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BRRD: Delegated Regulation on impracticability of contractual recognition of bail-in published in Official Journal

Delegated Regulation (EU) 2021/1527 supplementing the Bank Recovery and Resolution Directive (BRRD) with regard to regulatory technical standards (RTS) for the contractual recognition of write down and conversion powers has been published in the Official Journal.

The Delegated Regulation specifies:

- the conditions under which it would be legally or otherwise impracticable for an institution or entity to include, in the contractual provisions governing a relevant liability, the contractual term for the recognition of bail-in;
- the conditions for the resolution authority to require the inclusion of the contractual term; and
- the reasonable timeframe for the resolution authority to require the inclusion of the contractual term.

Until 6 October 2022, where a notification of impracticability is complex, the resolution authority may extend the timeframe for requiring the inclusion of the contractual term by six months, in order to allow the authority enough time to evaluate the notification. As from 7 October 2022, where the notification is complex, the resolution authority may extend the timeframe by three months.

Delegated Regulation (EU) 2021/1527 will enter into force on 7 October 2021.

MAR: EU Commission adopts RTS on cooperation arrangements with third countries

The EU Commission has published a Delegated Regulation dated 2 July 2021 supplementing the Market Abuse Regulation (MAR) with regard to RTS containing a template document for cooperation arrangements with third countries.

The Commission has endorsed the RTS following the European Securities and Markets Authority's (ESMA's) targeted consultation on the draft RTS with national competent authorities (NCAs) in 2019.

The RTS require NCAs, where possible, to use the template document contained in the annex where they conclude cooperation arrangements with supervisory authorities of third countries which fall under the scope of the RTS. They also impose personal data safeguards.

The Regulation will enter force 20 days after its publication in the Official Journal.

CRR: EBA publishes final guidance on assessing breaches of large exposure limits

The European Banking Authority (EBA) has published its final guidelines specifying the assessment criteria for exceptional cases when institutions exceed the large exposure limits and the time and measures to return to compliance.

The guidelines are intended to support competent authorities in their assessment of breaches of the large exposure limits set in the Capital Requirements Regulation (CRR) and ensure the CRR is applied in a prudent and harmonised manner, leading to a level playing field across the Single Market.

In the exceptional case that an institution breaches the large exposure limits, the CRR requires the institution to report the value of the exposure to the competent authority without delay. Where the circumstances warrant it, the institution is granted a limited period of time to comply with the limits. The guidelines provide guiding principles based on pre-defined criteria to help competent authorities decide on whether the exceptional circumstances leading to a breach of the large exposure limits would justify the decision to grant a limited period of time to the institution in order to comply with the limit.

The guidelines also provide criteria for competent authorities to determine the appropriate period of time as well as the specific measures to be taken for an institution to return to compliance with the large exposure limits.

Deposit Guarantee Schemes Directive: EBA publishes revised stress test guidelines

The EBA has published a final report setting out revised guidelines on stress tests conducted by national deposit guarantee schemes (DGSs) under the Deposit Guarantee Schemes Directive (DGSD).

The revised guidelines are based on the areas for improvement identified in the EBA's June 2020 peer review of the stress tests, and repeal and replace the earlier guidelines to further specify the requirements in relation to the design, execution and reporting of results. Revisions include:

- extending the scope of testing to cover all the interventions DGSs are legally mandated to perform, including reimbursing depositors, contributing to resolution and, depending on national law provisions, failure prevention and insolvency proceedings;
- requiring testing of the adequacy of all funding sources, including ex post contributions and alternative funding arrangements;
- strengthening cooperation between DGSs and public authorities by requiring stress test interventions where cooperation with other authorities is necessary;

- requiring DGSs to consider testing scenarios with additional business continuity challenges, such as a pandemic, ICT failures or other similar events; and
- a revised template for recording and submitting stress test results, with a submission deadline of 16 June 2024.

The revised guidelines applied from 15 September 2021.

SRB updates guidance on prior permissions regime

The Single Resolution Board (SRB) has published a communication providing an update on its approach to prior permissions for eligible liabilities, in line with the draft regulatory technical standards under Regulation (EU) 2019/876 (CRR2).

The communication summarises and explains the procedures that institutions should follow when seeking the SRB's permission to call, redeem, repay or repurchase eligible liabilities instruments before their contractual maturity. It is intended to assist institutions when applying to the SRB for permission in line with the requirements specified in the draft RTS.

The communication is intended to complement the guidance published by the SRB on 28 July 2021. The SRB has indicated that the communication should be read together with any future Q&A published by the EBA and the EU Commission.

IFPR: Financial Services and Markets Act 2000 (Prudential Regulation of FCA Investment Firms) (Definitions for the purposes of Part 9C) Regulations published

The Financial Services and Markets Act 2000 (Prudential Regulation of FCA Investment Firms) (Definitions for the purposes of Part 9C) Regulations (SI 2021/1046) have been made and laid before Parliament.

SI 2021/1046 amends the scope of the prudential consolidation definitions of 'group' and 'parent undertaking' under the new Investment Firm Prudential Regime (IFPR) set out in Part 9C of the Financial Services and Markets Act 2000 (FSMA) to reflect the scope of the relationships currently covered under the UK CRR.

It is anticipated that the IFPR will come into force on 1 January 2022.

The SI was made according to the negative procedure and, if not annulled by Parliament, comes into force on 6 October 2021.Legislation.gov.uk

Financial Services and Markets Act 2000 (Prudential Regulation of FCA Investment Firms) (Definitions for the purposes of Part 9C) Regulations (SI 2021/1046)

UK CRD5/CRR2: PRA publishes policy statement on financial holding companies

The Prudential Regulation Authority (PRA) has published a policy statement (PS20/21) setting out its final rules in respect of the application of existing consolidated prudential requirements to financial holding companies and mixed financial holding companies that have been approved or designated in accordance with Part 12B of the Financial Services and Markets Act 2000 (FSMA).

The rules were published for consultation in June 2021 but the PRA received no responses. It is therefore publishing the final rules without change from the version consulted upon. They comprise:

- an amendment to the PRA Rulebook;
- a new statement of policy, 'Supervisory measures and penalties in relation to financial holding companies'; and
- an updated statement of policy, 'The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure'.

The rules are intended to give effect to the fifth Capital Requirements Directive (CRD5) as transposed, and the second Capital Requirements Regulation (CRR2) as onshored, which impose direct responsibility for compliance with consolidated prudential requirements on approved or designated holding companies. They took effect on 15 September 2021.

German Federal Ministries publish draft ordinance on crypto fund units

The German Federal Ministry of Finance has published a draft ministerial ordinance on crypto fund units (Verordnung über Kryptofondsanteile, KryptoFAV), which it co-authored together with the German Federal Ministry of Justice and Consumer Protection.

The draft ordinance relates to the Act on Electronic Securities (Gesetz über elektronische Wertpapiere, eWpG), which entered into force on 10 June 2021. By way of amendment to the German Investment Code (Kapitalanlagegesetzbuch, KAGB), the eWpG created the possibility to issue electronic unit certificates for investment funds established in the legal form of special assets (Sondervermögen) by way of registration in a central register (zentrales Register).

To further strengthen Germany as a fund location, the KryptoFAV is designed additionally to enable providers of such investment funds to issue electronic unit certificates as so-called crypto unit certificates through registration in a crypto securities register (Kryptowertpapierregister).

The draft KryptoFAV establishes the general possibility to issue crypto fund units and for this purpose extends certain provisions of the eWpG to cover electronic unit certificates as well. The ordinance further stipulates that the registrar entity of a crypto securities register in which crypto fund units are registered is always the depositary of the investment fund itself, thereby ensuring that the depositary can fulfil its duties to the investor.

Comments are due by 1 October 2021.

BaFin applies ESMA guidelines on MiFID2/MiFIR obligations on market data

The German Federal Financial Supervisory Authority (BaFin) has announced that it will apply the German translation of ESMA guidelines on the MiFID2/ MiFIR obligations on market data, published by ESMA on 18 August 2021, in its supervisory practice from 1 January 2022.

The guidelines are intended to ensure that financial market participants have a uniform understanding of the requirement to provide market data on a reasonable commercial basis (RCB), including the disclosure requirements, as well as the requirement to provide the market data 15 minutes after publication (delayed data) free of charge. The guidelines are also intended to ensure that national competent authorities will have a common understanding and develop consistent supervisory practices when assessing the completeness, comprehensibility and consistency of the RCB and delayed data provisions.

Luxembourg Stock Exchange issues guidelines for listing SPACs

The Luxembourg Stock Exchange (LuxSE) has issued guidelines for listing special purpose acquisition companies (SPACs) at LuxSE.

The LuxSE believes that Luxembourg presents an attractive offering for SPAC sponsors and it seeks to act as the meeting place for market players wishing to tap into the potential of these instruments. In this context, and in alignment with ESMA's public statement regarding SPACs dated 15 July 2021 (ESMA32-384-5209), the LuxSE has released a framework to guide sponsors and other professional intermediaries to list SPACs on its markets, while protecting the interests of investors and market integrity.

In the guidelines, the LuxSE encourages sponsors of SPACs to take into account the following recommendations during the SPAC's structuring process:

- funds raised by a SPAC should be placed in an escrow account with a regulated financial institution and issuers shall document an order of priority for outgoing payments;
- the issuer should grant redemption rights to the SPAC shareholders and describe the conditions under which the rights can be exercised;
- the majority of shareholders should approve the business combination with the target company in a general meeting (de-SPAC process) and the issuer shall provide the shareholders with the information necessary to make an informed decision about the exercise of their redemption rights;
- in the prospectus accompanying the admission to trading, the issuer should describe its business strategy to deliver insights on the target industries and geographies where it seeks acquisition opportunities; and
- the timeframe for the consummation of the business combination shall be defined and limited in time.

The guidelines specify that both the regulated BdL market and the Euro MTF of LuxSE operate professional segments, which allow SPACs that do not target retail investors to restrict the shareholding to professional or qualified/well-informed investors.

Finally, the LuxSE has emphasised that, while the guidelines complement the general admission rules laid down in the Rules and Regulations of LuxSE, they do not constitute an exhaustive or mandatory list of features that SPACs should meet to secure admission by LuxSE.

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BRRD2: Draft implementation bill submitted to Dutch Parliament with changes to Article 48(7) implementation following consultation

The Dutch Ministry of Finance has submitted a draft bill which will, once enacted, implement the revised Bank Recovery and Resolution Directive (BRRD2) through the Financial Markets Supervision Act (Wet op het financieel toezicht) and Bankruptcy Act (Faillissementswet). The draft bill is entitled 'Implementation Act – loss absorption and recapitalisation capacity for banks and investment firms' (Implementatiewet verliesabsorptie- en herkapitalisatiecapaciteit banken en beleggingsondernemingen) and follows a consultation which closed in January 2020.

Amongst other things, BRRD2 implements the Financial Stability Board (FSB)'s total loss absorbing capacity (TLAC) standard through amendments to CRR, and revises the existing minimum own funds and eligible liabilities (MREL) regime to align it with the TLAC standard. Other reforms include amendments to requirements on the contractual recognition of bail-in, the introduction of a new moratorium power for resolution authorities and the introduction of requirements on the contractual recognition of resolution stay powers.

The draft bill introduces the Dutch implementation of the new Article 48(7) of BRRD by means of an amendment to the Bankruptcy Act. The proposed Article 212rf of the Bankruptcy Act copied the text of the BRRD almost verbatim, but following the consultation it has been expanded to the effect that:

- the hierarchy of claims resulting from capital instruments in bankruptcy has been codified, thus creating a statutory ranking which follows the CRR own funds and BRRD resolution order;
- fully disqualified capital instruments will rank between tier 2 capital and statutory senior non-preferred instruments, unless stipulated otherwise in the terms and conditions of the instruments; and
- cross references in contractual (pari passu) ranking provisions are put aside in respect of fully disqualified capital instruments, thus avoiding infection risk.

CNMV consults on management and monitoring of liquidity of collective investment schemes

The Spanish Securities Market Commission, the Comisión Nacional del Mercado de Valores (CNMV), has launched a public consultation on a draft technical guide on the management and monitoring of liquidity of collective investment schemes (Instituciones de Inversión Colectiva, ICC).

The draft technical guide sets out what should be included in the procedures of ICC management companies to ensure adequate management and monitoring of the liquidity risk of their ICC in order to avoid damage and conflicts of interest among investors.

The public consultation will end on 15 October 2021.

FINMA issues further guidance on LIBOR transition

The Swiss Financial Market Supervisory Authority (FINMA) has issued further guidance (03/2021) on the transition away from LIBOR, providing an update on the progress of the transition process. FINMA considers banks to be essentially on track with the roadmap, but notes that some product categories, and syndicated loans in particular, are still trailing behind.

To counteract inadequate preparation by financial institutions, FINMA set out its expectations and concrete milestones in its guidance 10/2020. FINMA is once again calling on all financial market participants to press ahead with their preparations for the LIBOR transition as a matter of highest priority. To this end, guidance 03/2021 sets out best practices to help institutions overcome the residual risks. FINMA will continue to monitor the LIBOR transition closely and has indicated that, if banks continue to enter into new business transactions referencing LIBOR, this can be regarded as a violation of the supervisory requirements with regard to adequate risk management, except in strictly limited and documented exceptional cases. FINMA has indicated that, if it discovers that certain institutions are insufficiently prepared for the LIBOR transition, it will take institution-specific measures.

FINMA issues its first approval for an exchange and a central depository for the trading of tokens

FINMA has issued two approvals to operate financial market infrastructures based on distributed ledger technology (DLT). In particular, FINMA has authorised SIX Digital Exchange AG to act as a central securities depository and the associated company SDX Trading AG to act as a securities exchange. This is the first time that a licence has been issued in the Swiss financial centre for infrastructures that facilitate the trading of digital securities in the form of tokens and their integrated settlement.

FINMA recognises the innovative potential of new technologies for the financial markets. In order to facilitate innovation, it seeks to apply the existing provisions of financial market law in a consistently technology-neutral way, i.e. in keeping with the 'same risks, same rules' principle, while also ensuring that the protective goals of financial market legislation are preserved.

Business models for the multilateral trading or settlement of securities based on DLT can be approved in one of two ways. First, in the traditional form of approval as a securities exchange or central securities depository as per the Financial Market Infrastructure Act (FMIA). This presupposes that the corresponding offering will only be open to supervised financial institutions. Alternatively, trading in DLT securities can now be approved on the basis of the DLT Act. An approval to operate a DLT trading facility allows organisations to obtain a single licence for the trading and settlement of DLT securities. Furthermore, in this case it is also possible to offer the service to end clients, as long as the corresponding additional requirements – e.g. provisions on combating money-laundering and the relevant provisions of the Financial Services Act – are complied with.

The licences granted to SDX took the traditional route, namely approval to act as a securities exchange and central securities depository as per the FMIA. The SDX offering is aimed at supervised financial institutions.

FINMA calls on portfolio managers and trustees to submit licence applications in good time

FINMA has recommended that portfolio managers and trustees who are required by the Financial Institutions Act (FinIA) to submit their licence application by 31 December 2022 do so in good time.

Some 2,400 of those already operating prior to 1 January 2020 have so far registered with FINMA. Of these, only around 180 have submitted a licence application to FINMA. This is approximately equivalent to 7% of all portfolio managers and trustees required to be licensed. Thomas Hirschi, the Head of FINMA's Asset Management division, has recommended that anyone wishing to avoid longer waiting times and uncertainties should not leave the licence application to the last minute but submit it as soon as possible.

Before portfolio managers and trustees can submit a licence application to FINMA, they must obtain the confirmation of a supervisory organisation (SO) for a possible affiliation. This step in the process should also be taken into account in the planning. The SOs are set to be confronted with a high number of applications in 2022 and FINMA has warned that, if large quantities of applications are submitted simultaneously, this will naturally slow down the processing of each individual case.

FINMA has emphasised that the responsibility for submitting applications on time lies with the portfolio managers and trustees and that, in order for the SO to be able to deal with an application on time, it needs to be submitted early on as otherwise the company affected may miss the legal deadline. If the application is received by FINMA after the deadline, this would mean that the company is operating without authorisation, which could entail consequences under criminal law. However, Hirschi notes that submitting the application on time but shortly before the deadline can also lead to uncertainties for companies awaiting authorisation, as their customers and custodian banks will not know automatically from 2023 who is waiting for a licence or who is operating without authorisation. This is another reason why FINMA believes it is advantageous to establish clarity beforehand. In consultation with the SOs, it therefore recommends that the portfolio managers and trustees concerned submit their applications as soon as possible to their SO and by 30 June 2022 at the latest.

The deadline of 31 December 2022 also applies to occupational pension scheme managers previously licensed by the Occupational Pension Supervisory Commission (OPSC). They have to submit their licence application by this date either as managers of collective assets or as portfolio managers, depending on the amount of the pension fund assets under management. Managers of foreign collective investment schemes that manage assets below certain thresholds and until now have only been subject to the anti-money laundering regulations must also submit a licence application as portfolio managers by the end of 2022.

SFC provides guidance on implementation of Hong Kong investor identification and OTC securities transactions reporting regimes

The Securities and Futures Commission (SFC) has issued a circular to intermediaries setting out the provisions regarding the implementation of the Hong Kong investor identification regime (HKIDR) and over-the-counter securities transactions reporting regime (OTCR). The circular is intended to provide guidance to licensed corporations and registered institutions subject to the HKIDR and OTCR (relevant regulated intermediaries) on their main obligations under the HKIDR and the OTCR, as well as a roadmap and indicative timeline for the implementation of the HKIDR and the OTCR.

The SFC has also issued another circular which is intended to set out the requirements to be observed for obtaining express consent from individual clients as required under paragraphs 5.6(p) and 5.7(h) of the Code of Conduct for Persons Licensed by or Registered with the SFC for the transfer of their personal data to the Stock Exchange of Hong Kong (SEHK) and/or the SFC under the HKIDR and OTCR. Such consent may be obtained by written and signed acknowledgement on paper, or by electronic means or by phone.

The circulars follow the SFC's August 2021 consultation conclusions on proposals to implement the HKIDR and the OTCR.

The HKIDR and OTCR will be implemented tentatively in the second half of 2022 and the first half of 2023 respectively. The SFC has indicated that it will organise relevant briefing sessions in the fourth quarter of 2021 to familiarise market participants with the HKIDR and the OTCR.

SFC concludes consultation on anti-money laundering guidelines

SFC has published the conclusions to its September 2020 consultation on proposed amendments to anti-money laundering and counter-financing of terrorism (AML/CFT) guidelines. The amendments are intended to align the guidelines with the Financial Action Task Force (FATF)'s AML/CFT standards, which include additional guidance to facilitate the implementation of risk-based AML/CFT measures by securities industry participants.

The SFC has confirmed that, while the proposals received broad support, a considerable number of comments were made on the requirements for cross-border correspondent relationships. In this regard, the revised guidelines provide greater clarity and additional flexibility in meeting the requirements.

The revised AML/CFT guidelines will become effective upon their gazettal on 30 September 2021, with the exception of the new cross-border correspondent relationships requirements, which will take effect on 30 March 2022.

The SFC has also published an updated set of frequently asked questions (FAQs) on AML/CFT to help the industry understand the application of requirements relating to simplified customer due diligence, cross-border correspondent relationships, persons purporting to act on behalf of the customer (PPTA), and third-party deposits and payments.

HKMA and People's Bank of China announce launch of Southbound Trading under Bond Connect

The Hong Kong Monetary Authority (HKMA) and the People's Bank of China (PBoC) have jointly announced 24 September 2021 as the launch date of the Southbound Trading under Bond Connect (Southbound Bond Connect). The Southbound Bond Connect is an arrangement that is intended to provide Mainland China institutional investors with a channel to invest in the Hong Kong bond market via the connection between Mainland China and Hong Kong financial infrastructure services institutions. Amongst other things, the regulators have provided the following guidance:

- the Southbound Bond Connect will abide by the relevant laws and regulations of the bond markets of Mainland China and Hong Kong. The implementation rules for the Southbound Bond Connect will be separately specified;

- regulators of Mainland China and Hong Kong bond markets will respectively take all necessary measures to establish, in the interest of investor protection, effective mechanisms under Southbound Bond Connect to respond to any misconduct in a timely manner; and
- financial infrastructure services institutions of Mainland China and Hong Kong will be required to provide financial infrastructure services to Southbound Bond Connect market participants in an orderly manner and with prudent risk management, and assist Mainland China institutional investors to understand the laws, regulations and operational rules of the Hong Kong bond market as well as prudently assess investment risks and make preparations for entering the Hong Kong bond market.

Following the announcement, the HKMA and the PBoC have amended and signed the memorandum of understanding on supervisory cooperation to enhance supervisory cooperation arrangements and liaison mechanisms in order to maintain the stability of financial markets and fair trading.

HKMA sets out implementation arrangements for cross-boundary wealth management connect pilot scheme in Greater Bay Area

HKMA has issued a circular to set out for registered institutions in Hong Kong the implementation arrangements and specific regulatory requirements regarding the pilot cross-boundary wealth management connect scheme in the Guangdong-Hong Kong-Macao Greater Bay Area (WMC scheme).

Under the WMC scheme, eligible residents in the Mainland China cities in the Greater Bay Area and Hong Kong can invest in wealth management products distributed by banks in each other's market through a closed-loop funds flow channel established between the banking systems of the two jurisdictions. The WMC scheme comprises the Southbound scheme and the Northbound scheme and will cover relatively simple investment products with low to medium risk.

Institutions with retail banking or private banking business and registered under the Securities and Futures Ordinance for carrying out Type 1 (dealing in securities) regulated activity can carry out wealth management connect business in Hong Kong. Hong Kong banks that participate in business activities under the WMC scheme must comply with requirements on investor eligibility, account opening, cross-boundary remittance, quota management, product due diligence, promotion and sale, controls and supervision, staff knowledge and training, complaint handling mechanism, reporting obligations and other requirements set out in the circular.

Detailed regulatory requirements in respect of the Southbound and Northbound schemes are set out in Annex 1 and Annex 2 to the circular respectively. The HKMA has also published a set of frequently asked questions to provide guidance on the WMC scheme.

The HKMA has indicated that it will conduct supervisory work, including but not limited to on-site examinations and off-site surveillance, on the activities of Hong Kong banks under the cross-boundary WMC.

MAS responds to feedback received on proposals regarding market risk capital requirements and consults further on draft standards for market risk capital and

capital reporting requirements for Singapore-incorporated banks

The Monetary Authority of Singapore (MAS) has published its response to the feedback it received on its May 2019 public consultation on the proposed implementation of the final Basel III reforms in Singapore pertaining to the proposals on market risk capital requirements.

Regarding the use of the simplified standardised approach for calculating market risk capital requirements (SSA(MR)), the MAS has confirmed that it will generally consider a bank's market risk portfolio to be small if its risk-weighted assets (RWA) for market risk, excluding credit valuation adjustment RWA, using the SSA(MR) is SGD 200 million or less, or is 2% or less of the bank's total RWA.

The MAS has also incorporated the response to the feedback received into the draft standards for market risk capital requirements for Singapore-incorporated banks and has launched a public consultation on draft standards relating to market risk capital and capital reporting requirements in the MAS Notice 637 on Risk Based Capital Adequacy Requirements for Banks Incorporated in Singapore.

The MAS intends to implement the revised standards for market risk capital for supervisory reporting purposes from 1 January 2023, and for the purposes of compliance with capital adequacy and disclosure requirements from 1 January 2023 or later.

Comments on the consultation are due by 13 October 2021.

RECENT CLIFFORD CHANCE BRIEFINGS

Synthetic LIBOR and UK contractual continuity – Critical Benchmarks (References and Administrators' Liability) Bill

On 8 September, a UK Bill to address synthetic LIBOR and contractual continuity was introduced into the House of Lords: the Critical Benchmarks (References and Administrators' Liability) Bill.

This short, high level briefing provides some context and outlines a few of the focus areas which we will be monitoring and assessing during the legislative process.

https://www.cliffordchance.com/briefings/2021/09/synthetic-libor-and-uk-contractual-continuity.html

Digital developments in the capital markets – summer 2021

Blockchain and DLT have the potential to transform how securities are issued, traded and settled. However, the adoption of technology in the capital markets has not matched take-up in other areas of finance and trade and, so far, is used for enhancing existing elements of the process rather than replacing it with something new.

This briefing explores the reasons for this and sharing experience of some of the developments in this area and other uses of technology in the capital markets.

https://www.cliffordchance.com/briefings/2021/09/digital-developments-in-the-capital-markets---summer-2021.html