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European System of Financial Supervision: EU Parliament publishes adopted texts

The EU Parliament has published the adopted texts of the European System of Financial Supervision review package.

“The package comprises the [Omnibus Regulation](#), the [Omnibus Directive](#) and a [Regulation amending the European Systemic Risk Board Regulation \(ESRB\)](#), and includes:

- changes to the existing system for supervisory convergence, including the elaboration of a strategic supervisory plan at EU level and reinforcing existing mechanisms such as peer reviews and consultations;
- reinforcing the role and powers of a management board within the European Supervisory Authorities’ (ESAs’) governance structure, which would be accountable to the EU Parliament and EU Council;
- giving the European Securities and Markets Authority (ESMA) direct supervisory powers over critical benchmarks and consolidated tape providers; and
- strengthening the role and powers of the European Banking Authority (EBA) as regards anti-money laundering supervision for financial institutions.

The package still needs to be formally approved by the EU Council.

Capital Markets Union: EU Commission announces composition of high-level forum

The EU Commission has announced the [composition](#) of a high-level forum on the future of the Capital Markets Union (CMU) project. The forum, composed of industry, independent and scholarly experts, will propose targeted policy recommendations to support the Commission’s goal of developing a further CMU encompassing all Member States so they can mobilise capital for businesses, offer better investment opportunities and boost economic growth.

The Commission expects the forum will meet each month from November 2019 to June 2020 and will comprise three sub-groups focusing on:

- the creation of an ecosystem enabling greater capital raising, with special focus on innovative SMEs;
- the development of the European capital market architecture, with special focus on how new financial technologies can support this process; and
- investment choice and accessibility to capital markets services to promote greater retail investors’ participation.

The forum starts its work on 26 November 2019 and is expected to submit a set of policy recommendations to the Commission by the end of May 2020.

EBA publishes risk reduction package roadmaps

The European Banking Authority (EBA) has published a [document](#) setting out roadmaps for delivering its mandates under the revised Capital Requirements Directive (CRD 5), Capital Requirements Regulation (CRR 2) and Bank Recovery and Resolution Directive (BRRD 2).

The roadmaps outline the EBA's policy strategy, approach and expected timelines for delivering regulatory and implementing technical standards (RTS/ITS), guidelines and reports in the areas of:

- governance and remuneration;
- large exposures;
- Pillar 2;
- resolution;
- Pillar 3 disclosures; and
- supervisory reporting.

Most of the mandates aim at completing and updating the Single Rulebook as well at monitoring regulatory practices within the Single Market.

EBA consults on ITS on disclosure and reporting of MREL and TLAC

The EBA has launched a [consultation](#) on draft implementing technical standards (ITS) on disclosure and reporting of the minimum requirement for own funds and eligible liabilities (MREL) and the total loss absorbency requirement (TLAC).

The draft ITS include proposals for templates and tables implementing the TLAC/MREL disclosure and reporting requirements. In addition to the draft ITS, the consultation includes two recommended reporting templates covering the forecast of MREL and TLAC positions and funding structures, and a file mapping disclosure and reporting requirements.

The draft ITS follow an integrated approach and, in the case of disclosures, are aligned with the Basel Pillar 3 standards. By integrating disclosures and reporting, the EBA is seeking to maximise efficiency by institutions, and to facilitate the use of information by authorities and market participants.

Comments are due 22 February 2020.

CRR 2: EBA consults on specific supervisory reporting requirements for market risk

The EBA is [consulting](#) on draft implementing technical standards (ITS) on specific supervisory reporting requirements for market risk, the first step to address the elements of the mandate of Article 430b of the Capital Requirements Regulation (CRR) referring to the alternative standardised approach for market risk (MKR-ASA).

CRR2 introduced the first elements of the fundamental review of the trading book (FRTB) into the EU prudential framework. The framework is implemented by means of a reporting requirement, constituting the first step towards the full implementation of the FRTB framework in the EU.

The EBA is consulting on a thresholds template, the first step in expanding the reporting requirement on the new market risk framework. The thresholds template aims to provide insights into the size of institutions' trading books and the volume of their business subject to market risk, and a summary template, reflecting the own funds requirements under the MKR-ASA. The reporting requirements on the new market risk framework will be gradually expanded over time.

The consultation period, which ends on 7 January 2020, has been shortened in order to meet the deadline for submitting the final draft ITS to the EU Commission and to ensure that the reporting starts within one year after the adoption of the Delegated Act in accordance with Article 461a of CRR.

The EBA expects to submit final draft ITS to the Commission in Q2 2020. The first reference date for reporting in accordance with these technical standards is foreseen to be on 31 March 2021 with an expected implementation period for the proposed reporting requirements of approximately 1 year.

ESMA Chair delivers keynote speech on banking and MiFID 2 review at Euro Finance Week

The Chair of the European Securities and Markets Authority (ESMA), Steven Maijoor, has delivered a [keynote address](#) on banking and the MiFID2 review at the Euro Finance Week in Frankfurt.

The speech broadly concerned the implementation of, and possible changes to, MiFID2 in light of ESMA's review and the recent publication of German Federal Ministry of Finance position papers on possible amendments and revisions, focusing on ESMA's work in the areas of:

- investor protection, in particular investment products' cost and performance, costs disclosures and PRIIPs key information documents (KIDs); and
- markets, providing a brief overview of responses ESMA has received to its recently concluded consultation on the cost of market data and the consolidated tape for equity instruments.

Equator Principles Association adopts final version of EP4

The Equator Principles Association has published the final version of [Equator Principles four](#) (EP4). The EPs are intended to serve as a common baseline and framework for financial institutions to identify, assess and manage environmental and social risks of project finance and certain corporate loan transactions. This iteration of the principles contains changes in:

- the scope of applicability of the EPs;
- applicable standards in designated vs. non-designated countries;
- human rights and social risk; and
- climate change.

Basel Committee reports on open banking and application programming interfaces

The Basel Committee on Banking Supervision (BCBS) has published a [report](#) on open banking and application programming interfaces (APIs), with a particular focus on customer-permissioned data sharing (i.e. where a customer grants permission to a third party firm to access their data, either directly or through their bank). From discussions with Committee members and industry practitioners across Committee jurisdictions, the BCBS has concluded that:

- traditional banking is evolving into open banking;

- open banking frameworks vary across jurisdictions in development, approach and scope; and
- data privacy laws can provide a foundation for an open banking framework.

The report also highlights key challenges faced by banks and supervisors, including:

- the multi-disciplinary aspect of open banking, and the resulting variety of regulators involved;
- the need to change business models to meet new requirements;
- data and cyber security issues;
- the time and cost to build APIs and the lack of widely accepted API standards;
- oversight of third parties, which may not have a contractual relationship with the bank or have regulatory authorisation;
- assigning liability in the event of financial loss or loss of sensitive data; and
- reputational risk.

The BCBS recommends that banks and their supervisors should pay particular attention to the risks posed by the increased sharing of customer-permissioned data and the growing connectivity of the various entities involved in providing financial services.

ISDA reports on final parameters for benchmark fallback adjustments

The International Swaps and Derivatives Association (ISDA) has published the [results](#) of its September 2019 consultation on the final parameters of adjustments that will apply to derivatives fallbacks for certain interbank offered rates (IBORs).

The report, prepared by the Brattle Group, follows two earlier consultations where the majority of respondents preferred the 'compound setting in arrears rate' to address differences in tenor between IBORs and overnight risk-free rates, and the 'historical mean/median approach' to deal with differences in credit risk and other factors.

The report covers technical issues on specific methodologies for the two adjustments. Responses to the September 2019 consultation show that a majority of participants preferred:

- a historical median approach over a five-year lookback period;
- not to include a transitional period in the spread adjustment calculation, not to exclude outliers, and not to exclude any negative spreads; and
- a two-banking-day backward shift adjustment for operational and payment purposes for the compounded setting in arrears rate.

Following these results ISDA will make the relevant amendments to its 2006 definitions to incorporate fallbacks with these adjustments for new IBOR trades and also publish a new protocol to enable market participants to include fallbacks within legacy IBOR contracts if desired. ISDA expects to finalise the protocol and amend its definitions by the end of 2019 with implementation set for sometime in 2020.

ISDA also plans to publish a new supplemental consultation on the spread and term adjustments for fallbacks in derivatives referencing euro LIBOR and EURIBOR which will also cover the final parameters for these adjustments. If the results are consistent with prior consultations, ISDA expects to implement fallbacks for euro LIBOR and EURIBOR in 2020, in line with fallbacks for nine other IBORs covered by earlier consultations.

FSB publishes letter to ISDA on pre-cessation triggers

The Financial Stability Board (FSB) has published a [letter](#) from the Co-Chairs of its Official Sector Steering Group (OSSG) to ISDA on fallback language for derivatives referencing key IBORs.

The letter encourages ISDA to add a pre-cessation trigger alongside the cessation trigger as standard language in the definitions for new derivatives and in a single protocol, without embedded optionality, for outstanding derivative contracts referencing key IBORs.

The OSSG considers that the goals of systemic risk reduction can best be met by this option. The OSSG also thinks that keeping the structure of the protocol simple and including the trigger in ISDA's documents in as straightforward a manner as possible will better encourage uptake and consistent outcomes.

The OSSG asks ISDA to take forward this option and, if necessary to broaden and consolidate the consensus of market participants, to set it out in a further consultation.

FSB publishes annual list of G-SIBs

The FSB has published its annual [list of global systemically important banks \(G-SIBs\)](#). Toronto Dominion has been added to the list of G-SIBs, taking the total number on the 2019 list to 30. 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 denominators of each of the twelve high-level indicators used to calculate the banks' scores;
- for each bank in the sample, the twelve high-level indicators used to calculate these denominators; and
- the cut-off score used to identify the G-SIBs and the thresholds used to allocate G-SIBs to buckets for the purpose of calculating the specific higher loss absorbency requirements.

FCA publishes Q&A on expectations for LIBOR transition

The Financial Conduct Authority (FCA) has published [questions and answers \(Q&A\)](#) on conduct risk arising from LIBOR transition.

The Q&A sets out the FCA's expectations on firms having a strategy in place and taking necessary action during the LIBOR transition, particularly regarding:

- governance and accountability;
- replacing LIBOR with alternative rates in existing contracts and products;

- offering new products with RFRs or alternative rates;
- communicating with customers about LIBOR and alternative rates and products; and
- firms investing on customers' behalf and LIBOR transition.

The FCA encourages all firms that currently rely on LIBOR to consider these questions and answers.

AFM consults on principles regarding 'choice architecture'

The Netherlands Authority for the Financial Markets (AFM) has invited financial institutions and pension funds to respond to its draft '[principles regarding choice architecture](#)'. The principles would apply to financial institutions that offer products or services to consumers and to pension funds. In the policy statement, the AFM outlines its expectations about the way in which consumers are offered choices in their financial decision-making process. According to the AFM, the choice architecture can (unconsciously) influence the choices that a consumer makes. The AFM has established twelve principles that describe its expectations regarding the choice architecture. The AFM's principles are not (new) rules, but are principles on a subject which relates to various legal standards that the AFM supervises (e.g. duty of care). Therefore, the principles do not prescribe how institutions can meet a certain standard, but outline expectations that the AFM has.

The AFM has [invited comments](#) by 15 January 2020.

MAS and Canadian Securities Regulators sign agreement to strengthen cooperation on fintech

The Monetary Authority of Singapore (MAS) and eight members of the Canadian Securities Administrators (CSA) have [signed](#) a cooperation agreement to strengthen collaboration on fintech between Singapore and the CSA's member jurisdictions (i.e. securities regulatory authorities in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan).

The cooperation agreement sets out a framework of collaboration between the MAS and the CSA members, including:

- setting up a referral and support mechanism to facilitate mutual market access for fintech firms;
- regularly exchanging views and best practices on the regulatory sandbox; and
- sharing information on the latest fintech trends.

MAS and Banque de France to strengthen financial and cybersecurity cooperation

The MAS and the central bank of France, Banque de France (BDF), have jointly [announced](#) that they will deepen financial linkages and foster closer cooperation in cybersecurity.

As part of this effort, BDF will:

- open an office in Singapore in early 2020, its first office in Asia and second abroad (the first being in New York). BDF's Singapore office is intended to

allow for enhanced monitoring of Asian economies and financial systems, and the forging of closer relations with central banks and financial authorities in the Asia-Oceania region; and

- set up a dealing room to strengthen its operational capacity to better serve international official sector entities in the Asian time zones.
- In addition, the MAS will sign a memorandum of understanding (MOU) with the BDF and the Autorité de contrôle prudentiel et de résolution (ACPR) to enhance cooperation in cybersecurity, through:
 - regular information sharing on cyber incidents and threat intelligence; and
 - staff exchanges to deepen working relationships and mutual learning.

The MOU will be signed on the side-lines of the Singapore FinTech Festival and Singapore Week of Innovation and TeCHnology (SFF x SWITCH) 2019.

MAS consults on proposed regulation of payment token derivatives

The MAS has published a [consultation paper](#) setting out its proposed regulatory approach under the Securities and Futures Act (SFA) for derivatives contracts that reference payment tokens as underlying assets (referred to as payment token derivatives).

Although the proposal is intended to allow approved exchanges in Singapore to meet the need of investors to manage their exposure to payment tokens, the MAS notes that payment tokens and their derivatives are not suitable for most retail investors and strongly advises retail investors to exercise extreme caution when trading in payment tokens and their derivatives.

The MAS intends to:

- regulate payment token derivatives offered by approved exchanges (but not other trading platforms, such as those operated by recognised market operators) by prescribing payment tokens as an 'underlying thing' in the Securities and Futures (Prescribed Underlying Thing) Regulations 2018;
- impose on certain financial institutions regulated by the MAS (e.g. approved exchanges, banks, merchant banks and capital markets services licence holders):
 - an obligation to collect margin 1.5 times the standard amount required for contracts offered by approved exchanges, subject to a floor of 50%;
 - an obligation to include risk warnings tailored to payment token derivatives in informational materials provided to investors; and
 - restrictions on advertising.

The proposed obligations and restrictions set out in the second bullet point above are intended to apply with respect to retail investors by 30 June 2020.

Through the consultation paper, the MAS is seeking feedback on the draft amendments to the Securities and Futures (Prescribed Underlying Thing) Regulations 2018. Comments are due by 20 December 2019.

Securities and Futures (Clearing of Derivatives Contracts) (Amendment) Regulations 2019 gazetted

The Singapore Government has gazetted the [Securities and Futures \(Clearing of Derivatives Contracts\) \(Amendment\) Regulations 2019](#).

Amongst other things, the amendment regulations amend the Schedule to the [Securities and Futures \(Clearing of Derivatives Contracts\) Regulations 2018](#) such that specified Euro and Pound Sterling fixed to-floating interest rate swap contracts are within scope of the mandatory clearing obligations from 1 April 2020.

The Securities and Futures (Clearing of Derivatives Contracts) (Amendment) Regulations 2019 are effective from 11 October 2019.

SFC issues new guidance to address market misconduct

The Securities and Futures Commission (SFC) has issued a [circular](#) to set out guidance for licensed corporations regarding dubious private fund and discretionary account arrangements or transactions.

The SFC has identified a number of dubious arrangements and transactions involving private funds or discretionary accounts in its supervision of asset managers. In these cases, asset managers did not act in the manner which the SFC would normally expect of a conventional investment manager in exercising discretion to make investment decisions for the funds or discretionary accounts under their management. According to the SFC, they largely followed investors' instructions when structuring private funds or discretionary accounts and effecting transactions, and many of these arrangements and transactions involved other red flags and together should have led to a reasonable suspicion on the part of asset managers that these might not be legitimate or proper.

The SFC cautions licensed corporations not to disregard dubious private fund and discretionary account arrangements or transactions, which may facilitate their clients or other entities in avoiding or contravening laws, rules or regulations such as the Securities and Futures Ordinance, the Codes on Takeovers and Mergers and Share Buy-backs and the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited.

The SFC advises that the senior management of an asset manager should have procedures and controls so that the asset manager can reasonably consider if a proposed private fund or discretionary account arrangement or transaction is dubious and decide if the asset manager should proceed with the arrangement or transaction.

The SFC has also issued a [statement](#) on the disclosure of actual controllers or beneficial owners of counterparties to a transaction. The statement is intended to remind listed companies to ensure that their announcements and other documents should not include materially false, incomplete or misleading information regarding their counterparties in pending corporate transactions.

RECENT CLIFFORD CHANCE BRIEFINGS

Sustainability linked loans – the star performer of the loan markets?

The growth of sustainability linked loans has been the success story of the European loan markets over the last 12 months. This briefing paper explores what that means and how the market has developed.

<https://www.cliffordchance.com/briefings/2019/11/sustainability-linked-loans-the-star-performer-of-the-loan-markets.html>

Just a click away – the ACCC takes on Google – the ACCC's first case building on the ACCC digital platforms inquiry

Following the Australian Competition and Consumer Commission's (ACCC's) digital platforms inquiry which culminated in the release of its final report in July 2019, the ACCC has commenced action in the Federal Court against Google, in what looks likely to be the first in a number of cases against the digital platforms Google and Facebook for alleged contraventions of the Australian Competition and Consumer Act 2010 (CCA).

The ACCC has stated that it was the first time a regulator anywhere in the world had taken on Google over the alleged misuse of personal data of its users based on misleading statements as to location data linked to individuals that Google collects, keeps and uses as part of its advertising business.

This briefing paper discusses the case.

<https://www.cliffordchance.com/briefings/2019/11/just-a-click-away--the-accc-takes-on-google--the-accc-s-first-ca.html>

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