supervisory guidance and rules for the management of all NPEs and FBEs by credit institutions, covering:

- NPE strategy, governance and operations;
- forbearance, recognition of NPEs and impairment measures;
- collateral valuations; and
- the supervisory evaluation of NPE and FBE management as part of the Supervisory Review and Evaluation Process (SERP).

A public hearing on the proposals will be held at the EBA on 25 April and the deadline for comments is 8 June. The EBA intends to finalise the guidelines during summer 2018, with a view to implementation by 1 January 2019.

### **ECB consults on draft principles for banks on capital and liquidity management**

The European Central Bank (ECB) has published two consultation papers on the draft principles underlying its expectations for banks' [internal capital adequacy assessment processes](#) (ICAAPs) and [internal liquidity adequacy assessment processes](#) (ILAAPs).

Banks submit their ICAAP and ILAAP information packages to their joint supervisory teams (JSTs) at the ECB annually as part of the supervisory review and evaluation process (SREP). The ECB identified significant differences in the approaches taken by individual banks after publishing its expectations for ICAAPs and ILAAPs. As such, the ECB has published updated guides for consultation and invites feedback on any gaps or weaknesses. The JSTs will begin using the guides from 2019 when assessing ICAAPs and ILAAPs.

Comments are due by 4 May 2018.

### **FSB publishes Global Shadow Banking Monitoring Report 2017**

The Financial Stability Board (FSB) has published the [results](#) of its seventh annual monitoring exercise to assess global trends and risks from the shadow

banking system. The 2017 report covers data up to end-2016 from 29 jurisdictions, including Luxembourg for the first time.

The report also includes an assessment of China's non-bank financial entities' involvement in credit intermediation that may pose financial stability risks from shadow banking, such as maturity/liquidity mismatches and leverage.

Among other things, the FSB observed that:

- the monitoring universe of non-bank financial intermediation (MUNFI), the measure of all non-bank financial intermediation, grew to an aggregate USD 160 trillion and MUNFI's share within global financial assets grew for the fifth consecutive year;
- assets of other financial intermediaries (OFIs) grew 8% to USD 99 trillion representing 30% of total global financial assets;
- the activity-based, narrow measure of shadow banking grew by 7.6% to USD 45.2 trillion; and
- collective investment vehicles with features that made them susceptible to runs e.g. open-ended fixed income funds, money market funds (MMFs), grew 11% in 2016.

## **FSB publishes reporting guidelines for securities financing transactions**

The FSB has published [guidelines](#) for authorities in reporting securities financing data as set out in its securities financing data standards, which were published in November 2015. The standards addressed financial stability risks in securities financing transactions (SFTs), particularly in relation to the transparency of securities financing markets and allow the FSB to collect aggregated data on reports, securities lending and margin lending from national and regional authorities.

The guidelines are addressed to authorities for reporting SFT data, including the scope, frequency, reporting deadlines, classification codes, and a data template for authorities to report to the global aggregator with the data elements envisaged by the November 2015 standards.

## **FSB updates report on correspondent banking relationships**

The FSB has published a [report](#) with updated data on correspondent banking relationships using data provided by SWIFT. The data is published as part of the FSB's action plan to assess and address the decline in correspondent banking relationships.

The report finds that the reduction in the total number of active correspondents, as measured by the number of banks that have sent or received messages, continued in the first half of 2017. While there may be some seasonality in the changes in the latest six months, the number of active correspondents in June 2017 is also lower than in June 2016.

The FSB intends to publish a progress report to the G20 on the FSB action plan to address the decline in correspondent banking relationships later this month, including a description of measures by the public sector and the financial industry to facilitate correspondent banking.

## **IOSCO consults on volatility control mechanisms**

The Board of the International Organization of Securities Commissions (IOSCO) has published a [consultation report](#) (CR03/2018) on the measures used by trading venues to manage extreme volatility and preserve orderly trading.

The report builds on IOSCO's 2011 recommendations on the impact of technology on market integrity and efficiency, and explores volatility control mechanisms currently in use in member jurisdictions. IOSCO has proposed a number of recommendations, in particular that:

- trading venues establish and maintain appropriate mechanisms during trading hours;
- mechanisms should be appropriately calibrated, and take into account the nature, trading profile and price of the financial instrument or underlying asset;
- trading venues should regularly monitor mechanisms and re-calibrate as necessary;
- regulatory authorities should ensure trading venues maintain relevant records;
- trading venues should make information on the execution of mechanisms they use available to regulators;
- trading venues should communicate sufficient information about mechanisms, and when a mechanism is triggered, to market participants and the public; and
- trading venues should communicate, both within and outside their jurisdiction, as appropriate when the same or related instruments are traded and mechanisms are triggered.

Comments on the consultation are due by 6 May 2018.

## **Brexit: Prime Minister delivers speech on future economic partnership with EU**

The Prime Minister has delivered a [speech](#) setting out her vision for the future economic partnership between the UK and the EU.

Among other things, the Prime Minister set out that the UK's future trading relationship, through a broad and deep partnership, should be underpinned by five foundations:

- reciprocal binding commitments to ensure fair and open competition;
- an arbitration mechanism that is completely independent;
- ongoing dialogue with the EU, and the means to consult each other regularly;
- an arrangement on data protection; and
- maintaining links between the people of the EU and the UK, and ensuring businesses are able to attract and employ the people they need.

The Prime Minister also discussed the trade in goods, agrifood and fisheries, and services. On financial services, the speech set out that the Chancellor of the Exchequer will shortly be setting out how financial services can be part of

a deep and comprehensive partnership, but also highlighted that passporting would end as this is intrinsic to the single market which the UK would no longer be a member of. In particular, the speech outlined the view that the UK and EU should establish the ability to access each other's markets, based on maintaining the same regulatory outcomes over time, with a mechanism for determining proportionate consequences where they are not maintained. Moreover, due to the need to manage risks to financial stability, this would require a collaborative, objective framework that is reciprocal, mutually agreed and permanent.

### **Brexit: Chancellor delivers speech on financial services**

The Chancellor of the Exchequer, the Rt Hon Philip Hammond MP, has delivered a [speech](#) on a future financial services component of a comprehensive trade partnership between the UK and the EU after Brexit. The speech was intended to build on the Prime Minister's speech on a future economic partnership, which was delivered on 2 March 2018.

Among other things, the Chancellor called for continued close collaboration between the UK and the EU on cross-border financial services, and set out how a future partnership in financial services may be structured. The Chancellor called for the relationship to follow the principle of mutual recognition and reciprocal regulatory equivalence, but not a relationship based on the EU's established third-country equivalence regime which the Chancellor views as inadequate for the scale and complexity of UK-EU financial services trade. Mutual recognition would include governance structures, dispute resolution mechanisms, and regulatory dialogue for agreeing acceptable rule-changes where possible. The speech also envisaged a partnership under which there would be continued close supervisory co-operation. While the UK would not be part of the EU's supervisory agencies, the Chancellor took the view that a close working relationship could cover market abuse, transaction reporting, and stability monitoring, as well as prudential concerns about individual firms, and could involve a version of existing college structures, covering both day-to-day supervision and resolution. The speech also discussed the need for independent arbitration mechanism, as in other free trade agreements (FTAs).

The Chancellor set out that a future FTA can and should include financial services, and pointed to negotiations between the EU and US on TTIP which discussed financial services co-operation. The Chancellor set out the view that given the shape of the British economy and the UK's trade balance with the EU27, it would be difficult for a future FTA to be a fair and balanced settlement in the interests of both sides without including services.

### **Brexit: HM Government publishes example SIs to correct retained EU law**

HM Government has published [illustrative samples](#) of statutory instruments (SIs) under the European Union (Withdrawal) Bill. Among other things, the Withdrawal Bill will create powers to make secondary legislation, including temporary powers, to enable corrections to be made to laws that would otherwise no longer operate appropriately once the UK has left the EU. The illustrative samples are intended to show how the powers in the Bill may be used to correct inoperabilities or deficiencies in retained EU law, and the samples are not intended to be presented as final drafts for consultation.

Among the sample SIs is [the Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment\) \(EU Exit\) Regulations 2018](#), which illustrates the Government's intention to incorporate the Rome I Regulation (Regulation (EC) No. 593/2008) and Rome II Regulation (Regulation (EC) No. 864/2007) into domestic law. In a covering note, the Government has set out that the main focus of the SI will be to amend the Rome I and Rome II Regulations so that both will continue to apply to the UK once it ceases to be an EU Member State by replacing references to 'Member State' with 'relevant state' and replacing references to 'Community law' with 'retained EU law', which reflects the language of the Withdrawal Bill. The [covering note](#) highlights that the Ministry of Justice expects other amendments to be included in the final SI, which are still under consideration and are not shown in the sample version.

The other sample SIs published by the Government are:

- The Employment Rights (Amendment) (EU Exit) Regulations 2018;
- The Employment Rights (Amendment) (EU Exit) (No. 2) Regulations 2018;
- The Exotic Disease (Amendment) (England) (EU Exit) Regulations 2018;
- The Health and Safety (Miscellaneous Amendments) (EU Exit) Regulations 2019;
- The Seal Products (Amendments) (EU Exit) Regulations 2018;
- The Harbours, Highways, Merchant Shipping and Other Transport (Environmental Protection) (EU Exit) Regulations 2018; and
- The Timber and Timber Products (Placing on the Market)(EU Exit) Regulations 2018.

## **FCA publishes Quarterly Consultation No.20**

The Financial Conduct Authority (FCA) has published its [quarterly consultation](#) (CP18/6) on proposed miscellaneous amendments to the FCA Handbook.

In particular, the consultation sets out proposed amendments to:

- the Prudential sourcebook for Investment Firms (IFPRU) in order to:
  - promote clarity for firms and groups within the scope of, and ensure continued compliance with, the Bank Recovery and Resolution Directive (BRRD); and,
  - introduce a transitional provision for large exposures in order to mitigate the impact of the introduction of IFRS 9, in accordance with Regulation (EU) 2017/2395;
- the Supervision manual (SUP) and Payment Services Approach Document to implement European Banking Authority (EBA) Guidelines made under the recast Payment Services Directive (PSD2) and the requirements of the Payment Services Regulations 2017; and
- SUP to remove the annual reporting requirement for changes to Appointed Representatives (ARs), and changes to retirement income forms (REP015 and REP016) and guidance.

Comments on chapter 2, relating to IFPRU, are due by 3 April 2018 and on chapter 5 (payment services) by 13 April 2018. The deadline for comments on reporting requirements is 3 May 2018.



## **Crowdfunding: AMF publishes position-recommendation on marketing and run-off management of platforms**

The Autorité des Marchés Financiers (AMF) and the Autorité de Contrôle Prudentiel et de Résolution (ACPR) have been working through their joint unit on improving the protection of crowdfunding clients and investors. As such, the AMF has published a [position-recommendation](#) (DOC-2018-02) on the marketing and run-off management of platforms, which applies to crowdfunding investment advisors (CIAs) and investment services providers offering crowdfunding advice (ISP-CAs).

The position-recommendation is intended to integrate the major principles already published by the AMF on marketing financial products to retail clients and adapt them to the specific online nature of crowdfunding. The position-recommendation also deals with the specific case of minibons marketed by CIAs and ISP-CAs.

## **MiFID2: Consob gives intermediaries instructions in relation to their reporting obligations**

The Commissione Nazionale per le Società e la Borsa (Consob) has issued a [communication](#) (no. 0056318 dated 1 March 2018) requiring financial intermediaries to include in their ongoing reports to be submitted to Consob a list of measures adopted and/or in the process of being adopted to comply with the provisions implementing MiFID2.

The communication includes, by way of example, certain specific aspects that are of interest to Consob (e.g., product governance, investment advice, conflicts of interests, inducements, etc.).

In light of the above, Consob has also postponed certain deadlines for filing the required reports.

## **CBRC releases revised licensing requirements for foreign-funded banks**

The China Banking Regulatory Commission (CBRC) published its [Decision](#) on amending the CBRC Implementing Measures for Administrative Licensing Matters Relating to Foreign-funded Banks (FFBs) on 13 February 2018. The final decision largely follows the draft consulted on by CBRC on 28 December 2017.

Among other things, the Decision includes:

- a new section entitled 'Establishing or Investing in a Domestic Banking Financial Institution', which sets out the eligibility requirements, application procedures and application documents for a wholly foreign-owned bank (WFOE Bank) or a Sino-foreign joint venture bank (JV Bank) to apply to establish or invest in a domestic banking financial institution. The section reinforces the Circular on Relevant Issues Regarding Certain Business Activities Undertaken by Foreign-invested Banks released by CBRC earlier in 2017, which in principle and for the first time allows WFOE Banks and JV Banks to use proprietary funds to invest in PRC Banks. In addition, the Decision further provides that WFOE Banks and JV Banks will, as a result, be subject to certain requirements applicable where foreign financial institutions invest in a domestic banking institution;

- the replacement of prior approval requirements with a post-filing requirement to the relevant PRC regulators in relation to a WFOE Bank or a JV Bank to engaging in new businesses such as overseas wealth management business, custody business for overseas wealth management and securities investment funds, and a liquidated foreign invested financial institution to repatriate interest-bearing assets; and
- certain streamlined requirements, including the approval procedures for the establishment of a sub-branch, qualifications of senior management members of FFBs, and issuance of debt instruments and supplementary capital.

### **Hong Kong Government announces measures to develop bond market**

In its 2018-19 [budget speech](#), the Hong Kong Government has announced measures to develop Hong Kong's bond market.

The measures relate to:

- a Pilot Bond Grant Scheme, which is intended to attract local, Mainland China and overseas enterprises to issue bonds in Hong Kong. It will apply to eligible enterprises issuing bonds in Hong Kong for the first time, and such entities can apply for a grant for a maximum of two bond issuances. Each grant will amount to half of the issuer's expenses for the relevant bond issuance, up to a cap of HKD 2.5 million. Further details of the scheme will be announced by the Hong Kong Monetary Authority (HKMA) in due course;
- a proposal to submit a resolution to the Legislative Council as soon as possible for the launch of a green bond issuance programme of up to HKD 100 billion. The proceeds will be used to provide funding for the government's green public works projects. The programme is intended to demonstrate the government's commitment to promoting green finance and to encourage other issuers to use the Hong Kong capital markets to meet their green financing needs. The government aims to issue its inaugural green bond in 2018-19; and
- a Green Bond Grant Scheme to subsidise qualified green bond issuers using the Green Finance Certification Scheme. The certification scheme was launched by the Hong Kong Quality Assurance Agency in January 2018 in order to support green finance development in Hong Kong. Under the certification scheme, issuers of debt instruments proceeds of which support green projects for environmental protection can apply for a third-party conformity assessment. The eligibility of the relevant project is assessed at pre- and post-issuance stages.

### **Japanese FSA issues business improvement orders and suspension orders to cryptocurrency exchanges**

The Financial Services Agency of Japan (JFSA) has [issued](#) business improvement orders to seven virtual currency exchange operators, including operators with pending applications for registration, and business suspension orders for two operators through Local Finance Bureaus. Operators are required to make improvement reports to the JFSA by 22 March 2018 and the duration of the business suspension orders is one month.

In April 2017, the revised Fund Settlement Act of Japan came into effect and virtual currency exchange business was added to the list of businesses requiring registration and supervision by the JFSA. Under the Fund Settlement Act, the JFSA has imposed compliance requirements for virtual currency exchange business operators including on customer protection, cybersecurity, segregation of customers assets, and internal staffing and structures sufficient to comply with regulatory requirements.

After Coincheck was hacked on 26 January 2018, the JFSA announced that all virtual currency exchange business operators should report on their business and compliance status. The JFSA has identified a number of compliance shortfalls, including on:

- customer protection;
- system risk mitigation measures; and
- anti-money laundering and counter terrorist finance measures.

The JFSA has also announced that:

- 3 applications to register as virtual currency exchange business operators have been withdrawn and their exchange business will cease; and
- that the JFSA intends to set up a study group for virtual currency exchange business to discuss and explore further regulation of virtual currency exchange business.

The JFSA expects the study group to consider margin transactions of virtual currencies, and ICOs and other cryptocurrency fund raising activities. Research and discussion in the study group may result in new legislation covering those points.

## **US Alternative Reference Rates Committee reports on recommended alternative to US Dollar LIBOR**

The US Federal Reserve's Alternative Reference Rates Committee (ARRC) has issued a [report](#) summarising its selection of a broad Treasury repo financing rate – the secured overnight financing rate (SOFR) – as its recommended alternative to US dollar LIBOR. This report sets out an enhanced paced transition plan that seeks to promote the use of SOFR on a voluntary basis. The transition plan is designed to progressively build the liquidity required to support the issuance of, and transition to, contracts referencing SOFR and includes:

- the creation of a forward-looking term rate based on SOFR derivatives markets; and
- an initial examination of the contractual language commonly used in products referencing LIBOR, with a particular focus on fall-back language.

The ARRC is now looking to expand its membership and working groups to a broader set of market participants to further enhance coordination between users of corporate loans, floating rate notes, and other financial instruments to:

- identify appropriate forward-looking solutions for new transactions; and
- develop a framework to address legacy issues if LIBOR should cease to be published after 2021.

The Federal Reserve Bank of New York, in cooperation with the Office of Financial Research, plans to begin publishing SOFR on 3 April 2018.

## **SEC issues statement on potentially unlawful online platforms for trading digital assets**

The US Securities and Exchange Commission (SEC) has issued a [public statement](#) cautioning investors and the operators of online platforms for trading digital assets, such as certain coins/tokens issued in initial coin offerings (ICOs), that many platforms are operating unlawfully. The statement is the latest assertion of jurisdiction over ICOs and ICO platforms by the SEC, and comes in the midst of SEC investigative and enforcement activity in this area.

The statement explains that platforms allowing trading in digital assets that are securities are likely a 'securities exchange' under the Securities Exchange Act of 1934. As such, the SEC has stated that such platforms must register with the SEC as exchanges, or rely on an exemption from registration, such as the exemption available for SEC registered broker-dealers that operate alternative trading systems (ATSs) in accordance with SEC Regulation ATS.

Moreover, the SEC stressed that some platforms should register as broker-dealers, and those that offer digital wallet services may be required to register as transfer agents or clearing agents. The SEC also reminded market participants that platforms offering digital assets that are securities may need to register the offer of the assets under the Securities Act of 1933, or rely upon an available exemption.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **The new 2018 DIS arbitration rules**

The German Institution for Arbitration, Deutsche Institution für Schiedsgerichtsbarkeit e.V., (DIS), Germany's most important arbitration institution, has completely overhauled its arbitration rules. The new rules apply, as of 1 March 2018, to all DIS arbitration proceedings, and replaces the version from 1998. Rather than just a revision of the old rules, the completely new set of rules introduces several key changes aimed at improving procedural efficiency (time/cost efficiency), including streamlining deadline rules and a complete revision or introduction of various procedural provisions.

This briefing paper discusses the new rules.

[https://www.cliffordchance.com/briefings/2018/03/the\\_new\\_2018\\_disarbitrationrules.html](https://www.cliffordchance.com/briefings/2018/03/the_new_2018_disarbitrationrules.html)

### **Overseas data seizures – US Supreme Court hears oral argument, but Congress might get to the issue first**

When and how can the long arm of the US government access customer data sitting outside of the United States? And what does this mean for the numerous global companies that store consumer data, and for the data of billions of customers around the world? This week, the US Supreme Court heard arguments on these very questions in *United States v. Microsoft*.

This briefing paper discusses the Supreme Court case, international attention, and Congress's draft bill 'Clarifying Lawful Overseas Use of Data'.

[https://www.cliffordchance.com/briefings/2018/03/overseas\\_data\\_seizuresussupremecourthear.html](https://www.cliffordchance.com/briefings/2018/03/overseas_data_seizuresussupremecourthear.html)

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