INTERNATIONAL REGULATORY UPDATE IRU 21 - 31 DECEMBER 2020

- **CRR: Delegated Regulation on deduction of software assets from CET1 items published in Official Journal**
- **MiFID2/MiFIR: Delegated Regulation amending RTS 2 published**
- **EMIR: EU Commission adopts delegated acts adapting implementation timelines for intragroup transactions, equity options and novations to EU counterparties**
- **EBA publishes final draft technical standards on estimation of Pillar 2 and combined buffer requirements for setting MREL and on reporting of MREL decisions**
- **EBA publishes final draft technical standards on impracticability of contractual recognition under BRRD framework**
- **Coronavirus: EBA publishes additional clarifications on application of selected policies**
- **CRD5: EBA proposes methodology for O-SII buffer rate calculation**
- **EBA updates reporting framework 3.0 and technical standards on Pillar 3 disclosure**
- **SFTR: ESMA publishes updated guidelines on reporting**
- **ESMA updates guidance on waivers from pre-trade transparency**
- **Benchmark administrators: ESMA consults on procedural rules for penalties**
- **Data reporting service providers: ESMA consults on procedural rules for penalties**
- **Brexit: EU and UK sign and provisionally apply Trade and Cooperation Agreement**
- **IOSCO launches survey on exchange-traded funds**
- **BoE publishes MREL review discussion paper and extends deadlines for mid-tier banks**
- **Sustainable finance: FCA issues policy statement on climate-related financial disclosures**
- **Coronavirus: FCA and PRA set out expectations on SM&CR and Approved Persons Regime**
- **FCA publishes final Brexit instruments and Temporary Transitional**

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

To request a subscription to our Alerter: Finance Industry service, please subscribe to our Client Portal, where you can also request access to the Financial Markets Toolkit and subscribe to publications, insights and events.

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Marc Benzler +49 69 7199 3304
Caroline Dawson +44 207006 4355
Steven Gatti +1 202 912 5095
Lena Ng +65 6410 2215
Gareth Old +1 212 878 8539
Mark Shipman + 852 2826 8992
Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

Power directions

- **BRRD2: PRA publishes policy statement on UK transposition**
- **BaFin extends permission for later publication of transactions in financial instruments until 1 January 2022**
- **Brexit: Luxembourg bill clarifying certain AML/CTF provisions and extending temporary regime for marketing of UK UCITS to retail investors published**
- **Luxembourg bill transposing Directive on cross-border marketing and distribution of collective investment undertakings within the EU published**
- **CSSF issues circular on ESMA guidelines on performance fees in UCITS and certain types of AIFs**
- **CSSF issues communication on AML/CFT cross-sector survey for 2020**
- **CSSF issues communiqué on thematic review of issuers' climate-related disclosures**
- **CSSF issues FAQs on use of securities financing transactions by Luxembourg UCITS**
- **Coronavirus: CSSF updates FAQs and issues recommendation on restriction of distributions during pandemic**
- **AFM consults on restriction of marketing, distribution or sale of turbos to retail investors in the Netherlands**
- **CRD 4: Bank of Spain adopts EBA guidelines on appropriate subsets of sectoral exposures to which competent or designated authorities may apply systemic risk buffer**
- **Bank of Spain maintains countercyclical capital buffer at 0%**
- **HKMA announces enhanced competency framework on operational risk management**
- **HKEX publishes consultation conclusions on proposals to introduce paperless initiatives**
- **SFC announces deferral of margin requirements for non-centrally cleared over-the-counter derivative transactions**
- **MAS consults on proposed notices regarding management of outsourced relevant services by banks and merchant banks**
- **MAS revises notices on disclosure in financial statements for banks and merchant banks**
- **Recent Clifford Chance briefing: UK and EU agree post-Brexit deal. Follow this link to the briefings section.**

CRR: Delegated Regulation on deduction of software assets from CET1 items published in Official Journal

Commission Delegated Regulation (EU) 2020/2176 on the deduction of software assets from Common Equity Tier 1 (CET1) items under Article 36 of

the Capital Requirements Regulation (CRR) has been published in the Official Journal. The Delegated Regulation amends the existing regulatory technical standards (RTS) on own funds requirements for institutions. It introduces a new Article 13a, which specifies that the amount of software assets that shall be deducted from CET1 items shall be determined on the basis of the prudential accumulated amortisation and sets out the methodology for its calculation.

The Regulation entered into force on 23 December 2020.

MiFID2/MiFIR: Delegated Regulation amending RTS 2 published

The EU Commission has adopted a Delegated Regulation establishing regulatory technical standards (RTS) amending Delegated Regulation (EU) 2017/583 (RTS 2) to adjust the average daily number of trades (ADNT) liquidity thresholds and trade percentiles used to determine the pre-trade size specific to the financial instrument (SSTI) threshold for bonds.

The amendments were recommended by the European Securities and Markets Authority (ESMA) in its MiFID2/MiFIR annual review report in July 2020. In that report, ESMA noted that an adjustment to the trade percentiles for other non-equity financial instruments would be premature.

The Regulation will enter into force on the twentieth day following its publication in the Official Journal.

EMIR: EU Commission adopts delegated acts adapting implementation timelines for intragroup transactions, equity options and novations to EU counterparties

The EU Commission has adopted two delegated acts under the European Market Infrastructure Regulation (EMIR) that amend Commission Delegated Regulation (EU) 2016/2251 on risk mitigation techniques for OTC derivatives not cleared by a central counterparty (CCP) and several other Delegated Regulations on the clearing obligation.

The first delegated act amends the Delegated Regulation on risk mitigation techniques in order to:

- facilitate further international consistency towards the implementation of the Basel Framework;
- extend the temporary exemption for intragroup transactions by 18 months;
- extend the temporary exemption for single-stock equity options or index options (equity options) for three years in order to avoid undue costs and an unlevel playing field situation for EU counterparties; and
- allow UK counterparties to be replaced with EU counterparties without triggering the bilateral margin and clearing obligation requirements under certain conditions. This limited exemption aims to create a level playing field between EU counterparties and preserve the regulatory and economic conditions under which the contracts were originally entered into.

The delegated act amending the Delegated Regulations on the clearing obligation makes changes in order to facilitate certain Brexit-related novations of OTC derivative contracts to EU counterparties during a specific time-window.

Both delegated acts will enter into force on the day following that of their publication in the Official Journal.

EBA publishes final draft technical standards on estimation of Pillar 2 and combined buffer requirements for setting MREL and on reporting of MREL decisions

The European Banking Authority (EBA) has published its final draft RTS specifying the methodology to be used by resolution authorities to estimate the Pillar 2 (P2R) and combined buffer requirements (CBR) at resolution group level for the purpose of setting the minimum requirement for own funds and eligible liabilities requirement (MREL).

The estimation of P2R and CBR is necessary for setting MREL when the resolution group perimeter differs significantly from the prudential perimeter at which own fund requirements have been set by the competent authority. The final draft RTS further specify a methodology for estimating own fund and combined buffer requirements. They provide a framework for a dialogue between resolution groups, competent authorities and resolution authorities aiming to improve the accuracy of the input for MREL setting.

The EBA has also published final draft implementing technical standards (ITS) specifying uniform reporting templates, instructions and methodology for the identification and transmission, by resolution authorities, of MREL to the EBA. This reporting between resolution authorities and the EBA aims to ensure that the EBA has all the necessary information to understand how MREL is set within the Member States.

EBA publishes final draft technical standards on impracticability of contractual recognition under BRRD framework

The EBA has published its final draft RTS and ITS on the impracticability of contractual recognition of bail-in powers under the Bank Recovery and Resolution Directive (BRRD).

The standards are intended to ensure the harmonised application of instances of impracticability of contractual recognition of bail-in powers. Where contracts are governed by the law of a third country, the BRRD requires that these contracts include a contractual recognition term by which the parties acknowledge that the contract may be subject to bail-in powers and agree to be bound by their effect. In certain situations, it might be legally or otherwise impracticable to achieve contractual recognition of the bail-in powers.

The final draft RTS further determine the conditions of impracticability, the conditions for the resolution authority to require the inclusion of a contractual term and the timeframe for the resolution authority to require its inclusion. Finally, the draft ITS specify the uniform formats and templates for the notification to resolution authorities of determinations of impracticability to achieve contractual recognition.

Coronavirus: EBA publishes additional clarifications on application of selected policies

The EBA has published a report setting out additional clarifications regarding the policies and guidelines it introduced in response to the coronavirus

pandemic. This report updates the report published by the EBA in July 2020 (EBA/REP/2020/19) and covers:

- questions and answers relating to the EBA's guidelines on legislative and non-legislative moratoria on loan repayments;
- an overview of the general payment moratoria currently in place across the EU;
- questions and answers regarding the implementation of the EBA's guidelines on reporting and disclosure of exposures subject to measures applied in response to the pandemic;
- a consideration of the criteria that institutions should adopt for the identification and treatment of operational risk events and losses in the context of the pandemic;
- clarifications on the likely identification of a coronavirus-triggered downturn period and its incorporation into downturn loss given default (LGD) estimations; and
- clarifications on the treatment of the coronavirus public guarantee schemes as a form of credit risk mitigation under the advanced internal rating-based (A-IRB) approach.

CRD5: EBA proposes methodology for O-SII buffer rate calculation

The EBA has published a report in fulfilment of a mandate under the fifth Capital Requirements Directive (CRD5) setting out proposals to implement an EU-wide floor methodology to calibrate buffer rates of Other Systemically Important Institutions (O-SIIs). The proposed methodology is intended to strengthen the banking sector's stability and avoid under-calibration of O-SII capital buffer rates whilst allowing relevant authorities to consider national banking sectors' specifics.

The EBA notes that at present there is no harmonised EU-level methodology for calibrating O-SII buffer rates and that the report's recommendations should therefore be seen as a preparatory step to inform the EU co-legislators. The EBA has also published a data visualisation tool in order to assist stakeholders' understanding of certain country-level data that contributed to the report's conclusions.

EBA updates reporting framework 3.0 and technical standards on Pillar 3 disclosure

The EBA has published an update to the reporting framework 3.0 and the ITS on institutions' Pillar 3 public disclosures.

This follows the:

- EU Commission's adoption of the ITS on supervisory reporting (v3.0), which includes changes introduced by the revised Capital Requirements Regulations (CRR2) and the Prudential Backstop Regulation;
- EBA's publication of the revised version of the mapping between Pillar 3 ITS on disclosures and ITS on supervisory reporting (v3.0); and

- EBA's release of phase 1 of its technical package on the reporting framework v3.0, which provides the standard specifications for the implementation of the EBA reporting requirements.

SFTR: ESMA publishes updated guidelines on reporting

ESMA has published a corrected version of its January 2020 guidelines on reporting under the Securities Financing Transactions Regulation (SFTR).

The changes to the guidelines, which are highlighted through the document, include amendments to the sections on aspects related to margin lending and reporting of zero collateral.

ESMA updates guidance on waivers from pre-trade transparency

ESMA has published an updated opinion providing guidance on pre-trade transparency waivers for equity and non-equity instruments.

The updated opinion provides:

- guidance related to request for quote systems;
- guidance on how trading venues should apply for a waiver to their national competent authority; and
- updates on frequently encountered issues when assessing waiver notifications.

The document updates the opinion ESMA published in July 2020, which provided guidance on pre-trade transparency waivers and information on ESMA's assessment in the context of issuing opinions on waivers from pre-trade transparency over the last three years.

ESMA intends to continue updating the opinion if further frequent issues in the context of assessing waiver notifications occur.

Benchmark administrators: ESMA consults on procedural rules for penalties

ESMA has launched a consultation on specific aspects of the procedural rules for imposing fines and penalties on benchmark administrators under ESMA's direct supervision.

The amended Benchmarks Regulation contains detailed rules regarding penalties for benchmark administrators. The consultation covers specific aspects of the rules, including the:

- right to be heard by the independent investigating officer (IIO);
- content of the file to be submitted by the IIO;
- access to the file;
- procedure for imposing penalties;
- adoption of interim decisions; and
- limitation periods for the imposition as well as enforcement of penalties, including their collection.

Comments are due by 23 January 2021. ESMA intends to provide technical advice to the EU Commission in the first quarter of 2021.

Data reporting service providers: ESMA consults on procedural rules for penalties

ESMA has launched a consultation on draft procedural rules for penalties imposed on data reporting service providers (DRSPs) under its supervision. The consultation is a response to a call for technical advice from the EU Commission. In particular, ESMA is seeking views on its proposed rules regarding:

- the right to be heard by the investigation officer;
- on the content of the file that must be submitted to ESMA by the investigation officer;
- the procedure for imposing fines and supervisory measures and the rights of the person subject to investigation;
- the proposed procedure for imposing periodic penalty payments;
- the right of the person subject to investigation to access their file;
- the procedure for interim decisions that may be made by ESMA in instances where urgent action is needed;
- the limitation periods for imposing and enforcing penalties;
- the methods for collecting fines and periodic penalty payments; and
- the calculation of periods, dates and time limits to be set in the rules.

Comments are due by 23 January 2021. ESMA intends to publish the final report and submit its technical advice to the Commission in the first quarter of 2021.

Brexit: EU and UK sign and provisionally apply Trade and Cooperation Agreement

The UK and EU have signed and progressed their respective ratification of the Trade and Cooperation Agreement (TCA), which broadly establishes the basis for their relationship now that the transition period has ended.

Both parties signed the TCA on 30 December 2020, which is in force in the UK and applies provisionally in the EU until full ratification.

In the UK, the European Union (Future Relationship) Act 2020, which received Royal Assent on 31 December 2020, implements into domestic law the TCA and other Agreements reached between the EU and UK, and enabled ratification of those Agreements by the UK Government.

In the EU, the Presidents of European Council and Commission signed the TCA on behalf of the EU following the adoption by the EU Council of a decision to do so. The decision also sets out the provisional application of the TCA from 1 January 2021, ahead of ratification.

The TCA broadly establishes the basis for the UK-EU relationship, under which further supplemental bilateral agreements may be agreed, and covers:

- trade, including goods, services and investment, digital trade, energy, as well as regulatory cooperation, aviation, road transport, social security coordination and fisheries;
- law enforcement and judicial cooperation in criminal matters;

- cooperation in relation to health security and cyber security;
- participation in EU programmes, principally Horizon; and
- dispute settlement.

It also establishes a Partnership Council comprised of representatives of the EU and UK to make recommendations and adopt decisions relating to its implementation, application and amendment. A Trade Partnership Committee, other Specialised Committees and Working Groups under the supervision of those Committees are also established to assist the Council in its tasks.

To be fully ratified, the EU Parliament is required to give its consent, following which the EU Council will adopt a decision to conclude the TCA. Once necessary procedures are completed, it will then enter into force. The Agreement provides for the EU and UK to jointly review it and any supplementing agreements five years after its entry into force and every five years thereafter.

IOSCO launches survey on exchange-traded funds

The International Organization of Securities Commissions (IOSCO) has issued a questionnaire on exchange-traded funds (ETFs).

The aim of the questionnaire is to enhance IOSCO's understanding of certain aspects of ETFs, including during the market volatility in March/April 2020 and, in particular, issues related to fixed-income ETFs.

IOSCO's Committee 5 on Investment Management intends to use the questionnaire responses to help inform its findings and policy analysis for an upcoming report to the IOSCO Board. IOSCO also intends to consider the questionnaire responses when formulating any potential guidance regarding ETFs in the future.

Comments are due by 1 March 2021.

BoE publishes MREL review discussion paper and extends deadlines for mid-tier banks

The Bank of England (BoE) has published a discussion paper as part of its review of the UK's framework for MREL.

The discussion paper broadly seeks feedback aimed at informing the BoE's review of its statement of policy, which will consider resolution strategies thresholds, the calibration of MREL, instrument eligibility and the application of MREL within banking groups. In particular, feedback is sought on:

- the purpose of MREL in the context of the development of effective resolution regimes;
- the potential impact on the statutory special resolution objectives of a hypothetical mid-tier bank failure in the event that insufficient MREL resources were available and the bank had to enter an insolvency procedure;
- banks' experience in issuing MREL instruments; and
- the potential interactions of the MREL regime with other regulatory developments.

In conjunction with the discussion paper and to enable it to complete its review, the BoE has extended the MREL and resolvability assessment framework (RAF) deadlines for mid-tier banks to 1 January 2023.

Comments on the discussion paper are due by 18 March 2021. The BoE intends to publish a consultation setting out any proposed changes in summer 2021 and, in light of feedback received, to make any policy changes by the end of 2021.

Sustainable finance: FCA issues policy statement on climate-related financial disclosures

The Financial Conduct Authority (FCA) has published a policy statement (PS20/17) setting out its feedback and final rules following its consultation (CP20/3) on proposals to enhance climate-related disclosures by listed issuers. In CP20/3, the FCA proposed to introduce:

- a new listing rule for commercial companies with a premium UK listing, requiring them to state in their annual financial reports whether they had made disclosures consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD) and, if not, to provide an explanation of why, along with a description of any steps they are taking, or plan to take, to facilitate consistent disclosures in future; and
- a new technical note to clarify existing environmental, social and governance (ESG)-related disclosure obligations for a wider scope of issuers under the FCA Listing Rules, Disclosure Guidance and Transparency Rules, Prospectus Regulation and Market Abuse Regulation.

Overall, respondents were supportive of the proposals although requested some amendments and further clarification. The FCA has therefore made the following changes to its final rules:

- amended the listing rule to promote transparency regarding any steps companies are taking, or plan to take, to make consistent disclosures in the future;
- added further guidance on the circumstances in which the FCA would expect issuers to explain rather than disclose;
- clarified that a company should conduct a detailed assessment of their disclosures, taking into account certain of the TCFD's guidance materials, when determining their consistency with the TCFD's recommendations; and
- provided additional high-level guidance on the level of detail that should be included in companies' disclosures.

The new listing rule applies for accounting periods beginning on or after 1 January 2021, with the first annual financial reports including disclosures subject to the rule published in spring 2022. The finalised technical note applies with immediate effect. The FCA notes it intends to issue two follow-up consultations in the first half of 2021, firstly on proposals to extend the application of the rule to a wider scope of listed issuers and to strengthen the compliance basis, and secondly on potential requirements for TCFD-aligned disclosures by UK-authorised asset managers, life insurers and FCA-regulated pension providers.

Coronavirus: FCA and PRA set out expectations on SM&CR and Approved Persons Regime

The FCA and the Prudential Regulation Authority (PRA) have issued a series of statements setting out their updated expectations of firms under the Senior Managers and Certification Regime (SM&CR) (both solo- and dual-regulated firms) and Approved Persons Regime (APR), as some of the temporary provisions introduced due to the coronavirus pandemic come to an end.

In their statements, the FCA and PRA note that some of the previously available provisions will end on 7 January 2021, including:

- in relation to firms' statements of responsibilities (SoRs) and senior management function's (SMF's) prescribed responsibilities under the SM&CR; and
- in relation to temporary notification arrangements in response to the pandemic under the APR.

The FCA previously issued modifications by consent to the 12-week rules under the SM&CR and APR, which would allow solo-regulated firms to notify the FCA if they consented to an extension of the 12-week rule for temporary arrangements for SMFs under the SM&CR and for controlled functions under the APR. These modifications by consent remain available, however firms cannot consent to a modification after 30 April 2021 and all modifications consented to before then will come to an end on that date (i.e. the maximum period of extension available to firms will reduce the closer it is to 30 April 2021).

The updated statements do not make significant changes to the expectations regarding the furloughing of staff. The FCA and PRA remind firms of their requirements regarding the performance of particular SMFs, the notification and recording of the furloughing of SMFs, the completion of annual employee certifications, and the activities of the Principal firm under the APR.

FCA publishes final Brexit instruments and Temporary Transitional Power directions

The FCA has published the final onshoring instruments, related guidance and Temporary Transitional Power (TTP) directions that apply from the end of the Brexit transition period.

To prepare for the end of the transition period, the FCA has made further EU exit-related changes to its Handbook and Binding Technical Standards for which, in some cases, it shares responsibility with the PRA or the Bank of England. The changes are intended to ensure that a functioning regulatory and legal framework for financial services continues to be in place after the transition period.

The update follows the publication in September 2020 of the FCA's Quarterly Consultation Paper (CP20/18) containing draft onshoring-related instruments. The final instruments are largely unchanged from the versions consulted on in CP20/18, and these changes are outlined in Handbook Notice 83.

The TTP directions have also been made and published. The TTP applies transitional provisions to financial services legislation for a temporary period. The TTP will be applied on a broad basis from the end of the transition period until 31 March 2022, but there are some areas where the TTP will not apply.

Firms will be able to see which changes will apply to them by reviewing the new Handbook site alongside the updated TTP information.

The FCA has also published guidance setting out the approach it expects firms to take when interpreting EU-based references found in reporting and disclosure templates and associated instructions in the CRD and CRR Binding Technical Standards after the expiry of the implementation period.

BRRD2: PRA publishes policy statement on UK transposition

The PRA has published a policy statement (PS28/20) providing feedback to responses to its consultation paper 'Bank Recovery and Resolution Directive II' (CP18/20) and including the final rules.

PS28/20 contains the PRA's final policy regarding the:

- amended Contractual Recognition of Bail-in (CROB) Part of the PRA Rulebook (Appendix 1); and
- amended Stay in Resolution (Stays) Part of the PRA Rulebook (Appendix 2).

The policy set out in PS28/20 has been designed in the context of the UK's withdrawal from the EU and entry into the transition period. During the transition period, the UK remains subject to EU law and must transpose Directives that become applicable before implementation period (IP) completion day. The PRA policy applicable only during the end of the transition period and ceasing to have effect on IP completion day will not need to be amended under the EU (Withdrawal) Act 2018 (EUWA). Therefore, no such EUWA changes will be made to the Stays Part, which will be in place for four days.

The policy set out in PS28/20 that came into effect at the end of the transition period (on IP completion day) will need to be amended under the EU (Withdrawal) Act 2018 (EUWA). These changes will be made separately by the PRA Rulebook (EU Exit) Instrument 2020.

BaFin extends permission for later publication of transactions in financial instruments until 1 January 2022

The German Federal Financial Supervisory Authority (BaFin) has announced that transactions in financial instruments can continue to be published later than generally required by MiFIR. The regulations has been extended until 1 January 2022 with effect from 2 January 2021.

For this purpose, BaFin has issued three general decrees (Allgemeinverfügungen), including a general decree on the permission of the later publication of transactions in non-equity instruments on trading venues operated by an investment firm, a general decree on the permission of the later publication of OTC transactions in non-equity instruments by investment firms and a general decree on the permission of the later publication of transactions in equity instruments on trading venues operated by an investment firm.

Separate permission for subsequent publication of OTC transactions in equity instruments is still not envisaged. According to MiFIR, these are covered by the permission for trading venues. Trading venues that fall under the

supervision of BaFin must obtain BaFin's approval before making use of the permission for deferred publication.

Brexit: Luxembourg bill clarifying certain AML/CTF provisions and extending temporary regime for marketing of UK UCITS to retail investors published

A new bill of law (Bill 7736) has been lodged with the Luxembourg Parliament with a view to amending (i) the law of 12 July 2004 on the fight against money laundering and terrorist financing (AML/CTF Law), (ii) the law of 20 April 1977 on the exploitation of gambling and bets relating to sports events (Gambling Law), (iii) the law of 25 March 2020 establishing a central electronic data retrieval system related to IBAN accounts and safe-deposit boxes (Central Register Law), (iv) the law of 10 July 2020 creating a register of fiducies and trusts (RFT Law), and (iv) the law of 17 December 2010 relating to undertakings for collective investment (UCI Law).

The main objective of the bill is to clarify and add further detail to certain provisions of the AML/CTF Law and Gambling Law as well as to further correct three material errors which have crept into the Central Register Law and RFT Law. These adaptations aim to refine the transposition of certain provisions of AMLD 4, Solvency 2 and CRD 4 and are in line with the recommendations of the Financial Action Task Force in this respect.

The second objective of Bill 7736 is to extend, until 31 July 2021, the temporary regime introduced in Article 186-6 of the UCI Law by the Luxembourg law of 8 April 2019 concerning the measures to be taken in relation to the financial sector, and more particularly regarding certain Luxembourg and UK funds, in case of a withdrawal of the UK from the EU (Brexit Law).

Luxembourg bill transposing Directive on cross-border marketing and distribution of collective investment undertakings within the EU published

A new bill of law (Bill 7737) transposing Directive 2019/1160 on cross-border marketing and distribution of collective investment undertakings within the EU has been lodged with the Luxembourg Parliament.

The Directive, which is completed by Regulation 2019/1156 and forms part of a wider package of initiatives under the Capital Markets Union action plan, is intended to harmonise and facilitate the cross-border marketing and distribution of alternative investment funds (AIFs) and undertakings for collective investment in transferable securities (UCITS) in the EU, by reducing the remaining regulatory barriers and improving cost efficiency whilst continuing to strive for better investor protection. In this context, the Directive amends the UCITS Directive and the AIFMD with new rules for (i) the pre-marketing of AIFs in the EU, (ii) the provision of local facilities for UCITS and AIFs being marketed to retail investors, (iii) the de-notification procedure for discontinuing the marketing of UCITS and EU AIFs in a host Member State, and (iv) the alignment of certain notification requirements for the marketing of UCITS and EU AIFs in a host Member State.

To a large extent, Bill 7737 currently incorporates the text of the Directive in relation to the above rules, by amending the Luxembourg law of 17 December 2010 on undertakings for collective investments (UCI Law) and the Luxembourg law of 12 July 2013 on alternative investment fund managers

(AIFM Law). However, Bill 7737 also proposes to make certain further amendments to the UCI Law and AIFM Law for consistency purpose under Luxembourg law, even if this is not explicitly provided for by the Directive. In particular, Bill 7737 proposes to:

- amend the UCI Law in order to align the notification procedure applicable to Luxembourg UCITS management companies (UCITS ManCos) with the one applicable to Luxembourg alternative investment fund managers (AIFMs) under the AIFMD (and AIFM Law as it will be amended by Bill 7737) in case of changes to the information initially notified to the Luxembourg supervisory authority of the financial sector (CSSF) in the framework of the establishment by these Luxembourg UCITS ManCos of a branch within the territory of another Member State;
- amend the AIFM Law to address and specify the conditions and procedure applicable to Luxembourg AIFMs for discontinuing the marketing of EU AIFs managed by them in Luxembourg as home Member Sate (while the Directive only defines the procedure to be complied with for the de-notification of marketing EU AIFs in a host Member State other than the AIFM's home Member State); and
- take into account recital 12 of the Directive (which provides that national rules cannot in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs in terms of pre-marketing activities), and further indicates (but only in the explanatory comments to the pre-marketing provisions to be included in the AIFM Law) that non-EU AIFMs engaging in pre-marketing activities in Luxembourg should thus also comply with similar conditions as those imposed on EU AIFMs pre-marketing AIFs in Luxembourg.

For the sake of completeness, Bill 7737 also proposes to abrogate the relevant article of the UCI Law dealing with marketing communication requirements, as Regulation 2019/1156 (directly applicable in all Member States) provides for new uniform and harmonised requirements to be complied with in this respect by both UCITS ManCos and AIFMs.

The lodging of Bill 7737 with the Luxemburg Parliament constitutes the start of the legislative procedure. The Directive foresees a transposition by Member States by 2 August 2021, and Bill 7737 currently provides that, once voted on and published, the new law and its proposed modifications to the UCI Law and AIFM Law will enter into force 2 August 2021.

CSSF issues circular on ESMA guidelines on performance fees in UCITS and certain types of AIFs

The CSSF has published a circular (20/764) concerning the application of the ESMA guidelines on performance fees in undertakings for collective investment in transferable securities (UCITS) and certain types of AIFs, i.e. only those AIFs in Member Sates allowing for the marketing of AIFs to retail investors in accordance with Article 43 of AIFMD and with the exception of (i) closed-ended AIFs and (ii) open-ended AIFs.

The ESMA guidelines were published on 5 November 2020 with a view to establishing harmonised common standards in relation to the manner in which investment fund managers charge performance fees to retail investors in UCITS/AIFs and the circumstances in which performance fees can be paid, in such a way as to prevent undue costs being charged to the relevant UCITS/AIF and its investors. In particular, ESMA set out common standards

and criteria in relation to the following: (i) performance fee calculation method, (ii) consistency between the performance fee model chosen and the fund's investment objectives, strategy and policy, (iii) frequency for crystallisation of the performance fee (and for the subsequent payment of the performance fee), (iv) circumstances where a performance fee should be payable, (v) duration of the performance reference period, and (vi) disclosure of the performance fee model.

The purpose of CSSF Circular 20/764 is to inform all investment fund managers of UCITS and AIFs marketed to retail investors in Luxembourg that the CSSF, in its capacity as competent authority, will apply the ESMA guidelines and integrate them in its administrative and regulatory practices as of the date of application of the guidelines, i.e. 6 January 2021. In this respect, the CSSF has further indicated, in line with ESMA, that:

- investment fund managers of new UCITS/AIFs created after the date of application of the guidelines with a performance fee, or any UCITS/AIFs existing before the date of application that introduce a performance fee for the first time after that date, should comply with the guidelines immediately;
- investment fund managers of UCITS/AIFs with a performance fee existing before the date of application of the guidelines should only comply with the guidelines in respect of those UCITS/AIFs by the beginning of the financial year following six months from 6 January 2021.

As regards umbrella UCITS/AIFs with multiple compartments, the CSSF considers that the ESMA guidelines will also be applicable as of 6 January 2021 for any newly created compartments, i.e. in relation to any new compartment setting up a performance fee at compartment or classes of units/shares level.

CSSF issues communication on AML/CFT cross-sector survey for 2020

The CSSF has issued a communication concerning its annual online cross-sector survey for the year 2020 relating to the fight against money laundering and terrorist financing (AML/CTF).

The purpose of the communication is to inform the professionals subject to the CSSF's supervision for AML/CTF purposes (e.g. credit institutions, investment firms, payment institutions, e-money institutions, specialised professionals of the financial sector and investment fund managers) that the 2020 survey collecting standardised key information concerning money laundering and terrorist financing risks (ML/FT) to which these professionals are exposed and the implementation of related risk mitigation measures will be launched on 15 February 2021 and that the answers to the survey questions will have to be submitted to the CSSF by 15 March 2021.

The CSSF indicates that the 2020 survey remains generally unchanged in substance compared to the previous year, but that a few new questions have been added following the amendment in March 2020 of the Luxembourg law of 12 November 2004 on AML/CTF with a view to implementing AMLD5.

The CSSF further emphasises that the 2020 survey must be initiated and submitted through the CSSF eDesk portal by (i) the compliance officer in charge of the control of compliance with professional obligations (RC) or (ii) the person responsible for compliance with professional obligations (RR). The completion of the 2020 survey may also be assigned within the CSSF eDesk

portal to another employee of the relevant professional or to a third party, but the ultimate responsibility for the adequate completion of the survey shall remain with the RC or RR of the relevant professional.

In practice, the professionals concerned or their potential delegates must have an eDesk account with a LuxTrust authentication to access and submit the 2020 survey to the CSSF. Reference is made by the CSSF to the 'Authentication and user account management' user guide in the dedicated section of the CSSF eDesk portal homepage for further details.

CSSF issues communiqué on thematic review of issuers' climate-related disclosures

The CSSF has issued a communiqué on its thematic review of issuers' climate-related disclosures.

The objective of the thematic review was to examine the current status of climate-related information reported by issuers, by comparing it with the recommendations made in the updated guidance on non-financial reporting for companies on how to report the impact of their business on the climate and the impact of climate change on their business, which is part of the guidance on the key aspects of Directive 2014/95/EU (NFI Directive).

Further to its review, the CSSF notes that in general only a small and unsatisfactory percentage of issuers address the questions in relation to climate change beyond the basic requirements of the NFI Directive. The CSSF further states that the results of the thematic review show that there are still significant gaps to fill and that further improvements in the quality and comparability of climate-related disclosures are urgently required to meet the needs of investors and other stakeholders.

Although the recommendations remain non-binding, the CSSF urges issuers to review the new guidance, which provides practical recommendations on how to better report the impact that their activities have on the climate as well as the impact of climate change on their business. The regulator further recommends that issuers already assess on a voluntary basis their level of compliance with the proposed recommendations and other guidance, given that these matters are of an increasing importance and disclosures in this context will be required in the near future, whether by investors, users of information, other stakeholders, and/or regulations.

Finally, the CSSF stresses that it will carry out a follow up of this examination and of the European priorities in relation to the enforcement of financial and non-financial information (climate change being an integral part thereof) in order to continue providing issuers with recommendations and good practices.

CSSF issues FAQs on use of securities financing transactions by Luxembourg UCITS

The CSSF has published a set of FAQs in relation to the use by Luxembourg-domiciled undertakings for collective investment in transferable securities (UCITS) of the following securities financing transactions (SFTs): (i) securities lending transactions, (ii) reverse repurchase agreement transactions and (iii) repurchase agreement transactions.

The FAQs are intended to bring further clarity to the following requirements concerning the use by UCITS of these SFTs, thereby taking into account the applicable EU and Luxembourg regulatory framework (e.g. the UCITS

framework and EU Regulation 2015/2365 on transparency of securities financing transactions and of reuse (SFTR)) and the supervisory experience gained by the CSSF over the last years:

- requirements on prospectus disclosure to investors regarding the use of SFTs;
- requirements on direct and indirect operational costs/fees arising from SFTs and on the policy on sharing of returns on SFTs; and
- requirements on conflicts of interests and best execution in the context of the use of SFTs.

The CSSF has specified that the FAQs only apply to the SFTs defined above and are not intended to deal with financial derivative instruments, including total return swaps (TRS), used by UCITS for the purpose of efficient portfolio management. However, having regard to the fact that the SFTR also includes provisions on the use of TRS, the CSSF invites the entities covered by the FAQs to also take into account the provisions of the FAQs for the TRS they conclude.

The FAQs are addressed primarily to Luxembourg UCITS. However, the CSSF considers that the SFTR also applies to the disclosure to investors by alternative investment fund managers (AIFMs) as laid down in Article 23 of the AIFMD, and consequently expects that:

- Luxembourg AIFMs authorised under the Law of 12 July 2013 on alternative investment fund managers (AIFM Law) give due consideration for their managed AIFs to the clarifications given in the FAQs;
- non-Luxembourg AIFMs authorised under the AIFMD consider the clarifications brought in the FAQs with regard to the Luxembourg-domiciled AIFs they manage, while those non-Luxembourg AIFMs should also give consideration to the relevant regulatory provisions and clarifications given in their respective home Member State; and
- Luxembourg-domiciled regulated AIFs (Part II UCIs and SIFs) managed by a registered sub-threshold AIFM, as well as Luxembourg-domiciled regulated UCIs (Part II UCIs and SIFs) which do not qualify as AIFs, also consider the clarifications of the FAQs where relevant.

The CSSF expects the disclosure clarifications given in the FAQs to be included in the UCITS prospectus, and in the disclosure to investors under the requirements of Article 23 AIFMD for AIFs, by 30 September 2021.

Coronavirus: CSSF updates FAQs and issues recommendation on restriction of distributions during pandemic

The CSSF has updated its COVID-19 FAQs and published a circular letter to clarify for all credit institutions that are not significant institutions under the SSM its policy stance as regards banks' distribution policies aimed at remunerating shareholders, as well as on variable remuneration in the COVID-19 context.

In its updated FAQs (i.e. Question 13), the CSSF states that it intends to comply with:

- the EBA statement of 15 December 2020 on banks' distribution policies;

- the European Central Bank (ECB) Recommendation of 15 December 2020 on dividend distributions during COVID-19 pandemic (ECB/2020/62); and
- the European Systemic Risk Board (ESRB) Recommendation of 18 December 2020 on restriction of distributions during the COVID-19 pandemic (ESRB/2020/15).

The Luxembourg regulator stresses that it remains committed to the aim of ensuring a globally coordinated response to the COVID-19 pandemic under the umbrella of the Basel Committee on Banking Supervision and the Financial Stability Board.

In this context, the CSSF recommends that Luxembourg credit institutions apply the principles in the updated FAQs and the circular letter, which set out in particular that:

- with respect to dividend distributions and share buy-backs, management bodies of Luxembourg credit institutions should consider not distributing any cash dividends or conducting share buy-backs until September 2021, or to limit such distributions; and
- with respect to variable remuneration, credit institutions should adopt extreme moderation with regard to variable remuneration payments until 30 September 2021, especially those to material risk takers.

The CSSF's recommendations entered into force on 1 January and apply until 30 September 2021. In the absence of materially adverse developments, the CSSF intends to repeal these recommendations on 30 September 2021 and return to assessing banks' capital and distribution plans as well their remuneration policies and practices in the context of the normal supervisory cycle.

AFM consults on restriction of marketing, distribution or sale of turbos to retail investors in the Netherlands

The Netherlands Authority for the Financial Markets (AFM) is consulting on a restriction on the marketing, distribution or sale of retail structured notes called turbos. The AFM believes that retail investors are now insufficiently protected against the risks of turbos. The AFM refers to research published in March 2020, which showed that investors lose an average of EUR 2,680 with these investments.

The AFM has published a draft decree to impose restrictions on the marketing, distribution and/or sale of turbos to retail clients. The restrictions are in line with those for the sale of contracts for differences (CFDs) that are currently in force. In short, the restrictions relate to a leverage limit, a mandatory risk warning and a ban on providing a retail client payments or other (non-)monetary benefits in relation to the marketing, distribution or sale of turbos.

Comments are due by 24 January 2021.

CRD 4: Bank of Spain adopts EBA guidelines on appropriate subsets of sectoral exposures to which competent or designated authorities may apply systemic risk buffer

The Bank of Spain has, in its capacity as designated authority for the application of the macroprudential tools set out in CRD 4, adopted the EBA guidelines on the appropriate subsets of sectoral exposures to which

competent or designated authorities may apply a systemic risk buffer in accordance with Article 133(5)(f) of CRD 4, as its own by decision of its Executive Commission. The decisions made by the Bank of Spain pursuant to the guidelines will apply to credit institutions, including the Spanish Official Credit Institute (Instituto de Crédito Oficial/ICO), and to specialised lending institutions.

Bank of Spain maintains countercyclical capital buffer at 0%

The Bank of Spain has decided to maintain the value of the countercyclical capital buffer applicable to credit exposures in Spain at 0% in the first quarter of 2021.

HKMA announces enhanced competency framework on operational risk management

The Hong Kong Monetary Authority (HKMA) has announced the launch of its Enhanced Competency Framework on Operational Risk Management (ECF-ORM).

The ECF-ORM is a collaborative effort of the HKMA, the Hong Kong Institute of Bankers (HKIB) and the banking sector to establish a set of common and transparent competency standards for raising the professional competence of relevant practitioners working in the operational risk management function of authorised institutions (AIs). The framework is intended to facilitate talent development and enhance the professional competencies of bank staff engaged in operational risk management.

The details of the ECF-ORM, including its scope of application, competency standards, qualification structure, certification and grandfathering arrangements, and continuing professional development (CPD) requirements are set out in the 'Guide to Enhanced Competency Framework on Operational Risk Management' attached to the circular. Aligning with the Supervisory Policy Manual module CG-6 'Competence and Ethical Behaviour' on the importance of ensuring continuing competence of staff members, AIs are encouraged to adopt the ECF-ORM as part of their overall efforts in supporting relevant employees' on-going professional development.

The ECF-ORM is administered by the HKIB, whose major roles include handling certification and grandfathering applications, administering the examinations and CPD requirements, and maintaining a public register of qualified certification holders.

The HKMA advises AIs to keep proper records of the relevant training and qualification of their staff and to provide them with necessary assistance in their applications for grandfathering and certification, and fulfilment of CPD training under the ECF-ORM.

HKEX publishes consultation conclusions on proposals to introduce paperless initiatives

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has published the conclusions to its July 2020 consultation on proposals to introduce a paperless listing and subscription regime, online display of documents and a reduction of the types of documents on display.

As part of its paperless initiative, the HKEX has decided to:

- require all listing documents in a new listing to be published solely in an electronic format, and new listing subscriptions, where applicable, to be made through online electronic channels only;
- replace the requirement for certain documents to be physically displayed with a requirement for those documents to be published online; and
- reduce the types of documents that are mandatory for an issuer to display with respect to notifiable transactions and connected transactions.

The listing rule amendments relating to paperless listing and subscription regime are effective from 5 July 2021 and the listing rule amendments relating to online display of documents and reduction of documents on display are effective from 4 October 2021.

SFC announces deferral of margin requirements for non-centrally cleared over-the-counter derivative transactions

The Securities and Futures Commission (SFC) has announced the deferral of the effective date of its margin requirements for non-centrally cleared single-stock options, equity basket options and equity index options by three years until 4 January 2024.

The draft regulatory technical standards published by the European Supervisory Authorities on 23 November 2020 proposed several amendments to the EU margin regime for non-centrally cleared over-the-counter derivatives, including one which further defers the application of margin requirements for single-stock equity options and index options transactions until 4 January 2024.

Taking into account that licensed corporations' exposure to non-centrally cleared single-stock equity options, equity basket options and equity index options is currently not significant and to prevent market fragmentation and regulatory arbitrage, the SFC has decided to align the effective date of its margin requirements with the EU's timeline.

MAS consults on proposed notices regarding management of outsourced relevant services by banks and merchant banks

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposed notices to banks and merchant banks on the management of outsourced relevant services. The Banking (Amendment) Act 2020, which was passed by the Singapore Parliament on 6 October 2020, introduces several amendments to the Banking Act (BA) in order to update and enhance the MAS' banking regulatory framework. These amendments include the consolidation of the regulation of merchant banks (MBs) under the BA and the introduction of a new section 47A, which applies where a bank in Singapore obtains or receives any relevant service from any branch or office of the bank located outside Singapore (including the head office of the bank) or any person.

The consultation paper sets out proposed requirements in relation to the management of outsourced relevant services by banks and MBs in Singapore. In particular, the proposed notices set out requirements:

- relating to material ongoing outsourced relevant services of banks and MBs in Singapore;
- relating to outsourced relevant services that involve the disclosure of customer information by banks or MBs to service providers. For such services, a subset of requirements aimed at protecting customer information will apply; and
- for a bank or a MB incorporated in Singapore to implement a group policy on outsourced relevant services.

The MAS has proposed a 12-month period from the date of issuance of the proposed notices for banks and MBs to comply with the requirements in the proposed notices, other than those relating to outsourcing agreements. Further, a bank or MB will be required to comply with requirements that relate to outsourcing agreements within 12 months from the date of issuance of the proposed notices, or from the date on which the bank or MB enters into a new agreement or renews an existing agreement, whichever is later.

The MAS has indicated that once the proposed notices take effect, MAS Notices 634 and 1108 will be repealed. Meanwhile, the MAS expects banks and MBs to continue to observe the Guidelines on Outsourcing and adhere to existing requirements in MAS Notices 634 and 1108. It will subsequently review and amend the guidelines to align with the proposed notices.

Comments on consultation are due by 29 January 2021.

MAS revises notices on disclosure in financial statements for banks and merchant banks

The MAS has revised two of its existing notices on disclosure in financial statements with respect to banks (MAS Notice 608) and merchant banks (MAS Notice 1013).

The notices have been revised mainly to amend the information for banks and merchant banks (incorporated domestically and outside Singapore) that is required to be disclosed in their financial statements. Specifically, the MAS Notice 608 has been updated to enhance the scope of the information supplementary to bank's financial statements, regarding capital adequacy ratio, which is required to be disclosed by banks incorporated in Singapore.

The MAS Notice 608 and the MAS Notice 1013 have been effective since 22 December 2020.

RECENT CLIFFORD CHANCE BRIEFING

Relieved? UK and EU agree post-Brexit deal

On 24 December 2020, after roller-coaster negotiations, the United Kingdom and the European Union announced they had agreed a post-Brexit 'EU-UK Trade and Cooperation' Agreement.

On 1 January 2021, the transition period ended, and the UK left the EU Single Market and the Customs Union. The EU-UK Agreement provides for zero

tariffs and quotas. It represents a fundamental shift in the EU-UK relationship with substantially reduced market access but greater UK autonomy.

The Agreement runs to 1,246 pages. This briefing examines what it covers, what it doesn't, and what happens next.

https://www.cliffordchance.com/briefings/2020/12/relieved-uk-and-eu-agree-post-brexit-deal.html

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ