

International Regulatory Update

6 – 10 February 2017

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ESAs consult on technical advice on PRIIPs with environmental or social objectives

In response to a call for advice issued by the EU Commission in May 2016, the Joint Committee of the European Supervisory Authorities (ESAs) has launched a [consultation](#) on draft technical advice in relation to packaged retail and insurance-based investment products with environmental or social objectives (EOS PRIIPs) under Article 8 of the PRIIPs Regulation (1286/2014). In particular, the ESAs are seeking input from stakeholders on a proposal to set minimum requirements on PRIIPs manufacturers for appropriate governance systems to ensure that disclosed EOS objectives are met.

Where a Key Information Document (KID) identifies an EOS PRIIP, the manufacturer must be able to demonstrate in supporting documentation the relevance of these objectives for the whole value chain of the investment process.

Overall the ESAs have found that the product oversight and governance provisions laid down in the relevant legislation for PRIIPs, including MiFID2 and the Insurance Distribution Directive (IDD), are generally sufficient for PRIIPs. However, for EOS PRIIPs the ESAs consider it necessary for the Commission to provide additional guidance to manufacturers when interpreting these rules.

Comments on the consultation are due by 23 March 2017.

MiFID2: ESMA revises ITS 4 on position reporting

The European Securities and Markets Authority (ESMA) has published a [revision](#) to the draft implementing technical standards on position reporting under MiFID2 (ITS 4). ITS 4 have been revised with regard to the format of position reports by investment firms and market operators and ESMA has published a redline version to indicate the changes made. The ITS have been submitted to the EU Commission for endorsement.

ESMA reports on application of distributed ledger technology to securities markets

The European Securities and Markets Authority (ESMA) has published a [report](#) on the application of distributed ledger technology (DLT) to securities markets.

Distributed ledgers, also known as blockchains, are ledgers of electronic transactions maintained by a shared network of participants and not by a centralised entity.

ESMA published a discussion paper on DLT in June 2016. The report reflects ESMA's analysis of the key benefits and risks of DLT applied to securities markets and examines how DLT interacts with the existing EU regulatory framework.

ESMA believes that DLT could bring benefits to financial markets, including more efficient post-trade services, enhanced reporting capabilities and reduced costs, and expects it to be used initially in less automated processes in low volume market segments and processes with minimum dependency on the existing legal framework.

ESMA considers that regulatory action is not needed as the technology is still at an early stage, but undertakes to monitor market development to assess whether a regulatory response is needed in the future.

CRR: EBA publishes final draft RTS on exclusion from CVA of non-EU non-financial counterparties

The European Banking Authority (EBA) has published [final draft regulatory technical standards](#) (RTS) specifying the procedures for excluding transactions with non-financial counterparties (NFCs) established in a third country from the capital requirement for credit valuation adjustment (CVA) risk.

Under the Capital Requirements Regulation (CRR), an institution's transactions with NFCs that do not exceed the clearing threshold specified in Article 10(3) and (4) of the European Market Infrastructure Regulation (EMIR) are excluded from the own funds requirement, regardless of whether the NFCs are established in the EU or in a third country.

The proposed RTS specify the procedures for excluding transactions with third-country NFCs from the own funds requirements for CVA risk. They further clarify that the institution is responsible for taking the necessary steps to identify all NFCs that qualify for the exemption under the CRR and calculate their own funds requirements for CVA risk accordingly.

In some cases verifying the status of NFCs established in a third country at the inception of each trade could be disproportionate for institutions, so the EBA proposes that the verification of the status may instead be performed periodically for each counterparty.

The draft RTS will now be submitted to the EU Commission for adoption.

CRR: RTS on additional liquidity outflows published in Official Journal

A Delegated Regulation with regard to RTS for additional liquidity outflows corresponding to collateral needs resulting from the impact of an adverse market scenario on an institution's derivatives transactions under the CRR has been [published](#) in the Official Journal. The RTS determine the method for calculating additional collateral outflows and the threshold above which an institution's derivative transactions fall within scope.

The Regulation will enter into force on 28 February 2017.

BRRD: EU Commission adopts Delegated Regulation on classes of arrangements to be protected in a partial property transfer

The EU Commission has [adopted](#) a Commission Delegated Regulation on classes of arrangements to be protected in a partial property transfer under Article 76 of the Bank Recovery and Resolution Directive (BRRD). Article 76 provides safeguards for certain contracts in the event of a partial transfer of assets, rights and liabilities of an institution under resolution or in the event of forced contractual modifications. The Delegated Regulation is intended to further specify the classes of arrangement that benefit from the safeguards closely following EBA technical advice.

The EU Commission adopted a previous Delegated Regulation under Article 76 BRRD on 18 March 2016 but now intends to replace that draft with the newly adopted draft Delegated Regulation, which is dated 7 February 2017. Among the changes in the drafting, the EU Commission has sought to clarify:

- the meaning of 'real securities';
- that 'financial contracts and derivatives' also benefit from protection in a partial property transfer; and
- resolution authorities' powers with respect to set-off and netting in individual resolution cases.

The Delegated Regulation will enter into force on the twentieth day following that of its publication in the Official Journal.

IOSCO reports on use of fintech in securities market industry

The International Organization of Securities Commissions (IOSCO) has published a [research report](#) on the use and

impact of financial technologies (fintech) on the financial services industry.

The report focuses on the delivery of securities and capital markets products and services through the use of innovative business models and emerging technologies, including:

- financing platforms, including peer-to-peer lending and equity crowdfunding;
- retail trading and investment platforms, including robo-advisers and social trading;
- institutional trading platforms, with a specific focus on innovation in bond trading platforms; and
- distributed ledger technologies, including application of the blockchain technology and shared ledgers to the securities markets.

IOSCO provides analysis of the opportunities and risks that each of these new technologies presents to investors, securities markets and their regulators, and reports on how some regulators have adopted pro-active measures to keep pace with technological innovation, such as through the establishment of fintech offices, regulatory sandbox frameworks and accelerator programs.

IOSCO recommends that regulators should address the global challenges of fintech, such as cross-border supervision and enforcement, through international cooperation and the exchange of information.

Benchmarks: IOSCO reports on implementation of financial benchmark principles in respect of WM/Reuters 4pm closing spot rate

IOSCO has published a [report](#) setting out the findings of a second review of the implementation of IOSCO's Principles for Financial Benchmarks in respect of the WM/Reuters 4pm London closing spot rate.

The second review assessed the extent to which the recommendations from the original review have been implemented as of 8 September 2016. The report notes that two significant changes made after the first review affected some policies and procedures of the closing spot rate:

- the UK Financial Conduct Authority (FCA) began regulating the rate in April 2015; and
- Thomson Reuters assumed ownership of the business from State Street in April 2016.

The report found that the administrator had made very significant progress, with most of the recommendations

from the first review in 2014 having been implemented. However, IOSCO has also made some recommendations aimed at improving and refining recently implemented policies and practices, particularly in relation to audit.

FCA consults on open-ended funds investing in illiquid assets

The Financial Conduct Authority (FCA) has published a [discussion paper](#) on its regulatory approach to open-ended funds investing in illiquid assets. The FCA hopes to gather evidence to determine whether more or different rules and guidance are needed to support market stability and protect consumers without restricting access to a diversified range of investment opportunities.

The FCA is seeking feedback on what problems exist where open-ended funds hold illiquid assets, how well the current rules work and what further regulatory intervention might be needed.

Following the UK's referendum vote to leave the EU in June 2016, liquidity management issues arose in some UK open-ended property funds. The FCA's paper specifically addresses the balance of interests between investors who wish to withdraw their money and those who wish to remain.

Comments to the paper close 8 May 2017.

MiFID2: HMT sets out approach to transposition

HM Treasury (HMT) has published a [document](#) setting out responses to its consultation on the transposition of MiFID2 in the UK and the Government's final policy. Annexes include the draft statutory instruments (SIs) to transpose MiFID2, which comprise:

- the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017;
- the Data Reporting Services Regulations 2017; and
- the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017.

Since the consultation, HMT has identified further issues that require legislative amendments and the draft SIs published alongside the document reflect these.

The Government intends to make and lay finalised SIs in early 2017, although further technical refinements are expected before they are finalised. HMT expects the SIs to come into force in the early part of 2017, after which time market participants will be able to formally apply to the FCA or PRA for new authorisations or variations of permission where necessary.

MAR: AMF applies ESMA's guidelines on persons receiving market soundings

The French Autorité des marchés financiers (AMF) has published a position paper ([DOC-2017-02](#)) incorporating ESMA's [guidelines](#) on persons receiving market soundings under the Market Abuse Regulation (EU) No 596/2014 (MAR) into French regulation.

Pursuant to article 11 of MAR and ESMA's guidelines, the AMF position is addressed to persons receiving market soundings, regarding:

- the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;
- the steps that such persons must take if inside information has been disclosed to them in order to comply with articles 8 and 10 of MAR; and
- the records that such persons must maintain in order to demonstrate that they have complied with articles 8 and 10 of MAR.

The AMF position applies as of 1 February 2017.

CNMV publishes handbook on authorisation process for foreign investment firms seeking to move to Spain

The Spanish National Securities Market Commission, the Comisión Nacional del Mercado de Valores (CNMV), has prepared an English language [handbook](#) on the fast-track authorisation process for investment firms, which forms part of the measures included in its 'Welcome to Spain' programme, the purpose of which is to attract EU financial institutions, especially those based in the UK, seeking a new base in the EU as a result of Brexit.

The handbook explains the key features of the fast-track authorisation process, which consists of an initial pre-authorisation phase lasting two weeks and a second formal authorisation phase taking at most two months.

The handbook includes a translation into English of the key legislation and templates of the standard pre-authorisation and authorisation forms. It also includes a guide to facilitate and simplify the authorisation process for broker-dealers, securities brokers and portfolio management companies.

CONSOB issues communication on risks linked to investments in contracts for difference, other similar products and related recommendations

The Italian securities regulator, the Commissione Nazionale per le Società e la Borsa (CONSOB), has published a [communication](#) to inform investors of the risks arising from certain highly complex financial transactions with speculative purposes. The products identified by CONSOB include contracts for difference (CFD), rolling spot forex and binary options.

Given the complexity of these products, CONSOB believes that:

- these investments do not meet most investors' needs as they are hard to understand;
- these investments might entail considerable losses (also greater than the capital invested);
- appropriate and in-depth analysis (including of risks) must be carried out before taking the decision to invest in these products; and
- it must first be ensured that the offeror is duly licensed to operate in Italy (by consulting the publicly available registers held by both CONSOB and the Bank of Italy).

FSMA publishes guidelines on how to apply legislation on unfair contract terms to financial instruments

The Belgian Financial Services and Markets Authority (FSMA) has issued a [circular](#) (FSMA_2017_04) containing a series of recommendations on the application of the provisions of Book VI of the Belgian Code of Economic Law (CEL) to offerings of investment instruments to retail investors.

Book VI of the CEL deals with market practices and consumer protection and implements Directive 2011/83/EU on consumer rights and Directive 93/13/EEC on unfair terms in consumer contracts in Belgian law.

The scope of Book VI of the CEL was expanded in 2014 to cover financial instruments. However, the terminology used in Book VI of the CEL was not easily comprehensible in the context of financial instruments. The FSMA has now published guidelines seeking to clarify the interpretation of certain concepts of the CEL when those concepts are applied to financial instruments.

The draft FSMA guidelines will have an impact on a number of standard clauses in issue documentation, whether or not the documentation is governed by Belgian law.

Draft Act Amending Act on Financial Market Supervision and Act on Insurance and Reinsurance Activity published in Poland

The Polish Minister of Development and Finance has [presented](#) a draft Act Amending the Act on Financial Market Supervision and the Act on Insurance and Reinsurance Activity, which is aimed at fulfilling the obligations of the Republic of Poland set out in Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) and Regulation (EU) 2016/2340 amending Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products as regards the date of its application. The Polish Financial Supervision Authority has been indicated as the body responsible for supervision, compliance with and enforcement of the provisions of Regulation 1286/2014 and the imposition of administrative fines for non-compliance with the Regulation.

The draft has been submitted for inter-ministerial and public consultations.

FINMA publishes securities trading circulars

The Swiss Financial Market Supervisory Authority (FINMA) has [published](#) the fully revised Circular 2018/2 'Disclosure requirements for securities transactions', the partially revised Circular 2008/4 'Securities journals' and new Circular 2018/1 'Organised trading facilities'. These circulars will enter into force on 1 January 2018.

The three circulars set out FINMA's approach to the disclosure requirements for securities transactions and operators of organised trading facilities under the Financial Market Infrastructure Act (FMIA), the Financial Market Infrastructure Ordinance (FMIO) and the FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA), which entered into force on 1 January 2016. In particular:

- Circular 2018/2 'Disclosure requirements for securities transactions' reflects the new requirement to disclose beneficial owners of securities transactions, applies the disclosure requirement to some non-standardised derivatives, revises exceptions to the reporting requirement and identifies admissible disclosures which conform with the EU standard;
- Circular 2008/4 'Securities journal' relates to the revised disclosure requirements and waives the requirement to keep a central journal for branch offices outside Switzerland in response to submissions made during the consultation; and

- Circular 2018/1 'Organised trading facilities' clarifies FINMA's approach to supervising organised trading facilities and states that platform operators must separate organised trading facilities from proprietary trading.

Capital Markets Board of Turkey amends Material Disclosure Communiqué No. II-15.1 and Public Disclosure Platform Communiqué No. VII-128.6

The Capital Markets Board of Turkey (CMB) [has amended](#) the Material Disclosure Communiqué No. II-15.1 (Özel Durumlar Tebliği) and the Public Disclosure Platform Communiqué (Kamuyu Aydınlatma Platformu Tebliği) as of 10 February 2017, in order to realise the Istanbul International Finance Centre Project and to meet the needs of the industry.

Under the new amendments to the Material Disclosure Communiqué No. II-15.1:

- issuers and related parties will now become subject to the Material Disclosure Communiqué No. II-15.1 starting from the date of approval of the prospectus/issuance certificate (izahname/ihraç belgesi);
- people who have administrative responsibilities in relation to shares or capital market instruments, people closely related with these people and partners (whether natural or legal persons) of issuers will be obliged to make material disclosures if the transactions carried out by such people in a calendar year exceed TRY 250,000;
- issuers who carry out public offerings for capital market instruments other than shares will also be required to make disclosures regarding re-purchases of such issued capital market instruments from their related parties;
- non-public companies which issue capital market instruments via non-public offerings (private placement or sale to qualified investors), companies whose shares are traded in the Qualified Investors Market (Nitelikli Yatırımcı İşlem Pazarı) and fund users in respect of domestic lease certificate issuances will not be subject to Section 2 (the Principles regarding Insider Information Disclosure) and Section 3 (the Principles regarding Continuous Information Disclosure). Instead, Section 4 will now apply to (i) fund users, (ii) non-public issuers whose issuance certificates have been approved for private placement or sale to qualified investors, (iii) companies whose shares are traded in the Qualified Investors Market. In addition to the previous requirements under Section 4, fund users and issuers will now have to disclose information regarding:
 - developments and events which (i) have occurred in the financial status and/or activities of the issuer or fund user and (ii) may have an adverse effect on the performance of the obligations regarding the issued capital market instruments; and
 - re-purchases of the issued capital market instruments other than shares from the related parties;
- companies whose shares are traded in the Qualified Investors Market will be subject to (i) the disclosure obligations set out for non-public companies whose capital market instruments are sold to qualified investors and (ii) relevant provisions of Article 5 of the Non-Public Companies Material Disclosure Communiqué No. II-15.2 (Payları Borsada İşlem Görmeyen Ortaklıklara İlişkin Özel Durumlar Tebliği).
- disclosures can now be made in languages other than Turkish if the CMB deems such requests appropriate;
- disclosures to be made in accordance with the changes in the shareholding structure and management control can now be made until 09:00 on the third succeeding day; and
- the board of directors of the issuers will be responsible for arranging the necessary procedures for effective implementation of the public disclosures.

Under the new amendments to the Public Disclosure Platform Communiqué No. VII-128.6:

- foreign companies and institutions whose shares are traded in Borsa İstanbul A.Ş. can now contractually outsource their disclosure obligations to third parties; and
- the Public Disclosure Platform Operator (Merkezi Kayıt Kuruluşu A.Ş.) will determine the principles under which the authorisations of e-certificates are cancelled and restored.

MAS consults on proposed amendments to banking regulations and banking corporate governance regulations

The Monetary Authority of Singapore (MAS) has launched a [public consultation](#) on proposed amendments to the Banking Regulations and Banking (Corporate Governance) Regulations. The proposals are intended to support the amendments in the Banking (Amendment) Act 2016, which was passed by Parliament in February 2016 to strengthen

prudential safeguards and depositor protections, and enhance corporate governance and risk management controls of banks. The proposals in the consultation also include certain administrative amendments.

The key proposals include:

- prescribing money-changing and remittance businesses for the purposes of section 12 of the Banking Act;
- introducing a new regulation 34 in the Banking Regulations to reinforce banks' risk management practices and controls;
- certain other amendments to the Banking Regulations and Banking (Corporate Governance) Regulations.

A list of proposed significant amendments are set out in Annex B of the consultation paper, and the full text of the proposed amendments to the Banking Regulations and the Banking (Corporate Governance) Regulations are set out in Annexes C and D of the consultation paper.

Comments on the consultation are due by 10 March 2017.

RECENT CLIFFORD CHANCE BRIEFINGS

The Market Abuse regime – six months on

The Market Abuse Regulation (EU) No 596/2014 (MAR) has now been in force for over six months. As market participants become more familiar with MAR and its related implementing and delegated regulations, and further guidance is published by ESMA (and, in some cases, national regulators), some of the initial concerns about how MAR would operate in practice are being laid to rest and we are beginning to see certain market norms emerge. We expect MAR will continue to be a hot topic throughout 2017 as the new regime continues to bed down and the detection, prevention and prosecution of market abuse remain areas of focus for the Financial Conduct Authority (FCA).

This briefing paper discusses some of the market practices and trends that have emerged since the implementation of MAR in July 2016.

https://www.cliffordchance.com/briefings/2017/02/the_market_abuser regime-sixmonthson.html

CRD V proposals on the application of proportionality – what are the implications?

Proposed amendments to the current CRD IV remuneration principles may lead to more financial services firms being

required to apply the bonus cap and more staff being subject to the remuneration codes.

This briefing paper discusses the proposed amendments.

https://www.cliffordchance.com/briefings/2017/02/uk_client_briefing-february2017.html

Asymmetric jurisdiction clauses upheld

An English court has decided that an asymmetric jurisdiction clause is valid and, further, that it is exclusive for the purposes of the Brussels I Regulation (recast).

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2017/02/asymmetric_jurisdictionclausesupheld.html

The US responds to Iran's missile test with new sanctions

On 3 February 2017, the US Office of Foreign Assets Control (OFAC) listed 25 individuals and entities from various countries as Specially Designated Nationals (SDNs) in response to Iran's ballistic missile test on 29 January. The action raises the question of whether Congress will pass new sanctions against non-US companies engaged in dealings with Iran.

This briefing paper discusses the new sanctions.

https://www.cliffordchance.com/briefings/2017/02/the_us_reponds_toiransmissiletestwithne.html

UAE securities regulator creates regime for promotion and introduction to UAE investors

The Promotion and Introduction Regulations (PIRs) recently approved by the Securities and Commodities Authority (SCA) fill a gap in the UAE regulatory landscape by regulating the promotion of securities and related introduction and referral activities.

The new regime alters some long-standing tolerated practices, particularly in the area of cross-border marketing of securities, and provides greater investor protection for non-institutional UAE investors.

This briefing paper highlights the key points of these new regulations.

https://www.cliffordchance.com/briefings/2017/02/uae_securities_regulatorcreatesregimefo.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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