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briefings section.

## **Green finance: Delegated Directive on integration of sustainability factors into product governance obligations published in Official Journal**

[Commission Delegated Directive \(EU\) 2021/1269](#) of 21 April 2021 amending Delegated Directive (EU) 2017/593 as regards the integration of sustainability factors into the product governance obligations has been published in the Official Journal.

Member States will need to transpose the Delegated Directive by 21 August 2022 in order for the national measures to apply from 22 November 2022.

## **Benchmarks Regulation: RTS published in Official Journal**

Five Delegated Regulations setting out regulatory technical standards (RTS) under the Benchmarks Regulation (BMR) have been [published](#) in the Official Journal.

The Delegated Acts specify the:

- criteria under which competent authorities may require changes to the compliance statement of non-significant benchmarks (Commission Delegated Regulation (EU) 2021/1348);
- criteria for the competent authorities' compliance assessment regarding the mandatory administration of a critical benchmark (Commission Delegated Regulation (EU) 2021/1349);
- requirements to ensure that an administrator's governance arrangements are sufficiently robust (Commission Delegated Regulation (EU) 2021/1350);
- characteristics of the systems and controls for the identification and reporting of any conduct that may involve manipulation or attempted manipulation of a benchmark (Commission Delegated Regulation (EU) 2021/1351); and
- conditions to ensure that the methodology for determining a benchmark complies with the quality requirements (Commission Delegated Regulation (EU) 2021/1352).

The Delegated Regulations will enter into force on 2 September 2021 and will apply from 1 January 2022.

## **CRR: EU Commission consults on changes to lists of equivalent third countries**

The EU Commission has launched a [consultation](#) on a draft implementing decision on the equivalence of supervisory and regulatory requirements of certain third countries and territories for the purposes of the treatment of exposures in accordance with the Capital Requirements Regulation (CRR).

The Commission proposes to:

- add Bosnia and North Macedonia to the list of equivalent third countries as regards supervisory and regulatory arrangements for credit institutions; and
- establish a new list of equivalent third countries for the large exposure framework, in order to reflect amendments made by the second Capital Requirements Regulation (CRR2).

The decision as drafted would enter into force twenty days after its publication in the Official Journal.

Comments on the draft decision are due by 3 September 2021.

### **ESMA reports on use of fintech by central securities depositories**

The European Securities and Markets Authority (ESMA) has published a [report](#) on the use of fintech by central securities depositories.

ESMA has gathered feedback from national competent authorities (NCAs) and market participants on their experience with and planned future use of fintech and distributed ledger technology (DLT), as well as on whether the current regulatory framework represents a barrier for them to implement projects involving DLT.

ESMA provides suggestions in a number of areas in which targeted amendments to the Central Securities Depositories Regulation (CSDR) and further guidance could help central securities depositories in the deployment of DLT.

ESMA's recommendations will inform the EU Commission's targeted CSDR review. The EU Commission is expected to prepare a legislative proposal by the end of 2021.

### **Coronavirus: IOSCO reports on exchange traded fund behaviour**

The Board of the International Organization of Securities Commissions (IOSCO) has published a thematic [note](#) on the behaviour of exchange traded funds (ETFs) during the COVID-19 induced market stresses.

The report reviews the operation and activities of the primary and second markets of ETFs during the market turmoil in March and April 2020, and broadly finds that although a subset of ETFs temporarily experienced unusual trading behaviours, ETF structure was relatively resilient and there are no imminent risks from a regulatory or financial stability perspective.

The report also notes an emerging consensus that fixed income ETFs could provide useful pricing information to the wider market, and outlines some challenging circumstances for certain derivatives-based ETFs that may warrant further consideration related to product structuring and contingency planning.

The report is expected to feed into IOSCO's broader analysis of the ETF market, with ETF policy proposals expected to be published for consultation in late 2021 or H1 2022.

## **FCA publishes MoU with SEC and BoE on use of substituted compliance by certain cross-border OTC derivatives entities**

The Financial Conduct Authority (FCA) has published a [Memorandum of Understanding](#) (MoU) concerning consultation, cooperation and the exchange of information related to the supervision and oversight of certain cross-border over-the-counter (OTC) derivatives entities in connection with the use of substituted compliance by such entities. The FCA entered into the MoU with the US Securities and Exchange Commission (SEC) and the Bank of England (BoE – including in its capacity as the Prudential Regulation Authority (PRA)).

The MoU is intended to address the requirements of the Securities Exchange Act of 1934, pursuant to Rule 3a71-6 of which the SEC may determine that an SEC-registered security-based swap dealer or major security-based swap participant, or class thereof, may comply with UK requirements in order to satisfy specified US requirements. The MoU is also intended to provide the SEC with tools to monitor and enforce ongoing compliance with any substituted compliance order and with applicable US federal securities laws and regulations.

The MoU took effect when signed by the authorities on 30 July 2021.

## **Review Panel publishes summary of responses on impact of ring-fencing regime**

The Ring-fencing and Proprietary Trading (RFPT) Independent Review has published a [summary of responses](#) to its call for evidence on the impacts of the ring-fencing regime and rules applied to propriety trading.

The Review Panel was appointed by HM Treasury (HMT) to make recommendations in relation to ring-fencing legislation and banks' proprietary trading activities, as required by the Financial Services (Banking Reform) Act 2013 (FSBRA).

Key points raised in responses, which were primarily from industry and industry bodies, include:

- little or no evidence put forward on the positive impacts of the ring-fencing regime;
- that the increased resilience of the UK financial sector could be attributed to increased capital and liquidity requirements and other regulatory reforms rather than the ring-fencing regime;
- that the ring-fencing regime had led to reduced diversification, including increased concentration in UK domestic retail markets, most notably retail mortgages, which could potentially leave the sector over-exposed to a UK economic stress;
- reduced offerings by firms within a ring-fenced entity to corporate and SME customers, including an inability to participate in some Government COVID-19 schemes aimed at supporting businesses due to ring-fencing restrictions; and
- disproportionate governance, operational, monitoring and compliance costs, in particular when addressing small value transactions in technical breach of the ring-fencing rules.

In relation to proprietary trading, responses broadly showed a general acceptance of the current rules and a consensus that it is no longer an attractive market for banks to be engaged in, with most respondents no longer partaking in classic proprietary trading following the financial crisis.

The panel is expected to finalise its written reports to HMT within one year of the beginning of the reviews, and intends to continue consulting with stakeholders. Further updates will be provided in due course.

### **BaFin consults on revised FAQs on distribution and acquisition of investment assets under German Capital Investment Code**

The German Federal Financial Services Supervisory Authority (BaFin) has launched a [consultation](#) on its [draft revised FAQs](#) on the distribution and acquisition of investment assets under the German Capital Investment Code (Kapitalanlagegesetzbuch – KAGB). The FAQs have been revised to reflect changes resulting from the newly enacted German Fund Jurisdiction Act (Fondsstandortgesetz – FoStoG), which implements Directive (EU) 2019/1160 amending Directives 2009/65/EC and 2011/61/EU with regard to the cross-border distribution of collective investment undertakings.

Comments are due by 13 September 2021.

### **BaFin publishes guidance note on prohibition of blind pool constructions**

BaFin has published a [guidance note](#) on the prohibition of blind pools under the newly adopted section 5b para 2 of the German Capital Investment Act (Vermögensanlagegesetz – VermAnlG).

In future, the investment object of investments must be concretely defined at the time the respective prospectus is prepared or, for investments exempted from the obligation to publish a prospectus pursuant to sections 2a, b VermAnlG, at the time the capital investments information sheet (Vermögensinformationsblatt - VIB) is prepared. The guidance note is intended to define criteria for distinguishing a concrete investment object within the meaning of section 5b para 2 VermAnlG from a (semi-) blind pool.

The guidance note has applied from 17 August 2021, when section 5b paragraph 2 VermAnlG came into force.

### **German Federal Ministry of Finance publishes draft ministerial ordinance on requirements for electronic securities registries**

The German Federal Ministry of Finance has [published](#) a draft ministerial ordinance on the requirements for electronic securities registries (Verordnung über Anforderungen an elektronische Wertpapierregister, eWpRV), which it drafted together with the German Federal Ministry of Justice and Consumer Protection.

The draft ordinance relates to the Act on Electronic Securities (Gesetz über elektronische Wertpapiere, eWpG), which entered into force on 10 June 2021. The eWpG provides for the issuance of bearer securities (primarily bearer bonds) through an entry in an electronic securities registry instead of issuance in paper form. The eWpRV sets out the requirements for the implementation and maintenance of such electronic securities registries together with related

investor protection provisions. In particular, the eWpRV specifies (i) the requirements pursuant to section 15 eWpG with respect to the electronic securities registries relating to a central registry (zentrales Register), which is set up and maintained either by a central securities depository or by a depository bank and (ii) the requirements pursuant to section 23 with respect to a crypto securities registry (Kryptowertpapierregister) which is set up and maintained through decentralised blockchain technology (or similar technology) by the issuing company or a separate service provider (e.g. a bank).

### **HKMA supports use of new technologies for AML/CFT and suggests actions for banking sector**

The Hong Kong Monetary Authority (HKMA) has issued a circular to direct [authorised institutions](#) (AIs) and [stored value facility \(SVF\) licensees](#) to a recent report published by the Financial Action Task Force (FATF) entitled 'Opportunities and Challenges of New Technologies for AML/CFT'. The HKMA has also shared its initiatives in the coming months as part of the broader Fintech 2025 strategy.

The FATF report identifies which technologies offer the most potential positively to impact anti-money laundering/counter financing of terrorism (AML/CFT) work, addresses common challenges, and shares use cases from across the FATF Global Network, including two from Hong Kong on overcoming operational challenges and the use of network analytics. It also sets out the actions necessary to ensure the FATF's global AML/CFT standards remain relevant and effective.

The HKMA has indicated that it will be taking a number of initiatives in the coming months as part of its broader Fintech 2025 strategy to advance AIs and SVF licensees' positive and responsible use of new technologies for AML/CFT. Key initiatives include the following:

- to share experience and success stories of AIs and SVF licensees through webinars and launching an online training portal;
- to launch AML and financial crime Regtech labs for experimenting and engaging with new technologies and emerging data analytics techniques;
- to promote network analytics capability for tackling online fraud and associated mule account networks; and
- to create a conducive environment for inclusive AML/CFT innovation.

The HKMA expects senior management of AIs and SVF licensees to ensure that the mandate for innovation in AML/CFT is supported with sufficient resources and relevant subject matter expertise.

### **SFC to introduce investor identification and OTC securities transaction reporting regimes**

The Securities and Futures Commission (SFC) has issued its [consultation conclusions](#) on proposals to implement investor identification for the securities market in Hong Kong and introduce an OTC securities transactions reporting regime for shares listed on the Stock Exchange of Hong Kong (SEHK).

The SFC proposed that under the investor identification regime, licensed corporations and registered institutions will submit to the SEHK the names and identity document information of clients placing securities orders on the SEHK.

In relation to the reporting regime, information on OTC securities transactions in ordinary shares and real estate investment trusts listed on the SEHK will be reported to the SFC.

Respondents broadly agreed with the proposals, so the SFC has decided to implement both regimes after making minor adjustments based on the feedback received. To implement the regimes, revisions will be made to the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission as set out in the consultation conclusions. The revisions will be gazetted and become effective on a date to be determined by the implementation timelines.

After taking consultation feedback into account, the SFC has extended the implementation timelines for the investor identification regime to be launched in the second half of 2022 and the OTC securities transactions reporting regime to commence in the first half of 2023, subject to the completion of system testing and market rehearsals.

The SFC has indicated that it will work with the SEHK to conduct training sessions for the industry prior to implementation and intends to issue an implementation circular by September 2021 to provide guidance to the industry on the preparations required and the timeline for the various matters that underpin the implementation of the regimes.

## **Australian Government consults on proposals to implement regulations under Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021**

The Australian Government has released a [policy paper](#) seeking feedback on proposals to implement regulations under the Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021.

The Bill, which was introduced in the Australian Parliament on 24 June 2021, implements Recommendation 2.10 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Recommendation 2.10 of the Financial Services Royal Commission Final Report recommends the establishment of a single disciplinary body for financial advisers and the requirement that all financial advisers who provide personal financial advice to retail clients be registered.

In particular, the Government seeks feedback on the following two matters which will be included in regulations to support the single disciplinary body:

- the circumstances in which the Australian Securities and Investments Commission (ASIC) must convene the single disciplinary body to determine a disciplinary matter; and
- the types of administrative sanctions made against a financial adviser that must be included on the Financial Advisers' Register.

The Australian Treasury has indicated that stakeholder feedback on the policy paper will be used in the development of exposure draft regulations, which will be released later in 2021 for another public consultation. It is intended that the regulations will come into force on 1 January 2022, subject to passage of the Bill.

Comments on the [consultation](#) are due by 20 August 2021.

## **APRA consults on further updates to Reporting Standard ARS 720.1 ABS/RBA Loans and Finance Leases**

The Australian Prudential Regulation Authority (APRA) has launched a [consultation](#) on proposed changes to Reporting Standard ARS 720.1 ABS/RBA Loans and Finance Leases (ARS 720.1). APRA, the Australian Bureau of Statistics and the Reserve Bank of Australia propose to amend ARS 720.1 to align it with the latest version of Prudential Standard APS 220 Credit Risk Management (APS 220) that was released in December 2019.

ARS 720.1 currently collects data on impaired exposures, which will no longer be used in APS 220. As such, APRA and the agencies propose to replace this item with the collection of data on non-performing exposures. This reporting standard is part of the modernised Economic and Financial Statistics data collection which replaced the domestic books collection submitted by authorised deposit-taking institutions and registered financial corporations.

APRA has proposed that the revisions will be effective from 1 January 2022. As a result, APRA will delay implementing the updates to ARS 720.1 released in November 2020 until this time.

Comments on the consultation are due by 7 September 2021.

## **APRA finalises new approach to licensing and supervising new banks**

APRA has finalised its [revised approach](#) to licensing and supervising new authorised deposit-taking institutions (ADIs), following its March 2021 consultation.

The revised approach proposed by APRA comprises stronger requirements for being granted a banking licence and closer supervision of new entrants as they seek to establish themselves. It was designed to encourage more sustainable competition in the banking sector by ensuring new ADIs are better equipped to succeed.

Based on the responses to feedback received, APRA's final position remains largely consistent with its original proposals, with the most significant clarifications relating to milestones in the progression of a licence application. In particular, under APRA's finalised approach:

- restricted ADIs must achieve a limited launch of both an income-generating asset product and a deposit product before being granted an ADI licence;
- there is increased clarity around capital requirements at different stages for new entrants, aimed at reducing volatility in capital levels and facilitating a transition to the methodology for established ADIs over time; and
- new entrants are expected to have a more advanced contingency plan to respond to financial stress, including an option to execute the ADI's orderly and solvent exit from banking business.

APRA has also [published](#) the following documents to set out its approach to new entrant ADIs and incorporate the changes made in response to feedback received during consultation:

- Information paper – ADIs: new entrants – a pathway to sustainability;
- Guidelines – Licensing: Locally-incorporated ADIs; and



- Guidelines – Overseas Banks: Operating in Australia.

## **ASIC sets out approach regarding new laws reforming financial services sector**

ASIC has [set out](#) its approach regarding the new laws reforming the financial services sector. Six reforms arising out of recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and other inquiries will commence in October 2021.

The new laws include design and distribution obligations, restrictions on the unsolicited selling of financial products (hawking), a deferred sales model for add-on insurance products, reference checking and information sharing requirements for financial advisers and brokers, and new requirements around how breaches are reported to ASIC and disputes are managed internally in firms.

These laws have been designed to provide consumers with long term protection from the harms highlighted by the Royal Commission and close regulatory gaps that previously existed. The reforms will also provide ASIC with greater visibility of issues in the marketplace, through breach reports, complaints data and data available under the design and distribution obligations. This is intended to help ASIC identify problems earlier and address them more quickly, with less reliance on disclosure to address consumer harms.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **FCA proposes further divergence from the EU PRIIPs Regulation**

On 20 July 2021, the FCA published a consultation paper proposing further amendments to the UK PRIIPs regime.

The proposed changes aim to: (i) clarify the products in respect of which a KID should be produced; and (ii) improve the information that is provided within the KID. In particular, the changes seek to address long-held industry concerns that the performance scenarios, risk indicators and transaction costs that must be provided within the KID are potentially misleading to investors. The proposals evidence both the FCA's continued focus on consumers and its willingness to diverge from EU requirements where it considers that this would be beneficial to such consumers.

This briefing discusses the proposed further amendments.

<https://www.cliffordchance.com/briefings/2021/08/fca-proposes-further-divergence-from-the-eu-priips-regulation.html>

### **The new SCA Rulebook – cross border considerations**

The new SCA Rulebook expands the scope for cross-border securities promotions and levels the playing field for licensing and oversight of investment firms across the UAE and its financial free zones.

This briefing discusses the changes in the new SCA Rulebook.

<https://www.cliffordchance.com/briefings/2021/07/the-new-sca-rulebook-cross-border-considerations.html>

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