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### EU Council publishes sixth compromise text on proposed Directive on distance financial services contracts

The EU Council Presidency has published its [sixth compromise text](#) on the EU Commission's proposal for a directive to repeal the Distance Marketing Directive (2002/65/EC) and to transfer the framework for consumer protections

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relating to financial services distance contracts to the Consumer Rights Directive (2011/83/EU).

The proposal broadly seeks to achieve a high level of consumer protection in order to enhance consumer confidence in distance selling and to ensure a level playing field among traders.

Among other things, the proposed directive provides:

- that only certain provisions of the Consumer Rights Directive such as relevant definitions and rules on additional payments, enforcement, penalties, inertia selling and reporting, should apply to distance financial services contracts; and
- for a dedicated chapter with rules applicable only to distance financial services contracts, including those concerning the right to pre-contractual information and the right to withdrawal, and online fairness.

Changes compared to the proposal are marked in bold, new text is underlined, deletions are indicated by strikethrough and changes compared to the fifth compromise text are highlighted in grey.

The text is dated 31 January 2023.

## **Deposit guarantee schemes: EBA publishes revised guidelines on calculating contributions**

The EBA has published its [final revised guidelines](#) on deposit guarantee schemes (DGS) contributions.

This follows a consultation launched in July 2022.

The revised guidelines are intended to further strengthen the link between the riskiness of a credit institution and how much it needs to contribute to the DGS funds that will be used to reimburse depositors in case their bank fails.

Changes to the guidelines include:

- setting minimum thresholds for the majority of core risk indicators, in line with the applicable minimum regulatory requirements, and adjust their minimum weights to better reflect the indicators' performance in measuring the risk to the DGSs;
- introducing a technical mathematical improvement to the formula for determining the risk adjustment factor of each member institution that ensures a constant relationship between the riskiness of institutions and their DGS contributions;
- specifying how to account for deposits where the DGS coverage is subject to uncertainty;
- introducing the possibility for DGSs to use a stock-based approach to raising contributions which incentivises banks to reduce their riskiness even after the DGS fund has reached its target level of contributions; and
- clarifying how to raise contributions following the use of DGS funds.

The EBA has also streamlined and simplified the wording of the guidelines.

## **FSB outlines work priorities for 2023**

The Chair of the Financial Stability Board (FSB), Klaas Knot, has written a [letter](#) to G20 finance ministers and central bank governors ahead of the upcoming G20 meeting that took place on 24-25 February.

The letter sets out the FSB's work during 2023 to monitor and address vulnerabilities including near record-high levels of debt, rising debt service costs and stretched asset valuations in some key markets.

The letter includes a list of work that the FSB intends to deliver to the G20 in 2023, including delivering a revised report to the G20 in April 2023 on achieving greater convergence in cyber incident reporting, as well as sending a consultation document to the July 2023 G20 meeting aimed at strengthening financial institutions' ability to manage third-party and outsourcing risk. The FSB intends to finalise its recommendations for the regulation, supervision and oversight of cryptoassets and markets and its recommendations targeted at global stablecoin arrangements by July 2023.

The letter also introduces three reports that the FSB is delivering to the February 2023 G20 meeting, including reports on:

- the financial stability aspects of commodity markets;
- the financial stability risk of decentralised finance (DeFi); and
- the implementation of the G20 Roadmap to enhance cross-border payments.

## **FSB reports on financial stability aspects of commodities markets**

The FSB has published a [report](#) on the financial stability aspects of commodities markets.

The report finds that while the commodities ecosystem was largely able to absorb the shock of the Russian invasion of Ukraine in February 2022, which caused a spike in margin calls on commodities derivatives markets, the events exposed the complex linkages between commodities markets and the financial system.

According to the FSB, many of the issues addressed in the report, such as leverage, impact of large margin calls on liquidity demand and market opacity, are not unique to commodities markets and are being addressed in the FSB's work programme to enhance the resilience of non-bank financial intermediation (NBFi).

Among other things. The report:

- examines the vulnerabilities of globally traded commodities markets such as crude oil, natural gas, and wheat, while focusing on the mechanisms through which any further stresses in these markets could propagate more broadly through the financial system;
- identifies a number of data gaps that hamper the assessment of vulnerabilities and transmission channels in the commodities sector;
- explains how the commodities ecosystem has adapted to the shock that followed the Russian invasion of Ukraine; and
- sets out its conclusion alongside learnings and policy implications.

## **FSB reports on priority actions to meet G20 targets for enhancing cross-border payments**

The FSB has published a [report](#) detailing the specific actions that will be taken under its three priority themes to move forward the G20 roadmap for enhancing cross-border payments and achieve the G20 targets by 2027.

The three priority themes are:

- payment system interoperability and extension;
- legal, regulatory and supervisory frameworks; and
- cross-border data exchange and message standards.

In the report, the FSB sets out tables specifying the actions that will be undertaken to take forward the priority themes. They contain a description of the actions under each priority theme as well as roadmap building blocks and relative timelines.

The FSB has also published a [press release](#) inviting firms that participate in the cross-border payments market and relevant industry associations to nominate senior representatives to a new taskforce (the LRS taskforce) on legal, regulatory, and supervisory matters that may contribute to enhancing cross-border payments.

The Committee on Payments and Market Infrastructures (CPMI) has in parallel published a [press release](#) inviting nominations for a taskforce (the PIE taskforce) on cross-border payments interoperability and extension.

## **FATF suspends membership of Russian Federation and announces outcomes of plenary meeting**

The Financial Action Task Force (FATF) has announced the [outcomes](#) of its plenary meeting in Paris on 22 – 24 February 2023.

The FATF has published a [statement](#) announcing its decision to suspend the membership of the Russian Federation, following its continued war of aggression towards Ukraine. The FATF reiterates that all jurisdictions should be vigilant to current and emerging risks from the circumvention of measures taken against the Russian Federation in order to protect the international financial system.

The FATF has also published an [updated list](#) of jurisdictions subject to increased monitoring, with South Africa and Nigeria being added to the list and Cambodia and Morocco being removed from the list.

Delegates also discussed strategic initiatives, including:

- revisions to Recommendation 25 on transparency and beneficial ownership of legal arrangements;
- new guidance on implementing the FATF's strengthened requirements on Recommendation 24 on transparency and beneficial ownership of legal persons;
- an action plan to drive timely global implementation of FATF standards relating to virtual assets, including on the transmission of originator and beneficiary information;
- a report on disrupting the financial flows relating to ransomware; and

new projects on money laundering and terrorist financing related to cyber-enabled fraud and on the use of crowdfunding for terrorist financing.

## **UK EMIR: BoE and FCA publish rules on reporting requirements, procedures for data quality and registration of trade repositories**

The Financial Conduct Authority (FCA) and the Bank of England (BoE) have published a [joint policy statement](#) (PS23/2) setting out the final amendments to technical standards and new rules for trade repositories in relation to the derivatives reporting framework under the UK European Market Infrastructure Regulation (UK EMIR).

This follows a consultation (CP21/31) launched in July 2021. The final rules are largely unchanged from the draft rules consulted on, but some minor changes have been made in response to the feedback received.

PS23/2 sets out:

- amendments to the framework for derivatives reporting under Article 9 of UK EMIR;
- amendments to the registration process for trade repositories; and
- requirements for trade repositories to establish procedures and policies for effective reconciliation, verification and orderly transfer of data between trade repositories.

The requirements set out in PS23/2 come into effect on 30 September 2024, except for certain amendments which relate to the format and details of applications for registration of trade repositories, which come into force immediately.

## **FCA consults on asset management regime**

The FCA has published a [discussion paper](#) on updating and improving the UK asset management regulatory regime (DP23/2).

DP23/2 concerns the implementation of the future regulatory framework (FRF) and seeks views on how the regime might be modernised when the FCA becomes responsible for moving relevant retained EU law into its rulebook, as proposed under the Financial Services and Markets (FSM) Bill. It covers the following areas:

- simplifying or restructuring the rules for asset managers;
- the retail funds regime;
- the professional fund managers regime;
- rules for authorised fund managers (AFMs), depositories and funds;
- technology in fund operations;
- fund tokenisation; and
- improving investor engagement through technology.

Comments are due by 22 May 2023. The FCA intends to publish a feedback statement later in 2023.

DP23/2 complements the FCA's related discussion paper published in December 2022 on the future disclosure framework for retail investment products (DP22/6).

### **Blockchain-based market infrastructures: AMF issues press release on upcoming entry into force of European DLT Pilot Regime**

The Autorité des marchés financiers (AMF) has issued a [press release](#) in anticipation of the EU Pilot Regime Regulation, which provides for a pilot regime for market infrastructures based on distributed ledger technology (DLT) and will apply from 23 March 2023.

In its press release, the AMF indicates that it is ready and available to engage with potential applicants wishing to apply for permission to operate a DLT market infrastructure. The AMF strongly recommends that potential applicants consider the European Securities and Markets Authority (ESMA)'s related guidelines dated 15 December 2022 (ESMA's report on guidelines on standard forms, formats and templates to apply for permission to operate a DLT Market Infrastructure) and reach out to the AMF to commence discussions on the EU Pilot Regime.

The AMF also notes that, on the French legislative side, a draft bill is currently being discussed to:

- clarify the roles of the different French competent authorities in dealing with applications in France under the EU Pilot regime – the AMF will have responsibility for regulated markets and central securities depositories (CSDs), whilst the Autorité de contrôle prudentiel et de résolution (ACPR) will have responsibility for investment firms; and
- adapt the French legal framework for DLT-registered securities to fully cater to the needs of French DLT market infrastructures.

In this respect, two categories of securities under French law will in future constitute financial instruments which can be admitted to trading on a DLT market infrastructure for the purposes of the EU Pilot Regime:

- registered securities registered within a DLT (pursuant to the French blockchain order); and
- dematerialised bearer securities recorded on a DLT in accordance with the EU Pilot Regime Regulation.

### **CNMV consults on draft technical guidelines to strengthen transparency of collective investment schemes**

The Spanish Securities Market Commission (CNMV) has launched a [preliminary public consultation](#) on draft technical guidelines on strengthening the transparency of collective investment schemes (Instituciones de Inversión Colectiva, or IICs) with specific performance objectives and fixed-income IICs with buy-and-hold strategies.



The draft technical guidelines are intended to update Technical Guidelines 1/2017, which sought to improve the transparency of investment funds with specific performance objectives. The main amendments include:

- extending the transparency regime contained in Technical Guidelines 1/2017 to IICs with buy-and-hold strategies, more specifically regarding timing and liquidity cost risks warnings to investors;
- establishing new criteria regarding information on estimated profitability in fixed-income IICs with buy-and-hold strategies;
- enhancing criteria contained in Technical Guidelines 1/2017 in order to reflect the supervisory experience of the CNMV, particularly regarding risk warnings; and
- enhancing warnings on liquidity costs.

Comments on the preliminary public consultation are due by 31 March 2023.

### **CNMV approves code of good practices for institutional investors, asset managers and proxy advisors on duties relating to conferred assets or services**

The CNMV has approved the [Code of Good Practices](#) for institutional investors, asset managers and proxy advisors in relation to their duties relating to conferred assets or services rendered. The aim of the Code is to promote a greater level of involvement of shareholders in the companies in which they invest and achieve an efficient management and corporate governance model.

Adherence to the Code is voluntary, and its application is based on the principle of proportionality according to the size and complexity of the entity, the nature and size of the investment, and the resources of the company in which the investment is made.

The Code sets out seven principles that can be summarised as follows:

- long-term strategy of the investment;
- adequate level of knowledge and monitoring of the investment;
- development and disclosure of commitment policy in the investment;
- exercise of voting rights;
- transparency regarding commitment and voting actions, and their outcome;
- management of conflicts of interest; and
- remuneration policy.

Eligible investors wishing to adhere and appear as compliant entities in the CNMV list must apply the abovementioned principles and explain in a clear way in their annual report how the principles of the Code have been implemented.

### **SFC consults on proposals to regulate virtual asset trading platforms**

The Securities and Futures Commission (SFC) has published a [consultation paper](#) on proposed regulatory requirements for operators of virtual asset trading platforms (VA trading platforms).

Following the passage of the Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Bill 2022 by the Hong Kong Legislative Council in December 2022, the new licensing regime for VA trading platforms trading non-security tokens will come into effect on 1 June 2023. Upon commencement of the new regime, all centralised virtual asset trading platforms carrying on business in Hong Kong or actively marketing to Hong Kong investors will need to be licensed and regulated by the SFC, irrespective of whether they provide trading services in security tokens or not.

The regulatory requirements proposed in the consultation paper are based on the requirements of the SFC's existing regime under the Securities and Futures Ordinance and are comparable to those for licensed securities brokers and automated trading venues. The SFC has also proposed modifications to some requirements of the existing regime considering the changed landscape over the years.

In particular, the SFC is seeking views on whether to allow licensed platform operators to serve retail investors, and if so, the measures to be implemented in addition to the proposed range of investor protection measures, which include ensuring suitability in onboarding clients and token admission.

The SFC has encouraged operators of virtual asset trading platforms to plan to apply for a licence, including pre-existing platforms, and begin to review and revise their systems and controls to prepare for the new regime.

Comments on the consultation are due by 31 March 2023.

## **Industry taskforce consults on Green and Transition Taxonomy**

The Green Finance Industry Taskforce (GFIT) convened by the Monetary Authority of Singapore (MAS) has launched its [third and final public consultation](#) seeking industry feedback on a green and transition taxonomy for Singapore-based financial institutions.

In particular, GFIT is seeking views on the detailed thresholds and criteria for the classification of green and transition activities in five sectors, namely:

- agriculture and forestry/land use;
- industrial;
- waste and water;
- information and communications technology; and
- carbon capture and sequestration.

The third consultation builds on GFIT's two earlier rounds of consultation launched in January 2021 and May 2022, which proposed thresholds and criteria for the energy, transport, and real estate sectors. According to GFIT, the eight sectors covered within the taxonomy account for close to 90% of greenhouse gas emissions in South-east Asia. By the first half of 2023, GFIT will publish the final taxonomy, which will take into account feedback from all three public consultations.

In addition, the third consultation also seeks views on:

- 'Do No Significant Harm (DNSH)' criteria which specify that activities which are making a substantial contribution to climate change mitigation should



not be carried out in a manner that would cause significant adverse impact to the other four environmental objectives under the taxonomy; and

- the adoption of a ‘measures-based approach’ for the industrial sector, which requires the production process of industrial raw materials to adopt a range of emissions reduction measures.

Comments on the consultation are due by 15 March 2023.

## **MAS publishes circular on notification of data breaches**

The MAS has published a [circular](#) setting out its revised expectations for licensed insurers regarding notification of data breaches to the MAS.

The revised expectations set out in the circular follow the regulatory changes brought in by the:

- Personal Data Protection (Amendment) Act 2020 which introduced mandatory data breach notification requirements for organisations in Singapore; and
- Personal Data Protection (Notification of Data Breaches) Regulations 2021 which specified the types of data breaches notifiable to the Personal Data Protection Commission (PDPC).

In particular, the MAS expects licensed insurers to notify it:

- concurrently of data breaches that are required to be notified to the PDPC;
- of data breaches that meet the criteria under the MAS Notice 127 and the MAS’s Guidelines on Outsourcing, based on the timelines indicated within these two instruments; and
- of all those data breaches that do not fall in the above two criteria, on a consolidated basis, within 3 weeks from the last day of each quarter starting from the first quarter of 2023.

The circular supersedes the MAS Circular ID 10/14 on ‘Notification to the Monetary Authority of Singapore on Events of Significant Impact’ issued on 30 September 2014 with immediate effect.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **EBA final report on draft RTS on homogeneity of underlying exposures in STS securitisations**

On 14 February 2023, the EBA published its final report on draft regulatory technical standards (RTS) specifying the criteria for the underlying exposures in securitisation transactions to be deemed homogeneous. The relevant mandate was part of the introduction of a cross-sectoral framework for simple, transparent and standardised (STS) on-balance-sheet synthetic securitisations. In particular, Regulation (EU) 2017/2402 (the Securitisation Regulation) together with Regulation (EU) 575/2013 (the CRR) established a general EU framework for securitisation and created a specific framework for STS securitisations.

Until 9 April 2021, only traditional (or true sale) securitisations were eligible to attain STS status pursuant to the EU securitisation framework. For the purposes of determining which underlying exposures are deemed to be

homogeneous in the context of the STS framework for traditional securitisations, the Commission adopted Delegated Regulation (EU) 2019/1851 (the Existing RTS).

On 6 April 2021, the Securitisation Regulation was amended pursuant to Regulation (EU) 2021/557 to include a cross-sectoral framework for STS for on-balance-sheet (synthetic) securitisations as well, effective as of 9 April 2021. As part of this change, and given that the STS requirements for on-balance-sheet synthetic securitisations did not exist at the time when the Existing RTS was published, the EBA was mandated to develop draft RTS further specifying which underlying exposures are deemed to be homogeneous in the context of the STS framework for on-balance-sheet (synthetic) securitisations (see Article 26b(13) of the Securitisation Regulation).

This briefing paper discusses the EBA's final draft RTS.

<https://www.cliffordchance.com/briefings/2023/02/eba-final-report-on-draft-rts-on-homogeneity-of-underlying-expos.html>

### **Clifford Chance Comment: French tax authorities opine on withholding tax treatment of manufactured dividends**

On 15 February 2023, the French tax authorities issued two public rulings relating to the withholding tax treatment of manufactured dividends paid by French banks to non-residents. The interpretation retained by the French tax authorities in these tax rulings considerably extends the scope of French dividend withholding tax rules to encompass manufactured dividend payments made notably under temporary acquisitions of French equities and derivatives transactions with an underlying in French equities.

This briefing paper discusses the two rulings.

<https://www.cliffordchance.com/briefings/2023/02/french-tax-authorities-opine-on-withholding-tax-treatment-of-man.html>

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