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Brexit: EU Commission updates civil justice preparedness notice

The EU Commission has published an updated stakeholder preparedness notice on civil justice and private international law, originally published during the Article 50 negotiations.

The updated readiness notice, which takes into account the transition period and the EU-UK Withdrawal Agreement, and seeks to highlight consequences for public administrations, businesses and citizens as of 1 January 2021, regardless of the outcome of the negotiations on the future UK-EU relationship, covers, among other things:

- international jurisdiction in legal proceedings instituted before and after the end of the transition period;
- rules on applicable law in contractual and non-contractual matters;
- recognition and enforcement of judgments in proceedings instituted before and after the end of the transition period; and
- insolvency proceedings.

FCA consults on extending annual financial crime reporting obligation

The Financial Conduct Authority (FCA) has launched a consultation on proposals to extend the scope of its annual financial crime reporting obligation (REP-CRIM) under The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs).

Currently, the obligation to submit REP-CRIM information is based on firm type (e.g. banks, building societies and mortgage lenders), or activity type provided the total revenue of the firm is GBP 5 million or more. The FCA is proposing to extend the scope to cover any activities that it considers to pose a higher risk of money laundering, regardless of the firm's type or revenue threshold. Under these proposals, the following firms would be required to submit REP-CRIM information:

- all firms authorised under the Financial Services and Markets Act 2000 that hold client money or assets or carry out certain high-risk activities;
- all payment institutions with the exception of those that carry out money remittance, account information or payment initiation services only or those that are EEA-authorised and are permitted to provide services in the UK under the freedom to provide services;
- all electronic money institutions;
- all multilateral trading facilities; and
- all cryptoasset exchange providers and custodian wallet providers.

The FCA is also proposing to remove two activities from the REP-CRIM reporting obligations (home finance mediation and the making of arrangements in relation to transactions in investments) which it believes fall outside the scope of the MLRs.

Comments are due by 23 November 2020. The FCA intends to publish its final rules in the first quarter of 2021.

CSSF issues AML/CTF regulation

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a new regulation (20-05) amending CSSF Regulation No.12-02 on the fight against money laundering and terrorist financing (AML/CTF), which has been published in the Luxembourg official journal (Mémorial A).

The regulation amends CSSF Regulation No.12-02 to reflect, among others, the rules and requirements set out in Directive (EU) 2015/849 (as amended) (AMLD 4/5), as implemented in Luxembourg. The regulation provides specifications on a number of matters, including:

- the identification, evaluation and understanding of money laundering and terrorist financing (ML/TF) risks;
- customer ML/TF risk classification;
- simplified customer due diligence;
- non-face-to-face business relationships; and
- outsourcing.

These regulations supplement the Luxembourg law of 2 November 2004 on AML/CTF (as amended) for financial sector entities subject to the supervision of the CSSF ('national level 3') and have the force of law. Regulation 20-05 entered into force on 24 August 2020.

Grand Ducal regulation on AML/CTF matters published

A new Grand Ducal Regulation dated 14 August 2020 amending the Grand Ducal Regulation of 1 February 2010 on the fight against money laundering and terrorist financing has been published in Mémorial A.

The regulation introduces minor amendments and clarifications to the 2010 regulation following the transposition of Directive (EU) 2015/849 (as amended) (AMLD 4/5) into Luxembourg law. The regulations are specifying regulations ('national level 2') to the Luxembourg law of 2 November 2004 on AML/CTF (as amended). The new regulation entered into force on 24 August 2020.

Swiss Federal Council proposes new funds type for qualified investors

The Swiss Federal Council has adopted a dispatch on amendments to the Collective Investment Schemes Act, which will create a new fund category in Switzerland offering qualified investors an alternative to similar foreign products.

The bill exempts certain collective investment schemes from the requirement to obtain authorisation and approval from the Swiss Financial Market Supervisory Authority (FINMA), provided they are reserved exclusively for qualified investors, are not offered to the general public and are managed by institutions supervised by FINMA. Collective investment schemes of this kind will be known as limited qualified investor funds (L-QIFs). The provisions of the Collective Investment Schemes Act will apply in principle to L-QIFs, which must additionally be audited. The L-QIFs are also subject to specific investment rules.

The new fund category is intended to increase Switzerland's attractiveness as a fund location and to ensure that more of the value chain remains in the country.

Parliament is due to discuss the bill for the first time in the second half of 2020. The bill is not expected to come into force until the start of 2022 at the earliest.

APRA consults on proposed updates to economic and financial statistics data collection reporting standards and guidance

The Australian Prudential Regulation Authority (APRA) has issued a consultation letter to authorised deposit-taking institutions (ADIs) and registered financial corporations (RFCs) requesting feedback on proposed changes to the modernised economic and financial statistics (EFS) data collection reporting standards and guidance.

The proposed changes are mainly intended to:

- incorporate, where appropriate, guidance provided by the EFS frequently asked questions into the APRA's reporting standards to clarify reporting issues raised by ADIs and RFCs and help them meet their reporting obligations;
- implement additional changes to ensure adequate coverage of EFS data for the publications purposes. These changes include lowering the reporting threshold on one reporting form and adding additional data items to capture specific segments needed to accurately monitor domestic activities;
- revise the definition of 'ADI Reporting Category A' in the Reporting Standard ARS 701.0 on ABS/RBA definitions for the EFS collection (ARS 701.0) to provide additional clarity; and
- formalise the deferred commencement date as 31 March 2021 (announced by the APRA along with the Reserve Bank of Australia and Australian Bureau of Statistics on 1 April 2020) for the Reporting Standards ARS 722.0 on ABS/RBA derivatives data collection and ARS 730.1 ABS/RBA on fees charged by reflecting it in the reporting standards.

Comments on the consultation are due by 25 September 2020.

ASIC manages transition to new regulatory regime for litigation funding schemes

The Australian Securities and Investments Commission (ASIC) has made a new legislative instrument entitled 'ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787' to provide exemptions to responsible entities of litigation funding schemes from certain provisions in Chapter 7 and Chapter 5C of the Corporations Act 2001, with a view to:

- facilitate the transition to the new regulatory framework for litigation funding schemes commencing on 22 August 2020; and
- give effect to the Australian Government's policy on the regulation of litigation funding announced in May 2020.

Apart from the various obligatory reliefs established under the instrument, which commenced on 22 August 2020, by ASIC to address the probable practical difficulties faced by responsible entities of litigation funding schemes while transitioning to the new regime, it also states that the operators of litigation funding schemes will be required to hold an Australian financial services licence and litigation funding schemes will generally be subject to the managed investment scheme regime in Chapter 5C of the Corporations Act.

ASIC has also issued a no-action position in relation to the obligation under Chapter 2C of the Corporations Act to set up and maintain a register of members of a registered litigation funding scheme.

ASIC has indicated that it plans to review its relief for Day 1 regarding the new regulatory regime in due course, taking into account the final report of the current Parliamentary Joint Committee inquiry into litigation funding and regulation of the class action industry.

ASIC will also consider applications for relief on a case-by-case basis, acknowledging the varying nature of litigation funding schemes in the market that may require a more bespoke regulatory response for some schemes. Applications for relief must be in writing and should address the requirements set out in Regulatory Guide 51: Applications for relief and any other regulatory guides relevant to the application.

Moreover, to ensure a smooth transition to the new regime, for the initial three months, ASIC is inviting operators of litigation funding schemes to discuss their product disclosure statements with it before they issue them to consumers, and their scheme constitutions and compliance plans before lodging them with ASIC.

ASIC releases guidance on enhanced regulatory sandbox

ASIC has released guidance to assist innovative financial businesses to test their products and services under the Australian Government's enhanced regulatory sandbox (ERS), scheduled to commence on 1 September 2020.

The ERS is a class waiver from licensing for certain financial services and credit activities and supersedes the ASIC sandbox that was issued in December 2016. It allows testing of a broader range of financial services and credit activities for a longer duration (up to 24 months).

ASIC has furnished detailed guidance on the ERS in the form of an Information Sheet 248: Enhanced regulatory sandbox (INFO 248) and a document that compares the key features of ERS with the ASIC sandbox.

ASIC has clarified that, to make use of the ERS, applicants will be required to complete the prescribed notification proof forms by explaining how their proposed product or service satisfies a new public benefit test and innovation test.

HKEX publishes listing rule amendments to enhance professional debt regime and guidance on disclosures and continuing obligations

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has published the findings of its December 2019 public consultation on proposals to review and enhance its listing regime for debt issues to professional investors only. Following feedback, the SEHK intends to implement its proposals, with some modifications to reflect the comments received.

The key changes to the related listing rules are:

- raising the existing issuer's minimum net assets requirement from HKD 100 million to HKD 1 billion;

- introducing a minimum issuance size of HKD 100 million for debt securities listed on the SEHK under Chapter 37 of the listing rules;
- requiring issuers to state explicitly in the listing document that the intended investor market in Hong Kong comprises professional investors only;
- requiring the publication of listing documents on the SEHK's website on the listing date; and
- enhancing the regulatory oversight of issuers and guarantors in terms of their continuing obligations.

The SEHK has also published guidance on disclosures in listing documents and continuing obligations under Chapter 37 of the listing rules, which provides:

- general guidance on disclosure requirements that issuers should consider when preparing listing documents, as well as on their continuing obligations under the professional debt regime; and
- specific guidance on disclosure requirements in relation to particular types of debt securities with specific features.

The SEHK has clarified that the guidance is not intended to be exhaustive nor prescriptive regarding the level and types of disclosures that should be included in a listing document, and reminds issuers of their responsibility to ensure that their listing documents contain the information necessary to permit investors to make informed investment decisions.

The listing rule amendments and the guidance are effective from 1 November 2020.

Hong Kong Government announces formalisation of partnership programme for cyber security information sharing

The Office of the Government Chief Information Officer (OGCIO) has announced that the partnership programme for cyber security information sharing, also known as Cybersec Infohub, will be formalised from 1 September 2020 onwards.

The two-year pilot version of the programme was launched by the OGCIO in 2018. It was designed to encourage the cross-sector sharing of cyber security information with a view to further enhancing Hong Kong's overall defensive capabilities and resilience against cyber attacks.

Under the formalised arrangement, the OGCIO will partner with the Hong Kong Internet Registration Corporation Limited (HKIRC), a non-profit-distributing organisation, to administer the programme and to encourage more public and private organisations to take part. At present, the programme has 259 organisation members with over 850 registered representatives, covering a wide range of sectors including finance and insurance, innovation and technology and information security. The membership of all existing members will transfer from the pilot to the formalised programme, without the need for re-registration.

SFC publishes first quarterly report for financial year 2020-21

The Securities and Futures Commission (SFC) has issued its first quarterly report for the financial year 2020-21, which covers the period from 1 April to 30 June 2020. The report summarises the SFC's key regulatory work during the quarter, including, amongst other things:

- the issuance of a joint statement with the Stock Exchange of Hong Kong Limited (SEHK) to provide guidance to listed companies on holding general meetings for shareholders when social distancing requirements are in effect;
- the launch of a public consultation on changes to the code on Real Estate Investment Trusts (REITs) to give Hong Kong REITs more flexibility when making investments;
- the publication of consultation conclusions on a proposed operational model for a paperless securities market, as well as on enhancements to the over-the-counter derivatives licensing regime;
- the publication of reports on the SFC's annual review of the performance of the SEHK and its expected regulatory standards for brokers offering leveraged foreign exchange trading;
- the signing of a memorandum of understanding with the Competition Commission to enhance cooperation and the exchange of information; and
- the establishment of Hong Kong's Green and Sustainable Finance Cross-Agency Steering Group to coordinate the management of climate and environmental risks to the financial sector.

Korean Government approves Bill on supervision of financial conglomerates

The Financial Services Commission (FSC) has announced that the Government has approved the Bill on supervision of financial conglomerates.

The new Bill is intended to provide a legal ground for the supervision of non-holding financial groups and includes the followings key provisions:

- the definition of financial groups - financial groups have been defined as those with financial assets in the amount of KRW 5 trillion or more, except financial holding companies and state-owned banks;
- establishment of an internal risk management body - an internal group-wide risk management body will be established to oversee the group-wide risk management policy, regulatory compliance, prudential management, etc;
- self-assessment by financial conglomerates - financial conglomerates will be required to conduct self-assessment on the capital adequacy to maintain their financial soundness; and
- reporting and disclosure requirements - the financial group's top representative company will be required to report and disclose the group-wide capital adequacy status and risk factors to the FSC.

The FSC has indicated that the new Bill will be submitted to the National Assembly for its enactment at the end of August 2020.

MAS revises Notice 603 on branches, places of business and automated teller machines

The Monetary Authority of Singapore (MAS) has revised its existing Notice 603 in line with its plans to enhance the significantly rooted foreign bank framework to award additional privileges to qualifying full banks (QFBs) that are significantly rooted in Singapore and from jurisdictions that have a free trade agreement with Singapore.

In particular, the Notice has been revised mainly to:

- introduce a new definition of 'place of business';
- impose a limit on the number of places of business established under QFBs;
- specify separate conditions regarding the operational places of business for foreign banks that accorded QFB privileges after 28 June 2012; and
- revise the notification requirement for setting up or relocation of place of business by a bank for the conduct of any business referred to in section 12(2) of the Banking Act.

The revised notice is effective from 25 August 2020.

SEC Amends Criteria for Accredited Investors and Qualified Institutional Buyers

The US Securities and Exchange Commission (SEC) approved a rule expanding the definitions of "accredited investor" and "qualified institutional buyer," key tests in determining who can participate in US securities offerings not registered with the SEC (which include private placements of interests in private investment funds).

The amendments to the "accredited investor" definition add new categories of qualifying natural persons and entities. The expanded definition includes holders of certain US financial industry licenses and employees of private funds. The amendments also clarify that family offices with at least US$5 million in assets (if directed by a person with the requisite knowledge and experience in financial and business matters) can be accredited investors, and add a new category for any entity, including entities organized under the laws of a foreign country, that owns investments in excess of US$5 million (in each case as long as such entity or such family office was not formed for the specific purpose of investing in the securities offered).

In the context of private investment funds, the amendments expand the universe of potential investors, though minimum capital commitments typically required by private funds (which in part serve as a measurable proxy for an investor's financial resources and thus its ability to bear possible losses) may still function as a practical limitation to them gaining access. Similarly, in this regard, the amendments do not alter any of the exemptions under the Investment Company Act, including Section 3(c)(7) which requires investors to be "qualified purchasers" and is most commonly relied on by private funds.

The amendments additionally expand the definition of "qualified institutional buyer" in Rule 144A to include limited liability companies if they meet the US$100 million in securities owned and invested threshold and add institutional investors included in the revised "accredited investor" definition

that are not otherwise enumerated in the definition of "qualified institutional buyer," provided they satisfy the US$100 million threshold.

These amendments will be effective 60 days after publication in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

FinCEN and the US federal bank regulatory agencies update statement on enforcement of Bank Secrecy Act/Anti-Money Laundering requirements

On 13 August 2020, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration, updated a joint statement, previously issued in July 2007, regarding enforcement of failures to comply with the Bank Secrecy Act (BSA) and anti-money laundering (AML) requirements. While the Statement notes that it 'does not create new expectations or standards,' it does provide further clarity regarding the circumstances under which the agencies would take BSA/AML-related enforcement actions, focusing on the circumstances under which the agencies will issue cease and desist orders. The statement follows the July 2019 publication of the Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision, in which the Financial Crimes Enforcement Network and the agencies reemphasized their risk-focused approach to BSA/AML supervision and their broader effort to reinforce and enhance the effectiveness and efficiency of the BSA/AML regime. Both statements provide helpful guidance to ensure BSA/AML compliance and mitigate the risk of a BSA/AML-related enforcement action.

This briefing discusses the latest updated statement.

https://www.cliffordchance.com/briefings/2020/08/FinCEN-and-the-US-Federal-Bank-Regulatory-Agencies-Update-Statement-on-Enforcement.html

Record-setting CFTC and DOJ penalties imposed after failure to provide complete and accurate information in an earlier investigation and settlement of spoofing charges

On 19 August 2020, the US Commodity Futures Trading Commission (CFTC) announced a USD127.4 million settlement with a bank headquartered outside the United States for spoofing and false statements. The settlement resulted from the bank's failure to respond candidly in connection with a prior spoofing investigation by CFTC, which was settled in 2018 for USD800,000, and the discovery of additionally violations upon CFTC's expanded reinvestigation. The current settlement includes the largest penalties ever assessed by CFTC for spoofing and for making false statements to CFTC as well as the appointment of a monitor.

This briefing discusses the settlement and its implications.

https://www.cliffordchance.com/briefings/2020/08/Record-setting-CFTC-and-DOJ-penalties-imposed-after-failure-to-provide-complete-and-accurate-information.html