Financial Markets in brief – new regulations and other developments

There have been many developments in national and European financial markets regulation during the past month. We provide a brief overview of these developments, which include the European Parliament’s adoption of a package of legislative measures on the review of the European system of financial supervision, delegated regulations and guidance under the Prospectus Regulation, and a Dutch Central Bank brochure on its supervision of small and medium-sized banks.

Highlighted publications

Package adopted on review of European system of financial supervision (ESFS)

On 16 April 2019, the European Parliament adopted a package aimed at improving the supervisory framework for European financial institutions. The European system of financial supervision comprises the three European supervisory authorities (ESAs) – EIOPA, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) – as well as the European Systemic Risk Board (ESRB). Among other things, the package improves the existing system for supervisory convergence and reviews the governance structure and powers of each of the three ESAs. The package strengthens the EBA’s role and powers in anti-money laundering supervision.

The next step is for the Council of the EU to adopt the package.

Changes to Euronext rules

Euronext has revised its Harmonised Rules (Rule Book I). The main changes include:

- the exclusion of liability provision has been made more legally sound while recognising that the Rule Book provisions cannot override applicable national law;
- a clarification of the steps Euronext may take in respect of issuers who fail to publish periodic financial information in a timely manner; and
- minor changes to reflect Euronext’s acquisition of the Irish Stock Exchange (now trading as Euronext Dublin).

Prudential supervision of small and medium-sized banks

In September 2017, the Netherlands Court of Audit published the results of its review of the Dutch Central Bank’s supervision of small and medium-sized small banks. One of the Court of Audit’s recommendations was that the Dutch banking supervisor take measures to be more transparent in the process of setting capital and liquidity requirements for small and medium-sized banks.

In accordance with this recommendation, the Dutch Central Bank published a brochure on its supervision of small and medium-sized banks in March 2019. The brochure includes a description of the supervisory review and evaluation process (SREP) and the determination of capital and liquidity requirements for small and medium-sized banks.

Prospectus Regulation

The Prospectus Regulation applies as of 21 July 2019 and will replace the Prospectus Directive. The regulation will be supplemented by a number of delegated acts and by guidance provided by ESMA. Last month, the following draft regulations and guidance were published by the European Commission and ESMA:

Delegated regulations

The Commission has published two draft delegated regulations supplementing the Prospectus Regulation:

- Commission Delegated Regulation supplementing the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.
- Commission Delegated Regulation with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal.

The delegated regulations will apply as of 21 July 2019.

ESMA’s guidelines on risk factors

ESMA has published its final guidelines on risk factors. The new Prospectus Regulation states that the primary purpose of including risk factors in a prospectus is to ensure that investors can make an informed assessment of risk. ESMA emphasises that risk factor disclosure must not be used to mitigate liability for the information contained in a prospectus. The ESMA guidelines, which are directly addressed to the national competent authorities, explain the criteria and give examples of risk factors that meet the criteria. The document also contains guidelines on the number of risk factors, the presentation of risk factors across different categories, and the use of headings.

ESMA’s advice – exemptions for takeovers, mergers and demergers

Issuers may offer securities connected with a takeover, merger or demerger without publishing a prospectus if there is a document available for investors which describes the transaction and its impact on the issuer. ESMA has issued its technical advice regarding the minimum information to be included in this document. In its advice, ESMA proposes a number of alleviations of the disclosure requirements for issues which can benefit from the
exemption.

Q&As Prospectus Regulation
ESMA has published its first set of Q&As relating to the transition from the Prospectus Directive to the Prospectus Regulation. The document includes the following guidance:

- Under the Prospectus Regulation, it will still be possible to passport a prospectus approved before 21 July 2019, providing the notification is issued pursuant to the national law of the member state where the prospectus was approved.
- All advertisements published after 21 July 2019 must comply with the Prospectus Regulation, even if they relate to securities that are subject to a prospectus approved before this date.
- ESMA guidance relating to the Prospectus Directive (such as the Q&As relating to prospectuses and the ESMA update of the CESR recommendations) should be applied to prospectuses drawn up under the Prospectus Regulation to the extent they are compatible with the Prospectus Regulation.

National thresholds, below which the obligation to publish a prospectus, does not apply
Under the Prospectus Regulation, no prospectus will be required for offers of securities to the public below EUR 1 million. Member states are able to set a higher threshold for their own domestic market. In the Netherlands, the threshold has been raised from EUR 2.5 to EUR 5 million, and in order to improve transparency, ESMA has published a table of the national thresholds chosen. The table also contains a summary of any national rules which apply to offers below the threshold and hyperlinks to the relevant national legislation and rules.

European Parliament scheduled to vote on further extending pension funds’ temporary exemption from clearing obligation
In 2017, we reported on a proposal to amend EMIR aimed at improving the functioning of the derivatives market in the EU. Until 17 August 2018, pension funds were exempt from the central clearing obligation under EMIR. Part of this proposal includes an extension of this exemption. As the proposal was not adopted before the exemption expired, the European supervisor, ESMA, has called on national supervisors not to enforce the clearing obligation, because the legislative process is expected to be finalised soon. The Dutch Central Bank and the AFM have confirmed that they will adhere to the ESMA’s advice.

Following the political agreement reached between the European Parliament and the Council of the EU, the European Parliament is now scheduled to vote on the EMIR amendment proposal on 18 April 2019. After this, the Council of the EU will also need to adopt the regulation.

ESMA publishes new MAR Q&As
ESMA has also published an update of its MAR Q&As. This includes questions on disclosure of inside information by collective investment undertakings and disclosure of inside information concerning emission allowances.
EIOPA licensing approach to InsurTech

The European Insurance and Occupational Pensions Authority (EIOPA) has published a report on InsurTech, covering best practices on licensing requirements, peer-to-peer insurance and the principle of proportionality. Although another recent report on innovation facilitators has found that 24 supervisory authorities have implemented innovation facilitators, this EIOPA report shows that most supervisory authorities have limited experience with InsurTech companies. At this stage however, the EIOPA believes there is no need for further regulatory steps on licensing. It recommends that supervisory authorities adapt their internal processes and know-how to reflect the impact of digital transformations and to avoid diverging supervisory practices in relation to the cross-border and cross-sectoral nature of some InsurTech developments. The EIOPA will work with InsurTech firms and supervisory authorities to prepare for potential risks associated with InsurTech.

Other publications

EC

- Draft Delegated Regulation amending Delegated Regulation (EU) 2016/2251 supplementing EMIR as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP, EC, 28 March 2019
- Draft Delegated Regulation amending Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 supplementing EMIR as regards the date at which the clearing obligation takes effect for certain types of contracts, EC, 28 March 2019
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- Recognition of financial benchmarks in Australia, EC, 19 March 2019
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- Capital Markets Union: Commission welcomes agreement on new rules to further improve access to capital markets for smaller businesses, EC, 6 March 2019
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- Press release: MEPs call for clearer criteria to boost environmentally sustainable investments, EP, 12 March 2019
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