INTERNATIONAL REGULATORY UPDATE 10 – 14 JUNE 2024

- **EU Council agrees negotiating mandate on retail investment package**
- **Benchmarks: EU Commission publishes report on delegation of power to adopt delegated acts**
- **MiFIR Review: EU Commission consults on draft Delegated Regulation on OTC derivatives identifying reference data**
- **MiCA: EBA publishes package of final draft RTS and guidelines on own funds, liquidity requirements and recovery plans**
- **IVASS implements EBA corporate governance guidelines on prevention of money laundering and countering financing of terrorism**
- **DNB consults on amendments to its deposit guarantee fund policy rules**
- **Recent Clifford Chance briefings: Securitisation markets and regulation and UK floating charge security for cloud computing company. Follow this link to the briefings section.**

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

To request a subscription to our Alerter: Finance Industry service, please subscribe to our Client Portal, where you can also request access to the Financial Markets Toolkit and subscribe to publications, insights and events.

EU Council agrees negotiating mandate on retail investment package

The EU Council has agreed its negotiating position on the EU Commission's proposed retail investment package.

The legislative package consists of a proposed Omnibus Directive amending the Markets in Financial Instruments Directive (MiFID2), the Insurance Distribution Directive (IDD), Solvency II, the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive and the Alternative Investment Fund Managers Directive (AIFMD), and a proposed Regulation amending the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation.

Among other things, the Council's position proposes changes relating to inducements and the value for money benchmarks. The proposals include:

- removing the proposed ban on inducements received for execution-only sales;
- strengthening the safeguards accompanying all inducements with an inducement test that applies where there is no ban on inducements, a new uniform test specifying the duty for advisors to act in the best interest of the client and enhanced transparency and disclosure about what payments are

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Marc Benzler +49 69 7199 3304
Caroline Dawson +44 207006 4355
Steven Gatti +1 202 912 5095
Rocky Mui +852 2826 3481
Lena Ng +65 6410 2215
Gareth Old +1 212 878 8539
Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

considered as inducements, their costs and their impact on investment returns; and

- introducing overarching principles which are intended to prevent inducements from incentivising firms to recommend particular products over others and from being disproportionate to the value offered and to ensure that inducements paid to or accepted and retained by entities belonging to the same group should be treated in the same way as others;
- using ESMA and EIOPA benchmarks as a supervisory tool to help national competent authorities (NCAs) detect investments products that fail to offer value for money, rather than mandatory benchmarks integrated in manufacturer's and distributors' product governance process;
- using a peer group system to compare manufacturer's and distributors' investment products to a peer group of other similar investment products in the EU to establish whether the investment product offers value for money;
- allowing Member States to permit manufacturers or distributors to opt to compare their products with the relevant EU supervisory benchmark, instead of a peer group; and
- allowing Member States whose NCAs have developed national benchmarks on costs and performance to detect outliers to continue to use those benchmarks in relation to insurance-based investment products only.

The EU Council and Parliament are now ready to begin trilogue negotiations on the proposals in order to agree the final texts.

Benchmarks: EU Commission publishes report on delegation of power to adopt delegated acts

The EU Commission has published a report on the delegation of power to adopt delegated acts conferred on the Commission pursuant to the EU Benchmarks Regulation (EU) 2016/1011 (BMR).

Under Article 49(1) of the EU BMR, the Commission is empowered to adopt delegated acts. Article 49(2) of the EU BMR further provides that the power to adopt delegated acts is conferred on the Commission for a five-year period, which can be tacitly extended for further periods of identical duration unless the EU Parliament or the Council opposes it no later than three months before the end of each period.

The five-year period initially ran from 30 June 2016 until 30 June 2021. Regulation (EU) 2019/2089 amended Article 49(2) so that the empowerment is currently granted from 10 December 2019 until 10 December 2024, and added the requirement to prepare a report in respect of the delegation of power. The Commission's report is intended to fulfil that requirement. It sets out the delegated acts the Commission has adopted under the BMR in the current five-year period, as well as listing the empowerments that the Commission has not used to date, and concludes that there is a clear need for a tacit extension of the delegation of power for a further period of five years.

MiFIR Review: EU Commission consults on draft Delegated Regulation on OTC derivatives identifying reference data

The EU Commission has launched a consultation on a draft Delegated Regulation regarding OTC derivatives identifying reference data under the Markets in Financial Instruments Regulation (MiFIR).

The draft Delegated Regulation sets out identifying reference data to be used with regard to OTC interest rate swaps and OTC credit default swaps for the purposes of the transparency requirements laid down in Article 8a(2), and Articles 10 and 21 MiFIR.

Following its consultation on the appropriate identifying reference data to be used for the transparency reporting of OTC derivatives under MiFIR, the Commission has explained that the Delegated Regulation seeks to strike a balance between allowing for the use of the same identifier for transparency and transaction reporting purposes, ensuring continuity of use for identifying reference data for the purposes of transaction reporting and avoiding the proliferation of ISINs.

Comments are due by 12 July 2024. The Delegated Regulation will enter into force on the twentieth day following its publication in the Official Journal and will apply from 1 September 2025.

MiCA: EBA publishes package of final draft RTS and guidelines on own funds, liquidity requirements and recovery plans

The European Banking Authority (EBA) has published a package of regulatory products on prudential matters under the Markets in Cryptoassets Regulation (MiCA). The package comprises:

- final draft regulatory technical standards (RTS) specifying the adjustment of the own funds requirement and the minimum requirements of stress testing programmes for issuers of asset-referenced tokens (ARTs) and of e-money tokens (EMTs);
- final draft RTS specifying the procedure and timeframe for an issuer to adjust the amount of its own funds to 3% of the average amount of the reserve of assets when the relevant issuer is issuing an ART or EMT classified as 'significant';
- final draft RTS specifying the liquidity requirements of the reserve of assets, including minimum percentages according to daily and weekly maturities and minimum amounts of deposits in each official currency referenced;
- final draft RTS specifying the highest quality liquid assets in the liquidity coverage ratio (LCR) as eligible highly liquid financial instruments, and setting concentration limits of highly liquid financial instruments by issuer;
- final draft RTS specifying the minimum content of the liquidity management policy and procedures; and
- guidelines on recovery plans, which set out the format and the content of the recovery plan that issuers need to develop and maintain.

IVASS implements EBA corporate governance guidelines on prevention of money laundering and countering financing of terrorism

The Istituto per la vigilanza sulle assicurazioni (IVASS) has published a new regulation intended to amend its Regulation No. 44/2019 in line with the EBA corporate governance guidelines on the prevention of money laundering and countering the financing of terrorism (EBA/GL/2022/05), which were published on 14 June 2022.

Amongst other things, this new set of provisions requires institutions to identify a member of the management body as responsible for AML compliance. This person is to act as a liaison between the AML function and the management body, ensuring the effectiveness of internal controls. The appointment must take place no later than the first renewal of corporate bodies following the publication of the regulation and in any event no later than 30 April 2026.

In terms of AML function, the amendments concern the relationship between the head of the function and the AML member referred to above, as well as the obligation to consult the AML function in the case of high-risk client relationships.

In relation to outsourcing, it is further clarified that it is possible to outsource the tasks of the AML function only, but not responsibility for it. An AML officer must be appointed to monitor and control the outsourced activities.

DNB consults on amendments to its deposit guarantee fund policy rules

The Dutch Central Bank (DNB) has issued a consultation document on the annual amendments to its policy rules on the Dutch deposit guarantee fund.

As the authority competent to implement the Dutch deposit guarantee scheme (DGS), in 2017 DNB published two policy rules, including:

- the Individual Customer View Policy Rule (Beleidsregel Individueel Klant Beeld, IKB Policy Rule); and

the Policy Rule on the Scope and Implementation of the Deposit Guarantee Scheme.

The IKB Policy Rule describes how a bank should ensure that its administration, procedures and measures are set up in such a way that it can at all times provide an accurate overview of its customer base that is eligible for DGS protection, i.e. the 'Individual Customer View' (in Dutch: IKB). In addition to periodically submitting their IKB files to DNB, banks must also procure an annual audit of their IKB system.

The current consultation, which ends on 19 July 2024, is part of the periodic review of the aforementioned DNB policy rules.

RECENT CLIFFORD CHANCE BRIEFINGS

Securitisation markets and regulation – navigating the shifting sands

When Jean-Baptiste Alphonse Karr wrote 'plus ça change, plus c'est la même chose' (the more things change, the more they stay the same) back in 1849

he could well have been talking about present day securitisation markets. In the decade and a half we have been publishing our annual compendium, not a single year has gone by where we thought 'Maybe we should skip a year; after all, everything has stayed pretty stable.' The sands continue to shift.

The highlights this year around the world are high interest rates, refinancing walls and Basel 3.1 (variously referred to as Basel IV, or Basel Endgame, as well). In Europe, we can add the perennial favourite that is Brexit.

Because of Brexit, the UK has seemed like it was the market with the most dramatic changes to regulation this year, but large parts of those changes have been structural and cosmetic, rather than substantive. Much was made by the UK Government of their new 'Smarter Regulatory Framework', but in the end, the new substantive rules look very similar to what we already have. It is true that the regulators have made a few positive changes, for which they should be lauded. It is also true that a second round of changes – which it remains too early to judge – is still coming. But it is inescapable that the main impact so far has been to split a single set of rules covering 28 countries into three sets of rules covering a single country. Great business for lawyers, but not great for anyone else. We wonder, therefore, whether the slow-motion changes on the continent – consisting largely of warm political statements so far – might actually end up being just as significant by the time both processes have matured.

In the US, the securitisation rules themselves have remained largely stable, but a number of proposals for connected rules have caused concern. The conflicts of interest rule has settled in such a way as to be manageable, but the outcome of the 'Basel Endgame' is still anybody's guess after a pushback the likes of which financial regulation rarely sees. Both rules are likely to affect the viability and structure of the synthetic risk transfer market in the US.

Finally, the Asia-Pacific region continues to develop and make increasing use of securitisation. China now being the second largest market for securitisation in the world is significant, but the region as a whole still has huge potential for growth and development, which will undoubtedly come with more regulation.

All this to say that this year is like every other; things continue to change. Like the shifting of sand dunes that change is mostly subtle, and often unpredictable, but also treacherous if ignored. We hope this volume helps you to navigate those changes and get ahead of the competition.

https://sites-cliffordchance.vuturevx.com/266/25615/landing-pages/survey-link.asp

It's all in the name – floating charge security for cloud computing company

Re UKCloud Ltd (in liquidation) is another first instance case which considers whether security is fixed or floating, following closely after Re Avanti Communications Ltd (in administration). In the context of Internet Protocol (IP) addresses, it helpfully confirms the process for characterising security as fixed/floating and provides further colour on the factors relevant to the analysis.

This briefing paper considers the key points and takeaways from the case.

https://www.cliffordchance.com/briefings/2024/06/-it-s-all-in-the-name--floating-charge-security-for-cloud-comput.html