

International Regulatory Update

20 – 24 November 2017

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Capital Markets Union: EU Council adopts securitisation rules

The EU Council has [adopted](#) a package of proposals for simple, transparent and standardised (STS) securitisation.

The proposals form part of the EU Commission's Capital Markets Union (CMU) Action Plan and are intended to facilitate the development of the securitisation market in Europe. The package comprises two proposed regulations on:

- rules and criteria to define STS securitisation; and
- capital requirements for positions in securitisation, which will amend the Capital Requirements Regulation (CRR).

Among other things, the new securitisation rules set the risk retention requirement at 5% in accordance with existing international standards.

The new rules will enter into force twenty days after publication in the Official Journal.

EBA to be relocated to Paris

The EU Council has [announced](#) that Paris will be the new seat for the European Banking Authority (EBA) following the UK's withdrawal from the EU. The EU Council has [also announced](#) that the new seat for the European Medicines Agency (EMA) will be Amsterdam.

The EU Commission will now prepare legislative proposals reflecting the vote for adoption under the ordinary legislative procedure, with the involvement of the EU Parliament.

EU Commission reports on functioning of corporate bond markets

The EU Commission has published a [report](#) on corporate bond markets in the EU. The report, prepared by a

Commission expert group, analyses the functioning of EU corporate bond markets and provides recommendations intended to improve their functioning. The recommendations are aimed at achieving six key objectives, namely:

- making issuance easier for companies;
- increasing access and options for investors;
- ensuring the efficiency of intermediation and trading activities;
- fostering the development of new forms of trading and improving the post-trade environment;
- ensuring an appropriate level of information and transparency; and
- improving the supervisory and policy framework.

The expert group will hold a public hearing to gather views of interested stakeholders and authorities on its recommendations on 24 November 2017.

Alongside the recommendations, the EU Commission has also published a [study](#) it commissioned from quantitative risk specialists, Risk Control Limited, which analyses factors that influence corporate bond market liquidity. Amongst other things, the study suggests that:

- overall there is a decline in liquidity on the corporate bond markets;
- there is a slowdown in a variety of activity-based liquidity indicators;
- price-based liquidity measures declined following the 2011-12 financial crisis but have exhibited an upward trend from 2014 onwards; and
- trading costs for bonds may fail to be resilient in future periods of market stress.

SEPA: EU Commission reports on application of Regulation

The EU Commission has published an [implementation report](#) on the application of the Single Euro Payments Area (SEPA) Regulation, which establishes technical and business requirements for credit transfers and direct debits in euro.

Overall the report concludes that the SEPA Regulation has been correctly applied across the EU and there is currently no need for a follow-up legislative proposal. It identifies two key barriers to the smooth functioning of SEPA:

- IBAN discrimination by payees, when payees insist payments can only be carried out to or from national

account numbers (BBAN) rather than accepting international account numbers (IBAN); and

- misunderstanding surrounding the powers of national competent authorities (NCAs), resulting in Member States designating NCAs for ensuring only that payment services providers (not payment services users) were compliant with the SEPA Regulation.

The EU Commission notes that the latter issue has been largely resolved and that all but three Member States are now compliant, but that issues surrounding IBAN discrimination should continue to be closely monitored as, while the number of cases have decreased, new cases could still arise.

MiFIR: Delegated Regulations on indirect clearing arrangements published in Official Journal

Commission Delegated Regulation (EU) 2017/2154 supplementing the Markets in Financial Instruments Regulation (MIFIR) with regard to regulatory technical standards (RTS) on indirect clearing arrangements and Commission Delegated Regulation (EU) 2017/2155 amending Delegated Regulation (EU) 149/2013 with regard to RTS on indirect clearing arrangements have been published in the Official Journal.

[Delegated Regulation \(EU\) 2017/2154](#) covers requirements for the provision of indirect clearing services by clients; the obligations of CCPs, clearing members, and clients; and requirements for the provision of indirect clearing services by indirect clients and second indirect clients. [Delegated Regulation \(EU\) 2017/2155](#) amends an earlier Delegated Regulation under the European Market Infrastructure Regulation (EMIR) to reflect recent developments and experience gained in the area of clearing and to ensure consistency with Delegated Regulation (EU) 2017/2154.

Both Delegated Regulations will enter into force on 11 December 2017 and will apply from 3 January 2018.

EMIR: Joint Committee issues statement on VM for physically-settled FX forwards

The Joint Committee of the European Supervisory Authorities (ESAs), comprising the EBA, the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), has issued a [statement](#) on variation margin (VM) exchange for physically-settled FX forwards under EMIR.

The ESAs acknowledge that some counterparties are facing challenges exchanging VM for physically-settled FX forwards by 3 January 2018 for transactions with certain

end-users. Following international standards, the ESAs implemented these standards by way of regulation applicable to transaction in the scope of EMIR. It has become apparent to the ESAs, however, that the adoption of the international standards in other jurisdictions via supervisory guidance has led to a scope of application that is more limited than the scope the ESAs had proposed.

As a result, the boards of the ESAs are currently undertaking a review of the regulatory technical standards (RTS) on risk mitigation techniques for over-the-counter (OTC) derivatives not cleared by a central counterparty (CCP) and developing draft amendments to these RTS that align the treatment of VM for physically-settled FX forward with the supervisory guidance applicable in other key jurisdictions.

The ESAs note that the amendment of the RTS and their subsequent implementation would most likely imply that the scope should cover transactions between credit institutions and investment firms. In addition, for some institution-to-non-institution transactions, the competent authorities should consider the actual risk that the exchange of VMs would mitigate and whether non-institutions might face additional risks related to the daily exchange of VM.

The ESAs expect to finalise their review and submit the draft amendments to the EU Commission by 24 December 2017.

CRR: EBA publishes guidelines on estimation of risk parameters under IRB approach

The EBA has published its [final guidelines](#) on the probability of default (PD) estimation, loss given default (LGD) estimation and the treatment of defaulted exposures under the advanced Internal Ratings-Based (IRB) approach.

The guidelines are intended to target discrepancies identified in the methodologies underlying risk estimates used to calculate capital requirements by aligning terminology and definitions, clarifying the application of certain regulatory requirements and specifying principles for the estimation of risk parameters.

The guidelines are intended to preserve flexibility and do not, therefore, prescribe the choice of risk drivers and estimation methodology. Rather, the guidelines focus on model calibration and provide, among other things, clarifications on the risk estimations for non-defaulted and defaulted exposures, such as a simplified concept of discounting factor used in the LGD estimation.

The EBA has also published a [report](#) on IRB modelling based on its IRB survey, which provides an impact assessment for the guidelines.

The guidelines will apply from 1 January 2021 at the latest, although earlier implementation is encouraged. The guidelines will be updated once draft regulatory technical standards (RTS) on the IRB assessment methodology are finalised and adopted.

EBA publishes third annual supervisory convergence report

The EBA has published its third annual report on the convergence of supervisory practices ([EBA-Op-2017-14](#)).

The report highlights progress in the implementation of the Supervisory Review and Evaluation Process (SREP) but also identifies challenges in converging capital adequacy assessments and determining institution-specific additional own funds requirements (P2R). In particular, the report observes:

- different approaches in the use of the outcomes of banks' own internal capital adequacy assessment process (ICAAP);
- disparity of risk taxonomies;
- differences in the clarity of the risk-by-risk determination of P2R; and
- differences in the use of P2R for macroprudential purposes.

The report also notes the EBA's ongoing policy work aimed at progressing convergence, including revisions to the SREP guidelines. These updates are intended to be finalised in 2018 and apply from 1 January 2019.

FSB publishes annual list of G-SIBs

The Financial Stability Board (FSB) has published its annual [list of global systemically-important banks](#) (G-SIBs). The 2017 list comprises the same 30 banks as the 2016 list, with the exception of Groupe BPCE, which has been removed, and the Royal Bank of Canada, which has been added. Several banks have also been allocated to different buckets, which determine the level of capital buffers they require.

Alongside the updated list of G-SIBs, the Basel Committee on Banking Supervision (BCBS) has published further details on the [assessment process](#), including the full sample of banks assessed, the denominators used to calculate their scores and the thresholds used to allocate them to buckets.

The FSB has also [announced](#) that it will not publish a new list of global systemically important insurers (G-SIIs) for 2017, as it has done for previous years. The policy measures set out in the FSB's 2016 communication on G-SIIs, as updated in February 2017, will continue to apply to the firms included in the 2016 list.

IOSCO reports on good practices for termination of investment funds

The International Organization of Securities Commissions (IOSCO) has published its [final report](#) on good practices for the voluntary termination of investment funds that aims to protect investors' interests during the termination process.

The report sets out proposed good practices for the voluntary termination of open-ended and closed-ended investment funds. The report also includes additional good practices specific to the termination of illiquid or hard to value securities.

The good practices are grouped into five areas:

- disclosures at time of investment;
- decision to terminate;
- decision to merge;
- during the termination process; and
- specific types of investment funds.

The good practices do not override national or regional legal or regulatory requirements and/or insolvency regimes, although legislation at a national level in most jurisdictions only addresses involuntary terminations.

IOSCO publishes fourth biannual hedge fund survey

IOSCO has published its [report](#) on the fourth IOSCO hedge fund survey. The survey, undertaken every two years, collects information from national competent authorities on the scope of hedge fund activities, the markets they operate and invest in, and their leverage and funding.

Findings from the survey, based on data as of end-September 2016, include that:

- global assets under management (AuM) rose 24% to USD 3.2 trillion in the two years since the previous survey;
- the Cayman Islands remains the fund domicile of choice, making up 53% of the global total by net asset value (NAV); and
- at an aggregate level there is a considerable liquidity buffer, suggesting that in normal market conditions

hedge funds should be able to meet investor redemptions.

FCA publishes MiFID2 guide

The Financial Conduct Authority (FCA) has published a [regulatory guide \(M2G\)](#) providing an overview of the FCA's approach to the transposition of the recast Markets in Financial Instruments Directive (MiFID2) in the MAR and REC sourcebooks, by explaining how they fit within the context of the overall implementation of the legislation at a UK and EU level.

M2G focuses on the regulatory regime in MiFID2 for trading venues (as defined by Article 4(1)(24) of MiFID2, this term comprises regulated markets, multilateral trading facilities and organised trading facilities but not systematic internalisers) and data reporting services providers (DRSPs).

The MiFID2 guide will become effective on 3 January 2018.

FCA publishes statement on LIBOR panels

The FCA has published a [statement](#) confirming that all 20 of the panel banks have agreed to support the LIBOR benchmark, ensuring the sustainability of the rate until 2021.

The support of the panels for LIBOR is needed until the end of 2021, by when it is hoped a transition can be made to alternative rates. The FCA has been working with the panel banks to finalise an agreement for the banks to remain on the panels they currently submit to until the end of 2021.

Ministerial Order amending AMF General Regulations published

A [Ministerial Order of 14 November 2017](#) amending the General Regulations of the Autorité des marchés financiers (AMF) has been published in the Official Journal of 19 November 2017.

The Order removes provisions of Title I of Book I on ethical rules and remuneration arrangements for members and experts of the AMF. It amends Article 212-5 (Book II) on derogations from the obligation to publish a prospectus for admission to trading on a regulated market. It also amends Article 312-5 and Article 312-11 (Book III), on the conditions for approval of a portfolio management company and the conditions for the extension of participation in the capital of a portfolio management company respectively.

AMF publishes annual report on corporate governance, executive compensation, internal control and risk management

The AMF has published the fourteenth edition of its [annual report](#). The report reviews current regulatory topics, including the application of the revised AFEP-MEDEF code and the legal 'say on pay' regime, the modification of the French and European normative framework, and in-depth and statistical developments, as well as examining the transparency of 60 listed companies.

MiFID2: BaFin to apply ESMA guidelines on transaction reporting, order keeping and clock synchronisation

The German Federal Financial Supervisory Authority (BaFin) has [confirmed](#) that it will apply the ESMA guidelines on transaction reporting, order keeping and clock synchronisation under MiFID2 (ESMA/2016/1452), which are intended to ensure the consistent application of the provisions set out in Article 50 of MiFID2 and in Articles 25(2) and 26 of MiFIR.

Dutch Cabinet approves legislative proposal to impose stricter rules on Dutch trust offices

The Dutch Cabinet has approved a [legislative proposal](#) which, once adopted, would impose stricter rules on Dutch trust offices (corporate services providers).

Under the amended Trust Offices Supervision Act (TOSA), more professionalism and integrity will be required from trust offices. For example, they will need to take the form of a private limited company (besloten vennootschap) or a public limited company (naamloze vennootschap) and should have a day-to-day management team consisting of at least two persons who must work from within the Netherlands. Furthermore, the TOSA will tighten up requirements on internal controls. This will include a requirement that the compliance function may not be outsourced to third parties.

In addition, trust offices will no longer be permitted to provide both tax advice and trust services to the same client. In the context of customer due diligence, trust offices will be required to share information with each other. This is intended to prevent a situation where a client is rejected by one trust office for integrity related reasons, but will still be serviced by another trust office.

The amended TOSA would also entrust De Nederlandsche Bank (DNB) with more supervisory powers. DNB would be able to require trust offices to follow a certain course of action, and the maximum administrative penalties that DNB

could impose would be increased from EUR 4 million to EUR 5 million. Turnover and profit related penalties would also be introduced.

The legislative proposal will be sent to the Council of State (Raad van State) and be made public once submitted to the Dutch Parliament.

Bank of Spain updates list of systemically important institutions and sets their capital buffers

The Bank of Spain has conducted its [annual review](#) of the institutions which will be considered global systemically important institutions (G-SIIs) in 2019 and other systemically important institutions (O-SIIs) in 2018.

The Bank of Spain has designated Banco Santander, S.A. as a G-SII in 2019; as a consequence, it will be subject to an additional requirement, the G-SII capital buffer, equal to 1.0%.

The Bank of Spain has also designated the institutions which will be considered other systemically important institutions (O-SIIs) in 2018. Regarding the designations made last year, Banco Popular ceases to have O-SII status as a result of its resolution and consequent acquisition by the Banco Santander in June 2017.

The designations of systemically important institutions are reviewed yearly. The next decisions on O-SIIs (for application in 2019) and G-SIIs (in 2020) will be adopted in the fourth quarter of 2018.

KNF issues resolution on application of EBA guidelines on remuneration policies and practices related to sale and provision of retail banking products and services

The Polish Financial Supervision Authority (KNF) has issued a [resolution](#) on the application of the EBA guidelines on remuneration policies and practices related to the sale and provision of retail banking products and services. The KNF expects cooperative savings and loan societies, mortgage brokers and also branches of credit institutions in Poland to take the EBA guidelines into account in their activity by no later than 1 July 2018.

KNF examines assumptions of amendments to Recommendation B on limitation of risk of financial investments of banks

The KNF has [examined](#) the assumptions of amendments to Recommendation B, which include:

- putting the appropriate terminology in the Recommendation in order;

- narrowing the scope of application of Recommendation B by excluding from it terms on derivatives dealt with in Recommendation A;
- deleting terms on outsourcing that are currently regulated in the Act – Banking Law; and
- adjusting the structure of the Recommendation to the terms currently applied to Recommendations adopted by the KNF.

The draft amendments to Recommendation B will be submitted for public consultation in the first quarter of 2018.

KNF issues communiqué on initial token offerings and initial coin offerings, and publishes fintech report

The KNF has issued a [communiqué](#) on initial token offerings (ITOs) and initial coin offerings (ICOs), in which it states that making investments in tokens under ICOs is highly risky. The KNF notes that actions in the scope of ICOs may potentially be subject to a number of legal requirements, including those pertaining to the preparation of an issue prospectus and public offering, the creation and managing of alternative investment funds and protection of investors, although they must be assessed on a case-by-case basis.

In the communiqué the KNF draws the attention of potential investors and entities interested in implementing projects of this kind to the specific and significant risks related with ICOs. The KNF notes that potential buyers should be aware, in particular, of the possibility of losing their entire invested capital and possible lack of legal protection.

The KNF explains that investors who are contemplating investing in ICOs are exposed to, in particular, the following risks: unregulated areas susceptible to fraud and other irregularities; high risk of the loss of all or a portion of the funds invested; lack of information, inadequate documentation; lack of the possibility of 'exiting' from the investment and very high fluctuations of value; and defects of the technology used.

The KNF has also published a [report](#) on fintech, which contains, among other things, an analysis of the barriers to financial innovation in Poland and a description of the actions taken to remove them. The report also includes recommendations for further action in this respect.

MAS and KNF sign agreement on fintech co-operation

The Monetary Authority of Singapore (MAS) and the KNF have [signed](#) a fintech co-operation agreement which lays out a framework for co-operation and referrals between the two regulators.

The framework is intended to enable both regulators to refer fintech companies to their counterparts and outlines the support given to the companies to better understand the regulatory regime in each jurisdiction. In addition, the framework sets out how the MAS and the KNF plan to explore joint innovation projects together, as well as share information on emerging market trends and their impact on regulation.

MAS and HKMA sign MoU to jointly develop Global Trade Connectivity Network

The MAS and the Hong Kong Monetary Authority (HKMA) have signed a memorandum of understanding (MoU) to jointly develop the [Global Trade Connectivity Network](#) (GTCN), which is a cross-border infrastructure based on distributed ledger technology (DLT).

The goal of the GTCN project is to build an information highway using DLT between the National Trade Platform in Singapore and the Hong Kong Trade Finance Platform to make cross-border trade and financing cheaper, safer, and more efficient. The GTCN project is intended to digitalise trade and trade finance between the two cities, with a view to potentially expanding the network in the region and globally.

The GTCN is the first strategic joint innovation project arising from the co-operation agreement signed by the MAS and HKMA on 25 October 2017.

A Joint Working Committee comprising the MAS, HKMA, National Trade Platform Programme Office (Singapore) and the Hong Kong Interbank Clearing Limited will lead the project at the start. The Joint Working Committee will invite other markets to participate after finalising the governance structure and implementation plan.

As part of a workshop held during the 2017 Singapore FinTech Festival, the MAS and HKMA also commenced a joint discussion with major DLT solution providers to develop business and technical models for the GTCN, which is expected to conclude in first quarter of 2018. The GTCN is expected to go live by early 2019, to tie in with the targeted go-live dates of the Trade Finance Modules on the National Trade Platform in Singapore and the Hong Kong Trade Finance Platform.

HKMA announces launch of enhanced competency framework on treasury management

The HKMA has issued a [circular](#) to announce the launch of its enhanced competency framework on treasury management (ECF-TM) on 2 January 2018. The

framework is intended to enable talent development and facilitate the building of professional competencies and capabilities of those staff engaged in treasury management duties along different stages of their banking career.

The ECF-TM is a collaborative effort of the HKMA, the Treasury Markets Association (TMA) and the banking sector in establishing a set of common and transparent competency standards for raising and maintaining the professional competence of relevant practitioners of the treasury management functions in authorised institutions.

As the supervisory policy manual module CG-6 'Competence and Ethical Behaviour' emphasises the importance of ensuring continuing competence of staff members, the HKMA encourages authorised institutions to adopt the ECF-TM as a benchmark for enhancing the level of professional competence of treasury management practitioners. Apart from supporting their staff to attend training and examination that meet the ECF certification, authorised institutions have also been advised to keep records of the relevant training and qualification of their staff and to provide them with necessary assistance in relation to applications for grandfathering and certification, and fulfilment of continuing professional development (CPD) training under the ECF-TM.

The HKMA will take into account the progress of implementation of the ECF-TM by authorised institutions and authorised institutions' effort in enhancing staff competence and on-going development during its supervisory process.

Korea and Canada sign currency swap agreement

The Bank of Korea and the Bank of Canada have [announced](#) a standing bilateral liquidity swap arrangement, effective immediately. The arrangement allows for the provision of liquidity in each jurisdiction to support domestic financial stability should market conditions warrant it.

The arrangement enables the Bank of Canada to provide Canadian dollars to the Bank of Korea, and to provide liquidity in Korean Won to financial institutions in Canada, should the need arise. Likewise, the Bank of Korea can provide Korean Won to the Bank of Canada, as well as provide liquidity in Canadian dollars to financial institutions in Korea.

SEC Division of Enforcement issues 2017 annual report

The US Securities and Exchange Commission (SEC) Division of Enforcement has issued its [annual report](#) for fiscal year 2017. The report describes the SEC's

enforcement activity for FY 2017, discusses notable enforcement actions considered, and provides comparative data between this FY and the last. Among other things, the report highlights that:

- the Division of Enforcement brought 754 enforcement actions in FY 2017. These actions included 446 'stand-alone' cases brought in court or as administrative proceedings, 196 'follow-on' proceedings seeking bars based on findings in other cases, and 112 proceedings to deregister public companies (typically microcap issuers);
- 80% of the stand-alone enforcement actions included charges against individuals; and
- 18% of the stand-alone enforcement actions last year implicated investment advisers or investment companies. Other cases in the top five enforcement categories involved public finance abuse (18%), issuer reporting/audit & accounting (21%), securities offerings (21%), and broker-dealers (12%).

The report also highlights the SEC's creation of its Cyber Unit to concentrate on computer hacking, distributed ledger technology, and other cyber-related threats; as well as a Retail Strategy Task Force, which will focus on wrongdoing involving microcap securities, Ponzi schemes, and offering fraud.

RECENT CLIFFORD CHANCE BRIEFINGS

Reviving corporate criminal liability in Poland

The Polish Government is working on a new Act on Corporate Criminal Liability. Key provisions include the extension of corporate criminal liability to any offence or treasury offence, making corporate criminal liability independent of the liability of the individual who committed the offence and a considerable increase in the maximum penalty that can be imposed on a corporate entity (from PLN 5m to 30m)

This briefing discusses the Act's purposes, what it may achieve, and potential timelines for implementation.

https://www.cliffordchance.com/briefings/2017/11/reviving_corporatecriminalliabilityinpoland.html

Tools of the trade — what's new in the toolbox for Australian regulators?

Australian regulators have long expressed frustration at the disparity between the options available to them when compared to their overseas counterparts. However, recent developments indicate a broadening of the suite of tools available to Australian regulators and highlight the importance for companies to stay abreast of the changes.

This briefing reviews the new regulatory environment and implications for Australian business practice.

https://www.cliffordchance.com/briefings/2017/11/tools_of_the_trade_what_s_new_in_the_toolbox_for.html

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