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EBA reports on platformisation of EU banking and payments sector

The European Banking Authority (EBA) has published a report on the use of digital platforms in the EU banking and payments sector.

The report details the rapid growth seen in the use of digital platforms, referred to as 'platformisation', to bridge customers and financial institutions. The EBA expects this trend to accelerate as financial institutions seek to satisfy customer 'search for convenience' and reduce costs, consistent with the core drivers of platformisation across all sectors of the EU economy.

The EBA also found that this use of digital platforms presents a range of potential opportunities for both EU customers and financial institutions and offers significant potential. For example, the report notes that digital platforms can facilitate access to financial products and services, including cross-border products and services. However, it also warns that new forms of financial, operational, and reputational interdependencies are emerging over which supervisors have limited visibility.

To address this issue, the report sets out steps to enhance supervisory capacity to monitor market developments. As a priority, in 2022 the EBA aims to help competent authorities to deepen their understanding of platform-based business models and the opportunities and risks arising by supporting competent authorities in:

- developing common questionnaires for regulated financial institutions on digital platform and enabler use, to facilitate tailored and proportionate information-gathering against a fast-evolving market; and
- sharing information about financial institutions' reliance on digital platforms and enablers to facilitate coordinated EU-wide monitoring.

MiFID2: ESMA consults on best execution reports

The European Securities and Markets Authority (ESMA) has launched a consultation paper on proposed amendments to the MiFID2 best execution reporting regime.

Views are sought on informal proposals for new regulatory technical standards (RTS) that could replace the current versions of RTS 27 (applicable to execution venues) and RTS 28 (applicable to investment firms) in order to address shortcomings and make reports more useful and effective.

Proposed technical changes to the reporting obligations for execution venues include narrowing the scope of RTS 27, reducing the granularity and volume of data to be reported, and moving to a set of seven indicators aimed at disclosing meaningful information for assessing execution quality.

Proposed technical changes to RTS 28 broadly aim to clarify the reporting requirements for firms that transmit client orders or decisions to deal to third parties for execution.

ESMA notes that the consultation outcome will not lead to any immediate change to RTS 27 and 28, but will be taken into account in the assessment of the adequacy of the regime, including the future formal review of the technical standards as required under MiFID2 Quick Fix.

The consultation closes on 23 December 2021.

Short Selling Regulation: ESMA consults on proposed amendments to address emergency measures and 'meme stocks'

ESMA has published a consultation paper on proposed amendments to the Short Selling Regulation (SSR). The proposals are intended to strengthen the SSR in light of the lessons learnt from the emergency measures adopted by relevant competent authorities (RCAs) during the COVID-19 crisis and the high volatility which took place in the US markets due to 'meme stocks', such as GameStop and BlackBerry.

In particular, ESMA is proposing to:

- clarify certain provisions and improve procedures to ensure the issuance of short and long term short selling bans is sufficiently flexible to allow RCAs to manage emergency situations effectively;
- amend the framework for calculating net short positions (NSPs), the locate rule and the list of exempted shares; and
- improve the system for publishing and disclosing NSPs.

Comments are due by 19 November 2021. ESMA intends to publish a final report in early 2022.

CSDR: ESMA publishes letter to EU Commission recommending delay to buy-in rules

ESMA has published a letter to the EU Commission regarding the implementation of the Central Securities Depositories Regulation (CSDR), urging it to consider a delay of the mandatory buy-in regime.

The final EU Commission legislative proposal for the review of CSDR, which may include changes to the buy-in regime, is not expected before the end of 2021. ESMA is in favour of delaying the entry into force of the buy-in requirements, which is currently scheduled for 1 February 2022, while applying the other settlement discipline requirements, such as settlement fails reporting and cash penalties regime, as planned.

ESMA considers it crucial that the EU Commission and the co-legislators clarify their political intentions around the review of the settlement discipline regime and consider whether to postpone the buy-in regime implementation as soon as possible.

Green finance: ECB publishes economy-wide climate stress test results

The European Central Bank (ECB) has published an occasional paper setting out the results of its economy-wide climate stress test.

The stress test assessed the resilience to climate risks of four million firms globally and 1600 banking groups across the euro area.

According to the ECB, the results indicate that there are clear benefits for firms and banks in an early adoption of policies to foster the transition to a zero-carbon economy. Additionally, they show that firms located in regions and areas that are most exposed to frequent natural disasters will face a decline in their creditworthiness if climate change is not mitigated.

Basel Committee provides update on cyber resilience, climate-related financial risks and digitalisation

The Basel Committee on Banking Supervision (BCBS) has published a newsletter on cyber resilience and a statement on climate-related financial risks and digitalisation, following its meetings of 15 and 20 September on the risks and vulnerabilities of the global banking system and on upcoming supervisory and policy initiatives.

The newsletter is intended to improve banks' resilience to cyber threats and incidents, such as ransomware attacks. It highlights the BCBS's previous publications on the topic, including its principles for operational resilience and operational risk which were published in March 2021, and calls on banks to ensure there is wider adoption of existing global tools, standards and frameworks on cyber resilience. The BCBS notes it intends to continue to monitor and assess developments in banks' cyber risk management and will take the steps necessary to limit the potential impact on financial stability.

The BCBS has also provided an update on its discussions regarding climate-related financial risks. Following the publication of a series of analytical reports in April, it is assessing the extent to which the current Basel framework adequately mitigates these risks. As part of this work, it is developing a set of related supervisory practices, which it plans to consult on later in 2021. It will also consider whether any additional disclosure, supervisory and/or regulatory measures are required.

BCBS members also considered the impact of the ongoing digitalisation and disintermediation of finance on the banking system, with an initial focus on retail banks. Topics discussed included the drivers of banks' strategic decisions regarding financial technology, and the competitive landscape for the provision of retail banking, including non-bank financial and technological institutions. The BCBS notes it intends to continue assessing these issues going forward.

Markets in Financial Instruments, Benchmarks and Financial Promotions (Amendment) (EU Exit) Regulations 2021 published

The Markets in Financial Instruments, Benchmarks and Financial Promotions (Amendment) (EU Exit) Regulations 2021 (SI 2021/1074) have been made and laid before Parliament.

SI 2021/1074 is intended to address deficiencies in relation to the retained Benchmarks Regulation (UK BMR) and UK MiFIR as well as the Financial Promotions Order 2005, including:

- removing the non-discriminatory access regime for exchange-traded derivatives (ETDs);

- amending two Commission delegated regulations to ensure the efficacy of the regulatory framework for the transparency and comparability of low carbon benchmarks; and
- amending certain exemptions to the financial promotions restriction to ensure that the UK is also included in the definition of relevant markets.

SI 2021/1074 was made according to the negative procedure and, if not annulled by Parliament, comes into force on 18 October 2021.

Capital Requirements Regulation (Amendment) Regulations 2021 made

The Capital Requirements Regulation (Amendment) Regulations 2021 (SI 2021/1078) have been made.

SI 2021/1078 revokes provisions in the UK Capital Requirements Regulation (UK CRR), in order to allow the Prudential Regulation Authority (PRA) to introduce updated prudential rules for credit institutions and PRA-designated investment firms.

It also contains additional consequential amendments to fix deficiencies which have arisen from the UK's withdrawal from the EU.

SI 2021/1078 comes into force on 1 January 2022.

Treasury Committee publishes Government response to future regulatory framework for financial services report

The House of Commons Treasury Committee has published responses from HM Treasury (HMT), the Financial Conduct Authority (FCA) and the PRA to the Committee's report of 6 July 2021 on the future framework for regulation of financial services.

HMT does not respond to the Committee's recommendations in detail owing to its intention to consult, as part of its Future Regulatory Framework (FRF) Review, on more detailed proposals in the autumn, and instead:

- reiterates its commitment to preserve the regulators' operational independence;
- notes its intention to pursue its proposed approach of the regulators being responsible for setting the direct regulatory requirements that apply to firms, operating within an overall policy framework set by Government and Parliament; and
- welcomes the Committee's recommendation that a targeted approach be taken to Parliamentary scrutiny of regulator activity.

HMT publishes economic crime levy consultation response and consults on draft legislation

HMT has published its response to its consultation on the proposed economic crime (anti-money laundering) levy (ECL) and a technical consultation on draft ECL legislation ahead of its inclusion in the Finance Bill 2021-22.

The ECL, which was announced at Budget 2020 and forms part of the Government's 2019 economic crime plan, will be:

- charged on entities that carry on a regulated business under the Money Laundering Regulations 2017 (MLRs);

- up to GBP 250,000 per firm per annum depending on the size of the firm's UK revenue;
- collected in 2023/24 (running 1 April 2023 to 31 March 2024), with liable entities paying based on their size of UK revenue reported during 1 April 2022 to 31 March 2023; and
- collected by AML supervisors, namely the FCA, HM Revenue & Customs (HMRC) and the Gambling Commission.

The Government intends to publish annual reports on the operation of the ECL and undertake a review by the end of 2027.

The technical consultation is aimed at ensuring the legislation operates as intended and closes on 15 October 2021.

Ordinance recasting provisions of monetary and financial code applicable in overseas territories published

An Ordinance dated 15 September 2021, adopted in accordance with article 218, paragraph III of the Pacte Law (Law No. 2019-486 of 22 May 2019 on the Action Plan for Business Growth and Transformation) has been published in the French official journal. The Ordinance recasts Book VII of the monetary and financial code relating to provisions applicable in overseas territories and is intended to improve the intelligibility of banking and financial law for actors established in the overseas territories while providing for an update of obsolete provisions and the introduction of provisions, previously not applicable in overseas territories, falling under the jurisdiction of the French State.

BaFin consults on general decree regarding reciprocal application of Luxembourg macroprudential measure

The German Federal Financial Supervisory Authority (BaFin) has launched a consultation on a draft general decree (Allgemeinverfügung) to be issued on the basis of section 48u para 7 of the German Banking Act (Kreditwesengesetz) to recognise and reciprocally apply Luxembourg's loan-to-value limit for private residential real estate financings. Loan-to-value describes the ratio of the loan amount to the market value of the relevant property.

By operation of the general decree, the respective limits will also have to be observed by German credit institutions when granting loans to private borrowers for the acquisition or construction of residential property in Luxembourg.

The general decree is intended to implement a recommendation issued by the European Systemic Risk Board (ESRB) on 11 June 2021.

Comments are due by 5 October 2021.

BaFin publishes guidance notice on suspension of trading on non-exchanges in resolution

BaFin has published a guidance notice on suspension of trading on non-exchanges in resolution (Merkblatt zur Handelsaussetzung an Nicht-Börsen im Rahmen der Abwicklung). The guidance notice covers the suspension or cessation of trading by systematic internalisers, as well as multilateral and

organised trading systems that are not operated by an exchange within the meaning of section 2 of the German Stock Exchange Act (Börsengesetz).

The guidance notice is addressed to all legal entities in Germany which (i) operate multilateral and/or organised trading systems that are not part of an exchange and/or (ii) have a license as a systematic internaliser.

Trading suspensions and cessations on relevant exchanges or their organised markets and multilateral and/or organised trading systems are not covered by this guidance notice but in BaFin's guidance notice on external bail-in implementation.

BaFin issues statement on cessation of notification requirement regarding MiFID2 ancillary activities exemption

BaFin has issued a statement noting that, as of 28 November 2021, the exemptions relating to ancillary activities provided for in section 2 para 1 no 9, para 6 sentence 1 no 11 and section 32 para 1a sentence 3 no 3 of the German Banking Act (Kreditwesengesetz) will be amended in order to implement changes made to MiFID2 by way of Directive (EU) 2021/338. As a consequence of these amendments, it will no longer be necessary for relevant persons to notify BaFin that they make use of the exemption relating to ancillary activities.

CSSF issues circular on mandatory use of ECB's IMAS Portal for banking qualifying holding and passporting notifications

The Luxembourg financial sector supervisory authority (CSSF) has issued a new circular (21/781) on the mandatory use of the IMAS Portal for banking qualifying holding and passporting notifications.

Early in 2021, ECB and the national competent authorities (NCAs) launched the IMAS Portal as a digital gateway and communication channel for initiating authorisation processes. From 27 January 2021, the IMAS Portal became mandatory in Luxembourg for processing the fit and proper applications for all significant banks/groups under the Single Supervisory Mechanism. As of 27 September 2021, the mandatory use of the IMAS Portal has been extended to the processing of passporting notifications from significant banks/groups (SIs) and less significant banks/groups (LSIs) and applications for the acquisition or increase of a qualifying holding in an SI or LSI. Those new modules will be open for receiving submissions from SIs, LSIs or other applicants.

Proposed acquirers shall use the IMAS Portal to submit their applications for banking qualifying holding assessments, track the status of these assessments and exchange related information with supervisors.

These supervised entities shall also use the IMAS Portal for submitting their passporting notifications (new notification, change of notification or cancellation of notification).

The CSSF has clarified that, in relation to qualifying holding applications, the IMAS Portal should not be used for qualifying holdings applications for third-country banks operating a branch in Luxembourg, but only in relation to acquisitions (or increases) of qualifying holdings in Luxembourg incorporated credit institutions.

The circular also provides further guidance on practical aspects relating to this new process including, among others:

- the website link to access the portal;
- the fact that the CSSF will no longer accept original paper documents or email. Instead, the relevant documents and information (initial applications and the subsequent related exchange of information with supervisors) will need to be uploaded by the applicant on the IMAS Portal. Communicating by emails outside the IMAS Portal may be unavoidable but only the upload in the IMAS will make the process move forward; and
- a recommendation that the proposed acquirers engage in prenotification discussions with the CSSF, in order to clarify expected information requirements, timeline and coordination for other potentially related procedures.

The circular also provides details on account management and registration, as well as contact details for obtaining technical support.

Polish Financial Supervision Authority sets out position on use of benchmarks under BMR

The Office of the Polish Financial Supervision Authority has published its standpoint concerning the use of benchmarks within the meaning of the EU Benchmarks Regulation (BMR).

The standpoint is addressed to lenders and its purpose is to set out certain basic issues relating to the subject matter of the BMR.

Amongst other things, the standpoint clarifies the definitions of key terms arising under the BMR and related to the use of benchmarks, as well as matters connected with the differences in the method of determining the variable interest rate in mortgage and consumer loans and the specific nature of variable rate loan agreements.

HKEX consults on proposals on listing framework for special purpose acquisition companies in Hong Kong

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has launched a public consultation on proposals to amend the Listing Rules with a view to creating a listing regime for special purpose acquisition companies (SPACs) in Hong Kong.

The intention behind creating the SPAC listing regime is to attract companies based in Greater China and South East Asia to list in Hong Kong. The key proposals under the consultation include the following:

- the subscription for and trading of a SPAC's securities will be restricted to professional investors only – this restriction will not apply to the trading of the successor company (the listed issuer following the completion of a de-SPAC transaction) shares post the de-SPAC transaction;
- SPAC promoters must meet suitability and eligibility requirements, and each SPAC must have at least one SPAC promoter which is an SFC licensed firm holding at least 10% of the promoter shares;

- promoter shares are proposed to be capped at a maximum of 30% of the total number of all shares in issue as at the initial offering date, and a similar 30% cap on dilution from the exercise of warrants is also proposed;
- the funds expected to be raised by a SPAC from its initial offering must be at least HKD 1 billion;
- a successor company must meet all new listing requirements, including minimum market capitalisation requirements and financial eligibility tests;
- independent third party investment will be mandatory and must constitute at least 15 to 25% of the expected market capitalisation of the successor company;
- SPAC shareholders must be given the option to redeem their shares prior to: (a) a de-SPAC transaction, (b) a change in SPAC promoter, and (c) any extension to the deadline for finding a suitable de-SPAC target; and
- a SPAC must liquidate and return 100% of the funds it raised (plus accrued interest) to its shareholders, if the SPAC is unable to announce a de-SPAC transaction within 24 months, or complete one within 36 months – the SEHK will then de-list the SPAC.

Comments on the consultation are due by 31 October 2021.

MAS revises notice on recommendations relating to investment products

The Monetary Authority of Singapore (MAS) has revised its existing Notice on Recommendations on Investment Products (Notice FAA-N16). The Notice FAA-N16 has been revised mainly to provide an exemption from the requirements in Notice FAA-N16 for financial advisers who advise on certain over-the-counter (OTC) derivative contracts for hedging purposes.

In particular, Notice FAA-N16 has been revised to incorporate:

- a new Paragraph 4A, which provides that the Notice will not be applicable to any recommendation made by persons specified in Paragraph 2 of the Notice if it is:
- made to a client that is neither an individual nor an accredited investor; and
- with respect to an OTC derivatives contract that is: (i) a foreign exchange forward contract, (ii) an interest rate swap, (iii) a contract that combines more than one foreign exchange forward contract, or a foreign exchange forward contract with an interest rate swap, and such investment product is entered into or to be entered into by the client solely for the purpose of hedging; and
- a new Paragraph 4B, which provides that the Notice will not be applicable to any recommendation made by an 'exempt financial institution'.

The revised Notice FAA-N16 is effective from 9 October 2021, except for amendments in respect of Paragraph 3 of the Notice FAA-N16 which have been effective from 17 September 2021.

The MAS has also published a set of frequently asked questions (FAQs) on the Notice FAA-N16 to provide guidance to financial advisers on the expanded scope of exemptions set out in the revised Notice FAA-N16, when advising corporate clients on selected OTC derivatives contracts for hedging purposes.

SEC publishes sample letter regarding climate change disclosures

The Securities and Exchange Commission (SEC) Division of Corporation Finance (DCF) has published a sample comment letter concerning climate disclosures made by US-listed public companies in quarterly and annual reports. The DCF selectively reviews filings made under the Securities Act and the Exchange Act to monitor and enhance compliance with applicable disclosure requirements. The sample letter contains comments that the DFC may issue to companies regarding their climate-related disclosure or the absence of such disclosure.

Depending on the particular facts and circumstances, information related to climate change-related risks and opportunities may be required in disclosures related to a company's description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations. For example, companies may want to include at least the same level of detail about climate-related risks in their SEC filings as they include in any publicly available corporate social responsibility report (CSR).

The sample comments do not constitute an exhaustive list of the issues that companies should consider. Actual comments issued by the SEC staff would likely be tailored to the specific company and industry, and would take into consideration any relevant disclosure that the company has provided in its public filings.

RECENT CLIFFORD CHANCE BRIEFINGS

Impact of the new EU AI regulation on financial sector firms

The recently proposed EU regulation on artificial intelligence (AI Act) will impose new regulatory requirements on firms across the financial sector when they use, provide, import or distribute computer software for biometric identification, human capital management or credit assessment of individuals.

It will also prohibit the deployment of software exploiting subliminal techniques or vulnerabilities due to age or disability and impose transparency obligations on providers and users of other software. Firms' compliance with the new requirements will be challenging because of the difficulty of determining what software will be treated as an 'artificial intelligence system' subject to these requirements and which entities within a financial sector group will be subject to obligations under the AI Act, especially given its extraterritorial application.

This briefing discusses the proposed EU regulation.

https://www.cliffordchance.com/briefings/2021/09/impact-of-the-new-eu-ai-regulation-on-financial-sector-firms.html

Legal considerations around smart contracts – contracts between computer programs

Difficult legal issues arise when computer software purports to enter into a contract. Electronic contracting is not a new concept. However, the rise of artificial intelligence and smart contracting means that these issues will become more important. They therefore deserve analysis.

This briefing considers two questions around capacity to contract and reversibility of performance which arise where two computer programs contract directly with each other, in circumstances where there is no separate written natural language contract and where there is no overarching contractual framework governing the interaction. While this is not a common scenario at present, it is likely to be seen more frequently as the use of electronic contracting becomes more common. These issues arise whether or not DLT is a feature of the underlying platform or software.

https://www.cliffordchance.com/briefings/2021/09/legal-considerations-around-smart-contracts--contracts-between-c.html