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Swedish EU Council Presidency sets out programme

The Swedish Presidency of the EU Council has published its programme for 1 January to 30 June 2023, setting out its priorities for the Council and its configurations over the next six months.

For the Economic and Financial Affairs Council (ECOFIN), the Presidency intends to:

- provide economic support to Ukraine;
- implement reforms within the EU Recovery and Resilience Facility;
- progress the review of the Energy Taxation Directive and the proposal for new VAT rules for the digital age;
- advance negotiations on AML/CFT legislative proposals;
- prioritise efforts towards Capital Markets Union, such as continuing work on the regulatory frameworks for funds and financial instrument markets, as well as on a European single access point for financial and non-financial information;
- progress banking and insurance initiatives for enhanced resilience, the implementation of international standards, and crisis management; and
- initiate discussions on Commission proposals on the digital euro and consumer protection.

EU Commission consults on reforms to electricity market, including stronger protection against market manipulation through amendments to REMIT

The EU Commission has launched a consultation on a proposed Directive intended to reform the EU's electricity market design.

The proposals are intended to make the market more resilient and to reduce the impact of gas prices on electricity bills while supporting the energy transition.

The proposals are mainly focused on:

- making electricity bills less dependent on short-term fossil fuel prices;
- enhancing market functionality to ensure security of supply and fully utilise alternatives to gas;
- improving consumer protection; and
- aiming for more market transparency.

The consultation paper also proposes stronger protection against market manipulation through changes to Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency (REMIT) in order to increase transparency, monitoring capacities and ensure more effective investigation and enforcement of cross-border cases in the EU to support the new electricity market design.

Comments are due on 13 February 2023. The Commission intends to adopt the proposal with any relevant amendments by the end of Q1 2023.

BRRD: EU Commission adopts amendments to Delegated Regulation on ex ante contributions to resolution financing arrangements as regards methodology for calculating liabilities arising from derivatives

The EU Commission has adopted a Delegated Regulation containing amendments to Commission Delegated Regulation (EU) 2015/63 on ex ante contributions to resolution financing arrangements under the Bank Recovery and Resolution Directive (BRRD) as regards the methodology for the calculation of liabilities arising from derivatives.

The Commission notes that the new method introduced by the second Capital Requirements Regulation (CRR2) for calculating liabilities arising from derivatives under the standardised approach to counterparty credit risk (SA-CCR) is not suited for the purposes of Delegated Regulation (EU) 2015/63, because its formulas are developed for assets rather than for liabilities and the result of applying its formulas would create distortions in the calculation of liabilities arising from derivatives.

The amending Delegated Regulation reinstates the current exposure method (CEM), renamed as the 'simplified exposure method', for calculating liabilities arising from derivatives, and inserts provisions equivalent to the original Articles 429, 429a and 429b of the CRR into Delegated Regulation (EU) 2015/63 as Articles 5a to 5e.

The EU Parliament and EU Council have three months to scrutinise the Delegated Regulation. It will enter into force on the day following its publication in the Official Journal and will apply retroactively as of 1 October 2022.

Banking Package: ECON Committee adopts reports on proposed CRR3 and CRD6

The EU Parliament's Economic and Monetary Affairs Committee (ECON) has adopted its reports on the EU Commission's legislative proposals for a regulation amending the Capital Requirements Regulation (CRR3) and a directive amending the Capital Requirements Directive (CRD6).

Key elements of the proposals highlighted by the ECON Committee include, among other things:

- on capital requirements, the need to consolidate the output floor at an EU level to allow for comparable risk weights and avoid variations in capital levels, and to allow competent authorities to address inappropriate distribution of capital among banking groups and propose a capital redistribution. The Committee also agreed on transitional arrangements for low-risk exposures secured by mortgages on residential property, which may be extended by up to four years;
- on sustainable finance, the Committee agreed to strengthen reporting and disclosure requirements for ESG risk;
- on cryptoassets, banks should disclose their exposure to cryptoassets and cryptoasset services, together with a description of their cryptoasset risk management policies;
- on governance, the membership of banks' management bodies should be sufficiently diverse and gender balanced and, in the event that a key

function holder ceases to comply with suitability criteria, that person must be replaced; and

- new third country branches must not commence their activities in the EU until the European Banking Authority (EBA) and the relevant third country have concluded a memorandum of understanding (MoU) on a co-operation framework.

The press release also notes that the Commission is invited to submit a legislative proposal on the merits of a dedicated prudential treatment for exposures to cryptoassets by June 2023.

ECB agrees MoU on cooperation with EU Member States which are not part of European banking supervision

The European Central Bank (ECB) has concluded a multilateral MoU with the national competent authorities (NCAs) of the six EU Member States that are not part of European banking supervision. The MoU will provide a framework for Czech Republic, Denmark, Hungary, Poland, Romania and Sweden to share information and coordinate supervisory activities.

The agreement aims to further enhance supervisory cooperation at the EU level and builds on the cooperation between the ECB and EU non-participating NCAs stemming from the work of the EBA.

ESMA reports on effect of market correction mechanism on gas derivatives

The European Securities and Markets Authority (ESMA) has published its preliminary data report following the introduction of Council Regulation (EU) 2022/2578 on establishing a market correction mechanism (MCM).

The report identifies the potential consequences of the MCM on the trading behaviour of participants in the natural gas derivative market and the effect it may have on the ability of market participants to effectively manage their risks. To that extent, the report includes a more qualitative analysis of the possible risks to central counterparty (CCP) risk management and the potential impact on the clearing of derivatives.

The report, which focuses on market indicators aimed at assessing the potential effects of the adoption of the MCM, does not identify significant impacts resulting from the adoption of the MCM Regulation but notes that this should not be interpreted as the MCM not having any effects on financial markets in the future.

Alongside the preliminary report, ESMA has published a letter addressed to the EU Commissioner for Financial Stability, Financial Services and Capital Markets Union and an annex containing points for clarification on some of the provisions in the MCM Regulation.

ESMA and FCA sign MoUs on benchmarks

ESMA and the FCA have agreed two MoUs on EU critical benchmarks and the recognition of UK benchmark administrators in the EU.

The MoUs relate to the cooperation and the exchange of information with respect to benchmark administrators based in the UK and enable ESMA to start recognising benchmarks administrators from the UK.

UK MiFID: FCA publishes update on ancillary activities exemption

The FCA has published a statement providing an update on its approach in relation to the removal of the market share test under the MiFID2 ancillary activities exemption for commodity derivatives, emission allowances and emission allowance derivatives.

Noting that HM Treasury has proposed a statutory instrument that will remove the current quantitative aspects of the ancillary activities test later this year, the FCA states that it will continue to apply the approach set out in Handbook Notice No 99 published in May 2022, namely that firms can continue to use the exemption for 2023-24 where they:

- were able to rely on the exemption for 2022-23 based on trading relating to the last previous published information (2018-2020); or
- have regard to their daily trading activity for the previous three years (2020-22); and
- meet the other conditions of the exemption as set out in PERG 13 Q44.

AML/CFT: FCA publishes feedback on cryptoasset businesses' applications under MLRs

The FCA has published feedback on good and poor quality applications made by cryptoasset businesses under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 as amended (MLRs).

In its role as the anti-money laundering and counter terrorist financing (AML/CFT) supervisor of cryptoasset businesses, the FCA has received over 300 applications for registration under the MLRs since 10 January 2020. The feedback is intended to help applicants as they prepare their application for registration and make the process as simple and efficient as possible. The feedback sets out the FCA's expectations of applicants during the various stages of applications including the preparation, submission and review stages.

FCA publishes review of Consumer Duty implementation plans

The FCA has published a review of how firms are planning to implement the Consumer Duty.

The rules and guidance will come into force on 31 July 2023 for new and existing products or services that are open to sale or renewal, and 31 July 2024 for closed products or services.

The FCA has reviewed a sample of implementation plans and found that many firms have established extensive programmes of work to comply with the Consumer Duty properly. However, the FCA also found that some firms are further behind in their planning, so there is a risk that they may struggle to apply the Consumer Duty effectively once the rules come into force.

Over the remaining six months of the implementation period, the FCA wants firms to focus particularly on:

- prioritising effectively, with a focus on the areas that will make the biggest impact on outcomes for consumers;

- making the changes needed so consumers receive communications they can understand, products and services that meet their needs and offer fair value, and get the customer support they need, when they need it; and
- sharing information and working closely with commercial partners to make sure they are all delivering good customer outcomes. The FCA has found that some firms need to accelerate this work to implement the Duty on time.

The FCA urges firms to consider the findings from the review and to develop their implementation plans and approach in line with good practice where appropriate. The FCA intends to issue letters to firms to highlight its key expectations on implementing the Duty and some of the key risks and consumer harms the FCA is concerned about in their sectors.

BaFin publishes report on risk focus for 2023

The German Federal Financial Supervisory Authority (BaFin) has published a report on the risks in its focus for 2023.

In BaFin's view, one of the major risks facing the financial sector is the rapid rise of interest rates, which has already affected the profitability of many banks due to losses in their securities portfolios. It notes that another sudden and sharp rise of interest rates would put a heavy burden on some institutions.

In its report, BaFin identifies the following six main risks which, in its view, could most endanger the financial stability and integrity of the German financial system, and explains what it is doing to contain these as best as possible:

- risks from abrupt interest rate rises of significant magnitude;
- risks from corrections on the real estate markets;
- risks from significant corrections in the international financial markets;
- risks from the default of loans to German companies;
- risks from cyberattacks with serious consequences; and
- risks from insufficient prevention of money laundering.

In addition, BaFin has identified three key future trends which pose risks that BaFin and the companies it supervises will have to focus on intensively: sustainability, digitalisation in the financial sector, and geopolitical changes. The report notes that these will shape business models in the financial sector in the long term.

BaFin consults on amendments to Recovery Plan Minimum Requirements Ordinance and related guidance notice on recovery planning

BaFin has launched a consultation on a draft amendment ordinance to the Recovery Plan Minimum Requirements Ordinance (MaSanV) and on a draft amended version of its related guidance notice on recovery planning.

The amendments to the MaSanV are intended to implement the revised the EBA guidelines on recovery plan indicators under Article 9 of the BRRD (EBA/GL/2021/11 of 9 November 2021). In addition, some requirements for the recovery planning of less significant institutions are being changed. This also requires changes to BaFin's guidance notice on recovery planning.

In particular, the amendments to the MaSanV concern the following topics:

- amendments to the minimum list of recovery plan indicators (new indicators added: MREL, available central-bank eligible unencumbered assets, liquidity position);
- amended guidance on the escalation process to management and the supervisory authority when recovery plan indicator thresholds are reached (stipulation of concrete time frames);
- amended guidance on the calibration of recovery plan indicator thresholds (generally, above the combined capital buffer requirement and LCR); and
- relief for recovery planning of less significant institutions

Comments are due by 3 March 2023.

BaFin consults on circular on product oversight and governance arrangements for retail banking products

BaFin has launched a consultation on a draft circular on product oversight and governance arrangements for retail banking products, which implements the EBA guidelines in this area.

On 15 July 2015, the EBA issued its guidelines on product oversight and governance arrangements for retail banking products (EBA/GL/2015/18), which contain regulations for the monitoring and governance of banking products, in particular (real estate) consumer loan agreements, deposit products and payment services, and are aimed at product manufacturers and distributors.

Initially, BaFin did not incorporate these guidelines into its administrative practice due to concerns as to whether they were based on sufficient authorisation in EU law. However, the European Court of Justice (ECJ) subsequently confirmed the validity of the guidelines in its judgment of 15 July 2021 (C-911/19).

Due to that judgment and the associated legal reassessment, BaFin is now implementing the EBA guidelines in its circular, which is closely aligned with the requirements of the guidelines.

Comments are due by 28 February 2023.

BaFin consults on liquidity exemptions for small and non-interconnected investment firms under IFR

BaFin has launched a consultation (03/2023) on a draft circular regarding exemptions from liquidity requirements under the Investment Firms Regulation (EU) 2019/2033 (IFR) for small and non-interconnected investment firms.

The draft circular sets out the criteria, conditions, and procedure for the exemption of small and non-interconnected investment firms from the liquidity requirements under Article 43 IFR. According to Article 43 para 1, sub-para 2 IFR, BaFin is authorised to issue such exemptions.

Comments (by email only) are due by 10 February 2023.

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CSSF issues circular letter on application of EBA guidelines on criteria for exemption of investment firms from liquidity requirements

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a circular letter (23/829) on the application of the EBA guidelines on the criteria for the exemption of investment firms from liquidity requirements in accordance with Article 43(4) of the Investment Firms Regulation (EU) 2019/2033 (IFR) (EBA/GL/2022/10).

The provisions of the circular are applicable to all investment firms that meet the conditions for qualifying as small and non-interconnected investment firms (SNI IF) set out in Article 12(1) of the IFR.

The objective of the circular is to inform market participants that the CSSF, in its capacity as competent authority, applies the guidelines and has integrated them into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this field at European level.

The guidelines specify that SNI IF as defined in Article 12(1) of the IFR are eligible for the exemption if they fulfil the criteria set out in sections 4.1 and 4.2 and point 20 of section 4.3 of the guidelines.

In-scope entities that wish to be exempted from the requirements must obtain prior authorisation from the CSSF. The CSSF performs a case-by-case assessment in accordance with the guidelines and as further described in the circular. In-scope entities must submit their authorisation request by email to their usual point of contact at the CSSF, with a copy to ei@cssf.lu.

The circular applies with immediate effect.

RECENT CLIFFORD CHANCE BRIEFINGS

The EU financial services legislative pipeline

The EU Commission continues to add to the EU financial services legislative pipeline but progress is slow on agreeing existing proposals.

This briefing paper provides an overview of the existing and scheduled legislative proposals by the current Commission on financial services and related cross-cutting issues indicating where the Parliament and the Council have already reached agreement on a proposal and where work will continue towards agreement during the remaining part of the Commission's term.

https://www.cliffordchance.com/briefings/2023/01/the-eu-financial-services-legislative-pipeline.html