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- **CSSF publishes FAQs on UCI Law clarifying disclosure of performance fee, investment management fee and investment advisory fee to investors of UCITS**
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SRB publishes its expectations for banks

The Single Resolution Board (SRB) has published its final 'Expectations for Banks' document alongside an overview of SRB responses to the industry consultation, which took place from 23 October to 4 December 2019.

The 'Expectations for Banks' document has been updated to reflect industry feedback and aims to provide clarity by setting out the capabilities the SRB expects banks to demonstrate to show that they are resolvable. The document sets out best practice and benchmarks for assessing resolvability.

The 'Expectation for Banks' will be subject to a gradual phase-in with banks expected to have built up their capabilities on all aspects by the end of 2023, except where indicated or agreed otherwise. The expectations are tailored to each individual bank and its resolution strategy, allowing for flexibility and proportionality.

The SRB has emphasised that it acknowledges the current challenges facing banks relating to the COVID-19 pandemic, and that its focus is on business continuity and supporting the economy. The SRB is closely monitoring the situation and is prepared to give banks the flexibility needed to implement the 'Expectations for Banks' on an individual basis.

CRR: Implementing Regulation amending ITS on supervisory reporting of institutions published in Official Journal

Commission Implementing Regulation (EU) 2020/429 of 14 February 2020 amending Implementing Regulation (EU) 680/2014 laying down implementing technical standards (ITS) with regard to supervisory reporting of institutions according to the Capital Requirements Regulation (CRR) has been published in the Official Journal.

The Implementing Regulation entered into force on 31 March 2020.

Delegated Regulation on mitigating credit counterparty risk for covered bonds and securitisations published in Official Journal

Commission Delegated Regulation (EU) 2020/447 of 16 December 2019 supplementing the European Market Infrastructure Regulation (EMIR) with regard to regulatory technical standards (RTS) on the specification of criteria for establishing the arrangements to adequately mitigate counterparty credit

risk associated with covered bonds and securitisations, and amending Delegated Regulations (EU) 2015/2205 and (EU) 2016/1178 has been published in the Official Journal.

The Delegated Regulation enters into force on 16 April 2020.

Delegated Regulation on treatment of OTC derivatives in connection with STS securitisations for hedging purposes published in Official Journal

Commission Delegated Regulation (EU) 2020/448 of 17 December 2019 amending Delegated Regulation (EU) 2016/2251 as regards the specification of the treatment of OTC derivatives in connection with certain simple, transparent and standardised (STS) securitisations for hedging purposes has been published in the Official Journal.

The Delegated Regulation enters into force on 16 April 2020.

Fundamental Review of the Trading Book: EBA publishes final draft RTS for implementation

The European Banking Authority (EBA) has published its final draft RTS on the new internal model approach (IMA) under the Fundamental Review of the Trading Book (FRTB).

The technical standards conclude the first phase of the EBA roadmap towards the implementation of the market and counterparty credit risk frameworks in the EU.

The final draft RTS cover 11 mandates and have been grouped into:

- the final draft RTS on liquidity horizons for the IMA;
- the final draft RTS on back-testing and profit and loss attribution (PLA) requirements; and
- the final draft RTS on criteria for assessing the modellability of risk factors under the IMA.

The adoption of the RTS is expected, under the current Capital Requirements Regulation (CRR2), to trigger the three-year period after which institutions with the permission to use the FRTB internal models are required, for reporting purposes only, to calculate their own funds requirements for market risk with those internal models.

In light of the current situation linked to COVID-19, the EBA welcomes the decision by the Group of Central Bank Governors and Heads of Supervision (GHOS) to defer the implementation date of the revised market risk framework by one year to 1 January 2023, which will also allow EU banks to benefit from a longer implementation time.

ESMA calls for evidence on credit rating information and data

The European Securities and Markets Authority (ESMA) has published a call for evidence on the availability and use of credit rating information and data. The purpose of the call for evidence is to gather information on the specific uses of credit ratings as well as how users of credit ratings currently access this information.

ESMA aims to identify users' specific rating data needs for each activity and how these correspond with the information currently provided on the European Rating Platform (ERP) and on credit rating agencies' (CRAs') public websites. The call for evidence also aims to understand why users choose to subscribe to third party data fee service providers rather than rely on the information published free of charge on the ERP and CRAs' websites.

Based on the feedback, ESMA will publish a report setting out options to improve access to and use of credit ratings, amongst other considerations. Responses to the call for evidence are due by 3 August 2020.

Cross-border distribution of funds: ESMA consults on draft ITS

ESMA has published a consultation on draft ITS under the Regulation on Facilitating Cross-Border Distribution of Collective Investment Undertakings. The draft ITS set out ESMA's proposed ITS to determine standard forms, templates, and procedures for the publication and notifications that national competent authorities (NCAs) are required to make in relation to national provisions concerning marketing requirements applicable within their jurisdiction.

Feedback to the consultation is due by 30 June 2020. ESMA expects to publish a final report by 2 February 2021.

ESMA delays reporting under Money Market Funds Regulation

ESMA has announced that the first reports by money market fund (MMF) managers under the MMF Regulation (MMFR) should be submitted by September 2020 instead of the previous April 2020 deadline.

The change follows a planned update to the XML schemas that should be used for reporting. According to ESMA, MMF managers will need additional time to comply with the reporting obligation.

Article 37 of MMFR requires MMF managers to submit data to NCAs who then transmit the data to ESMA. In July 2019 ESMA published the first version of the XML schemas and reporting instructions with the first quarterly reports originally meant to be submitted to NCAs by the end of April 2020. Following feedback by market participants and upon assessment of the technical committee on 25 February 2020, ESMA has decided to implement amendments on the XML schema and reporting instructions, which it intends to publish on its website shortly.

The reference period for the first reporting is still envisaged for Q1 2020, which means that MMF managers will have to report for both the Q1 and Q2 reporting periods in the September 2020 quarterly reports.

ESMA reports on enforcement of corporate disclosure

ESMA has published its annual report on enforcement and regulatory activities related to corporate reporting within the European Economic Area (EEA). The report presents the 2019 activities of ESMA and of European accounting enforcers when examining compliance of financial and non-financial statements provided by European issuers.

According to ESMA, in line with the announcement in the 2018 European common enforcement priorities, its efforts to increase supervisory

convergence in 2019 focused on harmonising the enforcement of the application of the new accounting standards IFRS 9 'Financial Instruments', IFRS 15 'Revenue from Contracts with Customers' and IFRS 16 'Leases'.

The report states that European enforcers examined:

- 950 financial statements drawn up under IFRS to identify and address material departures from IFRS, leading to enforcement actions which represented an action rate of 33%;
- 937 non-financial statements, leading to enforcement actions which represented an action rate of 10%; and
- 712 management reports to address whether the presentation and disclosure of alternative performance measures were compliant with ESMA guidelines, leading to enforcement actions which represented an action rate of 15%.

AIFMD: ESMA consults on leverage risk guidelines

ESMA has published a consultation paper on guidelines relating to the assessment by NCAs of leverage-related systemic risk under Article 25 of the Alternative Investment Fund Managers Directive (AIFMD).

The proposed guidelines, which form part of ESMA's response to the recommendations of the European Systemic Risk Board (ESRB) in April 2018 to address liquidity and leverage risk in investment funds, include:

- a common minimum set of indicators to be taken into account during the assessment;
- instructions to calculate those indicators; and
- qualitative and, where appropriate, quantitative descriptions of the interpretation of the indicators.

The consultation closes on 1 September 2020.

EMIR: ESMA publishes draft RTS for central counterparty colleges

ESMA has published a final report setting out RTS for central counterparty (CCP) colleges.

The report sets out proposed amendments to Delegated Regulation (EU) No 876/2013 on colleges for central counterparties to reflect amendments to EMIR introduced by EMIR 2.2, which entered into force on 1 January 2020.

As stated in the report, the draft amendments are limited in scope as they only concern competent authorities and do not impose any additional requirements on market participants, covering the conditions under which EU currencies are to be considered as the most relevant and the practical arrangements for the functioning of colleges.

The final report will be sent to the EU Commission for endorsement, after which the Commission Delegated Regulation will be subject to the non-objection of the EU Parliament and Council.

EMIR REFIT: ESMA consults on central clearing obligations for pension scheme arrangements

ESMA has published a consultation on potential central clearing solutions for pension scheme arrangements (PSAs).

Under the Regulation amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (EMIR REFIT), an amendment was introduced to EMIR that further extended the exemption from the clearing obligation for PSAs. The extension was introduced because of challenges that PSAs would face to provide cash for the variation margin (VM) calls related to their derivative contracts.

This extension is intended to support the EMIR REFIT objective of also ensuring that progress is made by the relevant stakeholders in addressing these challenges and for PSAs to clear their contracts. As part of this objective, EMIR REFIT requires the EU Commission to prepare a report assessing whether viable technical solutions have been developed for the transfer by PSAs of cash and non-cash collateral as VMs and the need for any measures to facilitate those viable technical solutions.

In order to provide input for the report, ESMA is required to produce, in cooperation with other European regulators, a report documenting the progress made towards clearing solutions for PSAs within six months from the entry into force of EMIR REFIT. According to ESMA, this deadline has not allowed the necessary collaboration between ESMA, the EBA, the European Insurance and Occupational Pensions Authority (EIOPA) and the ESRB.

The consultation is based on ESMA's first report to the EU Commission and sets out the issues PSAs face in clearing their contracts, studies the rationale for the use of derivatives by PSAs and explores the different solutions already envisaged to facilitate PSAs to centrally clear their OTC trades.

Comments to the consultation close 15 June 2020. ESMA expects to submit a second report to the Commission before the end of 2020.

EMIR REFIT: ESMA publishes technical advice on fines and penalties for third country CCPs

ESMA has published its final technical advice to the EU Commission on procedural rules for penalties imposed on third country central counterparties (TC-CCPs), trade repositories (TRs) and credit rating agencies (CRAs).

EMIR as amended by EMIR 2.2 and EMIR REFIT, provides that the Commission shall adopt delegated acts to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments. Additionally, as a result of amendments in EMIR REFIT, Commission Delegated Regulation (EU) 667/2014 with regard to rules of procedures for penalties imposed on TRs by ESMA also needed to be amended.

Following a request from the EU Commission for technical advice, ESMA consulted on proposals relating to penalties for TC-CCPs, TRs and CRAs in December 2019. ESMA's advice summarises the feedback received to its

consultation and sets out procedural rules for imposing fines and penalties on TC-CCPs and alignment of those of TRs and CRAs.

ESMA will now submit its advice to the Commission for adoption.

MiFID2: ESMA publishes review and technical advice on position limits in commodity derivatives

ESMA has published a review report on the impact of position limits in commodity derivatives markets and technical advice on weekly position reports.

In November 2019, ESMA consulted on proposed amendments to the existing regime and sought feedback on revisions to the technical advice to the Commission on the delegated acts to be adopted under MiFID2 on position reporting.

The report covers the impact of the application of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets as provided for under MiFID2.

ESMA's technical advice to the Commission sets out the weekly aggregated information to be published by trading venues on open positions per category of stakeholder. The advice aims to ensure that this information is made available for a larger number of commodity derivatives traded on EU trading venues to ensure more transparency in EU commodity derivative markets.

The review report will feed into the Commission's review of MiFID2 on the impact of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives it must deliver to the EU Parliament and the Council.

MiFID2/MiFIR Review: ESMA publishes technical advice on inducements, costs and charges disclosures

ESMA has published a final report setting out technical advice on the impact of the inducements and costs and charges disclosure requirements under MiFID2.

In respect of MiFID2 disclosure requirements for inducements permitted under Article 24(9), ESMA advises that the EU Commission conduct an impact assessment of the inducements regime on the distribution of retail investment products across the EU, including the effects a ban may have on different distribution models existing in the EU and actions that could be taken to mitigate the risk of undesired consequences should a ban be introduced, taking into account the bans already introduced in the Netherlands and the UK.

ESMA also suggests the EU Commission improve clients' understanding of inducements by clarifying that ex-ante and ex-post inducements disclosures should be made on an ISIN-by-ISIN basis, and by introducing an obligation to include, in all inducements disclosures, a sufficiently clear explanation of the terms used to refer to inducements.

In respect of costs and charges disclosure requirements under Article 24(4), ESMA broadly finds that the regime works well but recommends that it should allow more flexibility when applied to eligible counterparties and professional clients. ESMA also provides advice on trading by telephone and the provision of information to clients in a durable medium.

The report has been submitted to the EU Commission.

Brexit: House of Lords Committee publishes recommendations on financial services

The House of Lords (HoL) EU Financial Affairs Sub-Committee has published a letter to Rishi Sunak, the Chancellor of the Exchequer, setting out key conclusions and recommendations following its review of financial services after Brexit.

Among other things, the Committee suggests the UK Government:

- identify, in close cooperation with the industry, areas where equivalence is more important to UK financial services and prioritise these in negotiations with the EU;
- improve the equivalence process, such as by maintaining a regular and structured regulatory dialogue between the UK and the EU and by taking a phased approach to any instances where an equivalence decision might be affected;
- address and consider, separately from broader discussions on equivalence and the future relationship, outstanding risks of disruption to financial services;
- delegate more powers to the financial regulators, and fill the scrutiny gap left by the EU Parliament;
- consider whether regulators should be given a formal competitiveness objective;
- seek to agree in the negotiations with the EU a process for structured regulatory dialogue in order to manage future divergence;
- consider in which specific areas it would be desirable to take a different approach to the EU in Basel implementation; and
- take a leadership role and proactively seek to shape discussions in multilateral fora, and develop closer bilateral relations with jurisdictions which share a common approach to promoting cross-border financial services.

The Committee notes some of these recommendations should be addressed in the UK Government's forthcoming white paper on financial services.

PSR publishes Annual Plan and Budget 2020/21

The Payment Systems Regulator (PSR) has published its annual plan and budget 2020/21 setting out key aims, activities and expected costs.

Noting that the document was drafted prior to the outbreak of COVID-19, the PSR expresses an intention to continuously review the work outlined in the plan and to adapt its approach to meet the challenges presented by the pandemic, including deadline extensions where appropriate.

Key priorities outlined in the plan include:

- monitoring central infrastructure services procurement and delivering greater clarity about competition risk management in respect of the New Payments Architecture (NPA);

- taking appropriate steps to ensure reasonable access to the ATM networks, and working with the FCA, BoE, HM Treasury and industry stakeholders to develop a long-term framework for access to cash;
- publishing and consulting on initial findings as part of the PSR's card-acquiring market review;
- monitoring and assessing the extent to which the Contingent Reimbursement Model (CRM) Code and Confirmation of Payee (CoP) prevent authorised push payment (APP) fraud;
- continuing to progress competition and regulatory enforcement casework;
- improving how sector intelligence is collated and analysed;
- consulting on the PSR's long-term focus, with a view to publishing a final strategy; and
- publishing final updated powers and procedures guidance.

BaFin publishes guidance note on licensing procedure for crypto safe custody business

The German Federal Financial Supervisory Authority (BaFin) has published a guidance note addressing undertakings wishing to provide crypto safe custody business. The guidance note sets out the main features of the licensing procedure and summarises the essential requirements for granting authorisation.

The crypto safe custody business was introduced as a new financial service in the German Banking Act (Kreditwesengesetz, KWG) as of 1 January 2020, by the Act Implementing the Amending Directive to the Fourth European Money Laundering Directive (Gesetz zur Umsetzung der Änderungsrichtlinie zur Vierten Europäischen Geldwäscherichtlinie). Undertakings wishing to provide this service now require a licence from BaFin.

Revised minimum requirements for content of recovery plans published in German Federal Law Gazette

Following the completion of the consultation procedure, the revised Ordinance on Minimum Requirements for the Content of Recovery Plans (MaSanV) of 12 March 2020 has been published in the German Federal Law Gazette Part I no. 15 of 31 March 2020.

The revised MaSanV sets out the requirements applicable to recovery plans to be drawn up by all institutions which are potentially systemically relevant and also provides guidance on simplified requirements for the recovery plans of less significant institutions and institutions that are members of an institutional protection scheme (IPS).

In particular:

- section 1 contains general regulations for all restructuring plans, in particular on the scope of application of MaSanV and definitions;
- section 2 sets out requirements for remediation plans, which apply to all potentially systematically compromised institutions (PSIs);
- section 3 covers simplified requirements that the supervisory authority may set for non-PSIs; and

- section 4 deals with the requirements relating to the application for exemption, the conditions for exemption and the content of the IPS recovery plan.

CSSF publishes FAQs on UCI Law clarifying disclosure of performance fee, investment management fee and investment advisory fee to investors of UCITS

The Luxembourg supervisory authority of the financial sector (CSSF) has published an updated version of its FAQs on the law of 17 December 2010 on undertakings for collective investment (UCI Law), in which the CSSF clarifies the following points in relation to the disclosure of performance fee, investment management fee and investment advisory fee to the investors of UCITS:

- disclosure of performance fee – the CSSF indicates that the investment manager of UCITS is responsible and accountable for the investments of the relevant UCITS and its related performance, and that the UCITS' prospectus shall disclose (i) the performance fee model and the investment manager receiving such performance fee, and (ii) where applicable, the existing performance fee sharing arrangement with any investment advisor(s) contractually linked to the UCITS;
- disclosure of investment management and/or advisory fees – in accordance with Annex I, Section A, point 6 of the UCI Law, the CSSF indicates that the fees to be paid to the UCITS' investment manager(s) and/or any investment advisor(s) contractually linked to the UCITS shall also be disclosed in the UCITS' prospectus by distinguishing between the fees to be paid by the unitholders and those to be paid out of the assets of the UCITS, provided that (i) in case of payment of the investment management and/or advisory fees out of the assets of the UCITS, the method of calculation or the rate of the fee applied to each recipient shall also be disclosed in the UCITS' prospectus, (ii) the investment management and/or advisory fees shall only pay for investment management or investment advice respectively, and (iii) the investment advisory fee is expected to be at a lower level than the investment management fee;
- disclosure of other fees and expenses paid to investment manager(s)/advisor(s) – according to the CSSF, other fees and expenses paid out of the assets of the UCITS to the investment manager(s) or investment advisor(s) that are beyond the direct scope of their investment management or advice shall be disclosed separately in a way that clearly informs investors about the nature of such fees or expenses; and
- disclosure of 'all-in' fee services – in case of an 'all-in' fee services payment (which implies that only one compensation amount is paid out of the assets of the UCITS to a recipient (commonly the management company) who will afterwards pay the other service providers of the UCITS), the CSSF indicates that the prospectus shall clearly state the scope and nature of such an 'all-in' fee by specifying, ideally, each contractual recipient of this all-in fee so that the investors are allowed to compare UITS and make an informed judgement about the investment proposed.

Luxembourg law implementing AMLD5 published

The Law of 25 March 2020 implementing certain provisions of Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (AMLD5) has been published in the Luxembourg official journal (Mémorial A).

The Law implements certain AMLD5 provisions related to professional obligations and powers of the supervisory authorities and self-regulatory bodies in the area of anti-money laundering and counter terrorism financing. The Law further reinforces and harmonises the treatment of high-risk third countries based on recommendations issued by the Financial Actions Task Force (FATF). For these purposes, the Law amends in particular the Luxembourg Law of 12 November 2004 on the combat against money laundering and terrorism financing (AML/CTF Law).

Amongst other things, the Law specifies the standard and enhanced customer due diligence obligations that professionals subject to the AML/CTF Law have to apply, and extends the scope of such professionals explicitly to cover also virtual asset service providers generally (such as service providers engaged in exchange services between virtual currencies and fiat currencies, custodial wallet service providers), and under certain circumstances persons trading or acting as intermediaries in the trade or the storing of works of art.

The Law entered into force on 30 March 2020.

Luxembourg law introducing centralised electronic data search register concerning IBAN accounts and safe-deposit boxes published

The Law of 25 March 2020 introducing a centralised electronic data search register concerning IBAN accounts and safe-deposit boxes has been published in the Luxembourg official journal (Mémorial A).

Amongst other things, the Law implements certain provisions of the Fifth Anti-Money Laundering Directive (EU) 2018/843 of 30 May 2018 (AMLD5).

The Law introduces a centralised electronic register allowing the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts and bank accounts identified by IBAN, and safe-deposit boxes held with a Luxembourg credit institution. This register will be set up and administered by the Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), and will be made available to the Luxembourg financial intelligence unit, and other public authorities and self-regulatory bodies in their missions related to anti-money laundering and counter terrorist financing (AML/CTF).

The Law also follows recent FATF recommendations by introducing specific provisions on virtual asset service providers (VASPs) and on providers engaged in services related to companies and fiducies into the Law of 12 November 2004 on the combat against money laundering and terrorist financing (AML/CTF Law), making these two categories of service providers subject to the AML Law and imposing registration requirements with the CSSF (for VASPs) or competent authorities or auto-regulatory bodies (for companies and fiducies service providers).

In addition, the Law introduces an obligation for the CSSF when acting as prudential supervisory authority in relation to CRR institutions to inform the European Banking Authority (EBA) of any reasonable grounds for suspicion of money-laundering or terrorist financing.

Finally, the Law amends the Law of 19 December 2002 relating to the register of commerce and companies in order to correct an inaccuracy in the law.

The Law entered into force on 30 March 2020, except for one technical provision (regarding tick size regimes) amending the Law of 30 May 2018 on markets in financial instruments which entered into force on 26 March 2020.

JFTC consults on draft rules and guidelines to implement Antimonopoly Act amendments

The Japan Fair Trade Commission (JFTC) has published for consultation draft rules and guidelines to implement amendments to the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act).

Amendments to the Antimonopoly Act include the introduction of a system for applying reduction rates according to the degree of an enterprise's contribution to revealing the truth of a case under the Leniency Program.

To implement the relevant provisions of the amended Antimonopoly Act, the JFTC seeks views on amendments to the rules on reporting and submission of supporting materials regarding immunity from or reduction of surcharges, and on draft guidelines on the reduction system for cooperation in investigation

The JFTC also seeks views on the introduction of a new determination procedure whereby investigators will not be allowed to access documents containing confidential communication between an enterprise and an attorney regarding legal advice on unreasonable restraint of trade, if certain conditions are confirmed to be met pursuant to prescribed procedures. It also proposes amendments aimed at clarifying that employees of an applicant for the Leniency Program may take notes on the spot after completion of an interview conducted by investigators.

Comments on the consultation are due by 15 May 2020.

RECENT CLIFFORD CHANCE BRIEFINGS

Japan's Civil Code Reform – key implications for your business

A reform to the Civil Code of Japan becomes effective on 1 April 2020. We have picked out three key areas which foreign investors and corporates need to be aware of: defect liability (non-latent defects may need to be compensated for; buyers may request completion or a reduction in the purchase price), guarantees (guarantees for a category of unspecified obligations by individuals must have a cap on the guaranteed amount) and assignment of receivables (restricted claims may be more easily tradable). Commercial parties need to make sure that agreements entered into on or after the effective date reflect these changes.

This briefing looks at the three key areas.

https://www.cliffordchance.com/briefings/2020/03/japan-s-civil-code-reform--key-implications-for-your-business.html

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