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Capital Markets Union: EU Commission adopts ESAP/ELTIFs/AIFMD/MiFIR proposals

The EU Commission has adopted a package of measures aimed at further integrating EU capital markets.

Adopted as part of the 2020 Capital Markets Union (CMU) action plan, the legislative proposals include:

- a regulation to establish a European Single Access Point (ESAP) for public financial and sustainability-related information about EU companies and investment products;
- amendments to the European Long-Term Investment Funds (ELTIFs) Regulation aimed at broadening the scope of eligible assets and investments, reducing certain fund rule limitations and introducing an additional liquidity window redemption mechanism for early exit;
- targeted amendments to the Alternative Investment Fund Managers Directive (AIFMD), including common rules on loan-originating funds, harmonised liquidity management tools, improved availability of depositaries, and clarification of delegation rules; and
- amendments to the Markets in Financial Instruments Regulation (MiFIR) and Directive (MiFID), including establishing an EU-wide consolidated tape for shares, bonds, exchange-traded funds (ETFs) and derivatives,

adjusting the derivative trading obligation and the share trading obligation, and removing the open access obligation for exchange-traded derivatives.

The Commission intends to bring forward further CMU actions in 2022, including a proposal on listing, an open finance framework, an initiative on corporate insolvency and a financial competence framework.

EU Commission consults on Mortgage Credit Directive review

The EU Commission has launched a consultation on its review of the Mortgage Credit Directive.

The EU Commission is seeking views on the functioning of and possible improvements to the existing Mortgage Credit Directive framework. The review aims to assess whether current rules are adapted to new challenges, in particular:

- digitalisation;
- the need to enhance sustainability; and
- the COVID-19 crisis.

Comments are due by 14 February 2022.

EU Commission launches consultation on Listing Act

The EU Commission has launched a public consultation on the Listing Act to gather evidence on regulatory barriers to companies' listing.

The aim of the consultation is to simplify the listing requirements, including post-listing, in order to make public capital markets more attractive for EU companies and facilitate access to capital for small businesses. The Commission has indicated that it will also take into account feedback and proposals already put forward by the Technical Expert Stakeholder Group on SMEs, the High-Level Forum on Capital Markets Union and other stakeholders.

In parallel to the open public consultation, the Commission has launched a targeted consultation seeking more technical views, in particular from Member States, national competent authorities and the European Securities and Markets Authority (ESMA), market participants including SMEs (listed SMEs and those seeking a listing), businesses other than SMEs, stock exchanges, retail and institutional investors, consumer and investor organisations, brokers, key advisers that support companies through the IPO stage and other service providers. The questions asked in the open public consultation also feature in the targeted consultation, together with additional and more technical questions, and stakeholders are advised to reply to only one of the two versions to avoid unnecessary duplications.

Comments are due by 11 February 2022.

SRB publishes 2022 work programme

The Single Resolution Board (SRB) has published its work programme for 2022.

Developed in line with the SRB's 2021-2023 multi-annual programme (MAP) and structured around the same strategic areas, the SRB's priorities for 2022 cover, among other things:

- achieving resolvability of SRB banks and less significant institutions (LSIs), including implementing the SRB Expectations for Banks (EfB), operationalising resolution plans, and enhancing the internal framework on deep-dives and on-site inspections;
- fostering a robust resolution framework, including updating and enhancing the minimum requirement for own funds and eligible liabilities (MREL) policy, operationalising the single point of entry (SPE), introducing additional policy enhancements for the public interest assessment (PIA), and introducing operational guidance for the assessment of the identification and mobilisation of collateral;
- preparing and carrying out effective crisis management in relation to crisis preparedness and resolution action, including conducting dry-run exercise testing; and
- operationalising the Single Resolution Fund (SRF), with a focus on contributions, investments, and funding and financing.

UCITS: EU Parliament adopts PRIIPs KIDs amendments

The EU Parliament has adopted legislative amendments concerning the use of key information documents (KIDs) under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation by management companies of undertakings for collective investment in transferable securities (UCITS).

Among other things, the amendments:

- extend the transitional arrangement for management companies, investment companies and persons advising on, or selling, units of UCITS and non-UCITS from the requirement to provide retail investors with a PRIIPs KID to 31 December 2022; and
- set out that PRIIPs KIDS will be considered as satisfying the key investor requirements for UCITS from 1 January 2023.

Once formally adopted by the EU Council, the legislation will enter into force on the day following its publication in the Official Journal.

Digital finance: EU Council adopts negotiating mandate on MiCA and DORA

The EU Council has adopted its negotiating mandate on the proposal for a regulation on markets in cryptoassets (MiCA) and the proposed Digital Operational Resilience Act (DORA), which are part of the EU Commission's digital finance package.

MiCA is intended to establish a harmonised regulatory framework for the administration, offering and trading of cryptoassets, while DORA aims to create a regulatory framework on digital operational resilience whereby all firms ensure they can withstand all types of ICT-related disruptions and threats, in order to prevent and mitigate cyber threats.

The Council and the EU Parliament will now begin trilogue negotiations on these proposals. Once a provisional political agreement is found between their negotiators, both institutions will formally adopt the regulations.

Digital finance: EU Parliament and Council reach political on proposed pilot regime for DLT

The EU Parliament has reached a political agreement with the EU Council on the proposed 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.

The press release highlights the following points agreed by negotiators:

- the scope of the regime will be limited to shares with a market capitalisation of less than EUR 500 million, bonds with an issuance size of less than EUR one billion, corporate bonds with an issuance size of less than EUR 200 million, and UCITs with an issuance size of less than EUR 500 million;
- additionally, operators of DLT can admit new financial instruments only until their total market value reaches EUR six billion;
- the DLT settlement and DLT trading and settlement systems will be exempt from certain financial services rules but must have in place adequate safeguards to protect investors, including clearly defined liability to clients for any losses due to operational failures;
- new entrants must comply with the same requirements as authorised investment firms or market operators in order to access the pilot regime. These requirements will be technology neutral and based on the services provided and risks posed; and
- development and investments in low or zero emission DLTs will be strongly encouraged in line with the EU's climate policies.

MiFID2 Quick Fix: ESMA publishes final report on commodity derivatives technical standards

The European Securities and Markets Authority (ESMA) has published its final report on draft technical standards for commodity derivatives required under Directive (EU) 2021/338 (MiFID2 Quick Fix), which was adopted as part of the Capital Markets Recovery Package aimed at facilitating the EU's economic recovery from the COVID-19 pandemic.

The report sets out ESMA's final proposals for technical standards relating to the application of position limits to commodity derivatives, including:

- draft regulatory technical standards (RTS) on the calculation methodology for position limits, to specify the procedures for applying for a hedging exemption and for a liquidity provision exemption;
- amendments to implementing technical standards (ITS 4) on the format of position reports by investment firms and market operators to reflect that securitised derivatives are no longer within the position reporting regime; and

- draft RTS on position management controls.

The EU Commission has until 19 February 2022 to decide whether to endorse the proposals.

EMIR: ESMA consults on clearing thresholds

ESMA has launched a consultation on a review of the clearing thresholds under the European Market Infrastructure Regulation (EMIR).

Regulation (EU) 2019/834 (EMIR REFIT) introduced a mandate in EMIR for ESMA to periodically review the clearing thresholds and update them where necessary to ensure that the thresholds remain appropriate.

The consultation aims to:

- seek feedback on the effectiveness and proportionality of the EMIR clearing thresholds; and
- report ESMA's analysis of the current position under the EMIR REFIT Regulation.

Comments are due by 19 January 2022.

Investment firms: EBA publishes final guidelines on internal governance and remuneration under IFD

The European Banking Authority (EBA) has published two final reports setting out revised guidelines on internal governance and revised guidelines on sound remuneration policies for class 2 investment firms under the Investment Firms Directive (IFD).

The guidelines on internal governance specify:

- the tasks, responsibilities and functioning of the management body;
- the organisation of investment firms, including the need to create transparent structures; and
- requirements aimed at ensuring the sound management of risks, including detailed requirements in relation to the compliance function, independent risk management and the internal audit function, where applicable.

The guidelines on remuneration specify the respective governance arrangements and processes which should be applied to remuneration policies and variable remuneration of identified staff, and for ensuring policies are gender-neutral.

Both sets of guidelines enter into force on 30 April 2022.

CRR: EBA publishes final draft RTS on calculating risk weighted exposure amounts

The EBA has published its final draft RTS on calculating the risk-weighted exposure amounts in the context of the mandate-based approach (MBA) when there are some missing inputs.

The Capital Requirements Regulation (CRR) mandates the EBA to specify how institutions should calculate the risk-weighted exposure amount in the context of the mandate-based approach where one or more of the inputs required for that calculation are not available.

The draft RTS contribute to the calculation of own funds requirements for the exposures in the form of units or shares in collective investment undertakings (CIUs) under the standardised approach (SA) for credit risk. In particular, the RTS provide clarification on the regulatory treatment for missing inputs when the underlying risk of derivatives is unknown, as well as for the computation of the exposure value for counterparty credit risk. They also account for situations where the notional amount of a netting set needs to be computed or for when the identification of netting sets is not feasible.

The draft RTS explain what is considered as insufficient information versus missing inputs and clarify whether market measures provide sufficient information for the application of the MBA for exposures to CIUs.

CRD 4: ITS on benchmarking of internal models published in Official Journal

Commission Implementing Regulation (EU) 2021/1971 laying down amendments to Implementing Regulation (EU) 2016/2070 on benchmarking of internal models under the Capital Requirements Directive (CRD 4) has been published in the Official Journal.

Regulation 2021/1971 sets out ITS for templates, definitions, and IT-solutions to be used by institutions when reporting to the EBA and competent authorities under Article 78(2) of CRD 4.

Previous benchmarking exercises highlighted the potential for improving some definitions and reporting instructions contained in Regulation 2016/2070, which specified the reporting requirements for institutions to enable competent authorities to monitor the range of risk weighted exposure amounts or own funds requirements for the exposures or transactions in the benchmark portfolio resulting from the internal approaches of those institutions, and to assess those approaches.

The amending ITS will enter into force on 9 December 2021.

CRD 4: Commission Implementing Regulation on benchmarks reporting published in Official Journal

Commission Implementing Regulation (EU) 2021/2017 amending Implementing Regulation (EU) 2016/2070 as regards benchmark portfolios, reporting templates and reporting instructions to be applied in the EU under CRD 4 has been published in the Official Journal.

The amendments contained in the Regulation include two new annexes which reflect the new rules introduced by International Financial Reporting Standard 9 (IFRS9), one with templates for reporting the IFRS9 impact and the other with instructions for completing those templates. Other amendments reflect the draft (ITS submitted by the EBA.

The Regulation will enter into force on 16 December 2021.

FSB publishes statement on preparations for LIBOR cessation

The Financial Stability Board (FSB) has published a statement to support preparations for LIBOR cessation.

The FSB states that it is critical that market participants act urgently to complete any remaining steps set out in the FSB's Global Transition Roadmap, which was published in June 2021.

The FSB reports that significant progress has been made in transitioning to risk-free rates (RFRs), but market participants still need to finalise preparations to cease new use of LIBOR by end-2021. Considering the significant use of USD LIBOR globally, the FSB believes it is important to reinforce the message and timeline from supervisors globally to ensure there is no interruption to new business and financing. The FSB recognises the widespread use of USD and other LIBORs in emerging markets and developing economies and therefore considers engagement with emerging markets and developing economies to be a key part of LIBOR transition globally.

The FSB recommends that transition should be primarily to overnight RFRs, to avoid reintroducing the weaknesses of LIBOR. The FSB recognises that in some cases there may be a role for RFR-derived term rates and has set out the circumstances where the limited use of RFR-based term rates would be compatible with financial stability.

The FSB emphasises that active transition of legacy contracts remains the best way for market participants to have control and certainty over their contract terms, and provides a permanent solution and the ability to move to overnight RFRs, compounded in arrears. Synthetic LIBOR is being made available as a temporary bridging solution for legacy contracts only, and should not be directly or indirectly referenced in any new contracts.

The FSB intends to continue monitoring the final steps in completing LIBOR transition.

FSB publishes 2021 G-SIB list

The FSB has published the 2021 list of global systemically important banks (G-SIBs) using end-2020 data and an assessment methodology designed by the Basel Committee on Banking Supervision (BCBS).

The 30 banks on the list remain the same as the 2020 list. A new list of G-SIBs will next be published in November 2022.

The BCBS has also published further information related to its 2021 assessment of G-SIBs, with additional details to help understand the scoring methodology, including:

- the denominators of each of the 12 high-level indicators used to calculate banks' scores;
- the 12 high-level indicators for each bank in the sample used to calculate these denominators; and
- the cutoff score used to identify the G-SIBs in the updated list and the thresholds used to allocate G-SIBs to buckets for the purpose of calculating the specific higher loss-absorbency requirements.

IOSCO calls for oversight of ESG ratings and data product providers

The International Organization of Securities Commissions (IOSCO) has published a set of recommendations applicable to ESG ratings and data product providers.

IOSCO notes that the market for ESG ratings and data has grown over the past few years, in part due to a lack of consistent information disclosures at the entity level. As this market does not typically fall within the remit of securities regulators, IOSCO suggests that regulators could consider focusing greater attention on the use of ESG ratings and data products and the activities of ESG rating and data products providers in their jurisdictions, which it argues would help to increase trust in ESG ratings and data.

IOSCO has set out specific recommendations on what regulators could consider when developing their framework, including:

- promoting more transparency regarding the methodologies that ESG ratings and data product providers use in developing their products;
- ensuring their procedures for managing conflicts of interest are appropriate; and
- improving communication channels between providers and the entities covered by their ESG ratings or data products without undermining their impartiality.

FCA recognises FX Global Code and Global Precious Metals Code

The Financial Conduct Authority (FCA) has confirmed that it recognises the updated FX Global Code and the Global Precious Metals Code under the FCA's code recognition scheme.

The FX Global Code is maintained and updated by the Global Foreign Exchange Committee (GFEC), and sets out principles of good practice standards for the global foreign exchange (FX) market, promoting the integrity and effective functioning of the wholesale FX market.

The Global Precious Metals Code is maintained and updated by the London Bullion Market Association (LBMA), and sets out principles to promote the integrity and effective functioning of the global precious metals market.

Individuals subject to the Senior Managers and Certification Regime (SM&CR) need to meet requirements for market conduct for both regulated and unregulated activities. The FCA expects firms and individuals to consider both the spirit and letter of code provisions to make sure they fully meet 'proper standards of market conduct'.

The FCA highlights that:

- regardless of the terminology used, last look practices that incorporate a delay that is additional to what is required to complete price and validity checks are not consistent with the codes; and
- pre-hedging practices where market participants do not communicate their practices to clients in a manner that allows the client to understand the potential impact on the execution of their order are not consistent with the codes.

The FCA expects those who are signatories to the codes to make clear and transparent disclosures to market users to explain how their orders will be handled.

FCA publishes policy statement on changes to decision-making and governance

The FCA has published a policy statement (PS21/16) setting out a summary of the responses it received and final rules following its consultation paper (CP21/25) on proposed changes to the FCA's decision-making and governance.

In CP21/25, the FCA proposed amending its Enforcement Guide (EG) and Decisions Procedure and Penalties Manual (DEPP) to move some decision-making responsibilities from its Regulatory Decisions Committee (RDC), which is part of the FCA Board, to senior members of FCA staff in its authorisations, supervision and enforcement divisions. In particular, the FCA proposed that the following decisions should be made by staff rather than the RDC:

- imposing a requirement on a firm or varying its permissions by limiting or removing certain types of business;
- making a final decision in relation to a firm's application for authorisation or an individual's approval that has been challenged;
- making a final decision to cancel a firm's permissions because it does not meet the FCA's regulatory requirements; and
- the decision to start civil and/or criminal proceedings.

The changes were intended to give greater responsibility for decisions to staff close to the matters being decided upon, thereby allowing the FCA to make decisions and prevent harm faster.

The FCA received 32 responses to the consultation and, while the majority of responses supported the aims of the proposals, they did not support the method of achieving them. Respondents were concerned that the emphasis on speed and efficiency would result in a lack of fairness and objectivity. Concerns were also raised about the risk of bias and the difficulty of maintaining proper separation between the process of investigation and the decision being made under Executive Procedures. It was felt by some that the operational independence of the RDC made these risks easier to avoid.

The FCA notes that it has considered the responses carefully but has decided to proceed with the proposals as consulted upon. It states that its Executive Procedures, through which a number of decisions on authorisations and interventions are already made, provide a fair process and comply with statutory requirements.

The changes to DEPP and EG entered into force on 26 November 2021. The FCA intends to carry out a six month post-implementation review to assess the effectiveness of the reforms.

UK EMIR: BoE and FCA consult on changes to reporting requirements, procedures for data quality and registration of trade repositories

The Bank of England (BoE) and the FCA have launched a joint consultation on three proposals on changes to reporting requirements, procedures for data quality and registration of trade repositories (TRs) under the UK European Market Infrastructure Regulation (UK EMIR).

The proposals aim to align the UK derivatives reporting framework with international guidance from the Committee on Payments and Market Infrastructures (CPMI) and IOSCO to ensure a more globally consistent data set.

In particular, the BoE and the FCA are jointly consulting on a proposal to amend the framework for derivatives reporting under Article 9 of UK EMIR. Separately, the FCA is seeking views on two proposals in relation to:

- amendments to the registration process for TRs to streamline the process for TRs that are already registered or recognised under the UK Securities Financing Transactions Regulation (UK SFTR) and to incorporate the payment of the relevant registration fees; and
- requirements for TRs to establish procedures and policies to ensure the effective reconciliation of data between TRs.

Both consultations close on 17 February 2022.

CRR: PRA consults on operational resilience

The Prudential Regulation Authority (PRA) has published a consultation paper (CP21/21) on its proposals to apply the group provisions in the part of the PRA Rulebook on operational resilience relevant to CRR firms to holding companies.

The proposals also include minor formatting and clarification amendments to the parts of the PRA Rulebook on operational resilience and operational continuity.

The consultation will be of interest to UK banks, building societies, and PRA-designated firms, including those currently in scope of, or likely to come in scope of, the operational continuity part of the PRA Rulebook, as well as financial holding companies, mixed financial holding companies, UK Solvency II firms, and the Society of Lloyd's and its managing agents.

Comments are due by 14 January 2022.

BaFin revokes most position limits on commodity derivatives

The German Federal Financial Supervisory Authority (BaFin) has issued two general decrees (Allgemeinverfügungen) in order to revoke most of the position limits currently still applicable to commodity derivatives. The general decrees will come into force on 28 November 2021. Only for derivatives on agricultural commodities and the Phelix DE Base commodity derivative contract of the European Energy Exchange (EEX) will position limits remain in force.

As part of the Capital Markets Recovery Package (CMRP), the EU Parliament and Council adopted, among other things, an amendment to the Markets in Financial Instruments Directive (MiFID2) including an adjustment of the position limit regime. In Germany, this amending directive has been implemented by way of the Crowdfunding Accompanying Act (Schwarmfinanzierung-Begleitgesetz).

One of the changes made is that under section 54 (1) of the German Securities Trading Act (Wertpapierhandelsgesetz - WpHG), the application of position limits is now restricted to derivatives on agricultural commodities and to 'critical or significant' commodity derivatives that reach a minimum level of open interest (i.e., the sum of all open positions in a futures or options contract) of at least 300,000 tradable units. Commodity certificates will even be generally exempted from the application of position limits.

CRD 5: Bank of Italy updates regulations on remuneration and incentive policies and practices for banks

The Bank of Italy has issued the 37th update to its Circular No. 285 of 17 December 2013, setting out updated provisions applicable to banks with regard to remuneration and incentive policies and practices.

This update, adopted pursuant to Articles 53(1)(d) and 67(1)(d) of Legislative Decree No. 385 of 1 September 1993 (Consolidated Banking Act), replaces Chapter 2 of Part One, Title IV of Bank of Italy Circular No. 285/2013, which contains the existing provisions on remuneration and incentive policies and practices.

The amendments are intended to transpose the changes introduced by Directive 2019/878/EU (CRD 5) and the European Banking Authority (EBA) guidelines implementing the Directive (EBA/GL/2021/04). They will enter into force as follows:

- updated remuneration policies shall be approved at the latest in the context of the shareholders' meeting approval of the 2021 financial statements;
- employment contracts entered into after 1 July 2022 shall be fully compliant with this new set of provisions; and
- existing employment contracts shall be amended and updated to ensure full compliance with this new set of provisions as soon as possible and no later than 1 July 2022 for members of management and control bodies and 30 September 2022 for all other personnel.

Bank of Spain consults on draft amending circular on supervision and solvency, exercise of regulatory options, and transparency and loan origination responsibility

The Bank of Spain has launched a public consultation on a draft circular amending Circular 2/2016 of 2 February, to credit institutions, on supervision and solvency, Circular 2/2014 of 31 January, to credit institutions, on the exercise of regulatory options and Circular 5/2012 of 27 June, to credit institutions and payment services providers, on transparency of banking services and loan origination responsibility.

The main objective of the amendment of Circular 2/2016 is the transposition of CRD5 into the Spanish legal regime, extending the powers granted to the Bank of Spain, while the amendment of Circular 2/2014 pursues the exercise of regulatory options that Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 (CRR 2) confers on the national competent authorities, mainly related to liquidity risk. Additionally, the draft circular amends Circular 5/2012 to develop certain information obligations applicable to revolving credit.

Comments on the draft circular are due by 9 December 2021.

Swiss Federal Council extends duration of measure to protect Swiss stock exchange infrastructure and initiates consultation

The Swiss Federal Council has agreed to extend the measure to protect the Swiss stock exchange infrastructure and to initiate the consultation procedure on incorporating it into ordinary law. These steps were made necessary by the expiry of the protective measure at the end of 2021, and because the EU has not yet recognised the equivalence of Swiss stock exchange regulation.

The measure is aimed at protecting and maintaining a properly functioning Swiss stock exchange infrastructure. Amongst other things, it creates a basis for EU investment firms to continue trading Swiss equities on Swiss stock exchanges despite the lapse of stock market equivalence.

The Federal Council has indicated that it remains of the view that Switzerland meets all the requirements for unrestricted recognition of the equivalence of Swiss stock exchange regulation by the EU. Unlimited stock market equivalence remains the Federal Council's objective.

The Federal Council has initiated a consultation on incorporating the measure into the Financial Market Infrastructure Act (FinMIA). The protective measure would initially apply for a five-year period, but could be deactivated at any time beforehand. The consultation will last until 4 March 2022.

Swiss Federal Council prepares basis for green Confederation bonds

The Swiss Federal Council has decided to prepare a basis for the issuance of green Confederation bonds and indicated that it wants the Swiss financial centre to be an international leader in sustainable financial services.

Green bonds enable an issuer to raise money on the capital market. Unlike with conventional bonds, however, the capital raised with green bonds cannot be used freely. It may be used exclusively for the (re)financing of projects that have a positive impact on the environment, e.g. promoting renewable energies, increasing energy efficiency, preserving biodiversity or constructing environmentally friendly buildings. Noting that the market for green bonds has grown robustly in recent years, both in Switzerland and internationally, and that sovereign issuers in particular play an important role in this regard, the Federal Council has now decided to lay the foundations to enable the Confederation to issue green bonds as well. The issuance of such 'green Confederation bonds' is intended to enhance the application of international standards in Switzerland. In this way, the Federal Council hopes to encourage those in the private sector to issue green bonds. However, it acknowledges that green Confederation bonds will not have a direct environmental impact on their own and that political decisions are needed for concrete measures to protect the climate and the environment.

As instructed by the Federal Council, the Federal Finance Administration (FFA), in cooperation with the Federal Department of the Environment, Transport, Energy and Communications (DETEC), will prepare a framework for the issuance of green Confederation bonds and submit it to the Federal Council by the end of 2022 for a decision.

Cross-Industry Committee on JPY Interest Rate Benchmarks publishes final report on results of consultation on treatment of tough legacy contracts in Japan

The Cross-Industry Committee on Japanese Yen (JPY) Interest Rate Benchmarks has published its final report on the results of the public consultation on the treatment of 'tough legacy contracts' referencing JPY LIBOR governed by Japanese law in relation to loan and bond transactions.

The final report follows the September 2021 public consultation, which was intended to summarise the results of the Committee's discussions to date on legacy contracts that cannot feasibly be transitioned away from JPY LIBOR (tough legacy contracts) and on matters that contracting parties should keep in mind when considering the use of synthetic yen LIBOR. The Committee expects that the report will be regarded as a standard in Japanese markets for tough legacy contracts, and that a wide range of market participants in Japan will proceed with their preparations for the transition in line with this report.

Amongst other things, the Committee has confirmed the following, taking into account the feedback received:

- the use of synthetic yen LIBOR will not be prohibited in cases in which an agreement is reached between the contracting parties, even if the contracts do not fall under the basic concept for specifying tough legacy contracts that could be considered using synthetic yen LIBOR. Contracting parties should take into account the content of each contract and the intentions of the contracting parties when considering their transition;
- in exceptional cases where it is difficult to proceed with the negotiations between the contracting parties and the procedures stipulated by law, the use of synthetic yen LIBOR may be considered as a temporary measure to proceed with the transition. In such a case, consideration should be given to the content of each contract, the intentions of the contracting parties, as well as the risk mitigation measures outlined in the consultation paper;
- synthetic yen LIBOR will be available for one year only from January to December 2022. Therefore, the contracts set to expire on and after 1 January 2023 will need to be negotiated again regarding the interest conversion in good faith and an agreement must be reached with regard to the alternative reference rate within a year (excluding contracts for which the interest rates referenced will not be revised on and after 1 January 2023);
- contracting parties will be required to introduce fallback provisions with pre-cessation triggers concerning the loss of representativeness as early as possible; and
- market participants are advised to complete transition from JPY LIBOR by the end of 2021, when the cessation of panel-based JPY LIBOR will take place. If it is not possible to do so by the end of 2021, market participants are expected to continue their discussions after the turn of 2022 and complete the transition by the day of the first revision of interest rates at the latest.

HKMA issues guidance on authorised institutions sharing customer data with third parties for direct marketing

The Hong Kong Monetary Authority (HKMA) has issued a circular to provide guidance to authorised institutions (AIs) on the sharing of customers' personal data with third parties, including group companies of AIs, for direct marketing by such third parties.

The HKMA has noted that while AIs collect personal data of customers through online channels including mobile apps for their own operational and direct marketing purposes, there are increasing occasions where AIs may also provide such personal data to third parties so that the third parties may use it for their own direct marketing purposes.

Given that some of these third parties are not subject to any regulatory regime like that of AIs, the HKMA considers that the banking industry should meet a higher standard regarding the sharing of customers' personal data with third parties for the purpose of direct marketing.

Under the HKMA's guidance, there are two general approaches that AIs may adopt for sharing customers' personal data for direct marketing by third parties:

- by asking customers directly to approach the third parties so that the customers may provide their personal data directly to the third parties; or
- redirecting the customers from the AIs' website/mobile apps to the websites/mobile apps of the third parties (redirection) for provision of their personal data and/or consent for direct marketing by such third parties.

The guidance also stipulates how redirection should be made, the types of customers' personal data that may be shared with third parties in different circumstances under the redirection approach, and other guiding principles on the sharing of customers' personal data to third parties.

The HKMA has indicated that the guidance will take effect on 1 January 2022 such that any new applicable initiatives to be launched by AIs from that date should comply with the guidance. For AIs' existing applicable arrangements, the HKMA expects them to comply with the guidance as soon as practicable and in any case not later than six months from the effective date (i.e. by 30 June 2022).

HKEX concludes consultation on reforms to enhance listing regime for overseas issuers

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has published the conclusions to its March 2021 consultation on proposals to enhance and streamline the listing regime for overseas issuers.

The SEHK has confirmed that it will adopt all the proposals outlined in the consultation paper with minor modifications to reflect the comments received. The revised listing regime for overseas issuers will result in the following:

- one common set of core shareholder protection standards that will apply to all issuers, providing the same level of protection to all investors;
- Greater China issuers without a weighted voting rights (WVR) structure can secondary list: (a) without demonstrating they are an 'innovative

company' and (b) with a lower minimum market capitalisation at listing than currently required; and

- grandfathered Greater China issuers and non-Greater China issuers eligible for secondary listing with their existing WVR and/or variable interest entity structures may opt for a dual primary listing.

The SEHK also intends to publish a Guidance Letter on Change of Listing Status, to provide guidance for secondary listed issuers, on its approach with regard to the following:

- the migration of the majority of trading in an issuer's securities from an overseas exchange to Hong Kong;
- voluntary conversion to a dual-primary listing on the SEHK; and
- de-listing from overseas exchanges of primary listing.

The amended Listing Rules and the new guidance materials will take effect from 1 January 2022. The details of the transitional arrangements are set out in the consultation conclusions paper.

MAS consults on proposed amendments to Business Trusts Act

The Monetary Authority of Singapore (MAS) has launched a consultation proposing amendments to the existing Business Trusts Act (BTA).

The proposed amendments are intended to align the BTA with the Companies (Amendment) Act 2014, the Companies (Amendment) Act 2017 and the regulatory regime for Real Estate Investment Trusts (REITs), and to streamline and clarify regulatory requirements in response to industry feedback.

Amongst other things, the consultation seeks comments on the following:

- extending the scope of sections 12 and 13 of the BTA to require disclosures of interests by the CEO of the Trustee- manager (TM) of a BT;
- inserting a new part VIIIA of the BTA that will introduce a requirement for TMs of unlisted registered BTs to obtain and maintain information on beneficial ownership of units in the unlisted registered BTs;
- inserting a new section 93A of the BTA that will enable electronic transmission of notices and documents to unitholders with their express, implied or deemed consent in accordance with the trust deed of the BT;
- expanding section 42 of the BTA to allow a complainant to apply to the court for leave to start an arbitration in the name and on behalf of all the unitholders of the BT as a whole or intervene in an arbitration to which the TM, on behalf of the BT, is a party for the purpose of prosecuting, defending or discontinuing the arbitration on behalf of the TM;
- inserting a new section 52A of the BTA to provide that the MAS may proceed to deregister a BT upon notice of its winding up without the need for the TM to apply for voluntary deregistration; and
- certain proposed clarificatory amendments, amendments to align with amendments to the Securities and Futures Act (SFA) that are relevant to BTs and miscellaneous amendments that are consequential to the amended Companies Acts.

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Comments on the consultation are due by 27 December 2021.

SEC amends proxy rules to require use of universal proxy cards by management and shareholders in contested elections

The Securities and Exchange Commission (SEC) has amended the federal proxy rules to require the use of universal proxy cards by management and shareholders soliciting proxy votes for their own candidates in contested director elections. A universal proxy card lists the names of all duly nominated director candidates for election at an upcoming shareholder meeting, regardless of whether the candidates were nominated by management or shareholders. The SEC has also adopted rule amendments to require enhanced disclosure and voting options in all director elections.

Under new Rule 14a-19, the universal proxy card must include all director nominees presented by management and shareholders for election at the upcoming shareholder meeting.

Several amendments facilitate the use of universal proxy cards:

- the SEC has amended the current proxy rules so each side can list the other side's director candidates on its universal proxy card;
- the new rules also establish new notice and filing requirements for all soliciting parties, as well as formatting and presentation requirements for universal proxy cards; and
- the final rules require shareholders presenting their own director candidates in the contest to solicit holders of a minimum of 67% of the voting power of shares entitled to vote in the election.

Registered investment companies and business development companies are not subject to the universal proxy rules.

The final rules establish new requirements for all director elections, including uncontested elections. They mandate that 'against' and 'abstain' voting options be provided on a proxy card where such options have legal effect under state law. The rules also require disclosure in the proxy statement about the effect of all voting options provided.

The final rule amendments regarding universal proxy will apply to all shareholder meetings involving contested director elections held after 31 August 2022. The rule amendments regarding voting options will be applicable to all shareholder meetings involving director elections held after 31 August 2022.

RECENT CLIFFORD CHANCE BRIEFINGS

COP26 – Article 6 Rulebook for the new global carbon market mechanism agreed

Some six years after the Paris Agreement, COP26 has resulted in agreement on a global carbon market mechanism (GCMM) largely completing the so-called 'Paris Agreement Article 6 Rulebook'.

Key decisions have been made on the eligibility of projects and activities to be included in the GCMM, the approval process and issuance of credits, the making of corresponding adjustments to host state's emission accounts, and how to deal with legacy projects and credits under the Kyoto Protocol's Clean Development Mechanism (CDM).

This briefing paper discusses the key elements along with the likely impacts on the compliance markets and voluntary carbon markets.

https://www.cliffordchance.com/briefings/2021/11/cop26--article-6-rulebook-for-the-new-global-carbon-market-mecha.html

Data Centres and the UK National Security and Investment Act 2021

The UK Government's new investment screening regime under the National Security and Investment Act 2021 has garnered significant interest due to the broad-reaching powers granted to the Secretary of State for Business, Energy and Industrial Strategy to review, and potentially intervene in, the acquisition of certain interests in legal entities, assets and intellectual property if the UK Government identifies a national security concern. Data infrastructure is identified as a sector where transactions could potentially give rise to national security concerns.

This briefing paper considers the impact of the regime on data centre operators and investors.

https://www.cliffordchance.com/briefings/2021/11/data-centres-and-the-uk-national-security-and-investment-act-202.html

Pay in UK listed companies – Investment Association pay expectations for 2022 published

The Investment Association (IA) has published its Principles of Remuneration for 2022 along with a letter for Remuneration Committee (RemCo) Chairs highlighting its key priorities.

The impact of COVID-19 remains a focus, with the IA acknowledging the leadership that RemCos and executives have shown in responding to the pandemic. Disclosure, pay increases, and linking ESG measures to remuneration structures also continue to be hot topics for investors.

This briefing paper summarises the key points for UK listed companies

https://www.cliffordchance.com/briefings/2021/11/pay-in-uk-listed-companies--investment--association-pay-expectat.html

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