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PRIIPs KIDs amendments published in Official Journal

A Regulation, a Directive and a Delegated Regulation making legislative amendments concerning the use of key information documents (KIDs) under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation have been published in the Official Journal.

Regulation (EU) 2021/2259 amends the PRIIPs Regulation to extend the transitional arrangement for management companies, investment companies and persons advising on, or selling, units of undertakings for collective investment in transferable securities (UCITS) and non-UCITS from the requirement to provide retail investors with a PRIIPs KID to 31 December 2022.

Directive (EU) 2021/2261 amends the UCITS Directive to set out that PRIIPs KIDS will be considered as satisfying the key investor requirements for UCITS from 1 January 2023.

Both Regulation (EU) 2021/2259 and Directive (EU) 2021/2261 entered into force on 21 December 2021.

Delegated Regulation (EU) 2021/2268 amends PRIIPs regulatory technical standards (RTS) set out in Delegated Regulation (EU) 2017/653 in relation to, among other things, the presentation and contents of KIDs, including methodologies for the calculation and presentation of risks, rewards and costs. It enters into force on 9 January 2022 and the new requirements apply from 1 July 2022.

Investment firms: ITS on supervisory reporting and disclosures published in Official Journal

Commission Implementing Regulation (EU) 2021/2284 laying down implementing technical standards (ITS) on supervisory reporting and disclosure requirements under the Investment Firms Regulation (IFR) have been published in the Official Journal.

The ITS cover:

- supervisory reporting, including the application of reporting requirements on an individual and consolidated basis, and the format and frequency of reporting by different classes of investment firms; and
- public disclosure of own funds by investment firms.

Implementing Regulation (EU) 2021/2284 enters into force on 11 January 2022.

CRR/BRRD: EU Council adopts negotiating mandate on daisy chain proposal

The EU Council has adopted a negotiating mandate on targeted amendments proposed by the EU Commission to the Capital Requirements Regulation (CRR) and the Bank Recovery and Resolution Directive (BRRD) aimed at improving institutions' resolvability.

Known as the 'daisy chain' proposal, amendments include:

- incorporating a dedicated treatment for indirect subscription of instruments eligible for internal minimum requirements for own funds and eligible liabilities (MREL);

- further aligning the treatment of global systemically important institutions (G-SII) groups with a multiple point of entry (MPE) resolution strategy with the treatment outlined in the Financial Stability Board's (FSB's) international total loss-absorbing capacity term (TLAC) sheet; and
- clarifying the eligibility of instruments in the context of the internal TLAC.

The approval of the mandate allows the incoming French EU Council Presidency to launch discussions with the EU Parliament with a view to agreeing on a final text.

EU Council endorses political agreement on pilot regime for market infrastructures based on DLT

The EU Council's Committee of Permanent Representatives (Coreper) has endorsed the provisional political agreement reached between the Council and Parliament negotiators on the EU Commission's proposed regulation establishing a temporary common EU pilot regime for market infrastructures based on distributed ledger technology (DLT). The regime is intended to allow market infrastructures to experiment with restricted uses of DLT under exemptions from the requirements of certain financial services legislation.

The agreement sets out the Council and Parliament's position on the following issues discussed during trilogue negotiations:

- the definition of the DLT market infrastructure;
- the thresholds for admission to trading or recording on DLT;
- supervisory responsibilities (including that national competent authorities (NCAs) will remain responsible for authorising DLT operators, but that the European Securities and Markets Authority (ESMA) can issue a non-binding opinion on the application, and the NCAs must provide reasoning if they significantly deviate from that opinion); and
- consumer protection and compensation mechanisms.

The agreement will now be formally adopted by the Council and Parliament, after which it will be published in the Official Journal.

MiFIR: EU Commission adopts Delegated Regulation on DRSP supervision

The EU Commission has adopted a Delegated Regulation setting out criteria for the derogation of the principle that data reporting service providers (DRSPs) are to be supervised by the European Securities Markets Authority (ESMA).

As of 1 January 2022, responsibility for the supervision of DRSPs is transferred, with some exceptions, from national competent authorities (NCAs) to ESMA. The Delegated Regulation sets out the derogation criteria for DRSPs that will continue to fall under NCA supervision, namely approved publication arrangements (APAs) and approved reporting mechanisms (ARMs), whose activities are of limited relevance for the internal market.

The Delegated Regulation will enter into force on the third day following its publication in the Official Journal. ESMA will assess DRSPs' eligibility against the derogation criteria based on data from the first six months of 2021.

CSDR: ESMA issues statement on approach to mandatory buy-in regime

ESMA has published a statement on its approach to the implementation of the mandatory buy-in (MBI) regime under the Central Securities Depositories Regulation (CSDR).

While the rules become legally effective on 1 February 2022, ESMA states that it expects national competent authorities (NCAs) not to prioritise supervisory actions in relation to the regime.

ESMA intends to develop draft regulatory technical standards (RTS) postponing the application of the buy-in regime under recently agreed amendments to the CSDR, introduced via the proposed regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT), while retaining the application of the penalties and reporting requirements from 1 February 2022.

The statement also sets out ESMA's expectation that NCAs encourage central counterparties to continue applying the buy-in rules currently implemented by them as required under the Short Selling Regulation (SSR) until the revised CSDR buy-in regime enters into force.

Credit rating agencies: ESMA publishes annual market share calculations

ESMA has published its annual market share calculation for EU registered credit rating agencies (CRAs).

The market share calculation, which is required under Article 8d of the Credit Rating Agencies Regulation (CRA Regulation), aims to promote competition in the credit rating industry by encouraging issuers and related third parties to appoint smaller CRAs. The market share calculation also aims to increase awareness of the different types of credit ratings offered by each registered CRA.

Deposit guarantee schemes: EBA publishes guidelines on available financial means reporting

The European Banking Authority has published its guidelines on the delineation and reporting of available financial means (AFM) of deposit guarantee schemes (DGS).

The guidelines follow the EBA's recommendation to the EU Commission in January 2020 to clarify in the EU DGS Directive (DGSD) that borrowed funds do not count towards the AFM of DGSs. This is intended to ensure that DGSs raise contributions from the industry to reach the required minimum target level for the DGS fund.

The guidelines clarify that the AFM comprises the following two subsets:

- qualified AFM (QAFM), which means funds stemming directly or indirectly from contributions of DGS member institutions, which qualify towards reaching the target level of the DGS fund; and
- other AFM, which means funds which are not QAFM, including borrowed funds that stem from liabilities such as loans, and do not count towards reaching the target level of the DGS fund.

The guidelines recommend that DGSs should keep track of the origin of funds and record how they use and manage these funds, including contributions from the industry, any loans a DGS may obtain, as well as when allocating recoveries to QAFM and other AFM.

The guidelines also clarify the treatment of investment income and losses as well as loans between DGSs with regard to QAFM. DGSs will be required to report to the EBA their level of AFM, QAFM, other AFM, their outstanding liabilities, loans made to other DGSs, and high-level information on alternative financing arrangements in place, which will then be published on the EBA website.

Following the consultation on the draft guidelines, the EBA has replaced the approach originally proposed for the allocation of recoveries to QAFM and other AFM with an approach that permits two alternatives. It has also simplified the treatment of investment income with regard to QAFM and deleted the reporting requirement for unclaimed repayment.

The guidelines will apply from 30 March 2022.

EBA publishes final draft RTS on AML/CFT central database

The EBA has published its final report on draft regulatory technical standards (RTS) on a central database on anti-money laundering and countering the financing of terrorism (AML/CFT) in the EU. The European Reporting system for material CFT/AML weaknesses (EuReCa) will be used to coordinate efforts to prevent and counter money laundering and terrorism financing (ML/TF) in the EU. The database will contain information on material weaknesses in individual financial institutions that make them vulnerable to ML/TF. Competent authorities in the EU will have to report such weaknesses, as well as the measures they have taken to rectify them.

The draft RTS specify:

- when weaknesses are material;
- the type of information competent authorities will have to report;
- how information will be collected;
- how the EBA will analyse and disseminate the information contained in EuReCa; and
- the rules necessary to ensure confidentiality, protection of personal data and effectiveness of EuReCa.

The EBA will use EuReCa to provide information on ML/TF risk affecting the EU's financial sector and as an early warning tool to help competent authorities act before the ML/TF risks crystallise.

EBA publishes final RTS on reclassification of investment firms as credit institutions

The EBA has published final reports setting out two draft RTS regarding the reclassification of investment firms as credit institutions under the new prudential framework for MiFID investment firms.

The final draft RTS on the reclassification of investment firms as credit institutions under the Capital Requirements Directive (CRD) cover areas relevant for the calculation and implementation of the EUR 30 billion threshold required for investment firms to be authorised as a credit institution and subject to the CRD and CRR, including:

- the accounting standards for the determination of asset values;
- the methodology for implementing the solo and the group tests;
- the procedure to calculate total assets on a monthly basis; and
- the treatment of assets belonging to EU branches of third-country groups.

The final draft RTS specify the reporting requirements for investment firms to provide information to competent authorities for the effective monitoring of the credit institution thresholds under the Investment Firms Regulation (IFR).

Both sets of draft RTS have been submitted to the EU Commission for endorsement.

EBA publishes draft RTS on supervisory reporting to enhance proportionality

The EBA has published its [final draft implementing technical standards (ITS)] on supervisory reporting with respect to common reporting (COREP), asset encumbrance, global systemically important institutions (G-SIIs) and additional liquidity monitoring metrics (ALMM).

According to the EBA, proportionality was a key consideration in the draft ITS, making reporting requirements better suited to the size and risk of the institutions. The amendments form part of the implementation of the EBA's recommendations on cost reduction measures included in its study on the cost of compliance with supervisory reporting requirements.

Changes contained in the draft RTS include:

- an exemption for small and non-complex institutions (SNCIs) from reporting several liquidity metrics, including the concentration of funding by product type, the funding price for various lengths of funding, information on roll-over of funding, as well as more granular data on asset encumbrance;
- simplifications for medium-sized institutions, which will be exempted from reporting liquidity metrics on roll-over of funding;
- changes to reflect amendments to the prudential framework and bring the reporting up to date in the light of changing user needs;
- amended reporting on securitisation to implement the changes to the prudential requirements brought by the Capital Markets Recovery Package (CMRP);
- minor amendments on the reporting on own funds and own funds requirements to obtain a deeper understanding of institutions' use of the option to exempt certain software assets from the deduction from own funds;
- an amendment of the definition of the level of asset encumbrance; and
- an expansion of the scope of application of the reporting obligation in relation to the reporting of information for identifying G-SIIs and assigning G-SII buffer rates, to include standalone entities that meet the relevant criteria, and not only banking groups.

EBA consults on performance-related triggers for non-sequential amortisation systems in STS on-balance-sheet securitisations

The EBA has launched a consultation on its draft RTS specifying and calibrating the minimum performance-related triggers for simple, transparent and standardised (STS) on-balance-sheet securitisations that feature non-sequential amortisation.

The Capital Markets Recovery Package amended the Securitisation Regulation in several aspects, including creating a specific framework for STS on-balance-sheet securitisation to ensure that the EU securitisation framework provides for an additional tool to foster economic recovery in the aftermath of the COVID-19 crisis. The draft technical standards are intended to provide technical clarification on these triggers.

With the purpose of standardisation, the amended Securitisation Regulation sets out that sequential amortisation shall be applied to all tranches of STS on-balance-sheet securitisations. However, as a derogation, STS on-balance-sheet securitisation might feature non-sequential amortisation to avoid disproportionate costs of protection, as long as some minimum performance-related triggers determine the application of sequential amortisation. This will ensure that tranches providing credit protection have not already been amortised when significant losses occur at the end of the transaction.

The draft RTS further specify the minimum backwards- and forward-looking triggers, and set out that, for two of them, their level should be determined by the parties involved in securitisation transactions, as they are transaction specific and depend on the assessment made by the parties of the riskiness of the underlying exposures at inception. However, the RTS establish a level for the additional backwards-looking trigger to ensure for all STS on-balance-sheet securitisations featuring a non-sequential amortisation that under no circumstances the credit enhancement of the retained senior tranche falls below a certain threshold, in comparison with that at origination, as a result of the amortisation of the protected tranches.

Comments are due by 28 February 2022.

CRR: EBA consults on amending ITS on benchmarking of internal models

The EBA has launched a consultation on ITS amending the Implementing Regulation for the 2023 benchmarking of internal approaches used in credit risk and market risk.

The proposed ITS make no changes to the benchmark portfolios for credit risk, nor to the data fields to be reported. They do make minor clarifications in the instructions in annex 5 on how to deal with changes in the definition of default. The consultation also proposes a general question on the reporting of historical losses with a view to potentially updating the data requirements in future amendments to the ITS.

In respect to market risk, the EBA proposes to extend the data collection so as to include new instruments and portfolios, particularly regarding those that have lately been applied by the industry in a similar exercise.

The EBA has not proposed any changes to the IFRS9 templates.

Comments are due by 18 February 2022. A public hearing is scheduled for 3 February 2022.

CRR: EBA consults on draft ITS on mapping of ECAIs for securitisation positions

The EBA has launched a consultation on draft ITS amending the Implementing Regulation on the mapping of credit assessments of external credit assessment institutions (ECAIs) for securitisation.

The Implementing Regulation is intended to ensure that credit assessments issued by ECAIs can be used for calculating capital requirements for securitisation positions. The EBA specifies the correspondence or 'mapping' between credit ratings and the credit quality steps (CQS) defined in Chapter 5 of the Capital Requirements Regulation (CRR).

The proposed amendments reflect the amendments introduced by the CRR amendments to the securitisation framework. They also reflect the additional ECAI that has been established in the EU with methodologies and processes in place for producing credit assessments for securitisation instruments, the two existing ECAIs which have extended their credit assessments to cover securitisations, and the European Securities and Markets Authority's (ESMA's) withdrawal of the registration of an ECAI.

Comments are due by 31 January 2022. A public hearing is scheduled for 18 January 2022.

CRR: SRB to monitor regulatory changes in leverage and MREL calibration temporary measures

The Single Resolution Board (SRB) has announced that it will monitor regulatory changes related to the temporary measures regarding discretion on leverage and MREL calibration.

In response to COVID-19, the European Central Bank (ECB) introduced a measure allowing competent authorities discretion to temporarily exclude certain exposures to central banks from the calculation of an institution's total exposure measure (leverage amount), as granted by the Capital Requirements Regulation (CRR). Banks may benefit from this relief measure until the end of March 2022.

According to the SRB, the leverage ratio requirement and the leverage amount can influence the calibration of the final MREL targets as well as the compliance with the requirements by 1 January 2024. The SRB intends to monitor whether competent authorities will deem it necessary to extend the measures beyond March 2022 or not and their impact in the computation methodology of the leverage amount that might lead to consequences for the final MREL targets.

If needed, the SRB intends to take corrective actions in the annual MREL setting by re-calibrating the final targets on the basis of changed leverage amounts and requirements. This means that if the relief is not extended, the SRB will re-calibrate MREL targets based on the leverage amount including central bank exposures. The monitoring of compliance with the build-up towards the final MREL targets will also take this into account.

IOSCO consults on use of innovation facilitators in growth and emerging markets

The International Organization of Securities Commissions (IOSCO) Growth and Emerging Markets Committee (GEMC) has launched a consultation on draft recommendations related to the use of innovation facilitators (IFs) in growth and emerging markets (GEMs).

The consultation covers three types of IF: innovation hubs, regulatory sandboxes, and regulatory accelerators. It is based on the results of a fact-finding exercise conducted among GEMC members and sets out:

- key definitions;
- the risks and opportunities posed by IFs;
- an overview of GEM regulatory initiatives around IFs and some examples of the current practices in advanced markets; and
- four key recommendations intended to assist GEMs in developing IF initiatives in their jurisdictions, namely that: (i) authorities should develop effective frameworks to support financial innovation, which should include, among other things, a requirement that, prior to an IF's establishment, it is assessed to ensure its functions, scope and operational structure are suitable for the local market conditions and the jurisdiction's wider policy objectives; (ii) the objectives and functions of IFs should be clearly defined and publicly available, and relevant authorities should have sufficient innovation support functions and resources to oversee them; (iii) the scope of eligible entities and the criteria for application and selection should be clearly defined, transparent and publicly available; and (iv) relevant authorities should have in place mechanisms for cooperation and information exchange with other local and foreign relevant authorities to facilitate a holistic approach to cross-sector or cross-border issues.

Comments are due by 6 February 2022.

ICE Benchmark Administration to launch GBP SONIA Spread-Adjusted ICE Swap Rate

ICE Benchmark Administration (IBA) has announced that it plans to launch GBP SONIA Spread-Adjusted ICE Swap Rate for use as a benchmark in financial contracts and financial instruments by licensees on 4 January 2022.

This follows the publication by IBA of GBP SONIA Spread-Adjusted settings on an indicative beta basis since May 2021.

The settings are published for tenors ranging from one to 30 years and are determined in line with the methodology proposed by the Working Group on Sterling Risk-Free Reference Rates in its paper 'Transition in Sterling Non-Linear Derivatives referencing GBP LIBOR ICE Swap Rate (ISR)'.

FCA publishes statement on commodity derivatives position limits

The Financial Conduct Authority (FCA) has published a statement on its supervision of commodity derivatives position limits.

In December 2020, the FCA published a supervisory statement setting out its approach to operating the MiFID markets regime after the end of the Brexit transition period. This approach included a change to the FCA's supervisory and enforcement actions for commodity derivative position limits in light of constraints on market functioning highlighted during the COVID-19 pandemic. In particular, the FCA stated that, until 1 January 2022, it did not intend to take supervisory or enforcement action for positions that exceed limits where the position is held by a liquidity provider to fulfil its obligations on a trading venue.

In its new statement, the FCA confirms that it will extend this approach while the scope of the regime is being considered under HM Treasury's Wholesale Market Review. The FCA intends to review its approach if there are indications of market abuse.

The FCA expects firms to make their own assessment of whether the positions they take are positions resulting from their actions as a liquidity provider. Firms do not need to notify the FCA of these assessments, but a firm may be asked to explain its assessment to the FCA at any time, such as when it breaches a position limit. The position should not be any larger than necessary to enable the firm to fulfil its role as a liquidity provider. The FCA will expect a firm to reduce its positions if it reports a breach and it is not able to show that it is engaged in genuine liquidity provision.

FCA further extends temporary measures on 10% depreciation notifications

The FCA has published a statement announcing a further extension of temporary measures allowing supervisory flexibility regarding firms' ongoing compliance with the requirement to issue 10% depreciation notifications to investors (COBS 16A.4.3 UK).

The temporary measures, which have been extended for 12 months until 31 December 2022, mean the FCA will not take action for breaches where a firm has:

- issued at least one notification in the current reporting period indicating to retail clients a decrease in the value of their portfolio or position by at least 10%;
- informed those clients that they may not receive a similar notification should that value further decrease by 10%;
- referred those clients to non-personalised communications that outline general updates on market conditions; and
- reminded clients how to check their portfolio value and get in touch with the firm.

In relation to services offered to professional investors, the FCA states that it will not take supervisory action provided that firms have allowed professional clients to opt-in to receiving notifications.

BaFin consults on adoption of EBA guidelines on breaches of large exposure limits

The German Federal Financial Supervisory Authority (BaFin) has launched a consultation on a draft circular regarding the adoption of the EBA guidelines specifying the criteria to assess the exceptional cases when institutions exceed the large exposure limits of Article 395(1) of the Capital Requirements Regulation (CRR) and the time and measures to return to compliance pursuant to Article 396(3) of the CRR (EBA/GL/2021/09).

BaFin intends to incorporate the guidelines into its supervisory practice from 1 January 2022. The EBA had previously conducted a consultation on the guidelines.

Comments are due by 5 January 2022.

BaFin consults on circular regarding required stable funding for off-balance sheet items

BaFin has launched a consultation on a draft circular regarding the required stable funding for off-balance sheet items according to Articles 428p (10) and 428aq (10) of the Capital Requirements Regulation (CRR) as amended by Regulation (EU) 2019/876.

The circular applies to institutions to which Article 6 (4) CRR applies and which qualify as less significant institutions (LSIs) under Article 6 (4) of the SSM Regulation. If further applies to all institutions which are treated as CRR credit institutions pursuant to section 1a of the German Banking Act (Kreditwesengesetz).

By way of the circular, BaFin exercises the right stipulated in Articles 428p (10) and 428aq (10) CRR and determines that the required stable funding factor to be applied to off-balance-sheet exposures which are in the scope of these provisions shall in principle be 0% (subject to exceptions).

Comments are due by 28 January 2022.

CCP recovery and resolution: Luxembourg bill on implementation of Regulation (EU) 2021/23 published

A bill implementing Regulation (EU) 2021/23 on a framework for the recovery and resolution of central counterparties (CCPs) (Bill No. 7933) has been lodged with the Luxembourg Parliament.

The bill proposes to amend several laws relating to the financial sector, including, among others:

- the law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories (as amended), which will be complemented by a new Chapter 1bis on the resolution of CCPs, which designates the competent ministry and resolution authority and provides sanction powers to these authorities to ensure compliance with Regulation (EU) 2021/23; and
- the law of 23 December 1998 establishing a financial sector supervisory commission (as amended), which sets out the new competences of the resolution board.

The CSSF and the resolution board will each be given new competences regarding the recovery and resolution of CCPs respectively.

The bill also proposes to amend the law of 5 August 2005 on financial collateral arrangements (as amended) by introducing more detailed provisions regarding enforcement of pledges by public sale as well as enforcement of pledges over UCI shares or insurance agreements.

The lodging of the bill with the Luxembourg Parliament constitutes the start of the legislative procedure.

PSD2: CSSF issues circular on application of revised EBA guidelines on major incident reporting

The Luxembourg financial sector supervisory authority (CSSF) has issued a new circular (21/787) on the application of the EBA guidelines on major incident reporting under the Payment Services Directive (PSD2) dated 10

June 2021 (EBA/GL/2021/03), which replace the current EBA guidelines of 27 July 2017 (EBA/GL/2017/10) as of 1 January 2022.

The purpose of the circular is to inform all payment service providers (PSPs) subject to the supervision of the CSSF that the CSSF applies the guidelines and has integrated them into its administrative practice and regulatory approach in order to promote supervisory convergence in this field at EU level.

The circular provides certain details on the revised guidelines, including in particular that they aim at (i) optimising and, where possible, simplifying the reporting of major incidents under PSD2, (ii) capturing additional security incidents that would not qualify as major incidents under the previous criteria, and (iii) reducing the number of operational incidents that will be reported, but that do not have a significant impact on the operations of PSPs.

The circular also sets out the main deadline requirements for classification and notification of major incidents and draws the attention of PSPs to the fact that the delegation of reporting obligations of major incidents is not accepted.

Annex 1 to the circular lays down detailed technical instructions for sending the data related to the major incidents to the CSSF. PSPs are requested to use the CSSF standard reporting template published on the CSSF website when submitting the initial, intermediate, and final reports related to the same incident, and to complete a single template in an incremental manner for any update of the information provided with previous reports.

The circular applies with effect as of 1 January 2022 and, as of that date, repeals and replaces CSSF circular 18/704.

CSSF clarifies whether SPACs constitute eligible investments for UCITS

The CSSF has updated its FAQs on the law of 17 December 2010 on undertakings for collective investment (UCI Law) to clarify the conditions for UCITS to invest in SPACs.

UCITS may invest in SPACs if these qualify, at any point of their life cycle, as transferable securities withing the meaning of Article 1 (34) and Article 41 of the UCI Law and Article 2 of the Grand-Ducal Regulation of 8 February 2008.

Before investing in SPACs, UCITS must perform a detailed risk assessment covering all material risks to which the UCITS will be exposed as a result of the investment, and in particular, ensure the liquidity of the SPAC investments does not compromise the ability of the UCITS to repurchase its units at the request of unit-holders.

In addition, a UCITS’ investment in SPACs should in principle be limited to a maximum of 10% of a UCITS’ NAV and be appropriately disclosed in UCITS prospectuses.

CSSF updates communiqué on domiciliation activity exercised when operating a business centre or a coworking space

The CSSF has issued an updated version of its communiqué on domiciliation activity exercised when operating a business centre or a coworking space, which is now also available in English (the previous version was only available in French).

In addition to its previous explanations, in its updated communiqué the CSSF states that incubators providing services as part of support to start-ups which are in the development phase of an innovative activity do not exercise a domiciliation activity within the meaning of the law of 31 May 1999 governing the domiciliation of companies, as amended.

CSSF reforms post financial year requirements for IFMs and UCIs

The CSSF has published three circulars introducing new annual reporting requirements, and amending some of the existing ones, for Luxembourg-based IFMs, regulated UCIs and their approved statutory auditors (réviseurs d'entreprises agréés). These new circulars also include the abrogation of the CSSF Circular 02/81 concerning the Long Form Report.

The aim of this reform is to improve the risk-based supervision of the CSSF, both for prudential and AML/CFT purposes, and to provide a clear framework for the role of the approved auditors.

The new requirements will apply to IFMs for the first time for their financial years ending as of 31 December 2021 and to regulated UCIs for their financial years ending as of 30 June 2022.

The new requirements for both IFMs and regulated UCIs will have to be fulfilled on the CSSF eDesk platform and consist of:

- completing a self-assessment questionnaire, and
- sending a letter to the CSSF with certain information in case the approved statutory auditor issues a modified audit opinion in the context of the annual audit.

In addition, the approved statutory auditors will have to review the self-assessment questionnaires submitted by IFMs and regulated UCIs and complete a separate report on this basis. The management letter to be prepared on an annual basis by the approved statutory auditor remains applicable, but a specific regulatory framework has now been set out for this.

Finally, a new CSSF AML/CFT external report has to be prepared by the approved statutory auditor for all Luxembourg investment fund managers, including registered AIFMs, and all Luxembourg investment funds supervised by the CSSF for AML/CFT purposes. This report will be due for the first time for the financial years ending on or after 31 December 2021.

BRRD2: Dutch Bank Recovery and Resolution Directive Implementation Act enters into force

The Dutch Bank Recovery and Resolution Directive Implementation Act (BRRD2) has entered into force. The Act implements provisions for the recovery and resolution regime for banks and certain investment firms. In particular, it amends the Dutch Financial Supervision Act (Wet op het financieel toezicht) and the Dutch Bankruptcy Act (Faillissementswet) with respect to banks and investment firms that are subject to BRRD2 according to the Dutch Central Bank. This, amongst other things, means that new Article 48(7) of BRRD2, dealing with the ranking order of claims against banks in bankruptcy, is implemented by means of an amendment to the Dutch Bankruptcy Act.

China consults on revision of rules on depository receipts under Shanghai-London Stock Connect Scheme

The China Securities Regulatory Commission (CSRC) has proposed revisions to the Provisions on the Supervision and Administration of Depository Receipts under the Stock Connect Scheme between the Shanghai Stock Exchange and London Stock Exchange (for trial implementation) (Shanghai-London DR Provisions) and changed their name to the Provisions on the Supervision and Administration of Depositary Receipts under the Stock Connect Scheme between Domestic and Overseas Stock Exchanges (Draft Proposal for Public Consultation) (Domestic-Overseas DR Draft Provisions). The Domestic-Overseas DR Draft Provisions are subject to public comments until 16 January 2022.

The Domestic-Overseas DR Draft Provisions are intended further to open up PRC capital markets and facilitate cross-border investment and financing. Among others, the following key aspects are worth noting:

- expanding in-scope companies – eligible Shenzhen listed companies will be allowed to issue global depository receipts (GDRs), and listed companies in major European markets such as Germany and Switzerland will be allowed to issue Chinese depository receipts (CDRs);
- allowing overseas issuers to raise funds through issuance of CDRs – non-PRC issuers will be allowed to raise funds by way of issuing CDRs representing newly issued shares, in which case the offering price shall be determined by the market (mainly professional investors) through a price inquiry process;
- optimising information disclosure requirements – in addition to other application documents provided under the Shanghai-London DR Provisions, an assurance report on internal control issued by an accounting firm will be further required to prove the internal control compliance status of the non-PRC issuers. Where a CDR issuer prepares its annual report in accordance with overseas listing regulations and rules, a PRC legal opinion on whether there will be a material impact on investors' investment judgment and decisions taking into account the gap between CSRC requirements and overseas regulations on information disclosure will be needed; and
- clarifying the rule on disclosure of interests – the Domestic-Overseas DR Draft Provisions clarify that investors of relevant CDRs should comply with the relevant requirements on disclosure of interests under PRC law, whilst offshore shareholders that do not hold CDRs can comply only with the relevant requirements on disclosure of interests under the laws and regulations of the offshore listing venue with a copy of such disclosure being made available in the PRC market.

HKEX concludes consultation on listing framework for special purpose acquisition companies in Hong Kong

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 September 2021 consultation on proposals regarding the listing framework for special purpose acquisition companies (SPACs) in Hong Kong.

After considering the feedback, the SEHK has decided to implement the proposals set out in the consultation paper broadly as proposed, with some amendments to reflect comments made by respondents and to clarify the intent and practical aspects of the Listing Rules.

The guidance letter on SPACs is set out in Appendix V of the consultation conclusions paper. Amongst other things, the guidance letter provides guidance on SPAC promoters' suitability, prospectus and disclosure requirements for SPAC listings and de-SPAC transactions, what the 'fair market value' of a de-SPAC target is, and independent third party investments into SPACs.

In the consultation paper, the Securities and Futures Commission (SFC) proposed that the application of Rule 26.1 of the Takeovers Code in relation to a de-SPAC transaction which would result in the owner(s) of the de-SPAC target obtaining 30% or more of the voting rights in a successor company should normally be waived (ie a de-SPAC waiver). This proposal was adopted in the conclusions and the SFC has published a new practice note in this regard.

The new listing rules are effective as of 1 January 2022.

HKMA and SFC jointly consult on new calculation periods under clearing rules for OTC derivates regulatory regime

The Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) have launched a joint consultation on adding eight new calculation periods under the clearing rules for the over-the-counter (OTC) derivatives regulatory regime.

To meet their G20 commitments to reform the OTC derivative markets, the regulators have implemented a regulatory regime in Hong Kong to provide for the introduction of reporting, clearing, trading and record keeping obligations in respect of OTC derivative transactions. To date, the regulators have implemented two phases of mandatory reporting and one phase of mandatory clearing. Mandatory clearing took effect on 1 September 2016 to capture specified standardised interest rate swaps between major dealers if certain conditions under the clearing rules are met.

Pursuant to rule 6 of the clearing rules, the clearing obligation in respect of a prescribed person arises when its applicable average total position in relevant OTC derivative transactions in a specified period of time reaches a prescribed threshold for that period. The specified periods of time for calculating the applicable average total position are stipulated in the clearing rules as 'calculation periods'. As the existing list of calculation periods under Schedule 2 to the clearing rules will be exhausted in about one year's time, the regulators are proposing amendments to the clearing rules to add eight calculation periods. The draft amendments are subject to review by the Department of Justice and the negative vetting of the Legislative Council and may be subject to further changes.

Comments on the consultation are due by 21 January 2022.

HKMA publishes guidance on implementing FX Global Code

The HKMA has issued a circular providing guidance to authorised institutions (AIs) following the publication of the updated FX Global Code by the Global Foreign Exchange Committee (GFXC) in July 2021.

The FX Global Code was first published on 25 May 2017. It contains a single set of global principles of good practices for the wholesale foreign exchange market and is the product of efforts by market participants from the public and private sectors globally. The updated version has strengthened the guidance on areas including anonymous trading, algorithmic trading and transaction cost analysis, disclosures, and settlement risks.

The HKMA expects all AIs to take appropriate steps to review their practices considering the updated FX Global Code and ensure that they maintain adequate systems of control to support their observance of the FX Global Code. The HKMA further encourages AIs to demonstrate this by issuing or renewing the statement of commitment as set out in the FX Global Code and providing it to the Treasury Markets Association on or before 15 July 2022.

HKMA publishes new code of practice chapter on contractual recognition of suspension of termination rights under FIRO

The HKMA has published a new chapter of the code of practice titled 'Resolution Planning – Contractual Recognition of Suspension of Termination Rights' under the Financial Institutions (Resolution) Ordinance (FIRO).

The new chapter aims to provide guidance on how the HKMA as a resolution authority intends to exercise certain discretionary powers under, and on the operation of certain provisions in, the Financial Institutions (Resolution) (Contractual Recognition of Suspension of Termination Rights – Banking Sector) Rules (Stay Rules). However, the chapter does not seek to provide a comprehensive overview of requirements under the Stay Rules.

HKMA consults on implementation of Basel III final reform package regarding disclosure requirements

The HKMA has launched a consultation on proposals for implementing new/revised disclosure requirements contained in the following documents issued by the Basel Committee on Banking Supervision (BCBS):

- Pillar 3 disclosure requirements – updated framework of December 2018 (2018 requirements);
- revisions to leverage ratio disclosure requirements of June 2019; and
- revisions to market risk disclosure requirements and voluntary disclosure of sovereign exposures of November 2021.

Amongst other things, the HKMA intends to implement the following:

- the 2018 requirements that mainly cover revisions and additions to the Pillar 3 framework arising from the finalisation of the Basel III final reform package, and the new disclosure requirements on asset encumbrance; and
- the revised disclosure requirements on leverage ratio and market risk based on the BCBS standards.

The HKMA will not implement certain remaining new/revised disclosure requirements at this stage, including the prudential treatment of problem assets, capital distribution constraints, and sovereign exposures, having regard to local circumstances.

According to the revised BCBS timeline, the effective date for the new/revised disclosure requirements will be 1 January 2023. Given that the HKMA has adjusted the target effective date of the revised frameworks on credit risk, operational risk, the output floor and the leverage ratio under the Basel III final reform package in Hong Kong to 1 July 2023, the new/revised disclosure requirements associated with these frameworks will accordingly also take effect from 1 July 2023.

The implementation date of the new/revised disclosure requirements on market risk and credit valuation adjustment (CVA) risk will likewise follow that of the revised market risk and CVA risk frameworks. In Hong Kong, these frameworks are currently intended to enter into force, initially for reporting only, on 1 July 2023, to be followed by them taking effect on a date no earlier than 1 January 2024. During the reporting-only period, AIs will still be required to comply with the existing disclosure requirements for market risk and CVA risk under the Banking (Disclosure) Rules. The HKMA will consult the industry on the new/revised disclosure templates once the implementation timetable of the revised market risk and CVA risk frameworks is certain.

Comments on the consultation are due by 19 January 2022.

Australian Government consults on review of Australian Business Securitisation Fund Act 2019

The Australian Government has launched a consultation on the review of the Australian Business Securitisation Fund Act 2019.

The Act established the Australian Business Securitisation Fund (ABSF) to increase the availability and reduce the cost of finance for small and medium enterprises (SMEs) by investing in debt securities of SME lenders. The Act requires a review to be undertaken as soon as practicable two years and five years after its commencement to assess its effectiveness in meeting the set objectives.

Among other things, the review is intended to address the following:

- whether the ability of lenders to provide SME finance has improved and the extent to which this improvement can be attributed to the ABSF;
- the degree of the ABSF's influence on SME lending rates;
- the ABSF's effect on the viability of securitisation funding for SME lenders in terms of cost and assets;
- whether the ABSF had the effect of crowding in third-party investors to the SME securitisation market;
- the contribution of standardised data reporting to the development of the SME securitisation market; and
- the appropriateness of investment principles and the process established for the ABSF by the Australian Office of Financial Management to meet the objectives of the ABSF Act and whether they have been abided by in ABSF investments to date.

Comments on the consultation are due by 4 February 2022.

Australian Government consults on regulatory relief for foreign financial services providers

The Australian Government has launched a public consultation on the first tranche of exposure draft legislation to provide regulatory relief for foreign financial services providers (FFSPs). The consultation follows the announcement by the Government in the 2021-22 Budget that it would consult on options to provide regulatory relief for FFSPs and options to create a fast-track licensing process for those that wish to establish more permanent operations in Australia.

The exposure draft legislation proposes to introduce:

- the comparable regulator exemption, which exempts FFSPs authorised to provide financial services in a comparable regime from the requirement to be licensed when dealing with wholesale clients;
- the professional investor exemption, which exempts FFSPs that provide financial services from outside Australia to professional investors from the requirement to be licensed in Australia; and
- an exemption from the fit and proper person assessment to fast track the licensing process for FFSPs authorised to provide financial services in a comparable regulatory regime.

Comments on the consultation are due by 12 January 2022.

ASIC announces implementation of reforms regarding new financial adviser disciplinary system

The Australian Securities and Investments Commission (ASIC) has announced the implementation of a new financial adviser disciplinary system, following the Federal Government's response to the Financial Services Royal Commission Final Report Recommendation 2.10. The reforms will be implemented by the Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021.

Amongst other things, a key reform under the Act is to give the Financial Services and Credit Panel (FSCP) its own statutory functions and power. ASIC is also required to convene an FSCP in circumstances prescribed by the Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021, made on 20 December 2021.

ASIC will consult on guidance regarding the operation of the FSCP in early 2022. ASIC will also release guidance about how it will exercise its new power to issue warnings/reprimands in early 2022.

Canadian Alternative Reference Rate working group publishes white paper recommending cessation of CDOR

The Canadian Alternative Reference Rate working group (CARR) has published a white paper recommending that the Canadian Dollar Offered Rate (CDOR) administrator ceases publication of all of CDOR's remaining tenors after the end of June 2024. The decision to cease CDOR lies solely with Refinitiv Benchmark Services (UK) Limited (RBSL), and CARR's recommendation does not constitute a public statement or publication of information that CDOR has ceased or will cease permanently or indefinitely.

In October 2020, CARR was tasked with analysing the current status of the Canadian Dollar Offered Rate (CDOR) to examine the feasibility of reforming or enhancing CDOR, and to make recommendations based on that analysis. The white paper summarises CARR's findings and details its recommendations, including the recommendation that RBSL cease publication of all of CDOR's remaining tenors after the end of June 2024.

CARR proposes a two-staged approach to the transition away from CDOR:

- by 30 June 2023, CARR would expect all new derivative contracts and securities to have transitioned to using the Canadian Overnight Repo Rate

Average (CORRA), with no new CDOR exposure after that date except with limited exceptions. Those exceptions include derivatives that hedge or reduce CDOR exposures of derivatives or securities transacted before 30 June 2023 or in loan agreements transacted before 30 June 2024; and

- by 30 June 2024, firms will have had additional time to transition their loan agreements and deal with potential issues related to the redocumentation of legacy securities. The longer time window for stage two would also allow for more existing CDOR-based securities exposures to mature.

RBSL is required to consult on any proposed end-date and to publish a notice of an end-date ahead of any actual cessation date. It is this notice that would trigger the credit spread adjustment calculation under the International Swaps and Derivatives Association (ISDA)'s derivative CDOR fallbacks, as well as CARR's recommended CDOR floating rate note fallbacks. The actual fallbacks would only apply once CDOR is no longer published.

RBSL has published a statement acknowledging CARR's white paper and indicating that it plans to provide more information in Q1 2022. ISDA has also published a statement confirming that neither the white paper nor Refinitiv's statement constitute an index cessation event under the ISDA 2020 IBOR Fallbacks Supplement, the ISDA 2020 IBOR Fallbacks Protocol, the 2018 ISDA Benchmarks Supplement or its protocol.

Should RBSL discontinue CDOR, CARR recognises that infrastructure changes, potential changes to governing laws or regulations, and the potential development of new benchmarks may be required. CARR intends to continue to develop the tools and milestones necessary to enable a smooth transition away from CDOR.

SEC issues proposed rules to prevent fraud in connection with security-based swaps transactions, to prevent undue influence over CCOs, and requiring reporting of large security-based swap positions

The US Securities and Exchange Commission (SEC) has proposed rules intended to prevent fraud, manipulation and deception in connection with security-based swaps, to prevent undue influence over the chief compliance officer (CCO) of security-based swap dealers and major security-based swap participants (SBS entities), and to require any person with a large security-based swap position to publicly report certain information related to the position.

Proposed new Rule 9j-1 would:

- prohibit a range of misconduct and attempted misconduct in connection with security-based swaps, including misconduct in connection with the exercise of any right or performance of any obligation under a security-based swap;
- prohibit manipulation or attempted manipulation of the price or valuation of any security-based swap, or any payment or delivery related thereto;
- provide limited safe harbors for certain specified conduct;
- provide that a person cannot escape liability for trading based on possession of material non-public information about a security by purchasing or selling a security based swap based on that security and cannot escape liability under the proposed rule by purchasing or selling the

underlying security (as opposed to purchasing or selling a security-based swap that is based on that security).

Proposed new Rule 15Fh-4(c) would:

- prohibit personnel of an SBS entity from taking any action to coerce, mislead or otherwise interfere with the SBS entity's CCO.

Proposed new Rule 10B-1 would:

- require any person, or group of persons, with a security-based swap position that exceeds a specified reporting threshold to promptly file a Schedule 10B disclosing certain information related to its position;
- provide that any Schedule 10B be filed promptly but in no event later than the end of the first business day following the day of execution of the security-based swap transaction that results in the security-based swap position exceeding a threshold; and
- require reporting persons to file amendments promptly in the event of any material change to a previously filed Schedule 10B.

The proposed rules and a related fact sheet are available on the SEC website. Public comment is requested for 45 days following the publication of the proposed rule in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

Digital Markets Act – EU regulation of online gatekeepers remains on track for adoption in first half of 2022

In December 2020, the European Commission proposed new legislation to regulate digital platforms, the Digital Markets Act.

After a year of debate, the European Parliament adopted its amendments at a plenary session on 15 December 2021. That follows the Council of the European Union having adopted its amendments to the Commission's proposal on 25 November 2021. The amendments demonstrate a remarkable consensus that has emerged in the institutions, and these texts will serve as the basis for trilogue negotiations between the Parliament, the Council and the Commission, planned to start in January 2022.

This briefing discusses the amendments.

https://www.cliffordchance.com/briefings/2021/12/digital-markets-act--eu-regulation-of-online-gatekeepers-remains.html

The Whistleblower Directive – safeguarding effective access to leniency

The EU Whistleblower Protection Directive offers protections to individuals who report breaches of EU law, including EU antitrust rules. However, whilst aimed at increasing enforcement overall, the Directive may impact companies' ability to investigate potential antitrust breaches internally and apply for leniency for antitrust infringements. Following implementation of the Directive in the different EU Member States, companies should consider carefully how to maintain effective reporting systems.

This briefing discusses the Directive.

https://www.cliffordchance.com/briefings/2021/12/the-whistleblower-directive--safeguarding-e.html

Paperless international trade – achieving harmony between the law and technological potential

The development of technologies over the past decade has made paperless trade increasingly attainable. Recently, the disruption caused to supply chains by the COVID-19 pandemic has highlighted the gulf that now exists in many jurisdictions between what is technically possible and what is legally permitted or recognised in relation to the transferable records that underpin international trade.

Transition to the use of electronic transferable records as an alternative to paper-based transactions could reduce the inefficiency, errors, cost and environmental impact arising from the use of paper-based instruments in international trade.

This briefing examines the current legal framework relating to electronic transferable records in a number of jurisdictions, and the efforts towards reform that are being made in the international community.

https://www.cliffordchance.com/briefings/2021/12/paperless-international-trade--achieving-harmony-between-the-law-and-technologic.html

CMA updates its penalty setting guidance for competition investigations

The UK's Competition and Markets Authority has issued revised guidance on penalty setting in Competition Act cases. The revised guidance suggests an appetite to issue larger fines going forward.

This briefing discusses the guidance.

https://www.cliffordchance.com/briefings/2021/12/cma-updates-its-penalty-setting-guidance-for-competition-investi.html

Final countdown until the UK's new national security screening regime comes into full effect – implications for the financial markets

A new national security screening regime comes into effect on 4 January 2022 which gives the Government the power to assess certain transactions for national security risks. The new rules apply if there is a 'change of control' in relation to entities operating in certain specified areas of the economy that are deemed sensitive to national security and those closely linked. The rules also apply to a 'change of control' in relation to certain types of assets.

This briefing provides a snapshot of the issues to consider for financing transactions or arrangements involving a 'change of control' in one of the specified sensitive sectors or closely linked.

https://www.cliffordchance.com/briefings/2021/12/final-countdown-until-the-uk-s-new-national-security-screening-r.html

New listing regime for special purpose acquisition companies (SPAC) introduced by HKEX

On 17 December 2021, HKEX announced new rules to create a listing regime for special purpose acquisition companies (SPACs) that will take effect on 1 January 2022.

Clifford Chance's Hong Kong Equity Capital Markets team has updated the bilingual SPAC guide published in November 2021 in response to the new SPAC listing regime. The guide contains a high-level comparison of the new SPAC regime in Hong Kong (with effect from 1 January 2022), regulations applying to the primary listings of SPACs on SGX, and the regulations applying to SPACs in the US.

https://www.cliffordchance.com/briefings/2021/12/hkex-s-listing-framework-for-spacs--english-.html

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