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CCP recovery and resolution: EU Commission adopts two RTS

The EU Commission has adopted two Delegated Regulations containing regulatory technical standards (RTS) under the Regulation on central counterparty (CCP) recovery and resolution (CCPRRR).

The first RTS specify:

- the circumstances in which a person is deemed to be independent from both the resolution authority and the CCP under valuation for the purposes of Article 25(1) of the CCPRRR;
- the methodology for assessing the value of the assets and liabilities of the CCP; and
- the separation of the valuations under Articles 24 and 61.

The second RTS specify, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in Article 63(1) is required, and the conditions under which it is to be considered proportionate.

The Delegated Regulations will enter into force on the twentieth day following their publication in the Official Journal.

Working Group on Euro Risk-Free Rates publishes guidance for corporate lending products

The Working Group on Euro Risk-Free Rates has published guidance for corporate lending products for implementing its recommendations on EURIBOR fallback trigger events and €STR-based EURIBOR fallback rates.

This follows the Working Group's publication of recommendations in May 2021. The guidance is intended to provide clarity on the May 2021 recommendations and their application to corporate lending products. The Working Group hopes that the guidance will provide confidence to loan market participants to follow the recommendations and enable the development of standardised market practice.

The May 2021 recommendations on €STR based fallback rates recommended that market participants consider either:

- a backward looking period methodology (compounded €STR in arrears); or
- a two-level waterfall consisting of a forward looking methodology (term €STR) on the first level and compounded €STR in arrears on the second level.

The Working Group has set out further guidance on these recommendations, including clarificatory guidance on the use of €STR compounded in arrears and the use of a term rate.

The Working Group has also reminded market participants to be operationally ready for EURIBOR fallbacks. Whilst EURIBOR is not scheduled to be discontinued, the Working Group has emphasised that this does not negate the need for market participants to include robust fallback language in their contracts.

EU Parliament Committee adopts position on directive on corporate sustainability due diligence

The EU Parliament's Legal Affairs Committee has adopted its position on the proposed corporate sustainability due diligence directive (CSDDD / CS3D), which seeks to establish a duty on companies to address negative human rights and environmental impacts.

The Committee's adopted text extends the Commission's proposal, published in February 2022, to apply to:

- EU-based companies with over 250 employees and a worldwide turnover above EUR 40 million;
- parent companies with over 500 employees and a worldwide turnover above EUR 150 million; and
- non-EU companies with a turnover above EUR 150 million where at least EUR 40 million was generated in the EU.

The Committee is also seeking to introduce fines for non-compliant companies of at least 5% of net worldwide turnover, as well as a ban on non-compliant third-country companies from public procurement.

Once the Parliament has adopted its mandate, the co-legislators will enter trilogue negotiations in order to agree on a final version of text.

Primary Markets Effectiveness Review: FCA consults on equity listing rule reforms

The Financial Conduct Authority (FCA) has published a consultation paper (CP23/10) setting out its response to feedback on its May 2022 x(DP22/2) on the UK listing regime and seeking feedback on replacing the standard and premium listing share categories with a single category for equity shares in commercial companies (ESCC).

CP23/10 sets out an overview of the proposed new framework and the FCA's policy approach, which aim to reduce regulatory burdens and improve the competitiveness of the UK equity market, and seeks views on proposals relating to, among other things:

- the removal of certain eligibility requirements relating to historical financial information, revenue earning track record and working capital;
- modifications to initial and continuing obligations relating to independence of business, control of business, dual class share structures and controlling shareholders;
- amendments to the significant and related party transactions (RPT) regimes, as well as other matters requiring shareholder approval;
- retaining annual reporting requirements on compliance with the UK Corporate Governance Code; and
- amendments to the sponsor regime.

CP23/10 also sets out the potential impact of the proposals on other categories of issuers and securities, such as sovereign controlled commercial companies and closed-ended investment funds.

Comments are due by 28 June 2028. The FCA intends to issue a further consultation on wider proposed changes and draft rules in autumn 2023.

Wholesale Markets Review: FCA publishes policy statement on equity secondary markets

The FCA has published a policy statement (PS23/4) setting out changes to rules and guidance intended to improve the functioning of equity secondary markets.

Forming part of the Wholesale Markets Review (WMR), PS23/4 sets out changes to UK MiFIR and MiFID technical standards that seek to:

- improve the content of post-trade transparency by excluding non-price forming transactions, and simplifying trade flags and other reporting fields;
- simplify the reporting of over the counter (OTC) transactions by adopting a new regime based on designated reporting firms;
- improve choice and competition by allowing UK trading venues to use reference prices from overseas venues, and by removing size thresholds for orders benefiting from the order management facility (OMF) waiver; and
- improve the quality of execution by allowing the use of tick sizes from overseas primary markets from any jurisdiction.

PS23/4 also sets out the FCA's future direction of work aimed at improving the resilience of UK trading venues to outages and on the execution of retail orders.

The new post-trade transparency requirements enter into force in April 2024, and the changes to waivers from pre-trade transparency and to the tick size regime apply immediately.

FCA sets out steps to improve whistleblower confidence

The FCA has set out actions to improve the confidence of whistleblowers, including sharing further information with whistleblowers on how it has acted on their information, improving the use of information provided by whistleblowers, and improving how it captures information from whistleblowers.

This follows a qualitative survey of whistleblowers who had provided information to the FCA, to understand their experience and identify areas for improvement.

In particular, the FCA intends to:

- provide whistleblowers with more detail on what has been done with the information provided, or reasons for taking or not taking action;
- improve the use of whistleblowers' information across the FCA (e.g. making the best use of data and ensuring that end-to-end whistleblowing processes are as efficient as possible);
- enhance its webform to fully capture every whistleblower's disclosure; and

engage with the Department for Business and Trade to support a review of whistleblower legislation to enhance the wider whistleblowing system.

FCA publishes final rules on financial resilience regulatory return and consults on scope

The FCA has published a policy statement (PS23/3) containing the final rules on the new baseline financial resilience return (FIN073), and launched a consultation (CP23/9) on changing the scope of the baseline financial resilience regulatory return.

This follows a consultation (CP22/19) launched in October 2022 on replacing the Financial Resilience Survey with the baseline financial resilience regulatory return. PS23/3 summarises the feedback received to CP22/19 and sets out the final rules on the new financial resilience regulatory return, referred to as 'FIN073 – Baseline Financial Resilience Report'. Firms brought into the scope of FIN073 will need to be prepared to submit the return when it is due from January 2024.

CP23/9 sets out the FCA's proposals to change the scope of FIN073 to include all full permission consumer credit firms. These firms are currently excluded from the rules considering that they are captured under the definition of credit brokers.

Comments on CP23/9 are due by 6 June 2023. The FCA intends to publish a statement with its final position on scope in summer 2023.

PRA sets out business plan and provisional budget for 2023/24

The PRA has announced its 2023/2024 business plan and an overview of its budget for 2023/2024.

The PRA's strategic priorities are to:

- maintain and build on the safety and soundness of the banking and insurance sectors and ensure continuing resilience;
- be at the forefront of identifying new and emerging risks, and developing international policy;
- support competitive and dynamic markets, alongside facilitating international competitiveness and growth, in the sectors that they regulate; and
- run an inclusive, efficient, and modern regulator within the central bank.

The PRA's provisional budget for 2023/24, which is subject to finalisation of pension costs and year-end adjustments, is estimated at GBP 312.0 million. This is a decrease of GBP 8.9 million (3%) on the 2022/23 budget.

BoE and PRA consult on proposed changes to enforcement policies

The Bank of England (BoE) and the Prudential Regulation Authority (PRA) have jointly published consultation paper CP9/23 setting out proposed changes to their enforcement policies.

The changes are mainly designed to provide greater clarity for ease of usage and introduce options for speedier investigatory outcomes, including through the creation of a new route for early cooperation for subjects of an investigation and an enhanced settlement discount of up to 50% for early admissions.

The consultation also sets out proposed changes to the PRA's policies and procedures for making supervisory and other statutory notice decisions, and to the Bank's Enforcement Decision Making Committee's (EDMC) procedures.

The proposal consists of two separate policy documents:

- a consolidated statement of policy on the approach to enforcement; and
- the PRA's allocation of decision-making and approach to non-enforcement related supervisory decisions.

Comments are due by 4 August 2023.

PSR publishes policy statement on changes to regulatory fees regime for 2023/24

The Payment Systems Regulator (PSR) has published a policy statement (PS23/2) setting out its decisions on changes to its fees structure for 2023/24.

The PSR has been reviewing its fees structure, which has been in place since 2018, to ensure it remains appropriate in the current payments landscape.

In response to feedback received to its consultation (CP22/6), the PSR is introducing two main changes to the way its regulatory fees are allocated. The changes are:

- a minimum yearly fee threshold of GBP 100 for regulated payment service providers to move smaller firms outside of its fees, to simplify and save costs; and
- a special project fee where payment system operators with a for-profit business model are charged for work related to or arising from their designation. For instance, this could include making sure an appropriate regulatory framework is agreed.

The new fees rules came into force on 28 April 2023.

BaFin issues recommendations on cessation of US dollar LIBOR

The German Federal Financial Supervisory Authority (BaFin) has issued recommendations on the cessation of the remaining LIBOR tenors on 30 June 2023 (overnight, 1-, 3- and 6-month US dollar LIBOR) for supervised entities that continue to use LIBOR.

In particular, BaFin urgently recommends:

- not to enter into new contracts that reference LIBOR;
- to check whether robust fallback provisions can be included in existing contracts; and
- to avoid the use of synthetic LIBOR due to its transitional nature.

BaFin notes similar recommendations from the Financial Stability Board (FSB) urging market participants to transition to risk-free rates (RFRs).

BaFin's recommendations also expressly highlight the obligation of supervised entities under Article 28 para 2 of the Benchmark Regulation (EU 2016/1011) to produce and maintain robust written plans for a benchmark material change or cessation. BaFin currently does not expect the EU Commission to

designate a replacement benchmark pursuant to Article 23b of the Benchmark Regulation.

With respect to UK law and US law contracts, BaFin notes that the FCA and the Federal Reserve Board (FRB) have implemented the following transitional solutions:

- UK – on 3 April 2023, the FCA announced its decision to require LIBOR's administrator (ICE) to publish certain US dollar LIBOR settings from 30 June 2023 to 30 September 2024 using a synthetic methodology. Synthetic LIBOR is to be used for particular tough legacy contracts only. For other contracts active transition to other references rates is to be sought amongst the parties; and
- US – LIBOR legislation of March 2022 provides for replacement benchmark settings for overnight, 1-, 3- and 6-month US LIBOR tenors by the Federal Reserve Board for tough legacy contracts under US law.

BaFin consults on revised circular on information reporting for resolution planning purposes

BaFin has launched a consultation on its draft second and revised edition of the circular on information reporting systems for the provision of information for resolution planning purposes (Mindestanforderungen an Informationssysteme zur Bereitstellung von Informationen für Bewertungen im Rahmen einer Abwicklung - MaAbwicklungsbewertung) (Konsultation 07/2023). The first edition of the circular was published in February 2021.

The circular is addressed to institutions and undertakings within the meaning of Article 2 of the Single Resolution Mechanism Regulation (Regulation (EU) 806/2014) and of section 1 para 1 no. 1 – 3 of the German Act on the Recovery and Resolution of Credit Institutions (Gesetz zur Sanierung und Abwicklung von Kreditinstituten – SAG) which do not fall under the jurisdiction of the Single Resolution Board (SRB). The circular does not apply to institutions and group companies for which the resolution plan provides for liquidation under insolvency proceedings.

The circular sets out the requirements for the upkeep of appropriate systems and processes relating to the satisfaction of *ad hoc* resolution authority requests for the provision of information (within 24 hours in a virtual data room) on the resolution assessment by way of standard reports. The updated circular introduces a specific data model for the resolution assessment. The information required under the new data model needs to be made available in the virtual data room within 72 hours. Furthermore, the updated circular requires the set-up of a structured Q&A process.

Comments are due by 5 June 2023.

CSSF amends method for calculating ex-ante contributions to Luxembourg deposit protection scheme

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has, acting in its function as Depositor and Investor Protection Council (Conseil de Protection des Déposants et des Investisseurs, CPDI), published CSSF-CPDI Circular 23/34 modifying Circular CSSF-CPDI 20/21 on the annual contributions to be paid by all members of the Luxembourg deposit protection scheme, the Fonds de garantie des dépôts Luxembourg (FGDL).

The Circular is addressed to all credit institutions incorporated under Luxembourg law, to the POST Luxembourg, and to Luxembourg branches of non-EU/EEA credit institutions.

In its previous version, Circular CSSF-CPDI 20/21 provided that FGDL member institutions pay annual contributions which depend, among other things, on the annual growth of their covered deposits. No allowance is foreseen in case the deposit growth results from mergers between member institutions or from transfers of liabilities or similar operations between member institutions, whereas contributions have been paid in the past of the protection of such transferred deposits.

The Circular aims to adjust the contributions to be paid in the above cases. The adjustment consists in calculating the contribution of the member institution whose deposits have been transferred to another member institution, without applying a floor at zero. This amount, which is generally negative due to the decline in the volume of covered deposits, is used to reduce the contributions of the absorbing member institution(s).

To ensure the coherence of the calculation, the Circular adjusts the definition of certain sums in Circular CSSF-CPDI 20/21 such that the formulas to be used in the future take into consideration institutions which no longer participate in the FGDL on 1 January of the year during which the contributions are levied. A version of Circular CSSF-CPDI 20/21 tracking the changes is attached to the Circular.

Amendments to Act on Bonds, Act on Investment Funds and Management of Alternative Investment Funds and Act on Bank Guarantee Fund, Deposit Guarantee Scheme and Compulsory Restructuring published

Amendments have been published in the Journal of Laws under which banks, brokerage houses, insurance companies and reinsurance companies will be able to issue capital instruments that are equipped with a loss absorption mechanism. These capital instruments are the introduction of Additional Tier 1 (AT1) capital into the Polish legal system.

Among other things, the Act introduces a new category of bonds in the form of capital bonds. It defines the rules for issuing these bonds and lists the institutions that will be able to issue them (Polish banks, brokerage houses, Polish insurance companies and Polish reinsurance companies).

In addition, it will now be possible to increase share capital by converting capital bonds into shares. In line with EU rules, an instrument to cover capital shortfalls through support for institutions that apply to the State Treasury for assistance in meeting the applicable capital requirements has also been introduced, in the form of a temporary acquisition by the State Treasury of shares or bonds of such institutions.

In addition, the possibility of recording financial instruments using distributed ledger technology used by a DLT-based market infrastructure operator has been introduced in accordance with Regulation (EU) 2022/858 of the European Parliament and of the Council.

The new law will come into force in principle on 1 October 2023.

MAS and US Treasury conduct joint exercise to strengthen cross-border cyber incident coordination and crisis management

The Monetary Authority of Singapore (MAS) and the United States Department of the Treasury carried out a cross-border cybersecurity exercise from 25 to 27 April 2023, which allowed both agencies to test and strengthen existing protocols for information exchange and incident response coordination for cyber incidents involving banks operating in both jurisdictions.

The exercise follows a memorandum of understanding (MoU) on cybersecurity cooperation signed between the two agencies in August 2021. In particular, the MoU aims to enhance cooperation in the following areas:

- information sharing relating to the financial sector including cybersecurity regulations and guidance, cybersecurity incidents, and cybersecurity threat intelligence;
- staff training and study visits to promote cooperation in the area of cybersecurity; and
- competency-building activities such as the conduct of cross-border cybersecurity exercises.

ASIC calls on investment product issuers to make improvements on design and distribution obligations

The Australian Securities and Investments Commission (ASIC) has called on investment product issuers to 'lift their game' after an initial review found significant room for improvement in how they meet their design and distribution obligations (DDO).

The DDO commenced in October 2021 and are intended to help customers obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to the design and distribution of products. Following the review undertaken in 2022, ASIC has published a report which summarises its key observations on how issuers of investment products are meeting their DDO and highlights areas for improvement.

Amongst other things, the review found that a significant number of product issuers made deficient target market determinations (TMDs), with poorly defined target markets and unclear or inadequate product governance arrangements. The key target market deficiencies identified include:

- target markets defined too broadly – a factor in 15 stop orders;
- unsuitable investor risk profiles used – a factor in 21 stop orders;
- inappropriate levels of portfolio allocation used – a factor in 10 stop orders;
- unsuitable investment timeframes and/or withdrawal features, not reflecting the product's risks and liquidity profile – a factor in 18 stop orders;
- inappropriate or no distribution conditions – a factor in 13 stop orders; and
- inappropriate use of TMD templates – a factor in 13 stop orders.

As a result, ASIC placed interim stop orders on 26 investment products from 18 issuers since 1 July 2022, which in turn, caused twelve issuers to amend 18 TMDs, and five issuers to withdraw seven products.

In addition, ASIC reviewed the product design arrangements of several issuers of managed investment schemes, and their compliance with the reasonable steps and review obligations. Amongst other things, ASIC observed that while all issuers had arrangements to meet their TMD review obligations, they needed to use review triggers more effectively and improve their processes upon a review trigger.

ASIC has indicated that it will continue to monitor compliance and take regulatory action for breaches of the obligations.

FDIC issues overview report on deposit insurance system and reform options

Following the recent failures of Silicon Valley Bank and Signature Bank, the Federal Deposit Insurance Corporation (FDIC) has released a report on options for deposit insurance reform, which analyses the role of deposit insurance in promoting financial stability and preventing bank runs. The report also discusses three options for deposit insurance reform: limited coverage, unlimited coverage, and targeted coverage. The report describes how each option might be considered (alongside other tools) to maximize the possibility of achieving desired results.

C L I F F O R D
C H A N C E

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