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Benchmarks: Regulation on third country foreign exchange and replacement benchmarks published in Official Journal

[Regulation \(EU\) 2021/168](#), which amends the EU Benchmarks Regulation (BMR) as regards the designation of replacement benchmarks for those in cessation and the exemption of third country foreign exchange benchmarks, has been published in the Official Journal. The Regulation makes various amendments to the BMR, with the intention of reducing the disruption caused by the phasing out of various widely-used benchmarks scheduled to happen in 2021.

It grants the EU Commission powers to replace when necessary:

- 'critical' benchmarks, which influence financial instruments and contracts with an average value of at least EUR 500 billion;
- benchmarks with no, or very few, appropriate substitutes whose cessation would have a significant and adverse impact on market stability; and
- third country benchmarks whose cessation would significantly disrupt the functioning of financial markets or pose a systemic risk for the EU financial system.

The Regulation also extends the transitional period, under which benchmarks administered in third countries can continue to be used, from 31 December 2021 to 31 December 2023. The Commission will be permitted to extend this again for a maximum of two years (to 31 December 2025).

The Regulation has applied since 13 February 2021.

CRD 4: EU Commission adopts RTS on G-SIIs identification and categorisation

The EU Commission has adopted a [Delegated Regulation](#) amending Delegated Regulation (EU) 1222/2014 supplementing the fourth Capital Requirements Directive (CRD 4) with regard to regulatory technical standards (RTS) for the specification of the methodology for the identification of global systemically important institutions (G-SIIs) and for the definition of subcategories of G-SIIs.

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

Post-trade services: EU Commission consults on reviews of Settlement Finality Directive and Financial Collateral Directive

The EU Commission has launched a pair of related consultations on targeted reviews of the following post-trade services legislation:

- the [Settlement Finality Directive \(SFD\)](#), considering issues arising since it was last reviewed in 2008/2009; and
- the [Financial Collateral Directive \(FCD\)](#), also addressing the recognition of close-out netting provisions and financial collateral (cash and financial instruments), which are also relevant for the SFD, amongst other topics.

The consultations are intended to feed into a Commission report to the EU Parliament and Council. Comments are due by 7 May 2021.

Trade repositories: EU Commission consults on ESMA's fees

The EU Commission has [published for consultation](#) a draft Delegated Regulation setting out proposed supervisory fees for trade repositories to be charged by the European Securities and Markets Authority (ESMA) for 2021. Comments are due by 9 March 2021.

Coronavirus: EU Parliament formally adopts MiFID2 Quick Fix and Prospectus Regulation amendments

The EU Parliament has formally adopted the EU Commission's proposals for a [directive amending MiFID2](#) as regards information requirements, product governance and position limits (MiFID2 Quick Fix) and a [regulation amending the Prospectus Regulation](#).

The amendments set out in MiFID2 Quick Fix are intended to simplify information requirements and support the growth of euro-denominated derivatives markets.

The amendments to the Prospectus Regulation introduce a short-form 'EU Recovery Prospectus', which will apply until 31 December 2022.

Both measures form part of the Capital Markets Recovery Package aimed at facilitating the EU's economic recovery from the COVID-19 pandemic.

ESAs publish letter to EU co-legislators on proposals for digital operational resilience

The Joint Committee of the European Supervisory Authorities (ESAs) has published a [letter](#) written to the EU Council, Commission and Parliament on the Commission's proposed regulation on digital operation resilience for the financial sector (the Digital Operational Resilience Act (DORA)). The letter reaffirms the ESAs' support for the main principles of DORA but highlights some areas of concern regarding the current proposals, particularly around the treatment of the risks posed by the use of critical third party providers (CTPPs) for ICT services in the financial sector. The ESAs therefore set out recommended modifications to DORA's oversight framework for CTPPs, including:

- the creation of a joint-ESAs executive body, which would integrate the role of the proposed oversight forum and would be responsible for the overall oversight of cross-sectoral CTPPs;
- clarification regarding the potential designation of, and applicable governance model for, CTPPs which provide services to financial entities under the remit of a single ESA (i.e. sector-specific CTPPs);
- greater involvement for the ESAs in the follow-up and enforcement stages of oversight;
- the use of market transparency tools to strengthen the framework, such as making high-level information on the recommendations issued to CTPPs publicly available;
- the provision of additional resources to assist the ESAs in meeting the demands of the new ongoing tasks proposed under DORA; and

- an increased focus on the principle of proportionality in DORA.

Investment firms: EBA consults on draft ITS on supervisory disclosure

The European Banking Authority (EBA) has published a consultation on [draft implementing technical standards](#) (ITS) on the format, structure, contents list and annual publication date of the information to be disclosed by competent authorities under the Investment Firms Directive (IFD).

The draft ITS are intended to ensure that the following information on the new prudential requirements for investment firms authorised under MiFID2 is sufficient to enable a meaningful comparison of the approaches adopted in different Member States:

- the text of laws, regulations, administrative rules and general guidance adopted in each Member State;
- options and discretions in the application of the prudential requirements;
- criteria and methodologies of the supervisory review and evaluation process (SREP); and
- aggregated statistical data on prudential requirements.

The first disclosure date proposed under the draft ITS is 30 June 2022.

The consultation closes on 11 May 2021.

German Government adopts draft law to further strengthen investor protection

The German Federal Government has adopted a [draft law](#) to further strengthen investor protection. The draft law constitutes the final implementation of the package of measures to further strengthen investor protection which the Federal Ministry of Finance and the Federal Ministry of Justice and Consumer Protection jointly presented in August 2019.

In particular, the draft law includes the following rules:

- so-called blind pool investments (i.e. investments where the specific investment objects have not yet been determined at the time the prospectus is prepared) are being prohibited to ensure that investors can make an informed assessment at the time the investment is made;
- investments may only be distributed by supervised investment advisors and financial investment intermediaries;
- the possibilities for auditing the financial statements of issuers of investments are being improved and a control of use of funds by independent third parties introduced in order to prevent misuses;
- in case of investor protection concerns by the German Federal Financial Supervisory Authority (BaFin), the review of investment prospectuses will be suspended in order to allow for consideration of possible product intervention measures; and
- in order to further increase transparency for investors, investment sales prospectuses, securities information sheets and investment information sheets will be published on BaFin's website.

CSSF issues communication on SFDR deadline of 10 March 2021

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a [communication](#) to remind management companies and alternative investment fund managers (IFMs) of undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs) to comply with the relevant disclosure requirements of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector (SFDR) from 10 March 2021.

The communication supplements an earlier communication dated 16 December 2020 regarding the regulatory requirements and fast track procedure under the SFDR. In particular, the CSSF has clarified that the fast track procedure confirmation letter can now also be used to support the review of SFDR disclosures included in the prospectuses/issuing documents of UCITS and AIFs that are submitted to the CSSF through the traditional (i.e. non-fast track) procedure for updating prospectuses/issue documents.

CSSF updates its circular letters in respect of long form reports of external auditors of Luxembourg established credit institutions

The CSSF has issued a [circular \(21/765\)](#) which amends:

- the provisions pertaining to the long form report foreseen in CSSF circular 01/27 concerning the role of the external auditor and applicable to Luxembourg incorporated credit institutions and Luxembourg branches of third country credit institutions; and
- the provisions on external auditors' reports foreseen in CSSF circular 07/325 relating to credit institutions and investment firms of EU origin established in Luxembourg by way of branches or exercising activities in Luxembourg by way of free provision of services.

In the circular 01/27 new requirements have been introduced for the external auditor's long form report for financial years ending on 31 December 2020 or later and addressing recent AML/CTF law changes. The CSSF plans to fundamentally revise the rest of its circular 01/27 over the course of this year.

In the circular 07/325 the requirements for the external auditor's report for Luxembourg branches of credit institutions licensed in other EU Member States have also been updated to include a more detailed provision on reviewing the compliance with AML/CTF rules.

The changes to the two circulars were necessitated by the recent amendments made by the CSSF to its Regulation 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing (AML/CTF).

CSSF issues communication on digitalisation of AML/CFT market entry forms for funds and managers

The CSSF has issued a [communication](#) concerning the digitalisation of its AML/CFT market entry forms (previously available in Excel on the CSSF website), which have to be completed by certain Luxembourg investment funds and investment fund managers in order to allow the CSSF to collect standardised key information in relation to money laundering and terrorist

financing risks to which these funds and managers are exposed and in relation to the measures they put in place to mitigate those risks.

Bank of Spain conducts preliminary public consultation on draft circular to specialised credit institutions on liquidity, prudential requirements and reporting obligations

The Bank of Spain has launched a [preliminary public consultation](#) on a draft circular to specialised credit institutions (SCIs) on liquidity, prudential requirements and reporting obligations. The draft circular is intended to set out the regulatory development of Royal Decree 209/2020, of 11 February, on the legal regime for SCIs.

The regulatory framework will be based, with the appropriate modifications, on the requirements applicable to credit institutions with respect to:

- the liquidity buffer;
- the adequate structure of funding sources;
- the maturities of SCIs; and
- their reporting obligations in terms of solvency.

The draft circular also establishes the guarantees that the Bank of Spain may require when the control of an SCI is to be exercised by persons domiciled or authorised in a non-EU Member State and the specific cases in which SCIs must carry out the CAR and the Bank of Spain the SREP.

The draft circular will be subject to public consultation until 22 February 2021, inclusive.

CNMV and Bank of Spain issue joint communication on risks of cryptocurrencies as an alternative investment

The Comisión Nacional del Mercado de Valores (CNMV) and the Bank of Spain have issued a [joint communication](#) on the risks of cryptocurrencies as an alternative investment, which reiterates their 2018 warning that investments in cryptocurrencies (i.e. Bitcoin or Ether) are high-risk due to the extreme volatility, complexity and lack of transparency of these assets.

Although the CNMV and the Bank of Spain acknowledge that cryptoassets may modernise the financial system in the coming years, they emphasise the following risks relating to cryptocurrencies in particular:

- regulatory risk – a regulation on markets in crypto-assets (MiCA) is being negotiated at EU level but, in legal terms, cryptoassets are so far not a) considered a means of payment, b) backed by a central bank, or c) covered by customer protection;
- investment risk – cryptocurrencies require a high degree of knowledge and experience, so may not be suitable for retail investors;
- price calculation risk – prices are set without effective mechanisms to prevent manipulation;
- liquidity risk – circulation of cryptocurrencies among both retail and qualified investors is very limited;

- payment method – cryptocurrencies do not adequately fulfil the functions of unit of account (unidad de cuenta) and deposit value (depósito de valor) and this will remain unaltered with the current draft of MiCA;
- cross-border risk – it is not possible to locate the different entities engaged in the issuance, custody and trading of these assets in Spain, meaning any conflict which may arise may fall outside the Spanish authorities' jurisdiction; and
- fraud or loss risk – the custody/registry technology is not supervised nor regulated, so loss or misappropriation of passwords may mean the loss of the cryptocurrencies, with no possibility of recovering them.

China announces signing of MoU on launch of Cross-Boundary Wealth Management Connect Pilot Scheme in Greater Bay Area

The People's Bank of China, the China Banking and Insurance Regulatory Commission, the China Securities Regulatory Commission, the State Administration of Foreign Exchange, the Securities and Futures Commission, the Hong Kong Monetary Authority, and the Monetary Authority of Macao have entered into a [Memorandum of Understanding](#) (MoU) on the Cross-boundary Wealth Management Connect Pilot Scheme in the Guangdong-Hong Kong-Macao Greater Bay Area.

In addition to setting out the basic principles of the scheme, the MoU provides that the regulators in the three jurisdictions will duly exercise their respective statutory functions and implement the existing supervisory and enforcement mechanisms when regulating and supervising the scheme. It also provides the framework for the regulators to exchange supervisory support and assistance, and the regulators will work to formulate fundamental rules on the exchange of supervisory information, enforcement cooperation, investor protection, as well as a mechanism for discussion and consultation.

The formal launch of the scheme and its implementation rules are still to be announced.

SFC consults on conduct requirements for bookbuilding and placing activities in capital market transactions

The Securities and Futures Commission (SFC) has launched a [public consultation](#) on conduct requirements for capital market transactions in Hong Kong.

The SFC notes that, while a transparent and robust price discovery process through bookbuilding and ensuring that securities are fairly allocated are both crucial for the development of a healthy capital market, there are currently no specific requirements governing the conduct of bookbuilding or placing activities by intermediaries in either the equity or debt capital markets in Hong Kong.

The proposed requirements are intended to clarify the roles played by intermediaries in equity and debt capital raisings and set out the standards of conduct expected of them in bookbuilding, pricing, allocation and placing activities. The proposals were formulated based on recent reports issued by the International Organization of Securities Commissions to address conflicts of interest and associated conduct risks in equity and debt capital raisings as

well as on the SFC's observations from a thematic review of selected licensed corporations involved in these activities.

The SFC also notes that a separate 'sponsor coupling' proposal would require that, for an initial public offering of shares, at least one head of the underwriting syndicate would also act as a sponsor.

Comments on the consultation are due by 7 May 2021.

APRA publishes reconciliation action plan for 2020 – 2022

The Australian Prudential Regulatory Authority (APRA) has published its [second Reconciliation Action Plan](#) (RAP) for November 2020 to November 2022, which has been approved by both APRA's Executive Committee and Reconciliation Australia. The APRA's Innovate RAP is based on the following key themes:

- establishing strong relationships with Aboriginal and Torres Strait Islanders;
- respecting Aboriginal and Torres Strait Islander peoples, cultures and histories;
- creating opportunities for Aboriginal and Torres Strait Islander people within APRA; and
- strong governance with a greater emphasis on program management.

The APRA has indicated that these themes will be delivered over the 2020 – 2022 period through a range of actions which include:

- establishing and rolling out a cultural awareness program;
- establishing and building external connections with First Nations groups focusing on the financial sector;
- partnering with Indigenous Cadet programs;
- maintaining participation in Indigenous recruitment channels;
- delivering events for National Aborigines and Islanders Day Observance Committee and National Reconciliation Week; and
- reviewing and refreshing APRA's anti-discrimination policies.

RECENT CLIFFORD CHANCE BRIEFINGS

Updated German outsourcing requirements

Following Wirecard AG's fraudulent activities and subsequent insolvency, with its adverse economic impact on institutional investors as well as small investors, Germany devised an action plan for combating financial reporting fraud and strengthening controls over financial markets. The action plan is legislatively transposed in the governmental draft law on 'the strengthening of the integrity of the financial market' (Finanzmarktintegritätsstärkungsgesetz – FISG). One aspect of the multifaceted draft relates to outsourcing, inadequacies of which also became apparent in the Wirecard AG case. The draft introduces new rules to the German Banking Act (Kreditwesengesetz – KWG) for outsourcing, substantially enhancing how outsourcing is to be

conducted and managed. Importantly, the new rules are targeted not only at German credit and financial services institutions but also explicitly at the outsourcing service providers themselves (including their sub-contractors), irrespective of where they are geographically located. The new rules reflect (and partly go beyond) the approach under the EBA's guidelines on outsourcing arrangements.

This briefing paper gives an overview of the new outsourcing rules for banking and financial services in Germany.

<https://www.cliffordchance.com/briefings/2021/02/updated-german-outsourcing-requirements.html>

US CFTC charges Tokyo-based trader with swaps-related market manipulation and false statements to investigators

On 1 February 2021, the Commodity Futures Trading Commission charged a Tokyo-based swaps trader with manipulating US dollar-based interest rate swap spreads. The complaint demonstrates the CFTC's focus on protecting the integrity of US markets, including interest rate swap markets, from purposeful price manipulation, as well as the agency's increasingly sophisticated ability to reconstruct market conditions by analysing large amounts of trading data. It is also indicative of the CFTC's continued willingness to assert jurisdiction over traders outside the US whose trading affects US markets, including US price sources for instruments traded outside the US. Finally, the complaint underscores the major risks of making false statements to the CFTC, as well as the Commission's hostility toward the use of unrecorded and unmonitored communication platforms in connection with trading.

This briefing paper discusses the complaint.

<https://www.cliffordchance.com/briefings/2021/02/US-CFTC-Charges-Tokyo-Based-Trader-with-Swaps-Related-Market-Manipulation-and-False-Statements-to-Investigators.html>

Enhanced US subpoena authority over foreign banks with US correspondent accounts – watershed or overreach?

Congress passed the Anti-Money Laundering Act of 2020 on 1 January 2021 as part of the National Defense Authorization Act for Fiscal Year 2021.

The Act includes, among other significant updates to the Bank Secrecy Act and related US anti-money laundering regimes, new and potentially groundbreaking authority for the US Department of Justice and the US Department of the Treasury to subpoena non-US bank records stored outside the US, backed by hefty penalties for non-compliance.

This briefing paper discusses the new authority under the Act.

<https://www.cliffordchance.com/briefings/2021/02/Enhanced-US-Subpoena-Authority-over-Foreign-Banks-with-US-Correspondent-Accounts.html>

FinCEN advisory puts financial institutions on notice for red flags indicative of COVID-19 related health care fraud

As the COVID-19 pandemic continues, health care firms and financial institutions are particularly at risk of becoming the subject of pandemic-related

enforcement investigations. Because of their role in disbursing government stimulus funds and in processing customer transactions, financial institutions are also expected to identify potential indicators of pandemic-related fraud involving the health insurance and health care industries. On 2 February 2021, the US Department of the Treasury's Financial Crimes Enforcement Network laid out numerous red flags in its Advisory on COVID-19 Health Insurance- and Health Care-Related Fraud and directed financial institutions to be on the lookout for these scenarios.

This briefing paper discusses the Advisory and the seven representative categories.

<https://www.cliffordchance.com/briefings/2021/02/fincen-advisory-puts-financial-institutions-on-notice-for-red-fl.html>

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