INTERNATIONAL REGULATORY UPDATE
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International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041
Gareth Old +1 212 878 8539
Marc Benzler +49 69 7199 3304
Steven Gatti +1 202 912 5095
Paul Landless +65 6410 2235
Mark Shipman + 852 2826 8992
Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

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Brexit: EU Commission implements Contingency Action Plan and adopts contingency measures under EMIR and CSDR

The EU Commission has issued a communication to EU institutions on implementing the Commission's Contingency Action Plan, which was launched in its second Brexit preparedness communication on 13 November 2018 and sets out unilateral measures for damage limitation in the event of UK withdrawal without an agreement. At a meeting on 13 December 2018, the European Council (Art.50) called for work on preparedness to be intensified for all possible outcomes; given the continued uncertainty surrounding the ratification of the Withdrawal Agreement on the side of the UK and in line with the European Council (Art. 50) conclusions on 13 December, the Commission has decided to announce its urgent implementation of the Contingency Action Plan.

The communication sets out that the Commission has adopted all the legislative proposals and delegated acts announced in the Action Plan; implementing acts will be ready by 15 February 2019. On financial services, the Commission has adopted three contingency measures, following discussions with the European Central Bank (ECB) and the European Supervisory Authorities (ESAs) for:

- a Commission Implementing Decision determining the equivalence of the UK regulatory framework for central counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR) for twelve months;
- a Commission Implementing Decision determining the equivalence of the UK regulatory framework for central securities depositories (CSDs) under the Central Securities Depositories Regulation (CSDR) for 24 months; and
- two Delegated Regulations supplementing EMIR to facilitate novation, for a fixed period, of certain OTC derivatives contracts with a CCP established in the UK to allow for contracts to be transferred to an EU27 counterparty while maintaining exemptions from clearing and margining obligations.

The Bank of England (BoE) has welcomed the adoption of the decisions, which allow UK CCPs and UK CSDs to be recognised by the European Securities and Markets Authority (ESMA). ESMA has released a public statement setting out the conditions under which it will be able to make recognition decisions and indicated that it is now ready to review applications for recognition from UK CCPs and CSDs. ESMA intends to adopt recognition decisions well ahead of 29 March 2019 and these will take effect following Brexit in a no-deal scenario.

One condition of recognition under Article 25 of EMIR that must be met for ESMA to recognise UK CCPs is the establishment of cooperation arrangements between ESMA and the BoE. The BoE has confirmed to ESMA that it will provide information in line with its current obligations and those set out in the equivalence decisions. ESMA notes that it is already engaged in establishing a memorandum of understanding (MoU), which is in the process of being refined.

On citizens, the Commission's communication calls on Member States to make a generous approach to UK nationals who are already resident in their territory and sets out the Commission's intention to further discuss practicalities with the EU27 on 20 December 2018. The Commission also expects the UK Prime Minister's assurances on 13 November 2018 relating to EU citizens in the UK to be formalised soon so that they can be relied upon by citizens.

The Commission has called on Member States to refrain from entering into bilateral agreements, arrangements or discussions with the UK as the Commission views that this would undermine the ratification process, in most cases would be incompatible with EU law, would risk creating an unlevel playing field among Member States, and would complicate the EU's future negotiations on its relationship with the UK.

Brexit: EBA calls on financial firms to improve communication of contingency plans to customers

The European Banking Authority (EBA) has followed-up on its opinion on financial institutions' preparedness for the UK withdrawal from the EU, which was published in June 2018, by calling for firms to increase their communication with customers.

Since June, the EBA has observed progress in contingency planning but little evidence of financial institutions communicating effectively to their customers on how they may be affected by UK withdrawal and any actions undertaken as part of contingency planning that may affect customers' contractual or statutory rights.

As such, the EBA has issued a press release to remind affected financial institutions to provide adequate information on the risks and mitigating measures being taken based on the information specified in the June opinion, while also maintaining their efforts in effective contingency planning. The EBA has called on firms to do so as soon as possible.

Brexit: ESMA calls on financial firms to improve communication to clients

ESMA has published a statement to remind investment firms and credit institutions providing investment services of their legal obligations under MiFID2 to provide clients with accurate information on the impact of Brexit.

In particular, the statement, which is addressed to UK firms providing services to EU27 countries and EU27 firms that interact with clients in the UK, sets out that disclosures should at least relate to:

- the impact of UK departure for clients;
- actions being taken by the firm, including details of organisational requirements, any change in competent authority or changes in the protection provided by any existing national investor compensation scheme;
- implications of any corporate restructuring; and
- information on contractual and statutory rights of clients, including their right to cancel the contract and any right of recourse.

ESMA is also seeking to remind firms to finalise and implement suitable plans in order to mitigate any risks stemming from UK withdrawal in a suitable timeframe.

SFTR: EU Commission adopts Delegated and Implementing Regulations

The EU Commission has adopted three Delegated Regulations under the Securities Financing Transactions Regulation (SFTR).

The three Delegated Regulations supplement the SFTR with regard to:

- regulatory technical standards (RTS) on the collection, verification, aggregation, comparison and publication of data on securities financing transactions (SFTs) by trade repositories (TRs);
- fees charged by ESMA to TRs; and
- RTS specifying the details of SFTs to be reported to TRs.

The three Delegated Acts will now pass to the EU Council and the Parliament for scrutiny and will enter into force on the twentieth day following that of their publication in the Official Journal.

The EU Commission has also adopted two Implementing Regulations under the SFTR. The Implementing Regulations lay down implementing technical standards (ITS) with regard to:

- the format and frequency of reports on the details of SFTs to trade repositories in accordance with the SFTR and amending Implementing Regulation (EU) 1247/2012 with regard to the use of reporting codes in the reporting of derivative contracts; and
- the procedure and forms for exchange of information on sanctions, measures and investigations in accordance with the SFTR.

MiFID2: ESMA updates investment firms on assessment of third-country trading venues

ESMA has issued a statement on third-country trading venues (TCTVs) for the purpose of post-trade transparency and position limits under MiFID2/MiFIR. ESMA has stated that it has received requests to assess more than 200 TCTVs against the criteria set out in its opinions but has delayed publication of a comprehensive list until a more significant number of TCTVs have been assessed. As such, ESMA has updated investment firms that they do not need to make public their transactions concluded on TCTVs via an approved publication arrangement (APA) pending publication of the lists, and that commodity derivative contracts traded on TCTVs are not considered as economically equivalent OTC contracts for the purpose of the position limit regime.

MiFID2: ESMA amends guidelines on application of commodity derivatives definition

ESMA has published amended guidelines on the application of C6 and C7 of Annex 1 of MifiD2.

ESMA originally adopted the guidelines in October 2015 to ensure a common, uniform and consistent application of MiFID1 in relation to commodity derivatives defined in the C6 and C7 sections of the MiFID Annex. The

application start date of MiFID2 and its supplementing regulation means that these guidelines formally require updating while their substance is maintained.

Competent authorities to which the guidelines apply must notify ESMA whether they intend to comply or not within two months of the date of publication of the guidelines on ESMA's website in all official EU languages.

MiFID2: temporary Swiss stock exchange equivalence decision published in Official Journal

Commission Implementing Decision (EU) 2018/2047 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with MiFID2 has been published in the Official Journal.

The extension has been published in the context of the Swiss Federal Council launching a consultation on the new Institutional Framework Agreement between the EU and Switzerland until early 2019. The Commission announced on 17 December 2018 that a precondition of extending the decision beyond a six-month extension would be full and final endorsement of the Institutional Framework Agreement text by the Swiss Federal Council.

The decision applies from 1 January 2019 and will expire on 30 June 2019.

ESMA renews product intervention measure for binary options and CFDs

ESMA has adopted a Decision under Article 40 of MiFIR to renew the prohibition on the marketing, distribution or sale of binary options. The Decision will apply from 2 January 2019 for a period of 3 months.

ESMA has also decided to renew its restriction on the marketing, distribution or sale of contracts for difference (CfDs) to retail clients. ESMA is of the view that a significant investor protection concern related to the offer of CFDs continues to exist and has agreed to renew the measure for a further three month period from 1 February 2019. ESMA expects to adopt the renewal measure in the official languages of the EU in the coming weeks. The measure will then be published in the Official Journal and will apply for a period of three months from 1 February 2019.

ESMA publishes guidelines on non-significant benchmarks

ESMA has published its final report on guidelines on non-significant benchmarks under the Benchmarks Regulation (BMR).

The final report proposes lighter requirements for non-significant benchmarks, their administrators and their supervised contributors and provides guidelines in relation to:

- procedures, characteristics and positioning of oversight function;
- appropriateness and verifiability of input data;
- transparency of methodology; and
- governance and control requirements for supervised contributors.

The first three areas are applicable to administrators of non-significant benchmarks while the fourth one is applicable to supervised contributors to non-significant benchmarks.

CSDR: ESMA consults on settlement fails reporting and standardised procedures and messaging protocols

ESMA has issued consultation papers on proposed guidelines on settlement fails reporting and standardised procedures and messaging protocols under the CSDR.

Article 6 of the CSDR requires investment firms to take measures to limit the number of settlement fails. The draft guidelines on settlement fails reporting are intended to specify the scope of the requirement and certain characteristics of the standardised procedures and messaging standards which make up the arrangements which investment firms need to set up with their professional clients in order to limit the number of settlement fails.

Under Article 7 of the CSDR, for each securities settlement system that it operates, a CSD must set up a system that monitors settlement fails of transactions in financial instruments and provide regular reports to the competent authority and relevant authorities as to the number and details of settlement fails and any other relevant information, including the measures taken by CSDs and their participants to improve settlement efficiency. In order to assure consistent application of Article 6, the proposed guidelines on standardised procedures and messaging protocols set out the scope, reporting architecture and exchange of information between ESMA and the competent authorities regarding settlement fails based on reports submitted by CSDs.

Comments to the consultation close 20 February 2019. ESMA will review the feedback it receives and expects to finalise both sets of guidelines by July 2019.

EMIR: EU Commission extends dates of deferred application of clearing obligation for certain OTC derivative contracts

The EU Commission has adopted a Delegated Regulation with regard to RTS on the clearing obligation to extend the dates of deferred application of the clearing obligation for certain OTC derivatives.

Under EMIR, intragroup transactions may be exempted from the clearing obligation. Intragroup transactions with a third country entity may also be exempted if the Commission has adopted an equivalence decision under EMIR Article 13(2) for the third country where the group entity is established. To date no such decisions have been adopted.

The three Delegated Regulations on the clearing obligation include a provision related to intragroup transactions with a third country entity, providing for a deferred date of application of up to three years in the absence of the relevant equivalence decision. The soonest deferral date is 21 December 2018.

The Delegated Regulation introduces a modification to the three existing RTS on the clearing obligation to:

- Article 3(2) of Commission Delegated (EU) 2015/2205 regarding interest rate derivative classes, by extending the deferred date of application of the clearing obligation for intragroup transactions with a third country group entity from 21 December 2018 to 21 December 2020;

- Article 3(2) of Commission Delegated Regulation (EU) 2016/592 regarding credit derivative classes, by extending the deferred date of application of the clearing obligation for intragroup transactions with a third country group entity from 9 May 2019 to 21 December 2020; and
- Article 3(2) of Commission Delegated Regulation (EU) 2016/1178 regarding interest rate derivative classes, by extending the deferred date of application of the clearing obligation for intragroup transactions with a third country group entity from 9 July 2019 to 21 December 2020.

The Delegated Act will now pass to the EU Council and the Parliament for scrutiny and will enter into force on the day following that of its publication in the Official Journal.

Non-performing loans: EU Council and EU Parliament reach political agreement on capital requirements

The EU Council and EU Parliament have reached a provisional political agreement on the EU Commission's proposed regulation amending the Capital Requirements Regulation (CRR) as regards minimum loss coverage for non-performing exposures.

The proposed regulation introduces a prudential backstop for covering losses caused by future loans that turn non-performing.

The agreement will now be submitted for endorsement by EU ambassadors. The Council and Parliament will then be called on to adopt the proposed regulation at first reading.

EU Council endorses political agreement on proposed regulation on cross-border payment and currency conversion charges

The EU Council's Committee of Permanent Representatives (Coreper) has endorsed the political agreement with the EU Parliament on the proposed regulation on cross-border payment and currency conversion charges.

The proposed regulation amends the current cross-border payments regulation in order to:

- align charges for cross-border payments in euros for services such as credit transfers, card payments or cash withdrawals with charges for corresponding national payments of the same value in the national currency of the Member State where the payment service provider of the payment service user is located; and,
- increase transparency requirements relating to the charge for currency conversion services.

Once the text has undergone a legal linguistic revision, the Council and Parliament will be called on to adopt the proposed regulation at first reading.

EU Council and Parliament conclude negotiations on business insolvency Directive

Coreper has confirmed the agreement reached at trilogue negotiations between the EU Council and EU Parliament on the new Directive on business insolvency.

The Directive relates to preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures. The compromise agreement reached in trilogue includes provisions on:

- the duties of company directors in insolvency proceedings, including having due regard for the interests of creditors, taking steps to avoid insolvency and avoiding deliberate or grossly negligent conduct;
- workers' rights, to ensure existing rights are not affected by the preventative restructuring procedure; and
- the appointment of a restructuring practitioner to assist the debtor and creditors in certain situations, including cross-class cram-down.

The text will be submitted for adoption by the EU Parliament and EU Council. Once published in the Official Journal, Member States will have two years to transpose the rules into national legislation with an additional year available for implementation.

EU Council adopts negotiating stance on enhancing AML supervision by EBA

Coreper has endorsed the EU Council's negotiating stance on the amended proposal for a Regulation to reinforce the role and powers of the EBA as regards anti-money laundering (AML) supervision.

The Council's stance calls for the EBA to carry out tasks relating to:

- collecting information from national competent authorities (NCAs) on identified AML weaknesses;
- developing common standards and coordination among NCAs;
- performing risk assessments on NCAs;
- facilitating cooperation with non-EU countries on cross-border cases; and
- addressing decisions directly to individual banks as a measure of last resort.

The legislative proposal will be subject to trilogue negotiations between the Council and the EU Parliament.

Green finance: EU Council agrees negotiating position on low carbon benchmarks and disclosure requirements

Coreper has endorsed the EU Council's negotiating position on the EU Commission's proposals regarding disclosure obligations and low carbon benchmarks.

The proposals are intended to make finance greener and more in line with the objectives of the Paris agreement on climate change and include:

- a proposal introducing disclosure obligations on how financial companies integrate environmental, social and governance factors in their investment decisions; and
- a proposal creating a new category of financial benchmarks aimed at giving greater information on an investment portfolio's carbon footprint.

The EU Parliament voted on its positions on disclosure and on low-carbon benchmarks on 9 November and 13 December respectively. Negotiations between the Council and the Parliament are therefore ready to start.

ESMA consults on sustainable finance initiatives in EU capital markets

ESMA has issued three consultations on sustainable finance initiatives in the areas of securities trading, investment funds and credit rating agencies (CRAs) that support the EU Commission Sustainability Action Plan.

In May 2018 the Commission requested technical advice from ESMA to supplement its initial package of measures on sustainable finance adopted in May 2018 and to introduce or draft amendments to delegated acts under the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive, the Alternative Investment Fund Managers Directive (AIFMD), and MiFID2.

Two of the consultations seek feedback on draft advice for the integration of sustainability risks and factors into MiFID2, the AIFMD, and the UCITS Directive. The third paper consults on credit rating agency (CRA) guidelines intended to improve the quality and consistency of disclosures of environmental, social and governance (ESG) factors when considered as part of a credit rating action.

The draft advice was developed in cooperation with the European Insurance and Occupational Pensions Authority (EIOPA) which has received a similar mandate for technical advice on Solvency II and the Insurance Distribution Directive (IDD).

Comments on the consultations relating to MiFID2 and the AIFMD and UCITS Directive are due by 19 February 2019, with ESMA expecting to finalise its draft technical advice by the end of April 2019. The consultation on disclosure requirements applicable to credit ratings closes on 19 March 2019. ESMA will consider responses in Q2 2019 and expects to publish a final report by 30 July 2019.

Capital Markets Union: EU Commission asks ESMA to revise draft technical standards on securitisation disclosures

The EU Commission has sent a letter to ESMA stating its intention to endorse the draft RTS and ITS on securitisation disclosures that ESMA submitted in August 2018 only if certain amendments are introduced.

In particular, the EU Commission has asked ESMA to look at:

- extending the use of the 'No Data' option to additional fields of the draft templates, particularly in the asset-backed commercial paper securitisations (ABCP) templates for which there are no similar harmonised disclosure templates currently in use; and
- monitoring the use of and need for these 'No Data' options in each template field until the Joint Committee issues its report on the functioning of the Securitisation Regulation.

ESMA has six weeks to resubmit the revised RTS/ITS to the EU Commission.

EBA publishes final guidelines on disclosure of non-performing and forborne exposures

The EBA has published final guidelines on the disclosure of non-performing and forborne exposures as part of the European Council's 2017 Action Plan to tackle non-performing loans (NPLs).

The guidelines set out enhanced disclosure requirements and templates for credit institutions subject to all or some of the disclosure requirements specified in the Capital Requirements Regulation (CRR).

The following templates apply to all credit institutions:

- credit quality of forborne exposures;
- credit quality of performing and non-performing exposures by past due days;
- performing and non-performing exposures and related provisions; and
- collateral obtained by taking possession and execution processes.

The following additional templates only apply to significant credit institutions with a gross NPL ratio of 5% or above:

- quality of forebearance;
- quality of non-performing exposures by geography;
- credit quality of loans and advances by industry;
- collateral valuation – loans and advances;
- changes in stock of NPLs and advances; and
- collateral obtained by taking possession and execution processes – vintage breakdown.

The guidelines will apply from 31 December 2019.

The EBA is also developing new supervisory reporting requirements, which are intended to align with the disclosure templates, and will issue guidelines on banks' loan origination, monitoring and internal governance.

EMIR: Joint Committee publishes STS standards amending RTS on clearing obligation and risk mitigation techniques

The Joint Committee of the European Supervisory Authorities (ESAs) has published two draft RTS amending the RTS on the clearing obligation and risk mitigation techniques for non-cleared OTC derivatives.

The Securitisation Regulation (EU) 2017/2402 amends EMIR with the aim of ensuring a level playing field between the regimes for covered bonds and for securitisation with respect to the clearing obligation and the risk mitigation techniques for non-centrally cleared OTC derivatives.

EMIR, as amended by the Securitisation Regulation, requires that the ESAs develop draft RTS specifying the criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty risk with regards to the clearing obligation.

The draft RTS on risk mitigation techniques amend the existing RTS by extending the special treatment currently associated with covered bonds to STS securitisations. The treatment, which allows no exchange of initial margin and only collection of variation margin, is applicable only where a STS securitisation structure meets a specific set of conditions equivalent to the ones required for covered bonds issuers to be able to benefit from that same treatment.

Both sets of RTS have been submitted to the EU Commission. The Commission has three months to decide whether to endorse them.

Transparency Directive: EU Commission adopts Delegated Regulation on European Single Electronic Format

The EU Commission has adopted a Delegated Regulation with regard to RTS on the specification of a European single electronic format (ESEF). Under the Transparency Directive, all annual financial reports are to be prepared in a single electronic format from 1 January 2020.

The RTS require that Inline Extensible Business Reporting Language (XBRL) is the technology used for issuers to report their annual financial reports in a single electronic format as it enables both machine and human readability in one document. This digital format allows users such as investors, analysts and auditors to carry out software supported analysis and comparison of large amounts of financial information.

The Delegated Regulation will now pass to the EU Council and the Parliament for scrutiny and will enter into force on the twentieth day following that of its publication in the Official Journal. The Regulation will apply to annual financial reports containing financial statements for financial years beginning on or after 1 January 2020.

Working group on euro risk-free rates consults on transition from EONIA to ESTER and on ESTER-based term structure methodologies

The working group on euro risk-free rates has launched two consultations on its proposed transition path from the euro overnight index average (EONIA) to the euro short-term rate (ESTER) and on its proposed ESTER-based term structure methodology as a fallback in EURIBOR-linked contracts.

The first consultation seeks feedback on the technical analysis conducted by the working group on four main transition paths for the transition from EONIA to ESTER:

- parallel run approaches;
- contractual alternative approaches;
- pure succession rate approaches; and
- recalibration approaches.

In its report, the working group identifies a preferred transition option and sets out recommendations for both the European Money Markets Institute (EMMI), as the administrator of EONIA, and market participants, upon which is it also seeking feedback.

In the second consultation, the working group requests feedback on the need for term rates in different products and on the analysis of forward-looking methodologies to obtain term rates, as such rates could serve as fallback rates for EURIBOR-linked contracts. The consultation considers:

- the use cases for certain term structure methodologies; and
- the preferred ESTER-based term structure methodology proposed by the working group.

Comments on both consultations are due by 1 February 2019.

The working group plans to make its recommendation on risk-free term rates as (fallback) reference rates for different financial products in spring 2019.

Working Group on Sterling Risk-Free Reference Rates publishes paper on loan transactions referencing Sterling LIBOR

The Working Group on Sterling Risk-Free Reference Rates has published a paper on new and legacy loan transactions referencing Sterling LIBOR.

The paper is addressed to loan market participants who continue to reference LIBOR in new and legacy loan transactions, in particular where those loans mature beyond the end of 2021 when LIBOR may cease to be available. The paper is intended to help market participants increase their level of preparedness and forward planning by setting out:

- potential considerations associated with legacy or new loan agreements referencing LIBOR;
- steps which can be taken to mitigate these considerations for new transactions; and
- measures which can be taken to mitigate these considerations for legacy transactions.

Brexit: SIs under the EU (Withdrawal) Act for 17 – 20 December 2018

HM Government published new draft statutory instruments (SIs) under the EU (Withdrawal) Act 2018.

For guidance purposes, HM Treasury (HMT) has published:

- the draft Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019, which establish the Financial Services Contracts Regime (FSCR) to provide run-off mechanisms for EEA firms that currently passport into the UK under Financial Services and Markets Act 2000, EEA firms that currently passport into the UK under the Payment Services Regulations 2017 and Electronic Money Regulations 2011, and services provided by non-UK central counterparties (CCPs) and trade repositories (TRs);
- the draft Transparency of Securities Financing Transactions and of Reuse (Amendment) (EU Exit) Regulations 2019; and
- the draft Securitisation (Amendment) (EU Exit) Regulations 2019.

HMT has also published its approach to the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019, which relate to the financial

services framework between the UK and Gibraltar. The draft instruments are still in development and the guidance is intended to provide Parliament and stakeholders with further details on HMT's approach to onshoring financial services legislation.

The Electricity and Gas (Market Integrity and Transparency) (Amendment) (EU Exit) Regulations 2019 have been laid for sifting. The instrument makes modifications to the Regulation on wholesale energy market integrity and transparency (1227/2011 –REMIT), the REMIT Implementing Regulation (Commission Implementing Regulation (EU) No 1348/2014) and the Transparency Regulation (Regulation (EU) No 543/2013) to ensure that they continue to operate effectively in domestic law after Brexit. SIs going through the sifting process are considered by a committee in the House of Commons and the House of Lords, which determine the suitability of the 'negative procedure'. The sifting end date for this instrument is 16 January 2019.

The following instruments have been laid before Parliament:

- the draft Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019, which propose amendments to legislation relating to UCITS;
- the draft Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019, which propose amendments to legislation relating to European Long-term Investment Funds (ELTIFs);
- the draft Mortgage Credit (Amendment) (EU Exit) Regulations 2019, which amend legislation implementing the Mortgage Credit Directive (Directive 2014/17/EU – MCD); and
- the draft Insurance Distribution (Amendment) (EU Exit) Regulations 2019, which amend Delegated Regulations made under the Insurance Distribution Directive (2016/97 – IDD).

The Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018 (SI 2018/1394) and the Capital Requirements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1401) have been made.

For information on all draft SIs under the EU (Withdrawal) Act published last week, visit www.gov.uk and www.legislation.gov.uk.

Brexit: BoE and PRA consult on further changes to PRA Rulebook and binding technical standards

The Bank of England (BoE) and Prudential Regulation Authority (PRA) have launched a consultation on further changes to the PRA Rulebook and binding technical standards (BTS) under the European Union (Withdrawal) Act 2018.

The consultation paper (PRA CP32/18) contains two consultations on:

- the PRA's proposals for PRA Rulebook and BTS changes relating to the Capital Requirements Regulation (CRR) BTS, Securitisation Regulation BTS and MiFID BTS, which have already been consulted on by the Financial Conduct Authority (FCA) in CP18/28, as well as prudential rules relating to the Financial Services Contracts Regime (FSCR) that the Government published in draft on 17 December 2018, proposals relating to Gibraltar, regulatory transactions forms and the Financial Services Compensation Scheme (FSCS); and

- the BoE's proposals for the resolution BTS under the Bank Recovery and Resolution Directive (BRRD) as resolution authority, specifically BTS relating to procedures, standard forms and templates for the provision of information for the purposes of resolution plans and BTS specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions.

The draft PRA Rulebook EU Exit Instrument in Appendix 2 shows all the proposed changes to the Rulebook Parts affected by the consultation paper, including those changes proposed in the PRA consultation CP26/18, which was published on 25 October 2018. The changes specified in CP32/18 are highlighted yellow.

If the Withdrawal Agreement between the UK and the EU is ratified and an implementation period commences, the proposed changes would not take effect until after the implementation period, subject to further changes made during an implementation period.

Comments on the consultation are due by 21 January 2019.

FCA publishes policy statement on EU Securitisation Regulation implementation and CRR amendment

The FCA has published a policy statement (PS18/25) outlining the final and near-final rules that implement the EU Securitisation Regulation and CRR amendment.

The policy statement follows consultation papers on amendments to the CRR (CP18/22) and on changes to the Decision Procedures and Penalties manual (DEPP) and Enforcement Guide (EG) (CP18/30) of the FCA's Handbook.

The policy statement makes the following changes to the Handbook:

- third party verifier fees – GBP 1,500 application fee and GBP 250 periodic fee;
- amendments to the IFPRU, COLL and FUND sourcebooks to be consistent with the Securitisation Regulation and the CRR amendment; and
- amendments to the DEPP and EG sections of the Handbook.

HM Treasury (HMT) has laid a statutory instrument (SI) to implement the Securitisation Regulation in the UK providing the FCA with supervisory, disciplinary and investigatory powers over persons subject to the Regulation.

The Securitisation Regulation and related amendment to the CRR came into force on 1 January 2019.

PSD2: FCA publishes approach to technical standards and guidelines and launches consultation on Brexit no-deal proposals

The FCA has published its final policy statement (PS18/24) on its approach to regulatory technical standards and EBA guidelines under the recast Payment Services Directive (PSD2). The policy statement largely confirms the revised Payment Services and E-money approach document and Handbook changes consulted on in CP18/25. Certain amendments have been made based on suggestions and feedback and to reflect the final, published EBA guidelines on conditions to be met to benefit from an exemption from continency measures under PSD2.

The FCA has highlighted that all payment service providers (PSPs) must ensure they meet the requirements of PSD2 and the RTS on strong customer authentication and common and secure open standards of communication (SCA and CSC) and meet the deadlines set out in the policy statement.

Separately, the FCA has launched a consultation (CP18/44) on a proposal to make (RTS) for SCA in the event of a no-deal Brexit. Although sub-articles 30(3) and (5) will begin to apply from 14 March 2019, the remaining provisions of the EU RTS will apply from 14 September 2019 and the FCA has identified that there would be a gap in the UK's regulatory framework in the event of a no-deal Brexit. As such, the FCA is proposing UK RTS that would be substantially the same as the EU RTS to apply in the UK from 14 September 2019 in the event of no-deal.

The FCA would make the UK RTS under Regulation 106A of the Payment Services Regulations 2017 (PSRs), as amended by the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018, which will apply if the UK leaves the EU without a withdrawal agreement. In a no-deal scenario, the amended PSRs would require firms to apply strong customer authentication and to communicate securely in line with the RTS made by the FCA.

Comments on CP18/44 are due by 19 February 2019.

BoE consults on resolvability assessment framework

The Bank of England and PRA have launched consultations on the BoE's package of proposals for a resolvability assessment framework (RAF). The RAF is intended to build on the resolution regime to ensure that banks are able to fail in an orderly manner with losses borne by their investors and ensure that firms are resolvable and able to demonstrate their resolvability by 2022. The consultations are relevant for banks that would be resolved by the BoE using its stabilisation powers, as well as certain overseas firms where the BoE would support a home resolution authority in carrying out a cross-border resolution.

The BoE's consultation paper sets out its approach to assessing resolvability and how it proposes to increase transparency by making a public statement on resolvability. It also includes a draft statement of policy setting out where the Bank is consulting on new requirements for firms. Among other things, the paper specifies three outcomes that the BoE would deem necessary to support a successful resolution:

- having adequate financial resources;
- being able to continue business through resolution and restructuring; and
- being able to coordinate and communicate with authorities and markets to ensure an orderly resolution and restructuring.

The PRA's consultation paper (CP31/18) sets out proposed rules and expectations on how in-scope firms with retail deposits greater than or equal to GBP 50 billion on an individual or consolidated basis would implement the assessment and disclosure requirements.

The package proposes a two-year RAF cycle which would include firms' assessments, reports and the public disclosure, with the first cycle beginning in 2020. The timing of the first cycle is intended to allow the first reports to

reflect any changes to firms' structures that are required for EU withdrawal and ring-fencing.

Comments on the consultations are due by 5 April 2019.

Alongside the consultation papers, the BoE and PRA have published an introduction document that summarises the proposals and which, among other things, sets out the PRA's intention to separately consult on changes to the Senior Managers and Certification Regime (SM&CR) to incorporate the responsibility for carrying out assessments and related obligations into its rules.

MiFIR: BaFin extends regulations allowing transactions in financial instruments to be published later than generally required by one year until 1 January 2020

On 3 January 2018, new rules on post-trade transparency for transactions in financial instruments became applicable which generally require details of transactions in financial instruments traded on trading venues or carried out on an OTC basis to be published in real time or as quickly as technically possible.

However, national supervisory authorities may, under certain conditions, allow publication or certain information on transactions to be published later.

So far, the German Federal Financial Supervisory Authority (BaFin) has made full use of both options for trading venues and investment service providers by issuing three general decrees, each expiring on 1 January 2019.

BaFin will now keep its administrative practice for another year by publishing the following three general decrees, each with effect from 2 January 2019 until 1 January 2020:

- General decree authorising the subsequent publication of transactions in non-equity instruments on trading venues operated by investment service providers;
- General decree authorising the subsequent publication of OTC transactions in non-equity instruments by investments service providers; and
- General decree authorising the subsequent publication of transactions in equity instruments on trading venues operated by investment service providers.

A separate authorisation regarding the subsequent publication of OTC transactions in equity instruments at a later date is still not intended. Under MiFIR, these are covered by the authorisation for trading venues. Trading venues subject to BaFin supervision must obtain BaFin approval before making use of the authorisation for subsequent publication.

BaFin publishes guidance note on recognition of resolution stay provisions

BaFin has published a guidance note in relation to section 60a of the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz, SAG).

Under section 60a SAG, German credit institutions and other in-scope entities are required to include in financial contracts governed by the laws of, or subject to a place of jurisdiction in, a country outside the EU, contractual provisions pursuant to which:

- the contract counterparty acknowledges that the provisions regarding the temporary suspension of termination rights and other contractual rights may be applied to the liability of such in-scope entity; and
- the contract counterparty accepts a suspension of termination rights and other contractual rights as set out above with respect to such in-scope entity.

The guidance note addresses certain frequently asked questions on the scope and interpretation of section 60a SAG.

Consumer Protection: BaFin plans renewed national restriction on CFDs for retail investors

BaFin has published a draft general decree on renewing and extending the national restriction on CFDs for retail investors.

The draft general decree aims to renew and extend the existing prohibition relating to the marketing, distribution or sale of contracts for differences (CFDs) to retail investors in Germany. A similar restriction was first imposed by BaFin in May 2017 and subsequently also by the Europe-an Securities and Markets Authority (ESMA) for the whole of the EU on a temporary basis, effective as of August 2018. The product intervention measure by ESMA includes maximum permissi-ble leverage, a negative balance protection, a margin close out rule, a restriction on the incen-tives offered to trade CFDs and standardised clear risk warnings. BaFin is now including these protective measures for retail investors in its draft general decree and thus intends to permanently match the level of protection in Germany to the temporary product intervention measure issued by ESMA. In doing so, BaFin has repeated its significant investor protection concerns ex-pressed at the time of the initial prohibition regarding CFDs.

Comments on the draft may be submitted in writing until 10 January 2019.

Bank of Spain maintains countercyclical capital buffer at 0%

The Bank of Spain has decided to maintain the value of the countercyclical capital buffer (CCB) applicable to credit exposures in Spain at 0% in the first quarter of 2019.

CNMV issues communication on short position notifications

The Spanish Securities Market Commission (CNMV) has announced that in line with the practice followed in other EU Member States, it will no longer publish biweekly notifications on the aggregate short positions exceeding 0.2. This follows the requirements of the Short Selling Regulation, which sets the publication obligation at 0.5.

Royal Decree-Law establishing macroprudential tools published

Royal Decree-Law 22/2018 of 14 December establishing macroprudential tools, which confers powers on certain Spanish supervisory bodies to impose measures on participants in the financial system in order to prevent weaknesses in the system and promote financial stability, has been published.

In particular, Royal Decree-Law 22/2018 modifies Law 35/2003 and Law 22/2014 to give the Spanish Securities Market Commission (CNMV) the power to require the management companies of collective investment schemes or of companies governed by Law 22/2014 to increase the liquidity of their portfolios and to increase their percentage of investments in liquid assets.

The Royal Decree-Law also amends Law 10/2014 to grant additional macroprudential tools to the Bank of Spain, including the powers to increase capital requirements for portfolios with specific exposures and limit the exposure to specific economic sectors, the level of credit granted and the acquisition of fixed income securities or derivatives. Similar powers are conferred on the General Directorate of Insurance and Pension Funds through an amendment of Law 20/2015.

The restated text of the Securities Market Law is also amended to give the CNMV the power to limit certain activities of the entities supervised by it that may generate an increase in the indebtedness or in the risks affecting financial stability.

Royal Decree-Law 22/2018 will enter into force on 19 December 2018.

Warsaw Stock Exchange issues standpoint on criteria for admitting shares to trading on regulated market

The Supervisory Board and the Management Board of the Warsaw Stock Exchange have issued a joint standpoint on the criteria for admitting shares to trading on the regulated market. Under the standpoint, from 1 January 2019 the list of circumstances used to assess whether issuers have satisfied the requirements for the admission and introduction of shares and rights under shares to trading – compliance with the principles of the public nature of trading on the stock exchange – come into force. Most of the circumstances covered in the standpoint relate to the risk of some shareholders being preferred at the cost of others (e.g. in a situation where there are different issue prices and the pre-emptive right is excluded).

Clarification of the above-mentioned requirement also concerns first issues (debuts) as well as subsequent issues of financial instruments that are to be traded on the stock exchange.

Swiss Federal Council aims to further improve framework conditions for blockchain and distributed ledger technology

During its meeting on 7 December 2018, the Federal Council adopted a report on the legal framework for blockchain and distributed ledger technology (DLT) in the financial sector.

The Federal Council hopes to exploit the opportunities offered by digitalisation for Switzerland and create the best possible framework conditions so that Switzerland can establish itself and evolve as a leading, innovative and sustainable location for fintech and blockchain companies. At the same time, it wants to combat abuses and ensure the integrity and good reputation of Switzerland as a financial centre and business location.

The Federal Council has instructed the Federal Department of Finance (FDF) and the Federal Department of Justice and Police (FDJP) to draw up a consultation draft in the first quarter of 2019 with an aim to:

- in civil law, increase legal certainty for the transfer of rights by means of digital registers;
- in insolvency law, further clarify the segregation of cryptobased assets in the event of bankruptcy and examine the segregation of data with no asset value;
- in financial market law, devise a new and flexible authorisation category for blockchain-based financial market infrastructures;
- in banking law, reconcile the bank insolvency law provisions with the adjustments in general insolvency law; and
- in anti-money laundering law, more explicitly anchor the current practice of making decentralised trading platforms subject to the Anti-Money Laundering Act.

The Federal Council has also instructed the FDF to examine whether anti-money laundering law should be adapted with regard to certain forms of crowdfunding.

HKMA issues circular on supervisory measures for bank culture

The Hong Kong Monetary Authority's (HKMA) has issued a circular to announce its supervisory measures for bank culture. The HKMA initiated a Bank Culture Reform in 2017 by promoting the adoption of a holistic and effective framework for fostering a sound culture within authorised institutions, with particular attention given to three pillars, namely governance, incentive systems, and assessment and feedback mechanism and also provided practical guidance on these three pillars to all authorised institutions through its circular dated 2 March 2017.

With a view to ascertaining the progress of bank culture reform in Hong Kong and providing further guidance to the industry where necessary, the HKMA will implement the following supervisory measures:

- requiring authorised institutions to conduct self-assessment – authorised institutions will be required to review and report their governance arrangements as well as policies and procedures in relation to corporate culture and the implementation of the enhancement measures in fostering a sound bank culture with respect to the circular of March 2017. The self-assessment is intended to be an opportunity for authorised institutions to reflect on any insights, lessons learnt and issues encountered in the implementation of enhancement measures, but not a check-box type compliance exercise;
- conducting focus reviews – the HKMA will, through site visits and/or off-site reviews, assess and benchmark authorised institutions' practices with respect to the key areas of bank culture; and
- undertaking culture dialogues – the HKMA will meet with senior management and/or board members of authorised institutions responsible for bank culture to gather insights and lessons learnt.

The HKMA has indicated that it intends to commence the self-assessment exercise first and considers it appropriate to implement the self-assessment in phases. The first phase will cover about 30 authorised institutions including all major retail banks and selected foreign bank branches with substantial operations in Hong Kong. Authorised institutions covered in the first phase will be expected to complete the self-assessment and submit it to the HKMA within six months. Remaining authorised institutions which are not covered in the first phase are still expected to reflect on their own insights, lessons learnt and issues encountered in their culture enhancement initiatives.

HKMA revises supervisory policy manual on interest rate risk management

The Hong Kong Monetary Authority (HKMA) has issued a revised version of its supervisory policy manual (SPM) module 'IR-1- Interest Rate Risk Management' with an updated title 'IR-1- Interest Rate Risk in the Banking Book'. The SPM sets out the approach which the HKMA will adopt in the supervision of IRRBB and in monitoring authorised institutions' level of IRRBB exposures.

Following its circular dated 31 August 2018, the HKMA has decided to exempt authorised institutions incorporated outside Hong Kong from the local IRRBB framework in cases where the parent group of the authorised institutions is not additionally represented in Hong Kong through any locally incorporated authorised institution. These exempted authorised institutions are expected to manage their IRRBB together with their parent groups based on the IRRBB standards of their home jurisdictions and in accordance with the Basel Committee on Banking Supervision standards. Other authorised institutions that are not exempted from the local IRRBB framework should be ready to measure and report IRRBB exposures using the new standardised framework by 1 July 2019, with the first report based on data as of 30 June 2019.

SFC shares findings from review of control measures for protection of client assets

The Securities and Futures Commission (SFC) has published a report on its review of licensed corporations' internal controls for the protection of client assets and supervision of account executives. The report summarises the SFC findings from a high-level review of control measures for protecting client assets and a thematic review of brokers' internal controls, including their supervision of account executives. The report also shares some good practices for licensed corporations to consider in reviewing their control policies and procedures.

The SFC has also published a comprehensive self-assessment checklist to assist securities and futures brokers with their internal control reviews. The checklist covers the key control measures the SFC expects of a broker as well as some good practices identified from the high-level and thematic reviews. Licensed corporations have been advised to carefully review their internal controls to ensure compliance with the regulatory requirements and, based on the results of their reviews, enhance their policies and procedures.

The SFC has emphasised that licensed corporations and their senior management, including Managers-in-Charge, bear the primary responsibility for maintaining appropriate standards of conduct and robust policies and procedures to adequately protect client assets and diligently supervise their

staff. The SFC has indicated that failure to put in place effective supervisory and control systems for these purposes may subject licensed corporations and their senior management to the SFC's regulatory action.

SFC announces agreement to enhance exchange of information under Stock Connect

The SFC and the China Securities Regulatory Commission (CSRC) have reached an agreement to enhance the exchange of information under the Mainland-Hong Kong Stock Connect. The enhancements are part of the arrangements for the implementation of the investor identification regime for both northbound and southbound trading under the Stock Connect.

The investor identification regime for northbound trading was launched on 26 September 2018. The SFC plans to introduce the investor identification regime for southbound trading by the end of the first quarter of 2019, which is intended to enhance market surveillance and combat cross-boundary market misconduct under the Stock Connect.

ASIC reports on allocations practices in equity raising transactions

The Australian Securities and Investments Commission (ASIC) has published a report summarising the findings of its review of market practice for the allocation of securities in equity raising transactions in the Australian market. The review follows the ASIC's Regulatory Guide 264: Sell-side research (RG 264) published in December 2017, and Report 486 – Sell-side research and corporate advisory: Confidential information and conflicts published in August 2016.

The purpose of the review was to understand current market practices and identify areas of concern. The review focuses on the conduct of licensees and the factors considered in making allocation recommendations, including how conflicts of interest are managed and observations relevant to issuers and investors. It also sets out better practices that licensees can adopt to help them meet their regulatory obligations and identifies a number of better practices for issuers.

ASIC has indicated that it will continue to monitor selected transactions to test that allocation decisions are being made consistently with financial services laws.

RECENT CLIFFORD CHANCE BRIEFINGS

Hammering Litigation Privilege

The Court of Appeal has decided that litigation privilege only applies to communications made for the purpose of obtaining information or advice in connection with litigation. In particular, it does not apply to 'purely commercial' communications discussing a possible settlement of a dispute. This creates unwelcome confusion, especially so soon after the Court in ENRC had tried to make privilege more workable. But 'entangling' commercial discussions with legal advice or with information obtained for the litigation may save the day.

This briefing paper discusses the latest judgment.

https://www.cliffordchance.com/briefings/2018/12/hammering_litigationprivilege.html

The Judicial Tribunal decisions – emerging trends

The Judicial Tribunal established in 2016 under Dubai Decree No 19 of 2016 continues to determine conflicts of jurisdiction between the Dubai International Finance Centre (DIFC) Courts and the onshore Dubai Courts. In July 2017 we considered the remit of the Judicial Tribunal and the first eight publicly available Tribunal decisions. Our analysis of those decisions was that the effectiveness of the DIFC Courts' conduit jurisdiction to enforce foreign or Dubai seated arbitral awards in onshore Dubai appeared to be on the decline.

Since our last briefing the Tribunal has issued a further nine decisions. This briefing paper summarises trends emerging from the Tribunal's jurisprudence.

https://www.cliffordchance.com/briefings/2018/12/the_joint_judicialtribunaldecisions-emergin.html

Hong Kong to introduce expanded profits tax regime for funds

On 7 December 2018, the Hong Kong Government gazetted the Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018 (the Expanded Funds Tax Exemption). The Bill introduces a new preferential tax regime for qualifying funds and provides fund managers an alternative to the existing offshore funds tax regime, which has been in place for over a decade (the existing regime). The Expanded Funds Tax Exemption would apply to a wide range of offshore and onshore funds and proposes to remove a number of problematic aspects of the existing regime – in particular, its ring-fencing and tainting features.

This briefing paper discusses the expanded profit tax regime for funds.

https://www.cliffordchance.com/briefings/2018/12/hong_kong_to_introduceexpandedprofitsta.html