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INTERNATIONAL REGULATORY UPDATE 28 – 31 AUGUST 2018

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ECON Committee publishes report on EU relationships with third countries concerning financial services regulation and supervision

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published an own-initiative report dated 18 July 2018 setting out a motion for a Parliament resolution on relationships between the EU and third countries concerning financial services regulation and supervision, which was adopted by the Committee on 11 July 2018.

Among other things, the motion for a resolution calls for:

- the Commission to adopt a legislative act establishing a clear framework for a transparent, coherent and consistent application of equivalence procedures which introduces an improved process for the determination, review, suspension or withdrawal of equivalence;
- equivalence decisions to be subject to ongoing monitoring by the relevant European Supervisory Authority (ESA) to address the relevant legislation, enforcement practices and supervisory practices, as well as major legislative amendments and market developments, in the third country concerned and for the outcome of such monitoring to be made public;
- the Commission to publicly review the current equivalence regime and to assess whether it contributes to achieving a level playing field between EU and third-country financial institutions, while preserving EU financial stability, market integrity, investor and consumer protection and the functioning of the internal market; and
- the Commission to consider the possibility of introducing an application process for granting equivalence.

The motion is scheduled to be voted on by the Parliament's plenary session on 11 September 2018.

EBA consults on amendments to supervisory reporting

The European Banking Authority (EBA) has launched three consultations on amendments to implementing technical standards (ITS) as part of its reporting framework 2.9, which is intended to ensure reporting requirements are in line with changes to the regulatory framework.

The consultations relate to the:

- ITS on COREP liquidity coverage requirement (LCR), which are amended pursuant to the Commission Delegated Regulation on the LCR for credit institutions adopted and published on 13 July 2018 under which the calculation of LCR will be amended;
- ITS on COREP-securitisations reporting, due to changes to the securitisation framework and to ensure consistency between reporting and disclosure requirements; and
- ITS on supervisory reporting on FINREP, which will be amended to strengthen supervisors' ability to assess and monitor non-performing portfolios by way of collecting more granular information on these assets on a recurring basis, amendments to reporting of profit or loss (P&L) items, and minor amendments to reported data on leases due to changes to IFRS 16.

The EBA intends to publish draft Data Point Models (DPM) on the changes in September 2018. Comments on the proposed amendments to the ITS on COREP LCR are due by 26 October 2018. Comments on COREP-securitisations reporting and FINREP are due by 27 November 2018.

Basel Committee publishes technical amendment to Pillar 3 disclosure requirements

The Basel Committee on Banking Supervision (BCBS) has published a technical amendment to Pillar 3 disclosure requirements on the regulatory

treatment of accounting provisions. The amendment relates to additional Pillar 3 disclosure requirements for those jurisdictions implementing an expected credit loss (ECL) accounting model as well as for those adopting transitional arrangements for the regulatory treatment of accounting provisions.

The additional disclosures relate to:

- the 'fully loaded' impact of ECL transitional arrangements used in TLAC resources and ratios in template KM2;
- allocation of general and specific provisions for standardised approach exposures in template CR1; and
- the rationale for the categorisation of ECL accounting provisions in general and specific categories for standardised approach exposures in table CRB.

The Pillar 3 amendments will come into effect on 1 January 2019 and are applicable for banks using the ECL accounting model after this date as well as for those banks using transitional arrangements for regulatory treatment of accounting provisions.

MiFID2/MiFIR: Bank of Italy consults on implementing measures

The Bank of Italy has launched a public consultation on a set of proposed implementing measures intended to fully transpose MiFID2 and MiFIR into the Italian legal and regulatory framework.

This set of provisions consists of two parts where:

- Part I includes a new regulation which sets out provisions regulating, amongst other things, organisational matters and governance requirements applicable to banking and financial institutions which provide investment services and activities and collective investment management activities; and
- Part II includes a set of proposed amendments to the Circular No. 285/2013 of the Bank of Italy governing, amongst other things, the authorisation procedures applicable to Italian and non-EU banks.

The consultation runs until 23 October 2018.

CSSF issues circular on authorisation and organisation of Luxembourg investment fund managers

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a new circular (18/698) concerning the authorisation and organisation of Luxembourg investment fund managers (IFMs), including Luxembourg UCITS management companies and self-managed UCITS and Luxembourg alternative investment fund managers (AIFMs) and self-managed alternative investment funds (AIFs). The circular also includes separate provisions applicable to Luxembourg Chapter 16 management companies which do not qualify as AIFMs. It further introduces specific provisions on the fight against money laundering and terrorist financing applicable not only to IFMs, but also to Luxembourg entities carrying out the activity of registrar agent of investment funds.

The main purpose of the circular is to clarify, in a single document, the fundamental legal and regulatory conditions applicable to the authorisation,

and the maintaining of the licence, of all Luxembourg IFMs by the CSSF, in particular in terms of shareholding structure, capital and own funds, management bodies, central administration, internal governance arrangements and delegation of functions. To a large extent, the circular codifies the CSSF's existing regulatory practice already complied with by IFMs. However, the circular also imposes new requirements, in particular as regards (i) the maximum number of mandates that can be exercised, and the working time to be spent, by the directors/managers and the conducting officers of Luxembourg IFMs, and (ii) the minimum number of conducting officers and full-time employees required within Luxembourg IFMs.

Circular 18/698 entered into force with immediate effect and repealed Circular 12/546 regarding the authorisation and organisation of Luxembourg UCITS management companies.

FINMA consults on revision of its Anti-Money Laundering Ordinance for FinTech licence holders

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on the revision of the FINMA Anti-Money Laundering Ordinance (AMLO-FINMA).

In mid-June 2018, the Swiss Parliament approved a new licensing category for financial institutions, known as the FinTech licence, with the aim of promoting financial market innovation. This new licensing category under the Banking Act (BA) will apply to institutions which accept public deposits of up to CHF 100 million but which do not invest or pay interest on them. These institutions will be subject to the Anti-Money Laundering Act (AMLA) and its due diligence requirements. As a result, it has become necessary to revise the FINMA Anti-Money Laundering Ordinance (AMLO-FINMA).

As a rule, all financial institutions are subject to similar due diligence requirements relating to combating money laundering. However, as most FinTech licence applicants are likely to be smaller institutions, FINMA proposes to introduce some organisational relaxations for such institutions. These principles will now be set out in the Banking Ordinance. One specific relaxation in line with the principle of proportionality will see small institutions, unlike banks, be exempt from the requirement to establish an independent anti-money laundering unit with monitoring duties (Art. 25 AMLO-FINMA). For the purposes of the draft ordinance, 'small' institutions are those with gross revenues of less than CHF 1.5 million.

The consultation period on AMLO-FINMA will end on 26 October 2018. The Federal Council aims to implement the partially revised Banking Act with effect from 1 January 2019. If possible, the amendments to AMLO-FINMA will enter into force at the same time.

Borsa Istanbul announces introduction of swap market

Borsa Istanbul A.Ş. (the Istanbul Stock Exchange) has announced that it has started work on setting up a swap market, beginning with foreign exchange (FX) markets. Borsa Istanbul expects a rapid expansion in the markets to be introduced as part of the government's plans to make Istanbul a financial hub, noting that swap markets are among the most active in the global financial markets.

The swap market is intended to be open to all financial sector participants and is expected to accommodate mainly Turkish banks, which were affected by

the Banking Regulation and Supervision Authority's (BRSA's) recent decision to partially limit the swap transactions to be entered into by Turkish banks with foreign counterparties.

Istanbul Takas ve Saklama Bankası A.Ş. (the Clearing House of Turkey) will carry out the clearing transactions for this new centralised market as central counterparty (CCP) and will provide risk and collateral management services in line with its rules and practices. Accordingly, swap transactions previously traded in the over-the-counter (OTC) market between private parties will become exchange clearable.

The swap market is envisaged to operate initially for FX markets only. However, Borsa Istanbul has indicated that it will continue to work on new products for the swap markets in a bid to expand existing derivative markets. Borsa Istanbul has further announced that the principles and rules applicable to the swap markets are to be determined publicly, in consultation with stakeholders.

Following the recent announcement by the Capital Markets Board of Turkey (Sermaye Piyasası Kurulu) in respect of the appointment of the Central Registration Agency (Merkezi Kayıt Kurumu) as the central trade repository for OTC derivative transactions and the BRSA's recent decision partially to restrict Turkish banks from entering into FS swaps, the Turkish government is seeking to centralise the FX market to the extent possible, in a bid to maintain the Turkish Central Bank's control over the markets in light of the recent depreciation of the Turkish lira.

Capital Markets Board appoints Central Registration Agency as central trade repository for OTC derivative transactions

The Capital Markets Board (CMB) of Turkey has appointed the Central Registration Agency (Merkezi Kayıt Kurumu) (CRA) as the central trade repository for OTC derivative transactions pursuant to the Capital Markets Law (Law No. 6362). The CMB has indicated that the principal aim of introducing central reporting of OTC derivative transactions to the CRA is the effective monitoring and reduction of systemic risk, maintaining financial stability and improving the transparency of the market in Turkey, in line with its goals as a G20 member.

The Capital Markets Law generally contains broad provisions as to trade repositories, leaving the authority to determine the content or form of notifications to the CMB through secondary legislation. The Law also provides that those who are required to report to the trade repository may not refrain from doing so by relying on confidentiality provisions in their contracts or foreign law. The Law also grants the CMB the power to require certain parties executing financial transactions in Turkey to obtain an identification code from an institution to be determined by the CMB. The CMB is further authorised to determine the conditions and content of public/private disclosures to be made by the trade repository under the Law.

As the Law does not go beyond defining trade repositories, the CMB is now expected to issue secondary legislation and regulate the CRA's role as the central OTC derivative transaction repository in detail by establishing, among other things, to whom the reporting obligations would apply, rules in relation to specific types of derivative transactions, and how the correlation with the data protection legislation would be established. The CMB has confirmed that the

required technical infrastructure is currently being implemented in consultation with relevant public bodies and the secondary regulation is in the drafting process.

HKEX announces launch details of investor identification model for Northbound trading under Stock Connect

Hong Kong Exchanges and Clearing Limited (HKEX) has announced the launch details of the investor identification model for Northbound trading (NB Investor ID Model) through its mutual stock market access programme with the exchanges in Shanghai and Shenzhen (Stock Connect). The announcement follows an agreement between the Hong Kong Securities and Futures Commission (SFC) and the China Securities Regulatory Commission (CSRC) to implement the NB Investor ID Model under the Stock Connect on 17 September 2018.

The NB Investor ID Model is intended to facilitate more effective monitoring and surveillance by the CSRC and Mainland China stock exchanges to safeguard market integrity. Under the NB Investor ID Model, exchange participants that offer Northbound trading services are required to assign a unique number in a standard format, known as the Broker-to-Client Assigned Number (BCAN), to each of their Northbound trading clients and provide Client Identification Data (CID) to HKEX, which will forward the information to Mainland China exchanges.

To facilitate a smooth rollout of the NB Investor ID Model, HKEX has commenced the secure file transfer protocol service for exchange participants with effect from 27 August 2018. The service is intended to give exchange participants ample time to register BCANs and CIDs of their NB trading clients before the launch date of the NB Investor ID Model on 17 September 2018.

MAS announces enhancements for licensed securities-based crowdfunding operations

The Monetary Authority of Singapore (MAS) has issued a circular to licensed securities-based crowdfunding (SCF) operators, which sets out measures that the MAS expects licensed SCF operators to have in place in relation to their practices and controls on due diligence conducted on issuers, management of defaults and disclosures to investors.

Amongst other things, the MAS expects:

- licensed SCF operators to disclose to investors the scope of due diligence that they have performed on issuers, to allow investors to determine if they are satisfied with the due diligence conducted before committing to invest in the SCF securities;
- lending-based SCF operators generally not to allow a borrower to take up a new loan to pay off an existing overdue loan and to take steps to ascertain if there are legitimate reasons to extend a new loan to the same borrower before repayment of an existing loan;
- licensed SCF operators, particularly lending-based operators, to institute policies and procedures to handle issuer defaults. These policies and procedures should include the circumstances under which the licensed SCF operator will pursue different options (e.g. closer engagement with issuer, using a debt collection agency, commencing legal proceedings).

The different recovery options and associated cost should be disclosed to the investors;

- licensed SCF operators to notify the MAS immediately in the event of an issuer default, and provide certain prescribed information to the MAS within three business days of the default;
- licensed SCF operators to put in place a proper business cessation plan. The plan can include arrangements for handling investors' monies and loan agreements kept on behalf of investors, liaison with borrowers and investors on future interest and principal repayments, recovery actions in the case of issuer default, as well as procedures for communication with investors regarding the business cessation. Licensed SCF operators should disclose the arrangements and the communications which they will make in the event of business cessation before investors make an SCF investment;
- all SCF operators to disclose information on interest rates and non-performing loan rates in a consistent manner to enable investors to effectively compare different SCF offers and better understand the potential returns on their investments. In this regard, the MAS expects licensed SCF operators to comply with specific requirements; and
- licensed SCF operators that offer auto-allocation tools to have in place a proper governance and management framework over the design, monitoring, testing and operation of the tools. Licensed SCF operators are expected to highlight to investors the limitations of the tools and educate them on the functionalities before use.

The MAS expects the board and senior management of licensed SCF operators to be responsible for delivering fair dealing outcomes to investors and to exercise effective oversight of their operations. Existing licensed SCF operators should review their policies and processes against the measures in the circular and take actions to address any gaps arising from the review by 23 February 2019. All licensed SCF operators are required to furnish the MAS, by 9 March 2019, with an attestation from the chief executive officer that the gaps identified from the review have been fully remediated. Entities that intend to apply for a capital market services licence to operate SCF platforms will need to satisfy the MAS that they are able to implement policies and processes consistent with the measures in the circular.

CFTC proposes amendments to its swap clearing requirement to ease regulatory burdens for certain financial institutions

The US Commodity Futures Trading Commission (CFTC) has proposed to amend its swap clearing requirement to exempt certain swaps entered into with certain bank holding companies, savings and loan holding companies, and community development financial institutions.

As proposed, CFTC regulation 50.5 would be amended to exempt from the clearing requirement a swap entered into to hedge or mitigate commercial risk if one of the counterparties to the swap is either:

- a bank holding company or savings and loan holding company, each having no more than USD 10 billion in consolidated assets; or

- a community development financial institution transacting in certain types and quantities of swaps.

This proposal is consistent with no-action relief granted in 2016 by the CFTC's Division of Clearing and Risk.

The CFTC is seeking public comments on these proposed amendments. The comment period will end 60 days after publication in the Federal Register.

FINRA reminds alternative trading systems of their obligations to supervise activity on their platforms

The US Financial Industry Regulatory Authority (FINRA) has published Regulatory Notice 18-25 reminding alternative trading systems (ATSs) of their supervision obligations. The notice emphasizes that ATSs (and other non-ATS broker-dealer operated trading platforms) are required to maintain supervisory systems that are designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules, including, among other things, rules on disruptive or manipulative quoting and trading activity. The publication of the FINRA notice follows the recent Regulation ATS rulemaking and modernization by the US Securities & Exchange Commission.

RECENT CLIFFORD CHANCE BRIEFINGS

Luxembourg implements PSD2

The Luxembourg law dated 20 July 2018 implementing the revised Payment Services Directive (EU) 2015/2366 (PSD2) entered into force on 29 July 2018. The law amends the payment services law of 10 November 2009 on payment services which implemented the original Payment Services Directive 2007/64/EC (PSD1).

This briefing sets out the main features of the law.

https://www.cliffordchance.com/briefings/2018/08/luxembourg_implementspsd2.html

Bank wins decade-long Hong Kong mis-selling case

The Hong Kong Court of First Instance has handed a decisive win to the defendant bank in the latest mis-selling case to come before the courts. In *Shine Grace Investment Ltd v Citibank, NA* [2018] HKEC 2123, the court found overwhelmingly in favour of the bank, rejecting all the plaintiff's claims. Clifford Chance acted for the bank.

This briefing discusses the decision, which among other things, re-affirms the effectiveness of non-reliance clauses in bank-customer contracts following the approach taken by the courts in previous mis-selling cases.

https://www.cliffordchance.com/briefings/2018/08/bank_wins_decade-longhongkongmis-sellingcase.html

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