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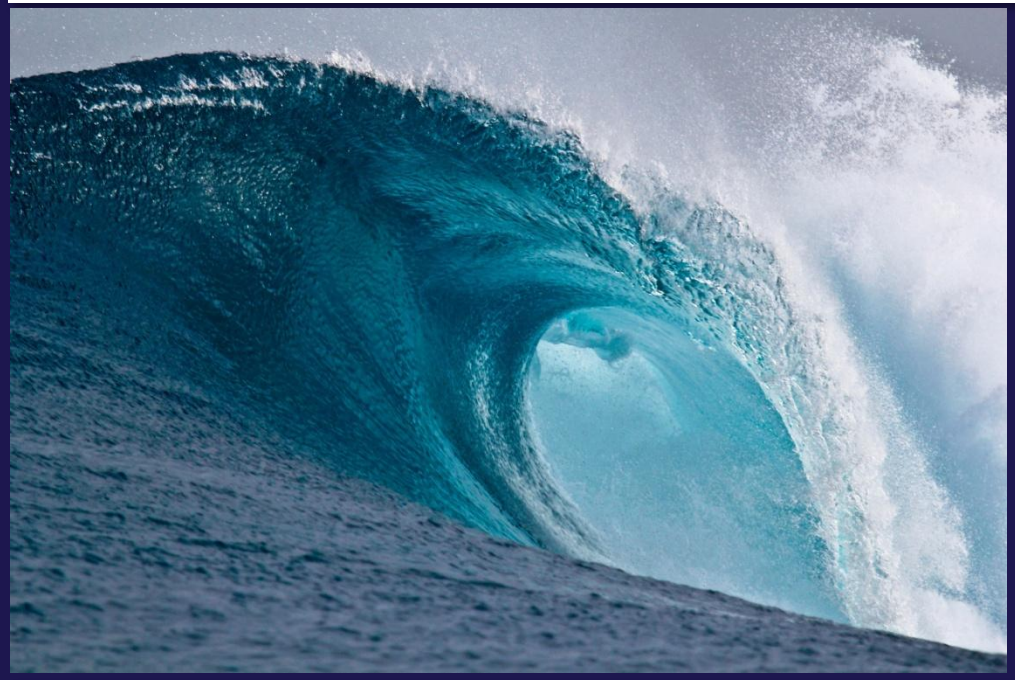

A NEW WAVE OF EU LEGISLATION Challenges ahead for the Banking Industry

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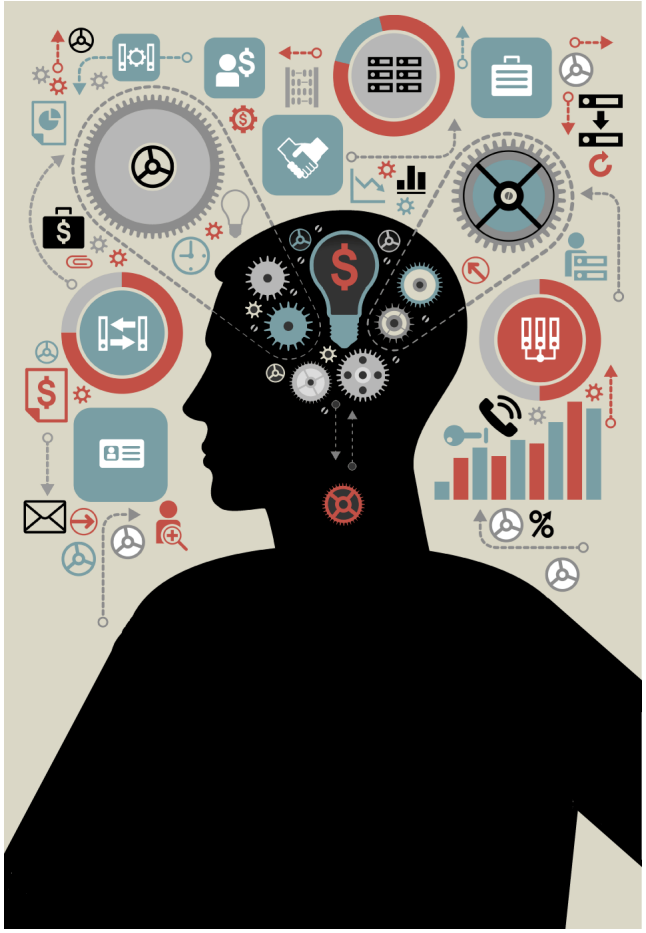
Selected EU Regulatory Initiatives

- AIFMD
- UCITS V and VI
- MiFID II
- CRD IV and CRR
- SSM
- SRM
- SEPA End Date Regulation
- Depositor Guarantee Scheme



- EMIR
- Short-Selling / CDS
- Insolvency Regulation
- PSD II
- Interchange Regulation
- Mortgage Credit Directive
- Bank Account Directive

European Banking Union

- Main Pillars:
  - Single Supervisory Mechanism
  - Single Resolution Mechanism
  - Liikanen Proposals on structural reforms of EU Banks
  - Single Rulebook
  - Amendments to the Deposit Guarantee Schemes

Single Supervisory Mechanism (SSM)

- SSM was seen as a prerequisite for any direct bank recapitalisation
- Most momentous unification step of Eurozone area since creation of euro
- Main legislative instrument is the Council Regulation No 1024/2013
- ECB to take over tasks and powers as from November 2014

Single Supervisory Mechanism (SSM)

- Key Impacts:
  - New regulatory authority for all banks within eurozone – the European Central Bank (ECB)
  - ECB to be given specific tasks in relation to the prudential supervision of eurozone banks. However, extent of the ECB's powers will depend on whether bank is judged to be *significant* or *less significant*.
  - For purposes of 'comprehensive assessment' to be undertaken by ECB, **HSBC Malta**, **BOV** and **Deutsche Bank Malta** have been deemed to be *significant.*

Single Supervisory Mechanism (SSM)

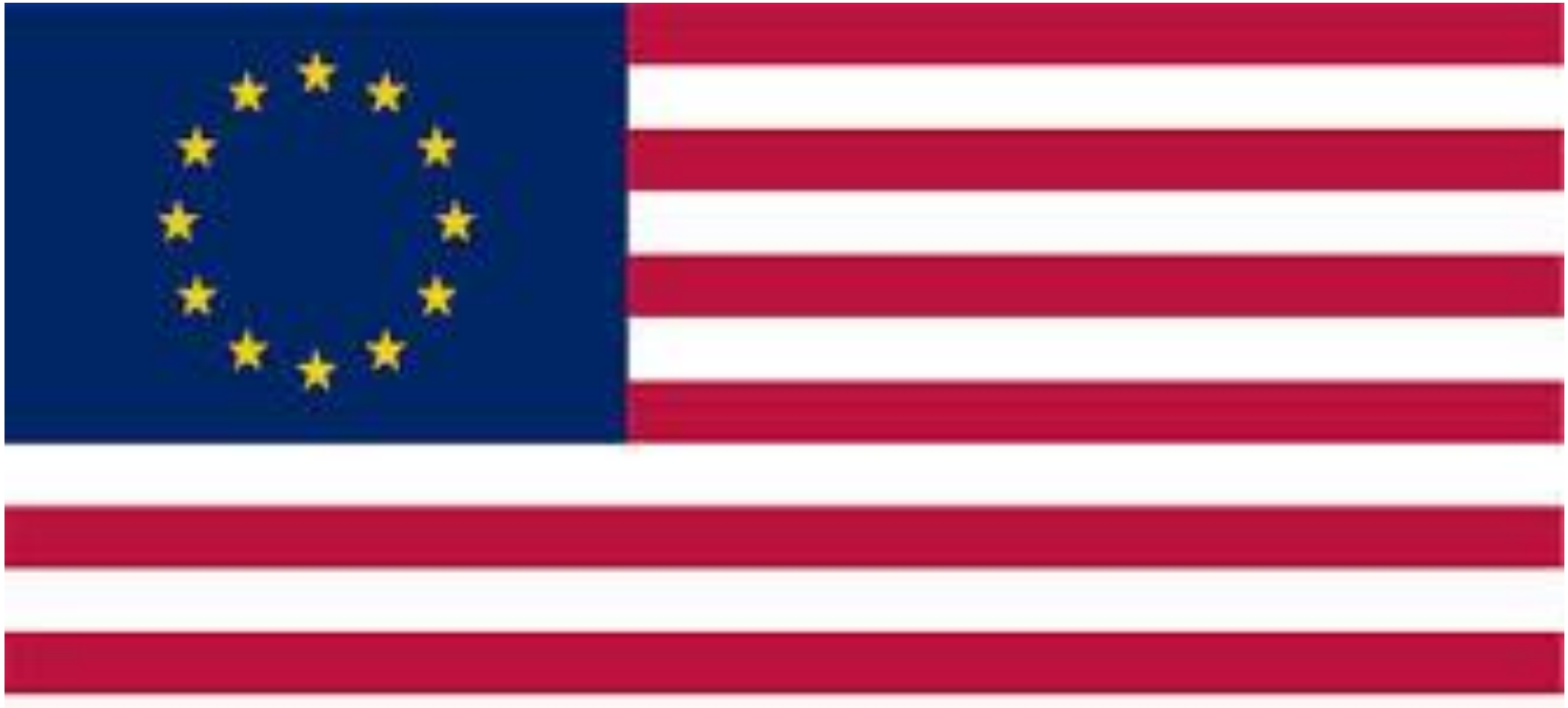
- For *less significant* banks:
  - the majority of tasks will remain within competence of MFSA;
  - ECB will have exclusive competence in relation to:
    - authorisation and withdrawal of authorisation of banks
    - Authorisation of changes in qualifying shareholdings (10% and over) in banks

Single Supervisory Mechanism (SSM)

- For *significant* banks, ECB will be exclusively responsible for:
  - Authorisation & withdrawal of authorisation of banks;
  - Authorisation of changes in qualifying shareholdings in banks;
  - Ensuring compliance with prudential requirements in areas of own funds, large exposures, liquidity, leverage etc.
  - Ensuring compliance with rules relating to governance requirements (fit and proper tests, risk management processes, internal control mechanisms, ICAAP etc.)
  - Carrying out supervision on a consolidated basis

Single Supervisory Mechanism (SSM)

- ECB powers will not extend to:
  - Consumer protection
  - Payment services
  - Anti-money laundering
  - Passporting
  - MiFID related matters.
- MFSA will retain most of its tasks in relation to conduct of business and consumer protection
- A *sui generis* cross-border twin peaks model of regulation?
- Should Maltese credit institutions expect higher supervisory fees?



European Bank Recovery & Resolution Directive *aka* Single Resolution Mechanism (SRM)

- Political agreement reached between Council and EP in respect of proposal for a directive on recovery and resolution of *banks* and large *investment firms* in an orderly manner.
- Instead of states bailing-out banks, banks' shareholders and creditors will themselves bail the bank (hence, bail-in) – the **Cyprus model.**
- Applies to all EU banks, not just eurozone banks.
- 1 Jan 2015 – date by which member states to comply with Directive (Bail-in tools as from 1 Jan 2016)

Single Resolution Mechanism

- Main focus of SRM is to preserve systemically important functions upon failure of a bank and to ensure that on insolvency **shareholders** and **creditors** (instead of taxpayers) bear the losses.
- Deposits of up €100,000 are protected in most cases, but above that threshold no.
- New Resolution Authority.

Single Resolution Mechanism

- Each Resolution Authority is required to establish a national resolution fund. Proposals suggest that banks within banking union would contribute to a central Single Resolution Fund.
- Institutions to be required to produce a detailed **recovery plan** setting out measures to be taken by institution when its viability is at risk.
- Resolution Authorities will draw up a **resolution plan** for every institution at firm & group level.

Single Resolution Mechanism

- When institution is failing, Resolution Authority will have a harmonised *minimum* set of resolution tools including:
  - Power to sell whole / part of business without shareholders' consent
  - Power to provide for new institution to continue to provide essential financial services to clients of failed institution;
  - Asset Separation Tool – enabling transfer of 'bad' assets to a separate vehicle or 'bad bank;

Single Resolution Mechanism

- Bail-in Tool – ensuring that most unsecured creditors bear losses
- Also powers to cancel shares / write down debt or convert debt into shares/ replace senior management & power of imposing moratoria & stays on creditors. Investing in shares / debt securities of banks will mean higher risks.
- Resolution Authority must act in accordance with certain principles incl. that shareholders bear first loss, then creditors

Structural Reform of EU Banks (Liikanen Proposals)

- On 29 January 2014, European Commission published proposals (in the form of a draft regulation) for structural reform of **largest** EU banks (around 29 EU banks may be caught).
- As from January 2017: A ban on 'proprietary trading' and on owning or investing in hedge funds. 'Proprietary Trading' is narrowly defined.
- As from July 2018: an obligation to separate other trading activities (widely defined and includes activities such as market making / derivatives trading) into a separate trading entity if so required by a supervisory review. This will be a separate legal entity that is separate from the core bank.

Mortgage Credit Directive

Mortgage Credit Directive

- Adopted by European Parliament on 10 December 2013.
- In March 2003, the Commission launched a process of identifying and assessing the impact of barriers to the internal market for credit agreements relating to residential immovable property.
- The recent crisis and the weaknesses which emerged further highlighted the need for such a directive.
- It is clear that the banking crisis was constantly on the mind of the legislators as the Mortgage Credit Directive was being drafted – such as focus on Credit intermediaries.

Mortgage Credit Directive

- Builds on Directive 2008/48/EC on credit agreements for consumers.
- The mortgage credit directive fills the void purposely left by the Consumer Credit Directive.
- There are many common areas such as the provisions relating to annual percentage rate of charge (APRC).

Scope

- The directive shall apply to:

  (a) credit agreements secured by a mortgage (or equivalent) on residential immovable property; and

  (b) credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building.

- The directive shall NOT apply *inter alia* to:

  (a) credit agreements where credit is granted free of interest

  (b) credit agreements in the form of an overdraft facility and where the credit has to be repaid within one month.

Conduct of Business Obligations

- "… the creditor, credit intermediary or appointed intermediary acts honestly fairly, transparently and professionally, taking account of the rights and interest of the consumers."
- Member states shall ensure that the manner in which creditors remunerate their staff do not impede compliance with the above principle.
- The remuneration policy:
- (a) should not encourage risk-taking that exceeds the level of risk tolerated by creditor
- (b) should provide that remuneration is not contingent on the number or proportion of applications accepted.

European Standardised Information Sheet (ESIS)

- The consumer has a right to received personalised information needed to compare the credits available, assess their implications and make an informed decision on whether to conclude a credit agreement.
- This information shall be provided in a durable medium by means of the ESIS (set out in Annex II to the Directive).
- The standardisation of the form in which the information is given will allow greater ease of comparison for the consumer.

Reflection period / right of withdrawal

- Member States shall specify a time period of at least seven (7) days during which the consumer will have sufficient time to compare offers, assess their implications and make an informed decision.
- Such period can be:

  (a) a reflection period before the conclusion of the credit agreement, or

  (b) a period for exercising a right of withdrawal after the conclusion of agreement, or

  (c) a combination of the two.

Good practices

- Obligation to assess the creditworthiness of the consumer
- Property valuation
- Database access across all Member States
- Early repayment – limiting compensation to the financial loss of the creditor.
- Foreign currency loans:

  (i) right to convert into an alternative currency

  (ii) other arrangements in place to limit the exchange rate risk to which the consumer is exposed under the credit agreement.

Arrears and Foreclosure

Arrears and Foreclosure

- Member States shall:

  (a) adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.

  (b) have procedures or measures to enable the best efforts price for the foreclosed immovable property to be obtained.

- Where after enforcement, outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are put in place.

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