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EMIR: EU Commission reports on whether trades from post-trade risk reduction services should be exempt from OTC derivatives clearing obligation

The EU Commission has published a report to the EU Parliament and Council on whether trades that directly result from post-trade risk reduction (PTRR) services, such as portfolio compression, should be exempted from the clearing obligation for OTC derivatives under Article 4(1) of the European Market Infrastructure Regulation (EMIR).

The report summarises the findings of the European Securities and Markets Authority (ESMA), which were set out in its report adopted in November 2020 following a public consultation. The Commission considers, in particular:

- the extent to which PTRR services mitigate risk, in particular counterparty credit risk and operational risk;
- the benefits of PTRR services;
- the potential for circumvention of the clearing obligation if an exemption was granted;
- the potential disincentive to central clearing if an exemption was granted; and
- the potential for new risks if an exemption was granted.

The report concludes that, while ESMA has undertaken an extensive and thorough analysis of PTRR services, there remain aspects that require further quantitative assessment and analysis before the Commission can make a proposal for legislative change. In particular, the Commission calls for further consideration on:

- the definition of PTRR services, including how different types of PTRR could be defined more concretely;
- the possible links between different PTRR services and the impact of their combined use on the aspects raised in the Commission's report;
- the relative size of the risk of the circumvention of the clearing obligation, the market practices that could be used to conduct such a circumvention, and the conditions to mitigate it;

- the incentives to centrally clear, taking into account a possible exemption from the clearing obligation; and
- an evaluation of potential liquidity shifts from centrally cleared to uncleared space.

The Commission suggests that further work on the above issues should be fed into the general EMIR assessment report, which is due to be submitted to the EU Parliament and Council by 18 June 2024.

EMIR: Implementing Decision amending list of equivalent designated US contract markets published in Official Journal

Commission Implementing Decision (EU) 2021/583 amending Implementing Decision (EU) 2016/1073 on the equivalence of US designated contract markets (DCMs) in accordance with EMIR has been published in the Official Journal.

Implementing Decision 2016/1073 states that, for the purposes of point 7 of Article 2 of EMIR, the boards of trade designated by the Commodity Futures Trading Commission (CFTC) as contract markets in the US are equivalent to regulated markets as defined in point 14 of Article 4(1) of MiFID. Derivative contracts executed on these markets are therefore not classified as OTC for the purposes of EMIR.

Implementing Decision 2021/583 amends Implementing Decision 2016/2073 to reflect additions, removals and amendments to the list of DCMs authorised by the CFTC since its adoption. It entered into force on 15 April 2021.

CRR: Delegated Regulation on assigning risk weights to specialised lending exposures published in Official Journal

Commission Delegated Regulation (EU) 2021/598 supplementing the Capital Requirements Regulation (CRR) setting out regulatory technical standards (RTS) for assigning risk weights to specialised lending exposures has been published in the Official Journal.

The Delegated Regulation will enter into force on 14 May 2021 and apply from 14 April 2022.

CRR: EBA publishes final draft RTS on methods of prudential consolidation

The European Banking Authority (EBA) has published the final draft RTS specifying the different methods of prudential consolidation under the CRR.

Under Article 18 of the CRR, institutions must fully consolidate all credit institutions, investment firms, and financial institutions that qualify as their subsidiaries, or if relevant, the subsidiaries of their parent financial holding company. Under certain circumstances, the CRR allows the application of a different method of consolidation other than full consolidation (proportional consolidation or the aggregation method), or the application of the equity method. The draft RTS elaborate on the criteria, indicators and conditions that institutions must meet for the application of these different approaches.

The draft RTS have been amended since they were consulted upon to reflect the changes introduced in the CRR and Capital Requirements Directive (CRD)

following the approval of the Risk Reduction Measures Package. The key changes deal with the newly introduced Article 18(8) of the CRR, which allows national competent authorities (NCAs) to extend prudential consolidation to certain non-financial undertakings in case there is a substantial risk of step-in. The draft RTS have therefore been amended to include several step-in risk indicators which NCAs should take into account when assessing whether an undertaking should be fully or proportionally consolidated for prudential purposes.

The final draft RTS will be submitted to the EU Commission for adoption.

ESMA publishes interim templates for STS synthetic securitisation notifications

ESMA has published interim simple, transparent and standardised (STS) notification templates for synthetic securitisations following amendments to the Securitisation Regulation.

The interim templates allow originators to notify ESMA of synthetic securitisations that meet the STS criteria. The templates are intended to ensure consistency across all STS notifications.

The amended Securitisation Regulation entered into force on 9 April 2021. The amended Securitisation Regulation extends the STS framework to synthetic securitisations. As with traditional securitisations, only those synthetic securitisations that meet pre-defined STS requirements will be published on ESMA's website.

Until the date of the application of the RTS specifying the content and the format of STS notifications for synthetic securitisations, originators can make the necessary information available to ESMA in writing. The interim STS notification templates may be used by originators on a voluntary basis, subject to possible changes following the entry into force of the RTS.

ESMA updates LEI statement under SFTR reporting regime

ESMA has published an updated statement on the implementation of LEI requirements for third-country issuers under the SFTR reporting regime.

ESMA maintains its position as described in its statement published on 6 January 2020 and provides an extended timeline for the reporting of LEIs of third-country issuers of securities used in Securities Financing Transactions (SFTs) until 10 October 2022. The updated statement also sets out the expectations towards trade repositories and counterparties, as well as the relevant supervisory actions to be carried out by authorities.

Basel Committee publishes 2021/22 work programme

The Basel Committee on Banking Supervision (BCBS) has published its work programme for 2021/22, which sets out BCBS's strategic priorities for the coming year. The work programme has been endorsed by the Group of Governors and Heads of Supervision (GHOS) and has been designed to reflect the findings of a recent review undertaken by BCBS to ensure it continues to meet its objectives of promoting financial stability and strengthening the regulation, supervision and risk management practices of banks around the world.

The programme focuses on three key themes:

- COVID-19 resilience and recovery, including ongoing monitoring and assessment of risks and vulnerabilities to the global banking system and, if required, implementing additional policy and/or supervisory measures to address these risks;
- horizon scanning and mitigation of medium-term risks and trends, including work related to the ongoing digitalisation of finance, climate-related financial risks, and the impact of the 'low-for-long' interest rate environment on banks' business models; and
- strengthening supervisory coordination and practices, including initiatives focusing on the role of artificial intelligence and machine learning in banking and supervision, data and technology governance by banks, operational resilience, and the role of proportionality in bank regulation and supervision.

As agreed with GHOS, the programme marks a clear end to BCBS's Basel III policy development agenda. Going forward, BCBS's Basel III-related work will focus on monitoring the implementation of the standards by its members and evaluating their effectiveness.

Sustainable finance: Basel Committee publishes two reports on climate-related financial risks

The BCBS has published two analytical reports on climate-related financial risks.

The 'Climate-related risk drivers and their transmission channels' report explores how climate-related risk drivers, including physical risks and transition risks, can arise and affect both banks and the banking system via micro- and macroeconomic transmission channels.

The 'Climate-related financial risks – measurement methodologies' report provides an overview of conceptual issues related to climate-related financial risk measurement and methodologies, as well as practical implementation by banks and banking supervisors.

The reports, which should be read in conjunction with each other, conclude that climate risk drivers can be captured in traditional financial risk categories, but additional work is needed to connect climate risk drivers to banks' exposures and reliably to estimate such risks.

FCA Executive Director of International delivers speech on regulating the UK as a global financial centre

The Executive Director of International and Interim Chief Operating Officer at the Financial Conduct Authority (FCA), Nausicaa Delfas, has delivered a speech on regulating the UK as a global financial centre at the City & Financial Global's Future of UK Financial Services Regulation Virtual Summit.

The speech broadly sets out the FCA's approach to the UK regulatory framework and global cooperation following the UK's withdrawal from the EU, and notes:

- an intention to introduce a UK specific prudential regime as part of the Investment Firms Prudential Review (IFPR);

- an intention to consult on proposals for climate-related financial disclosures by asset managers, life insurers and FCA-regulated pension providers;
- the FCA's expectations for international firms, as set out in its policy statement published in February 2021, including that the specific approach the FCA will take to international firms depends on both the level of cooperation with individual jurisdictions and the consistency of regulatory outcomes;
- on-going work in relation to cross-border business, including HM Treasury's call for evidence on the overseas framework and in particular the role of recognised overseas investment exchanges (ROIEs); and
- that the FCA has provided technical advice to HM Treasury as part of the recent agreement on the text of the UK-EU memorandum of understanding (MoU) on regulatory cooperation, along with the FCA's MoU with EU regulators, and is closely involved in other bilateral work, such as in relation to Switzerland and the US.

FCA and PRA publish Dear CEO letter on use of deposit aggregators

The FCA and the Prudential Regulation Authority (PRA) have published a Dear CEO letter highlighting the risks associated with the use of deposit aggregators. Deposit aggregators provide intermediary services between savings account providers and retail customers. These services can include keeping customers informed of changes in the savings rates available in the market, helping customers to spread deposits around different banks and building societies to maximise rates and protection under the Financial Services Compensation Scheme (FSCS), and providing customers with a single platform on which to view and manage all their accounts. Some deposit aggregators operate under business models in which their customer becomes a direct customer of the bank or building society, and others hold the deposit accounts on trust for their customers.

Key risks identified with aggregators include:

- customer confusion over the impact that using a deposit aggregator may have on the amount of FSCS protection they receive or the time it will take to receive a pay-out in the event of a bank or building society failure;
- the additional challenges aggregators pose in the context of a firm's preparations for orderly resolution, including ensuring eligible claimant criteria are met and client-specific information is available to ensure a swift pay-out; and
- the potential for deposits from aggregators to present a concentrated liquidity risk on the deposit-taker's balance sheet.

In light of these risks, the FCA and PRA expect firms to:

- have discussions at the appropriate level and to consider addressing any aspects that are directly relevant to them or their business model;
- consider the extent to which their deposit book relies on business sourced via deposit aggregators and whether this requires them to take any action;
- consider measures to achieve a faster customer repayment under the FSCS;

- look at expanding the information provided to the FSCS, FCA or PRA to include deposit aggregators used by the firm, the level of deposits coming via them and whether a direct or trust model is used; and
- consider the level of transparency regulated firms have regarding the beneficial owners of deposits sourced from deposit aggregators.

PRA sets out approach to non-systemic UK banks

The PRA has published a policy statement providing responses to its consultation on its approach to new and growing non-systemic UK banks.

The statement contains the final supervisory statement (SS3/21), an updated SS31/15 on the internal capacity adequacy assessment process and the supervisory review and evaluation process, and an updated statement of policy (SoP) on the PRA's methodologies for setting Pillar 2 capital.

The statement is relevant to new and growing non-systemic UK-incorporated banks, although some will have sufficient experience and resources to be able to move quickly to the standard expected of most established banks. This determination will depend on, among other things:

- whether the bank is part of an established domestic or international banking group;
- the size and complexity of its activities; and
- the extent of its available financial and non-financial resources.

The expectations set out in SS3/21 took effect upon publication on 15 April 2021.

Securities prospectuses: BaFin applies ESMA guidelines on prospectus requirements

The German Federal Financial Services Supervisory Authority (BaFin) has published a notification to confirm that it fully applies the German version, dated 4 March 2021, of the ESMA guidelines on disclosure requirements under the EU Prospectus Regulation.

The guidelines aim to ensure that market participants apply the requirements from the annexes to Commission Delegated Regulation (EU) 2019/980 consistently. They update the recommendations issued by ESMA and the Committee of European Securities Regulators (CESR) in 2011 under the Prospectus Directive.

BaFin consults on supervisory requirements for IT of payment institutions and electronic money institutions

BaFin has launched a consultation on a draft circular on payment services supervisory requirements for the IT of payment institutions and electronic money institutions (Zahlungsdiensteaufsichtliche Anforderungen an die IT von Zahlungs- und E-Geld-Instituten – ZAIT).

The circular is aimed at all payment institutions and electronic money institutions within the meaning of section 1 (3) of the Payment Services Supervision Act (Zahlungsdiensteaufsichtsgesetz – ZAG). It specifies the IT requirements specifically for these institutions.

The requirements are based on the existing Supervisory Requirements for IT in Financial Institutions (Bankaufsichtliche Anforderungen an die IT – BAIT).

In addition, they contain in particular the requirements from the two guidelines of the EBA on information and communication technology (ICT) and security risk management (GL / 2017/17) as well as from the guidelines on outsourcing arrangements (GL 2019/02).

The changes currently planned for the circular on Minimum Requirements for Risk Management (Mindestanforderungen an das Risikomanagement – MaRisk) and on Supervisory Requirements for IT in Financial Institutions have already been taken into account in this circular as far as possible.

Comments are due by 14 May 2021.

BaFin publishes circular on minimum requirements for implementation of bail-in

BaFin has published an extended version of its circular on the minimum requirements for the implementation of a bail-in (04/2021 (A) – Mindestanforderungen zur Umsetzbarkeit eines Bail-in – MaBail-in). The circular applies to all institutions in respect of which the Single Resolution Board (SRB) is not the competent resolution authority.

The original version of the circular (05/2019 (A)) was published on 4 July 2019. The new version contains the following extensions:

- previously, only liabilities eligible for bail-in of the resolution entity with a ranking in insolvency up to and including debt instruments within the meaning of section 38 of the German Insolvency Code (Insolvenzordnung-InsO) in conjunction with section 46f (6) sentence 1 and section 46f (9) of the German Banking Act (Gesetz über das Kreditwesen - KWG) ('non-preferred senior debt') were taken into account. The revised version of the circular generally covers all liabilities eligible for bail-in as well as other liabilities that BaFin deems necessary to record;
- during the revision of the circular, BaFin has further developed the guidance note on external bail-in implementation. In order to be able to take into account the extension of the execution approach beyond the existing baseline scenario as stipulated in the guidance note, the MaBail-in includes additional data points; and
- a third annex has been added to the MaBail-in, containing frequently asked questions from institutions and answers from the resolution authority. This is intended further to increase transparency and uniformity of administrative action.

BaFin publishes guidance note on external bail-in implementation

BaFin has published an extended version of its guidance note on external bail-in implementation.

The new guidance note extends the guidance note of the same name, which was published on 1 October 2019. While the old version covered only a base scenario (resolution entity established in the form of a stock corporation, instruments issued consisting of shares only), the new version covers, procedurally and technically, resolution entities established in all legal forms as well as various classes of instruments and also takes into account foreign currency bonds.

The guidance note is aimed at all institutions as defined in section 2 (1) of the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz – SAG) as well as companies as defined in section 1 no 3 of the German Recovery and Resolution Act in the Federal Republic of Germany, for which the resolution strategy foresees applying a bail-in. This also includes institutions under the responsibility of the SRB as resolution authority, but excludes institutions in respect of which the competent resolution authority considers that the opening of insolvency proceedings is possible.

Luxembourg Government extends IFD/IFR implementing bill to include MiFID Quick Fix and EU Crowdfunding Directive

The Luxembourg Government has introduced a series of amendments to Bill No. 7723 implementing Directive (EU) 2019/2934 on the prudential supervision of investment firms (IFD), certain provisions of Directive (EU) 2019/2177, Regulation (EU) 2019/2033 on the prudential requirements of investment firms (IFR), as well as Article 4 of Regulation (EU) 2019/2175 (IFD/IFR Bill).

The IFD/IFR Bill was initially lodged with the Luxembourg Parliament on 27 November 2020. The amendments made now pursue two objectives.

First, they aim to adjust the IFD/IFR Bill in order to ensure consistency between changes made to the amended law of 5 April 1993 on the financial sector (FSL) by both the IFD/IFR Bill No. 7723 and the CRD5/BRRD2 implementing Bill No. 7638. Indeed, the CRD5/BRRD2 Bill has been amended recently as a reaction to the opinion issued by the Luxembourg State Council (Conseil d'Etat).

Secondly, the Government amendments also incorporate into the IFD/IFR Bill the necessary modifications to transpose the following directives, given their short transposition deadlines:

- Directive (EU) 2020/1504 of the European Parliament and of the Council of 7 October 2020 amending Directive 2014/65/EU on markets in financial instruments (Crowdfunding Directive); and
- Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (MiFID Quick Fix).

The Crowdfunding Directive implementation introduces an FSL scope exemption for crowdfunding service providers, which will be regulated by the EU Crowdfunding Regulation (EU) 2020/1503 as of 10 November 2021.

The MiFID Quick Fix is part of the Capital Markets Recovery Package, which was adopted in response to the COVID-19 pandemic to help economic recovery by making changes to certain key framework regulations governing financial markets. The MiFID Quick Fix is more specifically dedicated to measures relating to MiFID2 and aims to facilitate providing investment services and promoting investment in the EU real economy by reducing the administrative burden concerning in particular the level of information to be provided to professional investors, without however compromising investor protection.

SFTR: CSSF issues circular on amended ESMA guidelines on reporting under Articles 4 and 12

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued Circular 21/770 on the ESMA guidelines on reporting under Articles 4 and 12 of the SFTR (ESMA-70-151-2838). By way of this circular, the CSSF informs all entities subject to its supervision and all non-financial counterparties to securities financing transactions as defined in Article 3 of SFTR that it has integrated the amended version of the ESMA guidelines into its administrative practices and regulatory approach. The revised ESMA guidelines were published on 29 March 2021.

The circular entered into force on 13 April 2021.

CSSF issues circular on telework governance and security requirements for supervised entities

CSSF has issued Circular 21/769 to define the governance and security requirements with respect to the implementation and utilisation by an entity under the CSSF's supervision of work processes based on telework solutions.

The CSSF stresses that no approval is required in order to implement, maintain or extend telework solutions for staff in a CSSF supervised entity.

Furthermore, it is specified that the circular applies (i) under normal circumstances (excluding pandemic situations, such as COVID-19, or other exceptional circumstances) and (ii) to financial sector regulatory requirements. Contractual relationships between the supervised entities and their employees are outside the scope of the circular.

Amongst other things, the circular provides for the following:

- definitions of key terms used, such as for example 'telework', 'privileged users', and 'critical activities';
- general principles, covering in particular requirements relating to (i) robust central administration and sufficient substance requirements, (ii) telework limits and risk assessments, (iii) continuity of the operational functioning of supervised entities, and (iv) ultimate responsibility for the telework;
- compliance with other legal provisions (stating in particular that the use of telework must not contravene mandatory public order provisions and that supervised entities should consider other legal requirements such as tax, companies, professional confidentiality, data protection or social security laws and regulations which differ from prudential requirements in terms of substance and central administration rules;
- baseline requirements (specifying, amongst other things, that staff members should be able to return to the premises on short notice in case of need and providing a list of criteria to be respected (e.g. telework time should be limited, at least one authorised manager to be on-site all the time, head-office remains the decision-making centre, etc.);
- internal organisation and internal control framework, covering in particular the risk management requirements, obligation to determine a telework policy, monitoring of the compliance with such telework policy, and controls by internal control functions over telework; and

- requirements related to ICT and security risks, specifying rules in terms of, amongst other things, policies and procedures, risk awareness, access rights, remote access devices, telework infrastructure, security of connections, review of the communication chain security, technology watch and logging.

The new circular will enter into force on 30 September 2021 (save exceptional circumstances, e.g. COVID-19 pandemic).

AFM and DNB consult on revised regulation on sound remuneration policies

The Netherlands Authority for the Financial Markets (AFM) and the Dutch Central Bank (DNB) are consulting on a revised Regulation on Sound Remuneration Policies (Regeling beheerst beloningsbeleid Wft 2021, Rbb 2021). The new regulation would replace the current 2017 regulation (Rbb 2017). The changes in the Rbb 2021 compared to the Rbb 2017 mainly concern the implementation of the Investment Firm Directive (2019/2034/EU) in Article 3 and the newly added Annex B. Annex A of the Rbb 2021 contains the remuneration rules for banks and investment firms that fall or will continue to fall within the scope of the CRR, and contains some textual adjustments and corrections to better reflect the wording of CRD4. Annex C contains the remuneration rules for premium pension institutions and has not been altered. Interested parties are invited to respond to the proposed Rbb 2021 by 14 May 2021.

Amendments to the Act – Banking Law published

The Act Amending the Act – Banking Law and Certain Other Acts of 25 February 2021 has been published in the Journal of Laws of the Republic of Poland.

The amendments are aimed at adjusting Polish law to the EU's CRD5/CRR2 package concerning capital requirements for financial institutions.

Polish Financial Supervision Authority publishes amendments to Recommendation R

The Polish Financial Supervision Authority (KNF) has published amendments to Recommendation R. The Recommendation is a collection of best practices concerning the classification of credit exposures and the estimating and recording of expected credit losses, in accordance with the accounting and credit risk management policy adopted by and in force at banks.

The document is addressed to Polish banks and branches of foreign banks in the meaning of the Act – Banking Law that draw up consolidated or individual financial statements in accordance with MSR/MSSF, entities subject to consolidated reporting by a bank, whose core business generates a credit risk, and foreign branches of Polish banks.

The Recommendation comes into force on 1 January 2022.

Polish Financial Supervision Authority sets out actions for implementation of Capital Market Development Strategy

KNF has announced that it has finished consultations concerning the introduction of the so-called single banking licence (which was one of the major requirements of the Capital Market Development Strategy).

Among other things, the assumptions developed during the consultations provide for the following:

- simplification of the licensing procedures to which brokerage offices, banks conducting investment activity outside the office structures and banks maintaining securities accounts (custodian banks) would be subject;
- organisational separation of a brokerage office, with simultaneous relaxation of the terms of separation (allowing certain legal requirements to be fulfilled by the bank as a whole, to simplify organisational solutions in banks, enabling the application of a uniform approach towards the customer in individual areas of the bank's activity); and
- expansion of the scope of investment activity and investment services of banks outside the structure of a brokerage office, maintaining brokerage offices' exclusivity with regard to the provision of investment services concerning instruments admitted to organised trading and the conduct of public offerings with prospectuses.

ASIC extends temporary financial advice relief measure in COVID-19 instrument

The Australian Securities and Investments Commission (ASIC) has announced that it will extend one of three temporary relief measures designed to help the financial advice industry in providing consumers with affordable and timely advice during the COVID-19 pandemic. The original relief measures, which were announced on 14 April 2020, are set out in ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 which expired on 15 April 2021.

ASIC intends to extend the relief measure that allows financial advisers to provide a record of advice rather than a statement of advice to existing clients requiring financial advice due to the impact of the pandemic. The record of advice relief measure, which is set out in a new legislative instrument ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2021/268, has been extended to 15 October 2021.

ASIC has indicated that the other two measures set out in ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 will not be extended. ASIC will continue to monitor the appropriateness of the temporary relief related to records of advice in light of the impact of the COVID-19 pandemic on the demand for financial advice.

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RECENT CLIFFORD CHANCE BRIEFINGS

The China International Commercial Court – a supportive forum for international commercial arbitration

As the China International Commercial Court (CICC) approaches its third anniversary, this briefing gives some insight into its operation based on our recent experience acting as international counsel for the prevailing parties. Such insight is valuable, as the CICC is still relatively unfamiliar to many, having published under 15 judgments. In this case, the CICC was asked to set aside two China-seated CIETAC arbitral awards made in our client's favour. The CICC declined to set aside the awards and demonstrated an approach consistent with other well-developed, arbitration-friendly jurisdictions.

https://www.cliffordchance.com/briefings/2021/04/the-china-international-commercial-court--a-supportive-forum-for.html