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Foreign Subsidies Regulation: EU Commission consults on implementation

The EU Commission has launched a consultation on a draft Implementing Regulation on detailed arrangements for the conduct of proceedings by the Commission pursuant to the Foreign Subsidies Regulation (FSR).

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The draft Implementing Regulation is intended to clarify practical and procedural aspects related to the application of the FSR including, among other things:

- procedures for notifying, and content of, notifications of concentrations and public procurement bids;
- rules for calculating time limits; and
- procedural rules on preliminary reviews and in-depth investigations in cases of suspected distortive foreign subsidies.

The FSR entered into force on 12 January 2023 and will start to apply from 12 July 2023.

Comments on the draft Implementing Regulation are due by 6 March 2023.

ECON Committee publishes report on European single access point

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published a report on the Commission's proposal for a regulation establishing a European single access point (ESAP) providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability.

The report sets out a draft legislative resolution setting out the ECON Committee's proposed amendments for adoption by the EU Parliament at first reading, as well as opinions setting out proposed amendments by the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The EU Council agreed its negotiating position in June 2022.

ECON Committee publishes report on AIFMD2

The ECON has published its report on the Commission's proposal for a directive amending the AIFMD and UCITS Directive (AIFMD2).

The report sets out a draft legislative resolution setting out the ECON Committee's proposed amendments for adoption by the EU Parliament at first reading, which build on the amendments published in a May 2022 draft report relating to:

- delegation and supervisory reporting;
- loan origination funds;
- liquidity management tools (LMTs);
- depository services; and
- transparency, data collection and disclosure.

In a Joint Declaration published in November 2022, AIFMD2 was established by the three EU institutions as one of their legislative priorities.

ESMA publishes its first market report on EU money market funds

The European Securities and Markets Authority (ESMA) has published its inaugural market report on EU money market funds (MMFs), which provides a market-level view of EU MMFs based on supervisory information collected by national competent authorities (NCAs) and ESMA.

The main findings included in the report were that:

- the EU MMF sector had EUR 1.44 trillion of assets in 2021, with 89% of the funds domiciled in France, Luxembourg and Ireland;
- low-volatility NAV (LVNAV) MMFs account for 46% of the total assets, followed by variable NAV (VNAV) MMFs (42%) and constant NAV (CNAV) MMFs (12%). All MMFs domiciled in France are of the VNAV type and almost exclusively denominated in EUR. MMFs in Luxembourg and Ireland are mainly in non-EU currencies and set up mostly as CNAVs and LVNAVs. MMFs authorised in other EU jurisdictions are VNAVs denominated in other EU domestic currencies and account only for a small fraction of assets;
- the portfolio structure of EU MMFs remains relatively stable over time, and they are mainly exposed to the financial sector. Between March 2020 and June 2022, average exposures to credit institutions amount to 60% of total assets. Most of the EU MMFs' government debt exposure is towards non-EU sovereigns, and during March to December 2020 LVNAVs increased their share of government bonds before starting a slow readjustment back to the pre-COVID composition;
- the share of daily and weekly liquid assets remained above the regulatory minimum, and increased for CNAVs at a regular pace starting in 3Q20. As of 3Q21, EU MMFs have significantly reduced the interest rate risk sensitivity of their portfolios, measured as the weighted average maturity of assets (WAM), to improve resilience to a rate rise; and
- professional investors hold more than 90% of EU MMFs. Financial corporations are the main unitholders of MMF shares, with insurance firms, pension funds and banks accounting together for 25% of NAV and other financial institutions, including collective investment undertakings, for 45% of the NAV. Between December 2021 and March 2022 MMFs experienced substantial outflows, partially driven by investor expectations linked to the increase in interest rates and investor sentiment turning away from fixed income instruments in general, a trend that reversed later in 2022.

CRR2/CRD5: EBA consults on amending ITS on supervisory disclosures

The European Banking Authority (EBA) has launched a public consultation on its draft implementing technical standards (ITS) on supervisory disclosures.

The amended draft ITS incorporate the changes to the Capital Requirements Regulation (CRR2) and the Capital Requirements Directive (CRD5), in particular the changes relating to supervisory reporting and investment firms.

They are intended to specify the format, structure, contents list and annual publication date of the supervisory information to be disclosed by competent authorities. According to the EBA, the draft ITS should enhance the quality and comparability of the reported data by supervisors and enhance transparency by providing the market with more information.

A public hearing will take place via a webinar on 28 February 2023. Comments on the consultation are due by 9 March 2023.

HM Treasury and Bank of England consult on digital pound

HM Treasury and the Bank of England (BoE) have launched a consultation on the potential development of a central bank digital currency (CBDC), or a digital pound. The BoE has also published a technology working paper exploring the technology challenges involved in a digital pound.

The digital pound would be sterling currency issued by the BoE and not the private sector. It would be a new form of digital money for use by households and businesses for their everyday payments needs.

The consultation sets out analysis by HM Treasury and the BoE on the potential case for a digital pound and the key features of a potential model. On the basis of their work to date, the BoE and HM Treasury judge that it is likely a digital pound will be needed in the future and that further preparatory work is justified.

Comments are due by 7 June 2023.

The BoE and HM Treasury intend to make a decision about whether to implement a digital pound around the middle of this decade. The earliest stage at which the digital pound could be launched would be the second half of the decade.

BoE publishes policy on outsourcing and third-party risk management for FMIs

The BoE has published its policy on outsourcing and third-party risk management for financial market infrastructures (FMIs).

The BoE has published three supervisory statements, aimed at central counterparties (CCPs), central securities depositaries (CSDs) and recognised payment system operators (RPSOs) and specified service providers (SSPs) setting out its requirements and expectations. The policy also comprises a policy statement providing responses to the April 2022 consultation and a new outsourcing and third-party risk management part to be added to the Code of Practice applying to relevant RSPOs and SSPs.

The policy is intended to:

- facilitate greater resilience and adoption of the cloud and other new technologies as set out in the BoE's response to the Future of Finance (FoF) report;
- set out the BoE's requirements and expectations in relation to outsourcing and third-party risk management in FMIs; and
- complement the BoE's supervisory statements on FMI operational resilience.

FCA publishes portfolio letter on its asset management supervision strategy

The Financial Conduct Authority (FCA) has published a letter to Chief Executives setting out its supervisory approach to asset management and expectations for firms.

The letter, which supersedes the FCA's previous letter dated 20 September 2020, outlines the risks, its expectations and next steps in relation to:

- product governance, including an intention to follow-up on its 2021 assessment of value review;
- ESG and sustainable investing, including an intention to publish the results of its review of firms' ESG oversight practices;
- product liquidity mismatch, noting that it is in the process of completing a liquidity management multi-firm review;
- investment in operations and resilience, noting that the current level of incident reporting is variable and reminding firms of their reporting obligations; and
- financial resilience, including an intention to publish initial observations on firms' implementation of the Investment Firms Prudential Regime (IFPR).

FCA calls on cryptoasset firms marketing to UK consumers to prepare for financial promotions regime

The FCA has issued a statement calling on all cryptoasset firms marketing to UK consumers, including firms based overseas, to start preparing for the new UK financial promotions regime and warning that it will take robust action against firms breaching these requirements. This may include take downs of websites that are in breach, issuing public warnings and enforcement action.

The FCA statement follows the policy statement on cryptoasset financial promotions regulation published by the UK Government on 1 February 2023, in which it set out its intention to introduce a bespoke exemption in the Financial Promotion Order for cryptoasset businesses registered with the FCA under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs). This exemption will enable cryptoasset businesses which are registered with the FCA under the MLRs, but who are not otherwise authorised persons, to communicate their own cryptoasset financial promotions to UK consumers. The policy statement also set out the Government's intention to reduce the implementation period for the regime from six months to four months from the relevant legislation being made in Parliament.

The FCA notes that, subject to Parliamentary approval, when the regime comes into force there will be four routes to communicating cryptoasset promotions to UK consumers:

- the promotion is communicated by an FCA authorised person;
- the promotion is made by an unauthorised person but approved by an FCA authorised person;
- the promotion is communicated by a cryptoasset business registered under the MLRs with the FCA; or
- the promotion otherwise complies with the conditions of an exemption in the Financial Promotion Order.

For these purposes, a firm only authorised under the Electronic Money Regulations or the Payment Services Regulations is not considered an 'authorised person' and so cannot communicate or approve financial promotions.

The FCA intends to publish its final rules for cryptoasset promotions once the relevant legislation has been made. Subject to any changes in circumstances, it expects to take a consistent approach to cryptoassets to that taken in its new rules, in place from 1 February 2023, for other high-risk investments.

FCA consults on firms' sustainability-related governance, incentives and competence

The FCA has published a discussion paper on firms' sustainability-related governance, incentives, competence and stewardship arrangements (DP23/1).

DP23/1 seeks views on effectively moving beyond disclosure-based initiatives to help contribute to a net zero economy and is intended to highlight good, evolving practices while considering whether there is a case for further regulatory measures. It covers:

- how governance, incentives and competence are considered in the Taskforce on Climate-related Financial Disclosures (TCFD) recommendations, and how expectations are evolving with the work of the International Sustainability Standards Board (ISSB), the UK's Transition Plan Taskforce (TPT) and the Glasgow Financial Alliance for Net Zero (GFANZ);
- firms' sustainability-related objectives and strategies, and how these are supported by their governance and incentive arrangements, as well as how asset managers and asset owners organise and govern stewardship activities; and
- training and competence on sustainability in regulated firms.

DP23/1 also contains ten commissioned articles authored by external experts, which are intended to complement the FCA's analysis and encourage diversity of thought and debate.

Comments are due by 10 May 2023.

PRA publishes remuneration policy for material risk takers

The Prudential Regulation Authority (PRA) has published its policy on remuneration for material risk takers (MRTs).

The policy statement includes feedback to responses to the PRA's July 2022 consultation paper 'Remuneration: Unvested pay, Material Risk Takers and public appointments', which proposed to add a new section to Chapter 4 of the 'Remuneration' supervisory statement (SS2/17) that would, among other things, add an expectation that firms should not convert unvested, deferred pay awards to MRTs from equity to other instruments, or *vice versa*. Most respondents to the consultation welcomed the proposals.

The PRA has made modifications to the text for the updated SS2/17 including, among other things:

- clarifying that there may be circumstances other than public appointments where a conversion is appropriate;
- clarifying that the use of the terms 'equity' and 'other instruments' are used for convenience to include those instruments that fall under sections

15.15(1)(a) and 15.15(1)(b) of the Remuneration Part of the Rulebook, respectively; and

- stating that in the event of a conflict of interest arising from a public appointment due to instruments being held during a retention period, the onus should be on a public sector employer to determine whether (or not) its conflicts of interest policy is able to address any conflicts.

The policy took effect from 10 February 2023.

BaFin publishes circular on exemption criteria from audit of MiFID2/ MiFIR obligations

The German Federal Financial Supervisory Authority (BaFin) has published its circular 02/2023 (VBS) on the criteria for exemptions from the audit of conduct and reporting obligations pursuant to section 89 para 1 sentence 3 of the Securities Trading Act (WpHG).

Pursuant to section 89 para 1 sentence 3 WpHG, BaFin may upon request exempt investment services firms entirely or partially from the annual WpHG and deposit audit required under section 89 para 1 sentence 1 and 2 WpHG (except for the audit of compliance with the requirements of section 84 WpHG) to the extent that this is appropriate for special reasons, in particular because of the type and scope of the business conducted.

Circular 02/2023 (VBS) sets out the exemption criteria that BaFin will in future use as a basis for deciding on applications for audit exemptions pursuant to section 89 para 1 sentence 3 WpHG. The circular applies to all investment services firms.

The new circular updates the ‘discretion criteria’ of 21 January 2009 (which are being repealed) and takes current developments into account.

BaFin consults on general decree on remuneration notifications

The BaFin has launched a consultation on a general decree (Allgemeinverfügung) regarding remuneration notifications for the reporting date 31 December 2022.

The consultation relates to the additional data collection and analysis requirements introduced by CRD 5 (Directive (EU) 2019/878), which the EBA has incorporated into the following new guidelines applicable as of 31 December 2022:

- guidelines on the benchmarking exercises on remuneration practices, the gender pay gap and approved higher ratios under Directive 2013/36/EU (EBA/GL/2022/06); and
- guidelines on the data collection exercises regarding high earners under Directive 2013/36/EU and under Directive (EU) 2019/2034 (EBA/GL/2022/08)

These guidelines replace the EBA’s previous guidelines on the remuneration benchmarking exercise (EBA/GL/2014/08) and the guidelines on the data collection exercise regarding high earners (EBA/GL/2014/07).

As the EBA has fundamentally revised the forms for these notifications, corresponding amendments need to be made to the German Banking Act (KWG) and the German Notification Ordinance (AAnzV). As national supervisors are obliged to provide the EBA with the information required under the new guidelines by 31 October 2023, but the process of amending the KWG and AnzV will extend beyond that date, BaFin has issued a general decree.

Comments are due by 8 March 2023.

CSSF shares results of 2021 enforcement campaign on information published by issuers

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a communiqué setting out the results of the enforcement activities regarding the 2021 financial and non-financial information published by issuers subject to the Transparency Law.

The CSSF is the competent authority tasked with the supervision of securities markets. In this context, the CSSF is in charge of examining that the financial and non-financial information published by issuers under its supervision is drawn up in accordance with the relevant reporting framework and thereby contributes to investor protection and promotes confidence in financial markets.

In its communiqué, the CSSF provides an overview of the enforcement activities carried out in 2022 and summarises its main findings on 2022 priorities for financial and non-financial information.

With respect to the priorities related to financial information:

- the CSSF urges issuers clearly to disclose judgements and estimates in relation to climate-related matters as well as related uncertainties when they face significant climate-related risks, even when they are not considered as key assumptions by management;
- the CSSF recommends that credit institutions ensure that users of their financial statements are able to understand from the notes which quantitative criteria have been applied to distinguish between the two categories ‘held to collect’ and ‘held to collect and sell’;
- while noting that disclosure in financial statements is governed by the principle of materiality, the CSSF recommends that credit institutions monitor guidance and interpretations issued by IASB to determine whether disclosure is needed for financial instruments with sustainability linked features; and
- although the effective application date for the new standard has not yet been set, the CSSF recommends that issuers already consider the impact, where relevant, of the future requirements for presentation of the statement of profit or loss in order to improve comparability and transparency of their performance reporting.

With respect to the priorities related to non-financial information:

- the CSSF urges issuers to strengthen their efforts to improve the presentation of climate-related matters in anticipation of the requirements of the future European Sustainability Reporting Standards that will apply with the forthcoming Corporate Sustainability Reporting Directive (CSRD); and

- sustainability data are increasingly seen as key information for issuers, in the same way as financial information. Article 8 of the Taxonomy Regulation contributes to providing relevant information in this context. Therefore, the CSSF recommends that issuers improve the qualitative information provided, thus better achieving the objective of the Taxonomy Regulation, which is to provide clear, understandable, relevant and comparable information.

In addition to this, the CSSF has also provided further information on financial data and alternative performance measures (APMs).

In terms of next steps, the CSSF released its priorities in relation to the enforcement of the 2022 financial information published by issuers subject to the Transparency Law on 2 January 2023.

RECENT CLIFFORD CHANCE BRIEFINGS

HM Treasury consults on new UK insurer resolution regime

HM Treasury has published its long-awaited consultation on a proposed insurer resolution regime (IRR). The proposals would give the UK authorities new tools and powers to manage the failure of insurers so as to minimise disruption to policyholders and the wider economy. The consultation is relevant to UK-authorised insurers (including reinsurers) and their holding companies, as well as their counterparties and investors.

Insurers will need to consider the potential impact of the new regime on their business, in particular the possible impact on their debt issuance, financial and supply contracts and insurance and reinsurance terms or pricing and whether they are likely to be within the scope of the proposed additional pre-resolution planning obligations. Insurance groups that are issuers in public markets will also need to consider how to address the proposals in risk factors in their offering documents. Insurers may wish to respond to the consultation proposals to seek to ensure that the IRR is proportionate to the risks presented by the insurance sector.

The consultation closes on 20 April 2023.

This briefing paper discusses the proposed regime.

https://www.cliffordchance.com/briefings/2023/02/hm-treasury-consults-on-new-uk-insurer-resolution-regime.html

Treasury issues first-ever Section 9714 order prohibiting transmittal of funds involving Bitzlato

On 18 January 2023, the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued an order identifying Bitzlato Limited, a virtual asset service provider, as a 'primary money laundering concern' in connection with Russian illicit finance and prohibiting certain transmittals of funds by any covered financial institution involving Bitzlato pursuant to the Combatting Russian Money Laundering Act (CRMLA).

The action was taken in conjunction with the FBI's arrest of Bizlato's founder Anatoly Legkodymov. As the Deputy Secretary of the Treasury commented at the subsequent press conference, this action is the first of its kind specifically under new authorities to combat Russian illicit finance, also noting that identifying Bitzlato as a 'primary money laundering concern' effectively renders the exchange an international pariah.

This briefing paper discusses FinCEN's order regarding Bizlato and its implications.

https://www.cliffordchance.com/briefings/2023/02/treasury-issues-first-ever-section-9714-order-prohibiting-transm.html

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