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Brexit: Final agreement on Article 50 extension published

The European Council has published its decision taken in agreement with the UK to extend the Article 50 period to 31 January 2020, with a view to allowing for the finalisation of the ratification of the Withdrawal Agreement.

In its decision, the European Council notes that in accordance with Article 50(3) TEU, the Withdrawal Agreement may enter into force on an earlier date. In the event that the UK and the EU complete their respective ratification procedures and notify the depositary of the completion of those procedures in November 2019, December 2019 or January 2020, the UK would leave the EU on the entry into force of the Withdrawal Agreement on either 1 December 2019, 1 January 2020 or 1 February 2020.

As the UK is expected to hold a general election on 12 December 2019, it is unlikely that the European Union (Withdrawal Agreement) Bill (WAB), required to ratify the Withdrawal Agreement in the UK, will pass in time to enable a 1 December 2019 departure.

The decision is accompanied by a declaration in which the European Council firmly states that it excludes any reopening of the Withdrawal Agreement in the future.

The Financial Conduct Authority (FCA) has also published a statement confirming that the UK's temporary permissions regime (TPR) has been extended to 30 January 2020.

Brexit: ESMA updates no-deal statements reference date

The European Securities and Markets Authority (ESMA) has published a press release confirming that its statements on preparations for a no-deal Brexit no longer apply as of 31 October 2019 following the extension of the Article 50 period.

The reference date for Brexit in all of ESMA's previously published measures and actions, including public statements, relating to a no-deal scenario should now be read as 31 January 2020.

ESMA intends to issue further announcements and updated measures as matters develop.

EBA reports on impediments to cross-border provision of EU banking and payment services

The European Banking Authority (EBA) has published a report on potential impediments to the cross-border provision of banking and payment services in the EU.

As part of its March 2018 FinTech Roadmap, the EBA has been monitoring the use of digital solutions, such as online and mobile banking applications and platforms, in the banking and payments sectors and observed that the cross-border provision of financial services remains limited.

The report identifies issues that, alone or in combination, may create barriers to market entry, impede the scaling up of cross-border activities and undermine the functioning of the EU Single Market.

The report calls on the EU Commission to update its interpretative communications to support the identification of cross-border services taking account of the digitisation of financial services and the development of legislative proposals to further harmonise requirements relating to:

- the designation as cross-border activity under the freedom to provide services or right of establishment;
- authorisations and licensing;
- consumer protection and conduct of business requirements; and
- anti-money laundering (AML) and combating the financing of terrorism (CFT).

The EBA will continue to monitor the adoption of digital solutions in the context of the provision of banking and payments services and take further action as required in the event new issues emerge that may impede the capacity for financial institutions to provides services cross-border.

Deposit Guarantee Schemes Directive: EBA publishes second of three opinions on implementation

The EBA has published its second opinion addressed to the EU Commission on the implementation of the Deposit Guarantee Schemes Directive (DGSD), which forms part of its work aimed at strengthening depositor protection, enhancing financial stability and improving operational effectiveness. This opinion focuses, in particular, on the payouts of deposit guarantee schemes (DGSs) and contains 30 proposals aimed at improving the current EU legal framework surrounding them.

Amongst other things the EBA recommends that:

- depositors should retain access to an appropriate daily amount from their deposits, while waiting for authorities to make a final decision on whether deposits have become unavailable;
- the DGSs be granted powers to suspend payouts to depositors suspected of money laundering or terrorist financing;
- depositors are informed about the most relevant features of their protection rights (such as in relation to temporary high balances and the set-off of deposits against their liabilities that have fallen due before their deposits became unavailable), in normal circumstances as well as during a DGS payout; and
- depositors are granted sufficient time to claim their funds after a bank failure.

The opinion should be read in conjunction with the EBA's earlier opinion on the eligibility of deposits, coverage level and cooperation between DGSs published in August 2019. Its third and final opinion on DGS funding and the uses of DGS funds is expected to be published in early 2020.

SRB publishes 2020 work programme

The Single Resolution Board (SRB) has published its work programme for 2020.

Developed in line with the SRB's 2018-2020 multiannual plan (MAP) and structured around the same strategic areas, the SRB's priorities for 2020 are:

- strengthening the resolvability of SRB banks and less significant institutions (LSIs), including:
  - drafting resolution plans for SRB banks and setting minimum requirements for own funds and eligible liabilities (MREL) targets;
  - identifying and addressing impediments to resolvability; and
  - carrying out an effective oversight function for LSIs;
- fostering a robust resolution framework;
- preparing and carrying out effective crisis management;
- operationalising further the Single Resolution Fund (SRF); and
- establishing a lean and efficient organisation.

Basel Committee sets out policy and supervisory initiatives

The Basel Committee on Banking Supervision (BCBS) has published a press release on the policy and supervisory initiatives discussed at the International Conference of Banking Supervisors (ICBS) on 30-31 October 2019.

Among other things, the BCBS agreed to:

- publish a consultation paper in November on a final set of limited and targeted adjustments to the credit valuation adjustment risk framework, with the expectation that the framework be implemented alongside the Basel III standards on 1 January 2022;
- publish consultation papers in November on:
  - revised disclosure requirements related to the market risk framework finalised in January 2019; and
  - voluntary disclosure templates related to banks' sovereign exposures;
- publish a discussion paper on the prudential treatment of cryptoassets;
- publish a report in November on open banking and application programming interfaces;
- conduct 'deep dive' assessments related to artificial intelligence and machine learning, banks' dependencies on unregulated third parties and the implications for outsourcing supervisory regimes, and data governance and management, data security, portability and recovery;
- publish draft guidelines on enhanced cooperation between prudential regulatory authorities and authorities in charge of anti-money laundering and combatting the financing of terrorism; and
- publish the reports it reviewed on the implementation of the Net Stable Funding Ratio and large exposures standards in Argentina and China.

The BCBS also discussed benchmark rate reforms and intends to consider whether any further supervisory measures are needed to help banks prepare to meet the transition timeline for alternative reference rates.

In relation to its ongoing work on evaluating and monitoring the impact of its post-crisis reforms, the BCBS also published a newsletter on buffer usability to reiterate the importance of the capital buffer framework.

The BCBS also discussed additional supervisory initiatives, including its guidance for managing and mitigating risks relating to the settlement of foreign exchange transactions, and exchanged views on climate-related financial risks and on the audit of expected credit loss accounting.

The next ICBS will take place on 21-22 October 2020 in Vancouver.

Brexit: SIs under the EU (Withdrawal) Act for 28 October – 1 November 2019

New statutory instruments (SIs) relevant to financial services were made under the EU (Withdrawal) Act 2018 last week.

The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019 (SI 2019/1423) amend the definition of exit day from 31 October 2019 to 31 January 2020.

The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No. 2) Regulations 2019 (SI 2019/1416) make amendments to reflect the entry into force of EMIR Refit (Regulation (EU) 2019/834).

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

Treasury Committee reports on IT failures in financial services sector

The House of Commons Treasury Select Committee has published its report on IT failures in the financial services sector. The Committee launched an inquiry in 2018 to examine why IT failures are occurring and how the industry and regulators could have prevented the outages.

While acknowledging that some IT failure is inevitable, the report finds that the current level and frequency of disruption and consumer harm is unacceptable.

Recommendations from the Treasury Committee to overcome these problems and improve operational resilience include:

- calling on regulators to ensure they have the appropriate skills and experience to improve the operational resilience of the financial services sector and, if necessary, increasing financial sector levies to ensure that staff with appropriate expertise and experience can be hired;
- ensuring that regulators maintain a very low tolerance for service disruption by providing guidance on what level of impact should be tolerated, and not allowing firms to set their own tolerance for disruption too high to avoid lax operational resilience;
- expanding the Senior Managers Regime to include financial market infrastructure firms, such as payment systems;

- ensuring that firms cannot use the cost or difficulty of upgrades as excuses not to make vital upgrades to legacy systems; and
- calling on regulators to highlight the potential concentration risks of financial services firms using the same third-party providers, such as cloud services. Where common providers are systemic, the Financial Policy Committee should consider recommending regulation to HM Treasury.

German Parliament Finance Committee and Committee on the Digital Agenda hold joint public hearing on Libra

The Finance Committee and the Committee on the Digital Agenda of the German Parliament (Bundestag) have held a joint public hearing on the Libra payment project.

During the hearing, Bertram Perez of the Libra Association explained that Libra, the payment project initiated and in preparation by the Facebook group, was not intended to interfere with the sovereignty of states and would also not grant loans. Similar to credit cards, it was meant to establish a new payment system only.

Perez described Libra as a new opportunity for about 1.7 billion people who do not have access to banks and financial services. He portrayed Libra as an independent institution domiciled in Switzerland whose aim it is to create a payment system and to reduce costs. 21 enterprises were involved so far. Perez emphasised that Libra is in contact with financial supervisory authorities and will cooperate with governments.

On the relationship between Libra and a potential future digital euro, Perez said the creation of a digital euro was welcomed. The euro would be part of the currency basket that Libra intends to set up as security for its system. The basket should consist of around 50% US dollars, 20% euros and 30% other currencies and should include only the most stable currencies worldwide. Libra was intended to be stable, unlike systems such as Bitcoin with strong volatility. It would also not be launched until all issues regarding money laundering and terrorist financing have been discussed.

On the possible role of Libra in Germany, Perez said Libra was not intended to be a means of payment for all. Its opportunities lay above all in cross-border payments, where – for payments beyond the euro zone – very high fees were sometimes charged in Germany. Libra wanted to be the better offer in this area. 'Libra is not intended to be used to pay for a coffee,' Perez added.

Luxembourg Financial Intelligence Unit publishes annual report

The Luxembourg Financial Intelligence Unit (Cellule de renseignement financier) has published its 2018 Annual Report. The report reviews the activity of the Financial Intelligence Unit over the course of the year 2018.

Aside from containing statistical data (such as on suspicious transaction report (STR) numbers, most common indicators for STRs, red flags and trends), the report stresses the improved cooperation with both reporting firms and public authorities (the Luxembourg Inland Revenue, the Prosecutor's office, the CSSF, the Police and the State Intelligence Service).

The report also points out that the Financial Intelligence Unit is no longer connected to the prosecutor specialised in economic affairs of the

Luxembourg Tribunal d'Arondissement, but is, as of 1 November 2018, an autonomous authority under the administrative supervision of the State General Prosecutor.

Capital Market Development Strategy published

The Capital Market Development Strategy adopted at the beginning of October by the Council of Ministers has been published.

The strategy identifies the most important barriers to the development of the capital market in Poland (primarily long-term) and proposes specific solutions to them.

Polish President signs Act Amending Act on Combating Money Laundering and Financing of Terrorism

The President of Poland has signed the Act Amending the Act on Combating Money Laundering and the Financing of Terrorism. The amendment relates, among other things, to the issue of information sharing between obliged entities belonging to one group. The existing provisions in this respect narrow the list of entities that can share information within their group on actions taken within the scope of combating money laundering and the financing of terrorism. The amendment is intended to ensure the compliance of Polish law in this respect with the provisions of EU Directive 2015/849.

Draft Order on information obligations regarding loans of indefinite duration associated with payment instruments published

The Ministry of Economy and Enterprise has published a draft Order amending Order EHA/2899/2011, of 28 October, on transparency and protection of banking services consumers, for the establishment of information obligations regarding loans of indefinite duration associated with payment instruments.

The proposed amendment contains two types of measures related to revolving credits associated with payment instruments:

- guidelines on solvency assessment addressed to institutions – in order to ensure a more prudent estimate that ensures sufficient customer payment capacity and avoids over-indebtedness, incorporating a specific provision for this type of product; and
- new transparency obligations for both the pre-contractual phase and during the term of the contract, which aim to ensure greater knowledge by the customer of the implications for his/her level of indebtedness of the quota election offered.

The draft Order will be subject to a public hearing until 18 November 2019.

SAFE further facilitates administration of cross-border trades and investment

The State Administration of Foreign Exchange (SAFE) has issued the 'Circular on Further Facilitating Cross-border Trades and Investment', which is intended to improve foreign exchange administration policies and simplify administrative procedures for market participants when handling foreign exchange issues.

Amongst other things, the following key aspects of the circular are worth noting:

- removal of restrictions on onshore equity investment by foreign-invested enterprises – previously, only foreign-invested enterprises of an investment nature could make equity investments in China. The circular expands the eligible scope to all foreign-invested enterprises, which means that all types of foreign-invested enterprises can now make equity investments in China by utilising their capital funds within the scope permitted by the Negative List of Foreign Investment (as amended from time to time) as long as the relevant investments are authentic and comply with the law;
- simplification of foreign debt registration – a non-bank borrower is no longer required to deregister its foreign debt with the competent local counterpart of SAFE and such formalities can be carried out with a bank. The timing requirement for deregistration of foreign debt is removed as well. In addition, in pilot zones, instead of case-by-case registration with SAFE, non-financial enterprises can now benefit from a regime of direct registration with banks; and
- upgrading the pilot measures on cross-border transfers of onshore credit assets – provided that the principles of controllable risk and prudential management are followed, the circular permits certain pilot zones and cities to launch programmes of cross-border credit asset transfer, such as non-performing assets of commercial banks and receivables under trade financing.

HKMA issues circular on consumer protection measures regarding open application programming interface framework

The Hong Kong Monetary Authority (HKMA) has issued a circular to clarify its expectations of authorised institutions regarding consumer protection measures in respect of the open application programming interface (Open API) framework.

The HKMA notes that during the implementation of Open API, as third-party service providers (TSPs) may interface with customers for providing the services under the Open API Framework, there are several consumer protection aspects, such as fair treatment of customers, disclosure and transparency, protection of customers against fraud, protection of customer data, complaint handling and redress mechanism, liability and settlement arrangement, and potential risk of mis-representation of authorised institutions by the TSPs.

The HKMA expects authorised institutions to devise and adopt adequate consumer protection measures to uphold the consumer protection principles set out in the Code of Banking Practice and comply with other applicable regulatory requirements, regardless of the underlying technology adopted for their banking products and services, and whether authorised institutions provide the products and services themselves or in partnership with TSPs. In order to strike a balance between innovation and consumer protection, the HKMA also requires authorised institutions to adopt a risk-based approach, and implement consumer protection measures that are commensurate with the risks involved.

The HKMA also provides clarification with regard to the requirements regarding authorised institutions' engagement of intermediaries, as the use of TSPs under Open API Framework (where customers' information is collected by the TSPs and then passed to authorised institutions in respect of retail consumer financial products or services) may constitute the use of intermediaries by authorised institutions.

SFC issues guidance on external electronic data storage

The Securities and Futures Commission (SFC) has issued a circular to licensed corporations on the use of external electronic data storage providers (EDSPs).

The circular sets out requirements for when regulatory records are kept exclusively with an EDSP without a duplicate set of records at the premises of the licensed corporation, including the need to seek approval from the SFC. It also conveys the SFC's expectations for the mitigation of cyber and operational risks when electronic data storage is outsourced to an EDSP, regardless of whether regulatory records are kept with it exclusively.

In particular, the circular emphasises that the authenticity, integrity and reliability of regulatory records, as well as the ability to access them promptly, are crucial if the records are required to be produced in legal proceedings initiated by the SFC or the Department of Justice.

Korean government launches open banking system

The Financial Services Commission (FSC) has announced that the Korean government has pilot-launched an open banking system to allow fintech firms access to banks' payment network through open application programming interface (API) initiatives. The open banking system is intended to boost innovation and competitiveness in the financial sectors by introducing a comprehensive financial service platform, allowing fintech businesses to adopt open banking, and improving the user experience for consumers.

In particular, the key features of the open banking system include:

- lowering transaction fees and enhancing user convenience:
  - the current fee of KRW 400 to 500 per transaction will be lowered to about KRW 40 to 50 for large service providers, and KRW 20 to 30 for small- and medium-sized firms;
  - bank customers can choose any mobile banking application to manage all their accounts in a single application without having to use separate applications for different banks; and
- ensuring security and protection for consumers:
  - fintech firms attempting to participate in the open banking system are subject to a security check by the Financial Security Institute;
  - the storage capacity of the current operating system will be upgraded from 4TB to 60TB before the system becomes open to fintech firms, and a 24-hour fraud; and
- a detective system will closely monitor fraudulent activities and automatically shut down suspicious transactions.

The FSC has indicated that the government:

- intends to ensure that open banking is operating in a stable and secure manner, and introduce new types of payment services, such as 'My Payment' in order to encourage participation by more fintech businesses;
- intends to review an expansion of the open banking system in 2020 to nonbank financial institutions, including mutual finance, savings banks and postal service;
- plans to diversify API functions and review a possible expansion to data sectors through an increased connectivity with 'My Data' service; and
- during the pilot-run period, intends to conduct a comprehensive assessment of the system and make adjustments if necessary before opening the system to fintech firms on 18 December 2019.

MAS issues updated guidelines on licensing, registration and conduct of business for fund management companies and related FAQs

The Monetary Authority of Singapore (MAS) has published updated guidelines on licensing, registration and conduct of business for fund management companies (FMCs).

Amongst other things, the guidelines have been updated to clarify:

- the admission criteria for FMCs, in particular, clarification on the requirement for substantive fund management activity, expectations concerning (i) competency and appointment of key individuals, and (ii) legal structure and office space;
- the ongoing requirements applicable to venture capital fund managers (VCFMs), in particular, clarification that VCFMs are subject to (i) the MAS Notice on Reporting of Misconduct of Representatives by Holders of CMS Licence and Exempt Financial institutions and (ii) the MAS Guidelines on Outsourcing; and
- application procedures for licensing or registration of FMCs.

The MAS has also updated its set of frequently asked questions (FAQs) on the licensing and registration of FMCs.

Federal Reserve and FDIC finalize changes to resolution plan requirements

The Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC) have finalized a rule that adapts their resolution plan requirements for large firms. The rule keeps resolution plans, also known as living wills, in place for the largest firms, while decreasing requirements for smaller firms that pose less risk to the financial system. The rule uses a separate framework developed by the banking agencies for application of prudential requirements, and establishes resolution planning requirements specific to the risk level a firm poses to the financial system. The rule would affect domestic and foreign firms with more than USD 100 billion in total consolidated assets.

The rule will be effective 60 days after publication in the Federal Register.

House passes bill to expose owners of shell companies

The US House of Representatives has passed legislation entitled the Corporate Transparency Act of 2019, which is aimed at assisting in the detection and prevention of money-laundering and other illicit activities. The Act, as currently drafted, would require corporations and limited liability companies organized under the laws of any US state to disclose their true, beneficial owners at the time the company is formed, as well as on an annual basis thereafter, in an effort to prevent the use of anonymous shell companies to evade law enforcement and disguise illegal activity. As the next step in the legislative process, the current iteration of the Act will be sent to the US Senate for its consideration.

RECENT CLIFFORD CHANCE BRIEFINGS

EBA publishes opinion on regulatory treatment of NPE securitisations

Over the past several years, there has been an increasing focus at the European level on measures that might be taken to help facilitate the removal of non-performing exposures (NPEs) from bank balance sheets.

On 23 October, the EBA made a substantial contribution by publishing an opinion suggesting adjustments to the regulatory regime for NPE securitisations. These include recommendations for adjusted regulatory capital treatment, risk retention and diligence obligations. These adjustments are designed to apply only to NPE securitisations and make them more fit for the particular circumstances that apply when securitising NPEs.

This briefing paper discusses the opinion.

https://www.cliffordchance.com/briefings/2019/10/eba-publishes-opinion-on-regulatory-treatment-of-npe-securitisat.html

View from the top 2019: A Clifford Chance study on boardroom perspectives on risk

In collaboration with the Economist Intelligence Unit we have captured the views of 200 board members globally.

View from the top compares the attitudes towards those risks perceived as most persistent and pervasive today, with those of five years ago. The study shines a light on themes such as the increasing sense of personal accountability, political volatility being accepted as the norm, and an overwhelming confidence on technology risk.

https://www.cliffordchance.com/hubs/boardroom-risk-hub/insights/boardroom-view-on-risk-management.html

ESG issues for corporates – risks and opportunities

Sustainability and environmental, social, and governance (ESG) factors have fast risen towards the top of the board agenda – corporates are increasingly aware that a failure to address these matters can be detrimental to their businesses, both financially and reputationally.

In the current business climate, a company's purpose, culture and values have never been so under the microscope. Investors and wider society are

increasingly of the view that the generation of profits cannot of itself be the ultimate purpose of a company, but rather to run a successful business with a clearly defined purpose and set of values which guide decision-making and with a long-term strategy which recognises the role that the company plays in wider society.

Investor pressure and the proliferation of a myriad of reporting frameworks, standards and requirements at the international, EU and domestic level in relation to sustainability and ESG reporting makes this a complex area for boards to navigate.

This briefing paper examines some of these reporting frameworks, standards and requirements, highlighting key issues for boards to consider and actions to take to ensure they are doing everything to mitigate ESG risks and seize ESG opportunities.

https://www.cliffordchance.com/briefings/2019/10/esg-issues-for-corporates-risks-and-opportunities.html

Climate change disputes – a summary of developments and drivers

Climate change has been dominating the public debate for some time now. The increasing number of lawsuits underlines that legal risks relating to climate change are increasing for companies acting in the oil, gas, energy and even the financial sector.

This briefing paper gives an overview on the developments and drivers in the field of climate change disputes.

https://www.cliffordchance.com/briefings/2019/10/climate-change-disputes-a-summary-of-developments-and-drivers.html

Sustainability snapshot – UK FCA signals next steps in its strategy on climate change and green finance

The UK financial services regulator has signalled the steps it intends to take over the next few months in order to meet its strategic objectives on climate change and green finance. Promoting sustainable finance is a key issue for governments, policy makers, regulators and businesses internationally. Given how serious regulators and policy makers appear to be about tackling this issue, industry players should expect to see more climate-related regulatory initiatives in the pipeline in the short to medium term.

This briefing paper outlines the four priority areas the FCA has identified and notes some of the issues that may arise.

https://www.cliffordchance.com/briefings/2019/10/sustainability-snapshot--uk-fca-signals-next-steps-in-its-strate.html

Brexit and the role of the European Union (Withdrawal Agreement) Bill

Following the news that a revised Brexit deal had been agreed between the UK and the EU, the long-awaited European Union (Withdrawal Agreement) Bill (WAB) was published by the UK Government on 21 October 2019.

For Brexit, the WAB is an essential piece of UK legislation, providing the means by which the UK Government can give effect in domestic law to the Withdrawal Agreement. While the bill has progressed through initial legislative

stages, MPs balked at the Prime Minister's proposal to pass the complex 110-page bill at breakneck speed, and its progression through Parliament has now been put on hold amid talks of Brexit delay.

This briefing paper discusses the Withdrawal Agreement Bill.

https://www.cliffordchance.com/briefings/2019/10/brexit-and-the-role-of-the-european-union--withdrawal-agreement-.html

Rise in UK stock drop claims not checked by Tesco

In recent years, there has been a marked increase in 'stock drop' claims brought against UK-listed companies, including claims against RBS and Tesco. None of these claims have yet reached judgment, and so the ambiguities in the legislation remain largely unresolved.

The rapid growth of the third party litigation market, combined with uncertainty in this area of the law and the possibility of substantial recoveries, means that UK-listed companies are targets for large shareholder claims.

A recent attempt by Tesco to strike out claims against it on the basis that the claimants did not have sufficient standing to bring the claim has failed.

This briefing paper discusses these 'stock drop' claims.

https://www.cliffordchance.com/briefings/2019/10/rise-in-uk-stock-drop-claims-not-checked-by-tesco.html

SEC eases restraints on pre-marketing investor communications

On 26 September 2019, the Securities and Exchange Commission adopted new Rule 163B under the US Securities Act of 1933, as amended, extending the 'test-the-waters' accommodation, currently available only to emerging growth companies, to all issuers. Effective 3 December 2019, Rule 163B will permit all issuers, whether domestic or foreign, reporting or non-reporting, to communicate with certain institutional investors before and after filing a registration statement to gauge market interest in a contemplated public securities offering in the United States. This new rule also allows issuers to authorise others, such as underwriters, to engage in these types of communications on their behalf.

This briefing paper discusses the new Rule 163B.

https://www.cliffordchance.com/briefings/2019/10/sec-eases-restraints-on-pre-marketing-investor-communications.html