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Digital Finance: EU Parliament and Council reach political agreement on DORA

The EU Parliament has reached a [provisional political agreement](#) with the EU Council on the EU Commission's proposed Digital Operational Resilience Act (DORA). DORA seeks to establish a uniform set of requirements for the security of network and information systems of companies and organisations operating in the financial sector, as well as any critical third parties which provide information communication technologies (ICT) services to them. It is part of the EU Commission's wider digital finance strategy which was published in September 2020.

The co-legislators have provisionally agreed the following:

- statutory auditors and audit firms will not be included in the initial scope of

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DORA, but their potential future inclusion will be subject to a review within three years;

- the ICT risk management framework will follow proportionality principles, taking into account the differences in financial entities' size, nature, complexity and risk profile;
- one in three of the tests of entities' cybersecurity preparedness will be conducted by an external provider;
- entities will report on ICT-related incidents to their competent authorities and may deviate from the required timelines, provided sufficient justification is supplied;
- critical ICT third-party service providers that provide their services to EU financial entities must establish a subsidiary in the EU and must inform the European Supervisory Authorities (ESAs) of any changes to their management structure;
- a Joint Oversight Network will be established to strengthen collaboration between the ESAs on the oversight of ICT third-party risk, the functioning of which will be subject to a review within five years; and
- the rules should apply 24 months after they enter into force.

The provisional agreement must now be formally approved by the Council and Parliament before going through the formal adoption procedure.

EU Commission publishes proposal for directive on financial services contracts concluded at a distance

The EU Commission has published a [legislative proposal](#) for a directive concerning financial services contracts concluded at a distance. The proposed directive will repeal the Distance Marketing Directive (2002/65/EC) and transfer the framework for consumer protections relating to financial services distance contracts to the Consumer Rights Directive (2011/83/EU).

The proposals also introduce a number of targeted amendments to the existing framework, intended to modernise and strengthen its provisions. These include:

- requiring traders to provide a withdrawal button when selling through electronic means, with a view to making it easier for consumers to exercise their fourteen day withdrawal right;
- requiring sellers to provide the email address of the trader and information on any potential hidden costs or risks to the consumer at least a day before a distance contract is signed;
- requiring traders to set up online systems which are fair and transparent and, if automated online tools are used, permitting consumers to request human intervention instead;
- introducing stronger penalties for widespread cross-border infringements of distance contracts; and
- harmonising the requirements by establishing similar rules for all EU providers.

The proposal has been submitted to the EU Council and the EU Parliament for consideration.

Payments: EU Commission consults on PSD2 review and open finance

The EU Commission has launched a set of consultations on the revised Payments Services Directive (PSD2) review and open finance.

Under the digital finance and retail payments strategies, the Commission is conducting a comprehensive review of the application and impact of PSD2, including an overall assessment of whether it is still fit for purpose, taking into account market developments.

The [consultation on PSD2](#) seeks views on whether the Directive has achieved its objectives and whether amendments are needed to ensure that its rules remain relevant. The Commission has also launched a separate targeted consultation seeking views from stakeholders with more in-depth and technical knowledge in order to inform the Commission on the application and impact of PSD2 taking into consideration, among others, developments in the payment market, payment user needs and the need for possible amendments.

Comments on the PSD2 consultation are due by 2 August 2022. Comments on the targeted consultation are due by 5 July 2022.

The [consultation on the open finance framework](#) and data sharing in the financial sector seeks views on the broader concept of 'open finance', which could cover a range of financial services, such as investment in securities, pensions, and insurance. A separate targeted consultation seeks input from professional stakeholders that have a more in-depth knowledge or working experience in the field of payments. These include, among others, payment service providers (PSPs), national and EU authorities and regulators, and payment experts.

Comments on the consultation on the open finance framework are due by 2 August 2022. Comments on the targeted consultation are due by 5 July 2022.

ESAs publish supervisory statement on PRIIPs KID

The Joint Committee of the European Supervisory Authorities (ESAs), comprising the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), has published a [supervisory statement](#) on the key information document (KID) for packaged retail and insurance-based investment products (PRIIPs).

The supervisory statement provides an overview of issues concerning the quality of descriptions provided by PRIIPs manufacturers and sets out the ESAs' expectations regarding elements of the 'What is this product?' section, including descriptions of:

The proposed draft RTS are intended to:

- the PRIIP's legal form;
- capital protection and potential losses;
- autocallability features;
- early termination;
- coupon payments;
- leverage factors; and

- target retail investors.

The ESAs also set out expectations relating to the language and layout, the use of automated processes, and information about underlying assets.

EBA reports on convergence of supervisory practices for 2021

The EBA has published its [annual report](#) on the convergence of supervisory practices for 2021.

According to the report, competent authorities (CAs) made progress in the implementation of the EBA guidelines on the supervisory review and evaluation process (SREP) and ensured communication to all institutions under their remit of the total SREP capital requirement (TSCR). Additionally, CAs appear to have reflected the key supervisory priorities for 2021 consistently in their own supervisory practices and activities, with particular focus on capital and liability management and asset quality and credit risk management.

The report identifies areas where additional efforts are expected from CAs on topics such as ICT and security risk, operational resilience and profitability and business model. It also concludes that there is scope for further convergence in the use of internal capital adequacy assessment (ICAAP) as well as in the consistent treatment of risks across the EU and in the setting of the Pillar 2 Guidance (P2G).

Queen's Speech May 2022: UK Government's legislative plans announced

Her Majesty the Queen's [speech](#) has been delivered in the Houses of Parliament setting out the UK Government's agenda for the coming session.

In relation to financial services, the Government intends to bring forward:

- a Financial Services and Markets Bill to revoke and replace retained EU law on financial services, reform the regulation of the UK's capital markets to promote investment, introduce additional protections for those investing or using financial products, update regulators' objectives to ensure a greater focus on growth and international competitiveness and ensure access to cash;
- a UK Infrastructure Bank Bill establishing a UK Infrastructure Bank aimed at supporting economic growth and delivering net zero emissions by 2050;
- a Brexit Freedoms Bill to enable retained EU law to be more easily amended;
- a Data Reform Bill to reform the UK's data protection regime; and
- an Economic Crime and Corporate Transparency Bill aimed at strengthening powers to tackle illicit finance and reduce economic crime.

More details will be available once the Bills are formally introduced.

Green finance: UK Government consults on update to Green Finance Strategy

The UK Government has launched a [call for evidence](#) to support the development of an update to the UK's Green Finance Strategy. The

consultation is intended to gather views and evidence from stakeholders to support the Government in developing an update to the Green Finance Strategy, planned for publication in late 2022. The updated strategy will take stock of progress and set out how the UK can better ensure the financial services industry is supporting the UK's energy security, climate and environmental objectives.

The consultation closes on 22 June 2022.

Transition Plan Taskforce launches call for evidence on sector-neutral framework

The Transition Plan Taskforce (TPT) has launched a [call for evidence](#) on a sector-neutral framework for private sector transition plans. The framework will inform UK regulations for certain financial sector firms and listed companies to publish a climate transition plan.

Comments are due by 13 July 2022.

Bank of Italy consults on draft regulations for IFD/IFR transposition

The Bank of Italy has launched a [public consultation](#) on the transposition of Directive (EU) 2019/2034 and the implementation of Regulation (EU) 2019/2033 (the IFD/IFR package). The consultation comprises:

- a draft regulation on the supervision of investment firms, which completes the transposition of the European provisions on prudential supervision (in particular, on minimum capital requirements, supervision of groups, prudential rules applicable to branches of third country firms other than banks, prudential supervision) and carries out a general reorganisation of the second level regulations on investment firms; and
- draft amendments to the Bank of Italy's regulations implementing articles 4-undecies and 6, paragraph 1, letters b) and c-bis), of Legislative Decree no. 58 of February 24, 1998 (Italian Financial Act), which concern the regulations on corporate governance, remuneration and internal controls in the provision of investment services.

The consultation will end on 5 July 2022.

HKMA endorses mandatory reference checking scheme

The Hong Kong Monetary Authority (HKMA) has published a [circular](#) to draw the attention of authorised institutions (AIs) to the guidelines on the mandatory reference checking (MRC) scheme issued by the Hong Kong Association of Banks (HKAB) and the DTC Association. The MRC scheme is endorsed by the HKMA.

The MRC scheme seeks to address the 'rolling bad apples' phenomenon in the banking sector in Hong Kong. In mid-2020 the HKMA consulted the banking industry and published its consultation conclusions in May 2021. The guidelines provide the operational details of the MRC scheme. In essence, AIs recruiting for certain specified positions that fall within the scope of the MRC scheme will be required to approach the former and current AI employer(s) of a prospective employee to request conduct-related information covering the seven years prior to the application for the position.

The MRC scheme is applicable to all AIs and will be implemented in phases. AIs are expected to implement Phase 1 of the MRC scheme by 2 May 2023. A review of the scheme will be conducted two years after the implementation of Phase 1 (i.e. in mid-2025). The findings of the review will help refine the scheme in its Phase 2, which is expected to be expanded to also cover individuals licensed or registered to carry out regulated activities.

The HKMA sees the MRC scheme as an important component of its effort for the further enhancement of bank culture in Hong Kong. While the MRC scheme is not introduced as a supervisory requirement, the HKMA attaches great importance to the effective implementation of the scheme. In particular, the HKMA considers that repeated failures of an AI to adhere to the requirements of the MRC scheme may indicate potential weaknesses with its governance arrangements or internal controls and procedures.

SFC publishes FAQs relating to code of conduct requirements

The Securities and Futures Commission (SFC) has issued a set of [frequently asked questions](#) (FAQs) to provide guidance on the application of paragraphs 21 and 17.1A of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission, which set the conduct requirements for

- bookbuilding and placing activities in equity capital market and debt capital market transactions; and
- ‘sponsor coupling’.

The code of conduct will be effective on 5 August 2022.

ASIC outlines expectations on cybersecurity risks

In light of the Federal Court’s decision in *Australian Securities and Investments Commission v RI Advice Group Pty Ltd* [2022] FCA 496 that the Australian Financial Services (AFS) licensee RI Advice breached its license obligations to act efficiently and fairly when it failed to have adequate risk management systems to manage its cybersecurity risks, the Australian Securities and Investments Commission (ASIC) has [set out its expectations](#) of AFS licensees relating to cybersecurity risks.

Among other things, the ASIC expects AFS licensees to:

- be aware of the potential consumer harms that arise from cybersecurity shortcomings;
- adopt good cybersecurity risk management practices to reduce potential harm to consumers;
- actively manage cyber risks and continuously improve cybersecurity, including assessing cyber incident preparedness and reviewing incident response and business continuity plans;
- act quickly in the event of a cyber incident to minimise the risk of ongoing harm; and
- report cyber incidents to the Australian Cyber Security Centre (ACSC), which has separately put in place eight essential mitigation strategies for organisations to protect themselves against many cyber vulnerabilities.

ASIC has also highlighted that dual regulated AFS licensees will have obligations to comply with the standards of other regulators, such as the Australian Prudential Regulation Authority. ASIC intends to take enforcement action if AFS licensees do not meet these obligations.

RECENT CLIFFORD CHANCE BRIEFINGS

The Digital Markets Act – a new era for the digital sector in the EU

The Digital Markets Act (DMA) ushers in a new era for the digital sector in the EU, as compliance will require some of the most influential digital companies to make unprecedented, far-reaching changes to the way they operate and interact with their customers, even going as far as to rethink aspects of their business models.

This briefing discusses the DMA.

<https://www.cliffordchance.com/briefings/2022/05/the-digital-markets-act--a-new-era-for-the-digital-sector-in-the.html>

ISDA releases new documentation for repurchase and SFTs under the ISDA Master Agreement – same, but different?

On the face of it, repurchase transactions and securities lending transactions (SFTs) documented under master agreements have several features in common with transactions under ISDA Master Agreements, including incorporating similar risk reducing concepts (for example the use of collateral and close-out netting). But look closer at the SFT products and there are significant distinctions in how they and their relevant markets operate, which reflects how their master agreements have developed.

The nature of SFTs necessitates distinct terms to reflect market practice and there are variations in methodologies used to achieve the commercial agreement. Though it has always been possible, in theory, to document a SFT under the ISDA Master Agreement, the three markets have historically traded under their own master agreements and market participants have navigated around their intricacies. However, this may change following the publication by ISDA of provisions and definitions enabling SFTs to be documented under a single ISDA Master Agreement.

This briefing discusses the documentation.

<https://www.cliffordchance.com/briefings/2022/05/isda-releases-new-documentation-for-repurchase-and-securities-le.html>

Diversity and inclusion on company boards and executive management – FCA policy statement

On 20 April 2022, the FCA published a policy statement (PS22/3) setting out its final policy decision on proposals set out in a consultation (CP21/24) launched in July 2021 to improve transparency on the diversity of listed company boards and their executive management teams. The measures being implemented are broadly similar to the proposals on which the FCA consulted, with the exception of changes to address concerns raised in consultation responses around the basis for reporting on the representation of

women and feedback relating to overseas data protection laws. The new rules apply to accounting periods starting on or after 1 April 2022. However, the FCA is encouraging companies whose financial years began on or after 1 January 2022 to consider reporting on the targets and making the numerical disclosures required by the new rules in relation to their current accounting period on a voluntary basis.

This briefing discusses the policy statement and the amendments to the Listing Rules and Disclosure Guidance and Transparency Rules.

<https://www.cliffordchance.com/briefings/2022/05/diversity-and-inclusion-on-company-boards-and-executive-manageme.html>

US developments in the CRT market – growing opportunities

The credit-risk transfer (CRT) market in the US continues to expand, with new banks and new asset classes. Several of the largest US banks have been active in this market and have recently increased sales of risk-transfer securities tied to mortgages, corporate loans and auto loans. Most recently, the issuance of CRT notes linked to mortgage warehouse lines by two regional banks – Texas Capital and Western Alliance – has attracted significant attention and speculation on whether other regional banks will follow suit.

The future development and growth of the CRT market depend on two factors:

- recognition of CRT for regulatory capital purposes in the US; and
- market familiarity and comfort with the different structures that are available.

This briefing discusses the basic regulatory issues, the structuring considerations and the legal issues which may affect the regulatory recognition of CRT and the expansion of the CRT market.

<https://www.cliffordchance.com/briefings/2022/05/us-developments-in-the-crt-market-growing-opportunities.html>

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