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### **Green finance: EU Parliament adopts position on disclosures relating to sustainable investments and sustainability risks**

The EU Parliament has adopted at first reading its position on the EU Commission's proposed [regulation](#) on disclosures relating to sustainable investments and sustainability risks. The proposed regulation aims to integrate environmental, social and governance (ESG) considerations into the decision-making process of investors and asset managers.

The proposal will now be forwarded to the EU Council for adoption.

### **Capital Markets Union: EU Parliament adopts position on harmonised framework for covered bonds**

The EU Parliament has adopted at first reading its position on the EU Commission's proposed [regulation](#) and [directive](#) on the establishment of a harmonised framework for covered bonds.

The proposed framework is intended to:

- provide a common definition of covered bonds;
- define the structural features of the instrument and the tasks and responsibilities for the supervision of covered bonds;
- set out the rules allowing the use of the 'European Covered Bonds' label; and
- strengthen the conditions for granting preferential prudential treatment to covered bonds under the capital requirement regulation.

The proposal will now be forwarded to the EU Council for adoption.

### **Capital Markets Union: EU Parliament adopts position on SME financing**

The EU Parliament has adopted at first reading its position on the proposed regulation on easier and cheaper access to new sources of funding for small and medium-size enterprises (SMEs).

The proposed [regulation](#), which amends the Market Abuse and the Prospectus Regulations, aims to:

- reduce reporting obligations;
- incentivise SMEs to access capital markets through SME growth markets; and
- provide a simplified prospectus for SMEs.

The proposal will now be forwarded to the EU Council for adoption.

## **EU Parliament adopts position on EMIR REFIT and EMIR 2.2**

The EU Parliament has adopted at first reading its position on:

- the proposed regulation to amend the European Market Infrastructure Regulation (EMIR) as regards the clearing obligation, reporting requirements, risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty (CCP), and the supervision of trade repositories ([EMIR REFIT](#)); and
- the proposed regulation amending EMIR as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs ([EMIR 2.2](#)).

The proposals will now be forwarded to Council for adoption.

### **EMIR: EU Commission adopts equivalence decision on derivatives transactions supervised by JFSA**

The EU Commission has adopted an [Implementing Decision](#) recognising the legal, supervisory and enforcement arrangements of Japan for derivatives transactions supervised by the Japan Financial Services Agency (JFSA) as equivalent to the valuation, dispute resolution and margin requirements of Article 11 of EMIR.

In particular, the decision recognises the JFSA rules on valuation and dispute resolution for OTC derivative contracts not cleared by a CCP as equivalent to EMIR and the JFSA rules on obligations on margins between counterparties as equivalent to EU rules.

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

### **EBA publishes opinion on nature of passport notifications for agents and distributors of e-money**

The European Banking Authority (EBA) has published an [opinion](#) on the criteria for determining when agents and distributors of payment institutions (PIs) and electronic money institutions (EMIs), that are located in different Member States to the PI or EMI, are classed as 'establishments' in the host Member State under the applicable EU legislation and case law. In summary, the EBA advises that the criteria for determining the nature of agents and distributors can be extrapolated from the EU Treaty provisions on the right of establishment and the free provision of services, along with case law from the Court of Justice of the European Union on the interpretation of these provisions. These include consideration of whether the agent or distributor has an infrastructure or physical presence that allows it to participate in the economic life of its host state on a stable and continuous basis.

The opinion also sets out the effect on a PI's or EMI's obligations under the Electronic Money Directive, the Payment Services Directive and the Anti-Money Laundering Directive if its agent or distributor is classed as an 'establishment'.

## **NPLs: minimum loss coverage for non-performing exposures regulation published in Official Journal**

[Regulation \(EU\) 2019/630](#) amending the Capital Requirements Regulation (CRR) as regards minimum loss coverage for non-performing exposures has been published in the Official Journal. The regulation forms part of the EU Commission's package of measures aimed at addressing the risks related to high levels of non-performing loans (NPLs) in Europe.

The regulation entered into force on 26 April 2019.

## **Bank of England publishes evaluation of its approach to concurrent stress testing**

The Bank of England (BoE) has published a [report](#) evaluating the effectiveness of its approach to concurrent stress testing. The BoE has used concurrent stress testing of the UK banking system since 2015 to assess the health of the banking system and the main institutions within it.

In February 2018 the Bank commissioned its Independent Evaluation Office (IEO) to assess the effectiveness of its approach and how well the framework was meeting policymakers' continuing needs.

The IEO found that concurrent stress testing provides a forward-looking assessment of banks' resilience and an orderly and repeatable process for policy Committees to inform the setting of firm and system-wide capital requirements. Additionally, the report found that the stress tests have recently allowed the BoE to judge and communicate the resilience of the banking sector to shocks associated with a disorderly Brexit.

The report sees opportunities for improvement and makes specific recommendations relating to:

- advancing macro and microprudential objectives;
- delivering the annual cyclical scenario (ACS) and biennial exploratory scenario (BES) more effectively; and
- communicating stress-test outcomes appropriately.

The BoE has also published its [reply](#) to the IEO's report, setting out its response to the IEO's recommendations and its proposed actions.

## **FCA publishes supervision and enforcement approach documents**

The Financial Conduct Authority (FCA) has published two documents setting out its approach to [supervision](#) and [enforcement](#).

The final documents are informed by responses received during March 2018 consultations and form part of the FCA's Mission framework for providing transparency of its activities.

The approach document on supervision sets out:

- the revised supervisory principles, which apply from 24 April 2019 and can also be found in the Supervision Handbook;
- the FCA's priorities and focus; and
- how it carries out its supervisory role in practice, including the Firm Assessment Model.

The approach document on enforcement outlines how the FCA assesses harm, and how it uses its statutory powers to investigate and, where appropriate, take civil, criminal and/or disciplinary action where there has been a contravention. It also seeks to clarify its approach to investigating individuals. More detailed information is provided in the previously published Enforcement Guide (EG), the Decision Procedure and Penalties Manual (DEPP), and the Annual Enforcement Performance Account.

### **FCA publishes feedback statement on duty of care for firms in financial services**

The FCA has published a feedback statement ([FS19/2](#)) on its Discussion Paper (DP18/5) on a duty of care for firms in financial services and potential alternative approaches.

The discussion paper asked whether a new duty of care (defined loosely to cover both a duty of care and/or fiduciary duty), or any other change (such as extending the client's best interests rules to cover all regulated activities), should be introduced to mitigate conflicts of interest, enhance firms' culture and governance, and improve consumer protection.

From the feedback it has received, the FCA has identified options that are more likely to deliver a higher degree of consumer protection and intends to do further internal work to examine the most effective and proportionate options so that it can understand their likely impact on all areas of its operation, industry and consumers.

The FCA will publish a further paper in Autumn 2019 seeking views on specific options for change and will continue its work to help financial services firms develop a healthy culture.

### **BaFin consults on circular on minimum amount of own funds and eligible liabilities for institutions with insolvency proceedings as resolution strategy**

The German Federal Financial Supervisory Authority (BaFin) has launched a [consultation](#) on a draft circular on the determination of the minimum amount of own funds and eligible liabilities for institutions for which insolvency proceedings are credible and feasible as a resolution strategy.

The proposed circular applies to institutions for which BaFin is the competent national resolution authority pursuant to Article 7 of the Single Resolution Mechanism (SRM) Regulation and section 1 and Section 3 of the German Recovery and Resolution Act (SAG). It describes BaFin's administrative practice with regard to the determination of minimum requirements for own funds and eligible liabilities pursuant to Article 12 of the SRM Regulation and the compliance requirements pursuant to Section 49 and Section 50 of the SAG for institutions and groups for which the implementation of insolvency proceedings as a resolution strategy is credible and feasible.

The consultation period ends on 17 May 2019.

### **BaFin consults on revised MaSanV and guidance note on recovery planning**

BaFin has published a [revised version](#) of the Ordinance on Minimum Requirements for the Contents of Recovery Plans (MaSanV) and a draft guidance note on recovery planning (Sanierungsplanung). The MaSanV sets

out the requirements applicable to recovery plans to be drawn up by all institutions which are potentially systemically relevant and also provides for guidance on simplified requirements for recovery plans of less significant institutions and institutions being members of an institutional protection scheme. Some provisions of Commission Delegated Regulation (EU) 2016/1075 are further specified by the MaSanV. In addition, the MaSanV transposes the rules of the guidelines of the European Banking Authority (EBA) on the range of scenarios to be used in recovery plans (EBA/GL/2014/06) and of the EBA guidelines on the minimum list of qualitative and quantitative recovery plan indicators (EBA/GL/2015/02) into German law.

BaFin has launched a consultation and will accept submissions until 24 May 2019.

### **Bank of Italy issues new FAQs on PSD2 implementation**

The Bank of Italy has released a new set of [FAQs](#) on the transposition of the Payment Services Directive (PSD2).

The FAQs include questions dealing with:

- the possibility to submit reports in English language;
- the use of certified electronic mail (PEC) in order to submit reports;
- the information and data format to be adopted;
- the entities carrying out the controls on the information;
- the cumulative notice;
- the exceedance and the calculation of the threshold with regard to prepaid payment instruments, the related notification deadline and cross-border use;
- the notification concerning fuel cards; and
- the deadline for the submission of reports on behalf of providers of electronic communications networks and services.

### **JPX and SSE announce scheme linking ETF markets**

Japan Exchange Group, Inc. (JPX) and Shanghai Stock Exchange (SSE) have [announced](#) that they will establish 'Japan-China exchange traded funds (ETF) Connectivity', a scheme for creating ETFs that link the ETF markets of both exchanges. Aimed at increasing opportunities for cross-border investment between the Chinese and Japanese securities markets, the scheme is the result of negotiations with the authorities and market participants based on the memorandum of understanding concluded between the two exchanges in October 2018.

Under the scheme, a Japanese or Chinese ETF provider will be able to develop a feeder ETF that mainly invests in the counterparty's ETF after additionally obtaining special investment quota for this scheme from the State Administration of Foreign Exchange of China. JPX and SSE have also agreed to actively collaborate to encourage ETF creation and investment under the scheme and promote the Japanese and Chinese securities markets to investors.



## **HKMA and SFC adopt a coordinated approach to supervise banks and licensed corporations**

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) have recently conducted coordinated inspections of a bank within a Mainland China-based banking group and a licensed corporation owned by a subsidiary (Group). The HKMA and the SFC [found](#) that the Group (being one of many Mainland China-based groups operating banks, licensed corporations and other affiliates in Hong Kong) had entered into a series of complex transactions via a private fund and other entities which give rise to several serious concerns.

According to the HKMA and the SFC, the findings from the coordinated inspections are illustrative of complex structures which appear to have been adopted by other Mainland China financial institutions in Hong Kong together with complex, opaque financing arrangements which may conceal embedded financial risks and make it difficult to conduct rigorous risk assessment. The HKMA and the SFC encourage all institutions which may have adopted similar financing arrangements involving subsidiaries or affiliates of licensed entities to review them urgently and take all necessary steps to address all untoward risks.

The HKMA has advised banks to ensure that credit facilities granted to their subsidiaries and affiliated companies or those of their holding company are granted on an arm's length basis and subject to a prudent credit assessment which should be at least as stringent as that performed on unrelated companies. Banks should also ensure that there is an effective post-lending monitoring framework to identify and follow-up on any major adverse developments of a borrower in a timely manner. The HKMA intends to review the effectiveness of controls of banks as part of its ongoing supervisory work.

The SFC reminds all holding companies or controllers of licensed corporations to prudently manage the overall group financial risks to ensure it has the ability to provide financial support to the licensed corporations and to contain contagion risks to the licensed corporations that may affect their financial integrity.

The HKMA and the SFC have indicated that they will continue to enhance regulatory cooperation and are also closely coordinating with Mainland China regulators to share information and observations derived from their supervisory work.

## **ARRC publishes white paper on using SOFR in cash products**

The Alternative Reference Rates Committee (ARRC) has published a [white paper](#) explaining how market participants can use the Secured Overnight Financing Rate (SOFR) in cash products.

This paper is part of the ARRC's work to help enable an effective shift to SOFR, which is the ARRC's preferred alternative to U.S. dollar LIBOR. The paper lays out some considerations for market participants interested in using SOFR, such as:

- financial products using some kind of average of SOFR, not a single day's reading of the rate, in determining the floating-rate payments that are to be paid or received;

- issuers and lenders having a technical choice between using a simple or a compound average of SOFR as they seek to use SOFR in cash products;
- users needing to determine the period of time over which the daily SOFRs are observed and averaged. An in advance structure would reference an average of SOFR observed before the current interest period begins, while an in arrears structure would reference an average of SOFR over the current interest period; and
- an average of SOFR in arrears will reflect what happens to interest rates over the period but provides very little notice before payment is due. There are a number of conventions designed to allow for a longer notice of payment within the in arrears framework, as well as conventions for in advance payment structures and hybrid models that can reduce the basis relative to in arrears.

The ARRC also seeks to explain the interaction between SOFR and the type of forward-looking term rates that the ARRC would like to see produced once SOFR derivative markets develop sufficient depth. The ARRC sees some specific productive uses for a forward-looking SOFR term rate, in particular as a fallback for legacy cash products referencing LIBOR and in loans where the borrowers otherwise have difficulty adapting to the new environment.

### **ARRC publishes recommended fallback language for floating rate notes and syndicated loans**

The ARRC has [published](#) recommended contractual fallback language for US dollar LIBOR denominated floating rate notes and syndicated loans.

This follows a consultation launched in September 2018, to which the ARRC received over 60 responses. The fallback language is for market participants' voluntary use in new contracts that reference LIBOR and was developed with the goal of reducing the risk of serious market disruption in the event that LIBOR is no longer usable.

For floating rate notes the ARRC's recommended fallback language defines the trigger events that start the transition away from LIBOR and outlines a waterfall approach to determine the SOFR-based successor rate and spread adjustment that would apply to the successor rate.

For syndicated loans the ARRC recommends two separate, alternative fallback language approaches:

- the hardwired approach – if LIBOR is no longer usable, this approach would clearly specify which SOFR-based successor rate and spread adjustment to apply; and
- the amendment approach – this approach would provide a streamlined amendment mechanism for negotiating a benchmark replacement and offers standard language, which provides specificity with respect to the fallback trigger events and explicitly includes an adjustment to be applied to the successor rate.

The amendment approach could serve as an initial step towards the hardwired approach.

The ARRC plans to release recommended fallback language for bilateral business loans and securitizations shortly. It also expects to consult on proposals for fallback language in consumer products in the future.



## **CFTC requests comment on proposed rule to improve data quality and streamline regulations for swap data repositories**

The Commodity Futures Trading Commission (CFTC) is [requesting comments](#) on a proposed rule intended to improve the quality of swap data and to update and streamline regulations related to swap data repository (SDR) operations and governance. The proposed rule is part of a comprehensive review of swap reporting regulations that the CFTC's Division of Market Oversight announced in July 2017. The proposed rule would:

- update requirements for SDRs to verify swap data with reporting counterparties;
- update requirements to correct swap data errors and omissions for SDRs, reporting counterparties, and other market participants; and
- update and clarify SDR operational requirements to ensure that data is available to the CFTC and the public as required by the Commodity Exchange Act.

In addition, the CFTC proposes to update SDR governance regulations in order to streamline the requirements for SDRs.

The deadline for submission of comments by interested persons is 75 days after the proposal is published in the Federal Register.

## **FRB requests comments on proposal to simplify rules determining control of banking organizations**

The Federal Reserve Board (FRB) has issued a [release](#) and related information chart concerning a new proposal setting forth a comprehensive regulatory framework for banking control determinations. The proposal details factors and thresholds that will be used to determine if a company has control over a bank and describes what combination of those factors would and would not trigger a determination of control. Key factors include:

- the company's total voting and non-voting equity investment in the bank;
- director, officer, and employee overlaps between the company and the bank; and
- the scope of business relationships between the company and the bank.

Comments in the proposal are requested and will be accepted for 60 days after publication of the proposal in the Federal Register.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **The EU Sustainable Action Plan - an update report**

As the current European Parliament's term draws to a close it is an opportune time to take stock of the progress made under the Commission's Sustainable Action Plan (the "SAP"). The SAP published in March 2018 is ambitious with three broad aims (1) to reorient capital flows towards a more sustainable economy, (2) to mainstream sustainability in risk management and (3) to foster transparency and long-termism. These aims are scoped in further detail in 10 separate action points. Some of the action points have been more fully

realised than others but the progress made in a year is impressive and reflects the EU's commitment to the sustainability and low-carbon transition agenda.

This briefing paper discusses developments relating to the development of a sustainable taxonomy, the proposed disclosure regulation, the creation of low carbon benchmarks and the EU green bond standard.

[https://www.cliffordchance.com/briefings/2019/04/the\\_eu\\_sustainableactionplan-anupdaterepor.html](https://www.cliffordchance.com/briefings/2019/04/the_eu_sustainableactionplan-anupdaterepor.html)

### **Hong Kong International Arbitration Centre to be conferred status of permanent arbitral institution in Russia**

By 25 April 2019 the Hong Kong International Arbitration Centre (the "HKIAC") is to be included on the list of foreign arbitral institutions recognised in Russia as permanent arbitral institutions ("PAI"). The HKIAC will be the first foreign arbitral institution to be conferred the status of a PAI. This means, among other things, that from a Russian law standpoint it should be possible to refer certain types of corporate disputes related to ownership of shares and participation interests in Russian companies to the HKIAC for resolution.

This briefing paper discusses the key provisions of this change.

[https://www.cliffordchance.com/briefings/2019/04/hong\\_kong\\_internationalarbitrationcentretob.html](https://www.cliffordchance.com/briefings/2019/04/hong_kong_internationalarbitrationcentretob.html)

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