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regarding LIBOR transition

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EU Commission adopts amendments to Delegated Regulations to support prospectus rules reform

The EU Commission has adopted two Delegated Regulations amending and correcting:

- Delegated Regulation (EU) [2019/979](#) supplementing Regulation (EU) 2017/1129 with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal; and
- Delegated Regulation (EU) [2019/980](#) supplementing Regulation (EU) 2017/1129 as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

Both Delegated Regulations will enter into force on the third day after their publication in the Official Journal.

Investment firms: EBA consults on draft technical standards and publishes roadmap on mandates

The European Banking Authority (EBA) has launched a [consultation](#) on regulatory technical standards (RTS) and implementing technical standards (ITS) under the Investment Firms Directive (IFD) and Investment Firms Regulation (IFR).

The consultations cover:

- prudential requirements – draft RTS on the reclassification of certain investment firms to credit institutions, capital requirements for investment firms at solo level, and the scope and methods of prudential consolidation for investment firms at group level;
- reporting requirements and disclosures – draft ITS on the levels of capital, concentration risk, liquidity, the level of activities as well as disclosure of own funds and draft RTS specifying the information that investment firms have to provide in order to enable the monitoring of the thresholds that determine whether an investment firm has to apply for authorisation as credit institution; and
- remuneration requirements – draft RTS on the criteria to identify ‘risk takers’ and specifying the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration of risk takers.

Comments on the consultation are due by 4 September 2020.

The EBA has also published a [roadmap](#) setting out its workplan for delivering mandates under the IFR and IFD.

The EBA mandates include:

- thresholds and criteria for investment firms subject to the Capital Requirements Regulation (CRR);
- capital requirements and composition;
- reporting and disclosure;
- remuneration and governance;
- supervisory convergence and the supervisory review process; and
- ESG exposure.

CRR2: EBA consults on stress scenario risk calculation draft RTS

The EBA has published a [consultation](#) on draft RTS on the capitalisation of non-modellable risk factors (NMRFs) for institutions using the new Internal Model Approach (IMA) under the FRTB (Fundamental Review of the Trading Book).

The draft RTS specify details needed for determining the own funds requirements related to non-modellable risks. In particular, they set out how institutions are to determine the stress scenario risk measure corresponding to a non-modellable risk factor.

The draft RTS are a key deliverable included in the roadmap for new market and counterparty credit risk approaches published on 27 June 2019 and have been developed according to Article 325bk(3) of Regulation (EU) 2019/876 of 20 May 2019 amending Regulation (EU) No 575/2013 (CRR2).

Comments on the consultation are due by 4 September 2020. A public hearing will take place via conference call on 3 July 2020 from 16:30 CET.

PSD2: EBA publishes opinion on obstacles to third party provider services

The EBA has published an [opinion](#) on obstacles to the provision of third party provider services (TPPs) under the RTS on strong customer authentication (SCA) and common and secure communication (CSC). The opinion addresses a number of issues regarding the interfaces provided by account servicing payment service providers (ASPSPs) to TPPs in order to support the objectives of the revised Payment Services Directive (PSD2) of enabling customers to use new and innovative payment services offered by TPPs.

The opinion is intended to:

- clarify when mandatory redirection is an obstacle to the provision of TPPs' services and the authentication procedures that ASPSPs' interfaces are required to support;
- clarify obstacles identified in the market; and
- explain that requiring re-authentication every 90 days for account information in accordance with the RTS is not an obstacle.

The EBA expects competent authorities to take necessary actions to ensure interfaces offered by ASPSPs comply with PSD2 and the RTS. Where obstacles are identified, authorities should ensure that ASPSPs remove them within the shortest possible time. The EBA intends to monitor the way in which the clarifications provided in the opinion are taken into account and where inconsistencies are identified, it will take actions needed to remedy them.

EBA reports on convergence of supervisory practices

The EBA has published a [report](#) on convergence of supervisory practices in 2019. The report also incorporates information on convergence in supervisory colleges, which in the past has been included in a separate report. One of the core elements covered in the report is the practical application of the Single Rulebook by competent authorities in their supervisory activities. It also provides an update on the policy developments and training activities supporting supervisory convergence.

The EBA has found that the four key topics for supervisory attention identified in its 2019 convergence plan – internal governance, ICT risk and operational resilience, non-performing exposures, and benchmarking of internal models – have been largely implemented, to different degrees, in supervisory work across the EU. Areas that require further attention include the formalisation of the ICT risk appetite and the ongoing assessment of the individual and collective suitability of the members of the management bodies.

The EBA has incorporated the 2020 convergence plan into the report. It has identified five key topics for supervisory attention:

- ICT risk and operational resilience;
- loan origination standards;
- profitability;
- capital and liability management; and
- money laundering and terrorism financing risk and other conduct risk for prudential supervisors.

The plan also notes the supervisory efforts and resources that will be dedicated to monitoring the crisis preparedness of institutions in 2020 and the further implications of COVID-19 on credit institutions' operations and financial soundness.

Banking Union: EU Council Presidency publishes progress report

The Croatian Presidency of the EU Council has published a [progress report](#) on measures to strengthen the Banking Union during the first semester of 2020.

The report sets out the Presidency's assessment of the outcome of discussions held at the 18 May 2020 informal videoconference of the Ad Hoc Working Party on the Strengthening of the Banking Union (AHWP) covering, among other things:

- parameters of the hybrid model, which relies on a central fund that reinsures national systems complemented by mandatory lending among

national Deposit Guarantee Schemes (DGSs), in relation to the liquidity phase of the European Deposit Insurance Scheme (EDIS);

- the methodology for the calculation of EDIS risk-based contributions (RBCs);
- whether Institutional Protection Schemes (IPSs) should be included in the scope of EDIS;
- the treatment of non-CRR institutions and the inclusion of alternative and preventive measures as well as pay-outs;
- implementation of the Banking Package, including the EU Commission decision to postpone a new legislative proposal concerning the finalisation of post crisis reforms;
- specific COVID-19 related measures; and
- the action plan to tackle non-performing loans (NPLs), including the current status of legislative measures proposed by the Commission.

MiFID2/MiFIR: ESMA updates third country trading venue opinions

The European Securities and Markets Authority (ESMA) has published updated opinions on determining whether a third-country trading venue (TCTV) should be considered a trading venue for the purposes of the MiFIR post-trade transparency regime and MiFID2 position limit regime.

ESMA has updated the opinions following its assessment of TCTVs, which is only relevant for TCTVs with EU market participants and trade instruments which are also traded on a European trading venue.

The updated [post-trade transparency opinion](#) includes an annex listing 136 venues from 25 countries with a positive or partially positive assessment. Investment firms concluding transactions on TCTVs absent from the list should make those transactions post-trade transparent via an approved publication arrangement (APA) by 3 October 2020. Investment firms are subject to the same obligation for transactions executed on TCTVs with a partially positive assessment, only for instruments exempted from the positive assessment.

The updated [position limits opinion](#) includes an annex listing 7 venues from 4 countries with a positive assessment. Commodity derivatives traded on venues absent from the list should be considered as OTC trades for the purposes of the position limit regime from 3 October 2020.

ESMA remains open to submissions from TCTVs and intends to update the lists of trading venues on an ongoing basis.

ESMA publishes final guidelines on MiFID2 compliance

ESMA has published its [final guidelines](#) on the MiFID2 compliance function. The guidelines replace those published in 2012 and include updates that aim to enhance clarity and foster greater convergence in the implementation and supervision of the new MiFID2 compliance function requirements.

The guidelines are addressed to:

- investment firms and credit institutions providing investment services and activities;

- investment firms and credit institutions selling or advising clients in relation to structured deposits; and
- undertakings for collective investment in transferable securities (UCITS) management companies and external Alternative Investment Fund Managers (AIFMs) when providing investment services and activities in accordance with the UCITS and AIFM Directives respectively.

ESMA believes that the guidelines will enhance the value of existing standards by providing additional clarifications on certain specific topics, such as new responsibilities in relation to MiFID2's product governance requirements, notably by detailing further the reporting obligations of the compliance function.

Once the translations of the guidelines have been published, national competent authorities have a two-month period to notify ESMA whether they comply or intend to comply with the guidelines.

ESMA updates MMF reporting instructions

ESMA has published updated [reporting instructions](#) to be used for reporting under the Money Market Funds Regulation (MMFR). ESMA has implemented amendments on the XML [schema](#) and reporting instructions in a new version (v1.1), following feedback received by market participants after the publication of the first version of the XML schema (v.1.0) and an assessment by the technical committee.

Reporting entities should use the updated version to submit reports required under Article 37 of MMFR by September 2020. The reference period for the first reporting is Q1 2020, meaning that in September 2020 MMF managers should submit quarterly reports for both the Q1 and Q2 reporting periods.

ESMA publishes final report on FRANDT commercial terms for clearing services

ESMA has published its final [report](#) with technical advice for the EU Commission on fair, reasonable, non-discriminatory and transparent (FRANDT) commercial terms for the provision of clearing services.

The technical advice specifies the conditions under which the commercial terms are to be considered FRANDT. The final report takes into account the feedback received and aims to strike a balance between improving clearing clients' access to clearing services and ensuring such services are provided on FRANDT compliant terms, while also ensuring the requirements are proportionate and within the mandate received.

According to ESMA, the requirements covered in the technical advice have been carefully designed to address clearing clients and clearing service providers' concerns and aim to:

- facilitate comparability of the information disclosed;
- address the process of onboarding clearing clients;
- standardise the information disclosed to clients bilaterally; and
- encourage further standardisation of contractual terms.

The final report has been sent to the EU Commission.

ESMA consults on cloud outsourcing guidelines

ESMA has published for [consultation](#) draft guidelines on outsourcing to cloud service providers. The proposed guidelines are intended to complement the existing outsourcing guidance published by the EBA in February 2019 and the European Insurance and Occupational Pensions Authority (EIOPA) in February 2020. They set out:

- the governance, documentation, oversight and monitoring mechanisms that firms should have in place;
- the assessment and due diligence which should be undertaken prior to outsourcing;
- the minimum elements that outsourcing and sub-outsourcing agreements should include;
- the exit strategies and the access and audit rights that should be catered for;
- the form and requirements for notifying competent authorities; and
- the required supervisory activities by competent authorities.

Comments are due by 1 September 2020 and ESMA intends to publish the final guidelines by the first quarter of 2021.

ESMA reports on supervision by NCAs of costs applicable to UCITS and AIFs

ESMA has published a [supervisory briefing](#) on the supervision by national competent authorities (NCAs) of costs applicable to UCITS and alternative investment funds (AIFs).

ESMA's first annual statistical report on costs and performance of retail investment products, published in January 2019, showed the significant impact of costs on the financial returns for investors. Following this report, ESMA started work with NCAs to assess the different national approaches to the supervision of the cost-related provisions under the UCITS Directive and the Alternative Investment Fund Managers Directive (AIFMD).

ESMA has developed the briefing to provide guidance to NCAs as regards the supervision of how costs are charged to investors by UCITS and/or AIFs and their managers. The briefing also aims to give market participants indications of NCAs' expectations and compliant practices regarding the cost-related provisions of the UCITS and AIFMD frameworks.

ESMA will cooperate with NCAs to promote application of the supervisory briefing and will assess the level of convergence across the EU in 2021.

Bank of England consults on FMI supervisory fees and amendments to special project fees

The Bank of England (BoE) has issued a [set of proposals](#) for supervisory fees for financial market infrastructure (FMI) for 2020/21 and proposed amendments to special project fees (SPFs).

The Bank's annual FMI supervisory fee includes the costs of FMI supervision staff together with relevant policy support, specialist resources, corporate services and other costs associated with the work of the FMI Directorate. The total cost for the 2020/21 fee year is expected to increase by 14% compared

with the previous fee year. The Bank proposes to phase in the increase over two years. Therefore, the proposed fees for 2020/21 are expected to total GBP 9.1 million, an overall increase of 7% on the previous year.

The Bank is also proposing an amendment to the way it invoices SPFs, as well as a change to the rates charged for work undertaken on special projects. The Bank proposes that where an SPF is used to fund its work on a special project, invoices will be issued on a quarterly basis. The Bank also proposes increasing the hourly rates charged for work on special projects.

The proposed implementation date for the proposals in the consultation is Q3 2020, at which point invoices are expected to be issued for the 2020/21 fee year.

Comments to the consultation close on 29 July 2020.

FCA publishes final rules to extend Senior Managers Regime to benchmark administrators

The Financial Conduct Authority (FCA) has published a [policy statement](#) (PS20/5) on extending the Senior Managers Regime (SMR) to benchmark administrators.

This follows a consultation (CP19/31) launched in November 2019. PS20/5 provides the final rules and guidance and also summarises the feedback received to CP19/31.

Benchmark administrators authorised in the UK generally supported the FCA's proposals in CP19/31. However, there was strong opposition from firms that are subject to Annex II of the EU Benchmarks Regulation (BMR), the majority of which are not regulated in the UK.

The FCA intends to implement the proposals largely as consulted on, but with some changes in response to the feedback received. In particular, the FCA intends to amend the draft rules to ensure a level playing field for firms administering Annex II benchmarks and firms that administer both Annex II and other benchmarks. The FCA is also providing further material on how to apply some of the Individual Conduct Rules to clarify how the rules should be interpreted in the context of benchmark administrators' activities.

With the publication of final rules in PS20/5, the SMR will come into force for benchmark administrators that do not undertake any other regulated activities on 7 December 2020.

Working Group on Sterling Risk-Free Rates publishes paper on LIBOR tough legacy issues

The Tough Legacy Taskforce of the Working Group on Sterling Risk-Free Reference Rates has published a [paper](#) on the identification of tough legacy issues.

Tough legacy contracts are considered those that do not have robust fallbacks and prove unable to be amended ahead of LIBOR discontinuation. The paper identifies the characteristics of tough legacy contracts across derivatives, bonds, loans and mortgages and the desirable outcomes in respect of tough legacy contracts.

The Taskforce believes that there is a case for action to consider what can be done to address tough legacy LIBOR exposures in the UK. This case differs by asset class and is driven by the nature of, and linkages between:

- the contracts involved (and the ability or otherwise to amend the terms);
- the practical challenge of amending a large number of contracts in a relatively short period of time; and
- the potentially material adverse economic implications should such exposures not have transitioned on or before LIBOR ceases to be published.

The Taskforce proposes that the UK Government consider legislation to address tough legacy exposures in contracts governed by English law that reference at least sterling LIBOR, and ideally other LIBOR currencies, that are still in operation when LIBOR is expected to cease on or after the end of 2021. However, while the Taskforce has a preference for a legislative solution, it recognises that there is no guarantee that such a solution will materialise, that it will materialise across all relevant legal jurisdictions, or that it would be available for all products and circumstances. The Taskforce also recognises that any potential solution will not necessarily be able to deliver the desired economic basis of the contract and should therefore not be relied upon for any contracts which are not genuinely stranded.

Consequently, the Taskforce recommends that:

- other solutions to the tough legacy problem should be pursued in parallel such as, for example, the scenario of LIBOR being stabilised via a so called ‘synthetic methodology’ for a wind down period following panel bank departure; and
- that market participants should focus primarily on active transition, to ensure that parties to the transaction have control over the timing and substance of the transition.

ACPR and New York DFS sign MOU to boost international fintech cooperation

The Autorité de Contrôle Prudentiel et de Résolution (ACPR) and the New York State Department of Financial Services (NYDFS) have signed a [memorandum of understanding](#) (MOU) to ease the operation of fintech companies across the two jurisdictions. The ACPR and NYDFS will cooperate with the aim of encouraging innovation in their individual financial services markets, enhancing consumer protection and supporting financial innovators to enter and meet regulations in each other’s jurisdictions.

This is the first cooperation agreement on fintech signed by the ACPR with a US authority.

BaFin consults on revised guidance notices on management board members and members of administrative and supervisory bodies

The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) has published a [consultation](#) on its revised guidance notices on directors and members of administrative and supervisory bodies.

The new guidance notices are intended to replace the existing guidance notice on management board members pursuant to the German Banking Act (Kreditwesengesetz – KWG), the German Payment Services Supervision Act (Zahlungsdienstenaufsichtsgesetz – ZAG) and the German Capital Investment Code (Kapitalanlagegesetzbuch – KAGB) and the guidance notice on members of administrative and supervisory bodies pursuant to the German Banking Act (Kreditwesengesetz – KWG) and the German Capital Investment Code (Kapitalanlagegesetzbuch – KAGB), each dated 4 January 2016 (and last amended on 18 November 2018).

In addition, the revised guidance notices are intended to incorporate the EBA and ESMA guidelines on the assessment of the suitability of members of the management body and key function holders under CRD4 and MiFID2 (EBA/GL/2017/12) and the guidelines on internal governance under Directive CRD4 (EBA/GL/2017/11) of 26 September 2017 into BaFin’s administrative practice.

Amongst other things, the revised guidance notices include:

- stricter requirements for the supervisory review process (‘fit and proper’ review);
- adjustments of the material requirements for management board members and members of supervisory bodies with a focus on counting mandates;
- requirements for internal guidelines and processes of institutions (suitability, diversity, introduction and training, dealing with conflicts of interest); and
- information on the duties of institutions (conducting internal audits of the individual and collective suitability of board members, suitability audits of key function holders, dealing with conflicts of interest).

The consultation ends on 1 July 2020.

Polish Financial Supervision Authority sets out information banks should obtain from customers in payment services sector

The Polish Financial Supervision Authority (PFSA) has prepared a [questionnaire](#) which contains examples of the information that banks should obtain from customers from the payment services sector. This is aimed at ensuring a uniform approach to this sector and compliance of the information obtained with the AML regulations.

HKMA shares feedback from recent thematic reviews of AML/CFT control measures for remote customer onboarding initiatives

The Hong Kong Monetary Authority (HKMA) has issued a [circular](#) to all authorised institutions (AIs) on the [key observations](#) and good practices in anti-money laundering and counter-financing of terrorism (AML/CFT) control measures identified in its recent thematic reviews of remote on-boarding initiatives from engagement with AIs, technology firms in the Fintech Supervisory Sandbox (FSS) and Chatroom, as well as its supervision of virtual banks. The review examined:

- how AIs conducted assessments of money laundering and terrorist financing risks associated with remote on-boarding and applied a risk-

based approach in the design and implementation of control measures to mitigate the identified risks;

- the extent to which AIs were able effectively to monitor and manage the technology adopted to on-board customers remotely; and
- how the AI's ongoing monitoring took into account vulnerabilities and threats associated with the product and delivery channel.

The HKMA notes that, to date, more than ten AIs have launched remote on-boarding, while others are considering or testing similar initiatives. It welcomes AIs making use of its FSS to test applications leveraging the government's 'iAM Smart' to enhance the efficiency of customer due diligence processes and improve customer experience.

JFSA and Bank of Japan write to major financial institutions regarding LIBOR transition

The Financial Services Agency of Japan (JFSA) and the Bank of Japan have jointly sent [letters](#) to the major financial institutions with regard to LIBOR transition. The letters call on financial institutions to prepare for the permanent cessation of LIBOR and request the submission of relevant materials to review the progress of preparedness in individual firms. The regulators have indicated that, although the letters have only been sent to some financial institutions, they will also monitor the preparedness of other financial institutions based on the content of the letters. The regulators expect financial institutions using LIBOR to accelerate their actions through the responsible and active involvement of management officials with due consideration of the letters.

MAS updates guide to digital token offerings

The Monetary Authority of Singapore (MAS) has published an [updated version](#) of its guide to digital token offerings, which was originally published in November 2017 to provide general guidance on the application of the laws administered by the MAS in relation to offers or issues of digital tokens in Singapore. The guide has mainly been amended to update and include further references to the Payment Services Act 2019. In particular:

- Case study 6 of the guide has been updated to clarify that the activity of establishing or operating a digital payment token exchange is currently regulated by the MAS under the Payment Services Act and entities licensed under the Act to perform such activities are required to comply with ongoing business conduct, regulatory reporting and technology risk management requirements (in addition to anti-money laundering and countering the financing of terrorism requirements, which had previously been mentioned in the guide); and
- Case study 7 of the guide has been updated to clarify that a digital token offered by a company that is incorporated and has its principal place of business in the United States may be considered a digital payment token under the Act if it is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt. If so, the company may be carrying on a business of providing the service of dealing in digital payment tokens. Moreover, the company should consider whether its services are regulated under the Act, and if so, it should apply for the relevant licence under the Act.

Securities and Futures (Offers of Investments) (Collective Investment Schemes) (Amendment No. 3) Regulations 2020 gazetted

The Singapore Government has gazetted the [Securities and Futures \(Offers of Investments\) \(Collective Investment Schemes\) \(Amendment No. 3\) Regulations 2020](#). The Amendment Regulations are intended to amend the [Securities and Futures \(Offers of Investments\) \(Collective Investment Schemes\) Regulations 2005](#) to streamline the fundraising process for real estate investment trusts (REITs) and bring it in line with the fundraising process for companies and business trusts by removing the requirement for REITs to comply with the requirement to notify the MAS of the offer of units in the REIT through CISNET when such units are offered in reliance on the exemption under section 305 (offer made to accredited investors and certain other persons) of the Securities and Futures Act.

The Amendment Regulations took effect on 29 May 2020.

RECENT CLIFFORD CHANCE BRIEFINGS

EU investment treaty protection future uncertain – what should investors do?

Recent developments mean that European Union investors in other EU Member States are unlikely to be able to rely in the future on applicable bilateral investment treaties (BITs). The position for UK investors in those EU Member States with BITs with the UK (and vice-versa) also remains highly uncertain.

Given this uncertainty, investors should review their investment structures and insurance to seek to mitigate the potential consequences of unjustified governmental measures.

This briefing discusses the key issues.

<https://www.cliffordchance.com/briefings/2020/06/eu-investment-treaty-protection-future-uncertain--what-should-in.html>

Brexit and insurance – Luxembourg insurance regulator analyses implications for deposits of assets representing provisions in the UK

The Luxembourg insurance sector regulator, the Commissariat aux Assurances (CAA), issued an information notice on the implications of Brexit for the application of CAA Circular Letter 16/9 in April. This circular letter deals with the deposit of securities and liquidities used as assets representing technical provisions by Luxembourg insurance companies in the UK.

This briefing gives an overview of the impact analysis the CAA has set out in its notice and the action points and structuring considerations for Luxembourg insurance companies.

<https://www.cliffordchance.com/briefings/2020/06/brexit-and-insurance--luxembourg-insurance-regulator-analyses-im.html>

C L I F F O R D C H A N C E

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