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EU Council adopts list of candidates for appointment as Commissioner

The EU Council has adopted the list of persons whom it proposes for appointment as members of the Commission until 31 October 2024.

Under Article 17(7) of the Treaty on European Union, the list is adopted by the Council by common accord with the President-elect of the Commission. President-elect Ursula von der Leyen gave her agreement to the draft list of Commissioners-designate yesterday. The decision will now be forwarded to the EU Parliament before being published in the Official Journal.

Executive Vice-President Valdis Dombrovskis (Latvia) will coordinate the work on an Economy that Works for People and be the Commissioner for financial services, supported by the Directorate-General for Financial Stability, Financial Services and Capital Markets Union.

In her mission letter to Dombrovskis, the President-elect sets out how she wants him to preserve and improve financial stability, protect savers and investors and ensure the flow of capital to where it is needed. In particular, von der Leyen states that she wants Dombrovskis to:

- focus on completing the Banking Union, notably by finalising the common backstop to the Single Resolution Fund and agreeing on a European Deposit Insurance Scheme;
- speed up the work towards a Capital Markets Union to diversify sources of finance for companies and tackle barriers to the flow of capital, and to explore ways to make cross-border investments easier, to improve the supervisory system and to better harmonise insolvency and tax proceedings;
- develop a green financing strategy to ensure that investment and financing can be directed to the transition to a climate-neutral economy and to lead global efforts to scale up sustainable financing;
- put forward a fintech strategy to support new digital technologies in the EU financial system;
- develop a new private-public fund specialising in initial public offerings for SMEs;
- put forward a new, comprehensive approach to fighting money laundering and the financing of terrorist activities, which should focus on better enforcement of legislation, better supervision, adapting to risks linked to new technologies and a stronger role in setting international standards;
- ensure a common approach with Member States on cryptocurrencies in order to help understand how to make the most of the opportunities they create and address the new risks they may pose; and
- develop proposals to ensure Europe is more resilient to extraterritorial sanctions by third countries and to ensure that the sanctions imposed by the EU are properly enforced, notably throughout its financial system.

EBA to clarify prudential treatment applicable to own funds instruments at end of grandfathering period

The European Banking Authority (EBA) has announced its intention to provide clarity on the appropriate treatment of 'legacy instruments' at the end of 2021, when the benefits of the grandfathering period will expire.

When the CRR entered into force, certain capital instruments which, at that time, did not comply with the new definition of own funds were grandfathered for a transition period. The beneficial treatment provided by the grandfathering provisions will end on 31 December 2021. The EBA intends to provide clarity on the appropriate end-treatment to ensure a high quality of capital for EU institutions and a consistent application of rules and practices.

The EBA also intends to clarify the interaction with the new grandfathering provisions introduced by the recent Banking Package and the corresponding amendments to the CRR and the Bank Recovery and Resolution Directive (BRRD), where relevant for own funds instruments and eligible liabilities.

The EBA intends to communicate on the end-treatment of the 'legacy' grandfathered instruments by mid-2020 so that institutions can adequately prepare for the end of the grandfathering period.

ESAs publish joint report on risks and vulnerabilities in the financial system

The Joint Committee of the European Supervisory Authorities (ESAs), which comprise the EBA, European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA), has published an update on risks and vulnerabilities in the EU financial system.

In particular, the ESAs have identified:

- uncertainties around the terms of the UK's withdrawal from the EU;
- risks related to the low interest rate environment which continue to put pressure on the financial sector and have renewed concerns regarding search for yield behaviour; and
- risks to the stability of the financial system posed by climate change.

Among other things, the Joint Committee has proposed policy actions by the ESAs, national competent authorities (NCAs), financial institutions and market participants, including:

- contingency planning and assurance of business continuity in the event of a no-deal Brexit;
- recommending that supervisors and financial institutions continue to take into account a 'low-for-long' interest rate scenario and associated risks;
- further work be done to address unprofitable banks and their business models in order to increase the resilience of institutions to a more challenging economic environment;
- identifying and exploring risks to the global financial sectors related to the leveraged loan market and collateralised loan obligations; and
- continuing to work on identifying exposures to climate related risks and facilitating access to sustainable assets for investors.

SEPA: EPC increases SCT Inst transaction amount

The European Payments Council (EPC) has published a document (EPC023-16) amending the maximum amount per instruction that can be processed under the Single Euro Payments Area (SEPA) Instant Credit Transfer (SCT Inst) scheme.

The amendment increases the current amount an originator can transfer via a single SCT Inst instruction from 15,000 euros to 100,000 euros, effective as of 1 July 2020.

The document also gives the EPC the option to adapt the amount outside the regular scheme rulebook release management cycle as defined in the Scheme Management Internal Rules of the SCT Inst Scheme Rulebook. This includes providing scheme participants the opportunity to suggest a new maximum amount.

IOSCO consults on synchronising clocks used for timestamping with UTC

The Board of the International Organization of Securities Commissions (IOSCO) has published a consultation on a proposed recommendation that trading venues and their participants synchronise the clocks they use for timestamping a reportable event with coordinated universal time (UTC).

The synchronisation of clocks used for recording time of a recordable event is important for establishing a clear audit trail of when trading events occur in the secondary markets. This process is increasingly important as more trading takes place across multiple venues, in different jurisdictions and at faster speeds.

Comments on the consultation are due by 13 November 2019.

PRA consults on pre-issuance notification requirements

The Prudential Regulation Authority (PRA) has published a consultation paper on proposed changes to the pre-issuance notification (PIN) regime contained in the PRA Rulebook. Under the PIN regime, firms must notify the PRA before issuing capital instruments to allow the PRA opportunity to comment on the issuances' terms and conditions and to consider the quality of the firms' capital resources.

Following the adoption of amendments to the Capital Requirements Regulation (CRR) introduced by Regulation 2019/876 (CRR2), there has been an overlap between the PRA's PIN rules and Article 26(3) of the CRR, which permits firms to classify subsequent issuances of an approved Common Equity Tier 1 (CET1) instrument as CET1, provided they meet certain conditions including notifying the PRA. The PRA is therefore seeking feedback in this consultation on proposed amendments to its Rulebook to address this overlap.

In addition to resolving the overlap, the PRA is also proposing amendments aimed at improving the risk-sensitivity and proportionality of the PIN regime by, for example, strengthening the governance of CET1 issuances and aligning the requirements for subsequent issuances of Additional Tier 1 (AT1) instruments to those for subsequent issuances of CET1 instruments. Finally, the PRA has set out draft amendments to its supervisory statement, 'CRD IV and capital' (SS7/13), which are intended, amongst other things, to emphasise the PRA's preference for simpler CET1 capital structures and clarify its expectations of firms' senior management in relation to the quality of capital resources.

Comments are due by 9 December 2019.

PRA publishes policy statement on changes to branch return form for international banks

The PRA has published a policy statement setting out its final policy, along with feedback to responses it received to its consultation (CP8/19) on revisions to the branch return form for international banks.

In CP8/19, the PRA sought feedback on proposals to:

- amend SS34/15, 'Guidelines for completing regulatory reports', to include guidance for completing the branch return form;
- align balance sheet concepts used in the form with the concepts and guidance in the PRA's wider reporting framework;
- reduce the number of data points required;
- clarify that firms must report within 30 business days; and
- replace the current Excel reporting format with XBRL.

Responses were generally supportive of the PRA's proposals with the exception of the proposal to replace the current Excel reporting format with XBRL. The PRA has therefore decided not to proceed with this suggestion, but has otherwise published the policy as consulted upon, with some minor amendments to improve clarity.

The changes to the form and reporting guidance will take effect for the H1 2020 reporting period and firms will need to submit their first revised form by 11 August 2020. The PRA intends to publish further details on the submission mechanism and validation rules by the end of 2019.

FCA publishes Quarterly Consultation No. 25

The Financial Conduct Authority (FCA) has published its quarterly consultation (CP19/27) on proposed miscellaneous amendments to the FCA Handbook.

In particular, the consultation sets out draft amendments to:

- chapter 15 of the Supervisory manual (SUP) in relation to Alternative Investment Fund Managers Directive (AIFMD) forms;
- the Collective Investment Schemes (COLL) sourcebook;
- the Handbook to update references to the UK Corporate Governance Code;
- the Disclosure Guidance and Transparency Rules sourcebook (DTR) to implement the European Single Electronic Format;
- the Handbook to implement changes made to domestic legislation to reflect the amendments brought by the EU Commission's Regulatory Fitness and Performance Programme (REFIT) to the European Market Infrastructure Regulation (EMIR) and to make firms aware of the FCA's new powers under the amended domestic legislation;

- the Handbook and binding technical standards (BTS) in relation to the extension of Article 50 (these amendments will only come into effect if the UK leaves the EU without an implementation period);
- the regulatory reporting requirements;
- the 'wake-up' pack and annuity information prompt rules; and
- the Training and Competence (TC) sourcebook list of appropriate qualifications.

The FCA is also seeking stakeholder views on whether the Lending Standards Board's standard of lending practice for business customers meet the FCA's codes recognition criteria.

Comments are due by 4 October 2019.

PSR publishes response paper on payments data use

The Payment Systems Regulator (PSR) has published a response (RP19/1) to its discussion paper on increased data use in the payments industry.

The PSR concludes that, at this point, it is not appropriate to require regulated payment system operators to open access to scheme-wide data or for it to consider data access models. However, it intends to work with Pay. UK to examine the feasibility of opening firm access to data once the New Payments Architecture (NPA) comes into operation (forecast for after 2021), including discussions on data types and classification, and the possibility of first developing and publishing synthetic NPA scheme-wide data (data artificially generated by machine learning of data processed over the NPA's central clearing and settlement layer) to allow firms to develop potential use cases without putting real transaction data at risk.

The PSR also notes that work is underway on common messaging and standards on security arrangements, and that it will continue to monitor developments in payments data.

CMA publishes provisional decision on review of Retail Banking Market Investigation Order 2017

The Competition and Markets Authority (CMA) has published a provisional decision from its review of the Retail Banking Market Investigation Order 2017. In July 2019 the CMA requested input from stakeholders into its review of Part 6 of the Order, which relates to the programme of overdraft alerts with grace periods for personal current accounts (PCAs).

After reviewing feedback from stakeholders, the CMA has reached a provisional decision to vary the Order to remove Part 6. In the absence of a review of the Order, the CMA has determined that the introduction of new FCA rules on overdraft alerts would result in duplication of regulatory requirements on firms, potentially leading to confusion among providers and imposing unnecessary costs of compliance with two potentially conflicting regulatory regimes.

The CMA is now seeking feedback on its provisional decision to vary the Order and on the draft Variation Order. Responses to the consultation are due by 15 October 2019. The CMA plans to consider the responses and assess the evidence before publishing its final decision.

Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2019 laid before Parliament

HM Treasury has laid the Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2019 (SI 2019/1256) before Parliament.

SI 2019/1256 amends the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 (SI 2018/135) to:

- amend the definition of a “Miscellaneous BM [Benchmarks] Person” to include a person who administers a benchmark in accordance with Article 46(8) of Regulation EU 2016/1011; and
- clarify that the FCA may only exercise its powers to impose requirements, in order to advance any of its operational objectives, in respect of those Miscellaneous BM Persons.

This Order comes into force on 14 October 2019.

German Federal Government publishes draft law to scope licence requirements for non-EEA entities conducting trading on own account with German counterparties or on trading venues in Germany

The German Federal Government has published a draft law on the recovery and resolution of central counterparties (CCPs), which also comprises clarifications on the licence requirements for non-EEA entities conducting trading on own account (Eigengeschäft) with German counterparties or on organised markets in Germany as follows:

- transactions in financial instruments with German counterparties are not licensable provided that these transactions constitute trading on own account without involving any services for a client in Germany. Hence, such inter-dealer transactions would not trigger a German licence requirement; and
- transactions on own account in financial instruments on German trading venues which are conducted by non-EEA entities as a participant or member of an organised market in Germany will not be subject to licensing requirements until ESMA issues a decision pursuant to Article 48 MiFIR.

This clarification, however, only covers trading on own account activities, i.e. the purchase and sale of financial instruments for own account which does not constitute dealing on own account. In this respect, dealing on own account activities (purchase and sale of financial instruments for others, market making, high frequency trading) would still trigger a licence requirement if conducted as a member or participant of a German organised market.

The draft law is expected to enter into force in early 2020. If a no-deal Brexit happens before that date, BaFin would presumably take into account the upcoming clarifications mentioned above in its administrative practice.

FINMA publishes guidelines on regulation of stable coin

The Swiss Financial Market Supervisory Authority (FINMA) has published a supplement to its guidelines on initial coin offerings (ICOs) outlining how it treats stable coins under Swiss supervisory law. FINMA has seen a steady increase in the number of stable coin projects since 2018, which aim to minimise the fluctuations in value typical of payment tokens such as bitcoin by backing the tokens with assets such as fiat currencies, commodities, real estate or securities.

Swiss financial markets regulation is principle-based and technology-neutral. FINMA's treatment of stable coins under supervisory law follows the existing approach used for blockchain-based tokens: the focus is on the economic function and the purpose of a token (substance over form). In ruling on concrete projects, FINMA will follow the principle of 'same risks, same rules' and take into account the specific features of each case. Stable coins can vary greatly. The requirements under supervisory law may differ depending on which assets (e.g. currencies, commodities, real estate or securities) the stable coin is backed by and the legal rights of its holders. Money laundering, securities trading, banking, fund management and financial infrastructure regulation can all be of relevance.

FINMA has also provided guidance on a concrete enquiry on how a specific stable coin platform would be regulated in Switzerland.

ASIC extends relief for foreign financial services providers

The Australian Securities and Investments Commission (ASIC) has decided to extend the licensing relief for foreign financial services providers (FFSPs) to 31 March 2020. The extension is intended to allow FFSPs to provide financial services to Australian wholesale clients without needing to hold an Australian financial services licence.

The licensing relief that has been extended by ASIC is in the following instruments, which were due to expire on 30 September 2019:

- ASIC Corporations (Repeal and Transitional) Instrument 2016/396 and ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 – FFSPs relying on this relief can provide specified financial services to Australian wholesale clients if their home regulatory regime has been assessed by ASIC as sufficiently equivalent to the Australian financial services licensing regime; and
- ASIC Corporations (Foreign Financial Services Providers-Limited Connection) Instrument 2017/182 – this provides licensing relief for FFSPs limited to inducing an Australian wholesale client to use the provider's financial services.

ASIC had indicated in Consultation Paper 315: Foreign financial services providers: Further consultation (CP 315) that it would extend the relief for FFSPs to 31 March 2020 pending consultation.

ASIC provides update on implementation of Royal Commission recommendations

ASIC has provided an update on its work and planned actions in relation to the recommendations and areas of concern identified by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission (FSRC)).

The update outlines a number of measures across the organisation by which ASIC is implementing the seven priorities highlighted in its Corporate Plan

2019-23, one of which is to prioritise the recommendations and referrals from the Royal Commission.

According to ASIC, it is continuing its work in the areas and sectors examined by the FSRC, and its work over the past six months includes:

- taking action on the FSRC recommendations directed at ASIC;
- supporting the Australian Government's legislative reform agenda;
- implementing reforms that have been passed by the Australian Parliament, including through regulatory guidance; and
- using its regulatory tools (including new regulatory tools recently passed by the Australian Parliament) to seek change where it identifies concerning practices that can cause consumer harm, including in advance of legislative reform.

China repeals restrictions on investment quota for QFIIs and RQFIIs

The State Administration of Foreign Exchange (SAFE) has announced that, as recognised by the State Council, the restrictions on investment quota for qualified foreign institutional investors (QFIIs) and Renminbi qualified foreign institutional investors (RQFIIs) will be repealed. SAFE has also indicated its next steps as follows:

- further amendments to existing rules – SAFE will formally repeal the filing and approval requirements in respect of (R)QFIIs investment quota under existing rules. It is anticipated that licensed QFIIs and RQFIIs may directly complete the registration process with onshore custodian bank(s) and remit/repatriate money accordingly; and
- abolition of restrictions on the RQFII pilot jurisdictions – in addition to lifting restrictions on investment quota, restrictions on the scope of RQFII pilot jurisdictions will be removed as well.

A formal announcement/regulation will be issued upon completion of the relevant administrative procedures with the State Council.

First addendum to SFC-FCA MoU on mutual recognition of funds published

The Securities and Futures Commission (SFC) and the FCA have published an addendum to the October 2018 memorandum of understanding (MoU) on the mutual recognition of funds (MRF).

The parties have agreed to enter into the addendum to reflect consequential amendments to the MoU that aim to ensure that the MRF arrangement will continue to operate smoothly after Brexit.

The addendum will enter into force on the date EU laws cease to have direct effect in the UK.

FSC reforms large shareholding reporting rules

The Financial Services Commission (FSC) has announced that it plans to amend large shareholding reporting requirements under the '5% rule' in an effort to support institutional investors' shareholder activities. The proposed amendments are intended to clarify the scope of shareholder activities 'to exercise influence over the management' and apply differential reporting requirements according to the shareholding purpose.

Amongst other things, the proposed amendments include the following:

- clarification on the scope of exercising influence over the management – the scope of shareholder activities intended to exercise influence over the management, subject to the requirement of a detailed report within five days, will be clarified and narrowed. However, the following will be exempted from this strict requirement as they are deemed not to involve the intention to exercise influence over the management:
  - the exercise of shareholder rights against unlawful acts by a company or its executives under the Commercial Act (e.g. the right to injunction against unlawful acts or the right to demand dismissal of an executive officer, etc.);
  - shareholder activities by public pension funds to change the articles of incorporation in accordance with pre-released principles to improve corporate governance;
  - shareholder activities with regard to a company's dividend policy; and
  - the expression of shareholders' opinion or intention;
- the differentiation of reporting requirement by shareholding purpose – under this proposal, shareholder activities without the purpose of exercising influence over the management, currently allowed to file a simple report, will be subdivided into two categories: 'simple investment' and 'general investment' activities. Further, they will be subject to differential reporting requirements; and
- special exemptions for public pension funds – under this proposal, the reporting requirements will be eased for public pension funds, given that they are subject to eased reporting requirements under the current rule in the case of shareholdings not intended to exercise influence over the management.

Comments on the proposed amendments to the Enforcement Decree of the Financial Investment Services and the Capital Markets Act are due by 16 October 2019. The FSC has indicated that the amended 5% rule is expected to take effect in the first half of 2020.

RECENT CLIFFORD CHANCE BRIEFINGS

German draft law clarifies licence requirements for own account trading

On 5 September 2019, the German Federal Government has proposed an amendment to the German Banking Act (KWG) which clarifies German licence requirements for cross-border own account trading (Eigengeschäft) by non-EEA entities. As such, the proposal is in particular relevant for UK entities in case of a no-deal Brexit. This briefing paper discusses the amendment.

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

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Russian currency control – significant changes in foreign accounts rules

Russia has adopted a restrictive approach to crediting accounts of its currency residents (i.e., companies organised under Russian law, individuals holding Russian passports or foreign nationals living in Russia under residency permits). Russian currency control legislation maintains an exhaustive list of payments which may be directly credited to foreign bank accounts of Russian currency residents (i.e. without the funds initially being credited to their Russian bank accounts). Any payment that is not on that exhaustive list has to be received by a Russian currency control resident in its Russian bank account. Failure to comply with this regime may lead to a fine for the Russian currency control resident of up to 100% of the value of that payment.

While there has been some progress in terms of broadening the list over the past few years, the legislation remains very restrictive.

This briefing paper provides a summary of two major changes to the regime of foreign bank accounts under Russian currency control rules effective from January 2020.

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

Busting Bitcoin's anonymity - the implications for financial institutions

A deliberate design feature of Bitcoin is that it enables users to buy or sell anything without revealing their identity. Yet, paradoxically, all Bitcoin transactions are stored publicly and permanently on blockchain. Now, as seen in recent cases, enterprising US prosecutors and private plaintiffs' lawyers are using software called blockchain explorer to crack Bitcoin's anonymity. The US Treasury Financial Crimes Enforcement Network (FinCEN) also appears to suggest that financial institutions and crypto businesses should consider how explorer software could help them meet their own anti-money laundering (AML) and sanctions obligations. This briefing paper discusses the new software.

https://www.cliffordchance.com/briefings/2019/09/busting_bitcoin_sanonymity-theimplication.html

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