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ESMA launches call for evidence on pre-hedging

The European Securities and Markets Authority (ESMA) has launched a call

for evidence on the practice of pre-hedging. In particular, ESMA is seeking stakeholder feedback on:

- the definition of pre-hedging and the distinction between it and illegal practices, such as front running;
- the benefits and drawbacks of pre-hedging;
- proposed guidance on pre-hedging from a Market Abuse Regulation (MAR) perspective, including whether a request for quote could be deemed inside information and what parameters could be used to evaluate the legitimacy of pre-hedging practices under MAR; and
- proposed guidance on the MiFID2 provisions that firms should comply with when engaging in pre-hedging, and the ways in which these provisions are currently applied.

ESMA intends to use the feedback received to develop appropriate guidance on pre-hedging if required.

Comments are due by 30 September 2022.

CPMI and IOSCO consult on CCPs' practices on non-default losses

The Bank for International Settlements' (BIS') Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) have asked for public comment on a discussion paper on central counterparty (CCP) practices to address non-default losses (NDL).

Non-default events, such as cyber-attacks, can threaten a CCP's viability as a going concern and its ability to continue providing critical services. Under the principles for financial market infrastructures (PFMI), CCPs must take action and have policies, procedures and plans for addressing NDLs, in addition to a sound risk management framework to mitigate and manage those risks.

The paper seeks to advance industry efforts and foster dialogue on the key concepts and processes used by CCPs. It outlines current practices at various CCPs to address NDLs in business as usual (BAU), recovery and orderly wind-down scenarios.

The paper is not intended to create additional standards for CCPs beyond those set out in the PFMI, nor is it intended to be an assessment of whether CCPs have appropriately implemented the standards set out in the PFMI regarding NDLs.

FCA publishes rules on appointed representatives

The Financial Conduct Authority (FCA) has published a policy statement setting out final rules aimed at improving the appointed representatives (ARs) regime (PS22/11).

PS22/11 sets out final rules and guidance requiring principal firms to:

- apply enhanced oversight of ARs;
- assess and monitor the risk their ARs pose to consumers and markets;
- annually review information on their ARs' activities, business and senior management;

- notify the FCA of future AR appointments 30 calendar days before it takes effect; and
- provide complaints and revenue information for each AR to the FCA on an annual basis.

The rules take effect on 8 December 2022 following a four-month implementation period.

The FCA also notes that it is working with HM Treasury on whether further legislative changes are required.

FCA publishes financial promotions rules and consults on LTAFs

The FCA has published a policy statement on strengthening financial promotion rules for high-risk investments (HRIs) and firms approving financial promotions (PS22/10) and a consultation on broadening retail access to long-term asset funds (LTAFs) (CP22/14).

PS22/10 sets out the FCA's final policy position and handbook rules aimed at setting a minimum standard for promotions of HRIs, including:

- rationalising and simplifying the categorisation of financial promotion marketing restrictions into realisable securities (RRS) not subject to marketing restrictions, restricted mass market investments (RMMI) subject to certain marketing restrictions and non-mass market investments (NMMI) which cannot be marketed to retail investors;
- banning HRI promotions from containing incentives to invest;
- standard risk warning wording for HRIs, including the option for firms to use alternative wording in certain circumstances;
- personalised risk warning wording for first time investors;
- introducing a minimum 24-hour cooling off period for first time investors;
- amending and simplifying investor declaration forms;
- enhancing appropriateness rules for HRIs;
- requiring firms to collect data relating to client categorisation and appropriateness assessments; and
- strengthening the role of authorised firms approving and communicating financial promotions.

Rules related to the standard risk warning have effect from 1 December 2022. All other rules and non-handbook guidance have effect from 1 February 2023.

The FCA intends to publish final rules for cryptoasset promotions once HM Treasury legislates to bring qualifying cryptoassets within the scope of the financial promotion regime.

CP22/14 proposes to classify the LTAF as a RMMI based on the rules set out in PS22/10, with the aim of making LTAFs accessible to direct investment by a wider range of retail investors.

Comments are due by 10 October 2022.

BaFin publishes circular on supervisory approach to off-balance sheet items treatment election in net stable funding ratios

The German Federal Financial Supervisory Authority (BaFin) has published a circular (06/2022) on its supervisory approach under Articles 428p (10) or 428aq (10) of the Capital Requirements Regulation (CRR) on the off-balance sheet items treatment election by less significant institutions pursuant to Article 6 (4) of the CRR in connection with Article 6 (4) of Council Regulation (EU) 1024/2013 (SSM Regulation) and by institutions pursuant to Section 1a of the German Banking Act (KWG) in the net stable funding ratio / the simplified net stable funding ratio.

BaFin classifies certain payment transactions in stationary travel sales as not requiring strong customer authentication

BaFin has published a guidance note on the supervisory classification of certain payment transactions in stationary travel sales pursuant to which a strong customer authentication in accordance with the Payment Services Directive 2 (PSD2) and the Payment Services Supervision Act (ZAG) respectively is not required. This interpretation explicitly applies to stationary travel sales only, and thus not to online bookings.

BaFin notifies capital management companies of obligation to prepare PRIIPS KIDs as of 1 January 2023

BaFin has issued a supervision notification to capital management companies (KVGen) under the German Capital Investment Code (KAGB) of their obligation to draw up PRIIPS key information documents (KIDs) pursuant to Regulation (EU) 1286/2014 (PRIIPS Regulation) (PRIIPS KIDs) as of 1 January 2023. KVGen were exempted from producing PRIIPS KIDs pursuant to Article 32 PRIIPS Regulation on the grounds of preparing KIDs under the KAGB (KAGB KIDs) instead. The obligation to prepare KAGB KIDs ceases as at the same date pursuant Sections 166, 270 KAGB. Due to Article 82a of Directive 2009/65/EC (UCITS Directive (as amended by Directive (EU) 2021/2261)) drawing up PRIIPS KIDs also satisfies the KIDs requirements under the UCITS Directive and thus the KAGB KIDs requirements under the KAGB. Where shares of UCITS are sold to professional investors, KVGen may choose which set of KIDs to prepare. The KAGB KIDs requirement relating to the sale of shares in public AIFs to professional investors will expire as of 1 January 2023.

Consob updates issuers regulations by simplifying procedure for approving prospectus and allowing documents in English

The Commissione Nazionale per le Società e la Borsa (Consob) has updated the issuers regulations by simplifying the procedure for approving prospectuses and allowing documents in English. The innovations introduced following the consultation in 2021 are the following:

- the abolition of the preliminary verification of the completeness of the documentation, which means that the administrative proceedings will start from the date of submission of the related applications to Consob;

- the deadlines for the maximum duration of the proceedings and for the response to requests for additions of the prospectus have been aligned with the provisions of the EU regulation on prospectuses;
- the documents to be attached to the draft prospectus have also been reduced The possibility has been confirmed for the issuer and/or the offeror to first submit to Consob issues of particular relevance related to the public offer or admission to trading, to ease the promptness of the preliminary process; and
- the possibility to draw up the prospectus in English has also been introduced, providing for the translation into Italian of the summary note only in the case of offers carried out entirely or partially in Italy, or if admission to trading on the Italian regulated market has been requested.

The new rules will enter into force when Resolution no. 22423 of 28 July 2022 is published in the Official Gazette.

CSSF issues press release on investors' sustainability preferences

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a press release stating that, from 2 August 2022, investors' sustainability preferences will have to be taken into account by professionals offering investment advice and discretionary portfolio management (gestion discrétionnaire).

The press release also notes that these entities will now be required to ask both new and existing clients about their preferences and level of knowledge about sustainable investments.

CSSF issues press release on MiFID rules related to sustainability

The CSSF has issued a press release on the application of the requirements relating to client sustainability preferences and the publication of the ESMA's consultation paper on MiFID2 product governance guidelines.

In the press release the CSSF:

- reminds supervised entities that as of 2 August 2022, the date of application of Commission Delegated Regulation 2021/1253, providers of investment advisory and discretionary portfolio management services are required to obtain specific information on their clients' preferences regarding sustainable investments and meet such preferences, while also meeting their other investment objectives and taking into account their financial situation and knowledge and experience;
- notes that, although ESMA is currently finalising the update of its guidelines on certain aspects of the MiFID2 suitability requirements in order to accommodate updates on this matter, the CSSF expects that, even in the absence of these guidelines, supervised entities that provide investment advisory or discretionary portfolio management services collect and take into account all relevant information related to the sustainability preferences of new clients from 2 August 2022 onwards, and update existing client information at the latest at the next regular update of the client's profile; and

- expects supervised entities to monitor the developments of the regulatory framework and the publication of the above-mentioned guidelines and to continue to adapt their processes and governance accordingly.

Looking to the future, the CSSF notes that further sustainability-related amendments to the MiFID2 framework will apply from 22 November 2022, as per Commission Delegated Directive (EU) 2021/1269 of 21 April 2021 amending Delegated Directive 2017/593, and also draws attention to the publication by ESMA on 8 July 2022 of a consultation paper in relation to an update of its guidelines on MiFID2 product governance requirements. The consultation paper is addressed to investors and consumer organisations, and to all firms manufacturing and/or distributing products as defined under MiFID2. The consultation ends on 7 October 2022.

CSSF publishes circular on requests for information on accounts under Article 14 of Regulation establishing a European Account Preservation Order

The CSSF has issued Circular 22/819 on requests for information on accounts under Article 14 of Regulation (EU) No. 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

The circular is addressed to all banks, and it is intended to inform them that, as of 1 September 2022, the CSSF will transmit requests for information on accounts pursuant to Article 14 of the Regulation (EAPO requests) via its eDesk (guichet numérique) and to provide details on EAPO requests.

Banks will receive and must respond to EAPO requests via the CSSF eDesk, meaning that they must have an eDesk account, which requires LuxTrust authentication. For further information, the CSSF refers to its user guide 'Authentication and user account management' on the homepage of the eDesk.

The CSSF is asking banks to adapt their internal procedures to take account of this change in the communication process for EAPO requests, in order to ensure a truthful response to the CSSF within the time limits.

The circular notes that the CSSF was designated as information authority in charge of obtaining information within the meaning of Article 14 of the Regulation and mentions the conditions in which the CSSF intervenes as information gathering authority. It further notes that upon receipt of an EAPO request all banks in the territory of the Grand-Duchy of Luxembourg are obliged to declare whether a certain debtor holds an account with them.

The CSSF further draws the attention of banks to their obligation to defer the notification of the debtor of the disclosure of his personal data for thirty days, in accordance with the provisions of Article 14 (8) of the Regulation.

MAS and IFSCA exchange MOU on supervisory cooperation

The Monetary Authority of Singapore (MAS) and the International Financial Services Centre Authority (IFSCA) have exchanged a memorandum of understanding (MOU) on supervisory cooperation.

In particular, the MOU is intended to provide a framework for supervisory cooperation between the two authorities in relation to financial services

including stock exchanges and technical cooperation. It seeks to pave the way for mutual assistance and the facilitation of the exchange of information between the two authorities, to strengthen the supervision of cross-border operations of the exchanges and compliance by the exchanges with the applicable laws and regulations.

MAS revises Notice 637 on Risk Based Capital Adequacy Requirements for Banks Incorporated in Singapore

The MAS has revised its existing Notice 637 which sets out the risk-based capital adequacy requirements for reporting banks incorporated in Singapore.

Notice 637 has been mainly revised to:

- implement the revised Pillar 3 disclosure requirements for interest rate risk in the banking book (IRRBB) published by the Basel Committee on Banking Supervision;
- implement a -100bps interest rate floor on the post-shock interest rates under the standardised interest rate shock scenarios set out in Annex 10C of MAS Notice 637;
- provide additional clarity on the application of interest rate floors, interest rate caps, and pass-through rates when computing IRRBB under the standardised interest rate shock scenarios; and
- implement various other technical revisions.

The revised MAS Notice 637 is effective from 1 January 2023.

HKEX concludes consultation on revising position limits and large open position reporting requirements

The Hong Kong Exchanges and Clearing Limited (HKEX) has published the conclusions to its June 2022 consultation on the following proposed revisions:

- the position limit regime for single stock options (SSO) and single stock futures (SSF); and
- the additional position limits and large open position (LOP) reporting requirements for mini-Hang Seng Index (HSI) and mini-Hang Seng China Enterprises Index (HSCEI) derivatives contracts (flagship-minis).

Considering the feedback received, the HKEX has decided to adopt the proposals to revise the position limit regime for SSO and SSF, and to remove the additional position limits for its flagship-minis contracts. However, the HKEX will not at this stage proceed with the proposal to revise the LOP reporting requirements for its flagship-minis contracts.

The revised position limit regime includes the following:

- two additional tiers (i.e. 200,000 and 250,000 contracts) will be added to the existing three-tier SSO position limit model (i.e. 50,000, 100,000, 150,000 contracts).
- the existing 5,000 contracts per expiry month SSF position limit model will be revised to a five-tier model with net position limits (i.e. 5,000, 10,000, 15,000, 20,000, and 25,000 contracts). A single contract month limit with 2 times the net position limit for all contract months combined will also be introduced; and

- the additional position limits that apply to flagship-minis contracts will be removed.

Subject to regulatory approvals, the HKEX will announce the effective date of the revised position limits in due course.

HKEX concludes consultation on proposed amendments to listing rules relating to share schemes of listed issuers

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of HKEX, has published the conclusions to its October 2021 consultation on proposed amendments to the listing rules relating to share schemes of listed issuers.

The key changes to the listing rules include the following for share schemes funded by issuance of new shares of listed issuers:

- extending Chapter 17 to govern all share schemes involving grants of share awards and grants of options to acquire new shares of issuers;
- defining eligible participants of share schemes to include employee participants, related entity participants and service providers;
- applying a scheme mandate limit of not exceeding 10% of an issuer's issued shares to all share schemes of the issuer and requiring the issuer to set a service provider sublimit within the scheme mandate limit and disclose the basis for its determination. Independent shareholders' approval for refreshment of scheme mandate within a three-year period is required;
- requiring approval by shareholders for share grants to an individual participant in excess of the 1% individual limit or a connected person in excess of the *de minimis* threshold and all share grants to connected persons will require approval by independent non-executive directors;
- requiring a minimum vesting period of 12 months. Share grants to employee participants may be subject to a shorter vesting period under specific circumstances. Share grants to directors and senior management with a shorter vesting period must be approved by the remuneration committee; and
- requiring disclosure of details of share grants by the issuer to the following participants to be made on an individual basis depending on whether it is a connected person, a participant with share grants in excess of the 1% Individual Limit or a related entity participant or service provider with share grants in excess of 0.1% of the issuer's issued shares over any 12-month period.

For share schemes funded by existing shares of listed issuers, the key amendments are:

- requiring disclosure in annual reports of a summary of each share scheme; and
- information relating to grants of existing shares during the year.

The main changes to the listing rules also include applying Chapter 17 to share schemes of a principal subsidiary. Share grants under share schemes of other subsidiaries will be subject to Chapters 14 and/or 14A requirements.

The rule amendments relating to share schemes will come into effect on 1 January 2023. Issuers may adopt the amended rules for their share schemes before the effective date.

ASIC extends transitional relief for foreign financial services providers

The Australian Securities and Investments Commission (ASIC) has extended the transitional relief for foreign financial services providers (FFSPs) from the requirement to hold an Australian financial services (AFS) licence when providing financial services to Australian wholesale clients.

The ASIC Corporations (Amendment) Instrument 2022/623 extends the transitional relief for another 12 months until 31 March 2024. The current transitional arrangements for ASIC's sufficient equivalence relief and limited connection relief were due to expire on 31 March 2023. The amendment instrument also delays the commencement of the ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199 until 1 April 2024.

ASIC has also indicated that, during the extended transitional period, it will consider new applications for individual temporary licensing relief, or new standard or foreign AFS licence applications, from entities that cannot rely on the transitional relief. FFSPs that have been, or are granted a foreign AFS licence, will be able to continue to operate their financial services business in Australia under the licence issued by ASIC.

RECENT CLIFFORD CHANCE BRIEFINGS

Evolving landscapes — creating a taxonomy of regulatory divergence

Since Brexit and the end of the transition period, UK and EU financial services regulation has begun to evolve and, in several cases, diverge.

In many instances, this is simply because the UK and EU are pursuing the same policy objectives, objectives that are shared by many jurisdictions around the world but tailoring the implementation of those objectives to their respective populations, economies and markets. Both the UK and EU have, for example, created sustainability disclosure regimes that draw heavily upon the global Task Force on Climate-related Financial Disclosures (TCFD) recommendations. Both the UK and the EU are drawing certain activities relating to cryptoassets within the scope of regulatory regimes.

In other instances, the differing evolution of UK and EU financial services regulation reflects differing agendas. An example of such an initiative is the UK's consumer duty, a new, expansive duty under which financial services firms must act to deliver good outcomes for retail customers. Thus far the EU has not announced a similar initiative.

In the future, and not least because of the UK's new Financial Services and Markets Bill, it seems likely that this pattern of similar-but-different evolution will only continue. The impact of this ongoing evolution is that firms that operate in both the UK and EU will need to keep abreast of, and operate in compliance with, both evolving regimes.

This briefing includes a high-level taxonomy of evolution, indicating the core areas in which the evolving regulation will lead, or is already leading, to divergence.

https://www.cliffordchance.com/briefings/2022/08/evolving-landscapes--creating-a-taxonomy-of-regulatory-divergenc.html

The Financial Services and Markets Bill – What does it mean for insurers?

The Financial Services and Markets Bill was introduced to Parliament on 22 July 2022 and proposes important changes to the UK's regulatory framework for financial services, including paving the way for Solvency II reforms.

If passed, the Bill would revoke all EU-derived legislation relating to financial services and markets, including regulations relating to Solvency II, insurance distribution, motor vehicle insurance and occupational pensions.

The Government has indicated that this process would take several years, and that EU-derived legislation would continue to be treated as retained EU law until it is revoked. Retained EU law comprises onshored EU regulations, technical standards and decisions and domestic legislation and rules implementing EU law, all as amended by 'exit instruments' under the European Union (Withdrawal) Act 2018. Retained EU law would remain in force during a transitional period until it is revoked and replaced by new or modified legislation.

This briefing discusses the provisions which will impact the UK insurance market.

https://www.cliffordchance.com/briefings/2022/08/the-financial-services-and-markets-bill-what-does-it-mean-for.html

Register of overseas entities – new registration requirements for foreign owners of UK land come into force

The Register of Overseas Entities opened on 1 August 2022. It is the first stage of implementing new rules under the Economic Crime (Transparency and Enforcement) Act 2022 that require overseas entities wishing to acquire UK land to disclose details of their beneficial owners on a new public register. The new rules also require overseas entities that already own land in England or Wales which was acquired in the last 20 years to disclose details of their beneficial owners. The new rules are of particular relevance to investors, in and lenders to, UK real estate, and the briefing considers what steps investors should be taking now to comply with the new registration requirements.

It has been confirmed by The Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No. 3) Regulations 2022 that the new rules are being implemented on a staggered basis. The Register of Overseas Entities opened on 1 August for overseas entities to electronically submit registration applications and the majority of the provisions of the Act relating to the operation of the new register came into force at the same time. However, the land registration aspects will not come into force until 5 September 2022 allowing overseas entities acquiring UK land a window to register on the Register of Overseas Entities before the land registration requirements take effect. This staggered implementation is good news for overseas entities who are currently negotiating purchases or new leases of UK

land nevertheless such entities should begin preparing their registration applications now.

This briefing discusses the new registration requirements for foreign owners of UK land.

https://www.cliffordchance.com/briefings/2022/08/register-of-overseas-entities--new-registration-requirements-for.html