

International Regulatory Update

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PRIIPs: Delegated Regulation on product intervention published in Official Journal

Commission [Delegated Regulation \(EU\) 2016/1904](#) with regard to product intervention under the Packaged Retail and Insurance-based Investment Products (PRIIPs)

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Regulation has been published in the Official Journal. The Delegated Regulation specifies the rules relating to supervisory measures on product intervention by national authorities and the European Insurance and Occupational Pensions Authority (EIOPA).

The Delegated Regulation will enter into force on 18 November 2016 and will apply from 31 December 2016.

FTT: EU Council sets out state of play

The EU Council has published a [document](#) setting out the state of play on the proposal for an enhanced cooperation Directive implementing a financial transaction tax (FTT) across 10 Member States.

Among other things, the document sets out the latest progress regarding a number of the building blocks of the FTT, including the scope of taxable transactions in shares and derivatives, territoriality, transaction chain, and the market making exemption. The participating Member States have also presented their findings on possible solutions to ensure adequate revenue at low administrative costs and some considerations on the actual costs of implementation of the FTT.

CRR: EU Commission adopts RTS on liquidity outflows

The EU Commission has adopted a draft [Delegated Regulation](#) with regard to regulatory technical standards (RTS) for additional liquidity outflows corresponding to collateral needs resulting from the impact of an adverse market scenario on an institution's derivatives transactions under the Capital Requirements Regulation (CRR). The RTS determine the method for calculating additional collateral outflows and the threshold above which an institution's derivative transactions fall within scope.

The Regulation will enter into force on the twentieth day following that of its publication in the Official Journal.

MiFID2: ESMA prepares for systematic internaliser regime

The European Securities and Markets Authority (ESMA) has published an updated questions and answers (Q&A) [document](#) on the application of MiFID2/MiFIR, which clarifies when ESMA will publish the first set of data needed to implement the systematic internaliser (SI) regime and the date by when firms must comply with the SI regime for the first time.

ESMA has indicated that:

- it will publish information on the total number and the volume of transactions executed in the European Union for the first time by 1 August 2018, covering the period from 3 January 2018 to 30 June 2018;
- investment firms must undertake their first assessment by and, where appropriate, comply with the SI obligations (including notifying their national competent authority) by 1 September 2018; and
- for subsequent assessments, ESMA will publish data by the first calendar day of February, May, August and November, and investment firms are expected to perform the calculations and comply with the SI regime by the fifteenth calendar day of February, May, August and November.

The earliest mandatory deadline for firms to comply with the SI regime, when necessary, is 1 September 2018 although MiFID2 and MiFIR apply from 3 January 2018. However, ESMA has stressed that investment firms can opt-in to the SI regime for all financial instruments from 3 January 2018 as a means of complying, for example, with the trading obligation for shares.

The purpose of the Q&A document is to promote common supervisory approaches and practices in the application of MiFID2/MiFIR and its implementing measures.

EBA recommends measure based on total liabilities as target level of resolution financing arrangements

The European Banking Authority (EBA) has published its [final report](#) on the reference point for the target level of national resolution financing arrangements. In the report, the EBA recommends changing the basis from covered deposits to a total liabilities-based measure and, in particular, total liabilities (excluding own funds) less covered deposits. The proposed methodology would align the target level basis with the reference base used for the calculation of individual contributions to national resolution financing arrangements.

The report further recommends that if the EU Commission issues a legislative proposal on amending the target level basis for national resolution financing arrangements it should consider adjusting the percentage of the target level, and whether a corresponding change to the target level basis would also be appropriate for the Single Resolution Fund.

EBA consults on proposed prudential regime for investment firms

The EBA has published a [discussion paper](#) setting out its proposed prudential requirements for investment firms. In June 2016 the EU Commission issued a call for technical advice on the new categorisation of investment firms and the design and calibration of a more appropriate prudential regime for investment firms.

The EBA proposes that ongoing capital requirements be calculated on capital factors (K-factors) that are attributed to risks that investment firms pose to customers and to market integrity and liquidity, with firms that pose more risk to customers and markets receiving higher capital requirements than those who pose less risk, and firms that pose similar risk to customers and markets but with more own risk holding more capital than those with less own risk.

Comments to the discussion paper close 2 February 2017.

EBA publishes final guidelines on ICAAP and ILAAP information

The EBA has published [final guidelines](#) on the collection of information related to the internal capacity adequacy assessment process (ICAAP) and the internal liquidity adequacy assessment process (ILAAP). This follows a consultation in December 2015, and detailed analysis of the feedback received and the EBA response accompanies the guidelines in this report. The aim of the guidelines is to facilitate a consistent approach to the supervisory assessment of ICAAP and ILAAP frameworks across the EU as part of the supervisory review and evaluation process (SREP). In particular, the guidelines specify what information competent authorities should collect from the institutions, including:

- ICAAP and ILAAP general information focusing on background information on internal governance, risk management, stress testing frameworks, business model and strategy;
- ICAAP-specific information covering design and main features of ICAAP methodologies and models, and their outcomes in terms of internal capital estimates, on internal capital and its allocation, capital planning and role of stress testing in ICAAP;
- ILAAP-specific information covering liquidity and funding risk management framework, funding strategy, strategy regarding liquidity buffers and collateral management, cost-benefit allocation mechanism, intraday liquidity risk management, liquidity stress testing and liquidity contingency plan; and

- ICAAP and ILAAP conclusions as well as information on quality assurance.

PSD2: EBA consults on authorisation and registration guidelines

The EBA has launched a [consultation](#) on guidelines specifying the information and documentary requirements for institutions applying for authorisation as payment and electronic money institutions or for those registering as account information service providers (AISPs) under the Payment Service Directive (PSD2).

The information requirements specified in the proposed guidelines include, amongst other things, the applicant's:

- programme of operations;
- business plan;
- governance arrangements and internal control mechanisms;
- procedure for monitoring and handling security incidents and complaints;
- evidence that it holds initial capital;
- procedure for filing, monitoring, tracking and restricting access to sensitive payment data;
- internal control mechanisms for its anti-money laundering obligations;
- security policy documents;
- the identity of directors, management, statutory auditors, and persons holding qualifying holdings; and
- legal status and articles of association.

The guidelines will apply in full to institutions applying for authorisation as payment or electronic money institutions and in part to those registering as AISPs.

Comments are due by 3 February 2017.

EBA consults on draft guidelines on internal governance

The EBA has published [draft revised guidelines](#) on internal governance for consultation. The draft guidelines are intended to harmonise institutions' internal governance arrangements, processes and mechanisms across the EU, in line with new requirements set out in the Capital Requirements Directive (CRD 4).

The original guidelines, published in September 2011, have been updated to counteract weaknesses in corporate governance that the EBA believes have contributed to excessive and imprudent risk-taking in the banking sector. The draft guidelines put greater emphasis on the duties and

responsibilities of the management body in its supervisory function in risk oversight, including the role of their committees. In addition, the framework for business conduct has been further developed with more emphasis being given to the establishment of a risk culture, a code of conduct and the management of conflicts of interest. Finally, more guidance is provided on the risk management framework, on how internal control functions are organised and how internal controls are implemented.

Comments are due by 28 January 2017.

ECB consults on exercise of options and discretions by NCAs in relation to less significant institutions

The European Central Bank (ECB) has launched a public [consultation](#) on a draft [guideline](#) and [recommendation](#) concerning the exercise of options and discretions (O&Ds) available in EU law for banks it does not directly supervise (less significant institutions or LSIs). The aim is to harmonise the way banks are supervised by national competent authorities (NCAs) in the 19 countries of the Single Supervisory Mechanism (SSM) and ensure a level playing field and the smooth functioning of the euro area banking system as a whole.

Comments are due by 5 January 2017.

HMT and FCA set out plans to enhance competition in banking sector

HM Treasury (HMT) has published its [response](#) to the Competition and Markets Authority (CMA) report on its investigation into the retail banking market. The response summarises the recommendations the CMA has made to HMT for addressing restrictions to effective competition in the banking sector, as well as the actions HMT intends to take as a result. These actions include:

- asking the Payment Systems Regulator (PSR) to publish a report on the annual performance of the Current Account Switch Service (CASS) against agreed key performance indicators, including customer awareness and confidence metrics;
- working with credit rating agencies (CRAs) and small and medium-sized enterprise (SME) lenders to implement a mechanism for soft searching for SME lending products, so that SMEs can shop around for credit without adversely affecting their credit rating;
- reviewing the landscape for sharing SME data, including the SME credit information and finance platforms initiatives, by summer 2018; and

- continuing collaboration between the Department for Business, Energy and Industrial Strategy (BEIS) and the British Business Bank (BBB), alongside other professional organisations, to ensure SMEs are provided with sufficient advice to make informed business decisions on choosing providers and sources of finance.

The Financial Conduct Authority (FCA) has also [set out](#) the actions it intends to take as a result of the CMA's findings, including:

- researching, testing and implementing measures to increase consumer engagement with their overdraft use and charges;
- acting as an observer on the Open Banking steering group;
- setting up an expert group to consider what information banks should be required to publish in order to allow consumers to effectively assess the differences in their service quality; and
- researching how best to prompt consumers to consider their account usage and cost, and to encourage them to consider switching accounts.

The FCA's response also sets out work it will undertake beyond the scope of the CMA's recommendations and in relation to the wider retail banking competitive landscape. This includes:

- undertaking work to ensure that consumers are appropriately protected in the area of overdrafts, including collecting and analysing data on the need for rules in relation to the proposed monthly maximum charge (MMC); and
- continuing to consider how competition and conduct are affected by the links between the different parts of the retail banking business model.

Draft Bank Recovery and Resolution Order 2016 published

The draft Bank Recovery and Resolution Order 2016 has been [published](#). The draft Order amends the special resolution regime for banks and investment firms and is intended to strengthen and clarify the UK's transposition of the EU Bank Recovery and Resolution Directive 2014/59/EU (BRRD).

In particular, the Order:

- amends Section 48Z of the Banking Act 2009 to ensure that certain instruments can take effect in accordance with their terms, to the extent specified by

the resolution authority (the Bank of England or the Treasury as the case may be), to support the stabilisation of the firm;

- gives stand-alone powers to the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) to require the removal and replacement of directors and senior managers in accordance with Article 28 of the BRRD, and to appoint temporary managers in accordance with Article 29;
- provides new powers for the PRA and FCA to call a shareholder meeting if the management body had been required to call a meeting, and had not done so;
- gives the Bank of England back-stop powers independently to resolve the UK branch of a third country (non-EEA) institution, if the Bank has refused to recognise the actions of the third country resolution authority or the third country resolution authority fails to act, in accordance with Article 96 of the BRRD. The Bank of England's power is limited to transferring the assets, rights and liabilities of the branch and the power to bail in transferred liabilities;
- extends the safeguards that apply in connection with the exercise of the property transfer and bail-in powers for firms established in the UK to the case of branch resolution; and
- gives the Bank of England powers to convert a failing building society into a company, enabling the shares of this company to be transferred to a bridge bank.

AFM reports on customer focus of banks and insurance companies

The Netherlands Authority for the Financial Markets (AFM) has published its [annual report](#) on the level of customer focus shown by banks and insurance companies. The AFM annually investigates, by way of the 'Customer Interest Dashboard', to what extent the major banks and insurance companies have their clients' interests as a focus point. The AFM reports that in 2015-2016, the sector improved on several fronts, as evidenced by the higher quality of investment advice and clearer information provision. The AFM notes, however, that further improvement is needed in the areas of investment insurances and consumer credit. Acting in the client's interest when collaborating with third parties such as collection agencies, intermediaries or authorised agents, is also highlighted as a point that deserves attention.

The AFM will discuss its findings with the concerned banks and insurance companies. The supervised entities will also receive extensive feedback from the AFM. The follow-up

work done by banks and insurance companies is continuously monitored by the AFM. In anticipation of the annual CEO meetings on client focus, the AFM will also discuss the results with the individual management boards of relevant banks and insurance companies.

CONSOB issues recommendation setting out guidelines on drafting of investor warnings section of prospectuses

The Commissione Nazionale per le Società e per la Borsa (CONSOB) has published a [recommendation](#) setting out guidelines to be followed with respect to the 'warnings for investors' (Avvertenze per gli investitori) section to be included in prospectuses. Although not expressly set out under the European or the Italian legal framework, CONSOB believes that this section has become increasingly common in recent years with the final purpose of highlighting the risks that each investor may run by subscribing for a specific financial instrument.

Amongst other things, CONSOB focuses on certain drafting criteria to be adopted when drafting this section. In particular, this section must be much simpler and more concise than the prospectus and must cross-refer to the relevant 'risk factors' section. It must be included on the front page of the prospectus with particular emphasis on the title 'warning for investors'. A reasonably readable font should be used.

CONSOB has also provided some examples of information that should be reported in this section, including information on the issuers' conditions (e.g. economic trends), supervisory authorities' measures (e.g. ongoing investigations) and the specific features of financial instruments (e.g. illiquidity).

FINMA revises corporate governance guidelines for banks

The Swiss Financial Market Supervisory Authority (FINMA) has [revised](#) its corporate governance requirements for banks by consolidating the provisions of Circular 2008/24 (Supervision and internal control – banks), the associated FAQs and other requirements into a new Circular 2017/1 (Corporate governance – banks) and publishing the revised Circular 2008/21 (Operational risks – banks) and revised Circular 2010/1 (Remuneration schemes), which both come into force on 1 July 2017.

FINMA accepted a number of recommendations from the consultation exercise, including:

- setting out the division of responsibilities between the board of directors and the executive board in greater detail and reducing the diversity requirements within boards of directors;
- allowing smaller banks to form a combined audit and risk committee;
- granting exceptions to the rule that a majority of committee members must be independent;
- allowing the chief risk officer to be responsible for other non-profit-generating functions; and
- not introducing a clawback clause in the Remuneration schemes circular.

Other changes include the following:

- the new circular defines requirements using general principles instead of detailed application guidelines;
- the new circular sets minimum requirements for the composition of boards, qualifications of their members and organisation of internal control systems;
- the Operational risks – banks circular introduces new guidelines on managing IT and cyber risks and incorporates principles from the FINMA position paper 'Legal and reputational risks in cross-border financial services';
- the Remuneration schemes circular prohibits hedging transactions, and must only be applied in full by the biggest banks and insurance companies; and
- all corporate governance requirements relating to disclosure will be moved to Circular 2016/1 Offenlegung – Banken which is scheduled to be published in December 2016.

Swiss Federal Council seeks to reduce barriers to entry for fintech firms

The Swiss Federal Council has [called](#) for a revamp of the regulatory framework for providers of innovative financial technologies. The focus is on reducing barriers to market entry in the fintech area to increase legal certainty and enhance the competitiveness of Switzerland's financial centre. A future-oriented approach based on the following three elements has been recommended:

- specific regulatory adjustments, e.g. setting a deadline of 60 days for holding money in settlement accounts to facilitate crowdfunding projects;
- establishing an innovation area – a service provider in this area can accept public funds up to CHF 1 million,

activities do not need to be authorised and will not be monitored by FINMA; and

- new fintech license granted by FINMA – less stringent regulatory requirements to apply to institutions which are restricted to the business of deposit-taking.

The Federal Department of Finance has been instructed to prepare a consultation draft by the beginning of 2017.

CLIFFORD CHANCE BRIEFINGS

Brexit – Parliamentary approval required for UK to leave the EU

The English High Court has decided in *R (oao Miller) v DExEU* that the Government needs prior authorisation from Parliament to give the article 50 notice that will start the process of the UK leaving the EU. The Government must therefore either appeal successfully or it must engage with Parliament. If an appeal fails, there could be delays while Parliament grapples with Brexit, and uncertainty as to what the outcome will be.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2016/11/brexit_parliamentaryapprovalrequiredforukt.html

AML and Cybersecurity – FinCEN's Advisory

On 25 October 2016, the Financial Crimes Enforcement Network (FinCEN) issued an advisory providing guidance to financial institutions on how Bank Secrecy Act (BSA) regulations apply to cyber events, cyber-enabled crime, and cyber-related information. In particular, the advisory focuses on Suspicious Activity Reports (SARs) submissions for both cyber-events and cyber-related information. The advisory provides guidance with respect to: (i) SAR reporting in connection with cyber-enabled crime and cyber events; (ii) including relevant cyber-related information in SARs; (iii) encouraging collaboration between in-house cybersecurity units and AML units; and (iv) sharing cyber-related information among financial institutions to combat money laundering, terrorism financing, and cyber-enabled crime. The advisory provides SAR-filing related guidance in the context of cyber events. FinCEN states specifically that the advisory 'does not change existing BSA requirements or other regulatory obligations for financial institutions.'

This briefing paper discusses the FinCEN advisory.

https://www.cliffordchance.com/briefings/2016/11/aml_and_cybersecurityfincensadvisory.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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