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Welcome to the EU edition of the Financial Services and Regulation Bulletin, featuring a full round-up of the main regulatory and legislative developments in the financial services sector over the past two months.

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PROGRESS OF LEGISLATIVE PROPOSALS

1. POLITICAL AGREEMENT ON MIFID AND MIFIR

On 14 January 2014, representatives of the European Parliament and the Greek Presidency of the EU Council reached a broad political agreement on two legislative proposals to overhaul the EU's financial markets regulatory regime. The proposed Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) are intended to expand the scope of regulated activity, enhance conduct of business rules, and fulfil the EU's outstanding G20 commitments on over-the-counter (OTC) derivative markets reforms. The proposals also seek to address popular concerns regarding speculation in commodity derivatives and the growth of high-frequency trading, as well as to promote greater competition in derivatives trading in Europe.

The negotiations did not address the majority of MiFID II and MiFIR provisions, which have already been agreed through political and technical trialogues[1] undertaken since July 2013. Instead, the negotiations focused exclusively on questions relating to the scope of MiFID II, position limits for commodity derivatives, provision of services by third country firms, and the MiFIR open access provisions.

There is as yet no combined or definitive text recording the political agreement. However, based on reports by the European Commission and European Parliament and the statement of Commissioner Barnier, the highest Commission official responsible for the MiFID reforms, the key elements of the agreement appear to be as follows:

- **Scope: commodity derivatives and insurance**

  The Greek Presidency and the European Parliament agreed the extension of the highly contentious definition for commodity derivatives. It expressly excludes gas and power contracts which fall within the EU Regulation on Energy Market Integrity and Transparency (REMIT). The EU legislators have further agreed an extended derogation from clearing and margin requirements for coal and oil derivative contracts. In addition, they have agreed that investments that involve contracts of insurance will be regulated by the proposed Insurance Mediation Directive (IMD 2), rather than MiFID II.

- **Third country regime**

  The agreement confirmed the result of the previous trialogue, according to which MiFID II will harmonise the regime for granting access to EU markets for firms from third countries based on an equivalence assessment of third country jurisdictions by the European Commission, that is, without the need to establish a branch in the Member State in which they operate. For a transitional period of three years, and then pending the equivalence decision by the Commission, national third country regimes will continue to apply.

  The harmonised regime will apply only to the cross-border provision of investment services and activities provided to professional and eligible counterparties. Retail investors will be excluded from the harmonised regime. As a result, each Member State will have discretion as to whether a third country firm must open a branch before offering retail banking services in that Member State.

[1] Under the EU's ordinary legislative procedure for introducing new legislation, the European Parliament and the EU Council need to agree on a common regulatory text, with the European Commission acting as a mediator. This process is known as "trialogue".

- **Position limits**

  The agreement on position limits is based on the proposal drafted by the Greek Presidency. In short, position limits would be set by national competent authorities on the basis of a methodology defined by the European Securities and Markets Authority (ESMA). Limits would be applied to net positions in commodity derivatives (a) traded on a trading venue and (b) "economically equivalent OTC contracts". Limits would not apply to hedge positions of or held on behalf of non-financial counterparties.

- **Open access**

  The new legislation will establish a harmonised EU regime for non-discriminatory access to trading venues, central counterparties (CCPs), and benchmarks for trading and clearing purposes, subject to certain transitional rules. Smaller trading venues and newly-established CCPs will be able to take advantage of optional transition periods.

  Subject to further confirmation, EU legislators agreed an overall "transitional period" of 30 months for the application of the open access provisions. As a result, the open access provisions would only apply 30 months after the application of MiFIR.

- **Next steps**

  The EU institutions will hold a technical trialogue meeting on 28 January 2014, during which they will iron out the technical details of the agreement. Legislators representing the European Parliament hope to schedule a plenary vote on the final legislative proposals in March 2014 (10-13 March). However, that timing will depend on how many issues are reopened by Member State governments in the course of technical negotiations and how quickly a final text can be agreed.

2. Political Agreement on the Bank Recovery and Resolution Directive (BRRD)

On 20 December 2013, the Lithuanian Presidency of the EU Council and the representatives of the European Parliament agreed the compromise text of a directive aimed at harmonising national rules on bank recovery and resolution (Bank Recovery and Resolution Directive, or BRRD). The Directive will provide Member States' authorities with common powers and instruments to tackle bank crises and minimise taxpayers' exposure to banks' losses. These powers and instruments include: (i) preparatory and preventative measures, (ii) early supervisory intervention, and (ii) resolution.

- **Resolution funds, recovery and resolution plans**

  The Directive requires Member States to set up resolution funds that will help banks to recover or to wind the banks down. The resolution funds will be financed by bank contributions and, by 2025, they should reach 1% of covered deposits of the banks in a given Member State. Moreover, banks will have to draw up and regularly update their recovery plans. In addition, Member States' resolution authorities will have to prepare resolution plans for each bank.

- **Bail-in**

  The Directive establishes a "bail-in" (internal recapitalisation) process aimed to ensure that the debts of a struggling bank are paid by the bank's creditors and not taxpayers. Bail-in provisions, which enter into force in January 2016, will enable Member States' resolution authorities to write down or convert into equity claims of shareholders and creditors of banks which are failing or likely to fail. Shareholders and creditors will have to cover a minimum level of losses equal to 8% of banks' total liabilities before the banks can access the resolution fund. Certain types of liabilities – such as covered deposits or secured liabilities – will be permanently excluded from any bail-in.

- **Use of public funds**

  The Directive allows recapitalisation of banks with public funds only in exceptional circumstances and only after 8% of the bank's assets have been bailed-in.

- **Minimum loss absorbing capacity**

  Member States' resolution authorities must set minimum requirements for own funds and eligible liabilities (MREL) in order to ensure that banks always have sufficient loss-absorbing capacity. The MREL will be based on the size, risk and business model of each bank. Based on a review to be conducted in 2016 and subsequent recommendations from the European Banking Authority (EBA), the Commission will introduce harmonised MREL applicable to all banks across the EU.

- **Next steps**

  The political agreement now needs to be officially endorsed by the EU Council and the European Parliament's plenary. According to the Parliament's procedure file, the vote will take place during the second plenary session in April 2014 (14-17 April). Once finalised, the Directive will enter into force on 1 January 2015.

3. Political Agreement on the Deposit Guarantee Schemes Directive (DGSD)

On 17 December 2013, the Lithuanian Presidency of the EU Council and the representatives of the European Parliament reached a political agreement on the proposed amendments to the Deposit Guarantee Schemes Directive (DGSD). Based on a memorandum published by the European Commission, the main aspects of the agreement cover the financing of deposit guarantee schemes (DGS), repayments made by DGS and information that must be provided to depositors about protection under a DGS.

- **Financing of DGS**

  The recast Directive confirms that DGS shall be financed by banks and not taxpayers. The Directive will require the funds for DGSs to reach 0.8% of covered deposits, although the Commission may permit Member States to lower the target level for DGS to 0.5% of covered deposits in the case of highly concentrated banking sectors. Banks will be required to contribute to the funds according to their risk profiles, with banks carrying out riskier activities contributing more.

- **Repayments made by DGS**

  The recast Directive will reduce the deadline for depositors to receive compensation from customers from the current 20 working days to 7 working days in 2024.

- **Information for depositors**

  When depositing money at a bank, depositors will be obliged to countersign a standardised information sheet containing all relevant information about the coverage of the deposit by the responsible DGS. In addition, banks will be obliged to inform their depositors about DGS protection of their deposits on the statements of account.

- **Next steps**

The political agreement now needs to be officially approved by the EU Council and the European Parliament's plenary. On 9 January 2014, the ECON agreed to vote for the compromise agreement during the second plenary session in April 2014 (14-17 April).

4. Political Agreement on Improving Securities Settlement and Central Securities Depositaries (CSD Regulation)

On 18 December 2013, the Lithuanian presidency of the EU Council and the representatives of the European Parliament reached a political agreement on the proposed Regulation on improving securities settlement and central securities depositaries (CSD Regulation). The Lithuanian Presidency confirmed the agreement in a press release.

The proposed Regulation creates a common authorisation, supervision and regulatory framework for CSD and improves the securities settlement process by introducing the dematerialisation requirement, harmonising the settlement period and determining settlement discipline measures.

The EU Council and the European Parliament will now negotiate the technical details of the proposed Regulation, with the Parliament due to consider the proposed Regulation during its plenary session scheduled for March 2014 (2-3 March).

5. Political Agreement on Criminal Sanctions for Insider Dealing and Market Manipulation (CSMAD)

On 20 December 2013, the European Parliament and the Lithuanian Presidency of the EU Council reached a political agreement on the proposed Directive on criminal sanctions for insider dealing and market manipulation (CSMAD). On 21 December 2013, the Council published a note containing the final compromise text for the CSMAD. CSMAD and the proposed Regulation on insider dealing and market manipulation (MAR) (collectively referred to as MAD II) will replace the Market Abuse Directive (MAD).

This agreement will enable the Parliament to adopt MAD II at first reading. On 9 January 2014, the European Parliament's Economic and Monetary Affairs Committee (ECON) agreed to vote for the CSMAD agreement in the first plenary session of February 2014 (3–6 February). MAR will also need aligning with the amendments to the Markets in Financial Instruments Directive (MiFID II).

6. EU Council agrees position on Undertakings for Collective Investment in Transferable Securities (UCITS V)

On 4 December 2013, the EU Council agreed its position on a series of revisions to the regulatory regime applicable to undertakings for collective investment in transferable securities (UCITS V). The potential areas of reform include (i) the UCITS depositary function; (ii) remuneration; (iii) sanctions; and (iv) access to telephone and data records. Thanks to the intergovernmental agreement, the Council can start negotiations with the European Parliament, with the aim of adopting the proposed changes at first reading.

7. European Parliament and EU Council adopt the Mortgage Credit Directive ("MCD")

On 10 December 2013, the European Parliament voted to adopt the proposed Mortgage Credit Directive (MCD). On 12 December 2013, the EU Council confirmed that the Parliament's position reflects what had been previously agreed between the trialogue. The Council adopted the Directive on 28 January 2014. Following its adoption, Member States will have two years to transpose the Directive into their national laws.

The Directive will apply to (i) credit intermediaries (*i.e.*, persons providing information and assistance to consumers looking for a mortgage credit and/or concluding mortgage agreements on their behalf) and (ii) creditors (*i.e.*, persons granting or promising to grant a mortgage credit). It focuses on residential property and concerns: credit agreements secured by a mortgage or other comparable security on residential property or secured by a right relating to residential property; credit agreements to purchase or retain a property; and certain credit agreements aimed at financing the renovation of a property.

8. EU Council and European Parliament ready to negotiate the Regulation on the Single Resolution Mechanism (SRM Regulation)

On 17 and 18 December 2013, the European Parliament and the EU Council agreed their respective positions on the proposed Regulation establishing a single resolution mechanism (SRM) for the European banking union. Pursuant to the SRM, a single resolution process would apply to all banks established in EU Member States that participate in the single supervisory mechanism (SSM). Under the SSM, the European Central Bank (ECB) will carry out key supervisory tasks for banks in EU Member States participating in the European banking union.

The Council's terms of agreement are available here and the Parliament's here. The Council and Parliament will now start negotiations on the SRM, with the Parliament scheduled to consider the SRM legislative proposal at its plenary session in March 2014 (10–13 March).

9. EU Council and European Parliament ready to negotiate the Directive on Payment Accounts

On 12 and 20 December 2013, the European Parliament and the EU Council agreed their respective positions on the proposed Directive on the comparability of fees relating to payment accounts, payment account switching, and access to payment accounts with basic features (Directive on Payment Accounts). The Council's terms of agreement are available here and the European Parliament's here. Those agreements enable negotiations between the Parliament and the Council, with the aim of adopting the Directive at first reading.

10. EU Council publishes compromise position on the prevention of the use of the financial system for the purpose of Money Laundering and Terrorist Financing (MLD4)

On 13 January 2014, the Council of the EU published a second compromise proposal (dated 22 November 2013) on the European Commission's proposal for the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (MLD4). MLD4 aims to strengthen further the EU's regime to fight money laundering and terrorism financing and ensure that the EU framework is aligned with the standards developed by the Financial Action Task Force, an inter-governmental body developing and promoting policies to combat money laundering and terrorist financing.

The Parliament's procedure file on MLD4 states that the Parliament will consider a report on MLD4 at its March plenary session (10–13 March 2014).

11. European Parliament to consider the amendments to the Insurance Mediation Directive (IMD2) at 24 to 27 February 2014 Plenary Session

On 9 January 2014, the European Parliament updated its procedure file on the proposed Directive amending the Insurance Mediation Directive (IMD2). The proposal aims to extend the scope of the

IMD to all sellers of insurance products, including insurance companies that sell directly to customers. It would also introduce a light-touch declaration procedure for certain intermediaries; new rules for the management and mitigation of conflicts of interest; special disclosure requirements to suppliers bundling products together; stricter selling practices for firms selling insurance packaged retail investment products (PRIPs); and mutual recognition of professional qualifications. In addition, it would strengthen the requirements for the out-of-court settlement of disputes; increase the harmonisation of administrative sanctions and measures for breach of key IMD provisions; and simplify the procedure for cross-border entry to insurance markets across the EU.

The IMD2 procedure file now indicates that the Parliament will consider the legislative proposal during its second February 2014 plenary session (24–27 February).

12. European Parliament to consider the review of the European System of Financial Supervision (ESFS) at 24 to 27 February 2014 Plenary Session

The European Parliament updated its procedure file on the review of the European system of financial supervision (ESFS), which includes the European Systemic Risk Board (ESRB) and the three European Supervisory Authorities (ESAs) *i.e.*, the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA).

The ESFS procedure file confirms that the Parliament will consider the legislative proposal during its second February 2014 plenary session (24–27 February).

13. European Parliament to consider European Long-Term Investment Funds Regulation (ELTIF Regulation)

The European Parliament updated its procedure file on the European Long-Term Investment Funds Regulation (ELTIF Regulation). ELTIF is a type of a collective investment vehicle allowing investments into companies and projects that need long-term capital that finances (i) tangible assets (*e.g.*, energy, transport, communication infrastructures, industrial and service facilities, housing and climate change technologies) and (ii) intangible assets (*e.g.,* education and research and development).

The ELFIT procedure file indicates that the Parliament will consider the legislative proposal during its second April 2014 plenary session (14-17 April).

New Regulations

1. Draft Regulation on types of Alternative Investment Fund Managers

On 17 December, the European Commission adopted a delegated Regulation that supplements the Alternative Investment Fund Managers Directive (2011/61/EU, AIFMD) with regard to regulatory technical standards (RTS) that specify the characteristics of alternative investment fund managers (AIFM) managing open-ended alternative investment funds (AIF). A draft text of the Regulation is now available on the Commission's website for information. The Regulation will enter into force 20 days after its publication in the EU's Official Journal (OJ).

2. Regulation setting out implementing technical standards on disclosure of own funds under the Capital Requirements Regulation

On 20 December 2013, the European Commission adopted Regulation 1423/2013 setting out implementing technical standards (ITS) relating to the disclosure of own funds requirements under the Capital Requirements Regulation (Regulation 575/2013, CRR). The ITS require firms to describe the main features of their capital instruments, complete a general own funds disclosure template, and a transitional own funds disclosure template.

The Regulation was published in the EU's Official Journal (OJ) on 31 December 2013 and will apply from 31 March 2014.

3. Draft Regulation on RTS relating to own funds under the Capital Requirements Regulation

On 7 January 2014, the Commission adopted a delegated Regulation setting out regulatory technical standards (RTS) relating to own funds requirements under the Capital Requirements Regulation (Regulation 575/2013, CRR). The Regulation will be published in the OJ if the European Parliament or the Council do not object to it within the time period specified in the Regulation on the European Banking Authority (EBA). The draft text of the Regulation is available on the Council's website for information.

The RTS cover areas including: common equity tier 1 (CET1) capital; additional tier 1 (AT1) capital; deductions from CET1 capital and from own funds in general; transitional provisions for own funds in terms of grandfathering; the conditions under which competent authorities may determine that an undertaking qualifies as a mutual, cooperative society, savings institution or similar institution for the purposes of the CRR own funds requirements; specification of the concept of gain on sale.

4. Draft regulation with technical standards on supervisory reporting of institutions under the Capital Requirements Regulation

On 8 January 2014, the European Commission adopted draft implementing technical standards (ITS) relating to supervisory reporting of institutions under the Capital Requirements Regulation (Regulation 575/2013, CRR) and Annexes I to XV, to which the draft ITS refer. The ITS set out in the draft Regulation relate to own funds requirements and financial information; losses stemming from lending collateralised by immovable property; large exposures and other largest exposures; leverage ratio; and liquidity coverage requirements and net stable funding requirements.

The Commission published the draft for information only. It allows interested parties to prepare for the new requirements relating to supervisory reporting by institutions under the framework established by the CRR and the Directive on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (2013/36/EU, CRD IV). Within the next couple of months – once the ITS are translated into all the official EU languages – the Commission services intend to submit the ITS to the College of Commissioners for their formal adoption.

5. Regulation on applying FICOD capital adequacy calculation methods

On 22 January 2014, the European Commission published the text of the delegated Regulation setting out regulatory technical standards (RTS) relating to the consistent application of the calculation methods under Article 6(2) of the Financial Conglomerates Directive (2002/87/EC, FICOD).

The text of the draft Regulation is now available on the Commission's website for information. The Regulation will enter into force 20 days after its publication in the in the EU's Official Journal (OJ).

NEW GUIDANCE: UPDATED ESMA Q&AS ON EMIR IMPLEMENTATION

On 20 December 2013, the European Securities and Markets Authority (ESMA) published an updated version of its questions and answers document (Q&A) on the implementation of Regulation on OTC derivatives, central counterparties and trade repositories (Regulation 648/2012, EMIR).

The revised Q&A clarify reporting of on-exchange derivatives under EMIR, amongst other matters. They also clarify the scope and content of the reporting rules under EMIR and MiFID and which firms are covered by them.

JUDGMENTS: COURT OF JUSTICE RULES THAT ESMA HAS THE POWER TO RESTRICT SHORT SELLING

In a judgment adopted on 22 January 2014, the Court of Justice ruled that Article 28 of Regulation 236/2012 on short selling and certain aspects of credit default swaps does not confer any additional powers to the European Securities and Markets Authority (ESMA). Article 28 of the Regulation allows ESMA to adopt measures that the EU Member States' financial markets must follow where there is a threat to (i) the orderly functioning and integrity of financial markets or (ii) the stability of the EU financial system.

In May 2012, the United Kingdom challenged Article 28 of the Regulation before the Court of Justice, claiming, amongst other issues, that it gives ESMA too much discretion. The Court rejected those claims. In its judgment, the Court found that Article 28 does not give ESMA any additional powers and that ESMA's discretion is limited by various conditions and criteria set out in that article. In particular, first, ESMA may only adopt measures pursuant to Article 28 in order to address a threat to the financial markets or the stability of the EU's financial system that may have cross-border implications. Moreover, ESMA may only adopt the Article 28 measures if no competent national authority has taken measures to address the threat or if the national measures have not proven successful. Second, ESMA is required to take into account the extent to which the Article 28 measures (i) address the threat to the financial markets or the stability of the financial system of the EU or (ii) significantly improve the ability of the competent national authorities to monitor the threat. ESMA must also ensure that such measures do not create a risk of regulatory arbitrage and do not negatively impact the efficiency of financial markets. Third, ESMA must consult the European Systemic Risk Board (ESRB) and, if necessary, other relevant bodies, as well as notify the competent national authorities before it adopts any measures pursuant to Article 28. Finally, the European Commission may specify criteria and factors that ESMA must take into account when determining in which cases there is a threat to (i) the orderly functioning and integrity of financial markets or (ii) the stability of the EU financial system.

UNITED KINGDOM DEVELOPMENTS

Please see our United Kingdom Bulletin for more information on developments in the United Kingdom.

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