

INTERNATIONAL REGULATORY UPDATE 24 – 28 JANUARY 2022

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- Recent Clifford Chance briefings: Fintech in 2022, China financial markets, and more. Follow this link to the briefings section.

ESRB publishes money market funds recommendations

The European Systemic Risk Board (ESRB) has published policy [recommendations](#) aimed at increasing the resilience of money market funds (MMFs).

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Intended as a contribution to the EU Commission's forthcoming 2022 review of the MMF Regulation and prepared in the context of wider international work on MMF reform, the ESRB's recommendations are to:

- reduce threshold effects by requiring all low-volatility net asset value (LVNAV) MMFs to have a fluctuating NAV;
- reduce liquidity transformation by incorporating higher liquidity requirements for LVNAV and variable NAV (VNAV) MMFs, composed of daily maturing assets, weekly maturing assets and public debt assets, and permitting MMF managers to use liquid assets to meet redemptions and hold fewer weekly maturing and public debt assets than required during market-wide stress;
- impose on redeeming and subscribing investors the cost of their redemptions and subscriptions by requiring liquidity management tools (LMTs), such as anti-dilution levies, liquidity fees and swing pricing, to be incorporated in MMF constitutional documents and other pre-contractual information; and
- enhance monitoring and stress testing.

The ESRB has also published a [report](#) setting out the economic rationale for and an impact assessment of its main proposals.

EMIR: ESMA consults on anti-procyclicality margin measures for CCPs

The European Securities and Markets Authority (ESMA) has launched a [consultation](#) on the regulatory technical standards (RTS) on anti-procyclicality (APC) measures for central counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR).

In the first part of the consultation, ESMA considers different proposals to harmonise the policies and procedures for selecting and reviewing the APC margin measures. In the second part, ESMA proposes to amend the RTS to improve the efficiency of APC margin measures by providing further granularity on the design and the use of specific tools.

Comments are due by 31 March 2022.

MiFID2: ESMA consults on suitability guidelines

ESMA has launched a [consultation](#) on proposed updates to its guidelines on MiFID2 suitability requirements.

Views are sought on updates to the current 2018 guidelines that seek to take account of the integration of sustainability factors, risks and preferences into Delegated Regulation (EU) 2017/565 in respect of certain organisational requirements and operating conditions for investment firms, which apply from 2 August 2022. In particular, proposed amendments relating to sustainability include:

- collection of information from clients on sustainability preferences;
- firms' assessment of sustainability preferences; and
- organisational requirements, such as staff training and updating client information.

ESMA also proposes to align the suitability guidelines with the guidelines on appropriateness where it has common provisions for both assessments, and to annex to the suitability guidelines a list of good and bad practices that emerged from its 2020 common supervisory action on suitability rules.

The consultation closes on 27 April 2022. ESMA expects to publish a final report in Q3 2022.

MiFID2: ESMA consults on trading venue perimeter

ESMA has launched a [consultation](#) on an opinion aimed at clarifying the MiFID2 provisions relating to multilateral systems and the trading venue authorisation perimeter.

The consultation follows the publication of the final review report on the functioning of organised trading facilities (OTFs) in April 2021 and seeks views on an opinion aimed at:

- clarifying the definition of multilateral systems; and
- providing guidance on when systems, in particular new technology providers, request for quote systems and systems that pre-arrange transactions, should be considered as multilateral systems and, in consequence, seek authorisation as trading venues.

The consultation closes on 29 April 2022. ESMA intends to publish a final report in Q3 2022.

ESMA consults on scope of CRA Regulation for private credit ratings

ESMA has launched a [consultation](#) on a targeted revision to its guidelines and recommendations on the scope of the Credit Rating Agencies (CRA) Regulation.

ESMA proposes to revise paragraphs 14 and 15 of its existing guidelines to provide greater clarity on the exemptions for private ratings under the CRA Regulation. The proposed amendments address:

- the interpretation of the terms ‘produced pursuant to an individual order’ and ‘provided exclusively to the person who placed the order’;
- restrictions on sharing a private credit rating with a ‘limited number of third parties’; and
- how to monitor the distribution of private credit ratings by the ratings producer.

The revised guidelines are intended to assist ESMA in its perimeter activities and to define the activities of private credit rating providers that ESMA considers to fall outside of the scope of the CRA Regulation.

Comments are due by 11 March 2022. ESMA expects to publish a final report by the end of Q2 2022.

ESMA publishes letter on Regulation of European Green Bonds proposal

ESMA has published a [letter](#) that it has sent to the EU Parliament and Council on the proposal for a Regulation of European Green Bonds.

ESMA welcomes the legislative proposal and the role foreseen in the proposal for ESMA in terms of supervising external reviewers. However, ESMA observes some potential challenges with the proposal, including:

- the timing of implementing measures (level 2 deliverables);
- the functioning of the third country regimes; and
- appropriateness of the resourcing and funding model provided for ESMA's supervision.

In addition, ESMA shares some insights it has gained from its supervision of credit rating agencies that may also be relevant for the supervision of external reviewers.

ESMA raises these observations for consideration by the co-legislators in the legislative process.

Taxonomy Regulation: Platform on Sustainable Finance responds to draft Complementary Delegated Act covering nuclear and gas activities

The Platform on Sustainable Finance has published its [response](#) to the draft EU Taxonomy Complementary Delegated Act (CDA) covering nuclear and gas activities. The report includes the feedback of Platform members and observers. The overall assessment of the Platform is that the draft CDA activities are not in line with the Taxonomy Regulation and most members see a serious risk of undermining the sustainable Taxonomy framework. Platform members have doubts about how the draft criteria would work in practice and are concerned about the environmental impacts that may result.

The Platform has prioritised four areas of feedback and recommendations for the EU Commission on the draft CDA. These are:

- the approach to draft CDA activities;
- energy generation from gaseous fossil fuels;
- new nuclear energy facilities and existing nuclear energy facilities; and
- disclosure and verification requirements.

Once the Delegated Act is adopted by the EU Commission, it will be subject to scrutiny by the EU Parliament and Council for a period of four months.

CRR: EBA publishes final draft ITS on Pillar 3 disclosures on ESG risks

The European Banking Authority (EBA) has published its [final draft implementing technical standards \(ITS\)](#) on Pillar 3 disclosures on environmental, social and governance (ESG) risks under the Capital Requirements Regulation (CRR).

The draft ITS are intended to ensure that stakeholders are well-informed about institutions' ESG exposures, risks, and strategies and can make informed decisions and exercise market discipline. They put forward comparable disclosures and key performance indicators (KPIs), including a green asset ratio (GAR) and a banking book taxonomy alignment ratio (BTAR), as a tool to show how institutions are embedding sustainability considerations in their risk management, business models and strategy and their pathway towards the Paris agreement goals.

The EBA believes that the ESG Pillar 3 package will help to address shortcomings of institutions' current ESG disclosures at EU level by setting mandatory and consistent disclosure requirements, including granular templates, tables and associated instructions, and also help establish best practices at an international level. The draft ITS have been built on the recommendations of existing initiatives, such as those of the Task Force on Climate-related Financial Disclosures (TCFD) of the Financial Stability Board (FSB).

The EBA has integrated proportionality measures that should facilitate institutions' disclosures, including transitional periods and the use of estimates.

CRR: EBA publishes amending ITS on currencies with constraints on availability of liquid assets

The EBA has published its [final report](#) on draft amendments to its ITS on currencies with constraints on the availability of liquid assets in the context of the liquid coverage ratio (LCR).

The proposed amendments remove the only specified currency currently in the list, the Norwegian Krone (NOK), as data analysis demonstrates that there is no longer a shortage in the supply of liquid assets in the currency.

Since this amendment will lead to an empty list, the EBA does not intend to update the corresponding regulatory technical standards (RTS) unless a future assessment shows the need for a currency to be added to the list.

UK financial regulators launch wider implications framework

The Financial Ombudsman Service (FOS) has [announced](#) a formal agreement between certain UK financial services regulators for collaboration on matters of common interest.

The wider implications framework builds on existing collaboration arrangements between the FOS, the Financial Conduct Authority (FCA), the Financial Services Compensation Scheme (FSCS), The Pensions Regulator (TPR) and the Money and Pensions Service (MaPS), and establishes a procedure for its members to discuss and agree approaches to:

- activities by one or more financial services firms that give rise to common interest questions; and
- by one or more of the members that impact on the activities of another member.

The framework is aimed at achieving a better outcome for consumers, small businesses and the financial services industry.

FCA consults on approach to compromises for firms who seek to limit liabilities

The FCA has launched a consultation ([GC22/1](#)) on its proposed guidance on the FCA's approach to compromises for regulated firms.

Compromises are arrangements that allow a firm to settle its liabilities with creditors and/or shareholders.

GC22/1 sets out:

- how the FCA considers compromises and the factors it considers when assessing them; and
- the FCA's role when a firm proposes a compromise.

In GC22/1, the FCA states that if firms do propose a compromise in respect of redress liabilities, they should ensure it is the best proposal that the firm can make, which includes the firm providing the maximum amount of funding for the compromise so that consumers receive the greatest proportion of what is owed to them.

The FCA also reminds firms of their regulatory obligations to notify the FCA immediately and to provide relevant information at an early stage if they are considering proposing a compromise to manage liability.

Comments are due by 1 March 2022.

FCA publishes webpage on data transformation programme

The FCA has published a [new webpage](#) on its joint transformation programme with the Bank of England (BoE) on data collection.

The programme is aimed at increasing value and reducing the burden on firms, and will focus on:

- integrating reporting to increase consistency in designing and delivering collections for value, reuse and efficiency;
- modernising reporting instructions to improve how data is interpreted and implemented by firms; and
- defining and adopting common data standards that identify and describe data in a consistent way.

The FCA intends to broaden its engagement with solo regulated firms in 2022 and to provide an update on its work in this area in the coming months.

CSSF issues white paper on distributed ledger technologies and blockchain

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has published a [white paper](#) on distributed ledger technologies (DLT) and blockchain.

The white paper is a non-binding supporting document intended to guide professionals in their due diligence process related to the use of DLT, in particular on the risk assessment to be carried out in the context of developing, providing, using or implementing a DLT solution. The white paper sets out a list of elements to which particular focus should be given when conducting such risk assessments and provides a list of 18 questions to be analysed by the relevant professionals involved. The white paper highlights the principal risks related to DLT, both in terms of governance and technical risks.

The white paper further discusses some technical aspects of DLT and its use. The paper also provides examples of use cases and further asserts the technology neutral approach applied by the CSSF. The CSSF recognises that, when properly used, a DLT can, like other technologies, provide

important advantages and benefits for the financial sector. However, the CSSF emphasises that institutions must demonstrate that prudential and regulatory requirements are met when using a DLT. The CSSF further sets out that it remains open to consultation and exchange and encourages market players to contact it in order either to present an innovative project, request information on the regulatory framework applicable to a project, or to initiate a dialogue on new technologies or regulation that may impact the financial sector.

The white paper is mainly addressed to professionals that are financial and non-financial institutions providing or intending to provide services to the Luxembourg financial sector.

The CSSF has invited any stakeholder to consider the concrete implications of the use of DLT in the provision of its services and encouraged these stakeholders to conduct a proper assessment and weighting of the risks and benefits related to DLT and its use in the provision of services in the financial sector.

China issues new rules for CIBM and exchange bond market connect scheme

The Shanghai Stock Exchange, Shenzhen Stock Exchange, National Interbank Funding System, Shanghai Clearing House and China Securities Depository and Clearing Corporation Limited (ChinaClear) have jointly issued the [Interim Measures for the Mutual Access and Connectivity Arrangement of the Interbank Bond Market and the Exchange Bond Market](#).

The Measures implement the scheme to connect the China Interbank Bond Market (CIBM) and China's exchange bond market (EBM) under the Bulletin [2020] No. 7 jointly announced by the China Securities Regulatory Commission and the People's Bank of China (PBOC) on 19 July 2020.

The implementation timeline of the scheme will be separately determined and announced to the market.

The Measures confirm the following key rules and set out the technical details accordingly:

- foreign institutional investors that have been approved to invest in either CIBM or EBM may invest in the other market through the scheme;
- the scheme adopts a nominee holding arrangement whereby Shanghai Clearing House and ChinaClear will open a nominee account with each other to hold bonds acquired by investors;
- trading of CIBM and EBM bonds will be subject to the rules of the venue where such bonds are traded and cleared (e.g., the CIBM rules for CIBM bonds and the stock exchange rules for EBM bonds); and
- after the implementation of the scheme, banks in China (including foreign invested banks) can trade bonds on EBM by either opening trading accounts with the exchanges directly or through the scheme.

ASIC launches regtech innovation initiative to address poor market disclosure

The Australian Securities and Investments Commission (ASIC) has [announced](#) that it will be working with five Australia-based regulatory

technology (regtech) entities for the Business Research and Innovation Initiative (BRII) Regulatory Technology (Regtech) Round, dealing with the challenges of corporate disclosure.

The latest BRII round, which was initiated by the Department of Industry, Science, Energy, and Resources, is intended to assess the potential of regtech to solve challenges across government agencies and departments. It focuses on developing a technology solution to help ASIC analyse corporate disclosures, and other datasets, to identify and assess compliance by listed companies with a range of requirements, including:

- continuous disclosure (price sensitive disclosure) and other disclosure obligations to the market;
- financial reporting obligations;
- the prohibition against misleading or deceptive disclosure (such as misleading categorisation of market announcements); and
- the prohibition against practices that manipulate the pricing of securities.

Under the latest BRII Regtech round, grants of up to AUD 100,000 will be provided to each of the five successful small-to-medium regtech enterprises to conduct a feasibility study in response to the corporate disclosure challenge during a period of about three months. ASIC has indicated that it will also work with these successful regtech firms throughout the feasibility study stage. In the next stage of the BRII Regtech round, two of these regtechs may receive further grants of up to AUD 1 million each to develop and test a proof of concept over a further 15 months.

RECENT CLIFFORD CHANCE BRIEFINGS

Fintech in 2022 – five trends to watch

With the COVID-19 pandemic ongoing, technology continues to revolutionise financial services at a rapid pace.

This briefing highlights five key trends for fintech in 2022 in the areas of crypto, non-fungible tokens, web 3.0, debt capital markets and digital trade finance.

<https://www.cliffordchance.com/briefings/2022/01/fintech-in-2022--five-trends-to-watch.html>

What to watch out for in the Spanish restructuring and financial litigation market in 2022

At the legislative and judicial level, 2021 was another year marked by COVID. The measures adopted in Spain since the start of the pandemic have held Spain's business sector in stasis.

This briefing looks at the trending topics in insolvency and financial litigation that will transform these practices over the next 12 months.

<https://www.cliffordchance.com/briefings/2022/01/-what-to-watch-out-for-in-the-spanish-restructuring-and-financia.html>

China financial markets – trends to watch in 2022

This will be a crucial year for China as it is determined to move centre stage globally. It plans to tackle a range of issues from climate change to dealing with increasingly powerful tech companies, while President Xi is likely to further increase his grip on power by asking the Party Congress for a third term in office.

This briefing looks at what lies ahead.

<https://www.cliffordchance.com/briefings/2022/01/china-financial-markets--trends-to-watch-in-2022.html>

ISS and Glass Lewis issue proxy voting policy updates for the 2022 proxy season

The two largest proxy advisory firms in the US, Institutional Shareholder Services Inc. and Glass, Lewis & Co., have released their updated proxy voting guidelines. ISS' policy updates are effective for annual shareholder meetings held on or after 1 February 2022. Glass Lewis' policy updates are effective for annual shareholder meetings held on or after 1 January 2022.

This briefing discusses both ISS' and Glass Lewis' 2022 policy updates for US companies, as well as points of convergence with major shareholders, including BlackRock, Fidelity, Vanguard, and State Street, who are increasingly focusing on environmental, social and governance issues. It notes certain key changes and action items that companies should implement in response, with a more detailed summary on the following pages. These policy changes should inform proxy drafting and shareholder engagement for the upcoming annual meeting season.

<https://www.cliffordchance.com/briefings/2022/01/iss-and-glass-lewis-issue-proxy-voting-policy-updates-for-the-20.html>

Federal Trade Commission and Department of Justice Antitrust Division launch public inquiry aimed at modernizing merger guidelines, seeking comments by 21 March 2022

On 18 January 2022, Chair Lina Khan of the Federal Trade Commission (FTC), and Assistant Attorney General Jonathan Kanter of the Department of Justice (DOJ) Antitrust Division, launched a joint public inquiry aimed at modernizing both the horizontal and vertical merger guidelines. As part of this effort, the agencies are soliciting comments from the public, including 'market participants, government entities, economists, attorneys, academics, unions, employees, farmers, workers, businesses, franchisees and consumers'. The comment period is open for 60 days, requiring all comments to be received no later than 21 March 2022. It will likely be approximately one year before a final version of any new guidelines are published, but the announcement and request for information provide useful insight into some of the issues and new theories of harm the DOJ and FTC are already considering when reviewing transactions.

This briefing discusses the inquiry.

<https://www.cliffordchance.com/briefings/2022/01/federal-trade-commission-and-department-of-justice-antitrust-div.html>

US Federal Trade Commission announces annual revisions to the HSR Act's thresholds and changes to maximum civil penalty amounts

On 24 January 2022, the US Federal Trade Commission announced its annual revisions to the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. Barring an exemption, parties to a transaction meeting these thresholds must make pre-closing notifications to the US antitrust authorities and abide by a mandatory waiting period. The revised thresholds also dictate the relevant filing fee the parties must pay when submitting their HSR filings. The new thresholds will apply to any transaction that closes 30 days after the new thresholds are published in the Federal Register. The maximum civil penalty amounts for premerger notification violations under the HSR Act increased and went into effect on 10 January 2022.

This briefing discusses the revisions.

<https://www.cliffordchance.com/briefings/2022/01/u-s--federal-trade-commission-announces-annual-revisions-to-the-.html>

Shadow trading – the first test for the SEC's novel theory

The first test of the Securities and Exchange Commission's (SEC's) shadow trading theory in federal court has resulted in a win for the agency. On 14 January 2022, a federal district court denied defendant Matthew Panuwat's motion to dismiss the SEC's complaint, permitting the case to go forward on a theory of 'shadow trading'. Shadow trading is where corporate insiders exploit material non-public information about their company, to trade in the securities of an 'economically-linked' company, such as a similarly situated competitor.

This briefing discusses the case.

<https://www.cliffordchance.com/briefings/2022/01/shadow-trading-the-first-test-for-the-secs-novel-theory.html>

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