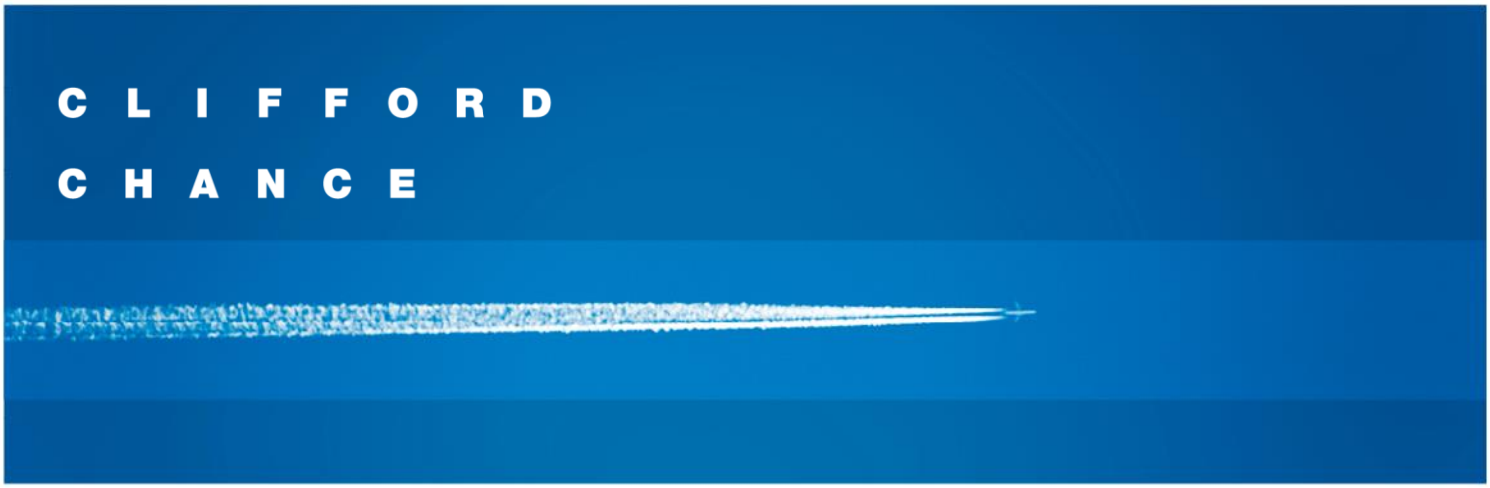

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EU Parliament adopts resolution on annual Banking Union report

The EU Parliament has adopted a non-legislative resolution on its Banking Union annual report for 2017 that includes sections on supervision, resolution and deposit insurance and supervision.

On resolution, the report welcomes the first application of the new resolution regime in 2017 but sets out concern at the mismatch between the state aid rules and EU legislation related to the ability of deposit guarantee schemes (DGSs) to participate in resolution as provided for in the Bank Recovery and Resolution Directive (BRRD) and Deposit Guarantee Schemes Directive (DGSD). The Parliament calls on the EU Commission to review its interpretation of the state aid rules with reference to the DGSD to guarantee that preventative and alternative measures can be implemented. The report also calls on the Commission to undertake a review of the framework of bank insolvency, including the 2013 Banking Communication, following the 2017 resolution cases which identified potential arbitrage opportunities due to a discrepancy between the rules on state aid applying under the resolution regime and national insolvency law. Among other things, the report also calls on Member States to implement Directive (EU) 2017/2239 on the priority ranking of unsecured debt instruments to ensure new buffers can be built up. On deposit insurance, the report includes a reference to the incompleteness of the Banking Union without the European Deposit Insurance Scheme (EDIS), and also points out ongoing discussions regarding the appropriate legal basis for the establishment of a proposed European Deposit Insurance Fund.

On supervision, the report highlights, among other things, views on:

- the importance of the cooperation between the European Banking Authority (EBA) as a regulatory authority and Single Supervisory Mechanism (SSM) as a supervisory authority and calls for concrete coordination between the EBA and European Central Bank (ECB) wherever possible to ensure the consistency of the single rulebook;
- concerns relating to non-performing loans (NPLs) in certain jurisdictions, including a call for better coordination between EU institutions on the issue;
- concerns relating to the risks stemming from the holding of Level III assets including derivatives, and welcoming the inclusion in the EBA's 2018 stress test procedures of specific risk management measures relating to Level 2 and Level 3 instruments;
- risks associated with sovereign debt, and potential 'home bias' of certain financial institutions overly investing in their own governments bonds, while one of the objectives of the Banking Union was to break the bank-sovereign risk nexus;
- addressing flaws identified in internal models in order to re-establish their credibility and achieve a level playing field across institutions;
- maintaining financial stability by bringing fintechs into scope of rules where their operations are of the same kind as activities of other players in the financial system, while protecting consumers; and
- the work by the EBA, European Securities and Markets Authority (ESMA) and SSM on supervisory convergence in the context of Brexit.

Banking reform package: EU Council Presidency withdraws latest compromise texts

The EU Council Presidency has withdrawn its latest compromise texts on the legislative proposals forming the banking reform package, which were published on 20 and 21 February 2018, and declared these texts null and void.

The withdrawn compromise texts related to the:

- proposed Directive to amend the Bank Recovery and Resolution Directive (BRRD 2);
- proposed Regulation to amend the Single Resolution Mechanism Regulation (SRMR 2);
- proposed Regulation to amend the Capital Requirements Regulation (CRR 2); and
- proposed Directive to amend the Capital Requirements Directive (CRD 5).

Brexit: EU Commission publishes draft Withdrawal Agreement

The EU Commission has published a draft text of the Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community (Euratom).

The text is intended to translate into legal terms the Joint Report published on 8 December 2017 by the negotiators of the EU and UK Government on the progress achieved in phase one of the Brexit negotiations, and also includes proposed text for the outstanding withdrawal issues mentioned, but not set out in detail, in the Joint Report.

The draft Withdrawal Agreement includes sections on:

- introductory provisions;
- citizens' rights;
- other separation issues such as goods placed on the market before the withdrawal date;
- the financial settlement;
- transitional arrangements; and
- institutional provisions.

It also sets out a protocol on Ireland/Northern Ireland, which operationalises the backstop solution set out in the Joint Report, which applies in the absence of other agreed solutions.

The text will be transmitted to the EU Council (Article 50) and the EU Parliament's Brexit Steering Group for discussion. The EU Commission intends to allow time for an exchange of views before the draft text is formally sent to the UK for negotiation.

MAR: ITS on exchange of information between competent authorities published in Official Journal

A Commission Implementing Regulation (2018/292) on implementing technical standards (ITS) with regard to exchange of information and assistance

between competent authorities under the Market Abuse Regulation (MAR) has been published in the Official Journal.

The ITS set out common procedures and forms to be used by competent authorities, including for the submission of requests for assistance, acknowledgements of receipts and replies to such requests. Under MAR, a competent authority is expected to have undertaken all actions reasonably practicable in its own jurisdiction before filing a request for assistance to another competent authority.

The ITS are based on a draft submitted by ESMA. The Commission views it necessary for the ITS to enter into force and apply as soon as possible, to ensure the smooth functioning of financial markets and considering that MAR is already in application.

The ITS will enter into force on 19 March 2018.

EMIR: ESMA updates validation rules

ESMA has updated its validation rules regarding Article 9 of the European Market Infrastructure Regulation (EMIR).

The validation rules for reports submitted under the revised technical standards:

- allow for the reporting of exchange-traded derivatives in products for which the effective date may be earlier than the date of execution; and
- clarify how the identification of the product should be validated in the reports submitted on or after 3 January 2018.

FATF announces outcomes of plenary meeting

The Financial Action Task Force (FATF) has announced the outcomes of its plenary meeting in Paris on 21-23 February 2018.

Following the meeting, the FATF issued a public statement identifying jurisdictions with strategic deficiencies in relation to anti-money laundering (AML) and combating the financing of terrorism (CFT). In particular, the Democratic People's Republic of Korea is subject to a FATF call on its members and other jurisdictions to apply counter-measures to protect the international financial system from the on-going and substantial money laundering and terrorist financing risks emanating from it. In addition, the FATF has issued a call on its members and other jurisdictions to apply enhanced due diligence measures proportionate to the risks arising from Iran. The FATF has also published an updated list of other jurisdictions with strategic AML/CFT deficiencies for which they have developed an action plan with the FATF.

Delegates also adopted a new counter-terrorist financing operational plan and a statement on the actions taken under the 2016 counter-terrorist financing strategy, which has been published by the FATF.

Among other things, delegates also discussed:

- updated FATF guidance on counter proliferation financing;
- amendments to Recommendation 2 on national cooperation and coordination;

- Brazil's progress in addressing the deficiencies identified in its mutual evaluation report since it agreed an action plan in November 2017;
- monitoring Iran's actions to address deficiencies in its AML/CFT system;
- revisions on information sharing to the FATF methodology;
- recent developments in de-risking;
- improving the understanding of virtual currency risks; and
- fintech and regtech initiatives.

Basel Committee consults on revised Pillar 3 disclosure framework

The Basel Committee on Banking Supervision (BCBS) has launched a consultation on an updated framework for Pillar 3 disclosure requirements. The proposals include new or revised requirements intended to reflect the Basel III post-crisis regulatory reforms finalised in December 2017. Among other things, BCBS is consulting on proposed requirements:

- for credit risk (including provisions for prudential treatment of assets), operational risk, the leverage ratio and credit valuation adjustment;
- for benchmarking a bank's risk-weighted assets (RWA) as calculated by its internal models, with RWA calculated according to the standardised approaches;
- for providing an overview of risk management, key prudential metrics and RWA; and
- on asset encumbrance and capital distribution constraints.

Separately, BCBS is also seeking feedback on the scope of application of the disclosure requirement on the composition of regulatory capital that was introduced in March 2017.

Comments are due by 25 May 2018.

MiFID2: Consob to comply with ESMA guidelines on product governance requirements, and guidelines on management body of market operators and data reporting services providers

The Commissione Nazionale per le Società e la Borsa (Consob) has announced its intention to comply with and make applicable ESMA's guidelines on MiFID2 product governance requirements in Italy. Amongst other things, these guidelines provide for indications intended to define target markets of recipients of products and services provided.

Consob also announced its intention to comply with and make applicable ESMA's guidelines on the management body of market operators and data reporting services providers. These guidelines, which have been published in all official languages of the EU, clarify which requirements ought to be applied to the management body of market operators and data reporting services providers. Consob ensured compliance with these requirements by means of its Decision no. 20249 of 28 December 2017 (New Consob Regulation on markets). The guidelines were to be followed from 3 January 2018.

Sejm adopts draft Act on Trading in Financial Instruments and Certain Other Acts, and draft Anti-Money Laundering and Terrorism Financing Act

The Sejm has adopted the draft Act Amending the Act on Trading in Financial Instruments and Certain Other Acts. The Act implements the provisions of MiFID2 into Polish law and will now be sent to the Senate for discussion.

The Sejm has also adopted the draft Act implementing the Fourth Anti-Money Laundering Directive (AMLD 4). The Act provides for, among other things, new categories of institutions obliged to apply the Anti-Money Laundering and Terrorism Financing Act and sets up the Central Register of Beneficial Owners. The Act also defines 'virtual currency'. The Act will not be sent to the Senate.

Federal Department of Finance consults on amendments to Capital Adequacy Ordinance

The Federal Department of Finance (FDF) has launched a consultation on amendments to the Capital Adequacy Ordinance (CAO). The main proposed revisions include the following:

- capital requirements for restructuring and resolution (gone concern requirements) will apply to the three domestic systematically important banks in addition to the systematically important banks which operate internationally;
- the treatment of systematically important banks' stakes in their subsidiaries will change from the current deduction of financial interests from capital to financial interest risk weighting;
- clarification will be provided on which units within a financial group perform systematically important functions and have to meet special requirements; and
- group companies which provide the services necessary for the continuation of a bank's business processes will now be subject to consolidated supervision by the Swiss Financial Market Supervisory Authority (FINMA).

The consultation ends on 30 May 2018. The revisions are proposed to enter into force on 1 January 2019.

SFC and FINMA sign fintech cooperation agreement

The Securities and Futures Commission (SFC) and the FINMA have signed an agreement to establish a framework for cooperation on financial technology (fintech).

Under the agreement, which came into effect on 23 February 2018, the SFC and the FINMA will cooperate to share information on emerging fintech trends, developments and related regulatory issues as well as on organisations which promote innovation in financial services. In addition, the agreement provides for a bilateral mechanism for referrals of innovative firms seeking to enter one another's markets.

Revised anti-money laundering guidelines gazetted

The SFC, the Hong Kong Monetary Authority (HKMA) and the Insurance Authority have gazetted their respective guidelines on anti-money laundering and counter-terrorist financing (SFC circular; HKMA circular; Insurance Authority circular). In addition, the SFC has gazetted its prevention of money laundering and terrorist financing guideline for associated entities.

The guidelines have been revised to incorporate provisions which reflect the relevant amendments in the recently enacted Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Ordinance 2018.

The key changes include the following:

- aligning the threshold of defining beneficial ownership from the current 'not less than 10%' to 'more than 25%', having regard to the prevailing FATF standard and international practice;
- introducing flexibility to the measures for verifying a customer's identity, in light of the technological development in the methods used by financial institutions for obtaining information relating to customers;
- permitting financial institutions to rely on foreign financial institutions within the same financial group as intermediaries to carry out customer due diligence measures;
- reflecting the criteria relating to wire transfers in the FATF recommendations by requiring the recording of basic information about a recipient; and
- changing the record-keeping period from 'six years' to 'at least five years'.

The revised guidelines came into effect on 1 March 2018.

The regulators have advised financial institutions under their supervision to review the revised guidelines and take necessary steps to ensure continued compliance with all the applicable requirements.

HKMA issues circular on implications of fintech developments for banks and bank supervisors

The HKMA has issued a circular to authorised institutions to draw their attention to a paper entitled 'Sound Practices: Implications of Fintech Developments for Banks and Bank Supervisors' issued by the BCBS in February 2018.

The HKMA recommends authorised institutions study the paper carefully to understand the risks and opportunities brought by fintech developments. As noted in the paper, the circular warns that if the strategic risk posed by increasing competitive pressure from fintech firms is not properly managed, there will be a growing risk of banks losing direct relationships with their customers or even being gradually displaced by fintech firms which are able to provide a better customer experience and tailor-made financial services. The HKMA expects senior management of authorised institutions to assess the strategic risk facing their institutions and develop suitable plans to monitor and manage such risk on an on-going basis. For locally-incorporated authorised institutions, the assessment should be presented to the board of directors for deliberation.

In addition, the HKMA has completed a round of discussions with the senior management of major banks to understand how they plan to cope with the challenges brought by technological advancement. The HKMA has indicated that it will continue to monitor and assess how authorised institutions manage technology related risks as part of its on-going supervisory work.

Revised ASEAN Collective Investment Schemes Framework and updated Standards of Qualifying CIS agreed

The Securities Commission Malaysia, the Monetary Authority of Singapore, and the Securities and Exchange Commission of Thailand have signed a Memorandum of Understanding to enhance the ASEAN Collective Investment Schemes (CIS) Framework.

With effect from 23 February 2018, the revised framework enables a fund manager operating in Singapore, Malaysia or Thailand to offer its fund to retail investors in one or both of the other jurisdictions under a streamlined authorisation process. Fund managers using the framework will have to abide by the updated Standards of Qualifying CIS.

The revised framework, which incorporates feedback from extensive industry consultations, seeks to promote more cross-border offerings of ASEAN funds and allow fund managers to offer a broader range of fund products to investors in the region.

Amongst other things, the following key changes have been made to the framework and Standards of Qualifying CIS:

- lowered qualifying criteria for fund managers from a minimum AUM of USD 500 million to USD 350 million, potentially enabling a wider range of fund managers to participate in the framework;
- a shortened reviewing time to within 21 calendar days for the authorisation of a fund by a regulator of each participating jurisdiction;
- an increased portion of a fund's assets that may be sub-managed by a manager not regulated by a regulator from 20% to 100%;
- a requirement for additional capital for managers with AUM in excess of USD 500 million now capped at a maximum of USD 20 million in additional capital; and
- an additional requirement for the manager to keep or cause to be kept books and records as will sufficiently explain the transactions of the Qualifying CIS and all transactions in the Qualifying CIS units.

US Treasury releases report on Orderly Liquidation Authority

In response to a Presidential Memorandum, the US Department of the Treasury has released a report on its review and recommendations for the Orderly Liquidation Authority (OLA) provided for under to the Dodd-Frank Act, which allows the Federal Deposit Insurance Corporation (FDIC) to take over and liquidate systemically important financial institutions.

Treasury recommends retaining OLA as an emergency tool for use only under extraordinary circumstances. Treasury has also recommended a revised Bankruptcy Code resolution mechanism to make bankruptcy a more effective

option for financial firms. Treasury refers to this revised bankruptcy process as 'Chapter 14' bankruptcy. Among other things, the report includes the following recommendations to reform OLA:

- eliminating the FDIC's authority to treat similarly situated creditors differently on an ad hoc basis;
- with respect to use of the Orderly Liquidation Fund (OLF), guarantees of private sector lending should be used as opposed to direct loans;
- the backstop assessment should be imposed as soon as reasonably possible if an OLF loan is not repaid; and
- reforms to the judicial review provisions related to use of the OLA to provide additional assurance that the government's decision to appoint the FDIC as receiver of a financial company is the product of reasoned and well-supported analysis.

RECENT CLIFFORD CHANCE BRIEFINGS

Navigating the transition to PSD2 – further challenges ahead?

13 January 2018 marked the deadline for national implementation of the revised Payment Services Directive (PSD2). However, this is by no means the end of the story, as some Member States have not yet transposed PSD2 into national law and several of the related guidelines and technical standards do not yet apply.

This briefing considers how firms may seek to navigate this transitional period and remaining implementation challenges.

https://www.cliffordchance.com/briefings/2018/02/navigating_the_transitiontopsd2furthe.html

Trump administration heightens pressure on entities engaged in prohibited transactions with North Korea — implications for non-US financial institutions

On 23 February 2017, the Trump administration heightened its pressure on North Korea with new sanctions against 27 entities and 28 vessels either registered or flagged in North Korea, China, Singapore, Taiwan, Hong Kong, Marshall Islands, Tanzania, Panama, and Comoros.

This briefing discusses the implications for non-US financial institutions, which are now under increased pressure to strengthen their customer and transactional due diligence, and the rigour of their risk management programmes.

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

The UK's approach to Brexit transition

The UK and the EU hope to reach an agreement on a Brexit transition period at the meeting of the European Council on 22 and 23 March. In the lead up to that meeting, both the EU and UK have set out their proposals for how an implementation phase could work.

This briefing paper compares the two proposals, including the two approaches to:

- transition period duration;
- new EU laws;
- institutional arrangements;
- third country agreements;
- supervision and enforcement;
- implementation;
- long term residence rights and the financial settlement; and
- the end of the period.

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

PRA consults on interpretation of eligibility criteria for unfunded credit risk mitigation

The Prudential Regulation Authority (PRA) has issued a consultation on the eligibility of guarantees as unfunded credit protection under the Capital Requirements Regulation (CRR). Of particular note, the PRA sets out its view that a guarantor should be contractually obliged to pay out 'within days' of the obligor's failure to pay, with some limited exceptions. This could potentially have a significant impact on the use of insurance as credit risk mitigation for capital purposes.

This briefing discusses the proposals, including their timing and how they may affect businesses.

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

UK authorities secure unexplained wealth orders for the first time

On 28 February 2018, the UK National Crime Agency (NCA) announced that it had secured two unexplained wealth orders (UWOs) to investigate assets totalling GBP 22 million believed to be ultimately owned by a politically exposed person. The orders relate to two properties in London and South East England. The NCA and other selected UK authorities have been able to seek such orders, made under new provisions of the Proceeds of Crime Act introduced by the Criminal Finances Act 2017, since 31 January 2018.

This briefing discusses UWOs and how they may affect financial institutions in the future.

https://www.cliffordchance.com/briefings/2018/03/uk_authorities_secureunexplainedwealthorder.html

New rules on monitoring of currency operations in Russia — Abolition of deal passports

On 1 March 2018, Instruction No. 181-I of the Central Bank of Russia of 16 August 2017 enters into force, bringing notable changes to the treatment of currency operations. One of the main aims of the new regulation is to simplify

the currency control requirements for persons performing currency operations, particularly as regards monitoring ('uchet').

This briefing presents an overview of key changes in the regulatory requirements and addresses certain practical aspects deserving of attention.

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

Netting – a UAE perspective

The legal recognition of close-out netting provisions in financial contracts is increasingly significant to parties in the UAE, particularly as the region advances implementation of Basel III principles. The consequences of non-netting also impacts a wide range of UAE market participants beyond financial institutions.

This briefing explores:

- the role of netting as a key tool to mitigate counterparty credit risk as recognised by international legislative bodies and trade associations;
- key elements of a legal framework to support netting enforceability;
- successes to date in UAE financial free zones where legal certainty on close-out netting has been achieved; and
- market participants impacted by netting enforceability: a case for federal-level netting law.

The briefing was first published by IFLR on 26 January 2018.

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

Hong Kong eyes international best practices with 2018 amendment to AML Ordinance

This briefing discusses the amendments to Hong Kong's Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) (AMLO) and the Companies Ordinance (Cap 622), which will come into effect on 1 March 2018 to bring Hong Kong's anti-money laundering and counter-terrorist financing (AML/CTF) regime closer to international standards promulgated by the Financial Action Task Force (FATF), an international AML standard setting body.

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

Securities and Exchange Commission issues new cybersecurity disclosure guidance

On 21 February 2018, the Securities and Exchange Commission issued a statement and interpretive guidance to assist issuers in preparing disclosures regarding cybersecurity risks and incidents.

This briefing discusses the new guidance.

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

Export Control Reform Act of 2018 — risks and opportunities in the modernization of US export controls

Perhaps as a treat for Chinese New Year, House Foreign Affairs Committee Chairman Ed Royce (R-CA) introduced a bill on Thursday 15 February to renew the legislative basis for US dual use export controls for the first time in nearly twenty years.

The bill, entitled the 'Export Control Reform Act of 2018' (ECRA), seeks to repeal the long-expired Export Administration Act of 1979 (EAA) and replace it with a legislative framework intended to modernize the US dual use export control regime while addressing perceived threats to US interests from non-US competitors.

This briefing discusses the bill, including how its proposals compare with existing US export controls and how the reforms may relate to the 'Foreign Investment Risk Review Modernization Act of 2017' (FIRRMA) currently working its way through Congress.

https://www.cliffordchance.com/briefings/2018/02/the_export_controlreformactof2018risksan.html

US Court of Appeals ruling calls for elimination of risk retention obligations for open-market CLO managers

The US Court of Appeals for the District of Columbia ruled in favor of The Loan Syndications and Trading Association on 9 February 2018 in a case that challenged the application of credit risk retention requirements to certain CLO managers.

Specifically, the court decided that the US risk retention rules should not apply to managers of issuers of CLOs that are collateralized by loans purchased in the open market. The basis for the ruling is that these CLO managers neither originate the underlying loans nor hold them as assets, and they therefore do not qualify as 'securitizers' under the applicable statutory provision.

This briefing discusses the ruling, and examines its potential effect.

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

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