INTERNATIONAL REGULATORY UPDATE 21 – 25 JUNE 2021

- EU Commission adopts final one-year extension of transitional regime for capital requirements for non-EU CCPs
- EU Commission consults on distance marketing directive review
- PSD2: EU Commission adopts RTS for supervising payment institutions and EMIs in cross-border payments
- EU regulators issue joint statement on cessation of USD LIBOR
- Coronavirus: ECB extends leverage ratio relief
- BRRD: SRB publishes policy on impracticability to include bail-in recognition clauses
- Green Finance: EBA reports on ESG risks management and supervision
- EBA reports on EU law applicable to branches of third country credit institutions
- EBA updates report on monitoring AT1 instruments
- EBA consults on amendments to supervisory reporting on securitisations, asset encumbrance and G-SIIs
- CRR: EBA consults on draft amending RTS specifying calculation of credit risk adjustments in order to facilitate NPL sales
- Payment and Electronic Money Institution Insolvency Regulations 2021 made
- Financial market infrastructure: BoE publishes discussion paper on supervisory stress testing of CCPs
- Green Finance: FCA consults on climate-related disclosure rules
- FCA consults on proposed decision to require synthetic LIBOR for 6 sterling and Japanese yen settings
- Primary Market Bulletin No. 34: FCA consults on changes to Knowledge Base in relation to prospectus regime
- HMT calls for evidence on UK Securitisation Regulation
- HMT publishes approach to financial promotions
- HMT publishes approach to implementation of Investment Firms Regime and Basel III standards
- UK CRD5/CRR2: PRA consults on penalties guidance and consolidated prudential rules for financial holding companies

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

To request a subscription to our Alerter: Finance Industry service, please subscribe to our Client Portal, where you can also request access to the Financial Markets Toolkit and subscribe to publications, insights and events.

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Marc Benzler +49 69 7199 3304

Caroline Dawson +44 207006 4355

Steven Gatti +1 202 912 5095

Lena Ng +65 6410 2215

Gareth Old +1 212 878 8539

Mark Shipman + 852 2826 8992

Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

- **PRA publishes occasional consultation paper on minor changes to rules**
- **Ordinance implementing Investment Firm Directive published**
- **BaFin extends pandemic-related leverage ratio relief until March 2022**
- **BaFin publishes general decree on information obligation regarding invalid interest rate adjustment clauses**
- **Bank of Italy consults on rules governing banks' and financial institutions' financial statements**
- **CSSF issues circular on management of climate-related and environmental risks**
- **HKMA issues guidance in light of SFC enhancements to competency framework**
- **Hong Kong-Thailand mutual recognition of funds scheme commences**
- **SFC to upgrade industry practitioners' competency standards**
- **Coronavirus: SFC updates exemption from compulsory quarantine scheme for senior executives at licensed corporations**
- **Ministry of Foreign Affairs announces commencement dates for tax convention and investment agreement between Japan and Georgia**
- **MAS consults on proposals to enhance pre and post-transaction safeguards for retail clients**
- **Recent Clifford Chance briefings: CSDR settlement discipline for buy-side firms, non-fungible tokens, and more. Follow this link to the briefings section.**

EU Commission adopts final one-year extension of transitional regime for capital requirements for non-EU CCPs

The EU Commission has extended, by one additional year, the current transitional regime regarding the capital requirements that EU banks and investment firms must maintain when exposed to non-EU central counterparties (CCPs). The transitional regime will therefore continue to apply until 28 June 2022.

The Commission has emphasised that this is the last and final extension possible under the Capital Requirements Regulation (CRR), that exposures to those non-EU CCPs which will not be recognised by the European Securities and Markets Authority (ESMA) by 28 June 2022 will no longer be eligible for lower capital requirements after that date, and that stakeholders should start preparing for this possibility.

The transitional regime under the CRR allows EU banks and investment firms to consider any non-EU CCP that has applied for recognition by ESMA as a 'Qualifying CCP' during the recognition process. CCPs in Argentina, Chile, China, Colombia, Indonesia, Israel, Malaysia, Russia, Taiwan, Thailand and Turkey and the United States of America currently benefit from that transitional regime. Those CCPs have not been recognised by ESMA as the Commission has not adopted equivalence decisions for their home jurisdictions or adopted such a decision only recently.

EU Commission consults on distance marketing directive review

The EU Commission has launched a public consultation on its review of Directive 2002/65/EC on Distance Marketing of Consumer Financial Services (DMD).

The public consultation, which follows the Commission's May 2021 roadmap consultation on an inception impact assessment, seeks views on both general and technical aspects of the DMD from consumers, retail financial services providers, supervisory authorities and other stakeholders such as fintechs and intermediaries.

The aim of the consultation is to review the DMD as part of a regulatory fitness exercise in light of market developments and the introduction of sectoral legislation since the DMD came into force in 2002.

Comments are due by 28 September 2021. The Commission intends to publish a proposal in Q1 2022.

PSD2: EU Commission adopts RTS for supervising payment institutions and EMIs in cross-border payments

The EU Commission has adopted regulatory technical standards (RTS) specifying the framework for cooperation and exchanging information between Member States under the Payment Services Directive (PSD2).

The RTS specify the framework for cooperation and the exchange of information between competent authorities of the home and the host Member States in the context of supervision of payment institutions and electronic money institutions (EMIs) exercising cross-border provision of payments services in other Member States.

The RTS also specify how the Commission will monitor compliance with national law transposing Titles III and IV of PSD2.

EU regulators issue joint statement on cessation of USD LIBOR

ESMA has published a joint statement with the EU Commission, European Central Bank (ECB) Banking Supervision and the European Banking Authority (EBA) on the forthcoming cessation of all LIBOR settings.

The statement strongly encourages market participants to use the time remaining until the cessation or loss of representativeness of USD LIBOR, GBP LIBOR, JPY LIBOR, CHF LIBOR and EUR LIBOR to take the following actions to substantially reduce their exposure to these interest rates:

- stop using the 35 LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021;
- limit the use of any LIBOR setting published under a changed methodology (also known as synthetic LIBOR) only to tough legacy contracts; and
- include robust fallback clauses nominating alternative rates in all contracts referencing LIBOR.

Coronavirus: ECB extends leverage ratio relief

The ECB has published a decision extending its decision temporarily to allow directly supervised euro area banks to exclude certain central bank exposures from their leverage ratios, following an opinion issued by its Governing Council confirming that exceptional circumstances continue to exist due to the COVID-19 pandemic.

The relief, which is pursuant to Article 429a of the CRR as amended, applies to central bank exposures, such as coins, banknotes and deposits relating to the implementation of monetary policy, and is expected only to benefit such exposures newly accumulated since the beginning of the pandemic, which is deemed to be from 31 December 2019.

The extension applies until 31 March 2022.

BRRD: SRB publishes policy on impracticability to include bail-in recognition clauses

The Single Resolution Board (SRB) has published a paper setting out its approach and expectations in relation to bank notifications of impracticability to include bail-in recognition clauses in relevant third country law governed contracts under Article 55(2) of the Bank Recovery and Resolution Directive (BRRD).

The paper sets out the notification and assessment process, as well as the following four preliminary categories of liabilities, for which the impracticability notification and assessment are simplified:

- liabilities resulting from trade finance operations under internationally agreed frameworks and protocols;
- liabilities resulting from project finance activities under official standardised terms;
- liabilities to financial market infrastructure (FMI) service providers, where the services are provided on standard terms not susceptible to bilateral negotiation; and
- minor operating liabilities, arising from (non-critical) business operations, where the terms of the contract are set by the provider and not bilaterally negotiated.

The SRB has published filing rules and a template notification form alongside the paper.

Green Finance: EBA reports on ESG risks management and supervision

The EBA has published a report on management and supervision of environmental, social, and governance (ESG) risks for credit institutions and investment firms.

The report provides common definitions of ESG risks and their transmission channels, as well as identifying evaluation methods that are needed for effective risk management. The EBA has recommended integrating ESG risks into business strategies, governance and risk management, and supervision in a timely manner.

The report also provides a steer on supervisory expectations and sets the foundations for future EBA guidelines on ESG risks.

EBA reports on EU law applicable to branches of third country credit institutions

The EBA has published a report setting out its findings from a stock-taking exercise of the legal and regulatory treatment of branches of third country credit institutions (TCBs) that are established in EU Member States. The EBA notes that TCBs increased in presence and activity between 31 December 2019 and 31 December 2020. While the EBA expects post-Brexit reorganisations of third country groups' (TCGs') presence in the EU and the implementation of the intermediate parent undertaking framework to impact these figures, it still observes an increasing trend in the use of TCBs as a form of accessing and operating in the EU market.

The exercise also revealed the varied and divergent regulatory and supervisory approaches to TCBs taken by different Member States. In particular, Member States differed in whether they treated TCBs as subsidiaries, by applying requirements as close to those under the CRR as possible, or whether they treated them as branches of the third country credit institution, and therefore relied largely on the third country's equivalent supervisory and regulatory regime.

In light of this regulatory fragmentation and the subsequent risks of arbitrage, the EBA has set out a series of recommendations addressed to the EU Parliament, Council and Commission designed to improve harmonisation of the EU legal framework applicable to TCBs. These recommendations include:

- introducing an EU-centralised equivalence assessment for authorising TCBs;
- encouraging effective cooperation with third country home authorities to devise appropriate mitigation measures for TCB-related risks and to ensure their sound prudential management;
- maintaining continuous supervisory dialogue with the TCB and its credit institution;
- establishing an appropriately determined scope of authorisation and prudential requirements, including on capital, liquidity and internal governance;
- introducing stronger requirements around anti-money laundering and counter terrorism financing;
- introducing a uniform minimum reporting framework;
- requiring satisfactory recovery plans; and
- introducing a subsidiarisation mechanism, which would require TCBs to become EU subsidiaries if they reach a certain size and/or other quantitative and qualitative risk indicators, such as if they carry out deposit-taking activities of covered deposits. The identification and calibration of the relevant thresholds should be based on an impact assessment.

EBA updates report on monitoring AT1 instruments

The EBA has published an updated report on the monitoring of additional Tier 1 (AT1) instruments, with the objective of further strengthening the robustness and quality of EU institutions' own funds and eligible liabilities instruments.

The updates to the report reflect:

- the amendments to the CRR;
- the monitoring of the implementation of the EBA opinion on legacy instruments; and
- observations on new market trends, such as ESG linked capital instruments.

Regarding the end of the transitional period for legacy instruments, the EBA has drawn attention to the need to keep the capital structure simple and avoid additional layers within a capital class.

It has also identified differences in the clauses of ESG issuances made for capital/loss absorbency purposes. The report provides best practices or practices that should be avoided for these issuances for the purpose of giving views and recommendations on how ESG capital bonds features are meant to interact with the eligibility criteria for own funds and eligible liabilities instruments, ultimately safeguarding the quality of the instruments from a prudential perspective.

EBA consults on amendments to supervisory reporting on securitisations, asset encumbrance and G-SIIs

The EBA has launched a consultation on amending its implementing technical standards (ITS) on supervisory reporting of institutions in relation to securitisation, asset encumbrance and identifying global systemically important institutions (G-SIIs), as well as to own funds reporting and requirements (COREP). The changes under consultation are intended to have the following effects in particular:

- enhanced proportionality for asset encumbrance reporting, as recommended by an EBA report on the cost of compliance with supervisory reporting requirements. In particular, the EBA proposes exemptions for small and non-complex institutions from certain granular data reporting, as well as an amended definition for the level of asset encumbrance;
- alignment of securitisation reporting requirements with prudential requirements in response to the Capital Markets Recovery Package (CMRP);
- a deeper understanding of institutions' uses of the option to exempt certain software assets from the deduction from own funds by means of amending COREP; and
- an expanded scope of application of the reporting obligation as regards information for determining G-SIIs and assigning buffer rates, such that the obligation would include standalone entities meeting the relevant criteria (rather than banking groups only).

Comments on the consultation are due by 23 September 2021. ESMA plans to submit draft ITS to the EU Commission in Q4 2021 or Q1 2022 and envisages that the revised requirements will apply from 31 December 2022.

CRR: EBA consults on draft amending RTS specifying calculation of credit risk adjustments in order to facilitate NPL sales

The EBA has launched a consultation on draft RTS on the calculation of specific credit risk adjustments. The draft RTS would amend Delegated Regulation (EU) No 183/2014 (supplementing the CRR with regard to RTS for specifying the calculation of specific and general credit risk adjustments) in order to remove a possible prudential disincentive to the sale of non-performing loans (NPLs), as requested by the EU Commission's December 2020 action plan, 'Tackling NPLs in the aftermath of the COVID-19 pandemic'.

Under the current framework, in certain circumstances the capital charge for a defaulted exposure may increase after sale from a risk weight (RW) of 100% on the seller's balance sheet to an RW of 150% on the buyer credit institution's balance sheet. The RTS under consultation are intended to remedy this situation by recognising the price discount on sale as a credit risk adjustment for RW calculation purposes.

Comments are due by 24 September 2021.

Payment and Electronic Money Institution Insolvency Regulations 2021 made

HM Treasury (HMT) has made the Payment and Electronic Money Institution Insolvency Regulations 2021 (SI 2021/716) following approval of a draft version of the regulations by both Houses of Parliament.

The regulations create a new special administration regime for payments institutions (PIs) and EMIs (a pSAR) and make changes to the Financial Services and Markets Act 2000 (FSMA), including extending Part 24 provisions in order to provide the Financial Conduct Authority (FCA) with specific powers to participate and protect consumers in the event of a PI/EMI insolvency. The regulations also make changes intended to correct a minor defect in the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020.

The regulations come into force on 8 July 2021.

Financial market infrastructure: BoE publishes discussion paper on supervisory stress testing of CCPs

The Bank of England (BoE) has published a discussion paper on the supervisory stress testing of CCPs.

The paper sets out proposals to develop a public framework for the stress testing, including a range of options across eight components of CCP supervisory stress testing, and considers how those options might contribute to the Bank's objectives. These include proposals in relation to components where the Bank has clear proposals and a direction of travel in mind, such as a full assessment of credit and liquidity risk via a combination of the Bank's and CCPs' analyses, as well as components where the Bank is contemplating a broader range of options.

The Bank intends CCP stress testing to be holistic and exploratory, rather than a pass-fail assessment, for the initial years of the exercise. Feedback received on the discussion paper will be used in conjunction with findings from the Bank's first public CCP supervisory stress test in 2021–22 to inform the further development of the CCP supervisory stress testing framework ahead of publication of the Bank's final framework.

Comments are due by 17 December 2021.

Green Finance: FCA consults on climate-related disclosure rules

The FCA has launched two consultations on enhancing climate-related disclosures.

The first consultation (CP21/17) sets out proposals to introduce a climate-related financial disclosure regime for asset managers, life insurers and FCA-regulated pension providers in line with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations.

The second consultation (CP21/18) sets out proposals to extend the application of the TCFD-aligned Listing Rule for premium-listed commercial companies to issuers of standard listed equity shares. CP21/18 also seeks views on ESG topics in capital markets, including on green and sustainable debt markets and the role of ESG data and rating providers.

Comments on both proposals are due by 10 September 2021.

The FCA intends to publish policy statements in Q4 2021 and a feedback statement on the ESG-related discussion topics in capital markets in the first half of 2022.

FCA consults on proposed decision to require synthetic LIBOR for 6 sterling and Japanese yen settings

The FCA has published a consultation paper (CP21/19) setting out its proposal to use its Article 23D(2) powers introduced through amendments to the Benchmarks Regulation (BMR) under the Financial Services Act 2021. In particular, the FCA proposes to require the administrator of LIBOR, ICE Benchmark Administration (IBA), to change the way 1-month, 3-month and 6-month sterling and Japanese yen LIBOR settings are determined after 2021 to secure an orderly wind-down. This requirement would be conditional on any designation of the 6 LIBOR settings as Article 23A benchmarks taking effect immediately after end-2021.

In March 2021, the FCA announced the future cessation or loss of representativeness of the 35 LIBOR benchmark settings, including the cessation of all sterling and Japanese yen LIBOR panels immediately after end-2021, and it is now seeking views on using its Article 23D(2) powers to require the 6 sterling and Japanese yen LIBOR settings to be determined under a changed methodology (i.e. on a 'synthetic' basis) after end-2021.

Comments are due by 27 August 2021. Following the consultation, the FCA intends to communicate any final decision as soon as practicable in Q4.

CLIFFORD
CHANCE

Primary Market Bulletin No. 34: FCA consults on changes to Knowledge Base in relation to prospectus regime

The FCA has published the latest edition of its Primary Market Bulletin (PMB). The bulletin contains a consultation on changes the FCA intends to make to its Knowledge Base in relation to the prospectus regime. In particular, the FCA is proposing to:

- create a new technical note to adapt, as FCA guidance, ESMA's guidelines on disclosure requirements under the Prospectus Regulation;
- create a new technical note to cover the measures on specialist issuers contained in the ESMA update of the Committee of European Securities Regulators (CESR) recommendations, which are currently on the FCA's Handbook Level 3 Materials site; and
- incorporate certain elements of the Level 3 Questions and Answers, Prospectuses (PD Q&As), currently in the FCA Handbook, into existing and new procedural and technical notes.

Comments on the consultation are due by 4 August 2021.

The FCA notes it intends to consult at a later date on the removal of the PD Q&As and the CESR recommendations from the FCA Handbook site, and the amendment of the Prospectus Regulation Rules (PRR) 1.1.5 G and 1.1.7 G., and PRR App 1.1 Relevant Definitions, which refer to them.

HMT calls for evidence on UK Securitisation Regulation

HMT has published a call for evidence in preparation for a review of the onshored UK Securitisation Regulation (UKSR). The Treasury notes the following overarching aims for the review:

- to bolster securitisation standards in the UK, in order to enhance investor protection and promote market transparency; and
- to support and develop securitisation markets in the UK, including through the increased issuance of Simple, Transparent and Standardised (STS) securitisations, in order ultimately to increase their contribution to the real economy.

The call for evidence notes the relationship between the UKSR review and a separate, wider review into the Future Regulatory Framework (FRF), and in particular, that HMT wishes any of the call's respondents to set out by when any proposed changes are needed in order to consider whether they would be better achieved through changes to existing legislation or through regulators' rules following the implementation of the FRF.

Responses to the call are due by 2 September 2021, and a subsequent Government report reviewing the UKSR is to be laid before Parliament by 1 January 2022.

HMT publishes approach to financial promotions

HMT has published a consultation response setting out its approach to the regulatory framework for the approval of financial promotions.

Among other things, the UK Government intends to introduce a new regulatory gateway operated by the FCA by amending FSMA to introduce a financial promotion requirement on all new and existing authorised persons prohibiting them from approving the financial promotions of unauthorised persons.

The requirement will not apply to firms approving the financial promotions of an unauthorised person within the same group, nor to the approval of authorised firms' own promotions for communication by unauthorised persons. The Government also proposes to exempt principals approving financial promotions for their appointed representatives in relation to regulated activities, for which the principal has agreed to accept responsibility.

Under the new regime, both new and existing authorised firms wishing to approve financial promotions not falling within the exemptions will have to apply via a variation of requirement (VREQ) to the FCA to have the prohibition removed either entirely (allowing them to approve all types of financial promotions) or partially (allowing them to approve certain types of financial promotions).

The new regime will commence following a transitional period during which only firms that have previously applied to continue to approve financial promotions in the new regime will be able to do so. At the end of the transitional period, when the new regime commences, only firms that have successfully applied to have the financial promotion requirement cancelled or varied will be able to approve financial promotions.

The UK Government intends to bring forward legislation when parliamentary time allows, and the FCA will consult on its proposals for implementing the gateway in due course.

HMT publishes approach to implementation of Investment Firms Regime and Basel III standards

HMT has published a consultation response setting out its approach to the implementation of the Investment Firms Prudential Regime (IFPR) and the remaining Basel III standards in the UK.

Among other things, the UK Government intends to:

- remove the equivalence provision relating to the capital treatment of firms' exposures in overseas funds in Article 132 of the UK CRR;
- implement the Fundamental Review of the Trading Book Standardised Approach (FRTB SA) reporting requirements alongside any changes to the FRTB revisions to Pillar 1 capital requirements (i.e. as part of Basel 3.1 and not from 1 January 2022);
- make further consequential amendments to ensure the macro-prudential framework reflects the enactment of the Financial Services Act 2021, including that all measures can be applied to holding companies approved or designated by the Prudential Regulation Authority (PRA), and that the Financial Policy Committee's (FPC) powers of direction over the total exposure measure will be defined by reference to PRA rules;
- put in place a transitional arrangement to maintain the effect of the pre-existing treatment of large exposures for equivalent overseas jurisdictions under UK CRR, as well as legislating to provide for the current effect of an equivalence decision under Article 391 UK CRR to be conferred under Article 107 UK CRR;
- replicate the scope of prudential consolidation under UK CRR in the definition of 'group' in FSMA;
- amend the Financial Services and Markets Act (PRA-Regulated Activities) Order 2013 (PRA RAO) to remove reference to the EUR 730,000 Initial

Capital Requirement (ICR) to allow the PRA to designated investments firms that deal as principal under Part 4A of FSMA; and

- remove FCA-regulated EUR 730,000 ICR firms and additional firms brought into scope of the GBP 750,000 capital requirement from the scope of the UK resolution regime.

In relation to other areas of Basel 3, such as the net stable funding ratio (NSFR), the standardised approach to counterparty credit risk (SA-CCR), the large exposures framework, and reporting and disclosure requirements, the UK Government notes that the PRA will publish its response to its consultation on the implementation of Basel standards (CP5/21) in due course.

The Government also sets out a brief overview of the BoE's approach to exclusions from bail-in and resolution stays exemptions under the Banking Act 2009, and notes its intention to consider the scaling of TLAC separately.

The Government intends to lay the relevant implementing secondary legislation to a timeline which provides institutions with adequate time to prepare ahead of the 1 January 2022 implementation date.

UK CRD5/CRR2: PRA consults on penalties guidance and consolidated prudential rules for financial holding companies

The PRA has published a consultation paper (CP 12/21) on proposed rules in respect of the application of existing consolidated prudential requirements to financial holding companies and mixed financial holding companies that have been approved or designated in accordance with Part 12B of the FSMA. The PRA also proposes guidance with respect to directions and penalties over holding companies under Part 12B FSMA, including on taking measures such as directions, and the imposition and size of penalties. The proposals are intended to give effect to the fifth Capital Requirements Directive (CRD5) as transposed, and the second CRR (CRR2) as onshored, which impose direct responsibility for compliance with consolidated prudential requirements on approved or designated holding companies.

Comments are due by 22 July 2021.

PRA publishes occasional consultation paper on minor changes to rules

The PRA has published an occasional consultation paper on proposals to make minor amendments to PRA rules, supervisory statements, reporting data items and instructions, the Branch Return, and associated guidance and notes.

The proposals will be relevant to banks, building societies, PRA-designated investment firms, CRR firms, PRA-supervised third country branches, UK Solvency 2 insurance and reinsurance firms, and the Society of Lloyd's and managing agents.

The proposed implementation dates for the changes are:

- 1 December 2021 for proposals contained in Chapter 2;
- 1 January 2022 for proposals contained in Chapters 4 and 6; and
- upon publication of the final policy for Chapters 3 and 5.

Comments are due by 25 August 2021.

Ordinance implementing Investment Firm Directive published

An Ordinance implementing Directive (EU) 2019/2034 on the prudential supervision of investment firms (IFD) has been published in the French Official Journal.

The Ordinance introduces a supervisory framework for investment companies that is now distinct from that for banks (credit institutions). It also introduces four categories of investment firms according to their size and activities:

- the largest investment companies, known as class 1 or class 1 bis, remain subject to the banking regime because of the risks to which they are exposed; and
- investment firms that are smaller or not exposing their balance sheets to risks similar to those of banks, known as class 2 and 3 companies, will henceforth be subject to the new prudential regime implemented by the Ordinance, and supplemented by Regulation (EU) 2019/2033 on the prudential requirements of investment firms (IFR), which is directly applicable.

The reform has been applicable from 26 June 2021.

BaFin extends pandemic-related leverage ratio relief until March 2022

The German Federal Financial Services Supervisory Authority (BaFin) has announced that, in light of the COVID-19 pandemic, institutions under its direct supervision will be further allowed to exclude certain risk positions vis-à-vis central banks of the Eurosystem when calculating their leverage ratio. The measure applied from 28 June 2021 and will be limited until 31 March 2022.

BaFin has, in accordance with Article 429a (1) (n) of the CRR and after consultation with the ECB, declared that exceptional circumstances exist which justify this exclusion and that these circumstances have already existed since 31 January 2019.

The risk positions that may be excluded from the calculation of the leverage ratio are coins and banknotes denominated in EUR, as well as assets in the form of claims against Eurosystem central banks related to the implementation of monetary policy measures.

The measure extends the exclusion previously allowed by BaFin in relation to less significant institutions under its direct supervision for the period from 22 September 2020 to 27 June 2021.

BaFin publishes general decree on information obligation regarding invalid interest rate adjustment clauses

BaFin has published a general decree (Allgemeinverfügung) that requires credit institutions to inform customers about the invalidity of certain interest rate adjustment clauses (Zinsanpassungsklauseln) used in premium-aided savings agreements (Prämiensparvertrag). The background to this is that interest rate adjustment clauses typically used in premium-aided savings agreements offered by credit institutions from the 1990s until the early 2000s have been held invalid in decisions of the German Federal Court of Justice (Bundesgerichtshof, BGH) because they allowed credit institutions to unilaterally determine the interest rate applicable from time to time.

Pursuant to the general decree, credit institutions are further obliged to inform their customers that they may have received insufficient interest due to such invalid clauses and either:

- irrevocably to undertake to perform a recalculation of the interest in accordance with Federal Court of Justice decisions expected to be handed down soon; or
- to offer to enter into an individual amendment agreement in order to implement a valid interest rate adjustment clause which is in compliance with the requirements set out in the BGH's ruling of 13 April 2010 (XI ZR 09/09).

The general decree will come into force two weeks after its publication and shall apply to all contracts entered into between 1990 and 2010 regardless of whether these contracts have been terminated by the credit institutions in the meantime. The required measures must be implemented by credit institutions within 12 weeks from its entry into force.

Bank of Italy consults on rules governing banks' and financial institutions' financial statements

The Bank of Italy has launched a consultation on a set of proposed amendments intended to update the rules and provisions governing the financial statements of banks and other financial institutions (such as investment firms, financial intermediaries, investment managers, etc.).

In particular, the new set of rules will, once approved, amend the Bank of Italy's Circular No. 262/2005 and the Bank of Italy's Regulation of 30 November 2018, setting out formats and rules for the preparation of financial statements respectively.

The need for this consultation stems from the Bank of Italy's intention to align the existing regulatory framework with the EU FINREP requirements and to fully implement IFRS 7 requirements.

The consultation will end on 23 August 2021.

CSSF issues circular on management of climate-related and environmental risks

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued CSSF Circular 21/773 on the management of climate-related and environmental risks.

The circular is addressed to all credit institutions designated as less significant institutions under the Single Supervisory Mechanism and to all branches of non-EU credit institutions. The objective of the circular is to raise credit institutions' awareness of the need to consider and assess climate-related and environmental risks and to increase the awareness of these risks among members of the management body and institutions' staff.

To this end, the circular describes the CSSF's expectations regarding how credit institutions should consider and integrate into their operations climate-related and environmental risks as drivers of existing categories of risks. The CSSF has indicated that these expectations are most relevant when credit institutions formulate and implement their business strategy, governance and risk management frameworks. The expectations in the circular are consistent with the ECB's guide on climate-related and environmental risks dated

November 2020 and the guide for supervisors on integrating climate-related and environmental risks into prudential supervision published by the Network of Central Banks and Supervisors for Greening the Financial System (NGFS) in May 2020.

The circular became applicable as of its publication date.

HKMA issues guidance in light of SFC enhancements to competency framework

Following the publication of the consultation conclusion by the Securities and Futures Commission (SFC) on its proposed enhancements to the competency framework for intermediaries and individual practitioners on 18 June 2021, the Hong Kong Monetary Authority (HKMA) has issued a circular to provide guidance to authorised institutions on their relevant obligations.

As registered institutions (RIs), executive officers and relevant individuals have been required to meet the same competence, fit and proper and continuous professional training requirements as SFC licensed corporations, responsible officers and licensed representatives respectively, the HKMA expects RIs to review and assess the possible impact of the revised Guidelines on Competence, Guidelines on Continuous Professional Training and Fit and Proper Guidelines, and take necessary actions to ensure compliance with the applicable requirements.

Hong Kong-Thailand mutual recognition of funds scheme commences

The SFC and the Securities and Exchange Commission of Thailand have announced the commencement of the mutual recognition of funds scheme (MRF). The scheme allows eligible Hong Kong and Thai public funds to be distributed in each other's market through a streamlined process. The SFC has updated its frequently asked questions on Thailand-Hong Kong mutual recognition of funds and Hong Kong feeder funds investing in Thai Master funds and Guide on Practices and Procedures for Application for Authorisation of Unit Trusts and Mutual Funds. The details of the MRF scheme were set out in the SFC circular on mutual recognition of funds between Thailand and Hong Kong dated 20 January 2021.

SFC to upgrade industry practitioners' competency standards

The SFC has published its consultation conclusions on proposals to update the entry requirements for licence applicants and ongoing competency standards for corporations and individual practitioners.

The SFC has indicated that the industry generally welcomed the proposals, which included raising the minimum academic qualification requirements for individuals, broadening the scope of recognised academic qualifications, clarifying the management experience requirements for responsible officers (ROs) and enhancing the competence requirements for individuals advising on matters in relation to the Codes on Takeovers.

After considering the responses to the consultation, the SFC has agreed to recognise post-graduate diplomas and certificates in designated fields. The SFC has also clarified the management experience required of an RO applicant and the corporate finance experience of those who intend to advise on matters in relation to the Codes on Takeovers. The SFC intends to include environmental, social and governance as a relevant topic for continuous professional training purposes.

The revised Guidelines on Competence, Guidelines on Continuous Professional Training, and Fit and Proper Guidelines was gazetted on 25 June 2021 and will become effective on 1 January 2022.

Coronavirus: SFC updates exemption from compulsory quarantine scheme for senior executives at licensed corporations

Further to its circular on the quarantine exemption for senior executives of licensed corporations dated 28 May 2021, the SFC has issued another circular for licensed corporations to highlight key points concerning antibody tests and other updates to the exemption scheme.

In light of the latest local and global pandemic situation, the Hong Kong Government has decided that:

- antibody tests in Hong Kong should be applied to the exemption scheme for all inbound travellers who have stayed in high or medium risk places specified in Group B or Group C under the Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation or Taiwan, China during the 14 days prior to their arrival in Hong Kong; and
- persons who have stayed in extremely or very high risk places specified in Group A1 or Group A2 under the Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation during the 21 days prior to their arrival in Hong Kong will not be qualified to apply under the exemption scheme.

Considering the updates to the exemption scheme, applications will be required to be made by completing the application form (updated as of 21 June 2021) in Appendix I enclosed with the circular and submitting it to the SFC at least 10 working days prior to:

- the expected date of departure from Hong Kong for proposed exempted executives travelling from and returning to Hong Kong; or
- the expected date of arrival in Hong Kong for proposed exempted executives visiting Hong Kong.

Ministry of Foreign Affairs announces commencement dates for tax convention and investment agreement between Japan and Georgia

The Ministry of Foreign Affairs of Japan (MOFA) has announced that the convention between Japan and Georgia for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, which was signed on 29 January 2021, will come into force on 23 July 2021. The convention will replace the current Tax Convention (Convention between the Government of Japan and the Government of the Union of Soviet Socialist Republics for the Avoidance of Double Taxation with respect to Taxes on Income) which entered into force in 1986.

The MOFA has also announced that the agreement signed between Japan and Georgia on 29 January 2021 for the liberalisation, promotion and protection of investment will commence on 23 July 2021. The agreement provides comprehensive and detailed rules regarding liberalisation, promotion and protection of investment between Japan and Georgia and is intended to further develop economic relations between the two countries, as well as further promoting bilateral investments.

MAS consults on proposals to enhance pre and post-transaction safeguards for retail clients

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposals to enhance pre and post-transaction safeguards for retail clients.

As the Balanced Scorecard (BSC) Framework introduced under the Financial Advisers Act in 1 January 2016 has been in place for several years now, the MAS has conducted a review of the effectiveness of the BSC Framework, which included seeking comments from the financial advisory (FA) industry and conducting inspections and surveys on the BSC practices of FA firms.

The MAS has also released the findings from a mystery shopping exercise (MSE) conducted in 2018/2019 to assess the standards of FA representatives' advisory and sales process. While the findings disclosed that the proportion of suitable product recommendations had improved from an earlier MSE conducted in 2011, weaknesses were identified in the implementation of safeguards for 'Selected Clients' (SCs), such as lapses in identifying SCs and making adequate product disclosures to SCs.

Based on the review of the effectiveness of the BSC Framework and findings from the 2018/2019 MSE, the MAS proposes to:

- strengthen the requirement to identify SCs;
- require a Trusted Individual to be present when investment recommendations are made to SCs;
- reinforce the requirement to conduct supervisory call-backs;
- require FA firms to audio record supervisory call-backs;
- require the setting up of an independent panel to review all investment recommendations made to SCs; and
- require the Independent Sales Audit Unit (ISA Unit) of the FA firm to sample and review transactions involving higher risk clients.

In addition to the proposed regulatory safeguards outlined above, the Association of Banks in Singapore and the Life Insurance Association are jointly working to develop industry guidelines to improve protection for vulnerable consumers, which include SCs, in the provision of financial advisory services. Together, the enhanced safeguards and industry guidelines are intended to raise industry standards and promote greater consumer trust, particularly amongst SCs, in the financial advisory industry in Singapore.

The MAS has indicated that it will consult on the proposed revisions to Notice FAA-N16 on Recommendations on Investment Products, after the proposals set out in the consultation paper have been finalised. It also proposes to grant FA firms a transitional period of six months from the time the revised notice is published, for the revisions to take effect.

Comments on the consultation are due by 3 August 2021.

CLIFFORD CHANCE

RECENT CLIFFORD CHANCE BRIEFINGS

Impact of CSDR settlement discipline for the buy-side

Buy-side firms, wherever established, which trade in-scope securities that settle on EEA central securities depositories should start preparing for the impact of new EU settlement discipline rules that will apply from 1 February 2022. The rules have extra-territorial impact and will require amendments to a wide range of contractual arrangements and operational processes.

This briefing highlights the impact of the mandatory buy-in and penalties regime on buy-side firms introduced by the Regulation on Central Securities Depositories.

https://www.cliffordchance.com/briefings/2021/06/impact-of-csdr-settlement-discipline-for-the-buy-side.html

Non-fungible tokens – the global legal impact

The market for non-fungible tokens (NFTs), or cryptoassets representing proof of title to a unique digital version of an underlying asset, has soared. In the sports and digital arts sectors, recent NFT issuances have sold out in seconds, netting their creators millions.

Subject to limitations in any relevant jurisdiction, NFTs have the potential to facilitate new revenue streams by establishing new forms of digital property, act as new channels for businesses and digital creators to reach customers, fans, and audiences and/or enable the monetisation of physical assets.

While NFT issuance is growing rapidly globally, the legal and regulatory treatment of NFTs continues to evolve. We have been advising clients on NFTs in various jurisdictions.

This briefing demystifies NFTs and considers some of the key risks, and how the tokens are regulated across some key financial centres.

https://www.cliffordchance.com/briefings/2021/06/non-fungible-tokens--the-global-legal-impact.html

UK Government extends further emergency legislation to protect businesses until 30 September 2021 and beyond

Following announcements by the UK Government that there is to be a four week delay to the lifting of all restrictions, further temporary insolvency and other measures aimed at protecting businesses during the coronavirus pandemic which were due to expire at the end of June will be extended until the end of the Summer and beyond.

This briefing discusses the measures.

https://www.cliffordchance.com/briefings/2021/06/uk-government-extends-further-emergency-legislation-to-protect-b.html

New Russian legislation on financial collateral – impact on netting and initial margin

On 9 June 2021 the State Duma adopted legislation improving the financial collateral regime. The amendments are currently pending ratification by the

Federation Council and signing into the law by the President, but these steps are expected to occur in the next few days.

This briefing summarises the key provisions of the amendments.

https://www.cliffordchance.com/briefings/2021/06/new-russian-legislation-on-financial-collateral--impact-on-netti.html

C L I F F O R D

C H A N C E