

## INTERNATIONAL REGULATORY UPDATE 11 – 15 JANUARY 2021

- **Sustainable Finance Disclosure Regulation: ESAs write to EU Commission on priority issues relating to application**
- **NPLs: ECON Committee adopts report on proposed directive on credit servicers and purchasers and recovery of collateral**
- **Brexit/MiFID2: ESMA publishes statement on reverse solicitation rules**
- **EBA publishes Q3 2020 risk dashboard and results of risk assessment questionnaire**
- **ECB publishes final guide on supervisory approach to consolidation**
- **Markets in Financial Instruments (Switzerland Equivalence) Regulations 2021 published**
- **House of Lords EU Services Sub-Committee publishes call for evidence on UK-EU trade in services**
- **BoE and FCA issue statement on completing sterling LIBOR transition by end-2021**
- **Coronavirus: FCA consults on update to guidance mortgages and consumer credit repossessions**
- **PRA consults on supervision of international firms' subsidiaries and branches**
- **BaFin consults on draft interpretation and application guidance for credit institutions under German Money Laundering Act**
- **IVASS publishes new regulation on transfer of run-off portfolios**
- **Ministry of Finance consults on draft bill to implement Directive on cross-border distribution of collective investment undertakings**
- **Amendments to Act Amending Act on Trading in Financial Instruments submitted to Sejm**
- **Polish Financial Supervision Authority publishes standpoint on the risks associated with the purchase of and trading in cryptoassets**
- **FSA and local finance bureaus establish financial market entry office**
- **Recent Clifford Chance briefings: Restructuring in Germany, and China's new blocking statute. Follow this link to the briefings section.**

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## **Sustainable Finance Disclosure Regulation: ESAs write to EU Commission on priority issues relating to application**

The Joint Committee of the European Supervisory Authorities (ESAs) has [written](#) to the EU Commission on areas of uncertainty in the interpretation of the Sustainable Finance Disclosure Regulation (SFDR).

While preparing draft regulatory technical standards (RTS) under the SFDR, the ESAs have identified priority questions that would benefit from urgent clarification in order to facilitate an orderly application of the SFDR from 10 March 2021 as scheduled.

The priority areas identified by the ESAs cover:

- the application of the SFDR to no-EU alternative investment fund managers (AIFMs) and registered AIFMs;
- application of the 500-employee threshold for principal adverse impact reporting on parent undertakings of a large group;
- the meaning or promotion in the context of products promoting environmental or social characteristics;
- the application of Article 9 of SFDR; and
- the application of SFDR product rules to portfolios and dedicated funds.

## **NPLs: ECON Committee adopts report on proposed directive on credit servicers and purchasers and recovery of collateral**

The EU Parliament's Economic and Monetary Affairs (ECON) Committee has [adopted](#) its report on the proposed Directive on credit servicers and purchasers and the recovery of collateral, which sets out common standards regulating the transfer of non-performing loans (NPLs) from banks to secondary buyers.

NPLs are commonly defined as loans that are either more than 90 days past due or are unlikely to be fully repaid. The proposed Directive is intended to foster the development of professional secondary markets for NPLs so that credit purchasers can buy existing NPLs from across the EU.

The ECON Committee also agreed to begin trilogue negotiations with the EU Council and EU Commission.

## **Brexit/MiFID2: ESMA publishes statement on reverse solicitation rules**

The European Securities and Markets Authority (ESMA) has published a [statement](#) reminding firms of the MiFID2 rules on the provision of investment services to retail or professional clients by firms not established or situated in the EU.

The statement follows the identification of some questionable practices relating to reverse solicitation since the end of the UK transition period on 31 December 2020, such as the inclusion of general clauses in Terms of Business or through the use of online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client.

ESMA therefore reminds firms that where a third-country firm solicits clients or potential clients in the EU, or promotes or advertises investment services or activities together with ancillary services in the EU, it should not be deemed as a service provided at the own exclusive initiative of the client, regardless of any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client.

ESMA also highlights that:

- the provision of investment services in the EU without proper authorisation exposes service providers to the risk of administrative or criminal proceedings; and
- investors may lose protections granted under EU rules when they use the services of investment service providers not properly authorised in the EU.

### **EBA publishes Q3 2020 risk dashboard and results of risk assessment questionnaire**

The European Banking Authority (EBA) has published its [Risk Dashboard for Q3 2020](#) along with the [results](#) of its Autumn 2020 risk assessment questionnaire (RAQ). For the first time, the Risk Dashboard includes data on moratoria and public guarantee schemes.

The Q3 2020 data shows that capital ratios continued to improve and the NPL ratio continued to decline, supported by a contraction in the NPL volume and rising total loans and advances, and return on equity (RoE) remained significantly below banks' costs of equity.

### **ECB publishes final guide on supervisory approach to consolidation**

The European Central Bank (ECB) has published a [final guide](#) on its supervisory approach to consolidation in the European banking sector.

The guide, which follows a public consultation conducted in 2020, is intended to enhance the transparency and predictability of supervisory actions and help credit institutions design prudentially sustainable consolidation projects. It covers:

- the overall approach to the supervisory assessment of consolidation projects;
- the supervisory expectations regarding consolidation projects;
- the supervisory approach to key prudential aspects of the consolidation transaction;
- the ongoing supervision of the newly combined entity; and
- the application of the framework to consolidation transactions involving less significant institutions (LSIs).

Among other things, it seeks to clarify that:

- the ECB will not penalise credible integration plans by setting higher Pillar 2 capital requirements, and will communicate during the application process an indication of the capital levels the combined bank will need to maintain;

- banks are expected not to pay out in dividends profits stemming from badwill until the sustainability of the business model has been firmly established, and that the acquirer is expected to take advantage of a relatively low acquisition price to increase sustainability; and
- the ECB will accept the temporary use of existing internal models, subject to a strong roll-out plan.

The ECB encourages parties considering consolidation to engage with supervisors early on, to allow the ECB to give preliminary feedback.

### **Markets in Financial Instruments (Switzerland Equivalence) Regulations 2021 published**

The [Markets in Financial Instruments \(Switzerland Equivalence\) Regulations 2021 \(SI 2021/28\)](#) have been made and laid before the UK Parliament.

SI 2021/28 specifies that the legal and supervisory framework for stock exchanges in Switzerland meet at least equivalent outcomes to the UK's corresponding regime and will allow investment firms to use Swiss trading venues to fulfil the share trading obligation (STO) under UK MiFIR.

The Swiss trading venues that have been recognised as equivalent are BX Swiss AG and SIX Swiss Exchange AG.

The SI was made according to the negative procedure on 13 January and, if not annulled by Parliament, comes into force on 3 February 2021.

### **House of Lords EU Services Sub-Committee publishes call for evidence on UK-EU trade in services**

The House of Lords (HoL) EU Services Sub-Committee has launched an inquiry and published a [call for fresh evidence](#) on the future of UK-EU relations on trade in services.

The inquiry will examine the impact of the provisions set out in the UK-EU Trade and Cooperation Agreement (TCA) on the UK's services sector, including financial services, professional business services, creative industries, research and education, and data and digital services.

In relation to financial services, evidence is sought on:

- how the arrangements in the TCA shape UK-EU trade in financial services;
- the form the dialogue on establishing structured regulatory cooperation should take;
- the form of Parliamentary oversight of financial regulators; and
- how financial services may be affected by changes in interrelated sectors.

The deadline for submissions is 5 February 2021 and the Committee aims to report to the House by Easter.

### **BoE and FCA issue statement on completing sterling LIBOR transition by end-2021**

The Bank of England (BoE) and Financial Conduct Authority (FCA) have jointly published a [statement](#) on completing sterling LIBOR transition by end-2021.

The statement highlights that ICE Benchmark Administration has launched a consultation on ceasing publication of all sterling LIBOR settings at the end of 2021, and that the Working Group on Sterling Risk-Free Reference Rates has updated its priorities and roadmap to help businesses finish planning the steps they may need to take to transition away from LIBOR.

In particular, the Working Group has recommended that, from the end of March 2021, sterling LIBOR is no longer used in any new lending or other cash products that mature after the end of 2021. Additionally, the Working Group has recommended that firms no longer initiate new linear derivatives linked to sterling LIBOR after the end of March 2021, other than for risk management of existing positions or where they mature before the end of 2021.

The BoE and the FCA intend to continue working closely with firms to secure a smooth transition. Supervisors of regulated firms will continue to expect transition plans to be executed in line with industry-recommended timelines. Senior managers should expect close supervisory engagement on how they are ensuring their firm's progress relative to industry milestones.

### **Coronavirus: FCA consults on update to guidance mortgages and consumer credit repossessions**

The FCA has published draft guidance setting out its proposed approach for [mortgage](#) and [consumer credit](#) borrowers affected by coronavirus. The proposals reflect the different risks and harms that customers with goods or vehicles on credit are likely to face compared to those who are at risk of losing their home.

In November 2020, the FCA published final guidance for firms on support for mortgage borrowers affected by coronavirus. The guidance provided that firms should generally not enforce repossessions before 31 January 2021. To take into account the worsening coronavirus situation, the FCA is proposing to extend its guidance so that firms should not enforce repossessions before 1 April 2021.

Under the FCA's current consumer credit guidance, firms should not, except in exceptional circumstances, terminate a regulated agreement or repossess goods or vehicles under the agreement before 31 January 2021. The FCA is proposing to amend this guidance to allow consumer credit firms to repossess goods and vehicles from 31 January 2021, but only as a last resort, and after carefully considering the impact of repossession on customers who may be vulnerable.

### **PRA consults on supervision of international firms' subsidiaries and branches**

The Prudential Regulation Authority (PRA) has published a [consultation paper \(CP2/21\)](#) on its approach to supervising the UK activities of PRA-authorized banks and designated investment firms that are headquartered outside of the UK or are part of a group based outside of the UK.

The purpose of the proposals, which would result in a new supervisory statement (SS) on the PRA's approach to branch and subsidiary supervision replacing SS1/18 on the PRA's approach to branch authorisation and supervision, is to consolidate and provide clarity on the PRA's approach.

Among other things, the draft SS sets out the PRA's overall approach and the relationship between:

- a firm's size and systemic importance;
- the information, co-operation, and controls likely to be required to be effectively supervised; and
- the degree of independence between UK and overseas business.

The consultation closes on 11 April 2021. The PRA intends to implement the final policy in Q2 2021.

### **BaFin consults on draft interpretation and application guidance for credit institutions under German Money Laundering Act**

The German Federal Financial Services Supervisory Authority (BaFin) has launched a [consultation](#) on guidance setting out its administrative practice regarding the special obligations of credit institutions under the German Money Laundering Act (Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten, GWG). The guidance applies to all credit institutions that are under the supervision of BaFin.

The Special Section of the Interpretation and Application Guidance for credit institutions supplements the Interpretation and Application Guidance on the GWG as amended on 18 May 2020.

The deadline for submitting comments is 12 February 2021.

### **IVASS publishes new regulation on transfer of run-off portfolios**

The Italian Institute for the Supervision of Insurance (IVASS) has published [Regulation no. 107](#) of 12 January 2021, which modifies Article 2, Paragraph 1, Letter f, of ISVAP Regulation no. 14 of 18 February 2008 in relation to the definition of 'portfolio', thus allowing transfer of portfolios made of claims only (soli sinistri).

The proposed amendment seeks to update IVASS' guidelines in the more general context of systematic revision of the secondary legislation currently in place in light of the applicable European framework.

The new regulation comes into force the day after its publication in the Italian Official Gazette.

### **Ministry of Finance consults on draft bill to implement Directive on cross-border distribution of collective investment undertakings**

The Dutch Ministry of Finance has published a [draft implementation bill](#) on the implementation of Directive (EU) 2019/1160 for consultation. Directive (EU) 2019/1160 amends the AIFMD and UCITS Directives with regard to the cross-border distribution of collective investment undertakings (Wet implementatie richtlijn grensoverschrijdende distributie van beleggingsinstellingen en icbe's). It is intended to create a level playing field between collective investment undertakings. Amongst other things, Directive (EU) 2019/1160 introduces a harmonised definition of pre-marketing and conditions under which a collective

investment undertaking may engage in pre-marketing activities. The draft implementation bill will amend the Dutch Financial Supervision Act.

The consultation will be open until 14 February 2021. The deadline for implementation of Directive (EU) 2019/1160 is 1 August 2021.

## **Amendments to Act Amending Act on Trading in Financial Instruments submitted to Sejm**

The [draft Act Amending the Act on Trading in Financial Instruments and Certain Other Acts](#) has been submitted to the Sejm by the Minister of Finance, Funds and Regional Policy.

Amongst other things, the draft implements Directive (EU) 2019/2177 on the operation of the European Supervisory Authorities and supplements Directive (EU) 2015/2366 on payment services.

The most important amendments concern:

- the activity of service providers with regard to the provision of information;
- supervision of insurance and reinsurance activity;
- the operation of public companies and protection of minority shareholders; and
- regulation of the performance of insurance agreements, reinsurance agreements and retrocession agreements concluded up to 31 December 2020 by insurance companies and reinsurance companies with their registered offices in the United Kingdom of Great Britain and Northern Ireland and Gibraltar, which on the basis of a single licence conducted activity in Poland, until the expiry date of those agreements.

## **Polish Financial Supervision Authority publishes standpoint on the risks associated with the purchase of and trading in cryptoassets**

The Polish Financial Supervision Authority (KNF) has published its [standpoint](#) concerning investments in cryptocurrencies and other digital assets, in which it warns against making investments in financial instruments, which may be driven by, for example, low interest rates on deposit products in banks and increases in the valuation of some digital currencies. The KNF standpoint addresses potential investors to remind them about the risks related to the purchase of and trading in the cryptoassets, including virtual currencies. The KNF points out, among other things, that the market of cryptoassets and cryptocurrencies:

- is not a regulated market and, therefore, is not supervised by, for example, the KNF;
- is highly volatile; and
- is a market on which irregularities occur on a large scale.

The KNF's standpoint also includes definitions of payment tokens, stablecoins, investment tokens, utility tokens, cryptocurrency mixers and cryptocurrency wallets.

## **FSA and local finance bureaus establish financial market entry office**

The Financial Services Agency (FSA) and the local finance bureaus have [established](#) the 'Financial Market Entry Office' as part of a set of initiatives designed to expand Japan's role as an international financial centre. The Japanese Government is committed to making Japan's capital markets more attractive with strategic initiatives and by creating an environment that attracts foreign businesses and highly-skilled foreign professionals.

The Office has been established to handle the entire regulatory process from pre-application consultation, registration, to supervision after the registration for newly entering asset management firms as a single point of contact with all the communications available in English. The Office is also intended to serve as a contact point for any inquiry regarding procedures under financial laws and regulations in connection with the establishment of a business base in Japan by all types of foreign financial business operators.

The Office will take over the role of the Financial Market Entry Consultation Desk, which was established in April 2017.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **New German restructuring scheme – a revolution of German restructuring law**

The long-discussed bill for the 'further development of the German restructuring and insolvency Law' entered into force on 1 January 2021. Its core is dedicated to a newly introduced pre-insolvency restructuring procedure ('German Scheme'), which for the first time allows for the restructuring of debtors by means of a restructuring plan outside of German insolvency proceedings whilst enabling cross-group cram-down decisions. The German Scheme has elements of the well-known British Scheme of Arrangement as well as the new Dutch Scheme and is in its implementation, largely adapted from the German insolvency plan procedure.

This briefing discusses the German Scheme.

<https://www.cliffordchance.com/briefings/2021/01/new-german-restructuring-scheme---a-revolution-of-german-restruc.html>

### **China issues 'blocking statute'**

On 9 January 2021, the PRC Ministry of Commerce (MofCom) issued its new 'blocking statute', known as the Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures, which came into effect on the same date.

The Rules, together with the Provisions on the Unreliable Entity List (UEL Provisions) promulgated by MofCom on 19 September 2020, expand the Chinese Government's arsenal to counteract foreign laws and measures with long-arm jurisdiction.

This briefing discusses the Rules.

<https://www.cliffordchance.com/briefings/2021/01/china-issues--blocking-statute-.html>



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