

## INTERNATIONAL REGULATORY UPDATE 15 – 19 APRIL 2019

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- **FSC accepts nine financial services providers into regulatory sandbox**
- **Recent Clifford Chance briefing: US-China ‘trade war’ and liberalisation of China’s technology transfer rules. Follow this link to the briefings section**

## **Banking Union: EU Parliament adopts banking package**

The EU Parliament has [adopted](#) the following proposed legislative measures comprising the EU Commission’s banking package:

- a proposed Regulation to amend the Capital Requirements Regulation (CRR 2);
- a proposed Directive to amend the Capital Requirements Directive (CRD 5);
- a proposed Directive to amend the Bank Recovery and Resolution Directive (BRRD 2); and
- a proposed Regulation to amend the Single Resolution Mechanism Regulation (SRMR 2).

Key changes aimed at reducing risk and making the framework for regulating and supervising banks more robust include:

- requiring global-systemically important institutions (‘G-SIIs’) to have more loss-absorbing and recapitalisation capacity;
- strengthening bank capital requirements;
- easing reporting and disclosure requirements for smaller, less complex banks; and
- greater cooperation and information sharing in the supervision and resolution of cross-border banking groups.

Once the texts are adopted by the EU Council and formal requirements met, they will be published in the Official Journal.

## **EU Parliament adopts European System of Financial Supervision review package**

The EU Parliament has [adopted](#) the European System of Financial Supervision review package.

Amongst other things, the package includes:

- changes to the existing system for supervisory convergence, including the elaboration of a strategic supervisory plan at EU level and reinforcing existing mechanisms such as peer reviews and consultations;
- reinforcing the role and powers of a management board within the European Supervisory Authorities’ (ESAs’) governance structure, which would be accountable to the EU Parliament and EU Council;
- giving the European Securities and Markets Authority (ESMA) direct supervisory powers over critical benchmarks and consolidated tape providers; and

- strengthening the role and powers of the European Banking Authority (EBA) as regards anti-money laundering supervision for financial institutions.

Once the texts are adopted by the EU Council and formal requirements met, they will be published in the Official Journal.

## **EU Parliament approves rules to protect whistle-blowers**

The EU Parliament has adopted [rules](#) intended to protect whistle-blowers revealing breaches of EU law in a range of areas including financial services, money laundering and consumer and data protection. Amongst other things, the rules:

- permit whistle-blowers to disclose information either internally or directly to national competent authorities or relevant EU institutions;
- protect whistle-blowers that choose to disclose information publicly if appropriate action was not taken in response to their initial report;
- introduce safeguards to prevent whistle-blowers, and those that assist them, from being suspended, demoted or facing other forms of retaliation; and
- require that Member States ensure whistle-blowers have access to comprehensive and independent information and advice on the procedures and remedies available to them.

The rules still need to be approved by the EU Council.

## **Capital Markets Union: EU Parliament adopts position on facilitating cross-border distribution of investment funds**

The EU Parliament has adopted at first reading its position on the EU Commission's [proposed regulation](#) facilitating cross-border distribution of collective investment funds and a [proposed directive](#) amending the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive.

The proposals are part of the Commission's action plan on the Capital Markets Union (CMU) and aim to improve the transparency of national requirements, remove burdensome requirements and harmonise diverging national rules.

The proposals will now be forwarded to the EU Council for adoption.

## **EU Parliament adopts position on proposed prudential regime for investment firms**

The EU Parliament has adopted at first reading its position on the EU Commission's [proposed regulation](#) on the prudential requirements of investment firms and the [proposed directive](#) on the prudential supervision of investment firms.

Under the terms of the texts, all investment firms would be subject to the same measures, in particular as regards capital holdings, reporting, corporate governance and remuneration, but the set of requirements they would need to apply would be differentiated according to their size, nature and complexity. The supervision package also sets out in greater detail some of the requirements under MiFID2/MiFIR that would apply to third country investment firms accessing the single market.

The proposals will now be forwarded to the EU Council for adoption.

## **Green Finance: NGFS publishes call for action report**

The Network for Greening the Financial System (NGFS), comprising 36 central banks and supervisors with the aim of meeting the goals of the Paris Agreement, has published its first comprehensive [‘call for action’ report](#) and an [open letter](#) on climate-related financial risks.

The report sets out six non-binding recommendations for central banks, supervisors, policymakers and financial institutions to facilitate the role of the financial sector in addressing climate-related risks within the remit of their mandates, including:

- integrating climate-related risks into financial stability monitoring and micro-supervision;
- integrating sustainability factors into own-portfolio management;
- bridging existing data gaps;
- building awareness and intellectual capacity and encouraging technical assistance and knowledge sharing;
- achieving robust and internationally consistent climate and environment-related disclosure; and
- supporting the development of a taxonomy of economic activities.

To translate the recommendations into operation policies and processes, the NGFS intends to develop:

- a handbook for supervisory authorities and financial institutions on climate and environment-related risk management;
- voluntary guidelines on scenario-based risk analysis; and
- best practices for incorporating sustainability criteria into central banks’ portfolio management, particularly with regard to climate-friendly investments.

Following the publication of the report, the Bank of England announced a commitment to disclose how it manages climate-related financial risks as part of its 2019/2020 annual report.

## **BaFin and UK authorities sign MoU on supervisory cooperation after Brexit**

The German Federal Financial Supervisory Authority (BaFin) has [signed](#) a memorandum of understanding (MoU) with the UK Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) in preparation for a no-deal Brexit. The agreement is based on a model MoU developed by the EBA in collaboration with the European Central Bank (ECB) and the national competent authorities (NCAs).

With this agreement, the cooperation of the German and British authorities will be placed on a legally sound basis even after Brexit has been completed. At the same time, the MoU will help prevent cliff-edge effects concerning supervisory action if the UK leaves the EU in a no-deal scenario. The new agreement regulates cooperation in various supervisory fields. These include cooperation in the licensing of companies, combating money laundering and the general exchange of information.

## **Brexit: BoE and PRA publish final post-exit policy materials**

The Bank of England (BoE) and PRA have published an updated [joint policy statement \(PS5/19\)](#) on their approach to financial services legislation in the event of a no-deal Brexit.

The statement sets out final policy materials on onshoring EU financial services regulation originally published on 28 February 2019, including:

- BoE statement of policy on the interpretation of EU guidelines and recommendations;
- PRA Rulebook instrument;
- PRA binding technical standard (BTS) instruments relating to capital requirements, CSDs, BRRD, EMIR, Solvency II, financial conglomerates and MiFID;
- PRA supervisory statements on:
  - non-binding PRA materials;
  - interpretation of reporting and disclosure requirements; and
  - depositor and dormant account protection;
- BoE (as resolution authority) BTS instruments on:
  - bank recovery and resolution; and
  - recognised clearing house rules;
- BoE (as FMI competent authority) BTS instruments on EMIR and CSDs; and
- BoE supervisory statement on non-binding materials.

All materials will come into effect on ‘exit day’ as defined in the European Union (Withdrawal) Act 2018, with the exception of Annex BF (Amendments to the Regulatory Reporting Part) to the PRA Rulebook instrument, which comes into force on 1 July 2019.

The updated policy statement does not include final versions of the transitional directions and guidance materials (originally set out in Section A of the February version of the policy statement). The BoE and PRA intend to consider whether changes are required and to publish further information in due course.

## **BoE publishes policy statement on fees regime for non-UK CCP recognition**

The BoE has published a [policy statement](#) setting out its fees regime for non-UK central counterparty (CCP) recognition.

In October 2018 the BoE consulted on fees for non-UK CCPs applying for recognition in 2018/2019. After considering the feedback received, the PRA has concluded that a fee is the fairest way to recover the costs associated with the recognition of non-UK CCPs. The PRA intends to set the fee at GBP 35,000 for applications received during the 2018/19 and 2019/20 fee years. Non-UK CCPs should expect to receive invoices once they have been recognised by the BoE.

## **PRA consults on proposed changes to its policy on settlement of enforcement action**

The PRA is consulting on proposed changes to its policy on the settlement of enforcement action.

In February 2017 the PRA published a joint policy statement with the FCA responding to a HM Treasury report that made recommendations regarding settlement policies and procedures, among other things.

This [consultation \(CP10/19\)](#) sets out proposed amendments that aim to simplify the PRA's settlement discount scheme and improve the clarity and transparency of the PRA's settlement procedure.

Comments are due by 15 July 2019. The PRA will also host a roundtable for law firms on 11 June 2019 to discuss the proposals set out in the consultation and receive initial responses.

## **PRA publishes policy statement on banks' and insurers' approaches to managing financial risks from climate change**

The PRA has published a [policy statement \(PS11/19\)](#) on enhancing banks' and insurers' approaches to managing the financial risks from climate change.

PS11/19 provides feedback to the responses the PRA received to its consultation on this issue (CP23/18). Respondents generally welcomed the PRA's proposals and some respondents urged the PRA to move more quickly and decisively on climate change issues.

PS11/19 also contains the final supervisory statement 'Enhancing banks' and insurers' approaches to managing the financial risks from climate change' ([SS3/19](#)). SS3/19 sets out the PRA's expectations regarding the strategic approach needed to deal with financial risks arising from climate change. The PRA expects firms to have an initial plan in place to address these expectations and submit an updated Senior Management Function (SMF) form by 15 October 2019.

The PRA intends to publish more detailed expectations in due course. The PRA considers that firms' practices regarding the financial risks from climate change will continue to develop and mature, and that the sophistication of firms' approaches will reflect that.

The PRA has assessed that the policy set out in PS11/19 will not be affected in the event that the UK leaves the EU without an implementation period in place.

## **PRA publishes 2019/20 business plan**

The PRA has published its [business plan](#) for 2019/20, which sets out its strategy, workplan and budget. It has also launched a [consultation](#) on its proposed fees and levies for 2019/20, which explains how it intends to fund its budget.

The PRA's strategic goals for 2019/20 include:

- maintaining robust prudential standards including the post-crisis regulatory regime;
- adapting to market changes and mitigating any potential risks;

- ensuring that firms are adequately capitalised and have sufficient liquidity;
- ensuring its prudential framework promotes operational as well as financial resilience;
- ensuring banks and insurers have established credible plans and capabilities to recover from financial stress events;
- considering the proportionality of its approach to facilitate effective competition;
- assisting in establishing a sustainable and resilient UK financial regulatory framework after Brexit; and
- ensuring resources are allocated to work that best advances the PRA's strategy and objectives.

The consultation on the PRA's proposed fees and levies for 2019/20 seeks views on:

- proposed fee rates to meet the PRA's 2019/20 annual funding requirement (AFR);
- replacing the ring-fencing implementation fee (RFIF) with the ring-fencing fee (RFF);
- maintaining the PRA's periodic fees discount to EEA firms in the context of the current UK and EU regulatory framework;
- proposed changes to the fees rules in the event of a no-deal Brexit;
- how the PRA intends to manage a shortfall from the 2018/19 AFR and distribute a surplus on the RFIF; and
- how the PRA intends to distribute the retained penalties for 2018/19.

Comments are due by 14 May 2019 and the PRA intends to implement the proposals on 1 July 2019.

## **HM Treasury consults on transposition of Fifth Money Laundering Directive**

HM Treasury has launched a [consultation](#) on the steps that the government proposes to take to meet the UK's expected obligation to transpose the Fifth Money Laundering Directive (5MLD) into national law.

5MLD makes amendments to the Fourth Money Laundering Directive on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing. The amendments and new provisions are aimed at further strengthening transparency and the existing preventative framework, whilst ensuring the UK adheres to international standards set by the Financial Action Task Force.

HM Treasury is consulting on the government's proposals and issues to be addressed where EU Member States are given the discretion to make decisions on certain aspects of 5MLD. HM Treasury also seeks views and evidence on the potential costs and benefits of the changes considered in the consultation.

Comments are due by 10 June 2019.

## **FCA publishes business plan, research agenda and proposed fees for 2019/20**

The FCA has published its [business plan](#) for 2019/20, which covers its supervisory priorities and intended policy work for the upcoming year. The plan sets out the FCA's planned activities to address issues in the investment management, retail lending, retail investments, retail banking, pensions, insurance and wholesale financial markets sectors. It also sets out several cross-sector priorities including:

- supporting an orderly transition once the UK leaves the EU;
- work on firms' culture and governance, including extending the senior managers and certification regime to all firms;
- ensuring firms treat existing customers fairly;
- developing the work being done on operational resilience;
- preventing financial crime and money laundering;
- further work on innovation, data and data ethics;
- examining intergenerational challenges in financial services; and
- considering the future of financial regulation.

Alongside the business plan, the FCA has published its [research agenda](#). Key research themes include:

- household finance and consumer behaviour;
- microstructure, integrity and stability of securities markets;
- competition, innovation, and firm behaviour and culture;
- technology, big data, and artificial intelligence; and
- regulatory efficiency and effectiveness.

Finally, the FCA has launched a [consultation](#) on its proposed 2019/20 regulatory fees and levies to fund itself, the financial ombudsman service, the money and pensions service, devolved authorities and the illegal money lending expenses of HM Treasury. Comments on the proposed fees and levies are due by 29 May 2019.

## **AMF sets out details of new regime for cryptoassets in France**

The Autorité des marchés financiers (AMF) has issued a [press release](#) on the forthcoming new regime for cryptoassets in France. Following the adoption of the Action Plan for Business Growth and Transformation (PACTE) draft bill at its final reading in the French National Assembly on 11 April 2019, the law will, once enacted, establish a framework for fundraising via the issuance of virtual tokens (Initial Coin Offerings – ICOs) and digital assets services providers (DASP).

The main provisions of this new regime relate to:

- the creation of an optional visa regime for ICOs;
- the possibility for digital assets services providers to apply for an optional licence;

- a mandatory registration requirement for digital assets custody services to third parties and for the purchase/sale of digital assets in exchange for legal tender activity;
- the possibility for certain funds to invest in digital assets; and
- measures to protect investors.

The PACTE law should be published in the French Official Journal soon.

### **BaFin issues statement on application of strong customer authentication to direct debits via the internet**

The German Federal Financial Supervisory Authority (BaFin) has [indicated](#) that strong customer authentication pursuant to section 55 para 1 no 3 of the German Payment Services Supervision Act (ZAG) is only required for direct debit payments via the internet if the payer's payment service provider is directly involved in the process of granting consent for the payment (direct debit mandate). This is only the case with the SEPA direct debit mandate if it is an 'e-mandate' within the meaning of the SEPA rules and regulations.

In the usual practice of mandating via the internet, however, the payer's mandate is granted to the payee only without the direct involvement of the payer's payment service provider. The initiation of a direct debit payment after the mandate has been granted is also not covered by the strong customer authentication pursuant to section 55 para 1 no 2 of the ZAG, since the electronic payment transaction is not initiated by the payer but by the payee.

### **CSSF issues circular on provision of investment services or performance of investment activities and ancillary services by third-country firms**

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has published a [circular \(19/716\)](#) on the provision of investment services or the performance of investment activities and ancillary services in Luxembourg by third-country firms in accordance with Article 32-1 of the law of 5 April 1993 on the financial sector, as amended (FSL).

The circular is addressed to third-country firms that (intend to) provide investment services or (intend to) propose ancillary services in Luxembourg. Before providing investment services or proposing ancillary services in Luxembourg, a third-country firm shall identify:

- the type of service it intends to provide (investment services or any other service under the FSL); and
- the type of clients it intends to serve according to the classification of clients under MiFID2, as transposed in the FSL (i.e. retail clients, 'per se' professional clients, professional clients 'on request' or eligible counterparties).

Article 32-1 of the FSL and Articles 46 *et seq.* of MiFIR will determine the applicable regime and any specific requirements. The CSSF also notes that following the entry into force of Article 32-1 of the FSL and of the circular, Circular CSSF 11/515 dealing in point (4) of Part II with the regime provided for in Article 32(5) of the FSL no longer applies to investment services provision by a third-country firm (but only for non-investment (banking) services) and is currently under review.

Part II of the circular provides detailed information on the different regimes under Article 32-1 of the FSL. For the provision of investment services in Luxembourg to retail clients or professional clients 'on request', a TCF must establish a branch in Luxembourg, in accordance with Article 32-1 (2) of the FSL and Chapter I of Part II of the circular. Chapter II of Part II of the circular clarifies, amongst other things, that the provision of investment services to 'per se' professional clients or eligible counterparties in Luxembourg may be conducted:

- through a branch established in Luxembourg, in accordance with Article 32-1 (1) of the FSL; or
- from a third country on a cross-border basis without establishing a branch in Luxembourg, based on:
  - an equivalence decision taken by the EU Commission and registration in the relevant ESMA register (European regime); or
  - a decision taken by the CSSF (national regime).

The circular specifies the conditions (including as regards third-country supervision and authorisation equivalence, cooperation between the CSSF and the third-country supervisory authority and third-country authorisation to provide investment services) and formalities that need to be fulfilled by a third-country firm wishing to provide investment services in Luxembourg to benefit from the national regime.

The CSSF further specifies that where investment services are provided at the client's sole request (reverse solicitation), the third-country firm is not required to apply for authorisation in Luxembourg or to establish a branch and refers for further guidance to ESMA's Q&A on MiFID2 and MiFIR investor protection and intermediaries topics.

The circular applies with immediate effect.

## **APRA releases new enforcement approach**

The Australian Prudential Regulation Authority (APRA) has [published](#) its new enforcement approach. The new enforcement approach sets out how APRA will approach the use of its enforcement powers to prevent and address serious prudential risks, and to hold entities and individuals to account.

The new enforcement approach is founded on the results of APRA's enforcement review, which was formally commissioned in November 2018. The review, conducted by APRA Deputy Chair John Lonsdale, made seven recommendations designed to help APRA better leverage its enforcement powers to achieve sound prudential outcomes.

APRA Chair Wayne Byres has stated that APRA will implement all the recommendations, including:

- adopting a 'constructively tough' appetite to enforcement and setting it out in a board-endorsed enforcement strategy document;
- ensuring APRA supervisors are supported and empowered to hold institutions and individuals to account, and strengthening governance of enforcement-related decisions;

- combining APRA's enforcement, investigation and legal experts in one strengthened support team, and ensuring resources are available to support the pursuit of enforcement action where appropriate; and
- strengthening cooperation on enforcement matters with the Australian Securities and Investments Commission (ASIC).

With the release of APRA's revised enforcement approach, the new enforcement appetite comes into effect immediately. Mr. Byres indicated support for the recommendations on legislative change, and that these would be referred to the government for its consideration. He also welcomed the recent passage of the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2019 as a useful complement to APRA's renewed enforcement appetite.

### **HKMA issues circular on introduction of tiered account services by Hong Kong banks**

The Hong Kong Monetary Authority (HKMA) has issued a [circular](#) to draw authorised institutions' attention to the introduction of tiered account services by some retail banks and the HKMA's related supervisory expectations.

Based on feedback from the business community, especially small- and medium-sized enterprises (SMEs), start-up companies and companies from outside Hong Kong which are seeking to establish a presence in Hong Kong, the HKMA says it is evident that some business customers do not require the full range of banking services generally offered by bank accounts (traditional accounts), particularly at the initial stage of banking relationships. The HKMA has thus been exploring with banks the introduction of a new tier of bank accounts ('Simple Bank Accounts' or SBAs) which offer a narrower set of banking services, and correspondingly, require less extensive customer due diligence (CDD) measures to be carried out at account opening.

The HKMA believes that there is no 'one-size-fits-all' approach for SBAs and individual banks may, based on their own risk assessments, determine the scope of services to be offered and the extent of CDD measures to be applied in a commensurate manner. Tiered accounts may transition to accounts offering a wider range of services, and in such cases authorised institutions would conduct any further necessary CDD measures commensurate with the risks involved. According to the HKMA, the streamlined account opening process of SBAs would offer more choices and enhance customer experience, particularly when customers cannot readily furnish certain CDD information/documents required for traditional accounts and yet do not require the full range of services at the initial stage. Banks are expected to clearly communicate the scope of services of SBAs to the customers during the account opening process.

Some retail banks have already launched SBAs for corporate customers. The HKMA is encouraging authorised institutions to support the initiative and introduce SBAs that fit their individual circumstances to further facilitate access to banking services in Hong Kong.

### **FSC accepts nine financial services providers into regulatory sandbox**

The Financial Services Commission (FSC) has [announced](#) the first batch of financial services providers accepted into its financial regulatory sandbox. Of

the 19 applications shortlisted for priority review, nine firms have been allowed to test their innovative services and products in the regulatory sandbox. The acceptance of the remaining ten applications in the regulatory sandbox will be decided by the FSC in its meeting scheduled for 2 May 2019.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **The US-China ‘trade war’ and liberalisation of China’s technology transfer rules**

China’s technology transfer regime has been put into the spotlight in the context of the US-China ‘trade war’. Shortly after China’s state legislature passed the landmark Foreign Investment Law (FIL), the Chinese government quietly announced amendments to the Administrative Regulation on Technology Import and Export (TIER), which became effective on 18 March 2019. TIER is the primary regulation in the field of technology transfers into and out of China. The latest revisions remove certain provisions in respect of foreign technology transfer into China that were subject to the US criticism of China’s ‘forced technology transfer’ policy and have caused substantial confusion over the years.

This briefing paper discusses the recent revisions to TIER and what parties can do now.

[https://www.cliffordchance.com/briefings/2019/04/the\\_us-china\\_tradewarandliberalisationo.html](https://www.cliffordchance.com/briefings/2019/04/the_us-china_tradewarandliberalisationo.html)

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