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Briefing note

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ESMA consults on indirect clearing arrangements under EMIR and MiFIR

The European Securities and Markets Authority (ESMA) has published a consultation paper on indirect clearing arrangements under the European Market Infrastructure Regulation (EMIR) and the Markets in Financial Instruments Regulation (MiFIR).

The consultation refers to EMIR and MiFIR as they cover arrangements for over the counter (OTC) derivatives and exchange-traded derivatives (ETD) respectively. It covers:

- rules for ETDs that are developed under MiFIR; and
- rules for OTC derivatives to amend existing RTS under EMIR.

Comments are due by 17 December 2015.

Stress test: EBA publishes draft methodology for 2016 scenario

The European Banking Authority (EBA) has published its draft methodology for the 2016 EU-wide stress test and list of 53 participating banks, of which 39 are Single Supervisory Mechanism (SSM) banks. It has also set out details of its timeline for the stress test, which is expected to be launched by the end of February 2016. The draft methodology sets out the risk drivers that the stress test will measure, relating to:

- credit risk, including securitisations;
- market risk and counterparty credit risk; and
- operational risk, including conduct risk.

In addition, the draft methodology requests that banks submit projections of the effect of the scenarios on net interest income and to stress profit and loss and capital items not covered by other types of risk. The methodology for 2016 adds an explicit treatment of conduct risk and FX lending to its scope. Under the stress test there will be no single capital threshold defined, instead banks will be assessed against relevant supervisory capital ratios under a static balance sheet.

Alongside the draft methodology, the European Central Bank (ECB) has published the list of participating banks and announced that it will conduct a parallel stress test for significant institutions not covered by the EBA scenario, which will be consistent with the EBA's methodology but also give due consideration to the size and complexity of those institutions.

Stress test results for all significant institutions will be used to assess Pillar 2 capital needs of individual banks in the context of the Supervisory Review and Evaluation Process (SREP).

European Money Markets Institute consults on evolution of Euribor

The European Money Markets Institute (EMMI) has published a consultation paper on the proposed transaction-based determination methodology and transition planning for Euribor.

In July 2014, the Financial Stability Board published a report which, among other things, recommended that Euribor and other major interest reference rates based on unsecured funding costs should be underpinned to the greatest extent possible with transaction data. This publication was part of a broader endeavour to reform financial benchmarks with respect to their determination methodology, governance and accountability arrangements, including the IOSCO principles on financial benchmarks, the ESMA-EBA Principles for Benchmark-Setting Processes in the EU and the proposed EU Regulation on benchmarks. In this context, EMMI has been working on a transaction-based determination methodology for Euribor.

Comments are due 29 January 2016.

FSB publishes principles for cross-border effectiveness of resolution actions and other guidance on ending too-big-to-fail

The Financial Stability Board (FSB) has published its final principles for cross-border effectiveness of resolution actions, guidance on cooperation and information sharing between crisis management groups (CMGs) and authorities and three consultation papers on other aspects of the FSB's policy agenda to end too-big-to-fail. The principles set out statutory and contractual mechanisms that jurisdictions should consider to give cross-border effect to resolution actions in accordance with the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions, published in 2011. The principles include considerations for jurisdictions' legal frameworks, contractual recognition and temporary stays and have been developed with a focus on bank resolution, but may include relevant principles for other types of financial institutions as well as financial market infrastructures.

The FSB's guidance discusses cooperation and information sharing between CMGs and host authorities of jurisdictions where an FSB-designated global systemically important financial institution (G-SIFI) is systemic in a local market but

is not material in the context of a firm's overall group and is not represented on its CMG.

The three consultative documents published alongside the principles and guidance relate to:

- proposed guiding principles on temporary funding required to support the orderly resolution of a global systemically-important bank (G-SIB) in order to address the risk of banks having insufficient liquidity to maintain critical operations during a resolution;
- proposed guidance on arrangements to support operational continuity of shared critical services in a resolution scenario in order to maintain provision of a firm's critical functions or facilitate the orderly wind-down in resolution; and
- proposed guidance for authorities and CMGs of global systemically-important insurers (G-SIIs) relating to the development of effective resolution strategies and plans for systemic insurers. The document has been prepared in consultation with the International Association of Insurance Supervisors (IAIS).

Comments on all three consultations are due by 4 January 2016.

FSB updates lists of G-SIBs and G-SIIs

The FSB has published its annual lists of global systemically-important banks (G-SIBs) and global systemically-important insurers (G-SIIs).

The updated list of G-SIBs comprises a total of 30 banks. Compared with the list of G-SIBs identified in 2014, one bank (China Construction Bank) has been added to and one bank (BBVA) has been removed from the list. The FSB has allocated the G-SIBs to buckets corresponding to higher loss absorbency requirements, which will begin to be phased in from January 2016 with full implementation by 1 January 2019. The buckets indicated in the 2015 G-SIB list relate to each institution's higher loss absorbency requirements fourteen months later, from January 2017.

Alongside the updated list of G-SIBs, the BCBS has published the denominators used to calculate the banks' scores, thresholds used to allocate the banks to buckets and, for the first time, the full sample of banks assessed.

The updated list of G-SIIs comprises a total of nine insurers. Compared with the list of G-SIIs identified in 2014, one insurer (Aegon) has been added and one insurer (Generali) has been removed from the list.

The FSB has also announced that the IAIS intends to publish a consultation in November 2015 on methodological revisions for the assessment of G-SIIs.

The FSB will publish its next update in November 2016.

FSB reports on progress of OTC derivatives market reforms

The FSB has published its tenth progress report on implementation of over-the-counter (OTC) derivatives market reforms.

The report finds that:

- 19 of the 24 FSB jurisdictions have trade reporting requirements in force covering over 90% of transactions in their markets. However, there are still challenges to the effectiveness of trade reporting, such as authorities' ability to access, use and aggregate trade repository data;
- 12 out of 24 FSB jurisdictions have central clearing frameworks in force that apply to over 90% of transactions in their markets, while in eight jurisdictions platform trading frameworks are in force that apply to over 90% of transactions; and
- most jurisdictions are in the early phases of implementing the BCBS–IOSCO framework for margin requirements for non-centrally cleared derivatives.

The FSB has invited feedback on the report by 4 December 2015. The FSB has also published a Thematic Peer Review of OTC Derivatives Trade Reporting assessing the progress of FSB member jurisdictions in implementing trade reporting requirements. The FSB notes that whilst good progress has been made in implementing these requirements, further work needs to be undertaken to ensure that the data collected by trade repositories can be effectively used by regulators. Amongst other things, the report states that:

- comprehensive reporting is in place in the majority of FSB member jurisdictions;
- there are widespread legal and regulatory barriers to reporting complete transaction information and accessing trade repository data. FSB members have agreed to address remaining legal and regulatory barriers to reporting complete information by June 2018 at the latest. Masking of counterparty-identifying data will be discontinued by end-2018 once such barriers are removed; and
- there remain a number of challenges in the quality and usability of trade repository data.

FSB member jurisdictions will be asked to report by June 2016 on their planned actions to address remaining barriers to full reporting.

BCBS consults on haircut floors for non-centrally cleared securities financing transactions

The Basel Committee on Banking Supervision (BCBS) has published a consultation paper on its proposal for incorporating the FSB's policy framework for haircut floors for non-centrally cleared securities financing transactions (SFTs) into the Basel III framework.

In October 2014 the FSB published a report specifying the regulatory framework for haircut for non-centrally cleared SFTs and introduced a framework for haircut floors for non-centrally cleared SFTs. As part of this framework, the FSB recommended that the BCBS incorporate the haircut floors into the capital requirements for non-centrally cleared SFTs by setting significantly higher capital requirements for transactions with haircuts traded below the haircut floors.

The objective of the BCBS' proposal is to create incentives for banks to set their collateral haircuts above the floors rather than hold more capital. In the consultation, the BCBS specifically seeks feedback on any weaknesses or further improvements that the Committee should consider, and any specific implementation challenges.

Comments are due by 5 January 2016.

Market abuse: FCA consults on implementation of MAR

The Financial Conduct Authority (FCA) has launched a consultation on proposed policy and Handbook changes to support the implementation of the EU Market Abuse Regulation (MAR) from 3 July 2016. The consultation paper is aimed at any firm or individual that directly or indirectly deals in, or any firm that issues, financial instruments. The FCA is also seeking views on options available in relation to the requirement to provide an explanation of the delay to the disclosure of inside information and the threshold for disclosure of managers' transactions.

Alongside the consultation, HM Treasury (HMT) has separately announced the publication of its preliminary draft statutory instrument (SI) for consultation. A copy of the draft SI is available from HMT on request. Comments to both the FCA and HMT are due by 4 February 2016.

Revised law implementing Single Resolution Mechanism in Germany enters into force

The revised law implementing the Single Resolution Mechanism (SRM) has been published in the Federal Gazette. Most parts of the law entered into force on 6 October, but some parts will enter into force on 1 January 2016 and on 1 January 2017. The law implements the SRM and includes corresponding amendments to existing laws, including the German Recovery and Resolution Act, the German Restructuring Fund Law, the German Banking Act, the German Law on Covered Bonds and further changes.

Draft law implementing Transparency Directive passes German Federal Council

The draft law on the implementation of the Amended Transparency Directive (Directive 2013/50/EU) has passed the German Federal Council without objection. The draft law includes, amongst other things, a clarification on the relevant point in time for the duty to make voting rights notifications (and which still sets the entering of an agreement as decisive, not the delivery), respective exemptions, the abolishment of the duty to publish quarterly reports and, beyond the Transparency Directive, a new licence requirement for central securities depositaries under Regulation 909/2014/EU. The draft contains further provisions implementing the Transparency Directive and aligning German law with some aspects which had formerly not been implemented.

CONSOB publishes resolution on duty to publish final terms not included in base prospectus or supplement

The Commissione Nazionale per le Società e la Borsa (CONSOB) has published a resolution intended to implement in Italy Article 1 of the Omnibus II Directive (2014/51/EU) amending Article 5(4) of the Prospectus Directive (2003/71/EC) (Resolution no. 19430 of 29 October 2015).

The resolution is intended to introduce the duty upon the competent authority to submit final terms – where not included in a base prospectus nor in a supplement – to the competent authority of the host Member State(s) (if any) and to the European Securities and Markets Authority (ESMA).

The resolution amends CONSOB Regulation no. 11971 of 14 May 1999 on issuers and comes into force on 1 January 2016.

Swiss Federal Council adopts despatch on Financial Services Act and Financial Institutions Act

The Federal Council has adopted the despatch to the Parliament in relation to the draft Financial Services Act (FinSA) and Financial Institutions Act (FinIA).

The FinSA serves primarily to improve client protection. It contains rules on providing financial services and offering financial instruments for all financial service providers operating in the financial centre on a commercial basis. Among other things, the FinSA provides for:

- basic training and continuous professional development requirements for client advisers;
- modular rules of conduct for financial services providers based on the type of service. No suitability requirements will apply for execution only transactions or transactions at the client's request that are not within the framework of an advisory service. An assessment of appropriateness is required when advising clients on individual transactions (transaction-related investment advice), and an assessment of suitability is required when providing investment advice taking account of the entire client portfolio (portfolio-related investment advice and portfolio management);
- there will be two main client segments, retail clients and professional clients (with a subgroup for institutional clients). Client segmentation is structured as a dynamic system with the option for the client under certain conditions to switch between segments;
- a duty of disclosure for all forms of remuneration (e.g. retrocessions, brokerage fees, etc.) received from third parties; and
- client advisers of financial service providers not subject to supervision in Switzerland must be entered in a register of advisers.

FinIA will introduce a differentiated supervisory regime for financial institutions (portfolio managers, managers of collective assets, fund management companies and securities firms). The main change concerns the introduction of a prudential supervision of managers of individual client assets, managers of the assets of occupational benefits schemes and trustees. Not all financial institutions will be supervised by FINMA in the process. The prudential supervision of managers of individual client assets and trustees will be performed by one or more independent supervisory organisations. Supervisory authorities will have the power to determine the audit frequency of supervised firms depending on the risk and activity.

Ministerial Order on information and classification of financial products published in Spanish Official Gazette

The Ministerial Order ECC/2316/2015 on information and classification of financial products has been approved by the Council of Ministers and published in the Spanish Official Gazette (BOE).

The Order is intended to guarantee that every non-professional investor has sufficient information on the risk taken when acquiring a financial product. The Order applies to the sale of bonds, shares, bank deposits, individual pension plans and life insurance products, among others (products covered by Regulation (EU) 1286/2014 are excluded from the scope of this Order).

In order to achieve its aim, the Order establishes a classification of products through a six-colour scale (and through numbers from 1 to 6). In addition, for certain products, information shall include features such as whether the principal is guaranteed or not, the timeline in which the principal must be returned, the credit rating of the product or, failing this, the credit rating of the issuer.

The Order determines that this information must be provided to clients prior to the acquisition of the relevant financial product.

The Order will come into force on 5 February 2016.

MAS issues Securities and Futures (Reporting of Derivatives Contracts) (Amendment) Regulations 2015

The Monetary Authority of Singapore (MAS) has published the Securities and Futures (Reporting of Derivatives Contracts) (Amendment) Regulations 2015 in the Gazette. The following key amendments to the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 came into operation on 1 November 2015:

- amendment of scope of derivatives contracts for determining whether an entity is a significant derivatives holder by excluding, for the purpose of calculating the entity's aggregate gross notional amount of specified derivatives contracts, (a) where the last day of the quarter in question is on or after 1 August 2015 but before 1 November 2015, foreign exchange derivatives contracts traded in or booked in Singapore; and (b) in any other case, interest rate derivatives contracts traded in Singapore, credit derivatives contracts traded in Singapore and foreign exchange derivatives contracts traded in or booked in Singapore;

- extension of masking relief from 1 November 2015 to 1 July 2017, and extension of deadline for unmasking of historical transactions after expiry of masking relief from 31 December 2015 to 1 January 2018; and
- reporting of interest rate derivatives contracts and credit derivatives contracts traded in Singapore disapplied for specified persons that are not banks in Singapore licensed under the Banking Act and merchant banks approved under the Monetary Authority of Singapore Act.

FSC sets out plan to strengthen role of policy banks

The Financial Services Commission (FSC) has outlined its plan to strengthen the role of the Industrial Bank of Korea (IBK) and Korea Development Bank (KDB) as policy banks in a bid to support the sustainable growth of start-ups and foster new growth drivers for the economy. The plan includes:

- support for the growth of start-up and tech companies – the role of policy banks (IBK and KDB) will be revamped in accordance with business growth stages of start-ups;
- support for new growth industries – IBK and KDB will increase financial support for new growth engine sectors such as intelligent robots, wearable smart devices and renewable hybrid systems;
- corporate restructuring – for cyclical industries, KDB will strengthen its screening and monitoring system for corporate lending and provide temporarily financially distressed companies with liquidity; and
- sale of KDB's non-financial companies – KDB will sell its stakes in non-financial companies within the next three years.

FSC sets out direction on improving recovery and resolution regimes for financial institutions

The FSC has announced the basic direction for improving the recovery and resolution regimes for financial institutions, namely introducing a recovery and resolution planning framework and bail-in scheme. In particular, the FSC has announced the following details:

- recovery and resolution plans – recovery and resolution plans assuming a crisis situation will be produced on an annual basis and retained for that year for major financial institutions identified as systemically important financial institutions (SIFIs);
- 'bail-in scheme' – the scheme is designed to require not only shareholders but also creditors to bear losses when a financial institution becomes bankrupt, in order to address moral hazard; and
- temporary stays on early termination rights – the FSC notes that, in the course of recovery and resolution, market sentiment may deteriorate if early termination rights are exercised by too many trade counterparties to derivatives, RPs and other contracts. To prevent this from happening, the FSC will be given the power to impose temporary stays on early termination rights, including early withdrawal.

The FSC has indicated that the Act on Structural Improvement of the Financial Industry will be amended in 2016, after it has received comments from stakeholders including banks and monitored developments in other countries which are yet to adopt the regimes, such as Japan and Australia.

FRB proposes TLAC rules for G-SIBs operating in the US

The Federal Reserve Board (FRB) has requested comments on a new proposed rule intended to reinforce the capacity of the largest domestic and foreign banks operating in the United States to be resolved without large amounts of government support or taxpayer assistance.

The proposed rule would focus on domestic firms determined by the FRB as global systemically important banks (G-SIBs) and to the US operations of foreign G-SIBs. The G-SIBs would meet a new long-term debt requirement and a new total loss-absorbing capacity (TLAC) requirement intended to sustain financial stability and allow them to withstand financial stress and failure without imposing losses on taxpayers.

Domestic G-SIBs would be required to maintain at a minimum:

- outstanding external long-term debt equal to the greater of 6% plus its G-SIB surcharge of risk-weighted assets and 4.5% of total leverage exposure; and
- outstanding external TLAC equal to of the greater of 18% of risk-weighted assets and 9.5% of total leverage exposure.

The US operations of foreign GSIBs generally would be required to maintain at a minimum:

- outstanding internal long-term debt equal to the greater of 7% of risk-weighted assets and 3% of total leverage exposure and 4% of average total consolidated assets; and

- outstanding internal TLAC equal to the greater of 16% of risk-weighted assets and 6% of total leverage exposure and 8% of average total consolidated assets.

Comments on the proposal can be submitted until 1 February 2016.

RECENT CLIFFORD CHANCE BRIEFINGS

Clifford Chance Comment: Landmark Supreme Court Decision – The Penalties Doctrine Lives On (In a New Guise)

On 4 November 2015, the Supreme Court of the United Kingdom confirmed that the centuries-old doctrine of penalties still has a place in the modern commercial world of contracts, in spite of calls for its abolition, leaving the door open for Courts to interfere in contracts.

The Court was unanimous that the doctrine of penalties should not be abolished, but was divided on its scope and the relevant test to be applied. It is clear that there is a shift in focus from the classic test of 'genuine pre-estimates of loss' and concepts of extravagance, unreasonableness and deterrence, and a greater emphasis on 'legitimate interests' and punishment.

Given the similarities between English law and the law of other common law countries, the decision is expected to resonate globally.

This briefing paper summarises the key lessons for commercial parties arising out of this complex case and suggests possible next steps.

http://www.cliffordchance.com/briefings/2015/11/landmark_supremecourtdecisionthepenaltie.html

Clifford Chance Comment: Comparison of EU and Swiss derivatives rules

The new Swiss regime for the regulation of derivatives trading is expected to come into force on 1 January 2016, subject to phase-in.

In June 2015, the Swiss parliament passed into law the Federal Act on Financial Market Infrastructures and the Federal Department of Finance, the Financial Markets Authority and the Swiss National Bank have consulted on the implementing ordinances, which are expected to be adopted before year end.

The new regime has many similarities with the regime under the EU Market Infrastructure Regulation (EMIR) but has important differences.

This briefing paper compares key features of the EU and Swiss regimes.

http://www.cliffordchance.com/briefings/2015/11/comparison_of_euandswissderivativesrules.html

Clifford Chance Comment: The introduction of a new filing and registration regime for foreign debt management in China

With a view to facilitating the utilisation of offshore capital at a lower cost, on 10 May 2015, the State Council of the People's Republic of China (PRC) announced the removal of the quota approval system of the National Development and Reform Commission (NDRC) for the issuance of foreign debt by enterprises. On 14 September 2015, NDRC crystallised the initiative by issuing the NDRC Circular on Promoting the Reform of the Filing and Registration Regime for Issuance of Foreign Debt by Enterprises. The NDRC Circular took immediate effect and overhauls the requirement for prior approval for foreign debt issuance, and imposes a national quota system and a reporting regime.

This briefing paper examines the key features of the NDRC Circular and highlights its potential impact on current and future offshore bond issuance and borrowing involving PRC enterprises and certain offshore entities.

http://www.cliffordchance.com/briefings/2015/11/the_introductionofanewfilingandregistratio.html

Clifford Chance Comment: Overview of US Margin Requirements for Uncleared Swaps

On 22 October 2015, the Board of the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) approved the text of a final joint rule that will impose minimum margin requirements for uncleared swaps that involve swap dealers and major swap participants regulated by US bank regulators. The final rule is the result of a joint rulemaking process involving five prudential regulators of US financial institutions, including the FDIC, the Federal Reserve and the OCC. The prudential regulators that have not yet approved this rule are expected to do so in the coming days.

The final rule contains exemptions for certain end users and will not apply to swap dealers and major swap participants that are not regulated by any of the prudential

regulators. Instead, such swap entities will be subject to minimum margin requirements to be adopted by the Commodity Futures Trading Commission (CFTC) with respect to swap dealers and those to be adopted by the Securities and Exchange Commission (SEC) with respect to security-based swap dealers. These two agencies have not yet adopted implementing regulations.

This briefing paper discusses the final rule.

http://www.cliffordchance.com/briefings/2015/10/summary_of_us_marginrequirementsforuncleare.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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