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Capital Markets Union: Delegated Regulation on PEPP information documents, costs and risk-mitigation published in Official Journal

Commission Delegated Regulation (EU) 2021/473 on information documents, costs and fees and risk-mitigation techniques for the Pan-European Personal Pension Product (PEPP) has been published in the Official Journal (OJ). The Delegated Regulation supplements the PEPP Regulation (Regulation (EU) 2019/1238) by:

- introducing two mandatory consumer information documents, the PEPP key information document (KID) and the PEPP benefit statement, which are intended to ensure consumers have all the relevant information needed to allow them to make informed decisions before entering into binding

contracts and to effectively monitor the performance of their savings during the life of the contract;

- specifying which costs and fees are included in the cost cap; and
- setting out the criteria which should be used when assessing three key risk-mitigation techniques (life-cycling, setting reserves and guarantees).

The Delegated Regulations will enter into force on 11 April 2021.

Delegated Regulation on minimum information for prospectus exemption in relation to public offerings during takeovers, mergers and divisions published in Official Journal

Commission Delegated Regulation (EU) 2021/528 supplementing Regulation (EU) 2017/1129 on the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division has been published in the OJ.

In accordance with the Prospectus Regulation, issuers may offer or admit securities connected with a takeover, merger or division without publishing a prospectus, provided that an alternative document, or 'exemption document' as defined in the Delegated Regulation, is made available to investors which describes the transaction and the impact on the issuer.

The Delegated Regulation will enter into force on 15 April 2021.

MiFID2/MiFIR: Amending Delegated Regulations published in Official Journal

Delegated Regulation (EU) 2021/529 amending Delegated Regulation (EU) 2017/583, and Delegated Regulation (EU) 2021/527 amending Delegated Regulation (EU) 2017/565 have been published in the OJ.

Delegated Regulation (EU) 2021/529 amends 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 and enters into force on 15 April 2021.

Delegated Regulation (EU) 2021/527 amends Delegated Regulation (EU) 2017/565 as regards the thresholds for weekly position reporting by trading venues and entered into force on 29 March 2021.

EU Commission consults on statutory replacement rate for CHF LIBOR

The EU Commission has launched a consultation on the designation of a statutory replacement rate for Swiss Franc LIBOR (CHF LIBOR).

The aim of the consultation is to assess the suitability of designating a statutory replacement for certain settings of CHF LIBOR to products such as savings accounts, mortgages and loans, including consumer credit agreements and small business loans, concluded prior to the entry into application of the EU Benchmark Regulation on 1 January 2018 and governed by the laws of one of the EU Member States.

The consultation seeks feedback on whether:

- the proposed replacement rate (3M SARON calculated as a compounded SARON under a last reset methodology) plus the ISDA adjustment spread (calculated as a historical median approach over a five-year lookback period) is a fair and equitable solution for a replacement of CHF LIBOR in mortgages and small business loans and consumer credit agreements; and
- the proposed calculation method (so called last reset) is compatible with the requirements of the EU Mortgage Credit Directive, the EU Consumer Credit Directive, Directive 93/13/EEC on unfair terms in consumer contracts and with other applicable legislation and national implementation laws.

Comments are due by 18 May 2021.

EU Commission launches targeted consultation on instant payments

The EU Commission has launched a targeted consultation ahead of a public consultation which is aimed at ensuring a smooth transition towards well-functioning and efficient pan-EU instant payment solutions. The targeted consultation aims to inform the Commission on remaining obstacles as well as possible enabling actions that it could take to ensure a wide availability and use of instant payments in the EU.

It also aims to enable the Commission to decide on whether EU coordinated action and/or policy measures are warranted in order to ensure that a critical mass of EU payment service providers (PSPs) offer instant credit transfers. The Commission seeks to identify factors that would be relevant for stimulating customer demand (from customers, corporate users and merchants) towards instant credit transfers.

The consultation is addressed to stakeholders including payment service users, PSPs and providers of supporting technical services, clearing and settlement mechanisms, public authorities and national regulators.

Comments are due by 2 June 2021. The public consultation will be launched on 31 March 2021.

Capital Markets Recovery Package: EU Parliament adopts Quick Fix amendments to CRR and Securitisation Regulation

The EU Parliament's plenary session has adopted at first reading proposals for two regulations amending the securitisation framework in response to the coronavirus crisis. The adopted texts form part of the Capital Markets Recovery Package and set out amendments to the Securitisation Regulation and Capital Requirements Regulation (CRR).

In particular, the proposals include measures intended to facilitate the securitisation of non-performing exposures (NPEs) and a framework of simple, transparent and standardised (STS) securitisation for synthetic transactions. The texts adopted provide for the amending regulations to enter into force on the third day following their respective publication in the OJ.

DORA: ECON Committee publishes draft report on proposed directive and regulation

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published its draft reports on the EU Commission's proposed digital operational resilience act (DORA) directive and regulation, which form part of the Commission's Digital Finance Strategy.

The proposed directive seeks to introduce targeted changes to:

- existing EU financial services directives (namely the Statutory Audits Directive, UCITS, Solvency II, AIFMD, CRD, MiFID2, PSD2 and IORP II) in order to align them with the proposed requirements on network and information systems and information and communication technologies (ICT) risk management and reporting set out in the proposed DORA regulation; and
- MiFID2 to provide legal certainty as regards the definition of crypto assets and to establish a temporary exemption allowing natural persons to participate in the pilot regime for a distributed ledger technology (DLT) multilateral trading facility.

The rapporteur broadly supports the Commission's proposed directive, but believes further changes and clarifications to existing financial services directives are needed to increase legal clarity and consistency, such as amendments to the CRD, BRRD, PSD2 and ALMD. The draft report on the proposed regulation welcomes the Commission's proposal and sets out draft amendments as informed by the general principles of proportionality, preserving competitiveness and futureproofing. The draft amendments are intended to address issues relating to the following topics in particular:

- ICT risk reporting and management framework;
- testing;
- third party ICT risk and the oversight framework for critical third-party providers (TPPs);
- competent authorities and delegated powers; and
- interaction with existing financial services and cyber security frameworks.

ECB to publish compounded €STR average rates

The European Central Bank (ECB) intends to start publishing compounded €STR average rates and a compounded index based on the euro short-term rate (€STR) on 15 April 2021.

Publication will take place on each TARGET2 business day at 09:15 CET and will include compounded €STR average rates for tenors of 1 week, 1 month, 3 months, 6 months and 12 months, as well as a compounded €STR index enabling the derivation of compounded rates for any non-standard tenor.

The ECB has published rules for the calculation and publication of the compounded €STR average rates and index.

The ECB Guideline (ECB/2019/19) on the governance of the €STR and on the administration and oversight of the €STR determination process has been amended to cover the calculation and publication of the compounded €STR average rates and index.

EMIR: ESAs publish joint Q&As on bilateral margining exemptions

The European Supervisory Authorities (ESAs), comprising the EBA, the European Insurance and Occupational Pensions Authority (EIOPA) and ESMA, have jointly published three questions and answers (Q&As) on bilateral margin requirements under the European Market Infrastructure Regulation (EMIR).

The joint Q&As are intended to clarify the following aspects of the bilateral margin regime:

- relief covered by a partial intragroup exemption from the requirements;
- the procedure to grant intragroup exemptions between a financial counterparty and a non-financial counterparty based in different Member States; and
- the exemption regime for derivatives entered into in relation to covered bonds.

ESMA consults on Money Market Funds Regulation Review

ESMA has published a consultation on the legislative review of the Money Market Funds Regulation (MMFR) and its implementing measures.

Views are sought on potential policy options for revising the framework, particularly in light of ongoing work at the international level on the need for MMF reform and the significant liquidity issues faced by MMFs during the COVID-19 crisis in March 2020, including:

- changes targeting the liability side of MMFs, such as decoupling regulatory thresholds from suspensions/gates, and requiring MMFs to use swing pricing or anti-dilution levies (ADL)/liquidity fees;
- changes targeting the asset side of MMFs, such as increasing liquidity buffers, reviewing calibration or making them countercyclical;
- changes targeting both the liability and asset side of MMFs, such as eliminating public debt constant net asset value (CNAV) and low volatility NAV (LVNAV) funds; and
- changes that are external to MMFs, such as assessing whether the role of sponsor support should be modified.

Views are also sought on other potential reforms, including:

- amending or specifying the rules on MMF ratings;
- strengthening the role of MMF stress-testing;
- further harmonising and enhancing the reporting framework;
- disclosing money market instruments (MMIs) main categories of investors to regulatory authorities, such as detailed information on liabilities;
- setting up a liquidity exchange facility (LEF) funded by MMFs, asset managers or third parties; and
- further clarifying the scope of the MMFR.

The consultation closes on 30 June 2021. ESMA intends to publish its opinion on the review in the second half of 2021.

UCITS: ESMA publishes results of common supervisory action on liquidity risk management

ESMA has published a statement presenting the results of the 2020 common supervisory action (CSA) on UCITS liquidity risk management (LRM).

The overall level of compliance with the applicable rules on LRM was found to be satisfactory. However, shortcomings and the need for improvements were also identified in relation to:

- the clarity of documentation of LRM arrangements, processes and techniques;
- the quality of written LRM procedures;
- the quality of mechanisms and methodology;
- an overreliance on the presumption of liquidity with regard to listed securities, including instances where the presumption was applied to all assets;
- insufficient involvement, monitoring and due diligence of delegates performing LRM functions;
- lack of data quality owing to overreliance on few data providers;
- missing, inaccurate or unclear disclosures;
- governance, including insufficient reporting to senior management and questions concerning the soundness and documentation of the decision-making process;
- a need to strengthen the internal control framework; and
- the performance of external controls by depositary and external auditors.

ESMA states that market participants should critically review their LRM frameworks and ensure compliance with all relevant UCITS regulatory requirements and associated EU and national guidance at all times.

National competent authorities (NCA) are expected to address the findings with market participants in follow-up supervisory actions. ESMA also intends to carry out further work to promote further convergence in the way NCAs follow-up supervisory findings and consider whether the results of the CSA should lead to any policy work.

ESMA updates Brexit statement on EU Benchmark Regulation

ESMA has updated its Brexit statement on the application of key provisions of the EU Benchmark Regulation (BMR).

This follows statements previously issued by ESMA in March and October 2019 as well as October 2020. The latest update specifies the EU's regulatory approach towards UK-based third country benchmarks as well as UK endorsed and recognised benchmarks.

Brexit: SRB sets out approach to eligibility of UK law instruments without bail-in clauses

The Single Resolution Board (SRB) has published a communication confirming that it will consider liabilities governed by UK law without a contractual bail-in recognition clause as eligible for minimum requirements for own funds and liabilities (MREL). The exemption will apply until 28 June 2025.

The law ensuring automatic application of SRB resolution actions in all EU Member States ceased to apply to the UK at the end of the transition period. As a result, liabilities governed by UK law are subject to the same rules as those governed by other third-country laws.

The SRB will consider liabilities governed by UK law without a contractual bail-in recognition clause as eligible for MREL, provided they:

- otherwise satisfy applicable MREL criteria; and
- were issued on or before 15 November 2018, when the SRB published its resolvability expectations for banks in the context of Brexit and noted the potential consequences of Brexit for banks' existing stock of UK law governed MREL instruments.

The SRB hopes that this approach will ensure a smooth transition and avoid any disproportionate effect on banks, while still achieving the resolvability of banks and ensuring that they maintain adequate levels of loss-absorbing liabilities. Any liability governed by UK law issued or materially amended after 15 November 2018 must include a contractual bail-in recognition clause to be eligible for MREL.

FATF consults on virtual asset guidance

The Financial Action Task Force (FATF) has updated its guidance on the risk-based approach to virtual assets (VAs) and virtual asset service providers (VASPs).

The revised document updates guidance in six areas to:

- clarify that the definitions of VA and VASP are expansive and that there should be no case where a relevant financial asset is not covered by the FATF standards;
- provide guidance on how the FATF standards apply to stablecoins;
- provide additional guidance on the risks and potential risk mitigants for peer-to-peer transactions;
- provide updated guidance on the licensing and registration of VASPs;
- provide additional guidance for the public and private sectors on the implementation of the 'travel rule'; and
- include guidance on principles of information sharing and co-operation amongst VASP supervisors.

The changes are intended to maintain a level playing field for VASPs, based on the financial services they provide in line with existing standards applicable to financial institutions and other entities with anti-money laundering and countering the financing of terrorism (AML/CFT) obligations. They also aim to

minimise the opportunity for regulatory arbitrage between sectors and countries.

The FATF is consulting private sector stakeholders before finalising the revisions. It is primarily seeking views from representatives from the VA community, including academics, VASPs, technology developers and providers, and other regulated entities. Comments are due by 20 April 2021.

The FATF is also considering whether further updates will be necessary through a second twelve-month review, where relevant issues identified in this consultation, which are outside the scope of the FATF's current project, may be considered.

International Islamic Financial Market considers implications of IBOR transition for Islamic finance

The International Islamic Financial Market (IIFM) has published a white paper on global benchmark rate reforms and the implications of IBOR transition for Islamic finance.

The paper aims to create awareness and to highlight the challenges posed to Islamic financial product structures, transactions, documentation, accounting, credit and legal related matters. The paper also contains recommendations to help overcome these challenges, following an IIFM consultative meeting held in November 2020.

The IIFM intends to use the white paper as the basis for its development work on the transition to risk-free rates (RFRs), which may impact new and legacy contracts, Islamic financing arrangements (syndicated and bilateral), hedging and capital market securities such as Sukuk. The IIFM also intends to form three workstreams for financing, hedging and Sukuk, consisting of leading institutions, to consider developments around IBOR transition and to achieve practical solutions.

Coronavirus: IOSCO publishes statement on going concern assessments

The International Organisation of Securities Commissions (IOSCO) has published a statement reminding issuers, audit committees and those charged with governance (TCWG), and external auditors of their role in providing investors with high-quality, reliable, timely and transparent financial information, including information about the existence of material uncertainties that may cast significant doubt on an entity's ability to continue as a going concern due to the COVID-19 pandemic.

IOSCO has stressed that it is management's responsibility to develop well-reasoned and supportable estimates and provide reliable financial information regarding the current and potential future effects on the issuer from COVID-19 conditions. When management determines that material uncertainties do not cause significant doubt on the ability of an entity adversely affected by COVID-19 to continue as a going concern, it is important for investors to receive complete information about the signification judgements that may have been exercised in arriving at management's decision.

IOSCO's statement also draws attention to audit committees and TCWG's responsibilities in overseeing the issuer's financial reporting and external audit process, and external auditors' duties to perform high-quality assurance services in accordance with professional standards on the financial

information with which they are associated. IOSCO believes that external auditors play a key role in evaluating the adequacy of disclosures and assessing the appropriateness of management's judgement about the entity's ability to continue as a going concern. The statement also reminds auditors to report on key audit matters (KAMs), which are matters requiring significant auditor attention in performing the audit.

IOSCO directs companies adversely affected by COVID-19 conditions to the educational material produced by the International Accounting Standards Board (IASB) and further material previously provided by the International Audit and Assurance Standards Board (IAASB).

BoE and FCA publish survey report on liquidity management in UK open-ended funds

The Bank of England (BoE) and the Financial Conduct Authority (FCA) have published a joint report setting out the findings of their survey of UK authorised open-ended funds and their liquidity management practices.

Launched in August 2020 as part of the ongoing joint review into vulnerabilities associated with liquidity mismatch, the survey provides insights into liquidity management, and how practices and tools performed during the market stress period triggered by COVID-19, including that:

- funds have a wide range of liquidity tools available but predominantly use swing pricing;
- the use of swing pricing intensified and was adapted during the stress period, although there were large variations in how swing pricing was applied;
- funds also managed their liquidity by holding liquidity buffers in the form of cash and non-cash liquidity assets, the latter two most common being units in money market funds (MMFs) and UK Government bonds;
- some funds adapted their approaches and governance measures temporarily or permanently in response to the COVID-19 stress; and
- managers of corporate bond fund may be overestimating the liquidity of their holdings.

The BoE's Financial Policy Committee (FPC) has welcomed the findings in its March 2021 financial policy summary and meeting record, which notes that:

- consistent and more realistic classification of the liquidity of funds' assets is an essential first step to ensuring funds can address mismatches between asset liquidity and redemption terms; and
- the survey indicates that the use of swing pricing was inconsistently applied across funds, and even when deployed, was insufficient in many cases.

The FPC intends to set out in the next Financial Stability Report its view on how a liquidity classification and an approach for more consistent and complete swing pricing could be developed.

FCA launches campaign to encourage individuals working in financial services to report wrongdoing

The FCA has announced the launch of a new campaign titled 'In confidence, with confidence', which is intended to encourage individuals working in financial services to report potential wrongdoing. As part of the campaign, the FCA has produced a set of materials for firms to share with employees, as well as a digital toolkit for industry bodies, consumer groups and whistleblowing groups. The materials provide guidance on:

- how to make a report to the FCA of potential wrongdoing in an area it regulates;
- how the FCA protects whistleblowers' identities;
- other legal protections and legal advice available to whistleblowers; and
- what the FCA does with the information provided by whistleblowers.

The FCA also intends to host a series of events to highlight the campaign.

FCA publishes feedback statement on its call for input on open finance

The FCA has published a feedback statement to its call for input on 'open finance', the extension of open banking-like principles of data sharing to a wider range of financial products. The call for input was launched in December 2019 and closed in October 2020. In summary, respondents felt that:

- open finance has the potential to increase competition, improve advice, and provide access to a wider and more innovative range of financial products and services;
- open finance may also create or increase risks and raise new questions around data ethics, as well as being a significant undertaking for firms;
- the implementation of open finance should be proportionate, phased and driven by a consideration of how consumers will use it; and
- the key building blocks required to develop open finance are a legislative and regulatory framework, common standards and an implementation entity.

The feedback statement also provides an update on the progress that has been made on various open finance and open data-related initiatives since the issuance of the call for input, and on the next steps the FCA intends to take in this area. These include:

- sharing lessons learned from the implementation and supervision of open banking and the development of pensions dashboards;
- working with the Government and industry stakeholders to identify what industry roadmaps are needed to support legislation;
- coordinating industry-led efforts to develop common standards to support open finance;
- assessing the regulatory framework that would be needed to support open finance; and

- supporting discussions on the future operating model for the Open Banking Implementation Entity (OBIE).

UK MiFIR: FCA to continue use of TTP to modify derivatives trading obligation

The FCA has published a statement following a review of its approach to using the Temporary Transitional Power (TTP) to modify the application of the UK MiFIR derivatives trading obligation (DTO).

The statement sets out the FCA's intention to continue using the TTP in order to modify the application of the DTO as set out in a statement dated 31 December 2020, as it has not observed market or regulatory developments that would justify a change in approach.

FMSB publishes draft standard on use of Term SONIA reference rates

The FICC Markets Standards Board (FMSB) has published a transparency draft of a proposed standard on the use of Term SONIA reference rates.

In the transition away from LIBOR, the FMSB recognises that there will be some circumstances where the use of a rate compounded in arrears is not appropriate or operationally achievable. The FMSB has developed a draft standard with the aim of identifying where there may be robust rationales for using Term SONIA and setting out expected behaviours of market participants.

The draft standard contains eight core principles, covering:

- that market participants should assess whether there is a robust rationale when deciding to use Term SONIA across lending products, derivative products and bonds;
- that banks/dealers should track and retain appropriate records of the volume of products, used or issued which reference Term SONIA;
- that banks/dealers should ensure they have adequate policies, procedures, systems and controls in place to identify and mitigate any conflicts of interest which may arise;
- that comprehensive risk disclosures should be provided by banks/dealers to end users to highlight any relevant risks associated with the use of Term SONIA;
- that corporates and buy-side firms should assess whether there is a robust rationale for any requests made to dealers to provide products referencing Term SONIA; and
- where market participants do use products referencing Term SONIA, they should ensure that such products have robust fallback arrangements included within the contractual terms to allow orderly transition if Term SONIA were to be discontinued or declared non-representative.

Comments on the transparency draft are due by 28 May 2021.

The Working Group on Sterling Risk-Free Reference Rates, the FCA and the BoE have published a statement welcoming the publication of the draft standard by the FMSB.

UK CRR: HM Treasury publishes draft SI extending prudential exemption for commodities dealers

HM Treasury (HMT) has published the draft Capital Requirements Regulation (Amendment) (EU Exit) Regulations 2021 for sifting. The draft statutory instrument (SI) is intended to ensure that the onshored CRR operates effectively until the introduction of the Investment Firms Prudential Regime (IFPR), in particular by extending the dates for certain exemptions for commodities dealers from prudential requirements until the IFPR applies on 1 January 2022.

The sift is due to end on 27 April 2021.

PRA sets out changes to policy on depositor protection ID verification

The Prudential Regulation Authority (PRA) has published a policy statement (PS 4/21) on depositor protection identity (ID) verification. PS 4/21 sets out changes to the Depositor Protection (DP) part of the PRA Rulebook and to Supervisory Statement (SS) 18/15 'Depositor and dormant account protection', as well as feedback on responses to its consultation paper on the same topic (CP 3/21).

The changes took effect on 29 March 2021.

BaFin backs European Supervisory Authorities' consumer warning regarding crypto-assets

As cryptocurrencies continue to attract investors, the ESAs have reminded consumers that some crypto-assets are highly risky and speculative and that they must be alert to the possibility of losing all their money.

Currently, cryptocurrencies are largely unregulated in the EU. The legislative proposal for an EU regulation on markets in crypto-assets is not yet applicable law. In Germany, the business of crypto-assets custody and activities related to crypto-assets that constitute banking business or financial services require an authorisation from the German Federal Financial Services Supervisory Authority BaFin, but this does not offer protection against losses. BaFin has therefore endorsed the ESA's warning without reservation.

BaFin updates minimum requirements for compliance function and additional requirements governing rules of conduct, organisation and transparency

BaFin has updated its Circular 05/2018 (WA) - Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency (MaComp).

In the special requirements in BT 3 of MaComp, BaFin has supplemented the module on the requirements for fair, unambiguous and non-misleading information pursuant to Section 63 (6) of the German Securities Trading Act (Wertpapierhandelsgesetz, WpHG) with regard to information on indicative order values. In addition, BaFin is expanding the requirements for the content of the declaration of suitability in the special requirements of BT 6, providing sample wording and examples of unsuitable formulations.

Bank of Spain consults on draft circular to credit institutions and other supervised institutions on

confidential financial information in market conduct, transparency and customer protection, and register of complaints

The Bank of Spain has launched a public consultation on a draft circular to credit institutions and other supervised institutions on confidential financial information in market conduct, transparency and customer protection, and a register of complaints.

The draft circular is intended to request from the institutions to which it applies certain statements of conduct, on a half-yearly basis, structured in three blocks differentiated by (i) the type of banking products and services, including payment products and services marketed by the entities; (ii) commissions and interest income; and (iii) complaints filed with the entities. For less complex institutions, a simplified reporting regime is established. In addition, the circular establishes the need for institutions to have a register of complaints available to the Bank of Spain, with predefined content.

The first reserved statements on conduct to be submitted to the Bank of Spain will be those corresponding to the second half of 2021, with some exceptions for which the first submission will be made in the second half of 2022. In addition, entities will have until 31 December 2022 to complete the aforementioned register of complaints.

The draft circular will be open for comments until 19 April 2021.

Bank of Spain maintains countercyclical capital buffer at 0%

The Bank of Spain has decided to hold the countercyclical capital buffer (CCyB) rate applicable to credit exposures in Spain at 0% in the second quarter of 2021.

FINMA publishes partially revised circular on direct transmission

The Swiss Financial Market Supervisory Authority (FINMA) has issued a partially revised Circular 2017/06 on direct transmission.

The circular sets out the rules for direct, legally compliant and timely exchanges of information between FINMA-supervised institutions and foreign authorities. In particular, the adjustments include an extension of the list of authorities eligible for administrative assistance to encompass those foreign authorities with which FINMA has concluded bilateral cooperation agreements meeting the standard for administrative assistance. Among other clarifications, the circular also clarifies the reporting process for planned transmissions.

The partially revised circular will enter into force on 1 April 2021.

HKMC announces commencement of enhancements to Special 100% loan guarantee of SME Financing Guarantee Scheme

The Hong Kong Mortgage Corporation (HKMC) Insurance Limited has announced that enhancements to the Special 100% Loan Guarantee of the SME Financing Guarantee Scheme (SFGS) took effect from 29 March 2021.

In order to alleviate the cash flow pressure for small and medium-sized enterprises, the Financial Secretary of Hong Kong announced earlier in the 2021-22 Budget that enhancements will be made to the Special 100% Loan Guarantee, and the application period will be extended to 31 December 2021.

Under the enhancement measures, eligible enterprises should have been operating for at least three months as at 30 June 2020 and have suffered at least a 30% decline in sales turnover in any month since February 2020 compared with the monthly average of any preceding quarter from early 2019 to mid-2020. The maximum amount of loan per enterprise will be raised from the total amount of employee wages and rents for 12 months to that for 18 months, or HKD 6 million (originally HKD 5 million), whichever is lower. Meanwhile, the maximum repayment period of the guaranteed loans will be increased from 5 years to 8 years, and the principal moratorium arrangement will be extended from up to 12 months to up to 18 months.

Financial Investment Services and Capital Markets Act revisions to improve rules on private equity funds passed by National Assembly

The National Assembly of the Republic of Korea has passed amendments to the Financial Investment Services and Capital Markets Act (FSCMA) to improve the rules on private equity funds (PEFs), and strengthen investor protection with regard to high-risk investment products for retail investors. The key amendments to the FSCMA include the following:

- a new PEF classification to place distinctions between the 'professional investment type' and the 'management participation type' depending on the scope of investment entities;
- stronger safeguards for retail investors who intend to make investments in general PEFs;
- revised rules governing the management of both general PEFs and institution-only PEFs which will be identical to the current rules on the 'professional investment type' PEFs;
- a new rule on the cancellation of registration for a quick removal of fund management firms that fail to meet requirements over a certain period of time. Moreover, in order to facilitate regular supervision of general partners (GPs) by the financial authorities, GPs will be required to report any changes to their business registration status within two weeks and submit financial statements once a year; and
- a stipulation that the maximum number of investors allowed for a PEF will be increased from 49 to 100 to facilitate investments by professional investors, although the total number of retail investors will continue to be limited to up to 49.

The amendments to the FSCMA will go through an approval process at a cabinet meeting prior to their pronouncement and will take effect six months thereafter.

The Korean Government expects that the revised FSCMA will bring about a more trusted PEF investment environment, strengthen the role of PEFs in providing venture capitals and make more effective management and supervision of the PEF market possible for the regulator.

ASIC to adopt 'no-action' position for annual general meetings

The Australian Securities Investments Commission (ASIC) has announced that it will shortly adopt a temporary 'no-action' position in relation to the convening and holding of virtual meetings. This position follows on from the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 which expired on 21 March 2021. Determination No. 3 operated to facilitate the holding of meetings (including annual general meetings) by temporarily removing legal uncertainty around the validity of virtual meetings.

In order to provide the market with a degree of certainty, ASIC's 'no-action' position will:

- support the holding of meetings using appropriate technology;
- facilitate electronic dispatch of notices of meeting including supplementary notices; and
- allow public companies an additional two months to hold their AGMs.

ASIC has indicated that the details of the 'no-action' position will be made available over the coming days and will include guidance around the appropriate approach to conducting virtual meetings.

ARRC publishes white paper on suggested fallback formula for USD LIBOR ICE Swap Rate

The Alternative Reference Rates Committee (ARRC) has published a white paper describing a formula to calculate a fallback from the US Dollar (USD) LIBOR ICE Swap Rate to a spread-adjusted Secured Overnight Financing Rate (SOFR) Swap Rate.

Contracts that are indirectly linked to USD LIBOR through reference to USD ICE Swap Rates are not covered by existing fallback provisions. The paper is intended to facilitate conversations within industry bodies and between counterparties on incorporating robust fallbacks in both legacy and new contracts referencing the USD LIBOR ICE Swap Rate.

The formula presented in the paper aims to complement a similar approach taken by the Working Group on Sterling Risk-Free Rates in designing a fallback for the British Pound Sterling (GBP) LIBOR ICE Swap Rate. The paper follows announcements that the publication of LIBOR on a representative basis will cease for the three-month USD LIBOR settings after 30 June 2023.

New York State Legislature passes USD LIBOR legislation

The New York State Legislature has passed Senate Bill 297B/Assembly Bill 164B, which aims to reduce risks associated with the transition away from USD LIBOR. The text of this legislation is consistent with a proposal published in March 2020 by the Alternative Reference Rates Committee. Once signed into law by New York Governor Cuomo, this legislation will apply to legacy contracts that refer to USD LIBOR, are governed by New York law, mature after the relevant tenor of USD LIBOR ceases to be published or is no longer representative, and do not include adequate fallback provisions to replace USD LIBOR. For such legacy contracts, this legislation will provide, by operation of law, a replacement benchmark recommended by the Federal

Reserve Board, the Federal Reserve Bank of New York or the ARRC following the discontinuation of USD LIBOR, to include a spread adjustment and any recommended conforming changes.

In addition, this legislation seeks to provide legal clarity for these contracts by:

- overriding any existing fallback provisions that provide for a replacement rate based on or otherwise involving a poll, survey or inquiries for quotes or information concerning interbank lending rates or any interest rate based on LIBOR;
- prohibiting parties from refusing to perform their obligations or declaring a breach of contract as a result of the discontinuance of LIBOR or the use of a replacement;
- establishing that the replacement is a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR; and
- providing a safe harbour from litigation for the use of the recommended benchmark replacement.

RECENT CLIFFORD CHANCE BRIEFINGS

Latest trends in economic sanctions and trade controls

In this extract from a recent Clifford Chance webinar, we explore the latest trends in US, EU and UK policy on economic sanctions and trade controls, including compliance and enforcement risks and potential changes under the Biden Administration.

This briefing examines efforts to roll-back Trump era US secondary sanctions on Iran; current US trade controls on China; US, EU and UK sanctions on Russia; Europe's new human rights sanctions and the impact of the existing US Magnitsky sanctions; and post-Brexit UK sanctions.

https://www.cliffordchance.com/briefings/2021/03/latest-trends-in-economic-sanctions-and-trade-controls.html

UK Government publishes proposals on audit and corporate governance reform

On 18 March 2021, the Department for Business, Energy & Industrial Strategy published a consultation paper on its proposals for significant reform to UK audit and corporate governance. The proposals are centred on reforms to further the public interest in audit and corporate reporting and the establishment of the previously announced new regulator – the Audit, Reporting and Governance Authority, replacing the Financial Reporting Council. The aim of the proposals includes to deliver more effective governance, reporting and audit of the UK's largest businesses in order to increase the reliability of the information on which investors base their decisions. The proposals would extend a range of new obligations to Public Interest Entities (PIEs) – the definition of which would be extended to cover large UK private companies and certain AIM listed companies. The proposals also envisage additional responsibilities and liabilities for directors of PIEs, including when declaring dividends, the potential for bonuses to be clawed-back in the event of serious director failings, and additional responsibilities for members of audit committees of FTSE 350 companies.

This briefing discusses these proposals.

https://www.cliffordchance.com/briefings/2021/03/uk-government-publishes-proposals-on-audit-and-corporate-governa.html

Hong Kong insurance industry welcomes new ILS regulatory regime and expansion of captive insurance business

In a move to further promote Hong Kong's insurance business in Asia and the Guangdong-Hong Kong-Macao Greater Bay Area, the new regulatory regime for insurance-linked securities and the rules relating to the expansion of captive insurance business came into operation on 29 March 2021. Together with the group-wide supervision framework that will come into effect on the same day, the Government continues its effort in boosting Hong Kong's status as an international insurance hub and risk management centre.

This briefing discusses the new regulations for ILS.

https://www.cliffordchance.com/briefings/2021/03/hong-kong-insurance-industry-welcomes-new-ils-regulatory-regime-.html

Supreme Court to decide whether Section 1782 allows discovery for use in foreign arbitrations

Participants in foreign arbitrations often seek evidence by taking advantage of US-style discovery practices, potentially expanding discovery far beyond the rules of the arbitration tribunal. The US Supreme Court has just agreed to hear whether this use of US discovery is permissible, in Servotronics, Inc. v. Rolls-Royce PLC et al., No. 20-794.

The issue centres around the scope of 28 USC § 1782, which permits interested persons to seek discovery in the US for use in 'a proceeding in a foreign or international tribunal.' The Supreme Court has agreed to decide whether a 'foreign or international tribunal' includes private arbitrations or is instead limited to court proceedings.

To date, the issue has divided US courts, with some concluding that only courts count as tribunals, while others include arbitration tribunals within the scope of 'international tribunals.' That broad interpretation would permit parties in foreign arbitrations to direct wide-ranging US style discovery requests to persons and entities in the US in connection with that arbitration, including document requests and depositions, whether or not such discovery requests were contemplated by arbitration procedures.

The case will be argued in the Term beginning in October, and the issue is expected to be decided within the next year.

This briefing discusses the case.

https://www.cliffordchance.com/briefings/2021/03/supreme-court-to-decide-whether-section-1782-allows-discovery-fo.html

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