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BRRD: Delegated Regulation on contractual recognition of stays published in Official Journal

[Commission Delegated Regulation \(EU\) 2021/1340](#) setting out regulatory technical standards (RTS) on the contractual recognition of stay powers under Article 71a(5) of the Bank Recovery and Resolution Directive (BRRD) has been published in the Official Journal.

Delegated Regulation (EU) 2021/1340 sets out the mandatory content for the contractual terms required in financial contracts governed by third country law and entered into by relevant institutions and entities whereby the parties recognise that the contract may be subject to the exercise of powers by a Member State resolution authority to suspend or restrict rights and obligations.

The Delegated Regulation enters into force on 5 September 2021.

Investment firms: EU Commission adopts RTS on remuneration and risk-takers

The EU Commission has adopted two delegated regulations setting out RTS on [remuneration](#) and [risk-takers](#) under the Investment Firms Directive (IFD).

The RTS on remuneration specify the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate to be used for the purposes of variable remuneration.

The RTS on risk-takers specify appropriate criteria to identify categories of staff whose professional activities have a material impact on the risk profile of an investment firm or of the assets that it manages.

The RTS will now be subject to scrutiny by the EU Parliament and Council. If there are no objections, the RTS will apply from the fifth day following their publication in the Official Journal.

ECON Committee publishes report on pilot regime for DLT

The EU Parliament Committee on Economic and Monetary Affairs (ECON) has published its [report](#) on the proposal for a regulation on the establishment of a temporary common EU pilot regime for market infrastructures based on distributed ledger technology (DLT). The proposed regime would allow market infrastructures to experiment with restricted uses of DLT under exemptions from the requirements of certain financial services legislation. It is part of the EU Commission's wider digital finance strategy which was published in September 2020.

In the report, which was adopted on 13 July 2021, the MEPs recommend that:

- the scope of the regime be limited to:
- shares with a market capitalisation of less than EUR 200 million;
- bonds with an issuance size of less than EUR 500 million;
- exchange traded funds with an issuance size of less than EUR 500 million; and
- UCITs with an issuance size of less than EUR 500 million;

- new entrants are required to comply with the same requirements as authorised investment firms or market operators in order to access the pilot regime;
- the European Securities and Markets Authority (ESMA) is granted a direct supervisory mandate to grant permissions and exemptions to DLT market infrastructures across the EU, after consulting with national competent authorities; and
- ESMA is required to publish annual interim reports during the lifecycle of the pilot regime on key trends, risks and vulnerabilities.

ECB and SEC publish MoU on OTC derivatives supervisory cooperation for security-based swap entities

The European Central Bank (ECB) has published a [memorandum of understanding](#) (MoU) it has signed with the US Securities and Exchange Commission (SEC) concerning consultation, cooperation and the exchange of information related to the supervision and oversight of certain cross-border over-the-counter (OTC) derivatives entities in connection with the use of substituted compliance by such entities.

The MoU prepares for the registration of ECB-supervised entities as security-based swap dealers or major security-based swap participants in the US. In particular, the MoU is intended to:

- address requirements of the Securities Exchange Act of 1934 in order to enable the SEC to permit the entities to satisfy certain US requirements by complying with comparable EU and national requirements; and
- provide the SEC with tools to monitor and enforce ongoing compliance with any substituted compliance order and with applicable laws and regulations.

The MoU took effect when signed by the authorities on 16 August 2021.

Global Foreign Exchange Committee publishes guidance and disclosure templates on last look trading

The Global Foreign Exchange Committee (GFEC) has published a [guidance paper](#) on last look trading within the FX market and [disclosure cover sheets](#) for liquidity providers and FX E-Trading platforms to provide information on their trading practices and operations, including for last look.

Last look is a practice used in electronic trading where a market participant has a final opportunity to accept or reject a trade request made on its quoted price. The guidance paper aims to provide clarity to market participants about the appropriate use of last look, and is intended to be read alongside the FX Global Code, which sets out principles of good practice for last look. The guidance paper reinforces Principle 17 of the FX Global Code by emphasising that the last look be applied in a fair and predictable manner, and that the process is intended to be used for the price and validity checks only, and for no other purpose. The main recommendations are:

- for liquidity providers to ensure a fair and effective last look process;
- for liquidity providers to enhance ex-ante disclosures; and
- to ensure information is available to regularly evaluate the handling of trade requests.

The GFEC has also published standardised disclosure cover sheets for liquidity providers and for FX E-Trading platforms to help support market participants to meet the disclosure and transparency principles within the FX Global Code.

FCA issues Dear CEO letter on investment-based crowdfunding

The Financial Conduct Authority (FCA) has issued a [letter](#) to the CEOs of firms active in the investment-based crowdfunding (IBCF) market. The letter sets out the key risks the FCA has identified in the market, the steps it is taking to address them, and its expectations of firms.

Key risks include inappropriate investments, scams, inadequate oversight of the activities of appointed representatives and disorderly firm failure. In light of these, the FCA expects firms to:

- request information from their customers before they invest in order to assess whether the investment opportunity offered is appropriate for them;
- make clear to potential investors what due diligence has been undertaken on the underlying recipients of the funding;
- be mindful of conflicts of interest between businesses who are raising money and consumers who are investing money, and either manage these conflicts or disclose them clearly to investors;
- take reasonable steps to ensure investors do not hold more than 10% of their portfolio in high risk or speculative investments;
- educate consumers about the risks of fraud and scams;
- maintain a high standard of operational resilience and put in place appropriate safeguards to ensure they are not promoting scams or inappropriate investments;
- ensure there are robust systems and controls for the oversight of their appointed representatives; and
- undertake regular reviews of the adequacy of their capital, liquidity and winddown plans.

BaFin applies updated ESMA guidelines on MMF Regulation stress test scenarios

The German Federal Financial Supervisory Authority (BaFin) has [announced](#) that it will apply the German translation of ESMA guidelines on stress test scenarios under the Money Market Funds (MMF) Regulation (Regulation (EU) 2017/1131 on money market funds) published on 29 June 2021.

In particular, as provided for in Article 28 (7) of the MMF Regulation, these guidelines establish common reference parameters of the stress test scenarios to be included in the stress test. In accordance with this provision, ESMA updates the guidelines at least every year taking into account the latest market developments.

In 2020, ESMA updated section 5 of the guidelines to ensure that MMF managers have the necessary information to complete the corresponding fields in the reporting template referred to in Article 37 of the MMF Regulation, as specified by Commission Implementing Regulation (EU) 2018/708. This

information includes specifications on the type of stress tests mentioned in section 5 and their calibration.

BaFin consults on updated interpretation and application guidance in relation to German Money Laundering Act

BaFin has launched a [consultation](#) on a draft [updated version](#) of its Interpretation and Application Guidance in relation to the German Money Laundering Act (Geldwäschegesetz – GwG).

BaFin provides this guidance in accordance with its obligation under section 51 paragraph 8 GwG. In particular, the updated version reflects recent changes made to the GwG by way of the Law for the European integration of transparency registers and for the implementation of Directive (EU) 2019/1153 on the use of financial information for combating money laundering, terrorist financing and other serious crimes (Transparenzregister- und Finanzinformationsgesetz), which entered into force on 1 August 2021.

The guidance applies to all obliged entities under the GwG that are under the supervision of BaFin.

Comments are due by 15 September 2021.

BaFin establishes Market Contact Group to intensify dialogue with market participants

BaFin has [set up](#) a Market Contact Group (MCG) as a central contact point to receive information from and maintain contact with market participants. The MCG has been operational since 16 August 2021.

The MCG is part of the same department as BaFin's Contact Point for Whistleblowers but primarily serves as an access channel for people who do not wish to remain anonymous. These may include hedge fund managers, short-sellers or journalists, i.e. groups that often possess valuable information that may help BaFin to identify risks in the financial market, or any misconduct by individuals or corporates, at an early stage.

The MCG will transmit information received to the relevant BaFin units or may also, if required, arrange for direct conversations between market participants and the competent department.

BaFin publishes circular on additional liquidity outflows for other products and services

BaFin has published a [circular](#) on additional liquidity outflows for other products and services pursuant to Article 23 of Delegated Regulation (EU) 2015/61, along with a related reporting form.

The circular applies to German less significant institutions (LSIs) and to institutions treated as Capital Requirements Regulation (CRR) institutions pursuant to section 1a of the German Banking Act (Kreditwesengesetz) and will enter into force on 1 September 2021.

It specifies the supervisory approach with regard to the application of Article 23 of Delegated Regulation (EU) 2015/61 and the corresponding provisions in Implementing Regulation (EU) 2021/451 (ITS on Reporting) on the additional liquidity outflows for other products and services that do not fall within the outflow categories of Articles 27 through 31a of Delegated Regulation (EU) 2015/61. In this context, the categories of products and services referred to in

Article 23 (1) (a) through (h) are defined in more detail and the liquidity outflows assigned to these products and services are specified.

In addition, the circular specifies the requirements and provides a reporting form for the reports to be provided at least once a year pursuant to Article 23 (2) of Delegated Regulation (EU) 2021/61 on the products and services referred to in Article 23 (1) for which the likelihood and potential volume of the liquidity outflows are material, and determines the outflows assigned to these products and services.

BaFin publishes revised MaRisk and BAIT as well as new circular on payment services supervisory requirements for IT

BaFin has published the sixth revised version of its [Minimum Requirements for Risk Management](#) (MaRisk). In particular, the revised version implements the European Banking Authority (EBA) NPE guidelines, outsourcing guidelines and ICT guidelines. Transitional periods for application of the new rules contained in the revised MaRisk are set out in BaFin's accompanying letter, while specifications of existing rules apply directly upon publication.

BaFin has also published a revised version of its [Supervisory Requirements for IT in Financial Institutions](#) (BAIT). The revised BAIT set out the framework conditions which BaFin now requires with respect to secure information processing and IT. The revised version applies directly as BaFin has only specified existing requirements.

In addition, BaFin has published its new Circular on [Payment Services Supervisory Requirements for IT](#) (ZAIT), in which it explains the supervisory requirements that payment and e-money institutions must observe with regard to IT security and data security. The circular is closely aligned with the MaRisk and BAIT and includes requirements from the EBA's ICT and outsourcing guidelines. The ZAIT apply immediately upon publication since they provide complementary interpretation of existing supervisory requirements, but the transition periods of the EBA guidelines apply accordingly.

BaFin states that banks may postpone individual credit obligations due to flood disaster

BaFin has [indicated](#) that banks may use existing supervisory law options to postpone credit obligations in individual cases where customers have been affected by the recent flood disaster, without a default being considered to have occurred with regard to the obligor.

Shortly after the outbreak of the COVID-19 pandemic, BaFin had already clarified in its frequently asked questions (FAQ) that banks may postpone liabilities on a case-by-case basis, i.e. not in the context of a general payment moratorium, without the obligor being considered in default as a result. The prerequisite is that interest is applied to the amounts postponed in line with the conditions originally agreed ('original effective interest rate'). In that case, the postponement will neither give rise to a 'past due material credit obligation' within the meaning of Article 178(1)(b) of the CRR nor constitute a 'distressed restructuring' within the meaning of Article 178(3)(d) of the CRR.

However, if the institution still considers it unlikely that the obligor will pay its credit obligations to the institution in full, a default will nevertheless be considered to have occurred in accordance with Article 178(1)(a) of the CRR.

Coronavirus: CSSF updates FAQs with regard to recommendation on restriction of distributions during pandemic

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has updated its [COVID-19 FAQs](#).

The CSSF has updated a number of its responses in light of the evolution of the COVID-19 pandemic and the related legal and regulatory texts. Amongst other things, it has clarified that (i) the amending EBA guidelines on payment moratoria (EBA/GL/2020/15) were not introduced in Luxembourg, as no new EBA compliant general payment moratorium was granted at local level beyond 30 September 2020, and (ii) the CSSF recommendations on dividend distribution and variable remuneration will apply until 30 September 2021 and banks should refrain from distributing interim dividends out of their 2021 profits until 30 September 2021. The FAQs also draw the attention of supervised entities to the entry into force on 30 September 2021 of Circular CSSF 21/769 on governance and security requirements for supervised entities to perform tasks or activities through telework.

The CSSF has also moved certain questions and answers to other CSSF FAQs, such as the FAQs on the law of 17 December 2010 and the Swing Pricing Mechanism – FAQs relating to undertakings in collective investment.

Finally, the CSSF has repealed certain questions and answers, including on the remuneration benchmarking exercise, on the prudential treatment of payment moratoria or on transitional or temporary deadlines, which are no longer applicable.

MAS revises notice on risk based capital adequacy requirements for banks incorporated in Singapore

The Monetary Authority of Singapore (MAS) has revised its existing [Notice 637](#) Risk Based Capital Adequacy Requirements for Banks Incorporated in Singapore.

The MAS Notice 637 has been revised to implement the framework for the treatment of major stake investments in financial institutions at the solo level.

The revised MAS Notice 637 was effective from 18 August 2021.

APRA issues further guidance on preparing for APRA Connect go-live

The Australian Prudential Regulation Authority (APRA) has [published](#) further information to assist entities in getting ready for APRA Connect, which will be available from 13 September 2021.

The latest guidance includes information on responsible persons and Banking Executive Accountability Regime (BEAR) information migration and reporting and final taxonomy artefacts. APRA expects all entities to prepare for APRA Connect production go-live and nominate their initial Regulatory Reporting Administrator via the D2A form RRA_PROD: APRA Connect nomination for 13 September go live, in readiness for production.

APRA has also scheduled a webinar for 1 September 2021 to provide entities with an overview of available information and support, which will include a demonstration of APRA Connect.

APRA publishes responses to submissions and final Prudential Practice Guide APG 220 Credit Risk Management

APRA has published its [responses](#) to submissions on its June 2021 proposals and the [final](#) Prudential Practice Guide APG 220 Credit Risk Management (APG 220). The APG 220 is intended to assist authorised deposit-taking institutions (ADIs) in making prudent lending decisions and meeting their requirements under the new Prudential Standard APS 220 Credit Risk Management (APS 220).

In response to feedback, APRA has issued a letter to ADIs to provide further clarity regarding its expectations for:

- the role of the Board in managing credit risk, aligning with the requirements in APS 220;
- sound credit assessment and approval processes, including providing examples where some additional flexibility could be considered prudent; and
- the use of automated valuation methods, including examples for the prudent development of scorecards and use of risk controls.

APRA expects Boards to have a strong focus on credit risk management, particularly for residential mortgage lending. It has encouraged ADIs to review the examples of better practice in APG 220 against their current credit risk management practices and make changes where appropriate.

RECENT CLIFFORD CHANCE BRIEFINGS

Do UK e-money and payment services firms hold safeguarded funds on trust?

The High Court has recently held (in *Re ipagoo*) that the customer funds of an insolvent UK authorised electronic money firm are not held on trust for customers. This conflicts with an earlier High Court decision (in *Re Supercapital*) which held that customer funds of an insolvent UK authorised payment services firm were held on trust and FCA guidance stating that both e-money and payment services firms hold their customer funds on trust.

The recent court decision gave a broad application to the statutory priority claims of customers in the insolvency of the e-money firm. However, the difference of view on the characterisation of customers' rights creates uncertainties for e-money and payment services firms.

This briefing discusses the recent court decision and what it means for e-money and payment services firms.

<https://www.cliffordchance.com/briefings/2021/08/do-uk-e-money-and-payment-services-firms-hold-safeguarded-funds-.html>

Luxembourg insurance regulator CAA amends cloud outsourcing rules

On 5 August 2021, the Luxembourg insurance supervisory authority Commissariat aux Assurances (CAA) adopted a new Circular Letter 21/15 on outsourcing to cloud computing service providers that applies to CAA supervised insurance and reinsurance undertakings.

More than a year ago, the CAA had already issued a circular letter (20/13) which informed of the full application by the CAA of the EIOPA guidelines on outsourcing to cloud service providers (EIOPA-BoS-20-002) and reminded (re-)insurance undertakings of their professional confidentiality (insurance secrecy) obligations. The new circular adopts the guidelines by setting them out in the text of the circular and integrates certain additional requirements of the CAA. The additional requirements relate to the setting up of an information security function, local expertise and competencies, the content of contracts and the related compliance assessment, the content of the cloud outsourcing notification to the CAA, insurance secrecy related aspects and the documentation in case of service interruptions.

This briefing provides an overview of the CAA specific requirements that are additional to or further specifying the guidelines and other legal or regulatory requirements relevant in this context.

<https://www.cliffordchance.com/briefings/2021/08/luxembourg-insurance-regulator-caa-amends-cloud-outsourcing-rul.html>

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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