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INTERNATIONAL REGULATORY UPDATE 16 – 20 APRIL 2018

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EU Parliament adopts fifth Anti-Money Laundering Directive

The EU Parliament plenary has adopted the fifth Anti-Money Laundering Directive (MLD5) following agreement in trilogue negotiations with the EU

Council. MLD5 forms part of the EU Commission's action plan on strengthening the fight against terrorist financing, which was adopted in February 2016.

Among other things, MLD5 will establish the right to access information on the beneficial ownership of firms operating in the EU, as well as beneficial ownership of trusts and similar arrangements, to those who can demonstrate a 'legitimate interest'. MLD5 will also extend the current regime to cover all forms of tax advisory services, letting agents, art dealers, electronic wallet providers and virtual currency exchange service providers. In particular, virtual currency exchange platforms and custodian wallet providers will be required to apply customer due diligence controls, including customer verification requirements, and the platforms will require registration alongside currency exchanges, cheque cashing offices, and trust and company services providers.

The Directive will enter into force three days after publication in the Official Journal with a deadline for transposition into Member States' national law 18 months later.

ECON Committee publishes draft reports on legislative proposals to amend prudential rules for investment firms

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published its draft reports on the legislative proposals to amend the current EU prudential rules for investment firms. The proposals for a directive and a regulation would amend the existing prudential framework set out in the Capital Requirements Regulation (CRR) and Directive (CRD 4) and in MiFID2 and MiFIR.

Overall the rapporteur broadly supports the measures set out in the legislative proposals but suggests changes to increase regulatory certainty, improve flexibility and provide a fair playing field to third-country firms. Changes suggested by the rapporteur include:

- enabling competent authorities to allow Class 3 firms to use different instruments than those listed in the CRR to fulfil their own funds requirements;
- amendments to allow the movements between Class 2 and Class 3 to happen as easily as possible for investment firms;
- significantly simplifying rules on reporting, governance and remuneration; and
- ensuring a more robust and adapted equivalence regime, avoiding the potential for EU banks to be placed in a less favourable position than third country investment firms.

CRR: EU Commission publishes draft implementing regulation on transitional periods for own funds requirements for CCPs

The EU Commission has published a draft implementing regulation on the extension of the transitional periods related to own funds requirements for exposures to central counterparties (CCPs) under the CRR. The draft implementing regulation would extend the transitional periods for own funds requirements by six months until 15 December 2018.

Comments are due by 15 May 2018.

CRR: EBA publishes draft ITS on supervisory reporting

The European Banking Authority (EBA) has published a final report on draft implementing technical standards (ITS) to amend the ITS on supervisory reporting (Commission Implementing Regulation (EU) No 680/2014), alongside new ITS on reporting for resolution plans and the corresponding data point model (DPM) and XBRL taxonomy.

The amending ITS are intended to update the existing ITS with:

- new information on prudent valuation for fair-valued items and supplementary information on credit risk;
- high-level information on securitisation subject to the revised securitisation framework introduced by Regulation (EU) 2017/2401 amending the CRR and revised information on selected Pillar 2 items (COREP); and
- other minor amendments.

The new ITS will replace Commission Implementing Regulation (EU) 2016/1066 in order to present a clearer scope of application of the minimum resolution framework, detailed minimum procedural information, new templates, and a full set of technical annexes to facilitate integration into banks' business processes and automation.

The draft ITS will be submitted to the EU Commission for endorsement. The EBA expects the technical standards to apply from December 2018 for reporting reference data as of 31 December 2018.

CRR: EBA consults on guidelines on high risk exposures

The EBA has published a consultation paper on its guidelines regarding the types of exposures to be associated with high risk under the CRR. The guidelines specify which types of exposures are associated with particularly high risk and under which circumstances. The guidelines also clarify the notion of investments in venture capital firms and private equity.

The consultation discusses the exposure classes that could contain high risk items. It also specifies the method which institutions can use to inform supervisors about the occurrence of high-risk items in their portfolios.

Comments are due by 17 July 2018

BRRD: EBA publishes revised draft ITS on reporting for resolution plans

The EBA has published a draft final report on ITS on reporting for resolution plans, which are intended to replace the ITS published in the Official Journal in 2016 (Commission Implementing Regulation (EU) 2016/1066).

The EBA is putting forward new draft ITS in light of the experience gained by resolution authorities in preparing resolution plans. In particular, the EBA intends the revised ITS to:

- clarify the scope of the reporting framework in line with the Bank Recovery and Resolution Directive (BRRD) by establishing a minimum set of reporting obligations for institutions;

- further specify minimum procedural and technical reporting requirements; and
- update the templates to be used when reporting.

The ITS are intended to provide for a new framework to be operational in 2019 when resolution authorities collect information as of 31 December 2018.

FSB publishes toolkit for mitigating misconduct risk

The Financial Stability Board (FSB) has published a report setting out a toolkit that firms and national authorities can use to mitigate misconduct risk.

The toolkit sets out nineteen options which relate to:

- mitigating cultural drivers of misconduct;
- strengthening individual responsibility and accountability; and
- addressing the "rolling bad apples" phenomenon.

Firms and authorities may apply the tools, either separately or in combination, that best conform to their business or supervisory approach and their legal and regulatory frameworks. The toolkit is not intended to not constitute guidance and the FSB expects it to evolve as firms and supervisors learn from their experiences.

The FSB has also announced its intention to consult on national reporting of data on the use of compensation tools in due course.

UK and US Governments establish Financial Regulatory Working Group

HM Treasury (HMT) has published a joint statement on the formation of the US-UK Financial Regulatory Working Group, which is intended to be a forum for HMT and the US Treasury Department, along with relevant financial regulatory authorities, to exchange views on the regulatory relationship between the United States and UK.

The statement notes that the prominence of US and UK financial markets and the transition in the UK's regulatory relationship with the EU, provides an opportunity for the UK and US to formalise engagement on bilateral regulatory cooperation.

The Working Group is intended to have general operational objectives relating to:

- improving transparency;
- reducing uncertainty;
- identifying potential cross-border implementation issues;
- avoiding regulatory arbitrage; and
- working towards compatibility, as appropriate, of each other's national laws and regulations.

EU (Withdrawal) Bill: HMT publishes illustrative sample SIs, including draft Financial Regulators' Powers Regulations

HM Government has published three additional illustrative samples of statutory instruments (SIs) under the European Union (Withdrawal) Bill (EUWB), including the draft Financial Regulators' Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018. The covering note accompanying the SI highlight that the SIs are still in development.

Through the draft Financial Regulators' Powers Regulations, HMT proposes that ongoing responsibilities under certain EU law Level 2 technical standards, referred to as binding technical standards (BTS), will be transferred from the European Supervisory Authorities (ESAs) to the Bank of England (BoE), Prudential Regulation Authority (PRA), Financial Conduct Authority (FCA) and Payment Systems Regulator (PSR). Moreover, HMT also proposes to delegate to the UK financial regulators the EUWB deficiency-fixing power in order to allow the regulators to correct deficiencies in BTS and FSMA rules that arise as a result of the UK's withdrawal from the EU. Analogous to HMT's exercise of these deficiency-fixing powers, the regulators will be subject to certain constraints including a 2-year time limit on the power. The SI sets out the procedure with which the regulators must comply when making an EU Exit Instrument, which will be the name of the instrument used to correct deficiencies in BTS and FSMA rules.

Part 2 of the draft SI and schedules specify the appropriate regulator for each BTS, although HMT notes that the list in the example SI is not final and has been provided for illustrative purposes only. Part 3 of the draft SI sets out the basis on which UK regulators will exercise their ongoing functions in relation to BTS, including the procedure for making 'Standards Instruments', which will be used to make BTS in the future.

Alongside the draft Financial Regulators' Powers Regulations, HM Government has also published:

- the draft European Union (Definition of Treaties Orders) (Revocation) (EU Exit) Regulations 2018; and
- the draft European Parliamentary Elections Etc. (Repeal, Revocation, Amendment and Saving Provisions) (United Kingdom and Gibraltar) (EU Exit) Regulations 2018.

HM Government is sharing illustrative sample SIs to show how the powers in the EUWB may be used.

BaFin publishes revised version of MaComp

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) has published its revised circular on minimum requirements for the compliance function and additional requirements governing rules of conduct, organisation and transparency (MaComp) for investment services firms (Wertpapierdienstleistungsunternehmen).

The circular was revised to reflect current legal and administrative developments, including those resulting from MiFID2 and the revised German Securities Trading Act (Wertpapierhandelsgesetz) as well as related delegated acts.

The revised circular includes additional modules reflecting relevant European Securities and Markets Authority (ESMA) guidelines in relation to product governance, assessment of knowledge and competence, complex debt instruments and structured deposits and cross-selling practices.

Further changes are expected to reflect further ESMA guidelines, including in relation to suitability requirements under MiFID2.

Bank of Italy consults on implementation of ECB guidelines on exercise of options and discretions in relation to less significant institutions

The Bank of Italy has published a consultation document on the implementation of the European Central Bank's Guideline (EU) 2017/697 of 4 April 2017 on the exercise of options and discretions available in EU law by national competent authorities in relation to less significant institutions.

Within the limits of its regulatory powers, the Bank of Italy is responsible for ensuring the adjustment of national law with a view to ensuring compliance with the European framework.

Comments need to be submitted within 40 days of the publication of the consultation document on 18 April 2018.

CSSF issues circular on ESMA guidelines on process for calculation of indicators to determine substantial importance of a CSD for a host Member State

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a new circular (18/689) on the European Securities and Markets Authority's (ESMA's) guidelines on the process for the calculation of the indicators to determine the substantial importance of a CSD for a host Member State (ESMA70-708036281-67). The circular is addressed to central securities depositories (CSD).

The guidelines are intended to ensure common, uniform and consistent application of the provisions of Article 24(4) of the Central Securities Depositories Regulation (CSDR). In particular, they provide guidance on the process for the collection, processing and aggregation of the data and information necessary for the calculation of the indicators to determine the substantial importance of a CSD for the functioning of the securities markets and the protection of investors in a host Member State.

By means of the circular the CSSF has adopted the guidelines, which apply as of 5 April 2018.

FSA publishes revised approach on implementation of TLAC framework

The Financial Services Agency (FSA) has published a revised document on its approach to introducing the total loss-absorbing capacity (TLAC) framework in Japan. The approach, originally announced in April 2016, is based on the Principles on Loss-absorbing and Recapitalisation Capacity of Global Systemically Important Financial Institutions (G-SIBs) in Resolution published by the Financial Stability Board (FSB) in November 2015.

The FSB principles are intended to facilitate the orderly resolution of a G-SIB when it fails in a manner that minimises impacts on financial stability without

exposing taxpayers to loss and ensures the continuity of its critical functions by imposing the losses on shareholders and creditors, in addition to meeting the recapitalisation needs of the G-SIB.

Under the TLAC framework, loss-absorbing and recapitalisation capacity will be required of G-SIBs alongside the regulatory capital adequacy requirement published by the Basel Committee on Banking Supervision (BCBS). Considering the close relationship between the TLAC framework and the BCBS requirements, the FSA intends to implement the TLAC requirements mainly through amendments to the FSA Administrative Notices on Capital Adequacy Rules (Pillar 1 Notices). The FSA also intends to amend relevant regulations (including supervisory guidelines) in due course as it deems necessary.

In line with the TLAC framework, banks designated as G-SIBs by the FSA in accordance with the designation by the FSB (Japanese G-SIBs) will be covered by the TLAC requirements in Japan. In addition, for internationally active financial groups, entry into resolution of one or more of their foreign subsidiaries could result in their losses being passed to the parent entity in Japan, potentially leading to a resolution of the group as a whole. The FSA has indicated that, provided that they have particular systemic significance for the Japanese financial system if they fail, a sufficient level of loss-absorbing capacity should be available at the time of resolution, as the need to address the 'too big to fail' problem is particularly high for such financial groups. In such a case, the FSA considers it necessary to include certain non-G-SIBs in the scope of the requirements for maintaining sufficient loss-absorbing and recapitalisation capacity.

The FSA intends to classify Mitsubishi UFJ Financial Group, Sumitomo Mitsui Financial Group, Mizuho Financial Group and Nomura Holdings Group as the covered SIBs (on the basis that they are Japanese G-SIBs or Japanese D-SIBs on the implementation dates) and plans to start implementing the TLAC framework from 31 March 2019 for Mitsubishi UFJ Financial Group, Sumitomo Mitsui Financial Group, Mizuho Financial Group and from 31 March 2021 for Nomura Holdings Group.

New York Attorney General launches virtual markets integrity initiative

The New York Attorney General has launched a fact-finding inquiry into the policies and practices of major US and non-US cryptocurrency platforms named the 'Virtual Markets Integrity Initiative'. As part of the initiative, the New York State Office of the Attorney General has sent a letter and questionnaire to thirteen exchanges specializing in cryptocurrencies.

The questionnaires inquire about six major topic areas, including:

- ownership and control;
- basic operation and fees;
- trading policies and procedures;
- outages and other suspensions of trading;
- internal controls; and
- privacy and money laundering.

Among other areas of interest, the recipients are asked to describe their approach to combating suspicious trading and market manipulation; their policies on the operation of bots; their limitations on the use of and access to non-public trading information; and the safeguards they have in place to protect customer funds from theft, fraud, and other risks.

The Attorney General's office intends to analyze the responses, compare them across platforms, and at the conclusion of this process, present what it has learned to the public.

Australian government consults on relaxing ownership cap in banking sector

In the 2017-18 Budget, the Australian government announced that it would look to relax the legislative 15% ownership cap to reduce barriers for innovative new entrants into the banking sector with the intention of increasing competition and offering consumers more choice.

Views are therefore sought on the exposure draft of the Financial Sector (Shareholdings) Amendment (Relaxing Ownership Restrictions) Bill 2018, which increases the current 15% ownership restriction to 20% for insurance companies (life insurance and general insurance companies), Authorised Deposit-taking Institutions and relevant holding companies under the Financial Sector (Shareholdings) Act 1998 (FSSA).

The new law also introduces a streamlined FSSA approval path for owners of domestically incorporated companies with assets less than the relevant threshold applying to become a financial sector company. These owners may be eligible to receive streamlined approval to hold a stake of more than 20% in a qualifying new or recently established financial sector company where certain criteria are met.

The new law also removes the misalignment between the 15% cap under the FSSA before Ministerial approval is required, and the 20% foreign ownership threshold that exists under the Foreign Acquisitions and Takeover Act 1975. It also gives the Treasurer the power to approve an unacceptable shareholding arrangement if the applicant can satisfy the Treasurer that holding a stake of more than 20% is in the national interest.

Responses to the consultation are accepted until 4 May 2018.

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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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