

# Regulatory monitoring

Newsletter

September 2021





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# RegGateway

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### Features

#### **HORIZON SCANNING / REGULATORY MONITORING**

Identify new regulatory developments easily and tailored to the specific type of regulated firm, so that only relevant changes appear.

#### **FINANCIAL REGULATORY LAW SOURCEBOOK**

A categorised collection of all laws in the field of financial regulatory law for Europe and Germany (constantly being expanded), which can be compiled as an obligation register and commented on as desired.

#### **IMPLEMENTATION MANAGEMENT**

Effective implementation (including tailored impact analysis and gap analysis) of new legislation and agile control using our project management tool (including KPIs).

#### **CHANGE ANALYSIS AND PREVIEW OF RULES**

Read the future versions of a law early, including the official explanatory memorandum, and identify any legislative changes.

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# 1. Bank regulation

## 1.1 Prudential regulation

### (a) General

#### (i) Germany

**BaFin: Letter to answer the questions on the amended requirements regarding loans to managers etc. pursuant to Section 15 of the German Banking Act (Schreiben zur Beantwortung von Fragen bezüglich der geänderten Organkreditbestimmungen in § 15 KWG)**

Status: Final

BaFin has published a Letter to answer the questions on the amended requirements regarding loans to managers etc. pursuant to Section 15 of the German Banking Act (*Kreditwesengesetz* – KWG). This letter has been distributed to the leading associations of German credit and financial services institutions on 14 September 2021 in response to the numerous questions directed to BaFin concerning the amendment to Section 15 of the KWG by the Risk Reduction Act (*Risikoreduzierungsgesetz* – RiG).

The letter comprises a summary of these questions and the supervisory authority's answers as well as more detailed explanations on the examination of market conformity for transactions pursuant to Section 15(6) of the KWG and a model for stock decisions on these transactions.

Date of publication: 17/09/2021

#### (ii) EU

**EBA: Regular monitoring Report on Basel III full implementation in the EU**

Status: Final

The EBA has published its regular monitoring Report on Basel III full implementation in the EU. According to this assessment, which is carried out using the same methodology as applied by the BCBS, the full Basel III implementation would result in an average increase of 13.7% on the current Tier 1 minimum required capital of EU banks. To comply with the new framework, EU banks would need EUR 3.1 billion of additional Tier 1 capital. The overall impact reflects the economic impact of the Covid-19 pandemic on participating banks that materialised up to December 2020, the reference date of this Report.

Date of publication: 29/09/2021

**ECB/EBA: Letters regarding the timely European implementation of outstanding Basel III reforms**

Status: Final

The EBA, the ECB and a group of EU prudential supervisors and central banks (in a separate [letter](#)) wrote to Mairead McGuinness, European Commissioner for Financial Services, Financial Stability, and Capital Markets Union in relation to the timely and consistent implementation of outstanding Basel III reforms. In March, Commissioner McGuinness announced that the EC would adopt a legislative proposal in July but this timing has subsequently been delayed until October. The letters highlight that further postponements or deviations would impact the credibility of European banking regulation and confidence in European banks. The implementation of the output floor is given as an example of one area where implementation approaches that are inconsistent with international agreements would leave shortcomings in the existing framework relating to specific risks that are not addressed.

Date of publication: 07/09/2021



## **ESRB: Recommendation amending Recommendation ESRB/2015/2 on the assessment of cross-border effects of and voluntary reciprocity for macroprudential policy measures (ESRB/2021/6)**

Status: Published in the OJ

The Recommendation of the European Systemic Risk Board (ESRB) amending Recommendation ESRB/2015/2 on the assessment of cross-border effects of and voluntary reciprocity for macroprudential policy measures has been published in the OJ. The framework set out in Recommendation ESRB/2015/2 aims to ensure that all exposure-based macroprudential policy measures activated in one Member State are reciprocated in other Member States. In this context, the new recommendation amends this framework to reflect the changes to the existing stricter national measure.

Date of publication: 07/09/2021

## **EBA: Funding plans report**

Status: Final

The EBA has published its annual update on EU banks' funding plans, which helps EU supervisors assess the sustainability of banks' main sources of funding. The results of the funding plans assessment show the impact the Covid-19 pandemic had on EU banks' funding composition. The plans point to a gradual 'normalisation' of banks' sources of funding over the next three years. This implies in particular a partial replacement of central bank funding with market-based funding.

Date of publication: 06/09/2021

### **(iii) International**

## **FSB: Financial Stability Surveillance Framework**

Status: Final

The FSB has published the Financial Stability Surveillance Framework which is intended to support a comprehensive, methodical and disciplined review of vulnerabilities by the FSB in order to identify and address new and emerging risks to financial stability. The framework embodies four key principles within its surveillance of financial stability: (i) focus on vulnerabilities that may have implications for global financial stability; (ii) scan vulnerabilities systematically and with a forward-looking perspective, while preserving flexibility; (iii) recognise differences among countries; and (iv) leverage the comparative advantages of the FSB while avoiding duplication of work. Once identified, material global vulnerabilities will be subject to more intensive monitoring, analysis and dialogue among FSB committees.

Date of publication: 30/09/2021

## **BCBS: Basel III Monitoring Report**

Status: Final

The BCBS has published its latest Basel III Monitoring Report, based on end-December 2020 data. The report sets out the impact of the Basel III framework and includes a special feature on exemptions from the leverage ratio exposure measure due to the Covid-19 pandemic. It covers 178 banks, including 111 large internationally active ("Group 1") banks, among them all 30 G-SIBs, and 67 other ("Group 2") banks.

The final Basel III minimum requirements, which will be fully phased in by 1 January 2028, will have an average impact on the Tier 1 minimum required capital (MRC) of Group 1 banks of +2.9%, compared to a 1.8% increase at end-December 2019. This higher impact for Group 1 banks and G-SIBs may be partially driven by the different treatment of some outlier banks. Furthermore, measures taken by some jurisdictions during the Covid-19 pandemic that reduce current capital requirements but leave capital requirements under the fully phased-in final Basel III standard unaffected could explain parts of the observed increase of the impact.

The monitoring exercises also collect bank data on Basel III's liquidity requirements. The weighted average liquidity coverage ratio (LCR) increased to 143% for the Group 1 bank sample and to 208% for the Group 2 bank sample. In the current reporting period there are seven Group 1 banks with an LCR below 100%. This is a significant increase compared to end-December 2019, where only one Group 1 bank did not meet the minimum, and it is driven by banks using LCR reserves during the Covid-19 pandemic as intended by the framework. All Group 2 banks report an LCR well above the minimum requirement of 100%. The

weighted average net stable funding ratio (NSFR) increased to 123% for the Group 1 bank sample and to 126% for the Group 2 bank sample. As of December 2020, all Group 1 banks and all but two Group 2 banks in the NSFR sample reported a ratio that met or exceeded 100%.

Date of publication: 29/09/2021

### **BCBS: Speech on Basel III and global co-operation**

Status: Final

The BCBS has published a speech by Carolyn Rogers, BCBS Secretary General, on Basel III and global co-operation. In her speech, Ms Rogers considers the importance of global co-operation to ensuring financial stability. She states that multilateralism lies at the heart of the work of the BCBS and that, looking ahead, there is no shortage of cross-border financial stability issues that will require global co-operation. She notes that over the coming years, the BCBS will tackle a range of challenges impacting the global banking system, including the impact of prolonged low interest rates, digitisation of finance, cyber threats and climate change. In relation to global co-operation and Basel III, Ms Rogers states that implementing Basel III in a full, timely and consistent manner is an important and powerful demonstration of a commitment to global co-operation. She notes that the EC is shortly expected to adopt its legislative proposal on transposing the final Basel III reforms into EU law.

Date of publication: 08/09/2021

### **ESAs: Joint Committee Report on risk and vulnerabilities in the EU financial system**

Status: Final

The three European Supervisory Authorities (EBA, EIOPA and ESMA – ESAs) have issued their second joint risk assessment report for 2021. The report highlights the increasing vulnerabilities across the financial sector, the rise seen in terms of cyber risk and the materialisation of event-driven risks.

The reasons for increasing vulnerabilities include: (i) uncertain expectations for economic recovery during the phasing out of exceptional crisis measures, which are increasing due to side effects of crisis measures, such as increasing debt levels and upward pressure on asset prices, and additional pressure from expectations of inflation and yield growth as well as increased investor risk-taking and financial interconnectedness issues; (ii) rising exposure to cyber risks as cyber-criminals develop new techniques to exploit vulnerabilities in this sector; and (iii) increased risk-taking behaviour as displayed in event-driven risks (such as GameStop, Archegos, and Greensill), as well as rising prices and volumes traded on crypto-assets.

In this context, the ESAs advise national competent authorities, financial institutions and market participants to take the following policy actions: (i) financial institutions and supervisors should continue to be prepared for a possible deterioration of asset quality in the financial sector, notwithstanding the improved economic outlook; (ii) as the economic environment gradually improves, the focus should shift to allow a proper assessment of the consequences of the Covid-19 pandemic on banks' lending books, and banks should adequately manage the transition towards the recovery phase; (iii) disorderly increases in yields and sudden reversals of risk premia should be closely monitored in terms of their impacts for financial institutions as well as for investors; and (iv) financial institutions and supervisors should continue to carefully manage their ICT and cyber risks. The ESAs also consider that policymakers, regulators, financial institutions and supervisors can start reflecting on lessons learnt from the Covid-19 crisis.

Date of publication: 08/09/2021

## (b) Remuneration

### (i) Germany

#### Third Amendment Regulation on the Institution Remuneration Regulation (Dritte Verordnung zur Änderung der Institutsvergütungsverordnung – InstitutsVergV)

Status: Published in the Federal Gazette

Date of entry into force: 25/09/2021

The Third Amendment Regulation on the Institution Remuneration Regulation (*Institutsvergütungsverordnung* – InstitutsVergV) has been published in the Federal Gazette. This amendment introduces adjustments and specifications to the InstitutsVergV, as required by CRD V, and its implementation in the Risk Reduction Act (*Risikoreduzierungsgesetz* – RiG). In particular, the amendment adapts the provisions regarding the remuneration regulations to be complied with by small non-complex institutions as well as the rules on the identification of risk-takers, and it specifies the amount up to which variable remuneration is subject to simplified requirements. In addition, the principle of a gender-neutral remuneration policy is now explicitly included in the legislation.

Date of publication: 24/09/2021

## (c) Large exposures/Limits to shadow banking entities

### (i) EU

#### EBA: Final Guidelines specifying the criteria to assess the exceptional cases when institutions exceed the large exposure limits of Article 395(1) of the CRR and the time and measures to return to compliance pursuant to Article 396(3) of the CRR

Status: Final

Date of application: 01/01/2022

The EBA has published a final report on its guidelines specifying the criteria to assess the exceptional cases when institutions exceed the large exposure limits of Article 395(1) of the CRR and the time and measures to return to compliance. The guidelines contain four sections: i) criteria to determine the exceptional cases referred to in Article 396(1) of the CRR; ii) information to be provided to the competent authority in case of a breach of the Large Exposure limits; iii) criteria to determine the appropriate time to return to compliance with the limits of Article 395(1) of the CRR; and iv) measures to be taken to ensure the timely return to compliance of the institution with the limits of Article 395(1) of the CRR.

The guidelines will be translated into the official EU languages and published on the EBA website. The deadline for competent authorities to report whether they comply with the guidelines will be two months after publication of the translations.

Date of publication: 15/09/2021

## (d) Deposit protection

### (i) EU

#### EBA: Final Report on the Revised Guidelines on DGS stress tests

Status: Final

Date of application: 15/09/2021

The EBA has published a Final Report on the Revised Guidelines on stress tests of deposit guarantee schemes (DGSs) under the Deposit Guarantee Schemes Directive (Directive 2014/49/EU) repealing and replacing Guidelines EBA/GL/2016/04. The revised guidelines: (i) strengthen the current DGS stress-testing framework by requiring DGSs to stress test their ability to perform all of the interventions they are legally mandated to perform; (ii) require DGSs to stress test their ability to have access in due time to all of their funding sources; (iii) strengthen co-operation between DGSs and different authorities by requiring the

stress testing of interventions where cooperation with other authorities is necessary; and (iv) encourage the DGSs to choose stress-testing scenarios with additional business continuity challenges or external circumstances that create extra stress for the DGSs to perform their functions, such as a pandemic, ICT failures or other such events.

The deadline for DGSs to submit their next reporting template is set for 16 June 2024.

Date of publication: 15/09/2021

## (e) Supervisory reporting

### (i) Germany

#### **BaFin: Amended date of enforcement for Circular 12/2021 on additional liquidity outflows for other products and services pursuant to Article 23 of the Delegated Regulation (EU) 2015/61 (Rundschreiben 12/2021 über zusätzliche Liquiditätsabflüsse in Zusammenhang mit anderen Produkten und Dienstleistungen gemäß Artikel 23 Delegierte Verordnung (EU) 2015/61)**

Status: Final

In response to requests from the banking sector for a delayed application date of the [Circular 12/2021 on additional liquidity outflows for other products and services pursuant to Article 23 of the Delegated Regulation \(EU\) 2015/61](#), which was published on 16 August 2021, BaFin has set out in a letter that, while the initial application date of 1 September 2021 is not postponed, non-compliance with the new notification requirements will be tolerated until 30 November 2021.

The circular specifies the supervisory approach with regard to the application of Article 23 of the Delegated Regulation 2015/61 and the corresponding provisions in Delegated Regulation 2021/451 (ITS on Reporting) on the additional liquidity outflows for other products and services that do not fall under the outflow categories of Articles 27 to 31a of the Delegated Regulation 2015/61. In this context, the categories of products and services referred to in Article 23(1) a) to h) of the Delegated Regulation 2015/61 are defined in more detail and the liquidity outflows to be allocated to these products and services are specified. Furthermore, the Circular specifies the reports that are required to be made at least annually pursuant to Article 23(2) of the Delegated Regulation 2015/61 on the products and services covered by Article 23(1) for which the probability and potential size of liquidity outflows are material, and it determined the liquidity outflows to be allocated to these products and services.

Date of publication: 01/09/2021

## 1.2 Recovery and resolution

### (i) Germany

#### **BaFin: Guideline on the web form “recovery plan according to simplified requirements”**

Status: Final

BaFin has updated its Guideline on the web form “recovery plan according to simplified requirements” pursuant to Section 19 of the German Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz – SAG*). The update mainly consists of editorial adjustments and additional information on the procedure for institutions to update their submitted recovery plans.

Date of publication: 30/09/2021

#### **BaFin: Guidance Notice on suspension of trading regarding non-exchanges in the context of resolution (Merkblatt zur Handelsaussetzung an Nicht-Börsen im Rahmen der Abwicklung – MeHNB)**

Status: Final

BaFin has published the Guidance Notice on trading suspension regarding non-exchanges in the context of resolution. It deals with the suspension or halting of trading by systematic internalisers (within the meaning of Article 4(1) no. 20 of MiFID II) as

well as multilateral and organised trading facilities (within the meaning of Article 4(1) nos. 22 and 23 of MiFID II) which are not operated by an exchange within the meaning of Section 2 of the Stock Exchange Act (*Börsengesetz* – BörsG).

This Guidance Notice supplements the [Guidance Notice on external bail-in implementation](#), which deals, among other things, with the suspension or halting of trading on relevant exchanges. Furthermore, this Guidance Notice describes which information, beyond the resolution order, the resolution authority provides to the addressees for the above purpose at which point in time and what it expects from the addressees in terms of implementation.

The background to the Guidance Notice is the Risk Reduction Act (*Risikoreduzierungsgesetz* – RiG), which came into force on 28 December 2020. The RiG has extended BaFin's authority to suspend or halt trading to all trading venues and systematic internalisers. The aim of this authority to suspend or halt trading is to calm the financial market in the context of resolution measures and to protect trading participants as well as investors from an insufficient price formation process. Furthermore, it facilitates the technical implementation of the instrument of participation of the holders of relevant capital instruments pursuant to Section 89 of the Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz* – SAG) or Article 21 of the SRM Regulation (No. 806/2014/EU) and/or the instrument of creditor participation pursuant to Section 90 of the SAG or Article 27 of the SRM Regulation at the financial market infrastructures.

Date of publication: 20/09/2021

## (ii) EU

### Commission Delegated Regulation (EU) 2021/1527 supplementing the BRRD with regard to RTS for the contractual recognition of write down and conversion powers

Status: Published in the OJ

Date of entry into force: 07/10/2021

The Delegated Regulation supplementing the Bank Recovery and Resolution Directive (2014/59/EU) (BRRD) with regard to regulatory technical standards (RTS) for the contractual recognition of write down and conversion powers has been published in the OJ. The BRRD II amends Article 55 of BRRD to address the scenario where it is impracticable for institutions and entities subject to BRRD to include bail-in contractual recognition clauses in liability contracts. New Article 55(6) of BRRD gives the EBA a mandate to draft RTS specifying conditions under which it would be legally, contractually or economically impracticable to include contractual recognition clauses. The Delegated Regulation specifies: (i) the conditions under which it would be legally, or otherwise, impracticable to include the clauses in certain categories of liabilities; (ii) the conditions for the resolution authority to require the inclusion of the clauses in certain categories of liabilities, where it concludes that none of the conditions of impracticability notified to it are fulfilled; and (iii) the reasonable timeframe for the resolution authority to require inclusion of the clauses.

Date of publication: 17/09/2021

## (iii) Eurozone

### SRB: Guidance on 2022 Resolution Reporting

Status: Final

The SRB has published Guidance documents regarding the resolution reports required from the affected banks in 2022. The information collected from these resolution reports will support the drawing up and implementation of resolution plans, including the calibration of Minimum Required Eligible Liabilities (MREL) targets from banking groups. In particular, the SRB has published the following Guidance documents for SRB-originated resolution reports:

- [Guidance on the 2022 Liability Data Report – LDR v1.0](#)
- [Guidance on the 2022 Additional Liability Report – ALR v1.0](#)
- [Guidance on the 2022 Critical Functions Report - CFR v1.0](#)
- [Guidance on the 2022 Financial Markets Infrastructure Report – FMIR v1.0](#)

Date of publication: 29/09/2021

## SRB: Update on the notification of impracticability to include bail-in recognition clauses in contracts: SRB approach and expectations

Status: Final

The SRB has added a new document on its XBRL filing rules for 2021 to its operational guidance regarding the notification of impracticability to include bail-in recognition clauses in contracts. By default, banks are required to include bail-in recognition clauses in relevant contracts under third country law to ensure that the liabilities under these contracts can be bailed-in in the event of resolution. However, banks may determine that it is impracticable to include such a clause in individual contracts. In that case, they need to notify their resolution authority, which then assesses the notification and may require the inclusion of the clause. As from 1 October 2021 the SRB expects banks to submit their notifications in this context in the XBRL format. For this purpose, the new document sets out the SRB filing rules by referring to the EBA XBRL filing rules (EB/XBRL/2020/12) and listing its amendments to this set of rules.

Date of publication: 22/09/2021

## SRB: Communication on application of RTS provisions on prior permissions

Status: Final

The Single Resolution Board (SRB) has published a Communication on application of RTS provisions on prior permission for reducing eligible liabilities instruments as of 1 January 2022. This update complements the 28 July 2021 guidance and aims to raise awareness of the requirements and how to report on them. This guidance is provided to assist institutions when applying to the SRB for permission in line with the requirements specified in the draft RTS (in recognition of the fact that they are unlikely to be finalised before 1 January 2022). It summarises and explains in a consistent and comprehensive way the procedures that institutions should follow when seeking the SRB's permission to call, redeem, repay or repurchase eligible liabilities instruments before their contractual maturity. As of 1 January 2022, the SRB will follow the draft RTS for granting permission. All applications seeking SRB authorisation as of the date of this Communication should be aligned with the requirements in the draft RTS. However, for applications due by 31 August 2021 seeking authorisations as of 1 January 2022, as an exceptional measure, the SRB will accept applications from institutions until 30 September 2021. Aligning the permission regime with the draft RTS now and in their final draft form will allow banks to continue with their redemptions transactions following the adoption of the Delegated Regulation without any disruption or the need to submit new applications, under the condition that the Delegated Regulation will not substantively deviate from the draft RTS. It will also provide certainty and transparency on what the SRB is expecting from banks that wish to apply for prior permission to redeem their eligible liabilities instruments early. The SRB will update this Communication if any parts of the draft RTS are changed when the Delegated Regulation is endorsed.

Date of publication: 16/09/2021

## 2. Market regulation/Conduct rules

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### 2.1 Benchmarks

#### (i) EU

##### **ESMA: Guidelines on methodology, oversight function and record keeping under the Benchmarks Regulation**

Status: Final

The ESMA has published a final report on the Guidelines on methodology, oversight function and record keeping under Regulation (EU) 2016/10111 (Benchmarks Regulation). These guidelines aim at providing guidance to financial market participants and competent authorities on the application of the requirements relating to the use of a methodology for calculating a benchmark and the related record keeping requirements as well as the requirements on the oversight function.

The guidelines originate from the [Consultation Paper](#) published on 25 February 2021, and the feedback received thereafter, on proposed draft guidelines in four areas of the Benchmarks Regulation, namely: (i) the key elements of the methodology in the context of exceptional circumstances; (ii) the material changes to the methodology and the consultation process; (iii) the oversight function; and (iv) the record keeping requirements.

In a next Step, the guidelines will be translated in all official EU languages and published on ESMA's website. The publication of the translations in all official EU languages will trigger a two-month period during which national competent authorities will have to notify ESMA whether they comply or intend to comply with the guidelines.

Date of publication: 24/09/2021

#### (ii) International

##### **IOSCO: Statement on Credit Sensitive Rates**

Status: Final

The International Organisation of Securities Commissions (IOSCO) has published a statement on credit sensitive rates. Credit sensitive rates are interest rate benchmarks that seek to measure the credit risk component of unsecured borrowing in certain markets. These rates have started to emerge as a possible alternative to USD LIBOR. In the statement, IOSCO: (i) highlights that alternative financial benchmarks must be compliant at all times with its principles on financial benchmarks (IOSCO Principles); (ii) calls for greater attention to Principle 6 and Principle 7 – IOSCO notes that benchmark administrators of credit sensitive rates should assess whether the systemic benchmarks that are used extensively are based on active markets with high volumes of transactions, representing the underlying interest they intend to measure, and whether such benchmarks are resilient during times of stress. IOSCO goes on to note that benchmark administrators of credit sensitive rates should also consider how their benchmarks would continue to meet Principles 6 and 7 over time if their use became widespread, given some of these rates are based on similar markets to LIBOR and may replicate many of LIBOR's shortcomings, as noted by authorities in the US and UK; (iii) explains that benchmark users should consider the robustness and reliability of the benchmarks they choose and ensure they have reliable fallback mechanisms that can be used, should their chosen benchmarks cease or become unrepresentative; and (iv) notes that users of benchmarks place considerable value on a benchmark being IOSCO-compliant – to continue to give market confidence in the reliability and integrity of financial benchmarks, IOSCO will be monitoring closely how the IOSCO badge is used in compliance assessments of the relevant credit sensitive rates.

Date of publication: 08/09/2021



## 2.2 Credit rating agencies

### (i) EU

#### **ESMA: Opinion on improving access to and use of credit ratings in the EU in accordance with Regulation (EC) No 1060/2009**

**Status:** Final

The ESMA has published an opinion which calls for legislative changes to improve access to and use of credit ratings in the EU in accordance with Regulation (EC) No 1060/2009. In the opinion ESMA highlights the difficulties experienced by users of credit ratings and recommends that the legislators amend the CRA Regulation or take alternative legislative action to address these. Credit ratings are published on Credit Rating Agencies' (CRAs') websites as well as on the European Rating Platform (ERP). However, the usability of these credit ratings is severely limited as they cannot be accessed in a machine-readable format or downloaded in sufficient numbers to be used for regulatory purposes. In practice, users mainly access and use credit ratings and related research reports through licences for data feeds and platform services offered by other companies in CRAs' groups. These companies are not currently subject to regulation and their licencing practices and the high fees charged raise both investor protection and competitiveness concerns. Users of credit ratings have reported that the terms of the licence agreements they must enter into to use credit ratings are subject to frequent changes and that they often need to enter into additional licences in order to maintain a consistent level of data usage over time. Users also report an inability to negotiate the terms of access to data feeds and a lack of transparency in price increases. ESMA concludes that legislative changes are needed to improve access to and use of credit ratings and highlights that these could be implemented through changes to the CRA Regulation or through the adoption of alternative legislation.

Date of publication: 30/09/2021

## 2.3 Market abuse

### (i) EU

#### **EC: Commission Delegated Regulation (EU) .../... supplementing the MAR with regard to RTS containing a template document for cooperation arrangements with third countries**

**Status:** Adopted by the EC

The EC has adopted a Delegated Regulation and [Annex](#) containing RTS on co-operation arrangements with third countries under Article 26(3) of the Market Abuse Regulation (596/2014) (MAR). The Annex contains a template for co-operation arrangements regarding the exchange of information between EU Member States' national competent authorities with authorities in third countries, and the enforcement of obligations arising under MAR in third countries. The template contains different sections that describe the scope of the co-operation, the content of the assistance to be provided, a description of the procedure as well as a description of the rules on confidentiality and the uses of information.

The Council of the EU and the European Parliament will now scrutinise the Delegated Regulation.

Date of publication: 14/09/2021

## 2.4 MiFID/MiFIR

### (i) Germany

#### **BaFin: Exemption for ancillary activities under MiFID II (Ausnahmeregelung bei Nebentätigkeiten gemäß MiFID II)**

Status: Final

Due to the amended MiFID II, an adjustment to the ancillary activity exemptions in Section 2(1) no. 9, Section 2(6)(1) no. 11 and Section 32(1a)(3) no. 3 of the German Banking Act (*Kreditwesengesetz* – KWG) will come into force on 28 November 2021. As of this date, it is therefore no longer necessary to notify BaFin of the use of an ancillary activity exemption.

Date of publication: 22/09/2021

#### **BaFin: Application of the ESMA Guidelines on the MiFID II/MiFIR obligations on market data (Anwendung der ESMA-Leitlinien zu Verpflichtungen gemäß MiFID II und MiFIR)**

Status: Final

BaFin has published a statement confirming that it will apply the [ESMA Guidelines on the MiFID II/MiFIR obligations on market data](#) in its supervisory practice from 1 January 2022. The German version of these ESMA guidelines has been published on 18 August 2021. The aim of these guidelines is to ensure that financial market participants interpret the requirement to provide market data on a reasonable commercial basis (RCB) in a uniform manner. The same applies to disclosure obligations and the requirement to make market data available free of charge 15 minutes after publication (delayed data). Furthermore, the guidelines are intended to ensure that the national competent authorities (NCAs) have a common understanding with regard to the assessment of the completeness, comprehensibility and coherence of the RCB as well as the provisions on delayed data.

Date of publication: 17/09/2021

#### **BaFin: Update on its FAQ on MiFID II rules of conduct according to sections 63 et seq. of the German Securities Trading Act (Ergänzung der FAQ zu MiFID II-Wohlverhaltensregeln nach §§ 63 ff. WpHG)**

Status: Final

BaFin has published an update on its FAQ on MiFID II rules of conduct according to sections 63 et seq. of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG). The update consists of a new question in the chapter on advertising, in which BaFin clarifies that chargeable investment services are generally not permitted to be advertised as being free of charge, except for when the advertisement informs on all further costs in direct connection and in line with the requirements set out in BT 3.3 in the [BaFin Circular on MaComp](#).

Date of publication: 03/09/2021

### (ii) EU

#### **ESMA: MiFID II/MiFIR review report on Algorithmic Trading**

Status: Final

The ESMA has published the MiFID II/MiFIR review report on algorithmic trading. It concludes that no fundamental issues have emerged with respect to the MiFID II algorithmic trading regime which has overall delivered on its objectives, but that some recommendations with the aim to simplify the regime and increase its efficiency should be implemented. The report also identifies issues which will be followed up by ESMA via amendments to ESMA technical standards or additional guidance on a number of topics, including: (i) the concepts of “algorithmic trading” and “Direct Electronic Access”; (ii) the authorisation regime for EU and non-EU algorithmic trading firms, including High Frequency Trading (HFT) firms, deploying their strategies on EU trading venues; (iii) the organisational requirements for investment firms, including the notification and testing requirements of algorithmic traders to competent authorities and the self-assessment exercises to be performed by investment firms; (iv) organisational requirements for trading venues, including the self-assessment exercises to be performed by trading venues, circuit breakers, the fee structures, order to trade ratios, and market outages; and (v) a review of MiFID II provisions

which are indirectly related to algorithmic trading activities (e.g. tick size and market making). The report also addresses recent market developments by including topics such as speedbumps and the sequencing between public vs. private transaction confirmation feed by trading venues.

Date of publication: 28/09/2021

### ESMA: Review of the MiFID II framework on best execution reports

Status: Consultation

Deadline for the submission of comments: 23/12/2021

The ESMA launched a consultation on proposals for improvements to the MiFID II framework on best execution reports. These proposals aim at ensuring effective and consistent regulation and supervision and enhancing investor protection.

ESMA's proposals include: (i) the reduction of the granularity and volume of the data which execution venues are required to report, for the purpose of simplifying these reporting obligations; (ii) the move to a set of seven indicators aimed at disclosing meaningful information to help firms to assess the execution quality of specific venues; and (iii) technical changes to the reporting requirements for firms by focusing mainly on clarifying the requirements for firms that transmit client orders or decisions to deal to third parties for execution. In addition, the consultation proposes amendments to the relevant provisions of the MiFID II legislative framework to enable these technical changes to come into effect in the future.

Since ESMA's technical proposals can only be implemented after the relevant provisions of MiFID II have been amended, the outcome of this consultation will not lead to any immediate change of the existing RTSs 27 and 28 which currently regulate best execution reporting by execution venues and investment firms. However, ESMA will consider the input received in supporting the European Commission in its assessment of the adequacy of the best execution reporting obligations, and any subsequent technical work to shape a well-functioning reporting regime.

Date of publication: 24/09/2021

## 2.5 Packaged retail and insurance-based investment products (PRIIPs)

(i) EU

### EC: Commission Delegated Regulation (EU) .../... amending the RTS laid down in Delegated Regulation (EU) 2017/653 which considers key information documents (KID) for PRIIPs

Status: Adopted by the EC

The European Commission has adopted a delegated regulation amending the RTS laid down in Commission Delegated Regulation (EU) 2017/653 as regards the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for the calculation of summary cost indicators, the presentation and content of information on past performance and the presentation of costs by packaged retail and insurance-based investment products (PRIIPs) offering a range of options for investment and alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of Regulation (EU) No 1286/2014 as underlying investment options with the prolonged transitional arrangement laid down in that Article. The RTS are amended in relation to (amongst other things), the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for the calculation of summary cost indicators, the presentation and content of information on past performance and the presentation of costs by PRIIPs offering a range of investment options.

The delegated regulation is now subject to scrutiny by the European Parliament and the Council of the EU and is scheduled to apply from 1 July 2022.

Date of publication: 07/09/2021

## 2.6 Short selling

### (i) EU

#### **EC: Delegated Regulation on the adjustment of the threshold for the notification of significant net short positions in shares**

**Status: Adopted by the EC**

The EC has adopted a Delegated Regulation amending the Short Selling Regulation (SSR) as regards the adjustment of the relevant threshold for the notification of significant net short positions in shares. The explanatory memorandum explains that on 16 March 2020, ESMA made use of its emergency intervention powers under Article 28 of the SSR and issued a decision to lower the notification threshold for net short positions in shares admitted to trading on a regulated market from 0.2% to 0.1% for a period of three months. ESMA subsequently renewed that decision in June, September and December 2020. The events following the Covid-19 outbreak and the increased visibility obtained by competent authorities on volumes of net short positions have convinced ESMA that the notification threshold should be established at 0.1% on a permanent basis. The explanatory memorandum also sets out ESMA's reasoning, which it provided to the EC in an opinion in May 2021.

The Council of the EU and the European Parliament will now scrutinise the Delegated Regulation.

Date of publication: 27/09/2021

#### **ESMA: Review of certain aspects of the Short Selling Regulation**

**Status: Consultation**

**Deadline for the submission of comments: 19/11/2021**

The ESMA has launched a consultation on the review of certain aspects of the Short Selling Regulation (SSR) which sets out suggestions for operational improvements and policy clarifications on: (i) the calculation of net short positions, the prohibition of uncovered short selling and the locate rule under which short selling trades can take place; (ii) the mechanism for transparency of net short positions and the proposal to publish aggregated net short positions per issuer based on all individual positions and the scope of the exemptions for shares that are more heavily traded in a third country; and (iii) the introduction of a centralised notification and publication system to reduce reporting burdens, increase cost efficiency and foster ESMA's monitoring capacity and coordination powers in case of potential threats at EU level.

The consultation paper also contains an empirical analysis of the impact of the short selling bans adopted after the COVID-19 outbreak, with reference to the effect of the bans on liquidity and volatility, concluding that current intervention powers remain a useful tool in case of developments impacting the resiliency of financial markets.

In a next step, ESMA expects to publish a final report by the end of Q1 2022. The consultation primarily addresses issuers of financial instruments admitted to trading or traded on a trading venue, investment firms, market makers, primary dealers, and persons who engage in short sales or transactions resulting in net short positions.

Date of publication: 21/09/2021

## 2.7 Transparency requirements/Shareholder requirements

### (i) EU

#### **ESMA: Practical Guide on the national rules on notifications of major holdings under the Transparency Directive**

**Status: Final**

ESMA has published a Practical Guide on the national rules on notifications of major holdings under the Transparency Directive which summarises the main rules and practices applicable across the European Economic Area (EEA) in relation to notifications of major holdings under national law in accordance with the Transparency Directive. It is intended to aid market

participants, particularly shareholders with notification obligations under national law in accordance with the Transparency Directive, with fulfilling these obligations.

Date of publication: 01/09/2021



## 3. Market infrastructure

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### 3.1 Custody rules

#### (i) EU

##### **ESMA: Guidelines on Settlement Fails Reporting under Article 7 of the CSDR**

Status: Final

The ESMA has published a final report on the Guidelines on Settlement Fails Reporting under Article 7 of the Central Securities Depositories Regulation (CSDR). These guidelines on the scope and exchange of information between ESMA and the competent authorities regarding settlement fails, based on the reports submitted by CSDs, aim to ensure the consistent application of Article 7(1) of CSDR as supplemented by Articles 14 and 39 of the RTS on settlement discipline. In particular, they aim to clarify the scope of the data to be reported by CSDs, the representation and valuation of financial instruments, as well as how to report settlement fails based on the reason for the settlement fails. The Guidelines are based on the responses received on the respective [Consultation Paper](#) published on 20 December 2018, whose responses they summarise and analyse.

Subsequently, these guidelines will be translated into the official languages of the European Union. Within two months from their publication, each national competent authority will have to confirm whether it complies or intends to comply with those guidelines and give reasons in case it decides not to comply with them.

Date of publication: 24/09/2021

##### **ESMA: Letter to the European Commission on CSDR settlement discipline**

Status: Final

The ESMA has published its letter to the European Commission regarding the implementation of the Central Securities Depositories Regulation (CSDR), urging it to consider a delay of the mandatory buy-in regime. As the final EC legislative proposal for the review of CSDR, possibly including changes to the buy-in regime, is not expected before the end of this year, ESMA is in favour of delaying the entry into force of the buy-in requirements, which has been scheduled for 1 February 2022, while continuing as planned with the implementation of the other settlement discipline requirements, such as settlement fails reporting and the cash penalties regime. ESMA therefore considers it crucial that the EC and the co-legislators clarify their political intentions around the review of the settlement discipline regime and consider the suggested delay as soon as possible.

Date of publication: 24/09/2021

### 3.2 EMIR

#### (i) EU

##### **Commission Delegated Regulation (EU) 2021/1456 supplementing EMIR on FRANDT commercial terms for clearing services for OTC derivatives**

Status: Published in the OJ

Date of entry into force: 09/09/2021

Date of application: 09/03/2022

The Delegated Regulation (EU) 2021/1456 supplementing EMIR ((EU) 648/2012) specifying the conditions under which commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT) was published in the OJ. In particular, this Delegated Regulation specifies the requirement that all parties that offer clearing services in relation to OTC derivative contracts that are subject to the clearing obligation pursuant to



Article 4(1) of EMIR are obliged to provide those services under FRANDT terms, as set out in Article 4(3a) of EMIR, which is applicable since 18 June 2021.

Date of publication: 08/09/2021





## 4. Anti-money laundering

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### (i) Germany

#### Regulation on enhanced due diligence requirements for the transfer of crypto assets (Kryptowertetransferverordnung – KryptoWTransferV)

Status: Published in the Federal Gazette

Date of entry into force: 01/10/2021

The Regulation on enhanced due diligence requirements for the transfer of crypto assets (*Kryptowertetransferverordnung – KryptoWTransferV*) has been published in the Federal Gazette. It has been enacted on the basis of Section 15(10)(1) no. 1 of the German Money Laundering Act (*Geldwäschegesetz – GwG*) and aims to prevent misuse of the transfer of crypto values for the purposes of money laundering or terrorist financing by requiring the parties involved in such transfers to transmit information on the ordering party and the beneficiary. In addition, this data transmission enables checks for persons affected by sanctions and allows for a more risk-oriented approach by the service providers involved. Thereby, the regulation implements the standards set out by the Financial Action Task Force (FATF) in the [FATF Recommendations 2012](#) (Recommendation 15 - Interpretative Note 7b, so-called "travel rule" for crypto assets).

The regulation also orders that information on the beneficiary or ordering party of a crypto value transfer must be collected and stored if the transfer is made from or to an electronic wallet that is not managed by a crypto custodian (self-managed electronic wallet, "unhosted wallet"). This also implements current FATF recommendations in this area. Furthermore, findings resulting from these requirements can also become relevant with regard to the circumvention of sanctions, e.g. in the area of proliferation financing.

Date of publication: 29/09/2021

#### BaFin: Subnational risk analysis 2020/2021 (Subnationale Risikoanalyse 2020/2021 – SRA 3.0)

Status: Final

BaFin has published the subnational risk analysis (SRA) which has been prepared by its AML division. This document contains the analysis and assessment of risks in the area of money laundering and terrorist financing to which the domestic financial sector is currently exposed and derives measures to reduce the identified risks. It is labelled as version 3.0 to indicate the changes made to the scope of analysis and to the assessment process in comparison to version 2.0 as of 2019.

Date of publication: 08/09/2021

## 5. Payments

### 5.1 Payment services/E-money

#### (i) EU

##### **Commission Delegated Regulation (EU) 2021/1722 supplementing Directive (EU) 2015/2366 with regard to RTS specifying 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 exercising cross-border provision of payment services**

Status: Published in the OJ

Date of entry into force: 18/10/2021

The Delegated Regulation (EU) 2021/1722 supplementing Directive (EU) 2015/2366 (PSD2) with regard to RTS specifying the framework for home-host cooperation and information exchange in the context of supervision of payment institutions and electronic money institutions exercising cross-border provision of payment services has been published in the OJ. The RTS establishes: (i) the framework for cooperation and for exchanging information between the competent authorities of the home member state and of the host member state under Title II of PSD2; and (ii) to the framework for monitoring compliance with national law transposing Titles III and IV of PSD2.

The Delegated Regulation will enter into force on 18 October 2021.

Date of publication: 28/09/2021

##### **EPC: Clarification paper on SEPA credit transfer and SEPA instant credit transfer scheme rulebooks**

Status: Final

The European Payments Council (EPC) has published an updated version of its clarification paper on the SEPA credit transfer (SCT) and SEPA instant credit transfer (SCT Inst) scheme rulebooks. The paper provides guidance and recommendations regarding operational aspects related to the SCT and SCT Inst rulebooks and seeks to ensure their consistent implementation by the participants in the schemes. This version of the paper includes a new section 3.6 on the SCT inquiry process clarifying how the Beneficiary Payment Service Provider (PSP) can indicate in its positive response message to an inquiry from the Originator PSP that its claimed Inter-PSP inquiry fee and interest compensation are to be paid in one payment or in two separate payments, and in case of two payments, how to indicate they are to be paid to two different accounts.

Date of publication: 16/09/2021

##### **EPC: Public consultations on the change requests for the 2023 SEPA payment scheme rulebooks**

Status: Consultation

Deadline for the submission of comments: 11/12/2021

The European Payments Council (EPC) has launched a consultation on the change requests for the 2023 SEPA Credit Transfer and SEPA Direct Debit scheme rulebooks. The 25 change requests relate to the SEPA Credit Transfer, the SEPA Instant Credit Transfer, the SEPA Direct Debit Core and/or the SEPA Direct Debit Business-to-Business schemes. This public consultation is part of the EPC's biennial change management cycle for these schemes.

- [SEPA Instant Credit Transfer Scheme Rulebook](#)
- [SEPA Credit Transfer Scheme Rulebook](#)
- [SEPA Direct Debit Core Scheme Rulebook](#)
- [SEPA Direct Debit B2B Scheme Rulebook](#)

Date of publication: 13/09/2021

## (ii) Eurozone

### ECB: Opinion on a draft regulation concerning the oversight of payment systems and supporting technological or network infrastructures (CON/2021/28)

Status: Final

The ECB published an opinion on an Italian draft regulation concerning the oversight of payment systems and supporting technological or network infrastructures in response to a request from the Banca d'Italia. The draft regulation governs payment systems in a broad sense, including relevant third-party payment service providers. In particular, the draft regulation extends the scope of the existing legislation to encompass both Italian retail and large-value payment systems, as well as technical infrastructures or service providers supporting the payment ecosystem, whose registered address and/or centre of operations is located in Italy. In its opinion, the ECB welcomes the Italian draft regulation and its adherence of the draft regulation to the Eurosystem oversight policy framework.

Date of publication: 21/09/2021

## (iii) International

### BCBS: New reports on central bank digital currencies

Status: Final

The BCBS published a set of new reports on central bank digital currencies (CBDCs) in collaboration with seven central banks. The reports explore: (i) how private-public collaboration and interoperability can be designed into CBDC systems to achieve this objective; (ii) how a CBDC could best serve people and businesses in a fast-changing technological landscape; and (iii) the possible impact of CBDC issuance on banking systems, in terms of intermediation capacity and overall resilience. The reports conclude, in particular, that for CBDC to work effectively, public and private institutions need: (x) to cooperate to ensure integration with existing payments systems; (y) to anticipate customers' future needs; and (z) to support innovation while preserving public trust, privacy and stability in the broader financial system. While none of the seven central banks involved has yet decided to proceed with a retail CBDC, they have expressed their believe that continuing to work on the topic is key, due to its wide-ranging implications.

Alongside the three new reports, the BCBS published an executive summary of the progress made since publishing an initial report in October 2020 setting out the common foundational principles and core features of a CBDC.

Date of publication: 30/09/2021

### BCBS: Enabling open finance through APIs: report on payment initiation

Status: Final

The BCBS published a report by the Consultative Group on Innovation and the Digital Economy (CGIDE) on payment initiation. The report summarises the analysis conducted by the Technical task Force of the CGIDE on the solutions available for payment initiation within a centralized application programming interface (API) architecture. Specifically, two solutions for payment initiation are explored: (i) the first makes use of a central validator (CV) auth-app such as the one described in the first report published by the CGIDE in December 2020, provided by a CV for the authentication and validation; (ii) the second involves the use of a similar functionality natively integrated in a payment initiator's payment app. Both solutions build on the secure identification and authentication of users analysed in previous CGIDE work. In addition, the report summarises the main insights gained from meetings held with several industry participants.

Date of publication: 29/09/2021

## 6. Banking union

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### 6.1 Single Supervisory Mechanism (SSM)

#### (i) Eurozone

##### **ECB: Speech “How can we make the most of an incomplete banking union?”**

Status: Final

The ECB published a speech by Andrea Enria, Chair of the Supervisory Board of the ECB, on actions the European banking sector can take to achieve progress towards an integrated prudential jurisdiction within the SSM and the current institutional and regulatory environment. Mr Enria discusses the numerous legal prudential obstacles to the free circulation of capital and liquidity within banking groups in the euro area. While legislative reforms aimed at removing these obstacles are clearly possible, he considers such legislation unlikely in the near future, and surely not before a fully-fledged EDIS is put in place. Mr Enria proposes that to achieve progress now, other avenues should be pursued. One suggestion is to continue relying on groups that focus mainly on subsidiaries to expand their business across the banking union. A contractual approach could be developed through intragroup guarantees, which could be made enforceable, and therefore credible, using supervisory tools at the European level. Another avenue that Mr Enria describes as “more radical and challenging, but potentially more promising”, would be for banks to review their cross-border organisational structure more actively. Mr Enria refers in particular to the possibility of relying more extensively on branches and the free provision of services, rather than subsidiaries, to develop cross-border business within the banking union and the Single Market. Mr Enria encourages banks interested in exploring these avenues to liaise with the ECB at an early stage to discuss possible options.

Date of publication: 09/09/2021

## 7. Institutional supervisory framework

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### (i) Germany

#### Special Fees Regulation of the Federal Ministry of Finance on Financial Services Supervision (Finanzdienstleistungsaufsichtsgebührenverordnung – FinDAGebV)

Status: Published in the Federal Gazette

Date of entry into force: 01/10/2021

The Special Fees Regulation of the Federal Ministry of Finance on Financial Services Supervision was published in the Federal Gazette. The Special Fees Regulation, in connection with the obligation of the fee creditor regulated in Section 1 of the Federal Fees Act (*Bundesgebührengesetz* – BGebG) to provide for fees for individually attributable public services of federal authorities in accordance with the BGebG and the fee regulations pursuant to Sections 22(3) and (4) of the BGebG, determines all fee elements in one of the areas of responsibility of the BMF, namely the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin). This implements the regulatory mandate under Section 22(4)(1) of the BGebG to issue department-specific Special Fees Regulations for this area of responsibility of the BMF. In this regulatory context, the regulation determines the arrangement of fixed and time-based fees pursuant to Section 11 of the BGebG (Section 22(1)(2) of the BGebG) as well as fees in special cases pursuant to Section 10(1)(3) of the BGebG.

Date of publication: 07/09/2021

### (ii) EU

#### ESMA: 2022 Annual Work Programme

Status: Final

The ESMA has published its annual work programme for 2022, setting out its priority work areas for the next 12 months to deliver on its mission to enhance investor protection and promote stable and orderly financial markets. In particular, ESMA aims to focus on the following key areas: (i) the exercise of new, and existing, supervisory powers for benchmarks and data service providers (DRSPs) as well as central counterparties (CCPs); (ii) its contribution to the EU priorities on the development of the Capital Markets Union (CMU), sustainable finance and innovation; and (iii) the convergence of supervisory and regulatory practices across the EU. In addition, it will continue to monitor the impact of the United Kingdom's withdrawal from the EU on the evolution of EU and global capital markets.

Date of publication: 27/09/2021

### (iii) Eurozone

#### ECB: Decisions on the delegation of decision-making power regarding internal matters

Status: Published in the OJ

Date of entry into force: 26/09/2021

The following seven Decisions of the ECB on the delegation of the power to adopt certain decisions regarding internal matters and on related internal matters have been published in the OJ.

- Decision (EU) 2021/1437 amending Decision (EU) 2017/934 on the delegation of decisions on the significance of supervised entities (ECB/2021/33)
- Decision (EU) 2021/1438 amending Decision (EU) 2017/935 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2021/34)
- Decision (EU) 2021/1439 amending Decision (EU) 2018/546 on delegation of the power to adopt own funds decisions (ECB/2021/35)

- Decision (EU) 2021/1440 amending Decision (EU) 2019/1376 on delegation of the power to adopt decisions on passporting, acquisition of qualifying holdings and withdrawal of authorisations of credit institutions (ECB/2021/36)
- Decision (EU) 2021/1441 amending Decision (EU) 2019/322 on delegation of the power to adopt decisions regarding supervisory powers granted under national law (ECB/2021/37)
- Decision (EU) 2021/1442 on delegation of the power to adopt decisions on internal models and on extension of deadlines (ECB/2021/38)
- Decision (EU) 2021/1443 nominating heads of work units to adopt delegated internal models and extension of deadlines decisions (ECB/2021/40)

Date of publication: 06/09/2021

## 8. Investment funds

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### 8.1 Product regulation

#### (a) AIF

##### (i) Germany

#### **BaFin: Application of the ESMA guidelines on marketing communications under the Regulation on cross-border distribution of funds**

Status: Final

BaFin has published a statement confirming that it will apply the ESMA guidelines on marketing communications under the Regulation on cross-border distribution of funds in its supervisory practice from February 2022. The guidelines establish common principles on the identification of marketing communications, the description of risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and the fair, clear and not-misleading character of marketing communications, taking into account the online aspects of such marketing communications.

Date of publication: 27/09/2021

#### **BaFin: Update of the Leaflet on notifications pursuant to section 320 of the German Investment Code (Änderung des Merkblatts für Anzeigen nach § 320 KAGB)**

Status: Final

BaFin has updated the Leaflet on notifications pursuant to section 320 of the German Investment Code (*Kapitalanlagegesetzbuch – KAGB*). This Leaflet, which was originally published in 2013, presents the main features of the notification procedure pursuant to Section 320 of the KAGB and explains the requirements for the distribution of units and shares in EU AIFs or foreign AIFs to private investors in the Federal Republic of Germany.

With this update, BaFin reflects the changes to the KAGB introduced by the German Fund Jurisdiction Act (*Fondsstandortgesetz – FoStoG*) which entered into force on 2 August 2021. In particular, the update therefore specifies the notification procedures for a revocation pursuant to the new section 295a of the KAGB and additional information required for notifications regarding AIFs that are similar to infrastructure funds with the meaning of sections 260a et seq. of the KAGB.

Date of publication: 31/08/2021

#### **BaFin: Update of the Leaflet on distribution pursuant to section 329 of the German Investment Code (Änderung des Merkblatts zum Vertrieb gemäß § 329 KAGB)**

Status: Final

BaFin has updated the Leaflet on distribution pursuant to section 329 of the German Investment Code (*Kapitalanlagegesetzbuch – KAGB*). This Leaflet, which was originally published in January 2018, presents the main features of the notification procedure pursuant to section 329 of the KAGB and explains the requirements for the marketing of units or shares in domestic special feeder AIFs or EU feeder AIFs managed by an EU AIF management company or an AIF capital management company, whose respective master AIF is not an EU AIF or domestic AIF managed by an EU AIF management company or AIF capital management company, or foreign AIFs to semi-professional and professional investors in the Federal Republic of Germany.

With this update, BaFin reflects the changes to the KAGB introduced by the German Fund Jurisdiction Act (*Fondsstandortgesetz – FoStoG*) which entered into force on 2 August 2021. In particular, the updated version specifies the notification procedures via email or download and sets out the notification procedures for a revocation pursuant to the new section 295a KAGB.

Date of publication: 31/08/2021



## (b) UCITS

### (i) EU

#### **BaFin: Application of the ESMA guidelines on marketing communications under the Regulation on cross-border distribution of funds**

**Status: Final**

BaFin has published a statement confirming that it will apply the ESMA guidelines on marketing communications under the Regulation on cross-border distribution of funds in its supervisory practice from February 2022. For more information, please see section 8.1 (a) above.

Date of publication: 27/09/2021

## 9. Special rules for real estate financing and covered bonds

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### 9.1 Mortgage credits

#### (i) **Germany**

**BaFin: Consultation on the General Administrative Act regarding the reciprocal application of Luxembourg's loan-to-value limits for mortgage loans on private residential real estate (Anhörung zur Allgemeinverfügung zur reziproken Anwendung der Loan-to-Value-Begrenzung Luxemburgs für private Wohnimmobilienfinanzierungen)**

Status: Consultation

Deadline for the submission of comments: 04/10/2021

BaFin is consulting on the General Administrative Act regarding the reciprocal application of Luxembourg's loan-to-value (LTV) limits for mortgage loans on private residential real estate. The supervisory authority intends to issue this order pursuant to Section 48u(7) of the German Banking Act (*Kreditwesengesetz* – KWG) to recognise these LTV limits which have been enacted in Luxembourg by the Commission de Surveillance du Secteur Financier (CSSF) with effect from 1 January 2021. The LTV describes the ratio of the loan amount to the market value of a property. With this order, BaFin aims to implement a [Recommendation of the ESRB](#) of 11 June 2021.

Date of publication: 20/09/2021

## 10. Special topics

### 10.1 Covid-19

#### (i) EU

##### **ESRB: Monitoring the financial stability implications of Covid-19 support measures**

Status: Final

The ESRB has published a note on monitoring the financial stability implications of support measures to protect the economy from the effects of Covid-19. The note summarises the analysis conducted after the publication in February 2021 of the final report produced by the ESRB Working Group on monitoring the financial stability implications of fiscal measures to protect the economy in the context of Covid-19. The ESRB identifies five key conclusions: (i) fiscal support continues to play a role in sustaining the economic recovery and the functioning of credit markets; (ii) while banks are increasingly provisioning for balance sheet risks, they may be underestimating macroeconomic risks; (iii) looking ahead, banks and supervisors need to pay attention to the fact that the link between economic and financial losses has become less tight during the pandemic; (iv) addressing financial stability issues that could arise from increased corporate debt in a timely manner is crucial; and (v) the policy response of authorities will have to become more differentiated over time – in response to Covid-19, all Member States reacted swiftly and implemented large fiscal support measures. Yet, the ESRB notes that different sectoral structures and pre-existing vulnerabilities will contribute to a less synchronised economic recovery and that therefore macroprudential authorities must continuously monitor and assess the different risks to financial stability and stand ready to move from crisis mode to prevention mode as required.

Date of publication: 08/09/2021

### 10.2 FinTech/Digital finance

#### (i) Germany

##### **BMF: Regulation on crypto fund shares (Verordnung über Kryptofondsanteile – KryptoFAV)**

Status: Consultation

Deadline for the submission of comments: 01/10/2021

The German Ministry of Finance (*Bundesfinanzministerium* – BMF) published a draft Regulation on crypto fund shares (KryptoFAV). This new regulation is intended to promote Germany as a fund location by opening up the possibility for providers of investment funds to also issue crypto fund shares. It relies on the law on the introduction of electronic securities, including the Electronic Securities Act (*Gesetz über elektronische Wertpapiere* – eWpG), which entered into force on 4 June 2021, as this law created the possibility of issuing electronic securities by way of entry into an electronic securities register.

Accordingly, the new regulation enables the providers of investment funds to issue electronic securities by entering them in an electronic securities register as so-called crypto fund shares. The regulation governs the general possibility of issuing crypto fund shares and, to this end, extends the provisions of the eWpG to electronic shares. It is ensured that the register-keeping entity of an electronic securities register in which crypto fund shares are registered is always the depositary of the investment fund itself. This ensures that the depositary can fulfil its duties in relation to the investor.

Date of publication: 06/09/2021

## (ii) EU

### **EBA: Report on the use of digital platforms in the EU banking and payments sector**

Status: Final

EBA has published a report on the use of digital platforms in the EU banking and payments sector, which identifies a rapid growth in this use. It concludes that this growth creates potential opportunities for EU consumers and firms, in particular by 'bridging' the communication between consumers and financial institutions and reducing costs on both ends. However, these developments also result in new interdependencies between financial and non-financial firms which present new challenges to the supervisors in monitoring these developments. Therefore, EBA sets out steps in the report towards a strengthened supervisory capacity to monitor developments in the EU banking and payments sector to ensure that risks can be identified in a timely and coordinated manner. In this context, EBA suggests the prioritisation of the following steps for 2022: (i) developing common questionnaires for regulated financial institutions on digital platform and enabler use in order to facilitate tailored and proportionate information-gathering against a fast-evolving market; and (ii) sharing information about financial institutions' reliance on digital platforms and enablers to facilitate coordinated EU-wide monitoring.

Date of publication: 21/09/2021

## (iii) International

### **IOSCO: Final Report on the use of artificial intelligence and machine learning by market intermediaries and asset managers**

Status: Final

The International Organisation of Securities Commissions (IOSCO) has published a final report on the use of artificial intelligence (AI) and machine learning (ML) by market intermediaries and asset managers. IOSCO notes that the use of this technology by market intermediaries and asset managers may create significant efficiencies and benefits for firms and investors, including increasing execution speed and reducing the cost of investment services. However, this use may also create or amplify certain risks, which could potentially have an impact on the efficiency of financial markets and could result in consumer harm. The final report therefore provides guidance to assist IOSCO members in supervising market intermediaries and asset managers that utilise AI and ML.

The guidance consists of six measures that reflect expected standards of conduct by market intermediaries and asset managers – these measures include an expectation that regulators will consider requiring firms to have designated senior management responsible for the oversight of the development, testing, deployment, monitoring and controls of AI and ML and that regulators will require firms to adequately test and monitor the algorithms to validate the results of an AI and ML technique on a continuous basis.

Date of publication: 07/09/2021

## 10.3 Sustainable finance

### (i) Eurozone

#### **ECB: Results of the economy-wide climate stress test**

Status: Final

The ECB has published the results of its economy-wide climate stress test, which show that firms and banks benefit from an early adoption of green policies. In particular, it drew the following conclusions from these results: (i) firms and banks will be severely affected if climate change issues are not sufficiently addressed; (ii) an orderly and swift transition to minimise costs and maximise benefits outweighs short-term costs of the transition to a zero-carbon economy over a medium to longer term; and (iii) investment in sectors and regions heavily exposed to climate risk is set to suffer most.

Date of publication: 22/09/2021

## **ECB: Opinion on the proposal for the Corporate Sustainability Reporting Directive (CON/2021/27)**

### **Status: Final**

The ECB has published an Opinion on a proposal for the Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (Corporate Sustainability Reporting Directive). This proposal is based on a review of Directive 2014/95/EU, also called the Non-Financial Reporting Directive (NFRD), which lays down the rules on disclosure of non-financial and diversity information by certain large companies.

In this statement, the ECB welcomes the proposal as an important step towards a completed and green Capital Markets Union as well as its timeline regarding the proposed adoption by October 2022. It sets out the need for better disclosures on forward-looking indicators to advance sustainability-related business models and improve the accuracy of risk assessments. The ECB also welcomes the proposed requirement to disclose sustainability information in the planned European Single Access Point, which would then serve as ‘one-stop shop’ for all investors and stakeholders with an interest in financial and sustainability reporting. Furthermore, it supports the proposed disclosure obligations for certain larger EU undertakings regarding their sustainability targets and progress towards them, as their fear of reputational harm for not reaching the targets would help promote sustainability in the market. In addition, the statement suggests that financial institutions should be required to disclose sustainability transition and decarbonisation plans as a basis for monitoring by the competent authorities and steering them towards sustainability milestones.

Date of publication: 10/09/2021

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