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MiFID2/MiFIR: ESMA published consultation on market data and consolidated tape

The European Securities and Markets Authority (ESMA) has published a consultation on the development in prices for pre- and post-trade market data and on the functioning of the consolidated tape (CT) for equity instruments.

In relation to market data, the consultation sets out ESMA's initial assessment of the impact of:

- the requirement to provide market data on a reasonable commercial basis (RCB), including the possibility of replacing the current transparency plus approach;
- the requirement to provide disaggregated data; and
- the provision to make market data available free of charge 15 minutes after publication.

In relation to the equity CT, the consultation sets out ESMA's initial assessment of:

- the reasons for the lack of equity CT;
- the availability and quality of post-trade information provided by existing commercial entities;
- the risks of not having an equity CT in the EU;
- factors necessary for the establishment of a CT; and
- the potential impact of Brexit.

The consultation, which forms part of the review required by MiFID2/MiFIR, closes on 6 September 2019. ESMA intends to submit a final report to the EU Commission in December 2019.

MiFID2: ESMA updates double volume cap register

The European Securities and Markets Authority (ESMA) has published double volume cap (DVC) data and calculations for 1 June 2018 – 31 May 2019 under MiFID2.

DVC limits the amount of dark trading allowed under the reference price waiver and negotiated transaction waiver. The update sets out new breaches of 47 equities for the 8% cap, applicable to all trading venues, and 9 equities for the 4% cap, which applies to individual trading venues. Trading under the waivers for all new instruments in breach of the DVC thresholds should be suspended from 10 July 2019 to 9 January 2020.

Additionally, ESMA highlights that none of the previously identified breaches of the caps proved to be incorrect and so no previously identified suspensions of trading under the waivers had to be lifted. As of 5 July 2019 there were 285 instruments suspended.

MiFID2: ESMA issues update on annual transparency calculations for equity and equity-like instruments

ESMA has issued an update on its annual equity transparency calculations.

After originally publishing its calculations in June 2019, ESMA was made aware of an issue with the updated calculations which appears to affect the results for shares whose main pool of liquidity is in a third country while having less that one transaction a day on average on the most relevant market in the EU.

ESMA advises that until further notice European trading venues are not bound by the tick sizes deriving from its June 2019 publication for third-country shares with an average daily number of transactions lower than one on the most relevant market. All those shares should be considered third-country shares for which the trading venue with the highest turnover is located in a country outside the EEA.

ESMA is investigating the issue and will revert in due course with a revised set of results for the relevant shares.

MiFID2/MiFIR: ESMA updates Q&As on market structure and transparency topics

ESMA has updated its MiFID2 and MiFIR questions and answers (Q&A) documents on market structure topics and transparency topics, both dated 12 July 2019.

The market structures Q&A has been updated to clarify the application of the tick size regime to periodic auction systems.

The transparency topics Q&A has been updated to clarify issues relating to:

- the treatment of constant maturity swaps;
- the hedging exemption of Article 8 of MiFIR; and
- the use of pre-arranged transactions for non-equity instruments.

MiFID2/MiFIR: ESMA updates Q&As on investor protection

ESMA has updated its MiFID2/MiFIR Q&A document on investor protection and intermediaries.

The document, dated 11 July 2019, provides a new best execution answer on the classification of financial instruments under RTS 27 if ESMA has not published any calibrated market sizes.

ESMA reports on licencing of fintech firms across EU

ESMA has published a report on the status of licencing regimes for fintech firms across the EU. The report draws on responses to two surveys conducted by ESMA with the national competent authorities (NCAs), the first on issues with the existing EU regulatory framework and areas of divergences, the second on the employment of proportionality and flexibility when licensing fintech firms.

From the survey responses, ESMA has set out the following key findings:

- NCAs do not typically distinguish between fintech and traditional business models in their authorisation and licensing activities;
- key issues and regulatory gaps stem from the uncertainty around the definition of financial instruments and the legal nature of cryptoassets, initial coin offerings and distributed ledger technology;
- there is a need for greater clarity around the governance and risk management processes for cyber security and cloud outsourcing;
- innovation facilitators (initiatives such as sandboxes and innovation hubs) play a key role in mapping approaches applied to fintech and in identifying areas where legislation and licensing requirements need amendment; and
- there is an ongoing discussion on the need for an EU-wide holistic crowdfunding regime, particularly for crowdfunding based on instruments outside of MiFID II.

ESMA concludes that at present most innovative business models can operate within the existing EU rules. It does not make any recommendations for changes in EU regulation at this stage but reaffirms the conclusions made in its recent reports on cryptoassets, cyber security and innovation facilitators

and pledges to continue to foster supervisory convergence on the topic of cryptoassets.

EMIR REFIT: ESMA issues statement on derivatives trading obligation

ESMA has issued a statement on the misalignment between the scope of counterparties subject to the clearing obligation (CO) under the European Market Infrastructure Regulation (EMIR) and those subject to the derivatives trading obligation (DTO) under MiFIR. Since the entry into force of the Regulation amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (EMIR REFIT), some counterparties are exempted from the CO while still being subject to the DTO.

ESMA's statement addresses the possible implementation challenges that this misalignment creates for counterparties exempted from the CO, and additionally clarifies the application date of the DTO for those counterparties impacted by the modified application date of the CO under EMIR REFIT.

ESMA's statement addresses:

- clearing and trading obligations for small financial counterparties and non-financial counterparties; and
- the date of application of the TO for Category 3 financial counterparties subject to the CO.

ESMA expects competent authorities not to prioritise their supervisory actions in relation to the MiFIR DTO towards counterparties not subject to the EMIR CO. For Category 3 financial counterparties subject to the CO, the date of application of the DTO should be the same as the new date of application of the CO as amended by EMIR REFIT. This date of application should be four months following the notification from the financial counterparty to ESMA and the competent authority as required under EMIR REFIT, rather than 21 June 2019.

ESMA updates Q&As on Benchmarks Regulation

ESMA has published updated Q&As regarding the Benchmarks Regulation.

The Q&As provide new clarification regarding:

- the commodity benchmark definition; and
- the contribution to the euro short-term rate (€STR).

The document is intended to be a practical convergence tool to promote common supervisory approaches and practices in the application of the Benchmarks Regulation.

ESMA issues statement to CFD providers on product intervention measures

ESMA has published a statement on the application of product invention measures under MiFIR for contracts for difference (CfDs) providers.

ESMA's statement is in response to practices and situations it has observed in the market which raise concerns of non-compliance with the legal

requirements applicable when providing services to retail clients. ESMA's statement makes particular reference to its concerns relating to providers circumventing applicable requirements by using professional client status or third country entities.

ESMA advises firms that they should refrain from implementing any form of practice that incentivises, induces or pressures an investor to request to be treated as a professional client. ESMA warns firms that any form of promotional language in relation to the status of professional client, including providing a comparison between leverage limits available to different types of clients and the promise of any form of rewards, shall be seen as incentivising a retail client to request professional client status.

ESMA is also aware that some third-country firms are marketing CfDs to retail clients in the EU that do not comply with ESMA's measures, and that EU firms are engaged in activities intended to circumvent ESMA's temporary product intervention measures.

ESMA observes that some CfD providers established in the EU are marketing the possibility for retail clients to move their accounts to an intra-group third country entity.

ESMA clarifies in its statement that in the absence of authorisation or registration in the EU in accordance with MiFIR or the national third-country regimes in force in various Member States, third-country firms are only allowed to provide services to clients in the EU at the client's own exclusive initiative, and that information in relation to any benefits of trading CfDs with an intra-group third-country entity could be seen as a circumvention of ESMA's product intervention measures by the EU authorised firm.

Firms must ensure that they are compliant with all applicable legislative requirements and with the relevant product intervention decisions and consider clarifications provided in relevant Q&As and ESMA's statement. ESMA and national competent authorities will continue to monitor compliance of CfD providers with the product intervention decisions and with the issues set out in the statement and consider whether further action is needed.

Prospectus Regulation: ESMA consults on disclosure guidelines

ESMA has issued a consultation on draft guidelines on disclosure requirements under the Prospectus Regulation.

In 2005, ESMA's predecessor, the Committee of European Securities Regulators (CESR), adopted recommendations in order to provide guidance to financial market participants on complying with various disclosure requirements in the Directive Prospectus. These recommendations were not adopted as guidelines under Article 16 of the ESMA Regulation which means the comply-or-explain mechanism does not apply to them.

ESMA has taken the view that it is appropriate to update the CESR recommendations in order to make them consistent with the contents of the Prospectus Regulation while at the same time converting them into guidelines.

ESMA's draft guidelines aim to ensure that market participants have a uniform understanding of the relevant disclosure requirements and assist national competent authorities when they assess completeness, comprehensibility and consistency of information in prospectuses. Topics covered include:

- historical financial information;
- interim financial information;
- profit forecasts and estimates;
- working capital statements; and
- capitalisation and indebtedness.

Comments to the consultation close on 4 October 2019.

Prospectus Regulation: ESMA publishes updated Q&As

ESMA has updated its Q&A document on the Prospectus Regulation.

Among other things, the updated document includes new Q&As on grandfathering, public offers, incorporation by reference, the inclusion of financial information, supplements to prospectuses, passporting and responsibility statements.

CSDR: ESMA publishes updated Q&As

ESMA has published updated Q&As on the implementation of the Central Securities Depositories Regulation (CSDR).

The document has been updated to include a new Q&A clarifying the scope of financial instruments subject to internalised settlement reporting, namely that:

- investment firms are not required to report in case they do not execute transfer orders themselves, which they forward in their entirety to a custodian, irrespective of whether the custodian is established in the EEA or not; and
- trade netting as such does not qualify as internalised settlement.

Brexit: EU Council adopts contingency measures for no-deal scenario

The EU Council Presidency has adopted contingency measures on the implementation and financing of the 2019 EU budget in the event of a no-deal Brexit.

The measures will enable the EU to continue making payments to UK beneficiaries for contracts signed and decisions made before the withdrawal date while the UK continues paying its contribution agreed in the 2019 EU budget.

The UK must confirm in writing that it will contribute to the 2019 EU budget as adopted, accept necessary controls for EU programmes and actions and make the first payment to the budget for the period after its withdrawal in order to remain eligible for financing.

Capital Markets Union: legislation on facilitating cross-border distribution of investment funds published in Official Journal

Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings and Directive (EU) 2019/1160 amending the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for Collective Investment in Transferable Securities (UCITS)

Directive with regard to Cross-border distribution of collective investment undertakings have been published in the Official Journal.

The legislation is part of the Commission's action plan on the Capital Markets Union (CMU) and aims to improve the transparency of national requirements, remove burdensome requirements and harmonise diverging national rules.

The Directive will enter into force on 1 August 2019 and the Regulation will enter into force on and also apply from 1 August 2019.

Joint Committee of the ESAs reports on cross-border supervision of retail financial services

The Joint Committee of the European Supervisory Authorities (ESAs), which comprises the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and ESMA, has published a report on the cross-border supervision of retail financial services.

The report aims to describe the main issues that NCAs are facing and to give an overview of the main consumer protection and retail conduct of business rules that apply to the cross-border provision of financial services, with a view to analysing how the current legislation addresses those issues. The report calls for more clarity on when activities carried out through digital means fall under passporting rules, and for considering the identified high-level principles on cooperation as the basis for any new legislation or possible amendment to current legislation.

The ESAs recognise that the deepening of the EU Single Market in financial services and the digitalisation of financial services have intensified the demands placed on NCAs. The report makes recommendations to the EU Commission, Council and Parliament, proposing to amend existing, or develop new, legislation to facilitate the deepening of the single market and makes recommendations to NCAs that aim to enhance cooperation amongst them.

ECB publishes risk type-specific chapters of guide to internal models

The European Central Bank (ECB) has published the final chapters of its guide to internal models. The three risk type-specific chapters are intended to provide transparency on how the ECB understands the regulations on the use of internal models to calculate own funds requirements for credit risk, market risk and counterparty credit risk.

The ECB consulted on its draft chapters in July 2018 and published its general topics guide in November 2018.

EBA publishes progress report on IRB models

The EBA has published a progress report on its roadmap to repair internal models used to calculate own funds requirements for credit risk under the internal ratings based (IRB) approach.

In February 2016 the EBA set out a roadmap to address concerns about undue variability of own funds requirements for credit risk stemming from the application of internal models and to enhance robustness and the comparability of the internal risk estimates and own funds requirements of institutions in the EU as well as improve the transparency of the models and their outcomes.

So far, the EBA's work has focused on reviewing the regulatory setting of the IRB approach. This review, which includes all the EBA related guidelines and technical standards, is the result of dialogue with the industry and cooperation with competent authorities. The report address concerns of both parties regarding implementation guidelines.

To allow for a high quality implementation, the EBA has extended the deadline for introduction of changes in the rating systems by one year to the end of 2021. Considering the interactions with the final Basel III framework published in December 2017, the EBA has allowed for the changes in the loss given default (LGD) and conversion factors models for low default portfolios to be implemented by the end of 2023 at the latest.

EBA publishes thematic report on the impact of fintech on institutions' business models

The EBA has published a thematic report on the impact of fintech on payment institutions' (PIs) and e-money institutions' (EMIs) business models.

The report sets out the EBA's findings on the current trends and drivers shaping the business models of PIs and EMIs, their different approaches to fintech, including their interaction with bigtech firms, the level of implementation of innovative technologies and observed changes to their strategies and business models. The EBA collected information and data through its engagement with the supervisory community and industry.

The report found that many PIs and EMIs' are shaping and adjusting their business models as a result of customer expectations/behaviour, competitive pressure, technological developments and regulatory changes.

Potential threats to PIs and EMIs, depending on their business model, may come from the potential impact of an active participation of bigtech firms, the impact of Brexit and the key dependencies on banks and card processors. The report advises that key challenges relating to operational resilience and ICT security, operational capacity, regulatory changes and customer education will need to be addressed.

EBA reports on LCR implementation

The EBA has published its first monitoring report on the implementation of the liquidity coverage ratio (LCR) in the EU.

The LCR has been applicable in the EU since 1 October 2015 and the LCR's full implementation at a minimum of 100% became effective in January 2018. The LCR Delegated Regulation sets out a material number of national discretions to be exercised by competent authorities when implementing the LCR requirements and envisages some leeway to credit institutions in the assessment of some material LCR items.

Against this background, the EBA has monitored the practical implementation of the LCR with the aim of fostering a higher degree of harmonisation in LCR implementation in areas where divergent practices have been observed, partly due to insufficient clarity of the regulatory provisions.

The EBA's report highlights areas in which further guidance is deemed useful to support a common understanding and harmonisation of the application of the liquidity standard, and in particular, provides guidance on operational deposits and retail deposits excluded from outflows as well as on notifications on additional liquidity outflows.

The EBA will further assess how the guidance in the report will be used by banks and supervisors and consider if further steps, such as guidelines or recommendations, are needed.

ECA publishes report on EBA stress tests

The European Court of Auditors (ECA) has published a report setting out its assessment of the implementation of the EU-wide bank stress test conducted by the EBA.

The EBA's stress test analyses how banks' capital positions develop under both a baseline and an adverse scenario for a pre-defined set of parameters.

The ECA focused on the EU-wide stress test conducted in 2018, assessing whether the test was fit for purpose, whether the EBA had sufficient assurance about the robustness of the figures calculated by the individual banks and whether the publication of the results allowed stakeholders to conclude whether the system was resilient.

The report found that the stress test should have been more demanding in testing bank's resilience to systemic risks across the EU. The ECA found the simulated shocks were milder than those experienced during the 2008 financial crisis and the adverse scenario used did not appropriately reflect all relevant systemic risks to the EU financial system.

The ECA found that the EBA relied heavily on national supervisors when designing and carrying out the test but did not have the resources it needed to exercise full oversight.

The ECA's recommendations to the EBA include:

- increasing the geographic spread of the test and selecting banks based also on systemic risks, rather than just on size;
- defining the minimum stress levels for the EU as a whole and considering risks from the point of view of an EU-wide financial system; and
- enhancing its control over the test design and strengthening its supervisory approach.

The EBA has welcomed the ECA's report and has undertaken to deliver a top-down approach to stress tests to complement the current bottom-up approach, to expand the criteria to assess the sample of the exercise and to publish all banks' minimum requirements. The EBA will keep the ECA informed of its progress implementing the recommendations.

EPC issues revised recommendations on customer reporting of SEPA transfers and direct debits

The European Payments Council (EPC) has issued revised recommendation guidelines on customer reporting of SEPA credit transfers (SCTs) and SEPA direct debits (SDDs).

The EPC's implementation guidelines are based on the ISO 20022 standard for the customer-to-bank (C2B) space as well as the interbank space. The EPC also provides recommendations on ISO 20022 bank-to-customer (B2C) account information.

The EPC's guidelines aim to map SEPA rulebook requirements against the 'transaction details' message elements of the ISO 20022 reporting messages.

The July 2013 version has been revised to be in line with the latest SEPA rulebook versions and includes recommendations related to SCT Inst as well as to the extended remittance information (ERI) option.

EIOPA publishes opinions on governance and risk management of pension funds

EIOPA has issued four opinions to assist national competent authorities (NCAs) and promote consistent supervisory practices in the implementation of the Institutions for Occupational Retirement Provisions (IORP) Directive.

EIOPA has published:

- an Opinion on the use of governance and risk assessment documents in the supervision of IORPs, which aims to provide guidance to NCAs on the use of governance documents in their supervision of IORPS with the supervisory review process and facilitate risk-based and proportionate supervision of IORPs;
- an Opinion on the practical implementation of the common framework for risk assessment and transparency for IORPs, which aims to provide guidance on the practical implementation of the common framework as a tool for risk assessment;
- an Opinion on the supervision of the management of operational risks faced by IORPs, which aims to provide NCAs with guidance on the supervision of IORPs operational risks, including the assessment and management of outsourcing and cyber risks; and
- an Opinion on the supervision of the management of environment, social and governance (ESG) risks faced by IORPs, which concerns the assessment and management of ESG risks faced by IORPs and further aims to facilitate risk-based and proportionate supervision of IORPs.

FSB consults on cyber incident response and recovery

The Financial Stability Board (FSB) has launched a survey on financial institutions' responses to and recoveries from cyber incidents. The FSB intends to use the survey, along with a review of publicly available information on firms' responses to cyber incidents and an analysis of guidance issued by national and international authorities, to develop a toolkit of effective practices for cyber resilience.

Responses are due by 28 August 2019.

FCA publishes statement on upcoming final rules to extend SM&CR to FCA solo-regulated firms

The Financial Conduct Authority (FCA) has published a statement on the upcoming final rules to extend the Senior Managers and Certification Regime (SM&CR) to FCA solo-regulated firms. The SM&CR is due to be extended from 9 December 2019, however the FCA has announced that it has agreed with HM Treasury to delay the commencement date for benchmark administrators to allow time for a dedicated consultation before making final rules for that sector. In addition, claims management companies (CMCs) will remain outside of scope until they have been authorised by the FCA. The commencement timing for all other firms will remain the same.

The FCA notes that once HM Treasury has published the SM&CR commencement order, the FCA will publish a policy statement finalising its rules on the extension. The new policy statement will encompass:

- the near final rules on extending the SM&CR to FCA firms published in PS18/14;
- the near final rules on extending the SM&CR to CMCs published in PS18/14; and
- the near final rules to introduce a new directory of financial service workers published in PS19/7.

FCA publishes multi-firm review of business continuity planning

The FCA has published a review of business continuity planning (BCP) by small and medium-sized retail banks, payments institutions and electronic money institutions.

The review, published as a webpage, sets out some of the FCA's expectations relating to operational resilience and its assessment of firms' approaches to preparing for and managing business continuity events.

The FCA broadly finds that although firms have a good understanding of the importance of BCP, improvements could be made, such as:

- considering the link between business continuity and large-scale change projects; and
- ensuring management and oversight of events is assigned to an individual with appropriate knowledge, experience and seniority.

The FCA encourages firms to familiarise themselves with the 2018 discussion paper on operational resilience and relevant parts of the FCA Handbook, consider how the review findings may apply to their business and where necessary, address deficiencies.

The FCA intends to engage with and assess firms on BCP and other issues relating to operational resilience on an ongoing basis.

Decree on interdealer access published in Official Journal

A Decree amending the French Monetary and Financial Code with regard to interdealer access has been published in the Official Journal.

The amendments provide that third country firms do not need authorisation in France when they enter into transactions in financial instruments or emission allowances on own account where:

- the transactions are entered into outside a trading venue with a French counterparty that is a bank or investment firm or a specified French public sector organisation which is also acting for its own account; or
- where the transactions are entered into on a French trading venue.

Article 1 of this text entered into force on 29 June 2019; Article 2 entered into force on 8 July 2019.

APRA releases response on changes to reporting requirements for registered financial corporations

The Australian Prudential Regulation Authority (APRA) has released a letter on its response to the submission it received on its May 2019 public consultation on proposed changes to reporting requirements for registered financial corporations (RFCs) that are not a related party of an authorised deposit-taking institution (ADI).

Under the consultation, APRA proposed changes to the economic and financial statistics (EFS) data collection relating to the consolidation of securitisation special purpose vehicles (SPVs). APRA received one submission from an industry body. The submission agreed that APRA's proposed changes to the EFS collection were the best way to capture the bulk of the securitisation industry as intended. It also noted issues to consider around the structure and control relationship of SPVs and suggested a change to reporting dates for RFCs.

Based on the outcome of the consultation, APRA has confirmed that it will proceed with the proposed changes to the reporting standard entitled 'ARS 701.0: ABS/RBA Definitions for the EFS collection' and the consequential changes to the reporting practice guide entitled 'RPG 701.0: ABS/RBA Reporting concepts for the EFS collection'.

The changes require an RFC that is not a related party of an ADI to consolidate the positions and transactions of all securitisation SPVs in a single set of reporting for EFS, and will not be applicable to an RFC that is a related party to an ADI. The assets and liabilities of securitisation SPVs would therefore be consolidated on to a RFC's domestic books. Assets originated into, or transferred to, an SPV are included in the RFC's reporting. The requirement for an external auditor's report, as set out in the standard on audit requirements for RFCs—EFS collection, will be applicable to the reporting RFC, not the individual SPVs.

APRA has indicated that, in line with the original proposal, the first reporting period will be for the period ending July 2019.

APRA responds to submissions on plans to boost loss-absorbing capacity of authorised deposit-taking institutions to support orderly resolution

APRA has released its response to submissions it received on its November 2018 discussion paper on proposed changes to the application of the capital adequacy framework designed to support the orderly resolution of a failing authorised deposit-taking institution (ADI).

In its November 2018 discussion paper, APRA proposed that the four major Australian banks be required to increase their total capital by four to five percentage points of risk weighted assets (RWA) over four years. APRA expected the banks would meet the bulk of this requirement by raising additional Tier 2 capital. For small to medium ADIs, extra loss-absorbing capacity would be considered on a case-by-case basis as part of the resolution planning process.

Following extensive engagement with a range of stakeholders, APRA has determined that the proposal outlined in the discussion paper, with some amendments, is the best course of action to support orderly resolution –

requiring ADIs to maintain additional total capital. However, in recognition of the concerns raised around market capacity for Tier 2 capital, APRA has confirmed that the major banks will be required to lift total capital by three percentage points of RWA (instead of four to five percentage points originally proposed) by 1 January 2024. APRA has also clarified that its overall long-term target of an additional four to five percentage points of loss absorbing capacity remains unchanged.

Further, APRA has indicated that, over the next four years, it will consider the most feasible alternative method of sourcing the remaining one to two percentage points, taking into account the particular characteristics of the Australian financial system.

ASIC consults on proposal to intervene to stop consumer harm in short term credit

The Australian Securities and Investments Commission (ASIC) has launched a public consultation on a proposal to use its product intervention powers under the Corporations Act 2001 (Act) to address what it considers to be the significant consumer detriment arising from some short-term lending models.

ASIC considers that significant consumer detriment may arise in relation to a particular model designed to provide short term credit at high cost to vulnerable consumers. These consumers include those on low incomes or in financial difficulty. In view of this, ASIC is targeting a model involving a short-term credit provider and its associate who charge fees under separate contracts. When combined, these fees can add up to around 990% of the loan amount.

The consultation paper considers the following three options to address the issues seen in short-term lending:

- use of product intervention powers to prohibit certain short-term lending models (Option 1) - under this option, ASIC will use its product intervention power to:
  - make an industry-wide product intervention order by legislative instrument under the Act to prohibit credit providers and their associates from providing short term credit and collateral services except in accordance with a condition which limits the total fees that can be charged; and
  - amend the existing order or introduce a new order to address that model if a new model, which seeks to circumvent the industry-wide product intervention order, evolves in response to the prohibition;
- encourage the use of alternative products or action through warning messages (Option 2) – under this option, ASIC intends to reduce the use of high-cost products such as the short-term lending model by encouraging consumers to visit financial counsellors and promoting awareness of alternatives like Centrelink advances, utility hardship programs, and no interest loan schemes. ASIC will also impose specific obligations on providers of short-term credit, requiring them to notify borrowers of these alternatives; and
- no change/status quo option (Option 3) - under this option, ASIC would take no regulatory action to address the use of the short-term lending model.

ASIC also expects to make a decision on whether to make a product intervention order in relation to short term credit during the course of August 2019.

Comments on the consultation are due by 30 July 2019.

ASIC reports on unacceptable sales practices, poor product design and significant remediation costs in consumer credit insurance sale

ASIC has published a report entitled 'Consumer credit insurance: Poor value products and harmful sales practices' summarising the findings of its review, for the period 2011 to 2018, relating to the sale of consumer credit insurance (CCI) by 11 major banks and other lenders.

The review forms part of ASIC's broader priority to address fairness to consumers and, in particular, harms in insurance, and found that:

- CCI product was extremely poor value for money – for CCI sold with credit cards, consumers received only 11 cents in claims for every dollar paid in premiums. Across all CCI products sold by lenders, only 19 cents were recovered in claims for every premium dollar which consumers paid;
- CCI sales practices caused consumers harm:
- consumers were sold CCI despite the fact they were ineligible to claim under their policy;
- telephone sales staff used high-pressure selling and other unfair sales practices when selling CCI; and
- consumers were given non-compliant personal advice to buy unsuitable policies;
- consumers were incorrectly charged for CCI, including being charged ongoing CCI premiums even though they no longer had a loan; and
- many lenders did not have consumer-focused processes to help consumers in hardship make a claim under their CCI policy.

ASIC expects lenders and insurers to design and offer products with significantly higher claims ratios, and has indicated that it will continue to collect and publish data to measure improvements.

Moreover, the report sets out design and distribution standards for CCI sold by lenders. ASIC expects lenders and insurers to meet these standards or cease selling CCI until they do. New entrants to the market are also advised to design their products and sales processes so they meet these standards as soon as they start business.

Further, ASIC requires attestations from accountable senior executives that:

- the recommendations to address mis-selling have been implemented and are working effectively;
- the minimum standards in ASIC's report are being met; and
- the remediation programs are thorough and robust.

Hong Kong and France sign MoU to support fintech innovation

The Hong Kong Monetary Authority (HKMA) and the Autorité de Contrôle Prudentiel et de Résolution (ACPR) have signed a memorandum of understanding (MoU) to enhance collaboration between the two authorities in supporting fintech innovation. The MoU is intended to help both authorities share their expertise on the regulation of digital finance and ease the international expansion of innovative financial businesses.

Under the MoU, the HKMA and the ACPR may collaborate on referral of innovative businesses, information and experience sharing, joint innovative projects and expertise sharing.

HKMA publishes FAQs on sale and distribution of debt instruments with loss-absorption features and related products

Following its circular dated 30 October 2018 on the sale and distribution of debt instruments with loss-absorption features and related products (loss-absorption products), the HKMA has published a set of frequently asked questions (FAQs) to provide clarification and further guidance on the requirements set out in the October 2018 circular in response to the enquiries received from the industry.

Amongst other things, the FAQs provide guidance with regard to the scope of loss-absorption products, product risk rating, disclosure of product information, 'external asset manager model/shared relationship structure', discretionary portfolio management service and the implementation deadline.

The requirements set out in the October 2018 circular were due to become effective on 6 July 2019. Considering that more time may be needed to further consider the matters clarified in the FAQs, the HKMA has decided to extend the deadline for loss-absorption products to 6 September 2019 except for in-scope collective investment schemes (CIS). For in-scope CIS, registered institutions will need to implement the requirements in the October 2018 circular and the FAQs by 31 December 2019.

US regulators issue final regulatory capital rules

The Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency have jointly issued a final rule simplifying regulatory capital rules for banking organisations.

The rule will apply to banks that do not use the 'advanced approaches' capital framework, which are generally firms with less than USD 250 billion in total consolidated assets and less than USD 10 billion in total foreign exposure.

The rule simplifies the capital treatment for mortgage servicing assets, certain deferred tax assets, investment in the capital instruments of unconsolidated financial institutions and minority interest, and also allows bank holding companies and savings and loan holding companies to redeem common stock without prior approval unless otherwise required.

Proposed revisions to the definition of high-volatility commercial real estate exposure are being addressed in a separate rulemaking.

The amendments to simplify capital rules will be effective as of 1 April 2020 and the revisions to the pre-approval requirements for the redemption of common stock and other technical amendments will be effective as of 1 October 2019.

CFTC and SEC request comment on proposed amendments to minimum customer margin requirements for security futures

The Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) (collectively, the Commissions) are proposing amendments to regulations that establish minimum customer margin requirements for security futures. The Commissions have joint rulemaking authority regarding margin requirements for security futures.

The Commissions had adopted rules in 2002 which established margin requirements for unhedged security futures products at 20 percent. Because lower margin requirements have been established for comparable financial products, the Commissions have re-examined the minimum margin required for security futures and are proposing an adjustment.

The proposed amendments would lower the margin requirement for an unhedged security futures position from 20% to 15%, as well as propose certain revisions to the margin offset table consistent with the proposed reduction in margin.

The deadline for submission of comments by interested persons is 30 days after the proposal is published in the Federal Register.

CFTC issues staff advisory concerning $50 million initial margin threshold and documentation requirements

A Staff Advisory has been issued by the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) clarifying that CFTC's uncleared swap margin rules do not require documentation governing the posting, collection and custody of initial margin until the initial margin threshold amount exceeds $50 million.

The Advisory also clarifies that while no specific initial margin documentation is required prior to reaching the $50 million threshold, DSIO expects that CFTC-regulated swap dealers will have appropriate risk management systems in place to calculate and monitor initial margin amounts and will act diligently as the amounts approach the $50 million threshold to ensure compliance with the documentation requirements.

RECENT CLIFFORD CHANCE BRIEFINGS

EU-Mercosur – after 20 years of negotiations, a deal is finally reached

On Friday 28 June 2019, Mercosur (Mercado Común del Sur – the economic and political bloc comprising Argentina, Brazil, Paraguay, and Uruguay) and the EU finally reached a deal on the trade component of an Association Agreement that has been the subject of negotiations for almost 20 years. However, significant structural and political challenges remain ahead of its ratification and use by business.

This briefing paper looks at the economic potential behind a deal and what has been agreed, as well as the complexities for European businesses seeking to use it given Mercosur's status as a customs union 'in the making', and the difficult political balance necessary to ratify and apply the agreement.

https://www.cliffordchance.com/briefings/2019/06/eu-mercosur_willthe20-yeartradedea.html

A Guide to Restructuring and Insolvency Procedures in Europe

This is an updated version of our guide to restructuring and insolvency procedures in Europe. The guide is designed to provide you with an overview of the relevant law in the diverse legal systems that operate across Europe. It will assist in ensuring that transactions (whether being originated or restructured or enforced) are structured in a way that maximises returns whilst minimising risks and exposures.

This guide captures all the latest reforms, providing you with the most up to date position. In keeping with previous editions, the guide aims to assist you when assessing credit risk and the potential impact of restructuring and insolvency procedures on realising security or seeking to rely upon pre-insolvency rights. At the start of the guide we have included a summary table that compares the restructuring and insolvency trends taking place in each of the jurisdictions, including the impact of local stays, the ability to cram down dissenting creditors, the position of management, and mandatory time limits imposed in some jurisdictions to file for insolvency.

https://www.cliffordchance.com/briefings/2019/07/a_guide_to_restructuringand insolvenc.html

Facebook's Libra currency - will unexpected tax complications scare off users?

The essence of Libra is that Facebook hopes consumers across the world will spend money in a new cryptocurrency. Its value will track a basket of fiat currencies, meaning that the value of a Libra against a particular fiat currency will inevitably fluctuate. That creates a problem for consumers: each time they transact, they'll be making a capital gain or loss. In most countries gains will be taxable, meaning consumers will have to file a detailed tax return showing all their transactions and the exchange rate at the time, and pay any tax due. This seems to us to be a significant barrier to wide adoption.

This briefing paper discusses the issues.

https://www.cliffordchance.com/briefings/2019/07/facebook_s_libracurrency-willunexpectedta.html

Draft Changes to Equator Principles Published

Following a targeted review of the Equator Principles (EPs), the Equator Principles Association has published a draft of the fourth iteration of the EPs. The EPs are used by financial institutions to assess and manage the environmental and social impacts of development projects.

Subject to further consultation, the draft iteration will broaden the scope of the EPs to cover a wider range of loans, including project refinancing and acquisition financing, as well as tightening standards in high-income OECD

countries and addressing human rights and climate change issues in more detail.

This briefing paper discusses the draft changes.

https://www.cliffordchance.com/briefings/2019/07/draft_changes_toequatorprinciplespublished.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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