INTERNATIONAL REGULATORY UPDATE
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Brexit: EU Commission publishes communication on finalising no-deal preparations

The EU Commission has published a communication on finalising preparations for the withdrawal of the UK from the EU on 1 November 2019 without an agreement.

The 6th Brexit preparedness communication notes an increased risk that the UK will withdraw without a deal, calls for all actors to make final adjustment to their no-deal plans and sets out updates on no-deal preparations both by the EU and EU27, including non-substantial, technical adjustments to be made to contingency measures. These adjustments include extending the scope of the European Solidarity Fund to cover serious financial burden inflicted on Member States directly imputable to a withdrawal without an agreement and that could not be avoided by preparing in advance.

In the area of financial services, the Commission does not intend to adopt additional contingency measures owing to its assessment that firms are largely prepared for no-deal. It will continue to assess the situation after the

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withdrawal date and decide on the appropriate course of action on the basis of EU legislation in force, particularly the framework introduced in the European Market Infrastructure Regulation (EMIR) in relation to the recognition of third-country central counterparties.

A no-deal Brexit preparedness checklist for companies doing business in the EU and/or in the UK, and a timeline for key EU contingency measures have been published alongside the communication.

ESMA publishes final guidelines on liquidity stress tests for investment funds

The European Securities and Markets Authority (ESMA) has published its final guidelines on liquidity stress testing in undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs).

Among other things, the guidelines require managers of AIFs and UCITS to:

- stress test the assets and liabilities of the funds they manage, including redemption requests by investors;
- be aware of the liquidity risk of the funds they manage and use stress testing as a tool to mitigate the risk;
- regularly test the resilience of their funds to liquidity risk and other types of market risks; and
- apply a comprehensive set of guidelines when designing the scenarios, policies and frequency of liquidity stress tests.

ESMA's guidelines follow the European Systemic Risk Board (ESRB) April 2018 recommendations on addressing liquidity and leverage risk in investment funds.

The guidelines will apply from 30 September 2020.

ESMA publishes stress simulation framework for investment funds

ESMA has published an economic report setting out its framework for stress simulations of the investment fund sector and a case study where the framework was applied to UCITS bond funds. ESMA intends that the framework will be used by supervisors to assess risks in different sectors of the asset management industry.

The results of the case study, which simulated a pure redemption shock, showed that most funds were able to cope with the investors' redemption requests, although some high yield funds experienced a liquidity shortfall under severe scenarios.

The impact of the funds' liquidation on financial markets was also modelled, as funds selling assets to meet investor redemption request could exert downward pressure on assets prices. The results of this simulation shows that the overall price impact is limited for most asset classes but for high yield bonds, emerging market bonds and related asset classes with limited liquidity, fund sales could have a material impact and generate material second round effects.

ESMA will use the simulation framework as part of its regular risk monitoring to identify risk and assess possible adverse scenarios that might impact the EU fund industry.

Brexit: SIs under the EU (Withdrawal) Act for 2 – 6 September 2019

HM Treasury (HMT) made four new draft statutory instruments (SIs) using the UK Government's 'urgency powers' under the EU (Withdrawal) Act 2018 last week.

The Capital Requirements (Amendment) (EU Exit) Regulations 2019 (SI 2019/1232) amend the retained EU law version of the Capital Requirements Regulation ((EU) 575/2013) (CRR) to reflect changes made by the CRR2 Regulation ((EU) 2019/876) that will apply before 31 October 2019.

The Prospectus (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1234) amend the UK prospectus regime set out in the Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/707) to reflect changes made by the EU Prospectus Regulation ((EU) No 2017/1129), which repealed and replaced the EU Prospectus Directive (2001/34/EC) on 21 July 2019.

The Financial Services (Electronic Money, Payment Services and Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/1212) include amendments to the Financial Services and Markets Act 2000 (FSMA), Banking Act 2009, Electronic Money Regulations 2011 (SI 2011/99), and the Payment Services Regulations 2017 (SI 2017/752).

The Risk Transformation and Solvency 2 (Amendment) (EU Exit) Regulations 2019 (SI 2019/1233) amend the retained EU law version of the Solvency II Delegated Regulation (EU 2015/35) to reflect changes made by Commission Delegated Regulation EU 2019/981 that apply before 31 October 2019, and also amend:

- the Risk Transformation Regulations 2017 (SI 2017/1212);
- the Solvency 2 and Insurance (Amendment, etc) (EU Exit) Regulations 2019 (SI 2019/407);
- the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulation 2019 (SI 2019/632); and
- the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (SI 2018/1403).

The regulations were made with immediate effect, but will cease to have effect at the end of 28 days unless approved by resolution of both Houses of Parliament. The end of the 28 day period will be after 31 October, as it excludes any period during which Parliament is prorogued or dissolved. Most provisions are due to enter into force on exit day.

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

German Federal Ministry of Finance publishes position papers on MiFID2, PRIIPs and MiFIR

The German Federal Ministry of Finance has provided two position papers regarding MiFID2, PRIIPs and MiFIR to the EU Commission. The position papers result from a consultation among market participants, investors and associations. The findings from the consultation did not show the need for a comprehensive review of MiFID2/MiFIR, but they did reveal considerable discontent with several requirements under the regime and a desire for an early refit covering certain requirements. The papers set out which changes and further steps are recommended in the short and medium term to the investor protection provisions of MiFID and PRIIPs as well as to the secondary market regulations of MiFID2/MiFIR. Examples include the harmonisation of information requirements under MiFID2 and PRIIPs, the introduction of options to waive the provision of written information on costs and removing (or at minimum, allowing customers to waive) the requirement to record telephone conversations.

MAS invites applications for new digital bank licences

The Monetary Authority of Singapore (MAS) has begun accepting applications for new digital bank licences. The licences, which will be extended to non-bank players, are intended to ensure that Singapore's banking sector continues to be resilient, competitive and vibrant.

The MAS announced in June 2019 that it would be issuing up to five new digital bank licences, comprising up to:

- two digital full bank licences, under which licensees can provide a wide range of financial services to and take deposits from retail and non-retail customers; and
- three digital wholesale bank licences, under which licensees can serve small and medium enterprises and other non-retail segments of the market.

The digital banks licensed will be in addition to any digital banks that Singapore banking groups may already establish under the MAS's existing regulatory framework.

The MAS has clarified that, in order to be considered for the digital bank licences, applicants are required to first meet the eligibility criteria for business track record, fit and proper shareholders, directors and management, capital commitment, a clear value proposition and a sustainable business model. Further, applicants must also be anchored in Singapore, controlled by Singaporeans and headquartered in Singapore.

Thereafter, eligible applicants will be assessed for the following:

- value proposition of the applicant's business model;
- ability to manage a prudent and sustainable digital banking business; and
- growth prospects and other contributions to Singapore's financial centre.

Applications for the new digital bank licences will be accepted until 31 December 2019. It is expected that successful applicants will be announced in mid-2020 and will commence business by mid-2021.

APRA updates enforcement approach to provide clarity around transparency and data reporting

The Australian Prudential Regulation Authority (APRA) has updated its enforcement approach to outline how it will increase transparency around the use of its formal enforcement powers. The revised document also sets out

APRA's intention to take stronger action against institutions that fail to meet their legal obligations to report data to APRA in full and on time.

APRA's enforcement approach was published in April 2019 following a review of the regulator's historical approach to enforcement led by Deputy Chair John Lonsdale. The approach sets out APRA's 'constructively tough' enforcement appetite, and willingness to use its powers more assertively to hold regulated entities and their leaders to account. APRA's enforcement actions can range from the imposition of licence conditions and infringement notices, to disqualifications of accountable persons under the Banking Executive Accountability Regime.

APRA responds to feedback on interest rate risk in banking book requirements for authorised deposit-taking institutions

The APRA has published its responses to the feedback it received on its February 2018 public consultation on proposed revisions to the capital framework for authorised deposit-taking institutions (ADIs), which outlined high-level directional proposals for the interest rate risk in the banking book (IRRBB) framework amongst other revisions to the capital framework for ADIs.

The response paper progresses the proposed revisions to the IRRBB prudential framework. The APRA has indicated that it intends to consult on proposed changes to reporting and disclosure requirements and a revised prudential practice guide for IRRBB in 2020.

Based on the feedback received, the APRA is commencing a detailed consultation on other amendments to strengthen the IRRBB prudential framework. The consultation also includes a draft Prudential Standard titled 'APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book' (APS 117), which sets out the requirements that an ADI must meet in relation to IRRBB. The proposals have been designed to both reduce volatility over time and variation between 'IRB ADIs' in the calculation of their IRRBB capital charge and to incorporate changes from the Basel Committee on Banking Supervision's IRRBB standard released in April 2016.

Under the consultation, the APRA is proposing changes to both the capital calculation and the risk management requirements. The key proposals include:

- standardising aspects of the internal modelling approach including placing constraints on the repricing assumptions an ADI can use for non-maturity deposits according to whether or not it is a core deposit and the calculations for optionality risk;
- removing the basis risk capital add-on; and
- extending the application of risk management requirements to all ADIs. 'Standardised ADIs' will not be subject to an IRRBB capital charge unless the APRA determines otherwise.

The APRA is also proposing to align the implementation of the risk-based capital framework with the Basel Committee's internationally agreed implementation date of 1 January 2022. Therefore, it is proposing that the revised APS 117 will also commence on 1 January 2022.

Comments on the consultation are due by 6 December 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

Clifford Chance EU Financial Services Legislation Stocktake

As we look ahead to the start of the new European Commission's term on 1 November, now is a good time to take stock of upcoming implementation challenges for firms under EU financial services legislation, as well as to review possible future legislation.

The European Parliament and the Council of the EU reached agreement on more than 20 new EU directives and regulations directly affecting the financial services sector during the last sessions of the previous European Parliament before the June elections. Some of these texts received a lot of attention from firms during the negotiation stage, whereas others may have flown under firms' radar.

Clifford Chance has prepared a stocktake of this new legislation and other outstanding EU financial services legislation awaiting implementation, as well indicating what legislative proposals have been carried over to the new term and the ongoing and upcoming reviews of current legislation. Please also see our updated EU financial services horizon scanner on the Clifford Chance Financial Markets Toolkit.

Labour's inclusive ownership funds – nationalising 10% of everything?

With a general election in the UK looking increasingly likely, we've taken a detailed look at one of the UK Labour Party's most striking policies – to require that 10% of the shares in all large UK companies be transferred to an 'inclusive ownership fund' for the benefit of employees.

Our quantitative analysis shows the cost to investors would be over GBP 300 billion, including a cost to UK pension funds of GBP 30 billion – but that the benefit to employees would be limited to around GBP 1 billion per year (with most of the dividends on the expropriated shares going to Government). Our legal analysis has identified a number of serious impediments to the proposal.

These difficulties, and the mismatch between the cost and the benefit, lead us to suggest an alternative path that Labour could follow, to achieve the same objectives without the economic cost and legal risk of its current proposal.

This briefing paper discusses the proposed policy and the suggested alternative path.

https://www.cliffordchance.com/briefings/2018/09/labour_s_plan_forthecompulsoryacquisitiono.html

Proposed changes to the passporting regime for MiFID firms providing services in the Czech Republic

The Czech parliament is currently debating a draft Bill amending the Czech Capital Markets Act that regulates, among other things, the provision of investment services by MiFID investment firms in the Czech Republic under the MiFID passport. Under the draft Bill, MiFID investment firms wishing to provide services to clients in the Czech Republic under the MiFID passport would be required to use a branch passport and provide MiFID services through a Czech branch unless the services are provided on a temporary or occasional basis.

This briefing paper discusses the draft Bill.

https://www.cliffordchance.com/briefings/2019/08/proposed_changestothepassportingregimefo.html

Green bond financing and ESG issues in Japan

Encouraging growth in its green bond market is one of Japan's key environmental priorities. The Ministry of the Environment (MoE) is seeking to increase green bond issuances and encourage green investments into Japan. Environment, society and governance (ESG) disclosure is also an area with discussions and developments underway.

This briefing paper discusses the guidelines surrounding this.

https://www.cliffordchance.com/briefings/2019/09/green_bond_financingandesgissuesinjapan.html

Australian court signals restrictive approach to sovereign immunity in enforcement action against Spain

In the first decision of its kind, an Australian court has temporarily stayed the enforcement of a EUR 101 million international arbitral award against the Kingdom of Spain, confirming Australia as an increasingly favourable site for the enforcement of arbitral awards against foreign states. The stay was requested by the award creditors and, somewhat counter-intuitively, opposed by Spain (the award debtor). The issues before the Court included a claim by Spain to sovereign immunity from the jurisdiction of the Australian courts.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2019/08/australian_courtsconfirmrestrictiveapproacht.html