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Brexit: EU Commission issues contingency measures in case of no-deal

The EU Commission has issued a communication and set of targeted contingency measures designed to maintain basic air and road connectivity and reciprocal fishing access rights between the EU and UK in the event of a no-deal Brexit.

If the transition period ends on 31 December 2020 without a deal being in place, EU and UK relations will mostly be governed by multilateral international frameworks and the EU and Member State domestic laws in relation to third countries.

The EU Commission feels that, in the case of air and road connectivity and access for fishing vessels, these fall-back solutions are not sufficient. It therefore believes that contingency measures are warranted and has adopted the following proposals:

- to allow, for a maximum of six months, UK air carriers to fly across EU territory without landing, make stops in EU territory for non-traffic purposes, and perform international passenger and cargo services between the UK and the EU;
- to permit aviation products and designs certified by the EU Aviation Safety Agency (EASA) or an EASA-certified organisation before the end of the transition period to continue to be used on EU-registered aircraft, regardless of whether the products or designs originated from UK-based companies;
- to maintain basic road freight and road passenger transport connectivity for a maximum of six months, including permitting bus services running on the island of Ireland to pick up and set down passengers in the border region;
- to maintain the operation of the Channel Fixed Link through the Channel Tunnel beyond 1 January 2021, by extending the validity of authorisations granted by the Intergovernmental Commission (IGC) (which will lose its status as a national safety authority at the end of the transition period) for a period of two months and, in the case of rail operators, who receive licences from the UK and safety certificates from the IGC, for a period of nine months; and
- to allow the EU to grant authorisations to UK vessels to enter EU waters and to manage authorisation requests by EU vessels to enter UK waters.

These measures are contingent on the UK conferring equivalent rights to the EU and will only enter into force if a deal is not in application by 1 January 2021.

The Commission highlights that there will be no extension of the grace period regarding the ownership and control requirements for EU air carriers and that EU road operators who hold UK-issued licences and certificates must arrange for the equivalent EU documents by 1 January if they wish to continue working in the EU.

EMIR: EU Commission consults on draft delegated act on penalties imposed on trade repositories

The EU Commission is seeking feedback on a draft delegated act on procedures for penalties imposed by the European Securities and Markets Authority (ESMA) on trade repositories (TRs).

The draft instrument amends Delegated Regulation (EU) 667/2014 with regard to rules of procedure for penalties imposed on TRs by ESMA including rules on the right of defence, supplementing the European Market Infrastructure Regulation (EMIR).

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) introduced changes affecting the rules of procedures for penalties imposed on TRs, particularly concerning the right of defence, including giving ESMA the power to adopt interim decisions on TRs in order to prevent significant and imminent damage to the financial system or to the integrity, transparency and orderly functioning of financial markets.

In order to adapt the existing rule of procedures to take into account changes introduced by EMIR REFIT, the proposed instrument amends (EU) 667/2014 on the rules for penalties imposed on TR by ESMA foreseen in Article 65 of EMIR.

Comments are due by 4 January 2021.

EMIR: Commission consults on draft delegated act on procedures for penalties imposed on third-country CCPs

The EU Commission is seeking feedback on a draft delegated regulation amending the European Market Infrastructure Regulation (EMIR) with regard to rules of procedure for penalties imposed on third-country central counterparties (CCPs) or related third parties by ESMA.

Under Article 25 of EMIR, the EU Commission is empowered to adopt delegated acts to specify further the rules of procedures for the power to impose penalties, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcements of penalties. The Commission's draft act draws on technical advice submitted by ESMA and feedback from the Expert Group of the European Securities Committee (EGESC).

Comments the draft delegated regulation close on 4 January 2021.

CSDR: EU Commission consults on review report

The EU Commission has issued a targeted consultation to gather views on the implementation of the Central Securities Depositories Regulation (CSDR).

The CSDR requires the EU Commission to prepare a review report for the Parliament and the Council on the implementation of the Regulation. The consultation seeks input from stakeholders for the Commission's report. The Commission's report will consider a range of specific areas where targeted action may be necessary to ensure the fulfilment of the objectives of the CSDR in a more proportionate, efficient and effective manner.

Amongst other things, the consultation seeks feedback on:

- CSD authorisation and review, and evaluation processes;
- cross-border provision of services in the EU;
- internalised settlement;
- settlement discipline;
- third-country CSDs; and
- technological innovation.

The consultation closes on 2 February 2021.

Benchmarks Regulation: EU Council endorses proposed amendments

The EU Council ambassadors have confirmed an agreement reached between the Council and the Parliament on amendments to the Benchmarks Regulation ((EU) 2016/1011) regarding the exemption of certain third country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation (2020/0154(COD)).

The amendment gives the EU Commission the power to replace benchmarks if their termination would result in a significant disruption in the functioning of financial markets in the EU. In such a situation, a statutory benchmark would replace benchmarks in financial instruments and contracts that contain either no contractual replacement (also known as a fallback provision), or a fallback provision which is deemed unsuitable by regulators.

The amendment also extends the transition period so that EU supervised entities will be able to use third-country benchmarks until the end of 2023. The EU Commission may further extend this period until the end of 2025 in a delegated act to be adopted by 15 June 2023.

The EU Parliament and the EU Council intend to adopt the amendments without further discussion as soon as possible.

Coronavirus: Political agreement reached on MiFID2 Quick Fix amendments

The EU Parliament has published a press release announcing that its Economic and Monetary Affairs Committee (ECON) and the Council of the EU have reached political agreement on the EU Commission's proposal for a directive amending MiFID2 as regards information requirements, product governance and position limits (MiFID2 Quick Fix).

The amendments set out in MiFID2 Quick Fix, which forms part of the Capital Markets Recovery Package aimed at facilitating the EU's economic recovery from the COVID-19 pandemic, are intended to simplify information requirements and support the growth of euro-denominated derivatives markets. Among other things, the press release notes the following agreed changes:

- professional clients will no longer receive information on costs and charges, although they will continue to receive information on investment advice and portfolio management;
- ex-post information on costs and charge to be suppled without delay and capable of being given over the phone, with clients also given a breakdown of the costs before concluding a transaction;
- providing retail clients with the option to receive information in digital format;
- disapplying certain product governance requirements to corporate bonds with make-whole clauses and financial instruments distributed to eligible counterparties; and
- a lighter position limits regime for certain commodity derivatives.

A final text of MiFID2 Quick Fix is expected once technical trilogues on non-controversial elements are complete.

The press release also notes that the EU Commission should present, if appropriate, a proposal for a review of both MiFID2 and MiFIR by 31 July 2021 at the latest.

Brexit: ESAs highlight change in status of certain STS securitisations

The Joint Committee of the European Supervisory Authorities (ESAs), which comprises ESMA, the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), has published a statement highlighting the forthcoming change in status for certain Simple, Transparent and Standardised (STS) securitisation transactions after the end of the transition period on 31 December 2020.

The ESAs note that for a securitisation transaction to qualify as an STS securitisation, the EU Securitisation Regulation requires that the originator, sponsor and the securitisation special purpose vehicle (SSPE) be established in the EU. Securitisation transactions currently labelled as STS securitisations will therefore lose their STS status where one or all the securitisation parties (originator, sponsor and/or the SSPE) are established in the UK after the end of the transition period. The ESAs note that loss of STS status also implies the loss of preferential capital treatment available for investments in this type of securitisations.

MiFID: ESMA updates double volume cap register

ESMA has published double volume cap (DVC) data and calculations for the period 1 November 2019 to 31 October 2020 under MiFID2.

DVC limits the amount of dark trading allowed under the reference price waiver and negotiated transaction waiver. The update sets out new breaches of 12 equities for the 8% cap, applicable to all trading venues, and 10 equities for the 4% cap, which applies to individual trading venues. ESMA advises that trading under the waivers for all new instruments in breach of the DVC thresholds should be suspended from 11 December 2020 to 10 June 2021.

Additionally, ESMA highlights that none of the previously identified breaches of the caps proved to be incorrect and so no previously identified suspensions of trading under the waivers had to be lifted. As of 7 December 2020 there were 205 instruments suspended.

Money Market Funds: ESMA updates validation rules

ESMA has updated its validation rules regarding the Money Market Funds (MMF) Regulation. Under Article 37 of the MMF Regulation, MMF managers must submit data to national competent authorities who will then submit the data to ESMA.

Following feedback from market participants, ESMA has implemented amendments that clarify existing validation rules in order to correct inconsistencies or make the rules easier to understand. It also extends the Classification of Financial Instruments for eligible assets.

SRB publishes final standardised valuation data set for banks in resolution

The Single Resolution Board (SRB) has published its final standardised data set, which is intended to ensure a minimum level of data is available to support the robust valuation of a bank in resolution.

In 2019, the SRB published a Framework for Valuation, which outlined the its expectations regarding the principles and methodologies for valuation reports by independent valuers. The new standardised data set builds on this framework by setting out the minimum data needed to support a valuation for resolution. It comprises:

- a valuation data set instructions document, which sets out the requirements and expectations in relation to the data set; and
- an explanatory note which provides further guidance to banks regarding their management information systems (MIS) capabilities and how to ensure they produce information that is as up to date and complete as possible and of adequate quality to carry out a fair, prudent and realistic valuation.

The SRB has also published the responses it received to the consultation on the draft standardised data set, as well as its feedback to these responses.

SRB publishes guidance on bank resolvability in M&As

The SRB has published a document setting out its expectations for ensuring the resolvability of banks engaging in mergers and acquisitions (M&As) and other corporate transactions.

Noting that banks are expected to inform resolution authorities without undue delay on material changes having an impact on resolution planning activities under Principle 1.2 of the SRB's Expectations for Banks (EfB), the document provides greater detail on the information the SRB may need from banks engaging in M&As or other corporate transactions. It also seeks to raise awareness of the potential consequences of such transactions on resolvability in selected areas, including:

- loss-absorption and recapitalisation capacity;
- information systems;
- operational continuity and access to financial market infrastructure (FMI) services; and
- legal structure.

Basel Committee reports on Basel III monitoring exercise

The Basel Committee on Banking Supervision (BCBS) has published the results of its latest review of the implications of the Basel III standards for banks based on data as of 31 December 2019.

The report sets out the impact of the Basel III framework initially agreed in 2010 as well as the effects of the Committee's December 2017 finalisation of the Basel III reforms and the January 2019 finalisation of the market risk framework.

The report found that, prior to COVID-19, large internationally active banks made further progress towards meeting fully phased-in final Basel III capital requirements and their liquidity ratios improved compared with the Committee's previous review.

The Committee also reports on Basel III liquidity requirements, finding that liquidity ratios improved compared with end-June 2019

ICE Benchmark Administration consults on ceasing publication of GBP, EUR, CHF, JPY and USD LIBOR

ICE Benchmark Administration (IBA) has launched a consultation on the potential cessation of LIBOR settings.

This follows announcements made by the IBA on 18 November 2020 and 30 November 2020. The consultation relates to the IBA's intention to cease the publication of:

- all GBP, EUR, CHF and JPY LIBOR settings, and the one week and two month USD LIBOR settings immediately following the LIBOR publication on 31 December 2021; and
- the overnight and one, three, six and twelve month USD LIBOR settings immediately following the LIBOR publication on 30 June 2023, subject to any rights of the Financial Conduct Authority (FCA) to compel IBA to continue publication.

IBA has emphasised that the consultation is not, and must not be taken to be, an announcement that IBA will continue or cease the publication of any LIBOR settings after 31 December 2021 or 30 June 2023.

IBA notes that any publication of the overnight and one, three, six and twelve month USD LIBOR settings based on panel bank submissions beyond 31 December 2021 will need to comply with applicable regulations, including as to representativeness. Based on current information from panel banks, IBA anticipates there being a representative panel for the continuation of these USD LIBOR settings through to 30 June 2023.

Comments are due by 25 January 2021. IBA intends to share the results of the consultation with the FCA and to publish a feedback statement summarising responses received to the consultation.

Brexit: UK signs FTA with Singapore

The UK and Singapore have signed a continuity free trade agreement (FTA).

Regarding financial services, the rollover agreement is intended to support financial services trade and investment in both countries, including providing opportunities for existing Qualifying Full Banks (QFBs) in Singapore to expand their footprint, including through additional customer service locations.

Ministers also announced their intention to commence negotiations for a Singapore-UK Digital Economy Agreement (DEA) early in spring 2021. A DEA would be intended to ensure an open, thriving and safe digital environment for the two countries' consumers and businesses.

Singapore has also agreed to start a review in 2021 to consider an increase in the limits imposed on e-wallet payments, which affect UK firms operating in Singapore, as well as to discuss opportunities for UK firms to apply to become Digital Wholesale Banks in Singapore.

CRD: PRA consults on proposed approach to designating entities in certain UK consolidation groups and publishes policy statement

The Prudential Regulation Authority (PRA) has issued a consultation paper (CP22/20) on its proposed approach to designating entities within certain UK consolidation groups as responsible for ensuring that consolidated prudential requirements are met during a transitional period.

Some amendments to the Capital Requirements Regulation (CRR2) apply from 28 December 2020, including the requirement for a UK consolidation group's approved parent holding company, where it has one, to become responsible for ensuring that consolidated prudential requirements are met. CRR2 does not specify the entity or entities responsible for ensuring compliance from 28 December 2020 until the date on which the UK parent financial holding company's application for approval or exemption is finally determined.

The PRA proposes to create a new part of the PRA Rulebook on designation with two new statutory instruments, the Draft Designation (Consolidation) Instrument 2020 and the Draft Designation (Consolidation) (EU Exit) Instrument 2020.

The PRA proposes 29 December 2020 as the implementation date for the changes resulting from this consultation, to coincide with the transposition date for the Capital Requirements Directive (CRD5) and the application of the relevant CRR2 requirement.

Comments to the consultation close at 5pm on 16 December 2020.

The PRA has concurrently published a policy statement (PS26/20) setting out its feedback to responses received to its July 2020 (CP12/20) and October 2020 (17/20) consultations on implementation of CRD5 and near-final rules instruments, statements of policy, supervisory statements and templates.

Respondents to both consultations generally welcomed the PRA's proposals, but sought additional clarification in some areas and provided feedback on elements they suggested could be difficult to operationalise.

The policy material is published as near-final, as the power for the PRA to make rules imposing consolidated or sub-consolidated requirements on holding companies cannot be exercised by the PRA before 28 December 2020. The final Rule instruments will be published in a subsequent PS in time for the implementation deadline of 28 December 2020.

FCA confirms rules on permanent speculative illiquid securities mass-marketing ban

The FCA has published a policy statement (PS 20/15) setting out its feedback and final rules following its consultation (CP 20/8) on making its temporary product intervention (TPI) requirement on marketing high-risk speculative illiquid securities (SISs) permanent and extending them to listed bonds with similar features.

A TPI requirement restricts speculative mini-bonds and preference shares from being mass-marketed to retail investors and improves disclosure of key risks and costs to those certified high net worth and sophisticated retail investors who are still eligible to receive promotions for these types of securities.

The feedback received to the CP 20/8 was generally supportive of the proposals to make the TPI requirements permanent.

The final rules come into force on 1 January 2021.

Brexit: FCA publishes information on MiFID reporting

The FCA has published a new webpage setting out information on MiFID reporting after the Brexit transition period on 31 December 2020.

The webpage provides details on the cutover from ESMA's Financial Instruments Reference Data System (FIRDS), which provides reference data for all MiFID instruments that are Traded on a Trading Venue (TOTV) in the EU, and ESMA's Financial Instruments Transparency System (FITRS), which publishes reference data, liquidity, waiver thresholds and quantitative data to help firms assess their trade reporting and tick size obligations, to the FCA's equivalent systems, including a timeline covering:

- each system's availability prior to cutover and throughout the cutover weekend; and
- the FCA FIRDS and FCA FITRS publication schedule up to the end of the first trading day after cutover (4 January 2021).

The webpage also outlines the instrument coverage in FCA FIRDS and FCA FITRS for the first weeks following the cutover.

Coronavirus: FCA consults on guidance for firms providing pay as you grow options under Bounce Back Loan Scheme

The FCA has launched a consultation on proposed guidelines for firms that will be providing pay as you grow (PAYG) options under the Government's Bounce Back Loan Scheme (BBLS) and for debt collection firms acting on their behalf.

The BBLS was established to help small and medium-sized businesses access government-guaranteed loans of between GBP 2,000 and GBP 50,000 during the coronavirus pandemic. On 24 September 2020, the Chancellor of the Exchequer announced the introduction of PAYG options, under which BBLS borrowers can chose to:

- extend the term of their loan to ten years;

- move to interest-only repayments for six months (this option can be used up to three times); and/or
- pause repayments for six months (this option can only be used if the borrower has made at least six repayments under the loan and can only be used once).

In its draft guidance, the FCA sets out how firms can use and offer the PAYG options in a manner compliant with the rules set out in the Consumer Credit Sourcebook (CONC) Chapter 7 and the Lending Standard Board's Standards of Lending Practice for Business Customers. It also provides guidance on how firms can recognise vulnerability, respond to the needs of vulnerable customers and assist borrowers who need debt advice.

Comments are due by 18 December 2020. The FCA intends to publish its feedback and final guidance in early 2021.

Corporate Insolvency and Governance Act 2020: temporary measures restricting statutory demands and winding-up petitions extended

HM Government has laid the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2020 (SI 2020/1483) before Parliament.

The regulations are intended to amend the Corporate Insolvency and Governance Act 2020 in order to extend the duration of the Act's temporary measures restricting the use of statutory demands and winding up petitions so that they expire on 31 March 2021 rather than on 31 December 2020.

The regulations enter into force on 31 December 2020.

Coronavirus: PRA to maintain systemic risk buffer rates until December 2022

The PRA has announced that, in response to the economic disruption caused by the coronavirus pandemic, it is maintaining firms' systemic risk buffer (SRB) rates at the rate set in December 2019 until December 2022. This is intended to aid firms in their capital planning and take pressure off their end-2020 balance sheets (which would have been used for the December 2021 rate reassessment).

On 29 December 2020, the SRB will be replaced under the revised Capital Requirements Directive (CRD 5) by the other systemically important institutions buffer (O-SIIB). The O-SIIB will be set at the same rate as firms' current SRB and, in accordance with the PRA's statement, will not be reassessed until December 2022. This means that no rate changes will take effect until at least January 2024. The PRA has also emphasised that all elements of banks' capital and liquidity buffers can be drawn down as necessary to support the economy through the financial shocks of the pandemic.

PRA publishes policy statement on simplified obligations for recovery planning

The PRA has published a policy statement (PS 25/20) setting out its feedback and final policy following a consultation (CP 10/20) on proposals to allow certain firms to benefit from simplified obligations for recovery planning, as required under the Bank Recovery and Resolution Directive (BRRD). In CP 10/20, the PRA proposed to amend supervisory statement (SS) 9/17, 'Recovery Planning', to specify that:

- global systemically important institutions (G-SIIs) and other systemically important institutions (O-SIIs) are not eligible for simplified obligations;
- credit institutions with a quantitative score of under 60 basis points and which do not provide critical functions are likely to be eligible for simplified obligations;
- non-GSII or non-O-SII investment firms will be assessed for simplified obligations eligibility using the qualitative assessment process set out in Commission Delegated Regulation (EU) 2019/348; and
- firms eligible for simplified obligations will be required to submit at least two scenarios in their recovery plan (rather than at least four for G-SIIs and O-SIIs, or at least three for all other firms) and those with shorter and less complex recovery plans will not be expected to submit a consolidated information template.

The PRA received two responses to its consultation, both of which were supportive of the proposals but requested further clarification. The PRA has therefore amended its policy as follows:

- minor amendments to improve clarity;
- added further detail to explain how its recovery planning expectations vary according to the size of firms; and
- explained that eligible firms are permitted to include a minimum of two scenarios in their recovery plans, and that these should be the ones that are most relevant to the firm's business model and sufficiently severe to test the recovery plan. The PRA expects firms to include a combined capital and liquidity stress, as these scenarios are the most challenging.

The updated supervisory statement came into effect on 7 December 2020.

BaFin publishes general decree on storage of virtual IBANs in file system

The German Federal Financial Services Supervisory Authority (BaFin) has published a general decree (Allgemeinverfügung) addressed to all credit institutions who issue, have issued or will issue international bank account numbers (IBAN) with the country code DE to payment service providers for forwarding to their end customers.

The general decree, which took effect as of 9 December 2020, requires that, going forward, credit institutions must record each virtual IBAN which they issue directly or indirectly to payment service providers immediately, correctly and completely in the data file pursuant to section 24c para. 1 of the German Banking Act (Kreditwesengesetz – KWG).

In instances where a credit institution has already issued virtual IBANs prior to the general decree entering into force, then it must enter the IBANs correctly and completely in the data file pursuant to section 24c para. 1 of the KWG within six months. Otherwise, the credit institution must immediately terminate the accounts of the payment service provider through which the virtual IBAN is processed or ensure in some other way that the virtual IBAN already issued to these payment service providers can no longer be used.

These requirements do not apply to cases in which the credit institution issues the virtual IBAN to customers who are not payment service providers and in which the use of virtual IBANs merely serves to facilitate the customer's own accounting.

IVASS consults on transfer of run-off portfolios

The Italian Institute for the Supervision of Insurance (IVASS) has published a consultation document on changes to ISVAP Regulation no. 14 concerning the transfer of run-off portfolios.

In particular, the consultation proposes to amend the ISVAP Regulation to remove the specific prohibition to transfer portfolios consisting of claims only (soli sinistri), expressly excluded in its original formulation.

Following this amendment, the transfer between insurance companies of portfolios consisting solely of obligations arising from insurance or reinsurance contracts would also be permitted.

The proposed amendment seeks to update IVASS' guidelines in line with the approach followed by other European countries and in accordance with the Solvency framework.

The consultation closes on 18 December 2020.

CSSF issues communication on new eDesk module for submission of certain information

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a communication announcing that the reception and processing by the CSSF of certain information will be progressively digitised via a new 'eDesk/Generic Request Management Module' on the CSSF eDeskPortal, which will allow users to submit their requests online.

The CSSF indicates that two types of request will be processed through the new eDesk module: those submitted at the initiative of the interested parties and those submitted on an ad hoc basis in response to a specific demand initiated by the CSSF via email. The CSSF further specifies that the following two requests for information fall under the scope of the new eDesk module as of 8 December 2020:

- information submitted to the CSSF under Circular 15/612 by, and at the initiative of, all Luxembourg alternative investment fund managers (AIFMs), including AIFMs authorised and registered with the CSSF, in relation to the EU/non-EU unregulated AIFs and/or the non-EU regulated AIFs managed by them; and
- information submitted to the CSSF (on an ad hoc basis) in relation to anti-money laundering supervisory measures by all Luxembourg investment managers (e.g. Luxembourg UCITS management companies/AIFMs and their Luxembourg branches), internally-managed UCITS/AIFs and internally-managed specialised investment funds (SIFs) and investment companies in risk capital (SICARs) that do not qualify as AIFs, it being understood that such information will have to be submitted further to a specific demand initiated by the CSSF.

The CSSF emphasises that, as of 8 December 2020, the only possible channel to submit the above two requests will be via the eDesk, meaning that submission by email, for instance, will no longer be accepted. The CSSF expects to issue communications regarding further types of request that should be submitted via the eDesk in due course.

A user guide providing additional information and guidance for the online submission of these requests via the new eDesk module is available in the dedicated section of the CSSF eDesk portal, and all information related to the creation of user accounts is detailed in the lower section of the eDesk portal homepage.

CSSF issues regulation setting conditions for granting of Luxembourg residential property loans

The CSSF issued on 3 December 2020 Regulation 20-08 which sets out conditions for the granting of loans relating to residential property located in the territory of Luxembourg. The Regulation was published in the Official Journal and entered into force on 7 December 2020.

The Regulation is addressed to credit institutions, insurance companies and professionals carrying out lending transactions, and covers loan agreements relating to residential real estate located in Luxembourg, including the repurchase of such contracts, concluded from 1 January 2021. Loan agreements signed up to 28 February 2021 that are based on firm and individual offers submitted by lending institutions to potential borrowers prior to the Regulation's publication in the Official Journal are exempt from the Regulation.

The Regulation sets out the following maximum limits:

- 80% for the ratio between the sum of all loans or loan tranches guaranteed by the borrower concerning residential real estate at the time of loan origination and the value of the property at that same time (the LTV ratio), which also applies to mortgage loans on property intended for rental;
- 90% for the LTV ratio with respect to the principal residence of the borrower (other than first-time buyers). However, institutions may grant individual loans with an LTV ratio of up to 100% provided that the aggregated amount of credits benefiting from this derogation represents no more than 15% of the annual aggregate amount of this category of credit; and
- 100% for the LTV ratio with respect to first-time buyers of a principal residence.

Brexit: CSSF publishes press release on impact of end of transition period for investment funds and their managers

The CSSF has issued a press release (20/26) on the end of the Brexit transition period on 31 December 2020, at which point, the CSSF emphasises, certain passporting rights and other Brexit-related aspects must be considered, and certain actions must be taken by investment funds qualifying as undertakings for collective investment in transferable securities (UCITS) or alternative investment funds (AIFs) and by their respective management companies (ManCos) or alternative investment fund managers (AIFMs).

The CSSF reminds stakeholders that, during the Brexit transition period, EU legislation has continued to apply in the UK, and UK entities have continued to provide their services in Luxembourg on the basis of their respective passporting rights under applicable EU legislation. The CSSF also reiterates that these passporting rights will now terminate on 31 December 2020 at midnight, and that certain actions will need to be taken by impacted funds and/or managers prior to (or by) 31 December 2020 at the latest.

The CSSF sets out considerations in relation to the following topics:

- the termination of the UCITS Directive/AIFMD management passport for cross-border management of Luxembourg UCITS/AIFs by UK UCITS ManCos/AIFMs;
- the termination of the UCITS Directive/AIFMD marketing passport for cross-border marketing in Luxembourg of UCITS/AIFs by UK UCITS ManCos/AIFMs;
- delegation of investment management, portfolio management and/or risk management activities by Luxembourg UCITS ManCos/AIFMs to undertakings in the UK;
- investment policy and eligibility issues for Luxembourg UCITS/AIFs invested in assets located in the UK or issued by UK issuers; and
- the use of secondment by Luxembourg UCITS ManCos/AIFMs, which remains possible subject to certain requirements.

CSSF updates COVID-19 FAQ on exclusion of certain exposures to central banks from the leverage ratio calculation

The CSSF updated its COVID-19 FAQs to clarify the regime applicable to less significant institutions (LSI) with respect to the temporary exclusion of certain exposures to central banks from the leverage ratio calculation.

In its updated FAQ, the CSSF states that the conditions required for exercising the discretionary powers provided for in Article 500b of the Capital Requirements Regulation (CRR) as amended in the context of the COVID-19 pandemic, are also warranted for the LSIs established in Luxembourg.

The CSSF therefore authorises LSIs placed under its direct supervision, by way of derogation from Article 429(4) CRR, to exclude on a temporary basis in the calculation of the regulatory leverage ratio, coins and banknotes in EUR as well as exposures to the central banks of the Eurosystem referred to in Article 500b(1)(b) CRR as specified by the decision of the ECB of 16 September 2020 (ECB/2020/44):

- deposits held at the deposit facility, as defined in the Guidelines (EU) 2015/510 of the ECB ; and
- balances held on reserve accounts, as defined in Regulation (EC) 1745/2003 of the ECB, including funds held in order to meet minimum reserve requirements.

The CSSF further states that this exemption is applicable until 27 June 2021.

Finally, an institution that excludes exposures to central banks of the Eurosystem from the total exposure measure pursuant to Article 500b(1) CRR is required to also disclose the leverage ratio computed without excluding those exposures.

BRRD2: Ministry of Finance consults on draft implementation bill

The Dutch Ministry of Finance has issued for consultation a draft bill which, once enacted, would implement the revised Bank Recovery and Resolution Directive (BRRD2) through the Financial Markets Supervision Act (Wet op het financieel toezicht) and Bankruptcy Act (Faillissementswet). The draft bill is titled the 'Implementation Act – loss absorption and recapitalisation capacity for banks and investment firms' (Implementatiewet verliesabsorptie- en herkapitalisatiecapaciteit banken en beleggingsondernemingen).

By way of background, BRRD2, amongst others, implements the Financial Stability Board's TLAC standard through amendments to the Capital Requirements Regulation (CRR), and revises the existing MREL regime to align it with the TLAC standard. Other reforms include amendments to requirements on the contractual recognition of bail-in, the introduction of a new moratorium power for resolution authorities and the introduction of requirements on the contractual recognition of resolution stay powers.

Polish Financial Supervision Authority publishes standpoint on issuance of and trading in cryptoassets

The Polish Financial Supervision Authority (KNF) has published its standpoint on the issuance of and trading in cryptoassets. In its standpoint, KNF sets out its opinions and views on the classification and legal qualification of cryptoassets for the purposes of offering and selling them or organising trading in them in circumstances where the governing law is Polish law. KNF also discusses, among other things, certain types of tokens and the legal and regulatory issues related to them.

Spanish Government passes Royal Decree on allocation of greenhouse gas emission allowances

On 9 December 2020, the Spanish Government passed Royal Decree 1089/2020 developing aspects related to the adjustment of the free allocation of greenhouse gas emission allowances in the period 2021-2030.

The Royal Decree, which completes the Spanish regulatory framework for the application of the EU Emissions Trading System in Spain, establishes the administrative rules and procedures to adjust the greenhouse gas emission allowances allocated to each fix facility with the real activity of such facility.

The main innovations of the Royal Decree include:

- when the average activity level of a facility during the last two years increases or decreases more than 15% of its reference level (period 2014-2018), the greenhouse gas emission allowances allocated to it will be adjusted accordingly and in proportion to the change of the activity level (until now, this adjustment only took place in case of increases or decreases of more than 50% of the activity level); and
- the holders of affected facilities are obliged to report about their activity levels on 28 February of each year (until now, this obligation was referred to 31 December of each year; therefore, the obligation to report on 31 December 2020 has ceased).

Other issues regulated by the Royal Decree are, among others:

- the return of greenhouse gas emission allowances in case of an excess of the free allocation to a specific facility;
- the suspension of the allocation of allowances in specific cases; and
- the procedure to be followed by new traders willing to receive the free allocation of greenhouse gas emission allowances.

Swiss Federal Council reports on further development of financial market policy

The Swiss Federal Council has published a report on the strategic development of its financial market policy. Among other things, the Federal Council seeks to establish a framework which will ensure that Switzerland retains its position as one of the world's leading financial centres and further increases its appeal as an international business location. The framework will combine established strengths, such as stability, security and trust, with an openness for new developments such as fintech and sustainable finance. Key points of the strategy include:

- creating a technology-neutral regulatory framework and promoting innovation in the financial sector to enable existing and new financial centre players to exploit the possibilities offered by new technologies, such as data-driven business models, in an optimal manner;
- supporting interconnectivity in a changing international environment by actively representing Switzerland's interests both in multilateral bodies and with its bilateral partners, and promoting open markets; and
- working alongside the competent authorities to ensure the fundamental stability of the sector, effectively combat financial crime and other risks, and align with the sustainable development goals under the 2030 Agenda (including greater transparency around investment).

FINMA issues guidance on LIBOR transition

The Swiss Financial Market Supervisory Authority (FINMA) has published a transition roadmap for LIBOR, which is intended to support the firms it supervises in preparing for the discontinuation of LIBOR in various currencies. FINMA's guidance reflects statements by the UK's FCA and the ICE Benchmark Administration on the discontinuation of LIBOR in CHF, EUR, GBP, JPY and USD. It also adapts the recommendations in the roadmap published by the Financial Stability Board (FSB) on 16 October 2020.

HKMA issues circular regarding climate risk stress test

The Hong Kong Monetary Authority (HKMA) has invited all licensed banks to participate in a pilot climate risk stress test (CRST) to be undertaken in 2021.

The main objectives of the exercise are to assess the climate resilience of the banking sector as a whole and to facilitate the capability building of participating banks for measuring climate risks. The HKMA expects participating banks to obtain useful insights into various aspects of climate risk management, such as:

- understanding the range of risks associated with climate change;
- identifying data gaps for risk identification; and

- establishing a robust framework for managing climate risks.

The exercise should also help participating banks embed climate risks in their business planning and develop strategies to mitigate climate risks.

The pilot exercise covers two major types of climate risks, namely physical risk and transition risk. Participating banks will need to assess these risks separately under different scenarios in order to allow for a better understanding and assessment of the impact of each of these risks.

Given the distinctive nature of climate risks, traditional stress testing techniques may not be suitable for use in CRST. The HKMA encourages participating banks to explore new methodologies for the pilot exercise.

Noting that the use of stress tests to measure climate risks is a relatively new development and the level of sophistication in conducting CRST varies across banks, the HKMA will extend flexibility to participating banks on, for instance, reporting granularities and exercise coverage.

SFC consults on enhancements to industry's competency standards

The Securities and Futures Commission (SFC) has launched a public consultation on proposed enhancements to the competency framework for intermediaries and individual practitioners. In view of the development of financial markets, the proposed changes are intended to update the SFC's entry requirements for licence applicants, as well as its ongoing competency standards for individual practitioners.

Under the proposals, the minimum academic qualification requirements for licence applicants will be raised and a broader range of qualifications will be recognised. In addition, applicants will have more flexibility to meet the industry qualification and regulatory examination requirements. The Continuous Professional Training (CPT) requirements for individual practitioners will also be enhanced through changes to the Competence Guidelines and the CPT Guidelines.

The SFC has suggested that, in order to address its concerns about the quality of work performed by some financial advisers on matters regulated by the Codes on Takeovers and Mergers and Share Buy-backs, the existing competence requirements will be upgraded in relation to individuals who might advise on such matters. The SFC also indicates that executive officers and relevant individuals will be required to meet the same competence and CPT requirements to maintain a level playing field.

Comments on the consultation are due by 10 February 2021.

SFC consults on proposals regarding investor identification for securities market

The SFC has launched a public consultation on its proposals to introduce an investor identification regime for the securities market in Hong Kong (HK Investor ID Regime).

The HK Investor ID Regime is intended to facilitate more timely and effective market surveillance and reduce ongoing compliance costs for firms when dealing with SFC enquiries about client identities. Currently, only the information for an exchange participant inputting a securities order (but not that of the underlying client instructing the order) is captured by the trading system used by the Stock Exchange of Hong Kong (SEHK). Under the proposed new regime, licensed corporations and registered institutions would be required to submit clients' names and identity document information to a data repository.

The SFC has observed that transactions which are not recorded by the SEHK as on-exchange orders or are not required to be reported to the SEHK as off-exchange trades (i.e. over the counter (OTC) securities transactions) have also been used in many manipulation schemes investigated by the SFC. As a complementary initiative to the HK Investor ID Regime, the SFC is therefore also proposing to introduce an 'OTC Securities Transactions Reporting Regime' for ordinary shares and real estate investment trusts listed on the SEHK.

The SFC intends to implement the HK Investor ID Regime by the first quarter of 2022, and to launch the OTC Securities Transactions Reporting Regime approximately six months after that (i.e. around the third quarter of 2022).

Comments on the consultation are due by 4 March 2021.

SFC publishes additional guidance on external electronic data storage

The SFC has published additional guidance for market participants on external electronic data storage in response to questions it has received from the industry. The additional guidance, which has been provided in the form of new frequently asked questions (FAQs), follows the SFC circular of 31 October 2019, which set out requirements for exclusively using external electronic data storage providers (EDSPs) to keep records or documents required under the Securities and Futures Ordinance or the Anti-Money Laundering and Counter-Terrorist Financing Ordinance.

The October 2019 circular imposed a requirement on licensed corporations that keep electronic regulatory records with an EDSP, to obtain a countersigned notice (from a Hong Kong EDSP) or an undertaking (from a non-Hong Kong EDSP) authorising the EDSP to provide regulatory records to the SFC on demand, provided the licensed corporation does not contemporaneously keep a full set of identical electronic records on premise. In the latest additional guidance, as an alternative means of satisfying the requirements for a countersigned notice or EDSP undertaking, the SFC has indicated that it will accept an undertaking from each of the licensed corporation's two Managers-In-Charge (MICs) of Core Function or, with the SFC's consent, one MIC or one Responsible Officer.

The SFC has also made consequential amendments to its FAQs on premises for business and record keeping.

MAS publishes guidance to notice on prevention of money laundering and financing of terrorism

The Monetary Authority of Singapore (MAS) has published guidelines for variable capital companies (VCCs) on its anti-money laundering and counter terrorist financing (AML/CFT) notice published on 13 January 2020 (Notice VCC-N01). The guidelines set out MAS' supervisory expectations and clarify the relationship and responsibilities of the VCC and its eligible financial institution (EFI).

Under the guidelines, MAS requires VCCs to conduct money laundering and terrorist financing (ML/TF) risk assessments, customer due diligence and ongoing monitoring. It also imposes particular requirements on VCCs that are not required of the other financial institutions under its supervision. These include that the VCC:

- appoints an EFI (regulated by MAS for AML/CFT) to perform the checks and measures necessary to comply with Notice VCC-N01;
- defines its members as customers under the notice; and
- maintains a register of its beneficial owners and nominee directors.

It is the responsibility of the VCC and its board to continue to ensure that the VCC is complying with the requirements of the notice, including:

- approving the VCC's ML/TF risk assessments, policies and procedures;
- appointing an AML/CFT compliance officer to carry out the AML/CFT function for the VCC;
- overseeing the EFI's arrangements for outsourcing and the use of third parties; and
- approving at a senior management level the establishment or continuation of business relations with customers who present a higher ML/TF risk.

In addition, the guidelines:

- clarify that 'senior management' refers to the VCC's director(s) or any individual the VCC's board has appointed to act as its senior management (and hence the VCC need not have its own employees); and
- set out the scope of the VCC's customer due diligence obligations where the VCC's members subscribe through distributors or introducers, and where the VCC was re-domiciled from outside Singapore.

Personal Data Protection (Amendment) Act 2020 gazetted

The Singapore Government has gazetted the Personal Data Protection (Amendment) Act 2020, which was passed in the Singapore Parliament on 2 November 2020 and assented to by the President on 25 November 2020. The Act amends the Personal Data Protection Act 2012 to:

- strengthen the accountability of organisations in respect of the handling and processing of personal data;
- enhance the legal framework for the collection, use and disclosure of personal data;
- provide individuals with greater autonomy over their personal data;
- enhance the enforcement powers of the Personal Data Protection Commission; and
- make consequential and related amendments to certain other acts.

The Personal Data Protection (Amendment) Act 2020 will come into operation on a date that the Minister appoints by notification in the Gazette.

JFSA publishes paper on corporate governance code

The Financial Services Agency of Japan (JFSA) has published a paper on issues related to the general meeting of shareholders in light of the revision of the Japanese Corporate Governance Code currently under discussion and due out in the spring of 2021.

Among other things, the paper sets out recommendations by a panel commissioned by the JFSA and the Tokyo Stock Exchange, including:

- companies in the prime market to have independent outside directors making up at least a third of their boards, up from the current recommendation of at least two members. Further, the revised code may request certain companies to have independent outside directors making up the majority; and
- companies (not limited to those in the prime market) to set voluntary and measurable goals for ensuring diversity in the promotion of women, foreigners and mid-career hires to managerial positions, and to disclose the implementation status.

In addition, the JFSA suggests that companies in the prime market have their annual securities reports and notices of convocation of the general shareholders' meetings translated into English to enhance corporate disclosure in English.

APRA consults on capital framework for authorised deposit-taking institutions

The Australian Prudential Regulation Authority (APRA) has launched a public consultation on proposed changes to the authorised deposit-taking institution (ADI) capital framework.

The consultation is a continuation of a process that responds to Financial System Inquiry recommendations and aims to ensure that Australian banks meet the internationally agreed Basel III requirements.

The consultation includes APRA's responses to the August 2018 consultation on improving the transparency, comparability and flexibility of the ADI capital framework, the June 2019 consultation on the revisions to the ADI capital framework and the November 2019 consultation on the leverage ratio requirement for ADIs. Due to the number of consultations APRA is responding to in this regard, the consultation consists of two papers: a discussion paper that provides a high level overview of APRA's proposals and their indicative impacts; and, a response to submissions paper that provides a more detailed response to technical issues raised in the prior consultations.

In particular, APRA's proposed amendments to the capital framework include:

- greater risk sensitivity within the risk weighting framework, including more differentiated risk weights for different types of mortgages and reduced risk weights for small business lending;
- providing for ADIs to hold a larger share of their required capital as buffers, enhancing the ability of the framework to respond flexibly to future stress events;
- improving the transparency of the framework by requiring all ADIs to disclose their capital ratios on a common basis, and making it easier to reconcile the Australian framework with international standards; and
- introducing a simplified framework and reduced compliance requirements for smaller ADIs.

Although the proposed changes do not require ADIs to raise additional capital, they would result in an increase in the reported capital ratios. The new framework is proposed to be implemented from 1 January 2023.

Comments are due by 1 April 2021.

APRA consults on revisions to prudential standard on banking credit risk management

APRA has issued a letter to authorised deposit-taking institutions (ADIs) launching a public consultation on revisions to the new prudential standard APS 220 Credit Risk Management (APS 220).

In September 2020, the Australian Government had announced a series of proposed reforms to the consumer credit laws. The two key elements of the Government's proposed reforms state that:

- ADIs would no longer be subject to the responsible lending obligations which had been administered by the Australian Securities and Investments Commission (ASIC); and
- non-ADI lenders would be subject to the new lending requirements, administered by ASIC, which are based largely on certain requirements in APRA's new APS 220.

APRA believes some amendments will be necessary in the event that the Government's proposed credit reforms are passed as legislation. Consequently, APRA considers it appropriate to make two potential changes to ensure alignment with the non-ADI lenders' regime:

- an amendment to the new APS 220 that would require ADIs to assess an individual borrower's repayment capacity without substantial hardship; and
- to more closely align the implementation date of the new APS 220 with the Government's proposed consumer credit reforms.

As the industry has been aware of the new APS 220 since late 2019, APRA expects most ADIs would already be complying with the new APS 220 requirements. However, APRA will not implement the new APS 220 earlier than 1 April 2021.

APRA has indicated that if the Government's proposed consumer credit reforms are not passed as legislation, the proposed changes to the new APS 220 will be deemed unnecessary and APRA will not progress the proposed revisions. It has also assured that the proposed changes to APS 220 will not affect the proposed first reporting period for reporting standard ARS 220 Credit Risk Management, which will remain for the quarter ending 31 March 2022.

Further, APRA intends to consult on amendments to prudential practice guide APG 223 Residential Mortgage Lending, depending on the outcome of the Government's proposed credit reforms.

APRA issues letter to ADIs on scrutiny of securitisation practices

APRA has issued a letter to all ADIs to announce the launch of a review into their securitisation practices. The announcement follows APRA's recent discovery that some ADIs were repurchasing residential mortgage loans that were subject to repayment deferral from their securitisations. In APRA's view, this represents implicit support and is thus inconsistent with Prudential Standard APS 120 Securitisation (APS 120), which requires ADIs to be clearly separate from their securitisations and to permanently (except in limited pre-defined circumstances) transfer credit risk to the securitisation investors. APRA also identified several other issues in relation to these ADIs' compliance with APS 120 and therefore decided it was necessary to conduct a program of securitisation thematic reviews. It has begun these reviews already and will continue them into 2021.

APRA has asked the ADIs that it considers to have provided implicit support to publicly disclose their repurchases as part of upcoming Pillar 3 reporting requirements. ADIs will also be required to arrange a third-party review of their program's APS 120 compliance and mitigate any issues prior to further securitisation issuance.

In its letter, APRA warns ADIs that the identification of non-compliance with APS 120 may result in them being required to publicly disclose their non-compliance and/or hold additional regulatory capital. In advance of the reviews, APRA recommends ADIs comply with the letter and intent of APS 120, and ensure controls and procedures are in place to maintain compliance.

ASIC extends relief from portfolio holdings disclosure

The Australian Securities and Investments Commission (ASIC) has announced the extension of relief for superannuation funds to disclose their portfolio holdings because the regulations supporting the requirements have not yet been made. The relief from portfolio holdings disclosure was originally set to expire on 31 December 2020, with disclosure of information about a fund's holdings required on its website no later than 90 days from its reporting date (either 31 December or 30 June).

ASIC has implemented the deferral, to allow additional time for the Australian Government to make the regulations, by amending the first reporting day in ASIC Class Order (CO 14/443) for superannuation funds to disclose their portfolio holdings to 31 December 2021. ASIC has indicated that it may shorten the period of the relief by a further legislative instrument, depending on when regulations are made. In doing so, ASIC will take into account the fact that industry will need an appropriate transition time to implement the regime.

Further, ASIC has taken this opportunity to appreciate the move by some funds to proactively increase transparency about their portfolio holdings in the absence of legislative obligations.

ASX updates listing rules guidance notes

The Australian Securities Exchange (ASX) has updated the ASX Listing Rules Guidance Note 5 (CHESS Depositary Interests) and Guidance Note 8 (Continuous Disclosure: Listing Rules 3.1 – 3.1B).

The change to the Guidance Note 5 is an amended footnote addressing the use of the Clearing House Electronic Sub-register System (CHESS) settlement facility by entities formed in Israel. The revision was made upon noting the need for Israel entities to have a provision in their constitution that securities holders are not entitled to a certificate for their securities.

The changes to the Guidance Note 8 include substantial enhancements to the materials on earnings guidance and earnings surprises in sections 7.1 to 7.3

as well as to the worked examples F and G in Annexure A to the Note. ASX has also made other minor editorial changes to the Guidance Note 8 in relation to a recent and important decision in the case of ASIC v Big Star Energy Limited (No 3) (2020) FCA 1442 wherein it was held that the listed entity breached Listing Rule 3.1 (obligation to disclose 'market sensitive' information immediately) and section 674(2) of the Corporations Act (continuous disclosure regarding information in accordance with the Listing Rules). In that case, the Federal court specifically rejected the argument by the listed entity that the identity of the purchaser was not material because the purchase was for a cash consideration.

CFR launches framework to test cyber resilience of Australia's financial services industry

The Council of Financial Regulators (CFR) has launched a Cyber Operational Resilience Intelligence-led Exercises (CORIE) framework to test and demonstrate the cyber maturity and resilience of institutions within the Australian financial services industry. A key objective of the CORIE framework is to provide data and information to inform relevant Australian regulators of systemic weaknesses that may present a risk to the integrity and stability of Australian financial markets. The framework also aims to identify actions to uplift the cyber resilience of financial institutions.

CORIE's exercises are designed to mimic the tactics, techniques and procedures (TTPs) of real-life adversaries, creating and utilising tools, and using techniques that may not have been anticipated and planned for. These exercises measure the ability of an organisation to detect, respond and recover from the operations of a real adversary based on such TTPs, so as to maintain critical business processes and protect sensitive data. As a result, CORIE would complement the existing traditional security testing programs that are required to be sustained by the financial institutions such as vulnerability assessments, penetration testing and continuous red teaming. The CORIE exercises will be conducted by independent providers to bring a fresh perspective and as close to an unbiased view as possible coupled with advanced adversary simulation capabilities.

The day-to-day management of the pilot program will be performed on behalf of the CFR by the CORIE Team Coordinators, consisting of a small number of trusted personnel within the cyber security teams of the CFR members. On completion of the exercises, a report detailing industry-wide cyber resilience trends amongst the financial institutions will be presented to the CFR to highlight any systemic weaknesses that may present a risk to the integrity of the Australian financial markets and financial system.

RECENT CLIFFORD CHANCE BRIEFINGS

European Commission consults on Taxonomy Technical Screening Criteria for climate mitigation and adaptation

The European Commission has launched a consultation on draft legislation containing detailed Technical Screening Criteria for climate mitigation and adaptation activities supporting the Sustainable Finance Taxonomy Regulation.

While the Commission has followed the broad thrust of the Technical Expert Group's recommendations for the Technical Screening Criteria, in some cases its approach to the details of the criteria has differed.

This briefing looks at the Commission's proposals.

https://www.cliffordchance.com/briefings/2020/12/european-commission-consults-on-taxonomy--technical-screening-cr.html

ESG – what's a private fund manager to do?

ESG is without doubt one of the key themes for the investment management industry for 2020 and beyond. Regulators across the globe are each developing their own agendas at their own pace, leaving something of a regulatory labyrinth for the global private fund manager to navigate.

This briefing looks at the key recent developments.

https://www.cliffordchance.com/briefings/2020/12/esg--what-s-a-private-fund-manager-to-do-.html