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Capital Markets Union: EU Commission consults on action plan

The EU Commission has launched a [consultation](#) on a roadmap for the next Capital Markets Union (CMU) action plan.

Noting the important role capital markets can play in post-pandemic economic recovery and other geopolitical developments such as Brexit, feedback is sought on the following targeted objectives aimed at deepening existing capital pools and creating an integrated European single market for capital:

- to improve the ecosystem for capital raising for EU businesses, using new technologies where appropriate, with special focus on SMEs;
- to support the creation of a more efficient pan-European capital markets architecture;
- to promote greater retail investor participation and a better savings allocation; and
- to promote cross-border investment and ensure better integration.

The consultation closes on 4 August 2020.

The Commission intends to adopt a communication on the CMU action plan in Q3 2020, taking into consideration both the recommendations of the High Level Forum published in June 2020 and the views gathered from other stakeholders through the consultation.

EU Commission consults on review of cybersecurity rules

The EU Commission has launched a [consultation](#) on cybersecurity and the functioning of Directive (EU) 2016/1148 on security of network and information systems (the NIS Directive). The NIS Directive, which entered into force in August 2016, seeks to increase the security of network and information systems within the EU by ensuring that operators of essential services, including those in the banking and financial sectors, are sufficiently prepared to deal with cyber threats, power and hardware failures and environmental hazards.

In its Work Programme 2020, the EU Commission announced its intention to complete its first review of the NIS Directive by the end of the year. As part of that review, the Commission has launched a consultation seeking public comment on, among other things:

- the relevance of the NIS Directive's initial objectives;
- the technical functioning of the NIS Directive;
- changes in trends, technology and the cyber-threat landscape; and
- approaches to cybersecurity in Europe that are not currently addressed by the NIS Directive.

Comments are due by 2 October 2020.

Brexit: EU Commission publishes communication on readiness at the end of the transition period and updates preparedness notices

The EU Commission has published a [communication](#) on readiness at the end of the transition period between the European Union and the United Kingdom.

The communication notes that, at the end of the transition period, the UK's withdrawal from the EU acquis, the internal market and the Customs Union, will create barriers to trade and cross-border exchanges that do not exist today, even if the EU and UK conclude a partnership covering all areas agreed in the political declaration by the end of 2020. The Commission believes that, regardless of the outcome of negotiations, there will be broad and far-reaching consequences for public administrations, businesses and citizens as of 1 January 2021.

In order to help stakeholders prepare for these changes, the Commission is reviewing and updating over 100 sector-specific [stakeholder preparedness notices](#) which were published during the Article 50 negotiations. Recently published notices on financial services cover:

- [asset management](#);
- [banking and payment services](#);
- [credit rating agencies](#); and
- [the emissions trading system](#).

ECB publishes guidance on default definition for directly supervised banks

The European Central Bank (ECB) has published [guidance](#) on the definition of the materiality threshold, which refers to the point at which a bank decides a debtor is in default on its loan. The definition, which follows a [public consultation](#) and is required by the Capital Requirements Regulation, applies to banks that are directly supervised by national supervisors, and specifies how national supervisors should exercise their discretion.

The new guidance for banks with national supervisors is aligned with the threshold defined in the ECB regulation for banks supervised directly by the ECB, published in November 2018. The alignment of the materiality threshold for credit obligations past due for all banks, regardless of whether they are supervised directly by the ECB or by national supervisors, aims to contribute

to the consistent application of supervisory standards to both significant and less significant credit institutions.

SFTR: ESMA consults on guidelines on calculation of positions in SFTs by trade repositories

The European Securities and Markets Authority (ESMA) has issued [draft guidelines](#) on the calculation of positions in securities financing transactions (SFTs) by trade repositories (TRs) under the Securities Financing Transactions Regulation (SFTR).

The consultation paper sets out the relevant clarification to TRs with regard to compliance with Article 4(6) of SFTR, setting out a general requirement for TRs to calculate positions (by cross-reference to Article 80 of the European Market Infrastructure Regulation (EMIR)). Furthermore, Article 12(2) of SFTR requires TRs to collect and maintain details of SFTs and Article 5 of Delegated Regulation (EU) 2019/358, the regulatory technical standards (RTS) on data aggregation, specifically requires TRs to calculate positions in SFTs in a harmonised and consistent manner.

The proposed guidelines cover two main types of aggregation – the named positions between counterparties and the sectoral positions for the purposes of Financial Stability Board (FSB) reporting. The guidelines aim to ensure a consistent methodology is used under EMIR and SFTR, while still reflecting the specificities of SFT reporting.

Comments to the consultation close on 15 September 2020. ESMA plans to publish its final report in Q4 2020/Q1 2021.

ESMA publishes guidelines on securitisation repository data completeness and consistency thresholds

ESMA has published a final report setting out [guidelines](#) on securitisation repository data completeness and consistency thresholds. The guidelines are intended to provide clarity for market participants and securitisation repositories (SRs) on accepted levels of 'no-data' (ND) options when submitting securitisation data to SRs.

The guidelines were finalised following a public consultation and set out how securitisation repositories should verify that ND options are only used where permitted and do not prevent the data submission from being sufficiently representative of the underlying exposures in the securitisation. The report document also includes details on comments ESMA received during the public consultation and ESMA's response.

EMIR: ESMA writes to EU Commission on draft acts on tiering criteria, comparable compliance and fees for third-country CCPs

ESMA has [written](#) to the EU Commission on draft delegated acts under Regulation (EU) 2019/2019 amending Regulation (EU) 648/2012 as regards the procedures and authorities involved for the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs (EMIR 2.2).

In June 2020 the Commission issued draft delegated acts on tiering criteria, comparable compliance and fees for third-country CCPs for public consultation. Following discussions with competent authorities and

stakeholders, ESMA has written to the Commission to draw attention to key technical points that should be addressed when finalising each of the acts, particularly in relation to the assessment of comparable compliance.

FSB and Basel Committee publish supervisory recommendations for benchmark transition

The Financial Stability Board (FSB) and Basel Committee on Banking Supervision (BCBS) have published a [report](#) on supervisory issues associated with benchmark transition.

The report sets out remaining challenges to transition based on surveys undertaken by the FSB, the BCBS and the International Association of Insurance Supervisors (IAIS). It reports that most FSB jurisdictions have a strategy in place to address LIBOR transition, as opposed to only half of the surveyed non-FSB jurisdictions.

The report sets out recommendations for authorities to support financial institutions' and their clients' progress in transitioning away from LIBOR, including:

- authorities and standard-setting bodies to issue public statements to promote awareness and engage with trade associations, and authorities to undertake regular surveys of LIBOR exposure and to request updates from financial institutions;
- authorities to establish a formal transition strategy supported by adequate resources and industry dialogue, and supervisory authorities to consider increasing the intensity of supervisory actions when the preparatory work of individual banks is unsatisfactory; and
- authorities to promote industry-wide coordination, maintain dialogue on the adoption of fallback language, consider identifying legislative solutions where necessary, and exchange information on best practices and challenges.

The report responds to the G20 request to identify remaining challenges to benchmark transition and to explore ways to address them. The report is to be delivered to G20 Finance Ministers and Central Bank Governors ahead of their virtual meeting on 18 July.

Basel Committee reports on Basel III implementation

The BCBS has published its eighteenth [report](#) on the adoption of Basel III standards by its 27 member jurisdictions.

As of end-May 2020, all member jurisdictions have risk-based capital rules, liquidity coverage ratio (LCR) regulations and capital buffers in force, and all but one jurisdiction has final rules in force for the countercyclical capital buffer and the leverage ratio based on the existing exposure definition.

Despite financial stability priorities related to the COVID-19 pandemic, member jurisdictions have made further progress in issuing final rules for capital requirements for bank exposures to CCPs and standards on interest rate risk in the banking book (IRRBB) since the previous October 2018 report.

While the Committee welcomes the overall progress made by member jurisdictions, it reaffirms its expectation of full, timely and consistent implementation of the Basel III post-crisis reforms, and will continue to monitor their implementation.

Basel Committee publishes targeted revisions to credit valuation adjustment risk framework

The BCBS has published the credit valuation adjustment (CVA) risk [framework](#) which replaces an earlier version of the standard published in December 2017.

The final standard incorporates changes proposed in the [consultation paper](#) published in November 2019 and has been informed by a quantitative impact assessment based on data as of end of June 2019. The revisions include recalibrated risk weights, a different treatment for certain client cleared derivatives, and an overall recalibration of the standardised approach CVA as well as the basic approach CVA.

The revised standard comes into effect on 1 January 2023.

PRA publishes policy statement on updates to Pillar 2A capital framework

The Prudential Regulation Authority (PRA) has published a [policy statement](#) (PS15/20) setting out its feedback to responses received on its consultation on draft amendments to the Pillar 2A capital framework (CP2/20), as well as its final policy.

In December 2019 the Financial Policy Committee (FPC) raised the UK countercyclical capital buffer (CCyB) rate in a standard risk environment from in the region of 1% to 2%. Subsequently, in CP2/20, the PRA proposed reducing the Pillar 2A capital requirements set out in supervisory statement (SS31/15) 'The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP)' in order to keep the total regulatory loss-absorbing capacity (LAC), defined as the minimum requirement for own funds and eligible liabilities (MREL) plus buffers, broadly constant when the UK CCyB rate is 2%.

Following consideration of the comments received on the consultation, the PRA has decided to implement its amendments to SS31/15 as consulted upon. The changes introduced by the amended supervisory statement took effect on 6 July 2020 and the PRA intends to apply the Pillar 2A reduction, where applicable, on or before 16 December 2020.

PRA publishes regulated fees and levies for 2020/2021

The PRA has published a [policy statement](#) (PS16/20) setting out its regulated fees and levies for 2020/2021 and providing feedback to responses to the proposals contained in its April 2020 consultation paper (CP4/20).

The policy statement sets out:

- fee rates to meet the PRA's 2020/21 Annual Funding Requirement (AFR) for the financial period 1 March 2020 to 28 February 2021;
- amendments to the Fees Part of the PRA Rulebook; and
- updates to supervisory statement (SS) 3/16 'Fees: PRA approach and application'.

No changes have been made to the proposals outlined in the consultation paper as a result of the responses the PRA received.

PRA statement on LIBOR transition and its resolution-related rules

The PRA has published a [statement](#) outlining its view on the implications of LIBOR transition for contracts in scope of the Contractual Recognition of Bail-In and Stay in Resolution Parts of the PRA Rulebook.

This follows a letter published by the PRA on 18 December 2019 on the prudential regulatory framework and LIBOR transition, which stated that the PRA had been considering possible implications of benchmark rate reform for rules related to resolution.

In particular, firms may need to consider whether existing contracts in scope of the Contractual Recognition of Bail-In (CROB) and Stay in Resolution (Stays) Parts of the PRA Rulebook that are changed to reflect the transition away from LIBOR could be considered materially amended, and thus required to include CROB and Stays terms.

The PRA encourages firms to consider adding CROB and Stays terms into the documentation for a third-country law governed liability or financial arrangement that is amended for the sole purpose of transitioning away from LIBOR, in order to enhance firm resolvability.

Firms could also consider whether having non-Common Equity Tier 1 (CET1) own funds instruments governed by third-country law but without statutory or contractual recognition of UK bail-in rules would create difficulties for resolution.

CSSF issues circular on indicators for tax offences as money laundering predicate offences specific to collective investment activities

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF) has issued [circular](#) 20/744 dated 3 July 2020 complementing CSSF Circular CSSF 17/650 on the application of the Luxembourg law of 12 November 2004 on the fight against money laundering and terrorist financing (as amended) (AML/CTF Law) and the Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the AML/CTF Law to tax predicate offences (aggravated tax fraud and tax evasion) for money laundering.

The circular complements Annex 1 of CSSF Circular 17/650 by adding a new Title II (Specific indicators concerning collective investment activities ('List II.')) setting out indicators specific to collective investment activities and professionals providing services in that particular sector. The CSSF expects professionals subject to its AML/CFT supervision to take these new indicators, where relevant, into account in their risk assessment and when designing risk mitigation measures proportionate to their risk exposure within the specific context of collective investment activities.

The circular entered in force on 3 July 2020.

CSSF issues circular on survey of amount of covered deposits held as of 30 June 2020

The CSSF, acting in its function as Depositor and Investor Protection Council (Conseil de Protection des Déposants et des Investisseurs) (CPDI), has

issued CSSF-CPDI [circular](#) 20/22 regarding the survey of the amount of covered deposits held as of 30 June 2020.

The circular is addressed to all members of the Luxembourg deposit protection scheme, the Fonds de garantie des dépôts Luxembourg (FGDL) (in particular to all credit institutions incorporated under Luxembourg law, to the POST Luxembourg, and to Luxembourg branches of non-EU/EEA credit institutions), and reminds them that the CPDI collects the amount of covered deposits on a quarterly basis in order to identify the trends and changes in the relevant indicators of deposit guarantee throughout the year.

The circular further draws members' attention to the provisions of the CSSF-CPDI circular 16/02, notably as regards the exclusion of structures assimilated to financial institutions and the treatment of omnibus and fiduciary accounts. The volume of eligible and covered deposits in omnibus and fiduciary accounts and the number of beneficiaries (ayants droit) are to be reported where credit institutions wish to ensure deposit protection for relevant beneficiaries and in order to allow the CPDI to prepare the FGDL for the reimbursements of such deposits.

In addition, FGDL members are requested to provide the data at the level of their legal entity, comprising branches located within other Member States, by 31 July 2020 at the latest. Entities that have not yet submitted the data that was due for 31 March 2020 are reminded that they must do so by 31 July 2020, in accordance with paragraph 4 of CSSF-CPDI 20/20.

In order to transmit these data, institutions are being requested to complete the table attached to the circular, which is also available on the CSSF website. The file containing the data must be completed and sent out no matter the circumstances in which the entity may find itself. The file shall respect the special surveys naming convention, as defined by CSSF circular 08/344, and shall be submitted over secured channels (E-File/SOFiE).

A member of the authorised management, i.e. the member in charge of the FGDL membership in accordance with CSSF circular 13/555, must review and approve the file prior to its transmission to the CSSF.

CSSF issues regulation on setting of countercyclical buffer rate

The CSSF has issued a new [regulation](#) (20-03) on the setting of the countercyclical buffer rate for the third quarter of 2020, which has been published in the Luxembourg official journal (Mémorial A). The regulation follows the Luxembourg Systemic Risk Committee's recommendation of 12 June 2020 (CRS/2020/002) and maintains the countercyclical buffer rate for relevant exposures located in Luxembourg at 0.5% for the third quarter of 2020. The new rate will apply as of 1 January 2021.

The regulation entered into force on 3 July 2020.

Bank of Spain consults on draft circular to payment and electronic money institutions on public and reserved financial reporting rules and financial statement standards

The Bank of Spain has launched a consultation on a [draft circular](#) to payment institutions and electronic money institution on public and reserved financial reporting rules and on financial statement standards. The main objective of

the circular is to establish the accounting regime applicable to payment institutions and electronic money institutions, which takes as a reference the accounting regulations applicable to credit institutions (although the differences in the nature, scale and complexity of the activities of payment institutions and electronic money institutions compared to credit institutions are translated into a simplified system of requirements for public and reserved financial statements requirements). In addition, the circular introduces some updates to the accounting circular applicable to credit institutions, mainly to maintain its alignment with EU regulations.

The public consultation is open until 23 July 2020.

Bank of Spain consults on draft circular on reserved information on conduct issues

The Bank of Spain has launched a consultation on a [circular](#) on reserved information on conduct issues, which is intended to regulate the information that supervised entities must prepare and present to the Bank of Spain on matters of conduct. The circular expands the sources of information available, to make it possible to obtain adequate and sufficient information for the control and supervision of the rules of conduct, transparency and customer protection by the Bank in Spain.

The public consultation will end on 17 July 2020.

FINMA authorises first supervisory organisations under FinSA/FinIA

The Swiss Financial Market Supervisory Authority (FINMA) has [granted](#) two organisations licences as supervisory organisations (SOs) with effect from 6 July 2020. The SOs will be responsible for the supervision of portfolio managers and trustees. FINMA is currently reviewing three additional SO applications.

With the enactment of the Financial Institutions Act (FinIA) and the Financial Services Act (FinSA) the supervision of portfolio managers and trustees became subject to new regulation. Independent portfolio managers and trustees now require authorisation from FINMA. However, they will be monitored by the SOs for compliance with the obligations under the FinIA and FinSA and the Anti-Money Laundering Act (AMLA) rules. The SOs will be supervised by FINMA.

Portfolio managers and trustees must apply for a licence from FINMA before the end of 2022 and prove that they are accredited to a supervisory organisation. By the cut-off date of 30 June 2020, FINMA had received notifications from 1,934 portfolio managers and 272 trustees who are interested in obtaining a licence.

FINMA also authorised the first registration body for client advisers. It expects that further registration bodies will be authorised in the future. The registration bodies maintain a register of advisers as defined in the FinSA. Client advisers of financial service providers must register if they are not subject to supervision and provide their services in Switzerland. The authorisation of the first registration body marks the start of a six-month transitional period: affected client advisers must submit an application to be entered in the register of advisers by 19 January 2021.

Finally, the Federal Department of Finance (FDF) recognised the first ombudsman's offices under FinSA. Unlike the self-regulatory ombudsman system for banks in the past, under FinSA all financial service providers that provide their services in Switzerland must become accredited to an ombudsman. As in the past, the ombudsman's offices should settle disputes regarding legal claims between the client and the financial service provider in mediation proceedings.

Borsa Istanbul announces institution-specific restrictions on short selling]

Pursuant to a series of resolutions adopted on 28 February 2020 and 2 March 2020, the Capital Markets Board of the Republic of Turkey (CMB) had previously issued a temporary ban on short selling shares traded on Borsa Istanbul Equity Markets, which also covered any trading positions that were closed out on the same day that they were opened. With its resolution dated 1 July 2020 and published in the CMB Bulletin No. 2020/40, the CMB lifted this temporary ban for trades on the BIST 30 Index.

Borsa Istanbul has now [announced](#) that a number of institutions have not made the legally required notifications with respect to short selling trades, and it has therefore decided to implement institution-specific restrictions on short selling for these specified institutions.

ASIC issues no-action position to allow right-of-use lease assets to count in satisfying AFS licensee requirements

The Australian Securities and Investments Commission (ASIC) has [issued](#) a temporary no-action position for Australian financial services (AFS) licensees in relation to potential breaches of the financial resource requirements that arise from recent changes to the accounting treatment of lease assets.

ASIC recognises that some AFS licensees may face difficulty in complying with their financial resource requirements because, following changes to the accounting standards for leases, lessees are required to recognise lease liabilities and a right-of-use asset for all leases. Under the temporary no-action position, ASIC will:

- allow licensees to use right-of-use lease assets to count towards their financial resource requirements; and
- not take regulatory action against licensees in relation to past breaches of financial resource requirements, when the breach arises from right-of-use lease assets not being able to be counted towards meeting those requirements.

ASIC has indicated that the no-action position will apply until further notice. Moreover, it plans to consult in the 2020-21 financial year on proposals to change the financial resource requirements to enable an AFS licensee to include a right-of-use lease asset when calculating whether it meets its financial resource requirements.

Hong Kong Government welcomes passage of Limited Partnership Fund Bill

The Hong Kong Government has [welcomed](#) the passage of the Limited Partnership Fund Bill by the Legislative Council.

The Bill is intended to establish a limited partnership fund regime to enable funds to be registered in the form of limited partnerships in Hong Kong. The limited partnership fund regime is an opt-in registration scheme administered by the Companies Registry.

The Limited Partnership Fund Bill is effective from 31 August 2020.

HKMA issues circular on range of practices regarding management of climate risks

The Hong Kong Monetary Authority (HKMA) has issued a [circular](#) to share with authorised institutions (AIs) practices adopted by major banks to manage climate risks.

In June 2020, the HKMA published a [white paper](#) setting out its initial thoughts on supervisory expectations on green and sustainable banking around four areas: governance, strategy, risk management, and disclosure. In formulating its initial thoughts, the HKMA engaged selected major banks in a series of discussions to understand their approach to managing climate risks in these four areas. During the discussions, the HKMA observed a range of practices that the more advanced authorised institutions have adopted or plan to adopt in their management of climate risks, which may be of reference value to other institutions.

The HKMA recommends AIs give consideration to these practices when developing their risk management framework. It also advises AIs to:

- take into consideration the nature, scale and complexity of their businesses, and ensure that their risk management framework is proportionate and fit for purpose;
- note the importance of being agile and responsive to changes when managing climate risks given their distinctive nature; and
- keep abreast of the latest standards on climate risk management and make adjustments to their approach based on actual developments.

Separately, the HKMA has indicated that it will invite interested AIs to participate in a pilot climate change stress testing exercise with a view to assessing the climate resilience of the sector as a whole. Moreover, noting that the use of stress testing to measure climate risks is a relatively new development, the HKMA will first collect feedback from participating banks on the scope, scenario and output of the exercise before launching it next year. More details regarding the pilot exercise will be provided to the industry in due course.

RECENT CLIFFORD CHANCE BRIEFINGS

European Commission publishes its report on the AIFMD

On 10 June 2020, the European Commission published its long awaited report to the European Parliament and Council on the application and scope of the AIFMD. At 10 pages, the relatively brief report comments on both the successes of the AIFMD and potential areas in which it could be improved, and concludes by confirming that the Commission is still assessing whether to propose amendments to the AIFMD.

This briefing discusses the key takeaways from the report.

<https://www.cliffordchance.com/briefings/2020/07/european-commission-publishes-its-report-on-the-aifmd.html>

Industry guidance published on new flexibilities for holding shareholder meetings

On 26 June 2020, new legislation came into effect which provides additional flexibility and certainty for companies on how they can hold and conduct general meetings in the period up to 30 September 2020. It also extends the deadline for holding AGMs and for making certain filings at Companies House. An industry-backed guidance note has also been published which provides companies with practical guidance on how to apply the provisions in the legislation relating to general meetings in practice.

This briefing discusses the new legislation.

<https://www.cliffordchance.com/briefings/2020/07/industry-guidance-published-on-new-flexibilities-for-holding-sha.html>

Good news for the loan market – SDNY distinguishes syndicated loans from securities

In *Kirschner v. JP Morgan Chase Bank, N.A.*, Judge Gardephe of the Southern District of New York dismissed a complaint that included state securities law claims based on allegations that interests in a syndicated term loan to a corporate borrower constitute securities. In dismissing the complaint, Judge Gardephe applied a four-factor test adopted by the US Supreme Court in *Reves v. Ernst & Young* to determine that interests in a syndicated term loan did not constitute securities.

This briefing discusses the analysis of the *Reves* factors in the *Kirschner* case and exploring the extent to which this ruling provides guidance to market participants.

<https://www.cliffordchance.com/briefings/2020/07/good-news-for-the-loan-market-SDNY-distinguishes-syndicated-loans-from-securities.html>

Recent SEC enforcement actions highlight the importance of sound valuation and disclosure practices by investment managers

The US Securities and Exchange Commission recently obtained a final judgment of over USD 30 million against a registered investment adviser for inaccurate disclosures based on its use of false and misleading track record information in violation of the Investment Advisers Act of 1940. The action against Navellier & Associates, Inc. followed two prior enforcement actions against registered investment advisers – Old Ironsides Energy, LLC and Everest Capital LLC – for private fund marketing disclosure violations. In addition, a recent risk alert by the SEC's Office of Compliance Inspections and Examinations identified inaccurate valuations as a recurrent finding in OCIE private fund adviser examinations. These recent developments underscore the SEC's continued focus on ensuring that investment managers accurately value portfolio holdings and clearly and accurately disclose fund and manager performance – requirements that are increasingly challenging since the outbreak of COVID-19.

This briefing discusses the recent SEC enforcement actions.

<https://www.cliffordchance.com/briefings/2020/07/recent-sec-enforcement-actions-highlight-the-importance-of-sound.html>

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