

International Regulatory Update

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MiFID2: ESMA announces double volume cap calculation delay

The European Securities and Markets Authority (ESMA) has announced a delay to the publication of the data on the double volume cap (DVC) under MiFID2/MiFIR. In a [press release](#), ESMA set out that the quality and completeness of the data received does not allow for a sufficiently meaningful and comprehensive publication of the DVC calculations. In particular, ESMA has received complete data for approximately 650 instruments, which represent only around 2% of the total data expected by ESMA.

ESMA has acknowledged the legal obligation to apply DVC from January 2018, but has taken the view that because the publication triggers other legal obligations in terms of transparency waivers' suspensions relating to dark trading, it would be inappropriate to initiate the new regime based on insufficient data.

ESMA is engaging with national competent authorities (NCAs) and trading venues and expects that the data quality and submission issues will be resolved to allow for publication in March 2018.

MiFIR: ESMA publishes public register of derivatives subject to trading obligation and list of trading venues temporarily opting-out from access provisions for ETDs

ESMA has published a [public register](#) of derivatives contracts subject to the trading obligation under Article 34 MiFIR and the regulatory technical standards (RTS) on the trading obligation for derivatives (Commission [Delegated Regulation \(EU\) 2017/2417](#)).

In particular, the register is intended to clarify the application of the trading obligation in relation to:

- the classes of derivatives subject to the trading obligation;
- trading venues on which those derivatives can be traded; and
- the dates on which the obligation takes effect per category of counterparties.

ESMA has also published a [list of trading venues](#) that are subject to a transitional exemption from the access provisions under Article 36(5) of MiFIR for exchange-traded derivatives (ETDs).

EMIR: ESMA consults on draft guidelines on anti-procyclicality margin measures for CCPs

ESMA has launched a [consultation](#) on draft guidelines under the European Market Infrastructure Regulation (EMIR) on anti-procyclicality (APC) measures for central counterparties (CCPs).

EMIR recognises that margin calls and haircuts on collateral may have procyclical effects and CCPs, their competent authorities and ESMA should adopt measures to prevent and control possible procyclical effects in the risk management practices adopted by the CCP.

Article 41 of EMIR requires CCPs to regularly monitor, and revise if necessary, their level of margins to reflect current market conditions, taking into account any procyclical effects of such revisions. Both ESMA and the EU Commission have published reports recommending an increase in the transparency of margin requirements to allow members to predict sudden margin changes effectively.

The draft guidelines seek to clarify the application of EMIR in the context of procyclicality of margins with the aim of ensuring common, uniform and consistent application of the relevant EMIR provisions.

Comments to the consultation close 28 February 2018. ESMA expects to publish final guidelines by the end of June 2018.

Payment Accounts Directive: technical standards published in Official Journal

Three sets of technical standards under the Payment Accounts Directive (2014/92/EU – PAD) have been published in the Official Journal.

Commission [Delegated Regulation \(EU\) 2018/32](#) sets out regulatory technical standards (RTS) for the standardised terminology for most representative services linked to a payment account.

Commission [Delegated Regulation \(EU\) 2018/33](#) lays down implementing technical standards (ITS) with regard to the standardised presentation format of the statement of fees according to PAD.

Commission [Delegated Regulation \(EU\) 2018/34](#) lays down ITS with regard to the standardised presentation format of the fee information document according to PAD.

PRA consults on MREL reporting for resolution planning

The Prudential Regulation Authority (PRA) has launched a [consultation](#) on proposals for reporting on the minimum requirement for own funds and eligible liabilities (MREL) (CP1/18). The paper sets out proposed amendments to the PRA's supervisory statement on resolution planning (SS19/13), and draft reporting templates and instructions, and is intended to clarify the future MREL reporting framework.

The consultation is relevant to PRA-authorized UK banks, building societies, UK designated investment firms and their qualifying parent undertakings to which the Resolution Pack Part of the PRA Rulebook applies. The PRA expects that the consultation should be read in conjunction with the Resolution Pack Part of the Rulebook, the Bank of England's MREL Statement of Policy and the Bank's consultation on internal MREL, published in October 2017.

Comments on the consultation are due by 9 April 2018.

Budget Law providing new unsecured debt instruments published in Italian Official Gazette

[Law no. 205 of 27 December 2017](#) on the estimated budget for the 2018 financial year and the multiannual budget for the next three-year period 2018-2020 has been published in the Ordinary Supplement no. 62 to the Italian Official Gazette (no. 302 of 29 December 2017).

With the Budget Law, new debt instruments for banks and investment firms have been made available. These instruments, known as 'strumenti di debito chirografario di secondo livello' (second level unsecured debt instruments), are new debt instruments made available to banks and investment firms with a buffer function in case of bail-in. These new instruments fall halfway between ordinary senior bonds and subordinated bonds.

Bank of Italy publishes provisions amending supervisory instructions on trading venues of government bonds

The Bank of Italy [Regulation of 22 December 2017](#) on supervisory instructions on wholesale trading venues of government bonds and their managers as well as multilateral trading systems of monetary deposits in euro has been published in the Italian Official Gazette.

These instructions repeal and replace the previous supervisory instructions adopted by the Bank of Italy, dated 28 August 2012, as well as the guidelines concerning

business continuity of market infrastructures published in May 2014.

SIMs: Bank of Italy amends provisions on prudential supervision and large exposures

With its [Communication of 4 January 2018](#), the Bank of Italy has amended the provisions on prudential supervision and large exposures applicable to Italian investment firms (SIMs) and SIMs' groups as set out under Bank of Italy Circular no. 285/2013. In particular, this Communication modifies and integrates the provisions included in the Communication of 31 March 2014 concerning the application to SIMs and SIMs' groups of CRD 4/CRR rules.

The aim of the amendment is to adapt the legal framework governing SIMs to the evolution of the European regulatory framework and to keep it in line with the banking framework, the regulations for which were the subject of similar measures.

IFRS 9: Bank of Italy publishes updates to its regulations

The Bank of Italy has published updates intended to introduce the international accounting standard 'IFRS 9 Financial Instruments', which replaced, as of 1 January 2018, the accounting standards 'IAS 39 Financial Instruments: Recognition and Measurement' for the purpose of the treatment of financial instruments.

Amongst other things, the updates concern financial institutions' statements of accounts and statistical and supervisory reporting. The following Bank of Italy circulars have been amended:

- [Circular no. 262](#) dated 22 December 2005 on statements of accounts;
- [Circular no. 148](#) dated 2 July 1991 on supervisory reporting requirements of financial institutions;
- [Circular no. 189](#) dated 21 October 1993 on supervisory reporting requirements of investment managers and collective investment schemes;
- [Circular no. 217](#) dated 5 August 1996 on instructions for supervisory reporting requirements of financial intermediaries, payment institutions and IMEL;
- [Circular no. 115](#) dated 7 August 1990 on instructions for supervisory reporting requirements on a consolidated basis; and
- [Circular no. 272](#) dated 30 July 2008 on 'Matrice dei conti'.

PRIIPs: CONSOB publishes amendments to Issuers Regulation

The Commissione Nazionale per le Società e la Borsa (CONSOB) has adopted a [new resolution](#) intended to amend its Issuers Regulation (Regulation no. 11971/1999) in the context of the implementation of the amendments made to Legislative Decree no. 58/1998 (Italian Financial Act) by Legislative Decree no. 224/2016, which in turn implemented – to the extent necessary – Regulation (EU) No. 1286/2014 (PRIIPs Regulation).

The amendment introduces the obligation to notify CONSOB of key information documents (KIDs) in accordance with Article 4-decies of the Italian Financial Act.

The amendment was published in the Italian Official Gazette on 2 January 2018 and came into force the following day.

Polish Financial Supervision Authority sets out position on implementation of PSD2

The Polish Financial Supervision Authority (PFSA) has published its [position](#) containing the supervisory expectations with respect to the rules of operations of payment service providers in the period from 13 January 2018 to the date of implementation into the Polish legal system of the revised Payment Services Directive (PSD2) (which is expected to take place in Q2 2018), and in the period from the date of implementation of PSD2 to the date of the application of RTS 2015/2366.

Polish Financial Supervision Authority issues notification on application of EU Benchmarks Regulation

The PFSA has issued a [notification](#) that, pursuant to the Act on Distribution of Insurances, it has been designated as the competent authority with regard to the exercise of the supervision provided for in Regulation (EU) 2016/1011 of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds.

PBoC amends regulation of RMB cross-border payments to facilitate trade and investment

The People's Bank of China (PBoC) has published the [Circular](#) on Further Improving the Policy of RMB Cross-border Business to Facilitate Trade and Investment (Yin Fa [2018] No.3). The Circular is an implementing measure of the Circular of the State Council on Several Measures to Promote Foreign Investments (Guo Fa [2017] No. 39).

The following key aspects are worth noting:

- Renminbi (RMB) settlement is available for any cross-border transaction that can be settled in foreign currencies by enterprises;
- banks may process RMB cross-border payments for individuals under current account transactions provided that requirements relating to 'know-your-client', 'know-your-business' and 'due diligence' are satisfied;
- foreign institutions may open a special RMB deposit account for carbon emissions trading;
- certain measures are introduced to further facilitate the use of RMB for foreign direct investments, including without limitation:
 - foreign investors may open multiple RMB accounts for upfront costs depending on their actual needs;
 - a foreign-invested enterprise (FIE) may open multiple RMB capital accounts with banks located outside the place where the FIE is incorporated;
 - where a FIE uses its RMB capital or foreign debt denominated in RMB for salaries, business travel, and/or occasional procurement, banks may directly process RMB payments upon the FIE's instruction; and
 - for profits and dividends, banks shall be permitted to process RMB cross-border settlement after verifying the relevant documents;
- domestic enterprises may remit funds raised overseas by issuing bonds denominated in RMB into the PRC, subject to the relevant requirements under the macro prudential management system; and
- domestic enterprises may remit RMB funds raised overseas by issuing shares into the PRC subject to the actual needs.

FRB requests comment on proposed guidance concerning supervisory expectations related to risk management

The Federal Reserve Board (FRB) is requesting comment on [proposed guidance](#) concerning supervisory expectations related to risk management for large financial institutions. The proposed guidance would apply to financial institutions, including:

- domestic bank holding companies and savings and loan holding companies with USD 50 billion or more in total consolidated assets;

- foreign banks operating in the United States with USD 50 billion or more in combined US assets; and
- nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Board.

The guidance is part of a broader initiative to develop a new rating system for large financial institutions that will align with the post-crisis supervisory program. It identifies core principles for effective senior management, which include ensuring that the firm manages its risk in a way that is prudent and consistent with its business strategy and risk management capabilities. The proposed guidance also identifies core principles for a firm's business line management and independent risk management.

Comments on the proposed guidance will be accepted until 15 March 2018.

SEC Chairman comments on need for investor caution regarding cryptocurrency-related investment products

US Securities and Exchange Commission (SEC) Chairman Jay Clayton and SEC Commissioners Kara Stein and Michael Piwowar have issued a [joint statement](#) commending the North American Securities Administrators Association (NASAA) on its press release highlighting issues and concerns related to cryptocurrencies, initial coin offerings (ICOs), and other cryptocurrency-related investment products. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the US Virgin Islands, Canada, and Mexico.

The NASAA press release emphasizes that cryptocurrencies lack many important characteristics of traditional currencies, including sovereign backing and responsibility, and are being promoted as investment opportunities rather than efficient mediums for exchange.

The SEC statement reminds investors that federal and state securities laws may apply to transactions in cryptocurrencies and ICOs, that investors are entitled to the benefits of state and federal securities laws when transacting in securities, and that many promoters of ICOs and others participating in cryptocurrency-related investment markets are not following these laws.

The SEC statement contains links to the NASAA press release and to SEC investor bulletins, alerts, reports, and statements on cryptocurrencies, ICOs, and related topics.

RECENT CLIFFORD CHANCE BRIEFINGS

The European Commission's proposal for new prudential regime for investment firms

The European Commission has published a proposal for the overhaul of the prudential regime for EU investment firms, i.e. regulated firms carrying on securities and derivatives business. This will have significant impacts on such firms' individual prudential requirements, and on the groups to which they belong.

The proposed changes will likely take effect sometime after mid-2019, at a time of significant change in this field, notably the CRD V/CRR 2 reforms and Brexit.

This briefing outlines the proposals, which include a three-tier classification system for investment firms, amendments to MiFIR, and a new form of consolidation group.

https://www.cliffordchance.com/briefings/2018/01/the_european_commissionsproposalforane.html

Singapore court dismisses summary judgment application in first Bitcoin decision

The first decision in Singapore relating to Bitcoin was released on 27 December 2017. The decision, although only interlocutory, is the first relating to cryptocurrencies in Singapore and highlights the legal implications of trades entered into through smart contracts, and the reversibility of such trades where a computer error is alleged.

This briefing discusses the case's background and the court's decision.

https://www.cliffordchance.com/briefings/2018/01/singapore_court_dismissessummaryjudgmen.html

Second consultation on proposed payments regulatory framework

On 21 November 2017, the Monetary Authority of Singapore (MAS) launched its second consultation on its proposed payments regulatory framework, which included a consultation on the draft Payments Services Bill. The draft Payment Services Bill aims to streamline the regulation of payment services under a single legislative framework, expand the scope of regulated payment activities to take into account developments in payment services, and calibrate regulation according to the risks posed by the respective payment activities.

This briefing explains the key proposals in the bill.

https://www.cliffordchance.com/briefings/2018/01/second_consultationonproposedregulator.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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