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EU Commission publishes roadmap on anti-money laundering

The EU Commission has published for discussion a roadmap to its work towards a new approach to preventing and combating money laundering and terrorism financing. The roadmap sets out areas that the Commission intends to address in its preparatory work in view of updating the existing regulatory framework.

Comments on the roadmap are due by 11 March 2020. The Commission will summarise the input received in a synopsis report explaining how input will be

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taken on board and, if applicable, why certain suggestions cannot be taken up.

Brexit: EU Parliament adopts resolution on negotiations mandate

The EU Parliament has adopted a resolution on the mandate for negotiations for a new partnership with the UK.

The resolution is broadly based on the EU Commission's draft negotiating directives published on 3 February and sets out the Parliament's priorities in the upcoming negotiations. Among other things, Parliament expects an agreement between the UK and EU to be based on the following three pillars: economic partnership, foreign affairs partnership and specific sectoral issues and thematic cooperation.

In relation to financial services, the Parliament considers that market access should be based on equivalence and that, once granted, an effective mechanism should be put in place to guarantee it is maintained. It also stresses that the EU can unilaterally withdraw equivalence decisions at any moment.

The negotiating directives are expected to be adopted by the EU Council on 25 February 2020.

Deposit Guarantee Schemes Directive: EBA publishes final opinion on implementation

The European Banking Authority (EBA) has published the third and final opinion on the implementation of the Deposit Guarantee Schemes Directive (DGSD).

Following the first opinion on eligibility of deposits, coverage level and cooperation between DGSs and the second opinion on DGS payouts, the third opinion focuses on DGS funding and the use of DGS funds, and sets out 23 proposals aimed at improving the current legal framework.

Among other things, the EBA recommends:

- clarification of the definition of available financial means;
- more transparency in relation to the reporting of DGS funds, consistency in the approach to payment commitments and precision in relation to investment of DGS funds; and
- clarification of the use of funds in relation to failure prevention following the General Court's ruling in Tercas (ECLI:EU:T:2019:167).

The EBA invites the EU Commission to consider the proposals in all three opinions when preparing its report on the implementation of the DGSD for the EU Parliament and Council, and if and when it prepares a proposal for a revised DGSD.

Capital requirements: EBA consults on guidelines on subsets of exposures in application of systemic risk buffer

The EBA has launched a consultation on draft guidelines on the appropriate subsets of exposures to which competent or designated authorities may apply a systemic risk buffer (SyRB) in accordance with the Capital Requirements Directive (CRD). The guidelines are intended to facilitate a common approach throughout the EU by setting a framework to harmonise the design of the appropriate subsets of sectoral exposures to which a SyRB may be applied.

The consultation paper sets pre-determined dimensions or components of exposures which should be used. A pre-condition when defining a subset of sectoral exposures is its systemic relevance according to a qualitative and quantitative assessment conducted by the relevant authority. In such assessments, the EBA recommends three criteria to use: size, riskiness and interconnection.

The paper also sets out general principles to ensure the right balance between addressing the systemic risk stemming from the identified subset of sectoral exposures and the unintended consequences when applying a sectoral SyRB to this subset. Relevant authorities should avoid unwarranted interactions with other macroprudential measures and consider reciprocity challenges that could arise when identifying an appropriate subset of sectoral exposures.

The deadline for submitting comments is 12 May 2020. A public hearing will be held on the draft guidelines at the EBA premises in Paris on 27 March 2020.

IOSCO reports on key considerations for regulating cryptoasset trading platforms

The International Organization of Securities Commissions (IOSCO) has published a report setting out key issues and risks associated with cryptoasset trading platforms (CTPs). The report is based on the findings of a survey of member jurisdictions and the regulatory approaches to CTPs they are currently applying or considering. It is intended to assist regulatory authorities in evaluating CTPs within the context of their existing regulatory frameworks and in mitigating any risks CTPs raise.

In particular, IOSCO highlights the following areas as ones regulatory authorities should consider in the context of the regulation of CTPs:

- access;
- safekeeping of participant assets;
- conflicts of interest;
- transparency of operations;
- market integrity and the monitoring and enforcement of trading rules;
- price discovery; and
- technology, including resiliency and cyber security.

IOSCO also notes that many issues related to the regulation of CTPs are the same as those faced by traditional securities trading venues and that, in instances where a regulatory authority has determined that a cryptoasset is a security, then the basic principles of securities regulation and the guidance set out in the IOSCO Principles and Methodology should apply.

FCA sends Dear CEO letter to credit brokers

The Financial Conduct Authority (FCA) has written a Dear CEO letter to credit brokers, setting out the key risks they should consider and act on.

The FCA has grouped together the firms it supervises into different portfolios based on their business models. The FCA is analysing each portfolio and developing strategies for supervision to monitor firms effectively and target firms posing the greatest risk of harm. This letter has been sent to firms in the credit brokers portfolio, whose business includes introducing customers to lenders or other brokers to provide finance.

The FCA examined firms' regulatory histories, the type and number of complaints and other information and data to assess how credit brokers could cause harm and found that:

- many firms did not understand their regulatory requirements;
- firms have poor oversight of staff and/or appointed representatives' (ARs') activities;
- firms present an increased risk of harm to customers where the sale of goods is made in the home;
- firms made misleading or inaccurate financial promotions which could cause consumers to make uninformed decisions;
- firms do not explain the level of service provided or other factors likely to influence a customer's decisions, such as whether they have arrangements to refer customers onto specific lenders, are tied agents or make whole of market introductions, or if the firm receives a commission from an introduction to a lender;
- where the firm is responsible for providing product information, adequate or relevant information to allow consumers to make informed choices was not provided; and
- firms do not consider or manage the risks to their business from technology, cyber-attacks and inadequate IT resilience.

The letter sets out the FCA's supervisory priorities for the credit brokers' sector, which include firms reporting accurate regulatory data, examining the firms' oversight of their staff and ARs, and domestic premises suppliers.

The FCA expects firms to review the areas of concern in the letter and consider whether changes can be made to reduce harm or potential harm to consumers.

BRSA tightens restrictions on FX swaps

Since 13 August 2018, the Banking Regulation and Supervision Agency (BRSA) has been putting in place restrictions to prevent local banks from short selling Turkish Lira in order to avoid another local currency crisis.

As per the restrictions put in place in the summer of 2018, the total notional principal amount of local banks' FX swaps and other similar products (spot + forward FX transactions) with foreign counterparties where at the initial date Turkish banks pay Turkish Lira and receive FX should not exceed 25% of the relevant bank's regulatory capital. On 8 September 2018, the BRSA also granted an exemption for FX swap transactions carried out by local banks with their parent entities or other affiliates that are included in the consolidated financial statements of the group. On 17 September 2018, the BRSA further clarified that the amounts of transactions with different maturity periods will be added into the daily calculation of the 25% threshold in various percentages as follows:

- percentage of the transaction amount to be considered where the term is less than 90 days: 100%;

- percentage of the transaction amount to be considered where the term is 90 to 360 days: 75%; and
- percentage of the transaction amount to be considered where the term is more than 360 days: 50%.

On 9 February 2020, the BRSA tightened the threshold for the total notional principal amount of local banks' FX swaps and other similar products (spot + forward FX transactions) by lowering it to 10%, which is expected to make foreign swap counterparties' access to TRY liquidity harder. In this regard, unless current excess is eliminated, no further transactions of these types could be entered into, and maturing transactions should not be renewed. The above-mentioned ratio is to be calculated daily on a consolidated and individual basis.

The BRSA is effectively restricting foreign swap counterparties' access to TRY liquidity in the offshore swap market and making it harder for them to borrow Turkish Lira from Turkish banks to enter into short selling trades, which has been identified as a critical factor in the depreciation of the TRY in the past year's currency crisis.

FINMA issues implementing regulations under FinSA and FinIA

The new Financial Services Act (FinSA) and Financial Institutions Act (FinIA) which entered into force on 1 January 2020 require the Swiss Financial Market Supervisory Authority (FINMA) to pass a number of implementing provisions, which are mainly technical in nature. As a result, FINMA proposes to create a new Financial Institutions Ordinance (FinIO-FINMA), amend some current FINMA ordinances and abolish three of its circulars. FINMA will hold a public consultation on the new regulations until 9 April 2020.

The new FinIO-FINMA contains:

- details of professional indemnity insurance for portfolio managers, trustees and managers of collective assets;
- details on calculating the de minimis threshold for obtaining authorisation as a portfolio manager; and
- details on risk management and internal control system for managers of collective assets.

FINMA also proposes to amend the client identification threshold values in its Anti-Money Laundering Ordinance (AMLO-FINMA) from CHF 5,000 to CHF 1,000 for exchange transactions in cryptocurrencies. Through these measures, FINMA is implementing the international standards approved in mid-2019 in acknowledgement of the heightened money-laundering risks in this area.

Draft regulatory amendments on support for fintech in Poland published

The Polish Financial Supervision Authority and the Ministry of Finance, with support from the European Bank for Reconstruction and Development and the European Commission, have launched a project entitled 'Development and Dissemination of Access to Innovative Financial Services in Poland', which is aimed at developing Poland's fintech sector.

The project will cover three main subject areas:

- 'fintech' will involve comprehensive identification and removal of regulatory and supervisory restrictions limiting the development of Poland's fintech sector;
- 'sandbox' will provide recommendations on, in particular, the opportunities to set up a regulatory sandbox in Poland, i.e. a space where new participants can test innovative financial services; and
- 'suptech' will involve feasibility studies with regard to the application of innovative technologies such as artificial intelligence and distributed registers to make supervisory structures more efficient.

Spanish Government consults on implementation of CRD 5, BRRD 2 and Directive on prudential regime for investment firms

The Ministry of Economic Affairs and Digital Transformation has published consultation papers on the implementation of the following EU directives:

- Directive (EU) 2019/879 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (BRRD 2);
- Directive (EU) 2019/878 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (CRD 5); and
- Directive (EU) 2019/2034 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU.

The consultation will close on 22 February 2020.

SFC provides update on front-loaded regulatory approach

The Securities and Futures Commission (SFC) has published a special edition of the SFC Regulatory Bulletin to provide an update on its front-loaded approach to addressing market quality and corporate conduct issues.

The SFC's front-loaded regulatory approach combines early regulatory intervention in listing matters and enhanced supervision of intermediaries, which are complemented by focused enforcement actions against firms with important gatekeeping functions and individuals in senior roles.

The latest bulletin highlights the SFC's key areas of concern and recent regulatory interventions in initial public offering (IPO) applications and corporate transactions. It also highlights that, in a number of cases, failures on the part of directors, often involving conflicts of interest, played a central role in dubious corporate transactions involving overvalued acquisitions and suspect valuations.

The bulletin reminds directors of their obligations to guard shareholders' interests and remain professional and vigilant when performing their duties. Moreover, it requires IPO sponsors to conduct proper due diligence and exercise professional scepticism when assessing IPO applicants, as well as emphasising that IPO sponsors should bear responsibility for the due diligence work conducted by third-party professionals.

MAS revises guidelines on margin requirements for non-centrally cleared over-the-counter derivatives contracts

The Monetary Authority of Singapore (MAS) has revised the guidelines on margin requirements for non-centrally cleared over-the-counter (OTC) derivatives contracts. The guidelines have mainly been revised to:

- defer the commencement date of the margin requirements for non-centrally cleared equity options and equity index options; and
- clarify that, for the purposes of determining whether a foreign covered entity is a person specified in Annex 1 (who would not need to undertake exchange of margins), the aggregate month-end average notional amount of the foreign covered entity should be calculated by reference to uncleared derivatives contracts booked in their place of operation (rather than in Singapore).

Banking (Amendment) Act 2020 gazetted

The Singapore Government has gazetted the Banking (Amendment) Act 2020, which was passed by the Singapore Parliament on 6 January 2020 and assented to by the President on 29 January 2020.

The key amendments to the Banking Act are intended to rationalise and streamline the regulatory frameworks for banks and merchant banks by:

- removing the divide between the Domestic Banking Unit and the Asian Currency Unit and making consequential amendments to the Act;
- consolidating the regulation of merchant banks and subjecting them to a licensing regime as a class of financial institutions distinct from banks under the Act (instead of an approval regime under the Monetary Authority of Singapore Act, Cap. 186 of Singapore);
- expanding the grounds for the MAS to revoke a bank licence; and
- enhancing the MAS' regulatory and supervisory powers to tackle new and emerging risks (e.g. in relation to outsourcing arrangements).

The Banking (Amendment) Act 2020 will come into operation on a date that the Minister appoints by notification in the Gazette.

RECENT CLIFFORD CHANCE BRIEFINGS

The EU legislative process explained

The UK left the EU at 11.00 p.m. UK time on 31 January 2020 and no longer has any role in the EU's institutions or law-making processes.

Clifford Chance has prepared an updated version of its guide 'The EU legislative process explained', which provides an overview of the key institutions of the EU, the EU legislative process and the roles of the European Commission and the European Supervisory Authorities in the creation of the technical rules that are central to the implementation of the single rulebook in financial services.

The updated guide also provides an outline of the effects of the UK's withdrawal on the EU institutions, including on the relative influence of the remaining 27 Member States in voting decisions.

https://www.cliffordchance.com/briefings/2020/02/the-eu-legislative-process-explained.html

EU and UK negotiating positions – room for compromise?

The European Commission and UK government have set out their positions ahead of forthcoming trade talks. Both state that their aim is to maintain duty free, quota free access to each other's markets. Yet, at first sight, the conditions attached by each side appear incompatible.

This briefing paper takes a closer look at these conditions.

https://www.cliffordchance.com/briefings/2020/02/eu-and-uk-negotiating-positions--room-for-compromise-.html

The OECD proposal to rewrite the rules of worldwide taxation – our take on what it means, and whether it will happen

There is now immense pressure to reform the way multinationals are taxed. The status quo – unchanged in essence for a hundred years – is widely seen by the public and policymakers as inadequate for the modern world and the digital economy. Last year, the OECD proposed a radical proposal to reshape the international tax system, creating new rights for countries to tax multinationals.

If the OECD process fails, many countries are likely to adopt unilateral measures and, with US companies the obvious targets, there is a real risk of retaliation by the US – even a trade war. Sadly that is in our view now a very plausible outcome.

This briefing paper looks at the current state of the OECD proposals and assesses both their potential impact, and the likelihood that they will be adopted.

https://www.cliffordchance.com/briefings/2020/02/the-oecd-proposal-to-rewrite-the-rules-of-worldwide-taxation.html

Building operational resilience

Shortly before the holiday season in December 2019, the FCA, PRA, and the Bank of England published a joint policy summary as well as separate consultation papers on operational resilience (including changes to the FCA Handbook and PRA Rules and new PRA Supervisory Statement). The proposals contain a new regulatory framework for operational resilience, requiring regulated firms to develop systems, processes and operations to ensure their ability to provide important business services in times of operational disruption. These proposals will require firms to mobilise resources and launch 'top-of-the-house' implementation projects to meet new standards of operational resilience. Failure to implement would risk regulatory enforcement against the firm and senior managers.

The increased regulatory focus on operational resilience stems from a combination of factors, including: a shift in the way customers access financial services by using digital services; the use of new technologies to improve services; the significant negative impact of IT failures/incidents, with major incidents at RBS, TSB and Visa; and the introduction of new types of risk such as cyber security risk. Increased reliance on outsourcing, with its use of technological innovations and new methods of delivering business operations, has also further rendered firms vulnerable to disruption risk.

This briefing paper discusses the regulators' proposals on operational resilience.

https://www.cliffordchance.com/briefings/2020/02/building-operational-resilience.html

Transition from LIBOR to an alternative benchmark rate raises concerns particular to REMICs

On 8 October 2019, the US Department of Treasury proposed regulations that would address the tax issues for real estate mortgage investment conduits that could arise from the impending transition away from interbank offered rates as references rates for floating rate debt.

This briefing paper discusses the proposed regulations, which include some important conditions that – if adopted as proposed – will require close oversight to confirm that they are met. Given the severity of the potential ramifications of not meeting these requirements, it is critical that all participants of a REMIC deal are aware of, and seek legal advice regarding, the tax aspects of switching to a replacement benchmark rate.

https://www.cliffordchance.com/briefings/2020/02/transition-from-libor-to-an-alternative-benchmark-rate-raises-co.html