

INTERNATIONAL REGULATORY UPDATE 17 – 21 OCTOBER 2022

- **Crowdfunding Regulation: Commission Delegated Regulation (EU) 2022/1988 published in Official Journal**
- **MAR: RTS on liquidity contracts for SME growth market issuers published in Official Journal**
- **EMIR: EU Commission adopts Delegated Regulations to provide liquidity relief on energy derivatives markets**
- **EMIR: ESMA proposes temporary amendments to CCP collateral requirements to provide liquidity relief on energy derivatives markets**
- **CRD4: EBA publishes final draft RTS and guidelines on interest rate risk arising from non-trading book activities**
- **CRR: EBA issues opinion on EU Commission's amendments to its final draft ITS on Pillar 3 disclosures on ESG risks**
- **EU Council and Parliament reach provisional agreement on ELTIFs Regulation**
- **EU Council adopts conclusions on energy and the economy**
- **EU Commission adopts 2023 work programme**
- **EU Commission publishes guidelines for sales of NPLs on secondary markets**
- **ECON Committee publishes draft report on proposed CSDR Refit**
- **CSDR: ESMA updates Q&As**
- **ESMA and ACER establish joint task force to strengthen oversight of energy derivative markets**
- **FSB consults on convergence in cyber incident reporting**
- **FSB publishes report on liquidity in core government bond markets**
- **Draft Financial Services (Miscellaneous Amendments) Regulations 2022 published**
- **FCA publishes notice on 1- and 6-month synthetic sterling LIBOR**
- **PRA publishes statement on capital requirements relating to firms' exposures under Energy Markets Financing Scheme**
- **Law Commission to review how private international law applies to digital assets and other emerging technology**
- **BaFin consults on revised Investment Institutions Remuneration Ordinance**

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- **German Financial Stability Committee issues statement on risks and resilience of German financial sector following ESRB warning**
- **Shareholder Rights Directive 2: Italy completes implementation process**
- **UCITS: Consob consults on amendments to issuers' regulation**
- **MAS revises Notice 603 on branches, places of business and automated teller machines**
- **Recent Clifford Chance briefings: VAT treatment of sub-participations, UK Lehman decision and more. Follow this link to the briefings section.**

Crowdfunding Regulation: Commission Delegated Regulation (EU) 2022/1988 published in Official Journal

[Commission Delegated Regulation \(EU\) 2022/1988](#) on extending the transitional period for continuing to provide crowdfunding services under the Crowdfunding Regulation has been published in the Official Journal.

The Delegated Regulation extends the transitional period of Regulation (EU) 2020/1503 from 10 November 2022 to 10 November 2023 allowing ECSPs to continue their business activities and avoiding widespread disruption to the crowdfunding markets. The extension applies to all ECSPs currently operating under national law.

MAR: RTS on liquidity contracts for SME growth market issuers published in Official Journal

[Delegated Regulation \(EU\) 2022/1959](#) setting out regulatory technical standards (RTS) for liquidity contracts for the shares of issuers whose financial instruments are admitted to trading on an SME growth market (GM) under the revised Market Abuse Regulation (MAR) as amended by the SME Regulation ((EU) 2019/2115) has been published in the Official Journal.

Delegated Regulation (EU) 2022/1959 sets out the requirements that parties to a liquidity contract should comply with in order to make sure that such persons are not engaging in market manipulation. In particular, the annex to the RTS contains a contractual template aimed at ensuring a level-playing field among issuers listed on SME GMs and investment firms, while safeguarding market integrity and maintaining flexibility.

The Delegated Regulation enters into force on 7 November 2022.

EMIR: EU Commission adopts Delegated Regulations to provide liquidity relief on energy derivatives markets

The EU Commission has adopted two Delegated Regulations amending the RTS under the European Market Infrastructure Regulation (EMIR) relating to the [clearing threshold for OTC commodity derivative contracts and other OTC derivative contracts](#) and [temporary emergency measures on collateral requirements](#) respectively.

The Commission is seeking to give energy companies in the EU additional margin for manoeuvre so that they can secure supplies and purchases of

energy commodities in the medium term in the wake of the current energy crisis. To that end, the Delegated Regulations:

- increase the clearing threshold for non-financial counterparties (NFCs) to EUR 4 billion, with those below the threshold having an exemption from the margin requirements on their OTC energy derivatives; and
- broaden the list of eligible assets that central counterparties (CCPs) may accept to cover their risks for one year, allowing non-financial companies as well as all market participants to use extra types of guarantees for meeting their margin calls.

The Delegated Regulations form part of the Commission's wider enhanced [framework](#) designed to respond to the current energy crisis.

EMIR: ESMA proposes temporary amendments to CCP collateral requirements to provide liquidity relief on energy derivatives markets

The European Supervisory and Markets Authority (ESMA) has published its [final report](#) on draft RTS which temporarily expand the pool of CCP eligible collateral to uncollateralised bank guarantees for NFCs acting as clearing members and to public guarantees for all types of counterparties.

This follows a request by the EU Commission on 13 September 2022 for ESMA to consider whether applicable Level 2 provisions should be temporarily adapted to alleviate the liquidity pressure on NFCs active on gas and electricity regulated markets cleared in EU-based CCPs. The report sets out draft RTS amending Delegated Regulation 153/2013 that ESMA has developed under Article 46(3) of EMIR, to temporarily expand for a period of 12 months the pool of eligible collateral to uncollateralised bank guarantees for NFCs acting as clearing members and to public guarantees for all types of counterparties.

ESMA has also published a [Q&A](#) clarifying the eligibility of bonds and commercial paper as collateral for CCPs.

ESMA intends to continue to work on other potential measures to respond to the volatility in the energy markets.

CRD4: EBA publishes final draft RTS and guidelines on interest rate risk arising from non-trading book activities

The European Banking Authority (EBA) has published its [final guidelines](#) and two final reports on draft RTS on interest rate risk arising from non-trading book activities under the Capital Requirements Directive (CRD4).

The reports complete the onboarding into EU law of the Basel standards on interest rate risks for banking book (IRRBB) positions.

The guidelines on IRRBB and credit spread risk arising from non-trading book activities (CSRBB) will replace the current guidelines on technical aspects of the management of interest rate risk arising from non-trading activities under the supervisory review process (SREP) published in 2018. The guidelines will apply from 30 June 2023, except for the part on CSRBB, which will apply from 31 December 2023.

The [final draft RTS on the IRRBB standardised approach](#) are intended to:

- specify the criteria to evaluate the risks arising from potential changes in interest rates that affect both the economic value of equity (EVE) and the net interest income (NII) of an institution's non-trading book activities;
- provide a simplified standardised approach for smaller and non-complex institutions; and
- adjust thresholds for modelling behavioural assumptions to be used in combination with standardised constraints and assumptions in order to provide for more proportionality.

The [final draft RTS on IRRBB supervisory outlier tests](#) (SOT) specify the modelling and parametric assumptions and the supervisory shock scenarios to identify institutions for which the EVE would decline by more than 15% of Tier 1 capital, as well as to evaluate if there is a large decline in the net interest income, that could trigger supervisory measures.

CRR: EBA issues opinion on EU Commission's amendments to its final draft ITS on Pillar 3 disclosures on ESG risks

The EBA has published an [opinion](#) on the EU Commission's proposed amendments to its final draft implementing technical standards (ITS) on prudential disclosures of environmental, social and governance (ESG) information. The EBA accepts the two substantive changes proposed by the Commission to enhance proportionality, although the EBA insists that institutions should make every effort to collect and disclose relevant information reflected in the Banking Book Taxonomy Alignment Ratio (BTAR). The changes proposed by the Commission are that:

- institutions 'may' choose to disclose BTAR information, instead of being required to do so on a 'best effort basis'; and
- the collection of information from counterparties will be on a voluntary basis.

EU Council and Parliament reach provisional agreement on ELTIFs Regulation

The EU Council and the EU Parliament have [reached](#) a provisional agreement on the EU Commission's proposed amendments to the European Long-Term Investment Funds (ELTIFs) Regulation.

The revisions are intended to remove supply-side and demand-side limitations and include clarifying:

- the scope of eligible assets and investments;
- the portfolio composition and diversification requirements;
- the conditions for borrowing and lending of cash; and
- other fund rules, including sustainability aspects.

The package also includes rules intended to make it easier for retail investors to invest in ELTIFs while ensuring strong investor protection.

Following technical and legal revision, the finalised text will be submitted to the Council and Parliament for formal adoption.

EU Council adopts conclusions on energy and the economy

The EU Council has adopted [conclusions](#) on energy and the economy and agreed on the need to accelerate and intensify efforts to reduce energy demand, secure supply, avoid rationing and lower energy prices for households and businesses whilst preserving the integrity of the Single Market.

The EU Council has called upon the Council and the EU Commission to urgently submit concrete decisions on additional measures and on the Commission proposals, having assessed their impact notably on existing contracts, including the non-affectation of long-term contracts, and taking into account the different energy mixes and national circumstances. The additional measures include, among other things:

- voluntary joint purchasing of gas and the speeding up of negotiations with reliable partners to seek mutually beneficial partnerships;
- a new complementary benchmark by early 2023 that more accurately reflects conditions on the gas market;
- a temporary dynamic price corridor on natural gas transactions to immediately limit episodes of excessive gas prices;
- a temporary EU framework to cap the price of gas in electricity generation;
- improvements to the functioning of energy markets to increase market transparency, alleviate liquidity stress and eliminate factors that amplify the volatility of gas price, while ensuring the preservation of financial stability;
- fast-tracking the simplification of permitting procedures in order to accelerate the rollout of renewables and grids including with emergency measures on the basis of Article 122 TFEU;
- energy solidarity measures in case of gas supply disruptions at national, regional or EU level, in the absence of bilateral solidarity agreements;
- increased efforts to save energy; and
- mobilising relevant tools at national and EU level.

EU Commission adopts 2023 work programme

The EU Commission has adopted a [communication](#) setting out its 2023 work programme.

New initiatives relating to financial services include legislative proposals to:

- improve the retail investment framework;
- establish an open finance framework;
- revise the Payment Services Directive (PSD2);
- lay down principles for a digital euro before its potential issuance by the European Central Bank (ECB); and
- clarify the scope and effects of legal tender of the euro banknotes and coins.

These are expected to be taken forward in Q1 or Q2 of 2023.

Priority pending proposals relating to financial services include the:

- proposed regulation amending the Central Securities Depositories Regulation (CSDR Refit);
- proposed Directive on corporate sustainability due diligence (CSDDD);
- proposed regulation and directive amending the EU Markets in Financial Instruments Regulation and Directive (MiFIR2/MiFID3);
- proposed regulation and directive establishing a European Single Access Point (ESAP);
- proposed regulation amending the ELTIF Regulation;
- proposed directive amending the Alternative Investment Fund Managers Directive and Undertakings for Collective Investment in Transferable Securities Directive (AIFMD2);
- proposed regulation amending the Capital Requirements Regulation (CRR3);
- proposed directive amending the Capital Requirements Directive (CRD6);
- proposed regulation on European green bonds; and
- proposed regulation amending the Single Resolution Mechanism (SRM) Regulation to establish a European deposit insurance scheme.

[Annexes](#) to the communication set out the new policy and legislative initiatives, regulatory fitness and performance (REFIT) initiatives, priority pending legislative files and intended withdrawals of pending proposals. [Factsheets](#) on the work programme have also been published.

The Commission intends to continue discussions with the EU Parliament and Council on a list of joint priorities, with a view to reaching agreement by the end of 2022.

EU Commission publishes guidelines for sales of NPLs on secondary markets

The EU Commission has published [guidelines](#) on a best-execution process for sales of non-performing loans (NPLs) on secondary markets.

The EU Commission announced its intention to develop guidance in its action plan for tackling NPLs in the aftermath of the COVID-19 pandemic, published on 16 December 2020.

The guidelines are intended to encourage good sell- and buy-side processes for NPL transactions in EU secondary markets and, in particular, to help sellers and buyers that may have less experience with secondary market transactions.

The guidelines summarise best practices following the sequence of main activities to be performed within the preparation of the competitive transaction process.

While market participants are not obliged to follow the guidelines, the guidelines aim to provide NPL sellers and buyers with a clear and structured process to help them achieve a successful outcome.

ECON Committee publishes draft report on proposed CSDR Refit

The EU Parliament's Economic and Monetary Affairs Committee (ECON) has published its [draft report](#) on the EU Commission's proposal for a Regulation amending the Central Securities Depositories Regulation (CSDR).

The draft report sets out the EU Parliament's suggested amendments to the proposed Regulation, along with the rapporteur's explanatory statement. The suggested amendments include, among other things:

- the introduction of a two-step approach to settlement discipline whereby mandatory buy-ins could become applicable if and when the penalties regime alone does not improve settlement fails in the EU;
- amending the conditions under which CSDs can access banking services by reviewing the threshold for such services and broadening the range of providers for such services; and
- simplifying the passporting requirements for CSDs to operate across the EU with one single license, by removing costly and duplicative procedures.

CSDR: ESMA updates Q&As

The European Securities and Markets Authority (ESMA) has updated its [Q&A document](#) on the implementation of the CSDR with an updated Q&A on settlement discipline questions.

The updates relate to cash penalties, in particular to:

- the duplication of penalties where new settlement instructions are entered into a securities settlement system to replace failed instructions where penalties have already been applied;
- in instances of settlement fails relating to transactions which were intended to be settled before the date of application of cash penalties requirements and continue to fail past that date, the requirement to pay cash penalties for each business day in which the transaction continues to fail to be settled after that date; and
- the possibility for CSDs to use additional incentives to limit the occurrence of payment delays leading to partial collection and distribution of cash penalties.

ESMA and ACER establish joint task force to strengthen oversight of energy derivative markets

The Agency for the Cooperation of Energy Regulators (ACER) and the ESMA have [announced](#) that they are strengthening their cooperation to improve information exchange and avoid potential market abuse in Europe's spot and derivative markets.

ACER and ESMA are establishing a joint task force to reinforce their cooperation and enhance coordination in respect of the exchange of data and knowledge among their staff and respective national authorities. The enhanced coordination is intended to support investigations and enforcement so that the rules are applied in a convergent and holistic way in all national jurisdictions.

The joint task force will provide a framework for broadening cooperation on the monitoring of energy and energy derivatives markets.

FSB consults on convergence in cyber incident reporting

The Financial Stability Board (FSB) has launched a [consultation](#) on achieving greater convergence in cyber incident reporting. The proposals include:

- recommendations to address the challenges to achieving greater convergence in cyber incident reporting;
- further work on establishing common terminologies related to cyber incidents; and
- a proposal to develop of a common format for incident reporting exchange (FIRE).

Comments on the consultation are due by 31 December 2022.

FSB publishes report on liquidity in core government bond markets

The FSB has published a [report](#) outlining policies intended to enhance the resilience of core government bond markets.

The report forms part of the FSB's programme to enhance the resilience of non-bank financial intermediation (NBFIs), analyses the March 2020 market turmoil and outlines measures to:

- mitigate unexpected and significant spikes in liquidity demand by non-bank investors, which may involve selling (or repo) near-cash instruments such as government bonds;
- enhance the resilience of liquidity supply in stress, such as exploring ways to increase the availability and use of central clearing for government bond cash and repo transactions and the use of all-to-all trading platforms; and
- enhance markets' oversight, risk monitoring and the preparedness of authorities and market participants, such as increasing the level of transparency in the markets and closing substantial data gaps.

The FSB intends to deliver its next progress report, including the main findings across NBFIs initiatives and policy proposals to address systemic risk in NBFIs, to the G20 Summit in November 2022.

Draft Financial Services (Miscellaneous Amendments) Regulations 2022 published

HM Treasury (HMT) has laid the [Financial Services \(Miscellaneous Amendments\) Regulations 2022](#) before Parliament.

The [draft statutory instrument](#) (SI), which is subject to the affirmative procedure, contains measures intended to address deficiencies in retained EU law. In particular, it will:

- extend the temporary recognition of EU Simple, Transparent, and Standardised (STS) securitisations from 31 December 2022 to 31 December 2024; and
- ensure that HMT and the Financial Conduct Authority (FCA) can apply their powers under certain regulations to Gibraltar firms in the UK financial services market.

Subject to parliamentary approval, the SI is expected to come into force on 31 December 2022.

FCA publishes notice on 1- and 6-month synthetic sterling LIBOR

The FCA has published a [notice](#) under Article 21(3) of the UK Benchmarks Regulation (BMR), requiring ICE Benchmark Administration (IBA) to publish 1-month and 6-month synthetic sterling LIBOR for a further period of three months, from 30 December 2022 until 31 March 2023.

This follows a statement published by the FCA in September 2022, announcing its decision not to compel the publication of 1- and 6-month synthetic sterling LIBOR after 31 March 2023.

The notice does not relate to 3-month sterling LIBOR, in respect of which the FCA expects to provide information in due course.

PRA publishes statement on capital requirements relating to firms' exposures under Energy Markets Financing Scheme

The Prudential Regulation Authority (PRA) has published a [statement](#) setting out its observations on the capital requirements relating to firms' exposures under the Energy Markets Financing Scheme (EMFS), particularly eligibility for recognition as unfunded credit risk mitigation (CRM) under the UK CRR.

In particular, the statement covers:

- CRM eligibility of EMFS guarantees;
- the EMFS scope of protection;
- firms applying the standardised approach for credit risk;
- firms applying an internal ratings based approach for exposures to the obligor, with a permanent partial use exemption for exposures to the guarantor;
- firms applying an internal ratings based approach for exposures to the obligor and for exposures to the guarantor; and

leverage ratio treatment of exposures under the EMFS.

Law Commission to review how private international law applies to digital assets and other emerging technology

The Law Commission of England and Wales has launched a Government-commissioned [review](#) that aims to provide clarity on how private international law rules can apply to emerging technology.

The review will consider private international law challenges in international tech-related disputes, such as those involving cryptoassets and electronic trade documents.

The Law Commission notes that the rapid rise of new digital technologies, which often rely on distributed ledger technology (DLT), has generated a number of conflict of laws issues, leading to legal uncertainty for users, organisations and governments. In many cases involving emerging technology, it is unclear which courts have the power or jurisdiction to hear the dispute, and which law should be applied. The problem is partly driven by

digital location. As digital assets are intangible and often distributed, their geographical location can be hard to pinpoint, creating an array of legal issues.

The Law Commission intends to launch a consultation on its proposals for reform in the second half of 2023.

BaFin consults on revised Investment Institutions Remuneration Ordinance

The German Federal Financial Supervisory Authority (BaFin) has launched a [consultation](#) on a draft Investment Institutions Remuneration Ordinance (WpIVergV).

The draft is based on the first draft of the ordinance, which BaFin consulted on in May/June 2021 (as part of a consultation on the comprehensive ordinance under the Investment Institutions Act (WpIG)) and has been revised on the basis of the comments received to the earlier consultation and the now finalised EBA guidelines on sound remuneration policies under Directive (EU) 2019/2034.

The WpIG implements Directive (EU) 2019/2034 (Investment Firms Directive, IFD). The proposed WpIVergV, based on section 46 para 3 WpIG, is intended to further implement the IFD with regard to the specification of remuneration requirements for ‘medium-sized investment institutions’ as defined in section 2 para 17 WpIG.

Comments are due by 21 November 2022.

German Financial Stability Committee issues statement on risks and resilience of German financial sector following ESRB warning

The German Financial Stability Committee (FSC) has issued a [communication](#) concurring with the European Systemic Risk Board (ESRB) warning of 22 September 2022 on the vulnerabilities in the EU financial system (ESRB/2022/7).

The FSC notes that, whilst German financial institutions are generally well capitalised, they should prepare for a significantly altered risk situation. According to the FSC, adequate risk provisioning is required by all financial market players to prevent adverse economic developments due to currently ailing macroeconomics.

The macroprudential measures package announced by the BaFin at the beginning of 2022 is an important tool for the preservation and enhancement of the resilience of the German financial system, states the FSC. The activation of the countercyclical capital buffer and the sectoral systemic risk buffer for loans secured by residential real estate has preserved equity capital in the German banking system without impairing lending, it concludes.

Shareholder Rights Directive 2: Italy completes implementation process

The Commissione Nazionale per le Società e la Borsa (Consob) and the Bank of Italy have [published](#) the final pieces of second-level regulations to implement the Shareholder Rights Directive 2 (EU) 2017/828 (SRD 2).

The regulatory revision allows the Italian regulations to be brought in line with the EU framework on shareholder identification, transmission of information, and facilitation of the exercise of shareholder rights. The amendments adopted make it possible to define an organic regulation of the procedures for requesting and carrying out the shareholder identification procedure.

The criteria for sharing the costs of identification requested by minority shareholders are also revised, amending the provisions of the Consob Issuers' Regulations, as well as the rules for the identification of holders of other financial instruments.

The changes introduced also concern:

- the obligations for the transmission of information, necessary for the exercise of rights, from the issuers up to the shareholder through the intermediaries along the chain of holding; and
- the modalities for sending through the chain of intermediaries the confirmation of receipt of electronic voting.

Further interventions concern the scope of application and the technical modalities for fulfilling the obligations under SRD 2.

Finally, a transitional period is provided for the entry into force of the new set of rules, to allow companies an adequate time frame for the necessary implementation work.

UCITS: Consob consults on amendments to issuers' regulation

The Consob has launched a [consultation](#) on proposed amendments to its Issuers' Regulation aimed at adapting to Directive (EU) 2021/2261, which amends the UCITS Directive with regard to the use of key information documents by management companies of UCITS and Regulation (EU) 2021/2259 amending Regulation (EU) 1286/2014 regarding the extension of the transitional regime for management companies, investment companies, and persons advising on UCITS and non-UCITS or selling interests of such products.

The amendments mainly concern the following aspects of the regulations concerning marketing activities:

- the marketing of both Italian and EU UCITS;
- the marketing of AIFs; and
- the prospectus for the offer and/or for the admission to trading of Italian UCITS and open-ended Italian and EU AIFs.

The consultation process ends on 7 November 2022.

MAS revises Notice 603 on branches, places of business and automated teller machines

The Monetary Authority of Singapore (MAS) has [revised its existing Notice 603](#), which sets out requirements for all banks in Singapore with respect to limitations on branches and places of business, setting up Automated Teller Machines (ATMs) and ATM networks, and providing debit services on an Electronic Funds Transfer at Point of Sale (EFTPOS) network.

In particular, MAS Notice 603 has been revised to:

- remove references to offshore banks;
- allow qualifying subsidiaries of qualifying full banks (QFBs) to install any off-premise ATM or permit the use of their ATMs by other foreign banks;
- allow QFBs to permit the use of their ATM networks by qualifying subsidiaries of QFBs; and
- allow qualifying subsidiaries of QFBs to provide debit services on an EFTPOS network.

The revised notice is effective from 13 October 2022.

RECENT CLIFFORD CHANCE BRIEFINGS

VAT treatment of sub-participations

In a decision which will be welcomed by loan market participants, the Court of Justice of the European Union (CJEU) has ruled in SKAS (Case C-250/21) that the supply which a sub-participant makes to the grantor under a funded sub-participation agreement falls within the 'granting of credit' VAT exemption.

The case was a Polish referral to the CJEU and involved a party (the sub-participant) paying an upfront amount to a lender (the grantor) who had granted a loan to a borrower (the debtor). In return for that payment, the grantor agreed to pay the sub-participant the proceeds it received from the debtor. The sub-participant was a Polish securitisation fund, but other than that there did not appear to be anything to distinguish the transaction from a typical sub-participation entered into under standard form LMA documentation. It contained the usual features that the sub-participant provided liquidity to the grantor, the grantor transferred the credit risk to the sub-participant and the sub-participant had no recourse (against the grantor or the debtor) if the debtor defaults.

This briefing paper discusses the case.

<https://www.cliffordchance.com/briefings/2022/10/vat-treatment-of-sub-participations.html>

Surviving insolvency – UK Lehman decision on ISDA bankruptcy events of default

Lehman's insolvency will shortly cease to be 'continuing' for the purposes of the ISDA Master Agreement. This may mean that payments owed to Lehman but suspended under section 2(a)(iii) of the Master Agreement will again become due for payment, more than fourteen years after Lehman's collapse.

In *Grant v FR Acquisitions Corporation (Europe) Ltd* [2022] EWHC 2532 (Ch), a judge decided that an administration is no longer continuing for the purposes of section 2(a)(iii) of the ISDA Master Agreement when the administration itself formally ends, even if the effects of the administration continue to be felt by creditors. He decided that an arrangement or composition with creditors will only be an 'Event of Default' for the purposes of the ISDA Master Agreement if it is proposed in circumstances of financial distress, not in a context that has no impact on credit risk. But if a scheme is done in that context, it may continue permanently. The decision also makes clear that any foreign law recognition of the insolvency proceedings or the scheme are not to be considered to be standalone events of default.

This briefing paper discusses the case.

<https://www.cliffordchance.com/briefings/2022/10/surviving-insolvency---uk-lehman-decision-on-isda-bankruptcy-eve.html>

HKSE consults on the proposed listing regime for specialist technology companies

The Stock Exchange of Hong Kong Limited (HKSE) has published a consultation paper on the proposed new listing regime for specialist technology companies by introducing the proposed new Chapter 18C. Comments on the consultation are due by 18 December 2022.

This briefing paper discusses the key proposals under the new Chapter.

<https://www.cliffordchance.com/briefings/2022/10/hkse-consults-on-the-proposed-listing-regime-for-specialist-tech.html>

With great speed comes great responsibility

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) recently issued guidance reminding both financial institutions and entities who offer instant payment systems that despite the difficulty in reconciling instant payments with pre-transaction processing OFAC screening, risk-based compliance measures still should be taken. The new guidance underscores that OFAC is focussed on risks presented by the rise of instant payment systems that may be outpacing a financial institutions compliance systems and risk framework. Although OFAC falls short of requiring the use of artificial intelligence tools and 'other innovative compliance solutions' to manage instant payment risk, the guidance notes that OFAC 'is aware' that such tools are available to financial institutions, perhaps messaging that failure to consider such tools may fall short of expectations. Finally, OFAC 'encourages' payment system developers to imbed tools in their products to facilitate a financial institution's ability to adequately manage sanctions risk.

This briefing paper discusses the guidance.

<https://www.cliffordchance.com/briefings/2022/10/with-great-speed-comes-great-responsibility.html>

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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