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Banking Union: EU Council endorses banking package

The EU Council has confirmed the final compromise texts of the following proposed legislative measures comprising the EU Commission's banking

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package:

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

Key changes aimed at reducing risk and making the framework for regulating and supervising banks more robust include:

- requiring global-systemically important institutions ('G-SIIs') to have more loss-absorbing and recapitalisation capacity;
- strengthening bank capital requirements;
- easing reporting and disclosure requirements for smaller, less complex banks; and
- greater cooperation and information sharing in the supervision and resolution of cross-border banking groups.

Following a legal linguistic revision, the EU Parliament and EU Council will be called on to adopt the proposed measures at first reading.

EU Council confirms position on ESFS reforms

The EU Council has [confirmed its position](#), and published compromise proposals, on the EU Commission's legislative proposals to reform the European System of Financial Supervision (ESFS).

The compromise proposals are on:

- the [proposed Omnibus Regulation](#), aimed at enhancing the role of the European Supervisory Authorities (ESAs), giving the European Securities and Markets Authority (ESMA) additional powers, and reinforcing the anti-money laundering mandate;
- the [proposed Omnibus Directive](#), which contains amendments to the MiFID2 and Solvency II Directives relating to additional powers for ESMA and the European Insurance and Occupational Pensions Authority (EIOPA); and
- the [proposed Regulation amending the ESRB Regulation](#), which seeks to reform the governance of the ESRB.

The EU Council's position includes:

- changes to the existing system for supervisory convergence, including the elaboration of a strategic supervisory plan at EU level and reinforcing existing mechanisms such as peer reviews and consultations;
- reinforcing the role and powers of a management board within the European Supervisory Authorities' (ESAs') governance structure, which would be accountable to the EU Parliament and EU Council;

- giving the European Securities and Markets Authority (ESMA) direct supervision powers over critical benchmarks and consolidated tape providers;
- strengthening information exchange and cooperation between national authorities;
- the ESAs to take better account of cross-border activities; and
- clarification of the role and competences of the European Systemic Risk Board (ESRB), to minimise risks of conflicts of interests with the European Central Bank's (ECB's) responsibilities within the Single Supervisory Mechanism (SSM).

As the EU Parliament adopted its position on 10 January, trilogue negotiations can now begin. The first trilogue was scheduled for 14 February, with a view to reaching an agreement at first reading.

EU Parliament adopts proposed cross-border payment and currency conversion charges regulation

The EU Parliament has adopted at first reading 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.

The regulation will now pass to the EU Council for adoption. If adopted, the regulation will enter into force on the twentieth day following its publication in the Official Journal, with the majority of its provisions applying from 15 December 2019.

EMMI publishes summary of feedback received to second consultation on EURIBOR hybrid methodology

The European Money Markets Institute (EMMI) has published a [summary of feedback](#) received to its second consultation on a hybrid methodology for EURIBOR.

EMMI has also published a [questions and answers \(Q&A\) document](#) on EURIBOR and a [blueprint of the methodology](#), which is intended for non-expert audiences and to provide further transparency and clarity on the hybrid methodology.

EMMI received 37 responses from a range of institutions who provided feedback on:

- aggregated anonymised indicators that EMMI should publish following the implementation of the hybrid methodology, to provide transparency to the determination process of EURIBOR;

- eligibility criteria for contributors' transactions to be considered as input for the first hybrid methodology levels; and
- the calibration parameters of the hybrid methodology second level.
- According to EMMI, the feedback received shows broad support for EMMI's proposals.

EMMI intends to file for authorisation to the Belgian Financial Services and Markets Authority (FSMA) by Q2 2019. Subsequently, EMMI will start transitioning panel banks from the current EURIBOR methodology to the hybrid methodology, with a view to finishing the process before the end of 2019.

MiFID2: EU Commission adopts amendments to tick size regime

The EU Commission has adopted a [Delegated Regulation](#) amending the tick size regime under Commission Delegated Regulation (EU) 2017/588 (RTS 11).

The amendments to RTS 11, originally proposed by the European Securities and Markets Authority (ESMA), allow competent authorities to adjust the average daily number of transactions (ADNT) when determining minimum tick sizes where a third-country trading venue has the highest turnover of shares traded in both the EU and a third country.

The amendments broadly seek to ensure the minimum tick size for these shares takes into account the liquidity available on non-EU venues.

The Regulation will enter into force on the twentieth day following its publication in the Official Journal.

FSB publishes 2019 work programme

The Financial Stability Board (FSB) has published its [2019 work programme](#). The programme sets out the work and publications the FSB plans to produce during 2019 as it shifts focus from post-crisis policy design to the implementation and evaluation of reforms and addressing new and emerging risks to financial stability.

Main areas of work include:

- addressing new and emerging vulnerabilities in the financial system, including an analysis of the financial stability implications of technological innovation and reporting on the development of practices for cyber resilience and non-bank financial intermediation (NBFIs);
- finalising post-crisis reforms in the areas of building resilient financial institutions, mitigating systemic risk and improving trade reporting;
- assessing the implementation of reforms through peer reviews and implementation reports; and
- evaluating the effects of post-crisis reforms through ongoing evaluation work and reports.

The FSB has set out an indicative timeline of publications in the annex to the work programme.

Fintech: FSB reports on technological innovation and financial market structure

The FSB has published a second report on fintech developments and their potential implications for financial stability. [The report](#), which builds on the FSB's June 2017 report on fintech and financial stability, focuses particularly on the link between technological innovation and market structure. Some of its key findings are:

- the relationship between incumbent financial institutions and fintechs has so far remained largely complementary and cooperative in nature;
- bigtech firms may have more competitive impact on the market than fintechs, due to their established customer networks and name recognition; and
- reliance on third-party data service providers for core operations is estimated to be low but requires ongoing monitoring from authorities.

The FSB notes that its Financial Innovation Network (FIN) is carrying out further analysis of bigtech in finance and of third-party services for financial institutions, including how they manage lock-in risk and cross-border activities.

BoE reports on its supervision of financial market infrastructures

The Bank of England (BoE) has published its [2019 annual report](#) on its supervision of financial market infrastructures (FMIs). The report sets out how the BoE has exercised its supervisory responsibilities of FMIs in the last year and its domestic and international policy work to strengthen regulatory and supervisory frameworks for FMIs.

The report highlights the BoE's work in monitoring UK FMI's EU withdrawal contingency plans and its advice to the UK Government on its work to nationalise EU law to enable FMIs to continue to operate within a legal framework based on the EU framework operating currently. Part of this work includes making preparations to assume responsibility for recognising overseas FMIs that wish to offer services in the UK after EU withdrawal, including ensuring that these FMIs are suitably informed about the steps to take to enter the transitional arrangements applicable to them in a no deal scenario.

The report also sets out the BoE's work to revise its objectives of FMI supervision, the expansion of its supervisory remit to include specified service providers to payment systems recognised as systemically important by HM Treasury, and work on the operational resilience of FMIs in conjunction with the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA).

Asset management: AMF amends its General Regulation

A [Ministerial Order of 2 August 2018](#) modifying Books III and IV of the French Financial Markets Authority's (AMF's) General Regulation regarding Asset Management has been published in the Official Journal. The amendments are intended to:

- clarify the provisions governing the composition and functioning of the Haut Conseil certificateur de place; and

- adapt the General Regulation to Decree No. 2018-1004 of 19 November 2018 to make the provisions of the General Regulation applicable to employee savings funds applicable to international employee investment funds (international FCPEs), unless otherwise provided.

Consob releases third study on fintech

Consob (the Italian securities regulator) has released a paper analysing the evolution of robo advice and the role it is playing in Italy.

[The paper](#) begins by setting out the results of a survey the working group has carried out with respect to robo advisory services offered in the Italian context. It then considers the main issues that the current regulatory framework may encounter if applied to robo advisors.

The first section of the paper sets out data concerning the spread of robo advice services in Italy. The information has been gathered from contributions by several banks and online services providers, which took part in the survey on a voluntary basis. The second section analyses the legal implications of these services. Consideration is given to the EU regime in this regard, focusing on the MiFID2 framework. In particular, the paper outlines the issues that may arise in terms of responsibility, transparency and cybersecurity.

Luxembourg Bill transposing Shareholders Rights Directive 2 published

A new Bill ([document parlementaire no. 7402/00](#)) transposing Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (SHRD 2) has been lodged with the Luxembourg Parliament, the Chambre des Députés.

The main objective of the SHRD 2 is to improve the long-term viability of European companies and create a more attractive environment for shareholders through the following measures:

- the establishment of a framework for listed companies to identify their shareholders and the obligation for intermediaries to transmit information related to shareholders and to facilitate the exercise of their rights;
- mandatory transparency of voting and engagement of institutional investors and asset managers, as well as of certain aspects of asset management contracts;
- the obligation for proxy advisors to provide information on their methods and to disclose their conflicts of interest;
- disclosure of the remuneration policy and individual remuneration, in combination with a shareholder vote; and
- increased transparency and independent advice on larger transactions with related parties, as well as the submission of the most important transactions to shareholder approval.

The Bill introduces new chapters into the law of 24 May 2011 concerning the exercise of certain rights of shareholders in general meetings of listed companies to implement the above measures into Luxembourg law. The Bill further exercises certain of the options provided for in the SHRD 2.

The lodging of the Bill with the Parliament constitutes the start of the legislative procedure. The Directive foresees transposition by Member States by 10 June 2019.

CSSF issues press release on complaints about infringements of Law of 10 November 2009 on payment services

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a press release ([CSSF 19/08](#)) on complaints about infringements of the Law of 10 November 2009 on payment services, as amended (PSL).

In the press release, the CSSF draws the attention of the public to the establishment of a formal procedure to allow, in particular, users of payment services, electronic money holders and other interested parties, including consumer associations, to submit complaints to the CSSF about an alleged infringement of provisions of the PSL by payment service providers (PSPs) and e-money issuers (EMIs). PSPs in Luxembourg include banks, payment institutions, e-money institutions or Post Luxembourg (Services Financiers Postaux).

The CSSF further notes that a complaint about a PSP or EMI which a complainant suspects not to meet legal requirements under the PSL will be treated separately from individual disputes that customers may have with a professional of the financial sector that is subject to the supervision of the CSSF. Those individual disputes are treated within the framework of the out-of-court resolution procedure of the CSSF.

Finally, the press release refers to the CSSF website for further information about the procedure that has to be followed in order to submit to the CSSF complaints about alleged infringements of the PSL and about the out-of-court resolution procedure.

CSSF launches survey on fight against money laundering and terrorist financing

The CSSF has issued a [press release](#) announcing the launch of the annual online survey collecting standardised key information concerning money laundering and terrorist financing (ML/TF) risks to which the professionals under its supervision are exposed as well as concerning the implementation of related risk mitigation and targeted financial sanctions measures.

The CSSF notes that this cross-sector survey contributes to the CSSF's ongoing assessment of ML/TF risks present in the financial sector and forms part of the anti-money laundering and counter-terrorist financing (AML/CTF) risk-based supervision approach put in place by the CSSF over the last years.

Brexit: Swedish government announces transitional solution for continued access to investment services

The Swedish government has presented a bill to the Riksdag to make it possible temporarily to exempt UK companies from the requirement to hold a licence from the Swedish Financial Supervisory Authority to provide investment services.

The [Swedish government notes](#) that, during a transitional period following the UK's withdrawal from the EU, there will be a need to allow companies

domiciled in the UK to continue to provide services to professional clients with whom they entered into agreements prior to Brexit. The aim of the exemption is to eliminate the risk of interrupted access to the necessary financial services to handle derivative contracts entered into by Swedish businesses with a counterparty in the UK.

The proposed bill will only enter into force if the UK leaves the EU without an agreement in place on transitional arrangements.

ASIC prepares plan for Brexit-related impacts

The Australian Securities and Investments Commission (ASIC) has [announced](#) that it is monitoring developments in the UK and has been liaising with the Financial Conduct Authority, the Bank of England, other Australian financial authorities, and its regulated stakeholders to identify and plan for potential Brexit-related impacts, which includes contingency planning for the event that the UK leaves the EU in a no deal scenario.

ASIC has encouraged firms with global operations to review their Australian financial services (AFS) licensing arrangements as part of their broader preparations for Brexit. For example, foreign financial services providers currently relying on an AFS licensing exemption are advised to consider the implications for their AFS licensing status where their global operations are to be transferred to a different EU subsidiary. In addition, ASIC has indicated that it will continue to monitor developments post-Brexit as intended and unintended consequences become apparent.

ASIC consults on updating guidance on responsible lending for credit licensees

ASIC has launched a [public consultation](#) to review and update its Regulatory Guidance ([RG 209](#)) on responsible lending for credit licensees. ASIC's review of the RG 209 is intended to consider whether it remains effective and identify changes and additions to the guidance that may help Australian credit licensees to understand its expectations for complying with the responsible lending obligations.

ASIC's guidance has been in place since 2010 when the responsible lending laws were first introduced. Although the laws have not changed since 2010 ASIC considers it timely to review and update the guidance in light of its regulatory and enforcement work since 2011, changes in technology, and the recent Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

In particular, ASIC proposes to:

- provide additional guidance to licensees to identify more clearly the inquiries and steps that ASIC thinks are important for licensees in complying with their responsible lending obligations;
- identify some aspects of the current guidance that ASIC considers may benefit from being updated or clarified, including:
 - the kinds of information that are available to verify different aspects of a consumer's financial situation;
 - the role of expense benchmarks in the process for verifying a consumer's financial situation; and

- what licensees should consider when inquiring about, and assessing whether a credit product meets a consumer's requirements and objectives; and
- identify a number of issues that are not currently addressed in any detail in RG 209.

Comments on the consultation paper are due by 20 May 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

Top 8 tech disputes and enforcement risks for 2019

Tech stories were never far from the headlines in 2018. With data privacy taking centre stage, the Cambridge Analytica-Facebook scandal prompted regulatory investigations in Europe and the US. The EU GDPR came into effect, sparking a deluge of compliance emails, and major organisations continued to suffer massive cybersecurity breaches. Technology giants in Europe and elsewhere remained under the spotlight, as fines of over EUR 4 billion were levied.

This briefing considers some of the key technology disputes and enforcement risks which we expect to be on the global agenda in 2019.

https://www.cliffordchance.com/briefings/2019/02/top_10_disputes_and_enforcement_risks_for_2019.html

Czech 'Brexit Act' and financial services

The Czech Government has prepared a Bill that will temporarily regulate relations between the Czech Republic and the UK in case the UK leaves the EU without a withdrawal agreement having been signed. It is expected to be approved by the Czech Parliament by the end of February.

The briefing discusses the Bill, which deals with areas that affect UK citizens such as residency, working permits, certifications and pensions as well as with areas that affect UK businesses such as those providing financial services in the Czech Republic.

https://www.cliffordchance.com/briefings/2019/02/czech_brexit_act_and_financial_services.html

The Netherlands / Brexit – exemption regulation extended to include UK investment firms

The Dutch regulation which exempts certain non-EU based investment firms from the MiFID licensing requirement in the Netherlands has been extended so that it will include investment firms based in the United Kingdom in case of a no deal Brexit. A formal decision from the Dutch Minister of Finance is still required to activate the exemption.

This briefing discusses the exemption, which will allow UK based investment firms to provide investment services and enter into own account trading within the meaning of MiFID without a local Dutch licence. The exemption is temporary in nature and will apply until 1 January 2021. Making use of the exemption will require the UK firm to submit evidence of the fact that it is licensed and supervised in the United Kingdom for the services that it wishes to provide in the Netherlands.

https://www.cliffordchance.com/briefings/2019/02/the_netherlands_brexitemptionregulatio.html

An otherwise lawful dividend can be a transaction defrauding creditors

The case of *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112 offers a warning to directors and companies. The English Court of Appeal concluded that the payment of a lawful dividend can be susceptible to challenge under section 423 of the Insolvency Act 1986 (transactions defrauding creditors) and that directors could have a duty to have regard to the interest of creditors in declaring the dividend.

This briefing discusses the judgment.

https://www.cliffordchance.com/briefings/2019/02/an_otherwise_lawfuldividendcanbeatransactio.html

Payment Services Bill extends licensing net to incidental remittances

The Money-changing and Remittance Businesses Act (MCRBA) regulates the business of accepting money for transmission to persons outside Singapore, and the High Court in *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] SGHC 108 (*Chinpo*) held that remittance activities that are carried on as incidental to their core business would not be caught by the licensing requirement under the MCRBA. The legislative position will change under the Payment Services Bill (PSB), which was passed by Parliament on 14 January 2019.

This briefing discusses the decision in *Chinpo* and the position under the Payment Services Bill.

https://www.cliffordchance.com/briefings/2019/02/payment_servicesbillextendslicensingnett.html

The EU Securitisation Regulation – considerations for US issuers, originators and sponsors

The EU Securitisation Regulation, which replaces previously sectoral securitisation rules and provides a harmonised regime, took effect on 1 January 2019. Unlike the US securitisation rules, EU law continues to impose significant compliance obligations on certain EU regulated entities that invest in securitisations. As a result, US securitisers offering asset-backed securities to EU institutional investors may be indirectly affected by the Securitisation Regulation's requirements.

This briefing considers the main elements of the Securitisation Regulation relevant to US issuers, originators and sponsors, and what compliance under the Securitisation Regulation would mean for their transactions.

https://www.cliffordchance.com/briefings/2019/02/the_eu_securitizationregulation-on-consideration.html

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