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- Recent Clifford Chance briefing: LIBOR cessation – English court implies ‘Reasonable Rate’ term into perpetual preference shares. Follow this link to the briefings section.

RTS under revised ELTIF Regulation published in Official Journal

[Commission Delegated Regulation \(EU\) 2024/2759](#) setting out regulatory technical standards (RTS) under the revised European Long-Term Investment Fund (ELTIF) Regulation has been published in the Official Journal.

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The RTS set out the circumstances in which the use of financial derivative instruments for hedging purposes is considered as solely serving the purpose of hedging the risks inherent to the investments of an ELTIF. They also set out the criteria to be used by ELTIF managers to determine the minimum holding period, the minimum information to be provided by the manager of an ELTIF to the competent authority of the ELTIF, and the requirements to be fulfilled by an ELTIF in relation to its redemption policy and liquidity management tools.

The Delegated Regulation entered into force on 26 October 2024.

DORA: EU Commission adopts RTS on conduct of oversight activities

The EU Commission has adopted a [Delegated Regulation](#) containing RTS supplementing provisions relating to oversight activities under the Digital Operational Resilience Act (DORA).

The RTS specify:

- the information that ICT third-party service providers (TPPs) must provide when applying to be designated as critical;
- the information that critical ICT TPPs must submit to their Lead Overseer when requested as part of the Lead Overseer's oversight duties; and
- the details of the competent authorities' assessment of the measures taken by critical ICT TPPs based on the recommendations of the Lead Overseer.

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

DORA: EU Commission adopts technical standards on major ICT-related incidents and cyber threats

The EU Commission has adopted [RTS](#) and [implementing technical standards](#) (ITS) on major ICT-related incidents and significant cyber threats under the DORA.

The RTS specify the content and time limits for the initial notification of, and intermediate and final report on, major ICT-related incidents, and the content of the voluntary notification for significant cyber threats.

The ITS set out the standard forms, templates, and procedures for financial entities to report a major ICT-related incident and to notify a significant cyber threat.

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

CRR3: EBA consults on draft RTS on treatment and reporting of structural FX positions

The European Banking Authority (EBA) has launched a [consultation](#) (EBA/CP/2024/21) on draft RTS on the treatment of structural foreign exchange (FX) positions under the Capital Requirements Regulation (CRR3).

In 2020, the EBA published guidelines (EBA/GL/2020/09) on how to implement the structural FX provision contemplated in Article 352(2) of the CRR to ensure a harmonised EU interpretation and implementation of the treatment of structural FX positions.

CRR3 introduced a mandate for the EBA to develop RTS in this regard, and the EBA is now seeking views on its draft RTS, including:

- the introduction of a clear quantitative threshold for a currency to be considered eligible for the structural FX treatment; this is proposed in view of reducing observed variability in the currencies that were considered relevant for the business under the guidelines;
- the possibility for banks to consider only credit risk own funds requirements when determining the position neutralising the sensitivity to the capital ratios, as long as the credit risk own funds requirements are the one driving the variability of the ratio against FX changes;
- clarifications around how institutions are to remove the risk position from the own funds requirements for FX risk; and
- provisions relating to the institution's policies as regards currencies that are particularly illiquid in the market, for example, because of EU restrictive measures.

In addition to the RTS, setting out the policy framework for the treatment of structural FX positions, the consultation paper also presents a proposal for the reporting, to be included in the ITS on supervisory reporting, on structural FX permissions granted by competent authorities.

Comments are due by 7 February 2025.

ECB consults on recast SIPS Regulation

The European Central Bank (ECB) has [published](#) for consultation a draft recast of the Regulation on oversight requirements for systemically important payment systems (SIPS Regulation).

Proposed changes include:

- a revised definition of a SIPS operator to exceptionally include a euro area branch belonging to a non-euro area legal entity;
- new requirements on SIPS governance arrangements relating to risk committees and members of the management;
- a new article on cyber risk; and

a new article on outsourcing.

Comments are due by 29 November 2024.

BIS reports on tokenisation of money and other assets

The Bank for International Settlements (BIS) has published a [report](#) for the G20 Presidency on tokenisation (i.e. the process of generating and recording a digital representation of traditional assets on a programmable platform) and its implications for the role of central banks in payments, monetary policy and financial stability.

The report also considers the global challenges in the regulated payments sector and the possible benefits of tokenisation in addressing existing frictions in financial markets. It notes that, while tokenisation could potentially result in cheaper and faster transactions, the costs and risks need to be considered.

In particular, the report calls on central banks to consider:

- responding to ongoing private sector tokenisation initiatives;

- assessing the appropriate balance between different types of settlement assets in token arrangements;
- identifying, monitoring and assessing tokenisation arrangements that may be subject to sound regulation, supervision and oversight; and
- assessing the potential impact of token arrangements on monetary policy implementation, such as changes in the structure of regulated markets, or the demand for central bank money versus other types of money.

FSB reports on depositor behaviour and interest rate and liquidity risks

The Financial Stability Board (FSB) has published a [report](#) on depositor behaviour and interest rate and liquidity risks in the financial system, highlighting lessons from the March 2023 banking turmoil.

The report summarises the findings from the FSB's recent assessments of vulnerabilities in the global financial system and highlights key findings including that:

- life insurers, non-bank real estate investors and a weak tail of banks are currently the most vulnerable to solvency and liquidity risks;
- some deposit runs during the March 2023 banking turmoil unfolded at an unprecedented speed with the three fastest runs experiencing outflows of around 20-30% per day; and
- social media may have influenced some bank runs, with technological advancements facilitating easier and faster transfer of deposits.

The FSB has suggested that bank managers, supervisors, regulators, resolution authorities and policy makers should:

- consider the report's findings and ways to address them, including reacting quicker to deposit outflows, address liquidity and solvency vulnerabilities and use social media monitoring as an early warning tool;
- consider collecting and publishing additional information on bank deposits and unrealised losses on bank securities portfolios to fill identified data gaps; and
- enhance banks' and authorities' operational readiness for resolution and incorporate effective communication strategies to ensure coordinated and consistent messaging.

FSB publishes letter to G20 and new reports on tokenisation and cryptoasset policy

The FSB has published a [letter](#) from its Chair to G20 finance ministers and central bank governors ahead of their upcoming meeting being held on 23-24 October 2024 in Washington.

The letter sets out an overview of the FSB's work during the Brazilian G20 Presidency with a focus on digitalisation, including:

- implementing enhanced cross-border payments;
- the impact of technology on deposit outflows in the context of the March 2023 banking turmoil;

- cyber and operational resilience, including an intention to publish a final version of a common format for incident reporting exchange (FIRE) by Q2 2025;
- implementing the global regulatory framework for cryptoassets, both within and beyond the G20; and
- tokenisation and the implications for financial stability.

Alongside the letter, the FSB has published its latest [status report](#) on the G20 Cryptoasset Policy Implementation Roadmap as well as a [new report](#) on the financial stability implications of tokenisation.

FSB publishes progress reports on cross-border payments

The FSB has published the following three reports detailing work to enhance cross-border payments:

- a [consolidated progress report](#) for 2024 reporting on actions being progressed as part of the G20 Roadmap for Enhancing Cross-Border Payments;
- an [annual progress report](#) on meeting the improved user experience targets for cross-border payments; and
- a [progress report](#) on the implementation of the Legal Entity Identifier (LEI).

The first report outlines the progress made by the FSB, in coordination with the BIS' Committee on and Market Infrastructures (CPMI) and other relevant international organisations and standard-setting bodies, over the past year on the priority actions under the G20 Roadmap, including efforts to strengthen engagement Payments with cross-border payments markets participants. The report also looks at the key insights from the Key Performance Indicators (KPIs) monitoring report.

In 2022, the FSB issued recommendations for improving the adoption of the LEI in cross-border payments to support G20 roadmap's objectives. The progress report on the implementation of the LEI includes additional recommendations for oversight authorities and standard-setting bodies to support their full and timely implementation. Globally, the number of active LEIs has reached 2.6 million, increasing by 84% compared to 2019. However, the report notes that broader adoption of the LEI in cross-border payments remains challenging due to costs and lack of perceived incentives for voluntary adoption by market participants and end users.

BoE consults on FMI fee rates for 2024/25

The Bank of England (BoE) has launched a [consultation](#) on the fees regime for (FMI) supervision financial market infrastructure for 2024/25.

The consultation sets out:

- the proposed fee rates to meet the BoE's 2024/25 funding requirement for its FMI supervisory activity and the policy activity that supports this, which is expected to be GBP 18.4 million;
- the BoE's proposed hourly rates for special project fees (SPFs) for 2024/25; and

- the actual fees for the 2023/24 fee year including rebate and recovery rates.

The proposed fee rates reflect changes to the BoE's responsibilities introduced by the Financial Services and Markets Act (FSMA) 2023, including increased policy work and the development of a central counterparty (CCP) rulebook. The anticipated cost of the work to develop the rulebook is GBP 4.5 million, which the BoE intends to spread across the next three years in instalments of GBP 1.5 million.

The consultation is relevant to all FMIs that currently pay FMI supervisory fees to the BoE or are expecting to do so within the 2024/25 fee year, including incoming CCPs and incoming central securities depositories (CSDs).

BaFin applies amended EBA guidelines on arrears and foreclosure

The German Federal Financial Supervisory Authority (BaFin) has [announced](#) that it has incorporated the amended EBA guidelines on arrears and foreclosure (EBA/GL/2015/12) into its supervisory practice. The guidelines were published by the EBA in 2015 and were amended this year by way of the EBA's amending guidelines (EBA/GL/2024/10).

The guidelines provide greater detail on how effect should be given to the provisions in Article 28 of the Mortgage Credit Directive (EU) 2014/17 (MCD), which requires EU Member States to adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated and sets out possible forbearance measures related to credit agreements. In Germany, Article 28 (1) of the MCD was implemented through section 18a (8b) of the German Banking Act (Kreditwesengesetz).

CSSF publishes communiqué on new CNC Q&A regarding impact of change in consolidation scope of a group

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has published a [communiqué](#) concerning the publication by the Luxembourg accounting rules commission, the Commission des normes comptables (CNC), of a [new Q&A](#) (CNC 24/033) on the implications of a change in the scope of consolidation of a group on the assessment of size criteria.

The law and accounting doctrine clarify the calculation methods for a group regarding the numerical limits of the three size criteria (total balance sheet, net turnover, and average number of employees), as well as the practical application methods of the repetition criterion referred to in Article 361 of the law concerning the register of commerce and companies (RCS). However, they do not address the implications of a change in the scope of consolidation of a group on the assessment of size criteria.

The Q&A is intended to clarify the implications of such a change on the assessment of size criteria for the categorisation of a group. The CNC takes the position that a variation in the scope of consolidation of a group during fiscal year N (through the acquisition or disposal of subsidiary companies) should not result in a retrospective modification of the consolidated accounts for fiscal years N-2 and N-1 to determine the category to which the group belongs.

Indeed, the CNC considers that requiring such a retrospective modification of the scope of consolidation for fiscal years N-2 and N-1 – necessitating that the group performs a new fictitious consolidation exercise – solely for the purpose of categorising a group, is contrary to the objective of reducing the administrative burden pursued by the EU legislator, as well as the imperative of legal certainty.

HKMA issues revised pillar 3 disclosure package

The Hong Kong Monetary Authority (HKMA) has issued a [circular](#) to inform authorised institutions that it is issuing and specifying a revised package of standard disclosure templates and tables, with accompanying explanatory notes, pursuant to sections 6(1)(ab) and 88(1)(b) of the Banking (Disclosure) Rules (BDR). The revised package is intended to be used by authorised institutions for making disclosures under the BDR.

The revised package mainly reflects the capital standards in the Basel III final reform package and features new templates and tables as well as revisions to the existing ones. Other refinements are also incorporated to provide greater clarity and to align with the latest corresponding disclosure requirements in the DIS (disclosure requirements) chapter of the Basel Framework.

In line with the commencement date of the Banking (Disclosure) (Amendment) Rules 2023, the revised package is expected to take effect on 1 January 2025. The HKMA has advised authorised institutions to use the revised package for making disclosures for any reporting period ending after this date.

SFC and HKEX issue joint statement on enhanced timeframe for new listing application process

The Securities and Futures Commission (SFC) and the Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), have jointly [announced](#) an enhanced timeframe for the new listing application process.

Currently, the SFC administers the Securities and Futures (Stock Market Listing) Rules (SMLR) and the Securities and Futures Ordinance (SFO). It reviews all new listing applications and engages in targeted intervention in more serious listing matters that fall within the scope of the SMLR or the SFO. The SEHK administers the listing rules and is responsible for making decisions under the listing rules on matters such as determining suitability for listing.

Under the enhanced application timeframe, where an applicant and its sponsor submit a new listing application and related materials that meet all applicable requirements and guidance under the SFO, the Securities and Futures (Stock Market Listing) Rules and/or the listing rules, there will be a maximum of two rounds of regulatory comments and the time taken by each regulator to confirm whether there are any material regulatory concerns will be no more than 40 business days. This means that the application process will be completed within the six-month application validity window.

For eligible A-share listed companies, an accelerated timeframe may apply, in which case each regulator will take no more than 30 business days to complete the regulators' assessment.

The enhanced application timeframe will be applicable to new listing applications filed after 18 October 2024.

SFC launches fast-track authorisation for simple investment funds

The SFC has [announced](#) that it will launch the Fund Authorisation Simple Track (FASTrack) on 4 November 2024 to expedite the application process for simple investment funds.

Under FASTrack, the SFC aims to grant fund authorisations within fifteen business days after receiving complete and quality submissions from applicants. The new approach will cover simple funds from jurisdictions which have mutual recognition of funds arrangements with the SFC. Applications meeting the relevant criteria set out in the circular received on or after 4 November 2024 will be processed under FASTrack. Otherwise, the fund will be processed under the existing processes for standard or non-standard applications.

The SFC has indicated that it will monitor the operation of FASTrack during a six-month pilot period ending 4 May 2025 and refine it as appropriate before its formal adoption.

To facilitate the smooth launch of FASTrack, the SFC has also issued a new pamphlet and updated versions of:

- the FAQs on application procedures for authorisation of unit trusts and mutual funds;
- the guide on practices and procedures for application for authorisation of unit trusts and mutual funds; and
- the information checklist for application for authorisation of unit trusts and mutual funds.

SFC issues circular regarding disclosure on information portal of integrated fund platform

The SFC has [announced](#) that the HKEX will launch the integrated fund platform (IFP) in phases from end-2024 commencing with a public-facing information portal for SFC-authorised funds.

The information portal intends to provide one-stop access to fund information which is required to be made available to investors. Relevant public information on funds will be made available on the information portal when it commences.

The other key components of the IFP, which consists of a communication hub and a business platform to facilitate dealing of funds between fund managers and distributors including licensed corporations and registered institutions, are expected to be rolled out subsequently. Amongst other things, the circular states that:

- in order to reduce the burden on the industry, management companies will not be required to file information separately to the IFP's information portal;
- information filed by management companies with the SFC should already comply with applicable regulatory requirements. In case of subsequent information updates by management companies, filings will also be made available to HKEX by the SFC and published on the information portal accordingly;

- the manner of information submission to the SFC will remain unchanged after the launch of the information portal;
- existing regulatory requirements on document submission for funds remain in force, including all filings required under Chapter 11 of the Code on Unit Trusts and Mutual Funds (UT Code); and
- management companies are reminded to file all notices to investors with the SFC pursuant to 11.2A of the UT Code.

RECENT CLIFFORD CHANCE BRIEFINGS

LIBOR cessation – English court implies ‘Reasonable Rate’ term into perpetual preference shares

Where contracts do not contemplate LIBOR cessation, the market has been transitioning LIBOR-referenced contracts to newer risk-free rates by agreeing amendments to the documentation. But what if a counterparty will not transition? Should a term be implied or should the product be redeemed?

That was the choice for the English Court in *Standard Chartered PLC v Guaranty Nominees Limited and Ors* [2024] EWHC 265, in an eagerly-awaited ‘test case’.

The Court implied a term – a decision that has been largely welcomed by the financial markets. But, as ever there is nuance.

This briefing paper considers implications for other products, and how the facts of the case may have impacted the Court’s decision in this instance.

<https://www.cliffordchance.com/briefings/2024/10/libor-cessation--english-court-implies--reasonable-rate--term-in.html>

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