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INTERNATIONAL REGULATORY UPDATE 18 – 22 MARCH 2019

- **European System of Financial Supervision: EU Council Presidency and Parliament reach provisional deal on reforms**
- **Brexit: EU agrees extension of Article 50 period**
- **EU Commission consults on draft implementing decisions regarding Australian and Singaporean benchmarks equivalence**
- **EMIR: Delegated Regulations on trade repositories published in Official Journal**
- **SFTR: Delegated Regulations published in Official Journal**
- **MiFIR: Delegated Regulation on requirement for prices to reflect market conditions published in Official Journal**
- **MiFID2: Delegated Regulation amending tick size regime published in Official Journal**
- **Capital Markets Union: EU Council confirms agreement on SME financing**
- **EMIR 2.2: EU Council publishes compromise text on authorisation of CCPs and recognition of third-country CCPs**
- **Presidency compromise texts on proposed prudential regime for investment firms published**
- **EU Parliament adopts minimum loss coverage for non-performing exposures regulation**
- **ECON and ENVI Committees adopt report on proposed sustainable investment framework regulation**
- **EMMI consults on EONIA methodology**
- **MiFID2/MiFIR: ESMA and FCA publish statements on trading obligation for shares in a no-deal Brexit**
- **Brexit: ESMA publishes statement on data operation plan in a no-deal scenario**
- **EBA updates list of other systemically important institutions**
- **EBA publishes reports on Basel III monitoring and liquidity measures**
- **BCBS reports on Basel III monitoring**
- **Brexit: FCA to introduce UK Benchmarks Register**

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- **Brexit: PRA, FCA and EBA agree template MoU on supervisory cooperation**
- **MiFID: FCA publishes technical communication on transparency regime post-Brexit**
- **Working Group on Sterling Risk-Free Reference Rates publishes SONIA market conventions discussion paper**
- **PRA consults on proposed changes to Pillar 2 liquidity framework**
- **Dutch government publishes draft legislative proposal introducing thin capitalisation rule for banks and insurers as of 1 January 2020**
- **Bank of Italy amends its provisions on transparency of banking and financial transactions and services**
- **Consob issues clarifications on information to be disclosed to public regarding SREP**
- **Consob consults on initial coin offerings and trading in crypto assets**
- **Brexit: Consob issues warning on need to inform customers about effects of no-deal scenario**
- **Brexit: Luxembourg bill on measures to be taken in relation to Luxembourg and UK funds published**
- **CSSF issues communiqué on obligations regarding strong customer authentication and common and secure open standards of communication for payment service providers**
- **Czech Brexit Act approved and published**
- **FINMA adjusts circulars on fintech licence and sandbox**
- **Securities and Futures (Trading of Derivatives Contracts) Regulations 2019 come into effect, together with regulations on mutual recognition of trading venues in US and Singapore**
- **MAS consults on proposed revisions to technology risk management guidelines**
- **MAS consults on proposed revisions to business continuity management guidelines**
- **HKMA issues chapter of code of practice in relation to Financial Institutions (Resolution) (Loss-absorbing Capacity Requirements - Banking Sector) Rules**
- **HKMA provides updates on implementation arrangements relating to sale and distribution of debt instruments with loss-absorption features and related products**
- **HKMA provides updates on supervisory policy manual on margin and risk mitigation standards for non-centrally cleared OTC derivatives**
- **SFC issues circular on implementation of online platform guidelines and offline requirements for complex products**
- **SFC issues supplemental circular on leveraged and inverse products**

- **Recent Clifford Chance briefings: Poland prepares for Brexit and Japanese FSA guidance on capital requirements for securitisation investors. Follow this link to the briefings section**

European System of Financial Supervision: EU Council Presidency and Parliament reach provisional deal on reforms

The EU Council Presidency and the EU Parliament have reached a provisional agreement on proposed changes to the functioning of the current European System of Financial Supervision (ESFS).

Amongst other things, the reforms include:

- 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; and
- strengthening the role and powers of the European Banking Authority (EBA) as regards anti-money laundering supervision for financial institutions - in particular, the EBA is given the tasks of collecting information from national competent authorities, enhancing the quality of supervision through the development of common standards, performing risk assessments and facilitating cooperation with non-EU countries on cross-border cases.

Pending technical finalisation of the text, the provisional agreement will be submitted for endorsement to the EU Council's Committee of Permanent Representatives (Coreper). The EU Parliament and Council will be called on to adopt the proposed regulation at first reading.

Brexit: EU agrees extension of Article 50 period

The EU Council has adopted conclusions and taken a decision to approve the UK's request for an extension to the Article 50 process.

The EU Council has agreed to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons by 29 March 2019. If it is not, the EU Council has agreed to an extension until 12 April 2019.

In its decision, the EU Council notes that the UK will be under the obligation to hold EU Parliamentary elections if it is still a Member State on 23-26 May 2019. It also reiterates that the extension excludes any re-opening of the Withdrawal Agreement.

The EU Council has also formally approved the Instrument relating to the Withdrawal Agreement and the Joint Statement supplementing the Political Declaration agreed on 11 March 2019.

UK Prime Minister Theresa May delivered a statement welcoming the EU Council's approval of the documents and the extension, underlining the importance of the UK Parliament passing the Withdrawal Agreement next week and noting that the UK and the EU intend to replace the backstop with alternative arrangements by the end of December 2020.

EU Commission consults on draft implementing decisions regarding Australian and Singaporean benchmarks equivalence

The EU Commission has published draft implementing decisions on the equivalence of the legal and supervisory frameworks applicable to benchmarks in Singapore and in Australia in accordance with the Benchmarks Regulation ((EU) 2016/1011).

When assessing such equivalence, the EU Commission considers whether the legal framework and supervisory practice of a third country ensures compliance with the IOSCO principles for financial benchmarks, and whether specific administrators or specific benchmarks or families of benchmarks are subject to effective supervision and enforcement on an on-going basis in that third country.

The EU Commission undertook an assessment of the benchmark regime in Singapore and concluded that the binding requirements with respect to the Singapore Interbank Offered Rate (SIBOR) and the Singapore Dollar Swap Offer Rate (SDSOR) are subject to effective supervision and enforcement on an on-going basis.

The EU Commission also undertook an assessment of the benchmark regime in Australia and concluded that the binding requirements are subject to effective supervision and enforcement on an on-going basis for:

- the Australian Bank Bill Swap Rate;
- S&P/ASX 200 Index;
- ASX Bond Futures Settlement Price;
- Australian Interbank Overnight Cash Rate; and
- Australian Consumer Price Index.

Comments are due by 16 April 2019.

EMIR: Delegated Regulations on trade repositories published in Official Journal

Two Commission Delegated Regulations on trade repositories have been published in the Official Journal. The first (Delegated Regulation (EU) 2019/361) amends Delegated Regulation (EU) No 151/2013 with regard to accessing data held in trade repositories. The second (Delegated Regulation (EU) 2019/362) amends the regulatory technical standards on applying for registration as a trade repository, as set out in Delegated Regulation (EU) No 150/2013. Both Delegated Regulations will enter into force on 11 April 2019.

SFTR: Delegated Regulations published in Official Journal

A series of Commission Delegated Regulations under the Securities Financing Transactions Regulation (SFTR) have been published in the Official Journal.

The Delegated Regulations lay down regulatory technical standards (RTS) with regard to:

- securities financing transactions (SFTs) to be reported to trade repositories ((EU) 2019/356);
- SFTs to be held in trade repositories ((EU) 2019/357);
- the collection, analysis and publication of data on SFTs by trade repositories ((EU) 2019/358);
- the application for registration and extension of registration as a trade repository ((EU) 2019/359) and the format of applications ((EU) 2019/364);
- fees charged by the European Securities and Markets Authority (ESMA) to trade repositories ((EU) 2019/360);
- reporting on the details of SFTs to trade repositories ((EU) 2019/363); and
- the procedures and forms for exchange of information on sanctions, measures and investigations ((EU) 2019/365).

MiFIR: Delegated Regulation on requirement for prices to reflect market conditions published in Official Journal

Commission Delegated Regulation (EU) 2019/442 of 12 December 2018 amending and correcting Delegated Regulation (EU) 2017/587 to specify the requirement for prices to reflect prevailing market conditions and to update and correct certain provisions has been published in the Official Journal.

Commission Delegated Regulation (EU) 2017/587 sets out transparency requirements for trading venues and systematic internalisers. It specifies that prices quoted by systematic internalisers reflect prevailing market conditions, as required by Article 14(3) of MiFIR, where those prices are close in price, at the time of publication, to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity. Systematic internalisers may therefore provide quotes that are not subject to the minimum price increment (tick size) with which trading venues are to comply. The Commission is concerned that such quotes may undermine the overall quality of the liquidity available, the efficient valuation and pricing of financial instruments, and the level playing field between trading venues and systematic internalisers.

Delegated Regulation (EU) 2019/442 amends Delegated Regulation (EU) 2017/587 so that prices quoted by systematic internalisers for those instruments should only be deemed to reflect prevailing market conditions where those prices are subject to minimum price increments corresponding to the tick sizes applicable to prices published by trading venues.

Additionally, Delegated Regulation (EU) 2019/442 removes references to securities financing transactions from Delegated Regulation (EU) 2017/587 following their removal from the scope of the transparency provisions for trading venues and systematic internalisers by Regulation (EU) 2016/1033.

MiFID2: Delegated Regulation amending tick size regime published in Official Journal

Commission Delegated Regulation (EU) 2019/443 amending the tick size regime under Commission Delegated Regulation (EU) 2017/588 (RTS 11) has been published in the Official Journal.

The amendments to RTS 11 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 9 April 2019.

Capital Markets Union: EU Council confirms agreement on SME financing

The EU Council's Permanent Representatives Committee (Coreper) has confirmed an agreement reached between the Council Presidency and the EU Parliament on the proposed regulation on easier and cheaper access to new sources of funding for small and medium-size enterprises (SMEs).

The proposed regulation, which amends the Market Abuse and the Prospectus Regulations, aims to:

- reduce reporting obligations;
- incentivise SMEs to access capital markets through SME growth markets; and
- provide a simplified prospectus for SMEs.

The EU Parliament will now vote on the agreement in the April plenary session. The text will then undergo a legal linguistic revision and the EU Council and the EU Parliament will be called on to adopt the proposed regulation at first reading.

EMIR 2.2: EU Council publishes compromise text on authorisation of CCPs and recognition of third-country CCPs

The EU Council Presidency has published the final compromise text on the EU Commission's proposed regulation amending the European Market Infrastructure Regulation (EMIR) as regards the procedures and authorities involved for the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs (EMIR 2.2).

Key elements of the proposed regulation include:

- establishing a CCP supervisory committee within ESMA to ensure closer cooperation between supervisory authorities and central banks responsible for EU currency;
- introducing a system for recognising and supervising third country clearing houses, and in particular, differentiating between non-systemically important CCPs and systemically important CCPs (also called Tier 2 CCPs);
- setting stricter rules that Tier 2 CCPs must adhere to in order to be recognised and authorised to operate in the EU; and
- as a measure of last resort, allowing ESMA to be able to conclude that a CCP or some of its clearing services are of such substantial systemic importance that the CCP should not be recognised, requiring the third country CCP to establish itself in the EU in order to be able to operate.

The Council Presidency has invited the Permanent Representatives Committee (Coreper) to approve the final compromise text and confirm that, if the EU Parliament adopts the regulation at first reading, the Council will approve its position.

Presidency compromise texts on proposed prudential regime for investment firms published

The EU Council Presidency has published compromise texts on the EU Commission's proposed directive on the prudential supervision of investment firms and proposed regulation on the prudential requirements of investment firms.

Under the terms of the texts, all investment firms would be subject to the same measures, in particular as regards capital holdings, reporting, corporate governance and remuneration, but the set of requirements they would need to apply would be differentiated according to their size, nature and complexity. The supervision package also sets out in greater detail some of the requirements under MiFID2/MiFIR that would apply to third country investment firms accessing the single market.

EU Parliament adopts minimum loss coverage for non-performing exposures regulation

The EU Parliament has adopted the proposed regulation amending the Capital Requirements Regulation (CRR) as regards minimum loss coverage for non-performing exposures.

The regulation forms part of the EU Commission's package of measures aimed at addressing the risks related to high levels of non-performing loans (NPLs) in Europe, and still needs to be formally approved by the EU Council.

ECON and ENVI Committees adopt report on proposed sustainable investment framework regulation

The EU Parliament Committees on Economic and Monetary Affairs (ECON) and on the Environment, Public Health and Food Safety (ENVI) have adopted their report on the proposal for a regulation on the establishment of a framework to facilitate sustainable investment.

The proposed text is intended to develop an EU taxonomy for climate change and environmentally and socially sustainable activities as well as to provide investors with a common language to identify to what degree economic activities can be considered environmentally sustainable.

The proposal is one of three measures that the EU Commission presented in May 2018 in relation to its Action Plan on sustainable finance.

The EU Parliament plenary session is scheduled to vote on the proposal at the end of March. The EU Council is yet to adopt its position.

EMMI consults on EONIA methodology

The European Money Markets Institute (EMMI) has launched a consultation on the change in the methodology of the Euro OverNight Index Average (EONIA), as recommended by the Working Group on euro risk-free rates.

EMMI is consulting on the following recommendations by the Working Group on euro risk-free rates:

- implementation of the recalibrated methodology for EONIA, whereby EONIA will be defined as the €STR plus a spread;
- the continued publication of EONIA under the current methodology until the €STR starts being published;
- projected implementation date of EONIA's recalibrated methodology on 2 October 2019; and
- transition of the market away from EONIA to the €STR following the discontinuation of EONIA on 3 January 2022.

Due to the dependencies between the recalibration of EONIA's methodology and the European Central Bank's (ECB's) production plans for the €STR, the market and other users of EONIA will have to adapt to a move in the publication time of EONIA from day T to day T+1 in a short timeframe. As a result, EMMI is also seeking feedback on the:

- preparation and implementation of changes in IT or valuation systems prior to the first publication of EONIA under the recalibrated methodology on 2 October 2019; and
- proposed publication time at or shortly after 11:00 am CET on day T+1 for EONIA under the recalibrated methodology.

Comments are due by 15 April 2019. EMMI intends to publish a summary of feedback received on 30 May 2019 along with more details on the implementation plan.

MiFID2/MiFIR: ESMA and FCA publish statements on trading obligation for shares in a no-deal Brexit

ESMA has published a statement on the application of the trading obligation for shares under Article 23 of MiFIR in the event of a no-deal Brexit and in the absence of an equivalence decision by the EU Commission.

The statement seeks to clarify the scope of the trading obligation in respect of the concept of 'non-systematic, ad-hoc, irregular and infrequent trading' in that scenario. To that end, ESMA will assume, for a temporary period to mitigate cliff-edge effects, that:

- shares with ISINs starting with a EU27, Iceland, Liechtenstein or Norway country code are within the scope of the trading obligation; and
- shares with ISINs starting with the UK country code (i.e. GB) are traded on a 'non-systematic, ad-hoc, irregular and infrequent trading' basis in the EU27 and not within the scope of the obligation, unless they qualify as liquid in the EU27 on the basis of 2018 trading volumes excluding UK data.

ESMA has published a list of EU27 and GB ISINs subject to the trading obligations to clarify the above approach.

ESMA has also expressed the view that the trading obligation should be applied on the basis of ISIN country code to GB and EU27 shares that were or will be newly admitted to trading or traded for the first time on an EU27 trading venue after 1 January 2019.

The UK Financial Conduct Authority (FCA) has published a statement in response, noting that firms may be limited to trading certain shares only in either the UK or the EU, or caught by overlapping obligations. The FCA therefore urges further dialogue and a coordinated approach to address issues of conflicting obligations applying to the same instruments.

Brexit: ESMA publishes statement on data operation plan in a no-deal scenario

ESMA has published a statement on the operation of ESMA data systems if the UK leaves the EU without a deal.

The statement, which complements ESMA's statement on the use of UK data published on 5 February 2019, sets out maintenance windows and actions, including those for market participants interacting with ESMA's IT systems, for implementing a no-deal Brexit in respect of:

- the Financial Instruments Reference Data System (FIRDS);
- the Financial Instrument Transparency System (FITRS);
- the Double Volume Cap System (DVCAP);
- the Transaction reporting systems; and
- ESMA's registers and data.

EBA updates list of other systemically important institutions

The EBA has published its 2018 list of other systemically important institutions (O-SIIs) in the EU. Relevant authorities across the EU have identified O-SIIs in their respective jurisdictions on the basis of the criteria in the EBA guidelines. The guidelines define O-SIIs by size, importance, complexity (or cross-border activities) and interconnectedness, although there is also a degree of supervisory discretion permitted, so that authorities may include institutions that would not automatically fall under the definition of O-SIIs but are still systemically important in their respective jurisdictions. Relevant authorities have also submitted to the EBA details of the underlying rationale and their process for identifying O-SIIs.

The Common Equity Tier 1 (CET1) O-SII capital buffer requirement will be re-assessed on the basis of the 2018 identification exercise and the O-SIIs' scores.

EBA publishes reports on Basel III monitoring and liquidity measures

The EBA has published updated reports on Basel III monitoring and on liquidity coverage requirements (LCRs) under the CRR.

The Basel III monitoring report, based on data as of 30 June 2018, assesses the impact of the final Basel III reforms, in particular the revisions of credit risk, operational risk and leverage ratio frameworks and the introduction of the aggregate output floor, new standards for market risk and credit valuation adjustments. Key findings of the report include:

- European banks' minimum Tier 1 capital requirement would increase by 19.1% at the full implementation date;

- the impact of the risk-based reforms is 25.4%, of which the leading factors are the output floor (8%) and operational risk (5.5%); and
- the leverage ratio is the constraining (i.e. the highest) Tier 1 requirement for some banks, explaining why part of the increase in the risk-based capital metric (-6.2%) is not to be accounted as an actual increase of the overall Tier 1 requirement.

The EBA is preparing a more detailed report, using the same reference date but an expanded sample of banks, in response to the EU Commission's call for advice on the implementation of the Basel III framework.

The report on liquidity measures broadly shows that EU banks have continued to improve their liquid coverage ratio (LCR), averaging 146%. Four banks monetised their liquidity buffers during times of stress which contributed to an aggregate gross shortfall of EUR 22.5 billion. The EBA also found evidence of potential currency mismatches in LCR levels, suggesting that banks tend to hold significantly lower liquidity buffers in some foreign currencies, in particular US dollar.

BCBS reports on Basel III monitoring

The Basel Committee on Banking Supervision (BCBS) has published the results of its latest review of the implications of the Basel III standards for banks. The report is based on data as at 30 June 2018 for 189 banks, of which 106 were Group 1 banks, defined as internationally active banks with Tier 1 capital of more than EUR 3 billion. The Basel III minimum capital requirements are expected to be implemented by 1 January 2022 and fully phased-in by 1 January 2027.

Key findings of the report include:

- on a fully phased-in basis, the capital shortfalls at the reporting date were EUR 30.1 billion for Group 1 banks at the target level, a 70% decrease to those in the end-2015 qualitative impact study, due mainly to higher levels of eligible capital;
- the Tier 1 minimum required capital (MRC) would increase by 5.3% for Group 1 banks in comparison to the 3.2% increase at end-2017;
- all sampled banks continue to meet both the Basel III risk-based Common Equity Tier 1 (CET1) requirement of 4.5% and the target level CET1 requirement of 7%, plus any surcharges for globally systemically important banks (G-SIBs);
- six out of 24 G-SIBs reporting total loss-absorbing capacity (TLAC) data have a combined incremental TLAC shortfall of EUR 68 billion, compared with EUR 82 billion at end-2017;
- the weighted average liquidity coverage ratio was 135% for Group 1 banks and 180% for Group 2; and
- the weighted average net stable funding ration (NSFR) was 116% for Group 1 banks and 119% for Group 2.

Brexit: FCA to introduce UK Benchmarks Register

The FCA has announced that it intends to create a UK Benchmarks Register to prepare for the possibility of the UK leaving the EU without an implementation period.

The UK Benchmarks Register will replace the European Securities and Markets Authority (ESMA) Register for UK supervised users and UK and third-country based benchmark administrators that want their benchmarks to be used in the UK.

The Benchmarks Administrators Register will be a public record of all benchmark administrators that are:

- authorised, registered or recognised by the FCA;
- outside the UK and have notified the FCA that they benefit from an equivalence decision that has been adopted by the UK; and
- copied from the ESMA register as set out in the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019.

The Third-country Benchmarks Register will be a public record of all benchmarks that are:

- provided by third country benchmarks administrators recognised by the FCA;
- endorsed by a UK authorised or registered benchmarks administrator, or other supervised entity, for use in the UK;
- provided by benchmarks administrators from outside the UK, that have notified the FCA that they benefit from an equivalence decision that has been adopted by the UK; and
- copied from the ESMA register as set out in the Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019.

On Exit day, the FCA will temporarily copy information from the ESMA register onto the UK Benchmarks Register. This information will stay on the UK Benchmarks Register for a period of 2 years unless it is subsequently removed pursuant to and in accordance with the UK Benchmarks Regulation.

Brexit: PRA, FCA and EBA agree template MoU on supervisory cooperation

The Prudential Regulation Authority (PRA), FCA and EBA have announced that they have agreed a template for memoranda of understanding (MoUs) on supervisory cooperation and information-sharing arrangements between UK and EU/EEA national authorities in the event of a no-deal Brexit.

The UK authorities and EU/EEA authorities intend to sign the bilateral MoUs as soon as possible, which will only come into effect in the event of no-deal in order to allow uninterrupted information-sharing and supervisory cooperation.

MiFID: FCA publishes technical communication on transparency regime post-Brexit

The FCA has published a technical communication on the operation of the MiFID transparency regime if the UK leaves the EU in a no-deal scenario.

The document sits alongside the supervisory statement published on 14 March 2019 and sets out further details on the FCA Financial Instrument Transparency System (FITRS), including the data it intends the system to contain, the file format and search capability, when the daily delta file will be published and the FCA's approach to missing data.

Working Group on Sterling Risk-Free Reference Rates publishes SONIA market conventions discussion paper

The Working Group on Sterling Risk-Free Reference Rates has published a discussion paper on conventions for referencing SONIA in new contracts.

The purpose of the discussion paper is to raise awareness on market conventions for market participants that seek to reference SONIA in new contracts. It is also intended that the discussion paper will support infrastructure providers and calculation agents in developing the necessary changes to enable end users to reference SONIA.

The discussion paper includes:

- a summary of conventions that already exist in SONIA-referencing markets;
- considerations for new products referencing SONIA; and
- questions for suggested feedback from market participants.

Comments are due by 30 April 2019.

PRA consults on proposed changes to Pillar 2 liquidity framework

The PRA has launched a consultation on draft amendments to the Pillar 2 liquidity framework. The proposed changes are intended to provide further clarity to:

- the PRA110 liquidity reporting template and related instructions;
- reporting requirements for non-EU EEA banks;
- expectations under supervisory statement (SS24/15) 'The PRA's approach to supervising liquidity and funding risks';
- the PRA's approach to cashflow mismatch risk; and
- the Regulatory Reporting Part of the PRA Rulebook.

The changes would be implemented through amendments to:

- the Regulatory Reporting Part of the Rulebook (Appendix 1);
- statement of policy 'Pillar 2 Liquidity' (Appendix 2);
- SS24/15 (Appendix 3);
- SS34/15 'Guidelines for completing regulatory reports' (Appendix 4);
- PRA110 reporting template (Appendix 5); and
- PRA110 reporting instructions (Appendix 6).

Comments are due by 19 April 2019.

Dutch government publishes draft legislative proposal introducing thin capitalisation rule for banks and insurers as of 1 January 2020

The Dutch government has published a draft legislative proposal introducing a thin capitalisation rule for banks and insurers as of 1 January 2020 for public consultation.

Based on the draft legislative proposal, the thin capitalisation rule would limit the deduction of interest and other costs in relation to debt instruments if generally the leverage ratio of a bank (i.e. Tier 1) under the Capital Requirements Regulation (CRR) or the own funds ratio of an insurer (i.e. Tier 1 and certain items of Tier 2 and Tier 3) under Solvency II is less than 8%.

The non-deductible interest under this thin capitalisation rule is calculated as (8%-X)/(100-X) with 'X' being either the leverage ratio in the case of a bank or the own funds ratio in the case of an insurer.

Bank of Italy amends its provisions on transparency of banking and financial transactions and services

The Bank of Italy has released a measure intended to modify its 2009 resolution on transparency of banking and financial transactions and services - fairness in dealings between intermediaries and customers.

The amendments are aimed at implementing the revised Payment Services Directive (PSD2) and the provisions of the Italian Banking Act dealing with transparency of payment services.

In addition, the new resolution seeks to align the Bank of Italy's regulatory framework with the following:

- the Mortgage Credit and Consumer Credit Directives, as modified by the Benchmarks Regulation; and
- the European Banking Authority (EBA) guidelines on remuneration policies and practices related to the sale and provision of retail banking products and services and the European Supervisory Authorities' Joint Committee guidelines on complaints-handling.

Further amendments have been introduced in light of the experience gained by the Bank of Italy while exercising its supervisory powers as regards compliance with customer protection regulations.

Consob issues clarifications on information to be disclosed to public regarding SREP

The Italian securities regulator Consob has released two communications on the information that has to be delivered by banks which are subject to the periodic assessment of their capital adequacy known as the Supervisory Review and Evaluation Process (SREP).

According to the first communication, such disclosure should reference the Pillar 2 requirements, namely the minimum mandatory capital ratios. The communication further underlines that banks are responsible for choosing whether to opt for a delay in communication to the public in respect of privileged information.

With regard to the quality requirements and Pillar 2 guidance, the second communication clarifies that it is for banks to assess the information that should be published. However, according to Consob, at least the non-compliance with capital ratios should be deemed to be relevant for these purposes.

The information must be included in banks' financial statements and submitted as part of the periodic financial reporting obligations.

Consob consults on initial coin offerings and trading in crypto assets

Consob has launched a consultation process concerning initial coin offerings and crypto assets trading. The aim of the initiative is to stimulate debate in light of the recent spread of initial coin offerings and crypto-assets amongst Italian investors. While Consob awaits the adoption of a coordinated European approach on the legal classification of crypto-assets, the consultation is intended to assess the main aspects to be considered in the preparation and development of possible regulatory measures at national level.

The consultation will run until 19 May 2019. Consob intends to organise a public hearing during this period and will communicate the date of the hearing shortly.

Brexit: Consob issues warning on need to inform customers about effects of no-deal scenario

Consob has released a warning requesting financial institutions to provide their customers with information concerning the impact of a no-deal Brexit on their provision of investment services.

According to the warning, UK institutions operating in Italy and Italian institutions operating in the UK should inform both professional and retail customers about the implications that Brexit might have on the relationships currently in place. In particular, the information must concern both the investment services rendered and expected developments with respect to existing contractual relationships.

The information should also be published on institutions' websites.

Brexit: Luxembourg bill on measures to be taken in relation to Luxembourg and UK funds published

A new bill of law (Bill 7426) concerning measures to be taken in relation to the financial sector in case of a UK withdrawal from the EU and amending the law of 17 December 2010 relating to undertakings for collective investment (UCI Law) and the law of 13 February 2007 on specialised investment funds (SIF Law) has been lodged with the Luxembourg Parliament.

Bill 7426 is intended to ensure the stability of financial markets and the protection of investors of Luxembourg undertakings for collective investment in transferable securities (UCITS), undertakings for collective investment subject to Part II of the UCI Law (Part II UCIs) and specialised investment funds (SIFs), as these investment funds may no longer be in compliance with their respective investment policies and investment restrictions as well as the relevant assets eligibility criteria applicable to them following the UK's withdrawal from the EU.

For these purposes, Bill 7426 proposes to grant a maximum period of twelve months for these Luxembourg UCITS, Part II UCIs and SIFs to regularise the situation caused by such non-compliance, provided that such a regularisation must be done as soon as possible, taking into account the protection of the investors. The twelve-month regularisation period is only granted in relation to the investment positions acquired by UCITS, Part II UCIs and SIFs before the date of the UK's withdrawal from the EU and only in relation to non-compliance situations caused by this withdrawal.

Bill 7426 also contains specific temporary provisions (for a maximum of twelve months) in favour of UK UCITS, which are currently marketed to retail investors in Luxembourg under the UCITS marketing passport and which will qualify as third country UCIs as of the UK's withdrawal from the EU.

For the avoidance of doubt, the specific measures provided for by Bill 7426 are expected to be taken in all possible cases of UK withdrawal from the EU and not only in the case of a no-deal Brexit.

Bill 7426 foresees an entry into force on the date of the UK's withdrawal from the EU.

CSSF issues communiqué on obligations regarding strong customer authentication and common and secure open standards of communication for payment service providers

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a communiqué on obligations regarding strong customer authentication and common and secure open standards of communication under Commission Delegated Regulation (EU) 2018/389 of 27 November 2017.

The communiqué draws the attention of payment service providers (PSPs) supervised by the CSSF to a number of new obligations resulting from the Delegated Regulation and from the Payment Services Directive (PSD2), which was implemented in Luxembourg by the law of 20 July 2018.

The Delegated Regulation applies to PSPs who offer payment accounts (including e money accounts) that are accessible online regardless of whether this access allows consultative services only, transactional services only, or both, and irrespective of:

- a presumed disinterest of the account servicing payment service provider's (ASPSP's) clients in using account information and/or payment initiation services offered by third party providers;
- the size of the ASPSP and the number of its clients;
- the fact that the ASPSP only has corporate clients; and
- the fact that the payment account only allows transactions to its owner's account held at another ASPSP.

The communiqué reiterates certain key points of the Delegated Regulation, in particular security standards (Strong Customer Authentication (SCA)), access interface modalities and related obligations, and the obligation to implement a contingency mechanism (or the possibility to obtain contingency mechanism exception) and rewinds PSPs to comply with the Delegated Regulation.

The communiqué further provides details with respect to the use of an access interface solution developed and managed by a third party and related outsourcing questions, including where a contingency mechanism exception is applied for.

The communiqué contains an annex setting out the timelines and deadlines to respect by PSPs with regard to access interfaces for third party providers (such as account information service providers and payment initiation service providers) and to contingency mechanism exemptions. The CSSF has also

indicated the forms available on its website that have to be used to apply for such an exemption.

Czech Brexit Act approved and published

The Act that will temporarily regulate relations between the Czech Republic and the UK in case the UK leaves the EU without a deal has been approved by the Parliament, signed by the President and published in the Collection of Laws as Act No. 74/2019 Coll., on the regulation of certain relations in connection with the UK's exit from the EU. While the Act has therefore become part of Czech law, it will only become effective if the UK leaves the EU without a withdrawal agreement having been signed.

For further details about the Act please refer to our February briefing paper at the link below.

FINMA adjusts circulars on fintech licence and sandbox

The new licensing category for fintech companies introduced by the Swiss Parliament and adjustments by the Federal Council of provisions concerning the sandbox require a corresponding adjustment of the Swiss Financial Market Supervisory Authority's (FINMA's) practice. FINMA is therefore carrying out a consultation exercise on Circulars 2008/3 'Public deposits with non-banks' and 2013/3 'Auditing. In particular:

- FINMA is adding the requirements for the regulatory auditing of fintech companies to its Auditing circular. The requirements for fintech companies are based on the established auditing requirements of banks and securities dealers, but the audit is less extensive and the reporting process simpler, while focusing on the risks specific to fintech business models; and
- while it is possible to invest deposits received up to CHF 1 million within the sandbox, operating in the so-called interest rate differential business is prohibited and remains the privilege of banks. In its amendment to the 'Public deposits with non-banks' circular, FINMA sets out its interpretation of the term 'interest rate differential business'.

The consultation will last until 15 May 2019. The partially revised circulars are expected to enter into force in autumn 2019.

Securities and Futures (Trading of Derivatives Contracts) Regulations 2019 come into effect, together with regulations on mutual recognition of trading venues in US and Singapore

The finalised Securities and Futures (Trading of Derivatives Contracts) Regulations (SF(TDC)R) and the Securities and Futures (Trading Venues for Derivatives Contracts in the United States of America) Regulations 2019 have come into operation.

The Monetary Authority of Singapore (MAS) has also published its responses to the feedback it received on its February 2018 public consultation on the draft SF(TDC)R to require the trading of over-the-counter (OTC) derivatives on organised markets.

Amongst other things, the MAS has clarified the following:

- the MAS will proceed with the proposed scope of derivatives contracts and contract specifications as set out in the consultation paper, and continue to

monitor the trading of OTC derivatives to inform its assessment on the scope of derivatives contracts to be subject to trading obligations;

- banks with significant OTC derivatives activity in Singapore will be subject to both clearing and trading obligations;
- all outstanding OTC derivatives contracts booked in Singapore will be counted towards the trading threshold, including OTC derivatives contracts regardless of whether they have been cleared or margined, as well as OTC derivatives contracts entered into between intra-group legal entities. Only inter-branch trades will not be included in the computation;
- to ease the operational difficulty of identifying the location of the individual trader to determine the trading nexus of the trade, the MAS has revised its proposed trading nexus, which is based on the office where the trade is being executed, rather than the individual trader executing the trade;
- the trading obligations will only be applicable where the specified person executes the trade in its capacity as a principal and not as an agent;
- intra-group transactions will be exempted from the trading obligations. Public bodies will also not be subject to the trading obligations because they are not specified persons;
- sufficient time will be provided for on-boarding onto organised markets operated by approved exchanges, recognised market operators and eligible foreign facilities. Derivatives contracts will be subject to the trading obligations only if the derivatives contracts are executed on or after 1 April 2020; and
- the MAS will proceed to subject fixed-to-floating interest rate swaps denominated in Euro and Pound Sterling, with maturity between 28 days and 10 years (inclusive), to the clearing obligations. These clearing obligations will take effect on 1 April 2020 and the Securities and Futures (Clearing of Derivatives Contracts) Regulations 2018 will be amended to include this requirement in due course.

The MAS and the Commodity Futures Trading Commission have also issued a joint statement on the mutual recognition of certain derivatives venues in the United States and Singapore. The Securities and Futures (Trading venues for derivatives contracts in the United States of America) Regulations 2019 contain a list of trading venues in the United States that are recognised in Singapore.

MAS consults on proposed revisions to technology risk management guidelines

The MAS has launched a public consultation on proposed revisions to the Technology Risk Management Guidelines. The guidelines set out technology risk management principles and best practices for the financial sector. The revisions are to update the guidelines for greater focus in the following key areas:

- technology risk governance and oversight - the proposed revisions articulate the need for both a financial institution's board of directors and senior management to have members with the necessary skills and understanding of technology risks. The responsibilities of the board of directors and senior management also include establishing a strong risk culture and a sound and robust technology risk management framework;

- software development and management - the proposed revisions advocate the adoption of secure software development best practices, such as secure coding and code review when using 'Agile development methods' and enforcement of segregation of duties in the key 'DevOps' practices;
- emerging technologies - the MAS notes that financial institutions are increasingly investing in technologies, such as application programming interfaces, smart electronic devices and virtualisation, to improve service delivery and efficiency. The proposed revisions will include additional guidance to manage risks arising from such technologies; and
- cyber resilience - the proposed revisions include guidance on cyber surveillance, cyber security assessment and testing, as well as cyber incident management. The MAS has advised financial institutions to establish and strengthen their processes and controls to identify, prevent, detect, respond to and recover from cyber incidents.

The circulars issued by the MAS after July 2013 on vulnerability assessment and penetration testing, information technology security risks posed by personal mobile devices, early detection of cyber intrusions and technology risk, and cyber security training for financial institution's board of directors have been incorporated into the revised guidelines to facilitate ease of reference by users.

Comments on the consultation paper are due by 8 April 2019.

MAS consults on proposed revisions to business continuity management guidelines

The MAS has launched a public consultation on proposed revisions to the business continuity management (BCM) guidelines, which were originally issued in 2003, then supplemented in 2006 by additional guidance on pandemic and physical security measures. The proposed changes are part of the MAS' efforts to help financial institutions strengthen their resilience in the event of major operational disruptions.

The revised BCM guidelines will also supersede MAS Circular SRD BCM 01/2006, and financial institutions will be expected to adopt the revised BCM guidelines within a year following their publication.

Amongst other things, the MAS is seeking comments on the following:

- the definition of a financial institution's 'business function';
- the roles and responsibilities of the Board of directors and senior management;
- the proposed scope of a business continuity plan;
- the proposed type and frequency of BCM tests;
- the expectation of conducting regular BCM audits; and
- any other aspects of BCM that warrant further guidance from the MAS.

Comments on the consultation paper are due by 8 April 2019.

HKMA issues chapter of code of practice in relation to Financial Institutions (Resolution) (Loss-absorbing Capacity Requirements - Banking Sector) Rules

The Hong Kong Monetary Authority (HKMA) has issued a chapter of a code of practice in relation to the Financial Institutions (Resolution) (Loss-absorbing Capacity Requirements - Banking Sector) Rules (LAC Rules) under the Financial Institutions (Resolution) Ordinance.

The chapter provides guidance on how the HKMA as resolution authority intends to exercise certain discretionary powers under the LAC Rules, and the operation of certain provisions of the LAC Rules. In particular, it sets out the HKMA's planning assumption that where the total consolidated assets of a Hong Kong incorporated authorised institution exceed HKD 300 billion, the LAC requirements should be imposed.

HKMA provides updates on implementation arrangements relating to sale and distribution of debt instruments with loss-absorption features and related products

The HKMA has issued a circular providing updates to registered institutions on the implementation arrangements relating to the enhanced investor protection measures for sale and distribution of debt instruments with loss-absorption features and related products, which were set out by it in its circular dated 30 October 2018.

The requirements set out in the previous circular were due to become effective on 6 April 2019. Following feedback from the industry, the HKMA considers it appropriate to extend the deadline to 6 July 2019 for registered institutions to implement the requirements in the previous circular.

The HKMA has also drawn registered institutions' attention to the Securities and Futures Commission's (SFC's) circular dated 19 March 2019 on the implementation of the online platform guidelines and offline requirements for complex products, which extended the effective date of the guidelines on online distribution and advisory platforms and the 'paragraph 5.5' of the Code of Conduct for Persons Licensed by or Registered with the SFC from 6 April 2019 to 6 July 2019 after the SFC had considered feedback from the industry.

HKMA provides updates on supervisory policy manual on margin and risk mitigation standards for non-centrally cleared OTC derivatives

The HKMA has issued a circular providing updates to authorised institutions in relation to its supervisory policy manual (SPM) module on margin and other risk mitigation standards for non-centrally cleared over-the-counter (OTC) derivatives with regard to the following:

- comparability of the United Kingdom's standards after Brexit - the HKMA notes that the wording of 'footnote 24' of the SPM module, which lists the jurisdictions deemed comparable by referring to the European Union and all the non-EU working group on margin requirements member jurisdictions, will currently not cover the UK after its planned withdrawal from the EU. The HKMA has indicated that it intends to maintain the UK's status as a deemed-comparable jurisdiction in the context of the SPM

module, independent of its EU membership status, and footnote 24 will therefore be revised to specifically cover the UK once it withdraws from the EU; and

- clarifications on the final implementation phases for margin requirements - the HKMA has indicated that the clarifications provided by the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) in their joint statement, issued on 5 March 2019, with regard to the final implementation phases of the margin requirements for non-centrally cleared derivatives will be applicable in the context of the SPM module. In addition, genuine amendments to existing derivatives contracts which are made to give effect to interest rate benchmark reforms will not be considered new contracts from the perspective of the HKMA's margin requirements. The HKMA has further indicated that, in coordination with other BCBS and IOSCO members, it will continue to monitor the effect of meeting the final stage of phase-in of the margin requirements.

SFC issues circular on implementation of online platform guidelines and offline requirements for complex products

The Securities and Futures Commission (SFC) has issued a circular to intermediaries with regard to the implementation of the online platform guidelines and offline requirements for complex products.

On 28 March 2018, the SFC issued new guidelines on online distribution and advisory platforms which, amongst other requirements, provide for additional protective measures for the sale of complex products in an online environment. On 4 October 2018, the SFC further announced that under a new paragraph 5.5 of the Code of Conduct for Persons Licensed by or Registered with the SFC, the additional protective measures will also apply to the sale of complex products in an offline environment.

Both the guidelines and paragraph 5.5 of the Code of Conduct were due to become effective on 6 April 2019. Following feedback from the industry, the SFC has agreed to extend the effective date by three months to 6 July 2019.

The SFC has also indicated that, from the effective date, additional protection will be provided to investors when they purchase a complex product without solicitation or recommendation. If an intermediary solicits the sale of or recommends a financial product to a client, the SFC advises it to comply with paragraph 5.2 of the Code of Conduct and ensure that the product is suitable for the client regardless of whether it is complex or non-complex.

SFC issues supplemental circular on leveraged and inverse products

The SFC has issued a circular supplemental to its circular on leveraged and inverse products issued on 17 December 2018. The December 2018 circular sets out the requirements under which the SFC would consider authorising leveraged and inverse products for public offering in Hong Kong under the Securities and Futures Ordinance.

The December 2018 circular also requires, among other things, that inverse products will be subject to a maximum leverage factor of one time (-1X) and such leverage factor will be subject to review going forward.

The supplemental circular sets out the way forward after the SFC's recent review and the resulting changes to the December 2018 circular. Based on the results of the review, the SFC is prepared to relax the leverage factor cap of inverse products to two-time (-2X) and accept applications for -2X inverse products.

The SFC has indicated that it will continue to keep in view the eligible indices of leveraged and inverse products but, at this stage, it will only accept applications for leveraged and inverse products tracking commodities indices on a case by case basis where there is no potentially outsized impact from roll costs on the performance of the products. In considering applications of leveraged and inverse products, the SFC will assess, among other things, liquidity of underlying assets, costs internalised by the products, and fairness of product design.

Australian government consults on enforceability of financial services industry codes

The Australian government has launched a public consultation on the enforceability of financial services industry codes. The consultation paper sets out a series of questions which are intended to inform the development of legislation to enact the government's commitment to implement 'recommendation 1.15' of the Royal Commission's final report relating to misconduct in the banking, superannuation and financial services industry, and further information on the current code framework and the government mandated codes. It also deals with the recommendations of the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce and the other Royal Commission recommendations.

In particular, with regard to recommendation 1.15 of the Royal Commission's final report the government proposes to:

- allow industry codes approved by ASIC to include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law;
- extend ASIC's power to approve codes of conduct to codes relating to all Australian Prudential Regulation Authority-regulated institutions and Australian credit licence holders;
- enable ASIC to take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code;
- provide for remedies, modelled on those now set out in Part VI of the Competition and Consumer Act 2010, for breach of an 'enforceable code provision'; and
- provide for the establishment and imposition of mandatory financial services industry codes.

Comments on the consultation paper are due by 12 April 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

Poland prepares for Brexit

In light of the increasing probability that the United Kingdom will leave the European Union without any deal, the Council of Ministers of the Republic of Poland has adopted three draft acts addressing the basic problems that would result from this situation. A no-deal Brexit would mean that on the day the UK leaves the EU, EU law will cease to apply to the United Kingdom and for Member States the UK will become a third country.

In response to that situation, the Council of Ministers has prepared a number of draft pieces of legislation to regulate issues such as:

- British citizens' right of residence;
- delegation of UK employees to Poland;
- the ability of British citizens to work and carry on economic activity in the Republic of Poland;
- recognition of professional qualifications gained in the United Kingdom; and
- the conduct of economic activity in Poland by British financial institutions.

This briefing paper deals with the first four areas.

https://www.cliffordchance.com/briefings/2019/03/poland_prepares_forbrexit.html

Japanese Financial Services Agency issues guidance on capital requirements for securitisation investors

Japanese investors have become increasingly active in the US, European and Australian securitisation markets in recent years, particularly with respect to CLO and RMBS transactions. The significant investments they make mean arrangers and issuers listen attentively to their requirements. The introduction by the Japanese Financial Services Agency (JFSA) of new due diligence rules (JDDRs) for Japanese investors therefore commands attention in all the major securitisation markets.

The JDDRs are set out in the Financial Services Agency Notices provided for each category of financial institutions. They bear similarities to due diligence and risk retention rules found in the EU and the US, though they diverge in a number of ways, therefore requiring an assessment to be undertaken on a case-by-case basis. The JDDRs will become applicable to banks upon the Notices taking effect on 31 March 2019.

On 15 March 2019, the JFSA released some guidelines and its views on questions made by market participants with respect to the application of the Notices, which alleviate earlier concerns that the JDDRs would exclude Japanese investors from many European and US securitisation transactions by providing that (i) if an investor considers them equivalent on the facts of the relevant rules, compliance with the US rules and/or EU rules will suffice for the purposes of the JDDRs and (ii) certain US securitisation transactions, such as open market CLOs, may not require risk retention for the purposes of the JDDRs. However, many of these deals will need to display triple compliance – with the US rules, the EU rules and, now, the Japanese rules too.

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This briefing paper discusses the JDDRs and the JFSA guidelines.

https://www.cliffordchance.com/briefings/2019/03/japanese_financialservicesagencyissue.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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