FINANCIAL SERVICES: MAIN LEGISLATION

Financial services regulation and supervision in the EU has received great attention during the global financial crisis. In the post-crisis period, the EU undertook a major overhaul of its financial services policy in order to bring back stability and confidence in the financial system. More than 40 new measures have been proposed in recent years, driven by initiatives such as the Banking Union and Capital Markets Union. The reform of the financial sector is still an ongoing process.

LEGAL BASIS

— For the most part, Articles 49, 56 and 63 of the Treaty on the Functioning of the European Union (TFEU) on freedom of establishment, freedom to provide services and free movement of capital form the legal basis for directives and regulations dealing with financial services;

— Full details on key legislation and current developments can be found on the website of the Commission's Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA).

BANKING AND PAYMENT SERVICES

A. Capital Requirements Directive - 'CRD' (Directive 2013/36/EU) and Capital Requirements Regulation - 'CRR' (Regulation (EU) No 575/2013), jointly referred to as CRD IV

1. Purpose and content

The purpose of the directive and the regulation is to establish a modern risk-sensitive legal framework for credit institutions which takes account of the international framework accords on own capital requirements for credit institutions (Basel III) drawn up by the Basel Committee on Banking Supervision. The provisions, which previously comprised two directives, are intended to boost the EU economy and also to create greater financial stability, with benefits for both businesses and consumers. The directives update the rules on authorisation and operations and the own capital framework, with a view to making the latter more comprehensive and more risk-sensitive. For example, the CRD provides for explicit measurement of operational risk and facilitates improvements in risk management through an authorisation scheme for internal rating systems. Subsequent revisions (CRD II-IV) have introduced, for example, provisions on re-securitisations and remuneration policies, as well as higher capital requirements. The CRR Regulation is intended to constitute a 'single rule book'. In November 2016, the Commission proposed amendments to the CRD IV/CRR, mainly in order to reflect the latest developments within the framework of the Basel Committee and the Financial Stability Board with regard to a binding leverage ratio, a binding net stable funding ratio (NSFR), more risk-sensitive own

funds requirements and the 'total loss-absorbing capacity' requirement for global systemically important banks to hold minimum levels of capital and other instruments.

2. Assessment

CRD IV is a transposition of the Basel Framework Agreement tailored to the European financial services sector which takes into account Parliament's 2010 priorities (improved capital base, liquidity standards, countercyclical measures, a leverage ratio, and the coverage of counterparty credit risk (CCR)). The many detailed implementation provisions to be laid down are, however, a challenge.

B. Payment Services Directive -'PSD' (Directive 2007/64/EC) – repealed by PSD 2 (Directive (EU) 2015/2366)

1. Purpose and content

This directive facilitates electronic payments throughout the EU and establishes a 'Single Euro Payments Area' (SEPA). Further objectives include improved consumer protection, through information requirements, and increasing competition by opening up markets under harmonised market access rules. PSD has been supplemented by Regulation (EU) No 924/2009 and Regulation (EU) No 260/2012. Although the SEPA instruments were introduced EU-wide in late 2010, little use was made of them. Regulation (EU) No 260/2012 has accordingly been adopted to make the transition from national to Europe-wide payment instruments. The revised directive (PSD 2) was adopted in autumn 2015, repealing the PSD. It lays down strict security requirements for the initiation and processing of electronic payments and for the protection of consumers' financial data. It also opens up the market to providers offering payment services based on access to information about the payment account. It reduces the liability for unauthorised payments and establishes an unconditional refund right for direct debits in euros. Surcharging, for instance for card payments, is prohibited, whether the particular payment instrument is used in a shop or online. PSD 2 entered into force on 12 January 2016 and has to be transposed into national law by 13 January 2018. Regulation (EU) 2015/751 on interchange fees is also an important element of the payment services legislation framework in that it caps the level of interchange fees charged between banks in order to reduce costs for retailers and consumers when using payment cards.

2. Assessment

Some aspects of the PSD have been criticised, for example the fact that the (decisive) IBAN number does not have to be cross-checked against the account holder's name, allowing transfers to be made even when the two do not match. No upper limit can be imposed on direct debits, and there is no possibility of recall once a transfer has been accepted. There are also security and data protection concerns about PSD 2.

SECURITIES MARKET SECTOR

A. Markets in Financial Instruments Directive - 'MiFID II' (Directive 2014/65/EU) and Markets in Financial Instruments Regulation - 'MiFIR' (Regulation (EU) No 600/2014)

1. Purpose and content

From 2004, MiFID I (Directive 2004/39/EC, repealed) laid down uniform standards governing securities trading, which made for more competition and improved investor protection, for example through greater transparency regarding the commission which can be charged for investment advice, and more integrated provision of financial services. Investors must be made aware of all fees that they will be required to pay and be fully informed about products and

the risks associated with them. It was hoped that this regulatory framework would help to boost investor confidence and thus increase the inflow of international capital to Europe. A revision in the form of a recast of the directive ('MiFID II') and a regulation ('MiFIR') were adopted in 2014, establishing a new legal framework. The new legal framework introduces a number of provisions aimed at enhancing consumer protection. For instance, investment firms' remuneration practices cannot conflict with their duty to act in the customer's best interest. It also aims to enhance regulation and transparency of financial markets and ensure more competition. It addresses the risks associated with technological developments such as algorithmic and high-frequency trading. The date of application of MiFID II and MiFIR, initially set for the beginning of 2017, was subsequently deferred by one year, to 3 January 2018.

2. Assessment

Investor-protection bodies complain, for example, that investors bear the burden of proof in cases where banks have given misleading or incomplete advice, even though it is the investment adviser who is required to document such advice. Furthermore, breaches of regulatory provisions cannot give rise to a claim under civil law, and investors are consequently not entitled to compensation. As this area is regulated by a 'Lamfalussy directive', it requires numerous implementing provisions. This also applies to the new directive and regulation.

B. Directive concerning undertakings for collective investments in transferable securities - 'UCITS' (Directive 2009/65/EC)

1. Purpose and content

Since 1985 the UCITS Directive has provided for harmonised investment fund shares to receive a 'European passport', so that, once they have been approved in a Member State, they can be sold in all other Member States. The product range covered has been continually expanded, and investor protection aspects have been taken into account. The recast directive clarifies the provisions on the EU passport for management companies, eliminates bureaucratic obstacles to cross-border marketing, and lays down rules governing fund mergers and master-feeder structures, demands on deposit banks, remuneration policy and liability rules, and penalties. There are separate regulations governing European long-term investment funds (ELTIF – Regulation (EU) 2015/760), venture capital funds (EuVECA – Regulation (EU) No 345/2013), and European social entrepreneurship funds (EuSEF – Regulation (EU) No 346/2013). Directive 2011/61/EC relates to alternative investment fund managers. The regulation on money market funds was adopted by the Council in May 2017, after Parliament's approval of the text.

2. Assessment

The UCITS Directive also requires many implementing measures, relating, for example, to pooling, the notification procedure, passport for management companies or key investor information.

INSURANCE

A. Insurance and Reinsurance Directive – 'Solvency II' (Directive 2009/138/EC)

1. Purpose and content

This directive overhauls the financial supervision of insurance firms, replacing the former static model of supervision with a dynamic risk-based approach in order to ensure better protection for consumers and companies. It regulates risk adequacy and capital management. It further consolidates the integration of the EU insurance market and protects policy-holders

and claimants more effectively. Ultimately, this should make EU insurance and reinsurance companies better able to compete internationally.

Earlier directives laid down a static method of calculating the solvency spread, which was assessed against the overall trading volume on the basis purely of the size of the balance sheet. By contrast, the Solvency II system is more concerned with actual risk, and the focus of supervision is the individual risk level of each company. All relevant quantifiable risks must now be taken into account (at the least market risk, credit risk, insurance risk, and operational risk). The new supervisory system means that insurance firms' capital resources are adequate to cover their risks. This is be supplemented by a minimum capital requirement (MCR).

2. Assessment

As a result of Solvency II, insurance companies will be able to compete more effectively on increasingly globalised markets. Supervisory authorities fear, however, that greater competition could result in more insolvencies and declining consumer confidence and increase the pressure on small and medium-sized insurance companies. In the short term, the result might be a lower level of protection against serious long-term risks (because of higher capital requirements), and insurers could cut back on cross-subsidisation, which might lead to an increase in certain premiums. In 2011, the Commission adopted the 'Omnibus II' proposal in order to take account of the new supervisory architecture and, in particular, the European Insurance and Occupational Pensions Authority (EIOPA), set up at the beginning of 2011. Due to the late adoption of the Omnibus II proposal, the transposition deadline for the Solvency II Directive was postponed to 1 January 2016.

ROLE OF THE EUROPEAN PARLIAMENT

The process of adoption and implementation of EU financial services legislation follows the so-called 'Lamfalussy process', according to which Parliament, together with the Council, adopts basic laws (level 1) under the codecision procedure. Parliament also has a scrutiny role in the adoption of level-2 measures.

Parliament has also consistently supported the work of the Commission, moving discussions forward on many occasions and issuing own proposals to make its position clear (for example to impose limits on remuneration schemes in the banking and investment sector). By virtue of its proactive approach, Parliament is prominently involved both in the ongoing debate with the Commission, the Council, and other international institutions about development of the supervisory and regulatory structure for financial markets and in exploring ways of addressing systemic risk.

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