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Clifford Chance's International Regulatory Update is a weekly digest of significant (non-Coronavirus-related) regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

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Benchmarks Regulation: EU Council and Parliament reach political agreement on proposed amendments

The EU Council and the Parliament have reached political agreement on proposed amendments to the Benchmarks Regulation ((EU) 2016/1011) regarding the exemption of certain third country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation (2020/0154(COD)).

Under the proposed amendments, the Commission would be granted powers to replace:

- critical benchmarks which influence financial instruments and contracts with an average value of at least EUR 500 billion;
- benchmarks with no or very few appropriate substitutes whose cessation would have a significant and adverse impact on market stability; and
- third country benchmarks whose cessation would significantly disrupt the functioning of financial markets or pose a systemic risk for the EU financial system.

EU market participants will be able to use benchmarks administered in a third country until the end of 2023. The Commission will be empowered to adopt a delegated act by 15 June 2023 to extend this extension by a maximum of two years until the end of 2025.

Once technical work on the text has been finished, the agreement will pass to the EU Parliament's Economic and Monetary Affairs (ECON) Committee and the Parliament plenary for approval. It will also need to be formally adopted by the Council.

Capital Markets Union: EU Council approves conclusions on Commission action plan

The EU Council has approved a set of conclusions on the Commission's Capital Markets Union (CMU) action plan.

The Council stresses that actions that have the potential to support a swift economic recovery from the COVID-19 pandemic should have the highest priority and be delivered by the Commission as soon as possible, along with measures considered most important for mobilising private capital, followed by measures to support a more vibrant and globally competitive capital market in the short and medium term.

The Council also encourages the Commission to look at more complex and time-consuming structural reforms and deliver in the medium term initiatives such as simplifying the withholding tax relief procedure for cross-border investments, assessing legislative and non-legislative initiatives to increase convergence of the outcome of insolvency procedures in different Member States and assess the need for further action to strengthen the confidence of investors and facilitate cross-border investments.

Benchmarks: Technical requirements for EU Climate Benchmarks and ESG disclosure requirements published in Official Journal

Three Delegated Regulations setting out the minimum technical requirements for EU Climate Benchmarks and environmental, social and governance (ESG)

disclosure requirements for benchmark administrators have been published in the Official Journal.

The Delegated Regulations supplement the Benchmarks Regulation (Regulation (EU) 2016/1011) and cover:

- the explanation in a benchmark statement of how ESG factors are reflected in each benchmark (Commission Delegated Regulation (EU) 2020/1816);
- the minimum content of the explanation on how ESG factors are reflected in the benchmark methodology (Commission Delegated Regulation (EU) 2020/1817); and
- minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks (Commission Delegated Regulation (EU) 2020/1818).

The Delegated Regulations will enter into force on 23 December 2020.

EU Commission publishes legislative proposal for a regulation on data governance

The EU Commission has published a legislative proposal for a regulation on European data governance.

Announced as part of the 2020 European strategy for data, the draft regulation aims to foster the availability of data for use by increasing trust in data intermediaries and by strengthening data sharing mechanisms across the EU.

The proposed regulation would address:

- making public sector data available for re-use, where such data is subject to the rights of others;
- sharing of data among businesses, against remuneration in any form;
- allowing personal data to be used with the help of a personal data-sharing intermediary, designed to help individuals exercise their rights under the General Data Protection Regulation (GDPR); and
- allowing data use on altruistic grounds.

Further proposals on data spaces are planned for 2021, to be complemented by a Data Act to foster data sharing among businesses and between businesses and governments.

EU Commission publishes communication on a new EU-US agenda

The EU Commission has published a joint communication with the EU High Representative for Foreign Affairs and Security Policy setting out a proposal for a new EU-US transatlantic agenda for global cooperation.

Addressed to the EU Parliament, EU Council and European Council, the communication identifies common areas of interest and proposes, among other things, that the EU and US:

- propose a new transatlantic green trade agenda;
- jointly design a regulatory framework for sustainable finance;
- create a new green tech alliance;

- set a joint EU-US tech agenda;
- open a transatlantic dialogue on the responsibility of online platforms and Big Tech;
- intensify cooperation at bilateral and multilateral level to promote regulatory convergence and facilitate free data flow;
- strengthen cooperation between competent authorities for antitrust enforcement in digital markets;
- facilitate bilateral trade and deepen regulatory and standards cooperation; and
- establish a new EU-US Trade and Technology Council.

The Commission and the High Representative invite the European Council to endorse the proposed outline and first steps as a roadmap for a new transatlantic agenda for global cooperation, and suggest that the agenda be launched at the EU-US Summit due to held in the first half of 2021.

BRRD2: EU Commission publishes second notice on interpretation

The EU Commission has published a second notice in the form of a Q&A on the interpretation of certain legal provisions in the revised Bank Recovery and Resolution Directive (BRRD2) and their interactions with the Single Resolution Mechanism Regulation (SRMR), the Capital Requirements Regulation (CRR) and the Capital Requirements Directive (CRD).

The notice, which complements a notice adopted on 29 September 2020, is intended to assist Member States in the transposition in national law and implementation of certain legal provisions, such as in relation to:

- definitions of ‘subordinated eligible instruments’, ‘resolution group’, ‘subsidiary’ and ‘central body’;
- the power to prohibit certain distributions;
- resolution planning;
- insolvency proceedings in respect of institutions and entities that are not subject to resolution action;
- the powers to suspend payment or delivery obligations;
- the selling of subordinated eligible liabilities to retail clients;
- the minimum requirement for own funds and eligible liabilities (MREL) covering eligible liabilities, determination of MREL, application of internal MREL and transitional and post-resolution arrangements;
- the contractual recognition of bail-in;
- the write down or conversion of capital instruments and eligible liabilities; and
- the contractual recognition of resolution stay powers.

Coronavirus: EBA reactivates guidelines on legislative and non-legislative moratoria

The European Banking Authority (EBA) has reactivated and revised its guidelines on legislative and non-legislative moratoria.

The guidelines on legislative and non-legislative loan repayments moratoria were originally published on 2 April 2020. The EBA extended the application date of its guidelines by three months, from 30 June to 30 September 2020, and on 21 September communicated their phasing-out.

Following close monitoring of the impact of the second COVID-19 wave and the related government restrictions taken in many EU countries, the EBA has decided to reactivate the guidelines, which will apply until 31 March 2021.

As part of the re-activation of its guidelines, the EBA has introduced two new constraints to ensure that the support provided by moratoria is limited to bridging liquidity shortages triggered by the new lockdowns and that there are no operational restraints on the continued availability of credit. The revised guidelines also include additional safeguards against the risk of an undue increase in unrecognised losses on banks' balance sheet.

CRR2: EBA publishes final draft RTS on treatment of non-trading book positions subject to foreign exchange risk or commodity risk

The EBA has published final draft regulatory technical standards (RTS) on the treatment of non-trading book positions subject to foreign exchange risk or commodity risk under the revised Capital Requirements Regulation (CRR2). Among other measures, CRR2 introduced revised requirements for institutions to compute their own funds requirements for market risk.

The EBA has published the draft RTS in accordance with a CRR2 mandate to specify how institutions should calculate the own funds requirements for non-trading book positions that are subject to foreign exchange (FX) risk or commodity risk in accordance with the alternative standardised approach (SA) and the alternative internal model approach (IMA). The EBA must also specify how institutions are to calculate the changes in hypothetical profit and loss (HPL), actual profit and loss (APL) and risk theoretical profit and loss (RTPL) for the purpose of the backtesting and P&L attribution requirements.

ECB consults on amendments to SIPS Regulation

The European Central Bank (ECB) has published for consultation proposed amendments to the Regulation (EU) No 795/2014 on oversight requirements for systemically important payment systems (SIPS Regulation) and two of its implementing decisions.

The proposals are intended to:

- clarify the criteria for determining which Eurosystem central bank will have oversight of a SIPS and to allow, in instances where a pan-European payment system has been overseen by a national central bank (NCB) for five years or more before becoming a SIPS, two competent authorities to have oversight (i.e. the NCB and the ECB);
- establish a more flexible and forward-looking methodology for the identification of a payment system as a SIPS to work alongside the existing

methodology and to ensure the framework keeps pace with rapid technological advances and changing consumer preferences; and

- introduce a phasing-out period prior to reclassifying a SIPS as a non-SIPS so that SIPS status would be withdrawn only after a payment system has not met the SIPS identification criteria for two years in a row.

Comments are due by 8 January 2021.

Banking Union: Eurogroup agrees to proceed with ESM reform and SRF backstop

The Eurogroup has issued a statement on its agreement to proceed with the reform of the European Stability Mechanism (ESM) and to advance the entry into force of a common backstop to the Single Resolution Fund (SRF).

The statement follows the Eurogroup's video conference on 30 November 2020 and sets out, among other things:

- the decision to sign the revised ESM Treaty, which strengthens the role of the ESM in the design, negotiation and monitoring of financial assistance programmes, in January 2021 and launch the ratification process;
- the decision to advance the entry into force of the common backstop to the SRF, in the form of an ESM credit line to replace the direct recapitalisation instrument, by two years to the beginning of 2022;
- the need for remaining vulnerabilities, such as non-performing loans (NPLs) levels and MREL shortfalls, to be addressed by a combination of additional efforts at bank, Member State and EU level; and
- an invitation to the EU Commission to review its State aid framework in the context of the review of the crisis management framework due to commence in 2021 and complete by 2023.

The statement calls on Member States to complete ratification processes, taking into account their national requirements, as soon as necessary for the early introduction of the common backstop.

SRB publishes 2021 work programme and multi-annual plan to 2023

The Single Resolution Board (SRB) has published its 2021-23 multi-annual work programme (MAP), which includes its work programme for 2021. The programme is structured around five strategic areas of operation, which broadly follow the priorities identified in the SRB's first MAP published in December 2017. These are:

- working to achieve resolvability of significant and cross-border institutions and less significant institutions;
- producing policies and guidance to foster a robust resolution framework;
- preparing and carrying out effective crisis management;
- operationalising the Single Resolution Fund (SRF), including using it to ensure the effective application of resolution tools; and
- supporting the SRB, its functions and its staff.
- Key actions that the SRB intends to take during 2021 to support these priorities include:

- conducting pilot on-site visits with banks deemed to be of specific interest to assess their resolvability;
- working with national regulatory authorities (NRAs) to revise MREL policy with a focus on responses to breaches, new aspects of the eligibility framework, and the implications of the requirement to set up an intermediate-parent undertaking in the EU;
- notify NRAs of the individual 2021 ex-ante SRF contributions and on-board the two new participating Member States (Bulgaria and Croatia) into the contributions cycle;
- monitor the implementation of the SRF investment plan by the external investment manager and on-board a second investment manager; and
- implement a comprehensive communications work programme across several different channels, including a new SRB website.

Coronavirus: Central Bank Governors and Heads of Supervision endorse coordinated approach to mitigating risks to global banking system

The Basel Committee on Banking Supervision's (BCBS's) oversight body, the Group of Central Bank Governors and Heads of Supervision (GHOS), has endorsed a coordinated approach designed to mitigate the risks posed by the coronavirus pandemic to the global banking system. The approach comprises the following elements:

- continuing to monitor and assess the vulnerabilities and risks to the global banking system and sharing supervisory insights;
- encouraging the use of the flexibility embedded in the Basel framework where applicable;
- monitoring the implementation of temporary adjustments to mitigate current risks to the banking system and ensuring they are consistent with the objectives of the Basel framework and are unwound in a timely manner; and
- where necessary and prudent, adopting additional global measures in a coordinated manner.

GHOS members reiterated that all aspects of the Basel III framework should be implemented in a full, timely and consistent manner to ensure that banks can withstand future crises. They note that the post-global financial crisis Basel III policy agenda is now at an end and that any further adjustments to Basel III will be limited. The BCBS's Basel III-related work will now focus on monitoring implementation, timeliness and consistency and evaluating the effectiveness of the reforms.

GHOS members have also endorsed a series of recommendations put forward by the BCBS following a strategic review of the future risks to the global banking system and its vulnerabilities. Under the endorsed agenda, the BCBS will focus on new and emerging topics including structural trends in the banking sector, the ongoing digitalisation of finance and climate-related financial risk.

FSB publishes progress report on OTC derivatives market reforms

The Financial Stability Board (FSB) has published its 2020 implementation report on the G20's OTC derivatives market reforms.

The FSB found that while implementation of the G20's reforms is well advanced overall, there had been limited progress since its October 2019 across member jurisdictions. The implementation status of trade reporting requirements for OTC derivatives transactions and interim capital requirements for non-centrally cleared derivatives (NCCDs), platform trading requirements, and mandatory central clearing requirements remained unchanged since the last progress report, while only one jurisdiction had published final standards for margin requirements for NCCDs and two jurisdictions adopted final capital requirements for NCCDs.

ICE Benchmark Administration to consult on ceasing publication of USD LIBOR

ICE Benchmark Administration (IBA) has announced that it intends to consult on ceasing the publication of USD LIBOR settings.

Specifically, the IBA plans to consult on its intention to cease the publication of:

- the one week and two month USD LIBOR settings immediately following the LIBOR publication on 31 December 2021; and
- the overnight and one, three, six and 12 month USD LIBOR settings immediately following the LIBOR publication on 30 June 2023.

This follows IBA's announcement on 18 November 2020 that IBA intends to consult on ceasing the publication of all GBP, EUR, CHF and JPY LIBOR settings. The IBA expects to consult on these in the same consultation as for USD LIBOR settings in early December 2020.

IBA has emphasised that its statement is not, and must not be taken to be, an announcement that IBA will continue or cease the publication of any LIBOR settings after 31 December 2021 or 30 June 2023. IBA expects to make separate announcements in this regard following the outcome of the consultations, and subject to any rights of the Financial Conduct Authority (FCA) to compel IBA to continue publication.

The FCA and the Federal Reserve Board (FRB) have published statements welcoming the IBA's announcement.

The International Swaps and Derivatives Association (ISDA) has also published a statement to confirm that IBA's announcement does not constitute an index cessation event under the IBOR Fallbacks Supplement or the ISDA 2020 IBOR Fallbacks Protocol and will not trigger the fallbacks under the supplement or protocol or have any effect on the calculation of the spread.

IOSCO consults on industry views on issues relating to market data in equity markets

The International Organization of Securities Commissions (IOSCO) has issued a consultation paper seeking industry views on issues relating to market data in secondary equity markets.

Market data and access to market data are necessary to trade in the secondary markets. Market participants, including investors, need timely access to market data to make investment, order routing and trading decisions, and to comply with certain regulatory requirements.

As markets have evolved to become largely electronic, the market data needs and means to access such data have changed for market participants. IOSCO's consultation asks for views on issues relating to market data and possible solutions.

The issues include:

- what market data is considered core for use by market participants;
- fair, equitable and timely access to market data;
- fees for market data, and how fees are determined and charged;
- the need for and extent of data consolidation; and
- how other products or services that relate to accessing market data are provided by trading venues or other regulated data providers, and any associated fees.

Based on its analysis of any feedback it receives, IOSCO will consider whether any policy work is needed. Comments to the consultation close 26 February 2021.

Brexit: FCA publishes draft share trading obligation direction

The FCA has published a draft direction on the share trading obligation (STO) using its temporary transitional power (TTP) to waive or modify onshored obligations at the end of the Brexit transition period.

The draft direction implements the changes announced in the FCA's statement published on 4 November 2020, namely to allow UK firms to continue trading shares on EU trading venues and systematic internalisers (SIs).

ESMA published a statement on its approach to the EU STO on 26 October 2020, whereby EEA ISIN shares on UK trading venues in British Pounds (GBP) will not be subject to the EU STO under Article 23 of MiFIR.

The direction takes effect from the end of the transition period at 11pm on 31 December 2020.

Brexit: FCA publishes Primary Market Bulletin on onshored legislation Insolvency: HMT consults on proposed special administration regime for payment and electronic money institutions

The FCA has published a special edition of the Primary Market Bulletin (No. 32) to remind market participants of the changes taking effect when onshored

legislation enters into force at the end of the transition period on 31 December 2020.

The Bulletin provides an update on Brexit and regulatory requirements relating to:

- short selling, including the new requirements for the market making exemption and net short positions reporting;
- market abuse, including public disclosure of inside information, managers' transactions and the exemption for buy-back programmes and stabilisation; and
- prospectuses, including issuer data submission requirements and passporting.

The Bulletin also sets out the FCA's approach to certain EU updates, including its future treatment of ESMA Q&As and guidelines, and the EU Commission's proposal for a new Delegated Regulation to supplement the Prospectus Regulation regarding the minimum information content of the exemption document in connection with a takeover by means of an exchange offer, a merger or a division.

FCA publishes Quarterly Consultation No. 30

The FCA has published its quarterly consultation paper (CP20/23) on miscellaneous amendments to its handbook. This quarter, the FCA is proposing to:

- clarify its expectations for temporary, long-term absences;
- remove references to collective investment schemes being able to issue bearer certificates, in line with draft Government legislation banning the use of bearer certificates;
- amend the rules in the Conduct of Business sourcebook (COBS) 4.5.12R to 4.5.15R to narrow the scope of their application to communications which could influence a retail investor's investment decision;
- make changes to the minimum levels of professional indemnity insurance cover to align them with the revised limits as published in Commission Delegated Regulation (EU) 2019/1935 amending the Insurance Distribution Directive;
- make changes to the cancellation form in Supervisory manual 6 Annex 6 to improve the cancellation application process; and
- transpose Article 1(16) of the revised Bank Recovery and Resolution Directive into FCA rules.

In addition, the FCA is seeking views from interested stakeholders about whether the Global Precious Metals Code meets its Codes Recognition Criteria.

Comments on Chapters 2 and 6 are due by 4 January 2021 and on Chapters 3, 4, 5, 7 and 8 by 4 February 2021.

Insolvency: HMT consults on proposed special administration regime for payment and electronic money institutions

HM Treasury (HMT) has published a consultation paper which sets out proposed changes to the insolvency regime for payment institutions (PIs) and electronic money institutions (EMIs), including a proposal for a special administration regime (SAR).

The consultation paper sets out details of the following features of the proposed SAR, among other points:

- explicit objectives on the special administrator regarding timely engagement with payment systems and authorities and to return customer funds as soon as reasonably practicable;
- a bar date for client claims to be submitted, which is intended to speed up the distribution process;
- a mechanism to facilitate the transfer of customer funds to a solvent institution;
- a post-administration reconciliation in order to top up or draw down funds to or from the safeguarding process;
- provisions for continuity of supply; and
- rules on allocation of costs and for treatment of shortfalls in the institutions' safeguarding accounts.

The consultation paper sets out details of draft regulations for the proposed SAR at annexes A and B. The Government will publish a further annex on 17 December providing details on rules for the SAR, which the consultation paper notes will be closely related to the Investment Bank SAR rules.

The proposed changes are intended to help protect customers in the event of a payment or electronic money institution being put into insolvency, which is intended to strengthen confidence in the payment and e-money sectors by improving customer and market outcomes.

Comments on the consultation are due by 14 January 2021.

HMT extends deadlines for future regulatory framework consultation and Solvency II call for evidence

HMT has extended the deadlines for responding to two open consultations it published in October 2020, in particular:

- the second phase of the Government's Future Regulatory Framework (FRF) review, which considers how to develop the UK's long-term regulatory approach to financial services post-Brexit; and
- a call for evidence regarding the UK's prudential regulatory regime for insurance firms under Solvency II. The call for evidence forms the first phase of a wider review of Solvency II.

Comments are now due by 19 February 2021.

Brexit: Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-

prudential Measures) (Amendment) (EU Exit) Regulations 2020 laid before Parliament

HM Treasury has made the Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1406).

The instrument implements the fifth EU Capital Requirements Directive (CRD5) in the UK, as required by 28 December 2020 under the terms of the EU Withdrawal Agreement.

HM Government intends to maintain the split of responsibility established during its implementation of CRD4, by which it delegated significant responsibility to the Prudential Regulation Authority (PRA), and is therefore legislating only where the PRA cannot make rules under existing powers. HM Treasury's CRD5 implementation updates the prudential regime by:

- exempting non-systemic investment firms;
- creating a holding company approval regime, and requiring certain holding companies to be responsible for sub-consolidated and consolidated prudential requirements;
- updating the macro-prudential tools available to Member States (which includes the UK until implementation completion day); and
- updating the confidential information-sharing regime with international bodies.

Brexit: HM Treasury makes Securities Financing Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020

HM Treasury (HMT) has made the Securities Financing Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020 (SI 2020/1385). A draft of the Regulations was laid before and approved by Parliament.

The regulations amend recently applicable retained EU legislation, including the Securities Financing Transaction Regulation (SFTR) and the Securitisation Regulation, as well as related UK domestic and retained EU legislation. They also make clarifications and a correction to earlier financial services EU Exit statutory instruments (SIs) and provide supervisory powers for the financial services regulators in order for them to supervise firms effectively at the end of the TP.

Amendments made by the instrument also affect legislation regarding the following topics, among others:

- the EU Benchmarks Regulation (BMR);
- central counterparties;
- capital requirements;
- credit rating agencies;
- cross-border payments;
- the EU Deposit Guarantee Schemes Directive;
- equivalence determinations;

- the EU Emissions Trading Scheme (ETS);
- financial regulators' powers;
- the Financial Services and Markets Act (FSMA) 2000 (Regulated Activities) Order 2001 and further FSMA-related secondary legislation;
- MiFID;
- over-the-counter (OTC) derivatives;
- packaged retail and insurance-based investment products (PRIIPs);
- the EU Prospectus Regulation;
- the EU Solvency II Directive; and
- trade repositories.

PRA consults on fees and levies for holding company regulatory transactions

The Prudential Regulation Authority (PRA) has published a consultation paper (CP 21/20) setting out its proposed rules in respect of regulatory transaction fees for applications for approval or exemption as a holding company.

CRD5 introduces requirements for certain types of parent financial holding companies (FHCs) or mixed financial holding companies (MFHCs) that substantively control their group to be subject to supervisory approval and consolidated supervision. The Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 extend certain supervisory powers to the PRA in respect of approved FHCs and MFHCs.

Comments on the consultation are due by 8 January 2021. The proposed implementation date for the changes is 1 March 2021.

Brexit: SI transposing BRRD2 made

The Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 (SI 2020/1350) have been made.

SI 2020/1350 transposes into UK law provisions in the amended Bank Recovery and Resolution Directive (BRRD2) that apply prior to the end of the transition period on 31 December 2020. As noted in the explanatory memorandum, this excludes the revised framework for minimum requirements for own funds and eligible liabilities (MREL) requirements as it applies after the end of the transition period.

Part 5 of the SI also sets out sunset provisions, which come into force on the transposition deadline (28 December 2020) and cease to have effect at the end of the transition period (31 December 2020), relating to:

- the power for the resolution authority to prohibit an entity from distributing more than the maximum distributable amount (M-MDA) where the entity fails to meet the combined buffer requirement, subject to certain conditions;
- the new pre-resolution moratorium power;
- changes to priority of debts in insolvency;
- updates to the contractual recognition of bail-in (CROB); and

- amendments to the in-resolution moratorium power.

A transposition table setting out how BRRD2 is being implemented in the UK has been published alongside the SI.

Belgium adopts law making basic banking services available to enterprises

Belgian law provides that consumers have a right to basic banking services. The Belgian Parliament has now adopted a new law which expands this right to enterprises.

Enterprises that have been denied access to banking services by at least three institutions will be entitled to apply to the Ministry of the Economy. The Ministry will then seek advice from the Belgian Financial Intelligence Processing Unit (CTIF/CFI) in relation to the applicant and, if that advice is positive, the Ministry will appoint one of the systemically important financial institutions in Belgium to provide basic banking services to the applicant (certain systemically important financial institutions will not, however, be required to provide these basic banking services).

Where the applicant is itself subject to the Belgian AML law, the right to basic banking services is subject to additional requirements, including the adoption of a royal decree which implements certain risk mitigation measures, or ratifies a code of conduct agreed between the sector in which the applicant is active and Febelfin.

Basic banking services will be provided in euro. At the request of the applicant, certain services may also be provided in US dollars.

The new law imposes requirements as to form and content for credit institutions who decide to refuse an application for banking services made by an enterprise.

The law will enter into force on 1 May 2021.

Investment firms: Luxembourg bill implementing IFD and IFR published

Bill No. 7723 implementing Directive (EU) 2019/2934 on the prudential supervision of investment firms (IFD), certain provisions of Directive (EU) 2019/2177, Regulation (EU) 2019/2033 on the prudential requirements of investment firms (IFR), as well as Article 4 of Regulation (EU) 2019/2175, has been lodged with the Luxembourg Parliament.

The bill follows the IFD/IFR objective of establishing a framework for the prudential supervision of investment firms that is more appropriate for the nature of the activities of investment firms, their vulnerabilities and inherent risks. In particular, the new framework foresees four major categories of investment firms to be introduced into Luxembourg law:

- investment firms in 'class 1' are going to be qualified as credit institutions. These include the biggest investment firms that carry out the activities of dealing on own account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and whose total value of assets exceeds EUR 30 billion;
- investment firms in 'class 1b' will be investment firms that carry out the activities of dealing on own account or underwriting of financial instruments

and/or placing of financial instruments on a firm commitment basis, which because of their size or importance or due to the fact that they belong to a group, will remain subject to a number of requirements under Directive 2013/36/EU and Regulation (EU) 575/2013, without however being treated as credit institutions. In Luxembourg, these are defined as CRR investment firms;

- investment firms in 'class 2' represent traditional investment firms that are entirely going to be subject to the new IFD/IFR framework; and
- investment firms in 'class 3', which are small and non-interconnected investment firms benefiting from certain derogations in order to ensure the proportionality of the rules applicable to them.

Additionally, the bill proposes to modernise the types of certain professionals of the financial sector, notably (i) the existing Luxembourg investment firm types are intended to be replaced by investment firm types purely based on the class of the MiFID investment service or investment activity carried out by the firm, (ii) the licence type of 'persons carrying out operations of cash exchange' will be deleted, such activity becoming an activity reserved for credit institutions, and (iii) the statuses of primary and secondary IT systems operators are intended to be merged into one single licence type.

Finally, the bill proposes to amend the Luxembourg law of 5 April 1993 on the financial sector in order to implement Article 1 and 2 of Directive 2019/2177, the objective of which is to transfer certain authorisation and supervision powers in relation to data reporting service providers from the national competent authority to the European Securities and Markets Authority (ESMA). The bill also facilitates the exchange of information between competent authorities, including with national regulators and the European supervisory authorities.

The publication of the bill constitutes the start of the legislative procedure.

IFR/IFD: DNB issues guidance on banking license applications by investment firms that qualify as credit institutions

The Dutch Central Bank (DNB) has published guidance for MiFID investment firms that will qualify as a credit institution under the IFD and IFR.

Certain investment firms who engage in own account trading and/or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis may be reclassified as credit institution within the definition of 'credit institution' as amended in article 62(3)(a) IFR (which includes article 4(1)(1)(b) in the Credit Requirements Regulation (CRR)). These types of investment firms must apply for a banking licence no later than the day referred to in article 62(6) IFD (which includes article 8a(1) in the Credit Requirements Directive (CRD)).

This means that investment firms with their registered office in the Netherlands must apply for a banking licence no later than the date of entry into force of the IFD Implementation Act implementing article 8a(1) CRD into the Dutch Financial Supervision Act (FSA). As it stands, the date of entry into force of the IFD Implementation Act is 26 June 2021.

If an application for a banking licence is submitted in time, investment firms that qualify as a credit institution can continue their activities without a banking

licence as long as the European Central Bank (ECB) has not yet taken a decision on the licence application. If the application has not been submitted on the date of entry into force of the IFD Implementation Act, the investment firm is in violation of Section 2:11 of the FSA, which is the prohibition to conduct banking activities without a licence from the ECB.

Investment firms that already meet the criteria to qualify as a credit institution or that expect at the time of entry into force of the IFD Implementation Act to qualify as a credit institution, have the possibility to submit an application for a banking licence by 27 December 2020 (in accordance with the grandfathering regime pursuant to article 8a (3) CRD).

Dutch bill implementing CRDV and CRR2 adopted by Senate

The Dutch Senate has adopted the bill implementing CRD5 and CRR2. The bill is expected to enter into force by 28 December 2020 at the latest.

Polish Financial Supervision Authority publishes standpoint on change to supervision model in banking sector

The Polish Financial Supervision Authority (KNF) has published its standpoint concerning a change to the supervision model in the banking sector. CRD4 imposed extensive obligations on financial regulators with regard to the verification of the primary and secondary assessment of the individual suitability of members of the management bodies of banks and the assessment of the collective suitability of bodies as a whole. The provisions of the Directive are reflected in the regulations of the Act – Banking Law and the recently issued Recommendation Z on the terms of internal governance in banks.

As the KNF notes, the supervision model existing to date with regard to corporate governance will be modified. The main aim of the change to the supervision model in this area is to have banks' assessments of the suitability of all members of management boards and supervisory boards subjected to increasingly active and systemic verification.

CNMV issues communication on ESRB recommendations on liquidity risk arising from margin calls

The Spanish Securities Market Commission (CNMV) has announced that it will take into consideration the recommendations of the European Systemic Risk Board of 20 July 2020 aimed at reducing liquidity risk arising from margin calls in its supervisory activities relating to central counterparties, as well as with regard to the exchange of margins between financial and non-financial counterparties, in derivatives contracts not cleared by CCPs and in their activities as clearing members on behalf of clients.

Bank of Spain issues circular to payment institutions and electronic money institutions on public and reserved financial reporting rules and on financial statement standards

The Bank of Spain has issued Circular 5/2020 to payment institutions and electronic money institutions on public and reserved financial reporting rules and on financial statement standards, which establishes the accounting

framework for payment institutions and electronic money institutions, setting out similar accounting standards to those for credit institutions, but with simplified requirements due to the differences in the nature, scale and complexity of the activities they carry out.

The obligation for payment institutions and electronic money institutions to report separately on their electronic money activities is fulfilled by including this information in the annual report.

The circular will enter into force on 1 January 2021 and the first financial statements that have to be filed following the new standards will be those relating to 30 June 2021.

HKEX consults on main board profit requirement

The Stock Exchange of Hong Kong Limited, a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has launched a public consultation on the Main Board profit requirement.

Since the minimum market capitalisation requirement under Main Board Rule 8.09(2) was increased from HKD 200 million to HKD 500 million in 2018, the Exchange has seen an increase in listing applications from issuers that marginally met the profit requirement under Main Board Rule 8.05(1)(a), but had relatively high proposed market capitalisations. The Exchange notes that this misalignment of the profit requirement with the increased market capitalisation requirement has raised regulatory concerns as to the quality of companies seeking Main Board Listings. Consequently, the Exchange is proposing to increase the profit requirement by either:

- 150%, based on the percentage increase in the market capitalisation requirement in 2018; or
- 200%, based on the approximate percentage increase in the average closing price of the Hang Seng Index from 1994 to 2019.

In recognition of the impact that the increased profit requirement might have on companies which have already commenced their listing preparations, the Exchange is proposing to introduce transitional arrangements if the increment proposal is adopted. The Exchange will also introduce temporary conditional relief from the increased profit requirement to facilitate the listing of quality companies whose financial results have been temporarily and adversely affected by the COVID-19 pandemic.

Comments on the consultation are due by 1 February 2021.

HKEX launches sustainable and green exchange to support sustainable finance ecosystem

HKEX has launched the Sustainable and Green Exchange (STAGE).

The STAGE platform comprises an online product repository which features 29 HKEX-listed sustainable products including sustainability, green, and transition bonds from issuers across a variety of sectors such as utilities, transportation, property development and financial services as well as environmental, social and governance (ESG)-related exchange traded products. STAGE also acts as an online repository of green and sustainable finance resources to help market participants enrich their understanding of sustainable finance, green products, ESG integration and sustainable investing.

STAGE will allow issuers to provide investors with additional information on their sustainable investment products to promote transparency and facilitate access. Issuers included on STAGE will be required to provide information on their sustainable investment products such as the use of proceeds reports and annual post issuance reports, in order to enable investors to access a trusted, easy-to-use platform for the region's 'green sector'. At the same time, the information is intended to act as a benchmark for issuers seeking to raise funds for their sustainable projects, and to contribute to the standardisation of sustainability metrics.

HKEX has indicated that it is working closely with local, regional and international partners to further expand the available content on STAGE.

SFC announces gazettal of amendments to code on real estate investment trusts

The Securities and Futures Commission (SFC) has announced that the amendments to the Code on Real Estate Investment Trusts (REIT Code) took effect on 4 December 2020. The final amendments were set out in the consultation conclusions on proposed amendments to the REIT Code which were published on 27 November 2020.

The SFC has also issued a circular regarding the details for the implementation of changes to the REIT Code. The circular states that, in order to provide further guidance to the industry, the SFC has updated the following:

- frequently asked questions relating to REITs;
- the circular regarding the streamlined approach for vetting and approval of announcements and circulars;
- checklist for application for authorisation of REITs; and
- guidance on the REIT authorisation process and documentary requirements.

For connected party transactions which were entered into before the effective date, a transitional period of six months will be allowed for REITs to comply with the revised requirements.

MAS announces launch of grant scheme to support green and sustainability-linked loans

The Monetary Authority of Singapore (MAS) has announced the launch of the Green and Sustainability-Linked Loan Grant Scheme (GSLS), which will be effective on 1 January 2021. The GSLS is an initiative under the MAS' Green Finance Action Plan that is designed to direct more financing towards green projects and enhance corporates' sustainability practices.

The GSLS seeks to support corporates of all sizes to obtain green and sustainable financing by defraying the expenses of engaging independent service providers to validate the green and sustainability credentials of the loan, capped at SGD 100,000 per loan. The GSLS will also encourage banks to develop frameworks for green and sustainability-linked loans by defraying expenses up to 60%, capped at SGD 120,000, that are incurred by banks to engage independent sustainability assessment and advisory service providers for developing such frameworks, obtaining external reviews, and reporting on the allocated proceeds of loans originated under the framework. The MAS will

also defray by 90% the expenses incurred by banks to develop frameworks specifically targeted at small and medium-sized enterprises (SMEs) and individuals, capped at SGD 180,000 per framework.

The MAS will also expand the scope of the existing Sustainable Bond Grant Scheme (SBGS) to include sustainability-linked bonds, effective immediately, by covering the post-issuance costs of engaging independent sustainability assessment and advisory service providers to obtain external reviews or report for bonds under the SBGS.

ASIC publishes information sheet on managing conduct risk during LIBOR transition

The Australian Securities and Investments Commission (ASIC) has published Information Sheet 252: Managing conduct risk during LIBOR transition (INFO 252) to provide practical guidance aimed at assisting entities to establish necessary arrangements to mitigate conduct risk associated with the discontinuation of LIBOR.

In order to ensure an orderly transition from LIBOR, INFO 252 sets out regulatory expectations and clarifications in relation to:

- frameworks, practices and recommendations on fair treatment of clients, representation of product performance, and client communication strategies;
- ASIC's expectation of the industry, including what is considered to be best practices; and
- buy-side entity specific guidance and recommendations.

ASIC has strongly encouraged all entities with LIBOR exposures to review INFO 252 and take reasonable steps to implement the relevant recommendations.

ASX consults on proposed changes to ASX clear operating rules, procedures and guidance note 12

The Australian Securities Exchange (ASX) has launched a public consultation on proposed changes to the ASX Clear Operating Rules, Procedures and Guidance Note 12 (Trust and Client segregated account) in order to provide an improved framework and additional guidance to assist participants to comply with their client money obligations.

The proposed key amendments affect the following:

- ASX Clear Operating Rules and Procedures, including revisions to the reconciliation and notification requirements and the addition of a new rule and procedure to facilitate compliance under the Rule 4.23; and
- ASX Clear Operating Rules Guidance Note 12 (Trust and Client Segregated Accounts). These changes are intended to provide detailed guidance on policies and procedures a participant should have in place to comply with their client money obligations, the types of reviews that participants should be conducting periodically or as part of their change management processes into their client money processes, and ASX's expectations as to the matters a participant's external auditor should be examining as part of the annual audit of the participant's compliance with its client money obligations.

ASX has proposed a 12-month transition period, from the date of publication, for participants to align their arrangements with the revised Rules, Procedures and Guidance Note.

Comments on the consultation are due by 8 February 2021.

ASX consults on proposed listing rules amendments

ASX has launched a public consultation on proposed changes to the listing rules.

The proposed amendments are primarily intended to facilitate the introduction and operation of the next round of various new and updated online forms which will be released by ASX in 2021. In addition, ASX has also proposed:

- changes to the rules dealing with notifications of security issues in Listing Rules 3.10.3 – 3.10.3D to make them clearer and easier to follow;
- amendments to Listing Rules 3.21 and 3.22 and a new Listing Rule 12.13 addressing the cancellation or deferral of previously announced dividends, distributions and interest payments;
- an amendment to Listing Rule 2.8.3 to reduce the deadline for applying for the quotation of securities issued as a consequence of the conversion of unquoted convertible securities from 10 business days to 5 business days;
- clarificatory amendments to the definition of 'employee incentive plan' in Listing Rule 19.12; and
- changes to the timetables for corporate actions in Appendices 6A and 7A, particularly to allow an additional 2 business days for an entity to announce the results of certain corporate actions.

Subject to the receipt of the necessary regulatory approvals, ASX intends for the final rule amendments to take effect on 20 March 2021.

Comments on the consultation are due by 24 December 2020.

RECENT CLIFFORD CHANCE BRIEFINGS

EBA report on significant risk transfer in securitisation

On 23 November, the EBA published its long-awaited report on significant risk transfer (SRT) in securitisation. The SRT Report was published with the laudable ambition of simplifying and harmonising the current complex European patchwork of approaches taken to SRT, and providing certainty and predictability to market participants seeking to structure transactions that will achieve SRT.

This briefing discusses the EBA's proposals and assesses how much progress the SRT Report makes towards these ambitious goals.

https://www.cliffordchance.com/briefings/2020/11/eba-report-on-significant-risk-transfer-in-securitisation.html

The partial restoration of UK Crown preference with effect from 1 December 2020

On 1 December 2020, The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 came into force, partially restoring the Crown's

status as a preferential creditor in the order of distribution in insolvency proceedings.

It also applies to all insolvency proceedings commenced after 1 December 2020 even where the floating charge security was created prior to that date, having retrospective application in this respect.

This briefing paper discusses the new regulations.

https://www.cliffordchance.com/briefings/2020/11/the-partial-restoration-of-uk-crown-preference-with-effect-from-.html

The UK's new competition regime for digital platforms with strategic market status

On 27 November 2020, the UK Government announced its intention to establish a new regime to govern the behaviour of 'digital platforms' funded by online advertising that have Strategic Market Status. This regime will comprise a mandatory code of conduct and will be enforced by a new Digital Markets Unit to be established within the Competition and Markets Authority in 2021.

This briefing paper discusses the new regime.

https://www.cliffordchance.com/briefings/2020/12/the-uk-s-new-competition-regime-for-digital-platforms-with-strat.html

FinCEN and DOJ signal increased scrutiny of cryptocurrencies

US authorities are closely scrutinising the anti-money laundering (AML), terrorist financing, and sanctions compliance risks associated with the use of cryptocurrencies. While US authorities including the Financial Crimes Enforcement Network of the US Treasury (FinCEN) and the US Department of Justice (DOJ) have been tracking the rise in use (and potential for misuse) of cryptocurrencies for years, 2020 saw a flurry of new developments that indicate that cryptoassets are now centre stage.

Recent guidance and enforcement actions against companies and private individuals make clear the need for US and non-US cryptocurrency sponsors, trading platforms and other intermediaries that facilitate cryptocurrency transactions involving US persons to adhere to applicable US legal and regulatory requirements, including registration.

This briefing discusses recent developments.

https://www.cliffordchance.com/briefings/2020/11/fincen-and-doj-signal-increased-scrutiny-of-cryptocurrencies.html

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