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CRR: ESAs publish final draft ITS on mapping of ECAIs

The EU Council has adopted the following legislative measures comprising the EU Commission's banking package:

The Joint Committee of the European Supervisory Authorities (ESAs), which comprises the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA), has published revised draft Implementing Technical Standards (ITS) amending Implementing Regulation (EU) 2016/1799 on the mapping of credit assessments of External Credit Assessment Institutions (ECAIs) for credit risk under the Capital Requirements Regulation (CRR).

The amendments are intended to reflect the outcome of a monitoring exercise on the adequacy of the mappings, based on additional quantitative and qualitative information collected after the original Implementing Regulation entered into force.

In particular, the Committee:

- proposes to change the credit quality steps allocation for two ECAIs;
- proposes to introduce new credit rating scales for ten ECAIs; and
- addresses the mappings of credit rating agencies (CRAs) recently registered in accordance with the CRA Regulation and that are related to previously mapped ECAIs.

The Committee has published individual draft mapping reports illustrating how the methodology was applied to produce the amended mappings.

ESAs consult on draft ITS on financial conglomerates' reporting of intra-group transactions and risk concentration

The Joint Committee of the ESAs has published a consultation on draft ITS on the reporting of intra-group transactions and risk concentration for financial conglomerates subject to supplementary supervision in the EU. The draft standards were developed based on the mandate included in the Financial Conglomerates Directive (FICOD).

Comments on the consultation are due by 15 August 2019.

EuSEF and EuVECA funds: Delegated Regulations on conflicts of interest published in Official Journal

Delegated Regulations supplementing the European Social Entrepreneurship Funds (EuSEF) Regulation and the European Venture Capital Funds (EuVECA) Regulation have been published in the Official Journal.

Commission Delegated Regulation (EU) 2019/819 supplements the EuSEF Regulation with regard to conflicts of interest, social impact measurement and information to investors in the area of EuSEFs, specifying:

- the types of conflicts of interest which managers of qualifying social entrepreneurship funds need to identify and the steps that managers of qualifying social entrepreneurship funds must take in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest;

- the details of procedures to measure the extent to which the qualifying portfolio undertakings in which the qualifying social entrepreneurship fund invests achieve the positive social impact to which they are committed; and
- the content of certain information to be provided to investors as well as how such information can be presented in a uniform way in order to ensure the highest possible level of comparability.

Commission Delegated Regulation (EU) 2019/820 supplements the EuVECA Regulation with regard to conflicts of interest in the area of venture capital funds, specifying:

- the types of conflict of interest referred to in Article 9(5) of the EuVECA Regulation; and
- the steps that managers of qualifying venture capital funds must take in order to identify, prevent, manage, monitor and disclose conflicts of interest.

Both Regulations will enter into force on 11 June 2019 and will apply from 11 December 2019.

Green finance: ESMA establishes coordination body on sustainability

ESMA has established the Coordination Network on Sustainability (CNS). The CNS has been created to foster the coordination of national competent authorities' (NCAs') work on sustainability and to develop policy with a strategic view on issues related to integrating sustainability considerations into financial regulations.

Ana María Martínez-Pina Garcia, Vice-Chair of the Comisión Nacional del Mercado de Valores (CNMV), has been appointed by ESMA to chair the CNS for a period of two years.

MiFID2: ESMA launches call for evidence on position limits in commodity derivatives

ESMA has issued a call for evidence as part of its report to the EU Commission on the impact of position limits and position management on commodity derivatives markets.

ESMA is seeking feedback on the impact of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets. ESMA seeks views from stakeholders on their experience of the application of the MiFID2 position limit and position management provisions, how trading in commodity derivatives may have been impacted and suggestions for possible amendments.

Comments to the consultation close 5 July 2019. ESMA will consider the feedback and plans to issue its draft report to the Commission for consultation in Q4 2019 with a view to finalising the report by the end of March 2020.

Benchmarks: ESMA updates Q&A

ESMA has updated its questions and answers (Q&A) document on the implementation of the Benchmarks Regulation providing clarification on the following issues:

- the information included in the ESMA register of administrators of benchmarks;
- determination of the Member State of reference; and
- the role of IOSCO principles and of external audit in the recognition of 3rd country administrators.

The Q&A document is intended to be a practical convergence tool to promote common supervisory approaches and practices in the application of the Benchmarks Regulation.

CSDR: ESMA publishes updated Q&As

The European Securities and Markets Authority (ESMA) has published an updated Q&A document on the implementation of the Central Securities Depositories Regulation (CSDR).

The document has been updated to include new Q&As relating to internalised settlement.

FSB seeks feedback on too-big-to-fail reforms

The Financial Stability Board (FSB) is seeking feedback on the effects of the too-big-to-fail (TBTF) reforms of banks agreed by the G20 in the aftermath of the global financial crisis.

The evaluation will examine how successfully TBTF reforms for systemically important banks (SIBs) that have been implemented to date are achieving their intended objectives and aims to help identify any material unintended consequences that may have to be addressed, without compromising on the objectives of the reforms.

The FSB invites feedback from banks and financial institutions, industry associations and other interested parties on:

- the extent to which TBTF reforms are achieving their objectives as set out in the FSB's terms of reference;
- which types of TBTF policies, such as higher loss absorbency and resolution and resolvability, have had an impact on SIBs and how;
- any evidence that the effects of these reforms differ by type of bank;
- the broader effects of these reforms on financial system resilience and structure, the functioning of financial markets, global financial integration or the cost and availability of financing;
- any material unintended consequences from the implementation of the reforms to date; and
- any other issues relating the effects of the TBTF reforms.

Comments are due by 21 June 2019. The FSB expects to publish a public evaluation report summarising its main findings and providing an overall assessment of the effects of the TBTF reforms in June 2020 and a final report by the end of 2020.

FCA extends TPR deadline

The Financial Conduct Authority (FCA) has extended the deadline for notifications for the temporary permissions regime (TPR) to the end of 30 October 2019.

The TPR would allow EEA-based firms passporting into the UK to continue new and regulated business within the scope of their current permissions for a limited period while they seek full FCA authorisation.

The extension also allows EEA-domiciled investment funds that market in the UK under a passport to continue temporarily marketing in the UK.

The deadline for applying to the Trade Repository and Credit Rating Agencies has also been extended to the end of 30 October 2019. The notification window for temporary permissions for EEA payment services and e-money firms has closed but will open again under relevant HM Treasury Regulations on 31 July 2019 and end on 30 October 2019.

FCA publishes findings from review of principal firms in investment management sector and Dear CEO letter

The FCA has published the findings from its review of principal firms and their appointed representatives (ARs) in the investment management sector.

Authorised firms act as principal for their ARs and have regulatory responsibility for their actions. The FCA's review identified significant shortcomings in principal firms' understanding of their regulatory responsibilities for their ARs, including:

- weak or underdeveloped governance arrangements, including a lack of effective risk frameworks, internal controls and resources;
- poor assessment of the risks posed by the activities of their ARs, resulting in some principals not holding enough financial resources for both liquidity and capital; and
- the identification and management of conflicts of interest.

The FCA has concluded that there is a significant risk of harm to consumers and to the market resulting from the activities of ARs operating in this sector and expects principals to identify and address any shortcomings in their firm's risk-management frameworks and processes.

The FCA has also issued a Dear CEO letter setting out its expectations to firm CEOs and management boards. The FCA expects firms to assess how they are meeting its requirements as set out in the Handbook in relation to their AR's and warns that if, after implementing reviews to identify shortcomings they cannot demonstrate compliance with the Handbook and any risks relating to the activities of ARs they are responsible for, they should consider ending their relationships with their ARs. The FCA plans to conduct further work, including visits to principal firms, and will take appropriate action if it finds firms have failed to act.

Working Group on Sterling Risk-Free Reference Rates provides update on adoption of risk-free rates in sterling markets

The Working Group on Sterling Risk-Free Reference Rates has published a statement on the progress on adoption of risk-free rates in sterling markets.

The statement reviews the adoption of SONIA in different product markets in the past year, since the Bank of England (BoE) implemented reforms to the SONIA interest rate benchmark.

The Working Group also discusses the development of a term benchmark based on the sterling risk-free rate, known as a Term SONIA Reference Rate (TSRR). Three administrators (FTSE Russell, ICE Benchmark Administration and Refinitiv) have confirmed they are working on the development of a TSRR. Over the remainder of 2019, the Working Group expects administrators to establish whether a robust TSSR, compliant with international standards, can be produced on a timetable consistent with the broader transition work.

The Working Group encourages market participants to continue with their transition efforts away from LIBOR in order to reduce the risk of disorderly adjustment closer to end-2021 and to help develop liquidity in SONIA-referencing markets further.

CSSF issues circular on guidelines on complaints-handling for securities and banking sectors

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued Circular CSSF 19/718 on the adoption of the guidelines on complaints-handling for the securities and banking sectors issued by the Joint Committee of the European Supervisory Authorities (JC 2018 35).

The circular is addressed to all professionals subject to prudential supervision by the CSSF and all entities subject to public supervision of the audit profession by the CSSF. The aim of the circular is to draw the attention of these professionals and entities to the guidelines, with which the CSSF has declared its intention to comply.

The guidelines supplement the guidelines of 27 May 2014 for complaints-handling for the securities and banking sectors issued by the Joint Committee (JC 2014 43) and rendered applicable through CSSF Regulation 16-07 relating to out-of-court complaint resolution. The content of the 2014 guidelines remains unchanged by the new guidelines, but the scope is extended to (i) credit intermediaries and non-credit institution lenders (as defined in Article 4(5) and (10) of the Directive 2014/17/EU respectively) and to (ii) payment institutions providing only payment initiation services or account information services (as defined in Article 33 of the Directive 2015/2366/EU).

The guidelines are applicable as of 1 May 2019.

CSSF issues circular on guidelines on STS criteria for ABCP and non-ABCP securitisation

The CSSF has issued Circular CSSF 19/719 on the implementation of EBA guidelines on the STS criteria for non-ABCP securitisations and the STS criteria for asset-backed commercial paper (ABCP) securitisations.

The circular is addressed to all originators, original lenders, sponsors, securitisation entities, investors, and third persons verifying STS criteria compliance of an STS securitisation. The aim of the circular is to draw the attention of these professionals and entities to the guidelines, with which the CSSF has declared its intention to comply.

The guidelines entered into force on 15 May 2019 and are annexed to the new circular.

Draft Order on transparency on conditions and information requirements applicable to payment services published

Royal Decree-Law 19/2018, of 23 November, on payment services and other urgent measures on financial matters (RDL 19/2018) delegated the establishment of the transparency conditions and requirements relating to the provision of payment services to the Ministry of Economy and Business (Ministerio de Economía y Empresa). In compliance with that delegation and, in particular, relating to Article 29 of RDL 19/2018, the Draft Order covers the following matters:

- the establishment of transparency obligations applicable to payment services providers;
- the definition of low-value payment instruments;
- information obligations applicable to single payment transactions; and
- information obligations relating to payment transactions covered by a master agreement.

The Draft Order will be subject to a public hearing until 6 June 2019.

Public hearing on amendment of CNMV Circular 1/2017 on liquidity agreements launched

The Spanish National Securities Market Commission (CNMV) is suggesting the following amendments to its Circular 1/2017, of 26 April, on liquidity agreements with the aim of making liquidity agreements more accessible to a broader group of listed companies:

- in section 3 of the Circular, the introduction of a new limit on the daily volume to be negotiated by the intermediary pursuant to the liquidity agreement applicable to such agreements subscribed by issuer companies whose shares lack a liquid market and are negotiated on a multilateral negotiation system or in a regulated market with a fixing contracting system. This limit will be the higher of (i) 25% of the daily average volume negotiated in the 30 previous trading days; or (ii) EUR 20,000 on each trading day; and
- in section 4 of the Circular, the elimination of the restriction to the possibility of maintaining simultaneous orders of purchase and sale and establishment of the obligation of the financial intermediary to adopt the necessary measures to prevent these orders being crossed.

The public hearing will last until 31 May 2019.

APRA releases report on industry self-assessments into governance, culture and accountability

The Australian Prudential Regulation Authority (APRA) has released a report analysing the self-assessments carried out by 36 of the country's largest banks, insurers and superannuation licensees in response to the Final Report of the Prudential Inquiry into Commonwealth Bank of Australia (CBA).

APRA noted a wide variation in the quality of the self-assessments, i.e. most institutions recognised the opportunity provided by the findings in the Final Report to critically examine their own organisation, however a small number of institutions took a lighter touch approach and viewed it as an exercise for APRA rather than an opportunity to drive improvement. It also observed that:

- the weaknesses identified in the Prudential Inquiry are not unique to the CBA;
- there are consistent findings relating to non-financial risk management, accountabilities and risk culture; and
- institutions may not have fully identified the root causes of findings, resulting in the risk that actions to address weaknesses may not be effective or sustainable.

APRA has indicated that it is considering applying additional capital requirements to several regulated institutions after an analysis of self-assessments found material weaknesses in the governance and management of non-financial risks. It is also seeking assurances from all boards that the weaknesses identified in their self-assessments will be addressed as a matter of priority in an effective and sustainable manner.

SEC releases proposal regarding cross-border application of US security-based swaps regulations

The Securities and Exchange Commission (SEC) has proposed a combination of rule amendments and interpretive guidance regarding cross-border regulation of security-based swaps transactions and market participants.

The proposal addresses for key areas:

- the use of transactions that have been 'arranged, negotiated, or executed' by personnel located in the United States as a trigger for regulating security-based swaps and market participants;
- the requirement that non-US resident security-based swap dealers and major security-based swap participants certify and provide an opinion of counsel that the SEC can access their books and records and conduct onsite inspections and examinations;
- the cross-border application of statutory disqualification provisions; and
- the questionnaires or employment applications that security-based swap dealers and major security-based swap participants must maintain with regard to their foreign associated person.

The SEC is seeking public comment on this proposing release. The comment period will end 60 days after the release is published in the Federal Register, which is expected to occur soon.

RECENT CLIFFORD CHANCE BRIEFINGS

Remuneration aspects of CRD V

The Capital Requirements Directive IV (CRD IV) introduced several remuneration principles in order to curb excessive risk taking and short termism in the financial services sector. At the end of last week, the European Council formally adopted the text of CRD V. CRD V makes several

amendments to CRD IV. It will be published in the EU Official Journal in June and Member States then have until 1 January 2021 to transpose it into national law.

This briefing paper discusses the remuneration aspects of CRD V.

https://www.cliffordchance.com/briefings/2019/05/remuneration_aspectsofcrdv.html

ISDA Credit Support Annex – Court of Appeal re-affirms no obligation to pay 'negative interest'

The English Court of Appeal has ruled on whether the standard form ISDA 1995 Credit Support Annex contains an obligation to pay negative interest. The Court's judgment re-affirms that, where parties have not otherwise agreed how to address negative interest rates, there is no obligation in the CSA on a party transferring eligible collateral in the form of cash to pay or otherwise account for negative interest on that cash.

This briefing paper discusses the case.

https://www.cliffordchance.com/briefings/2019/05/isda_credit_supportannexcourtofappea.html

Supreme Court resolves trademark treatment following rejection in bankruptcy

The U.S. Supreme Court has issued its decision in Mission Product Holdings, Inc. v. Tempnology, LLC, finally answering the long-awaited question as to whether a debtor-licensor's rejection of a trademark contract deprived the licensee of its right to use the trademark. The Court concluded that rejection of a trademark licensing agreement operates only as a breach, allowing the trademark user to continue to use the trademark post-rejection to the extent permitted under applicable state law. The ruling resolved a split among the First Circuit Court of Appeals and the Seventh Circuit Court of Appeals on what the International Trademark Association identified as 'the most significant unresolved issue in trademark licensing.'

This briefing paper discusses the Court's decision.

https://www.cliffordchance.com/briefings/2019/05/supreme_court_resolvestrademarktreatmen.html