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Briefing note

International Regulatory Update

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MiFID2: ECON Committee publishes draft reports on proposed delay

The EU Parliament Committee on Economic and Monetary Affairs (ECON) has published two draft reports on the EU Commission's legislative proposals to amend MiFID2 and MiFIR as regards certain dates, which were published by the Commission on 10 February 2016.

The draft ECON report on the proposed Regulation to amend MiFIR states that delaying the date of application of MiFIR by a year to 3 January 2018 as well as some corresponding dates also by a year seems sensible and justified and therefore recommends that the EU Parliament adopt the Commission's proposal at first reading.

The draft report on the proposed Directive to amend MiFID2 recommends an amendment to the Commission's proposal to move the date of transposition by Member States from 3 July 2016 to 3 July 2017, in line with the overall delay to allow Member States to transpose MiFID2 properly, particularly as the implementing legislation is still unavailable.

CRR: Commission Implementing Regulation on disclosure of leverage ratio published in Official Journal

A Commission Implementing Regulation (2016/200) laying down implementing technical standards (ITS) on disclosure of the leverage ratio for institutions under the Capital Requirements Regulation (CRR) has been published in the Official Journal. The Implementing Regulation sets out a disclosure template for information related to the leverage ratio and is intended to ensure effective and harmonised disclosure across the EU.

The Implementing Regulation applies from 17 February 2016.

CRR: EBA publishes final draft ITS on mapping of ECAIs' credit assessments for securitisation positions

The European Banking Authority (EBA) has published final draft implementing technical standards (ITS) on the mapping of external credit assessment institutions' (ECAIs') credit assessments for securitisation positions, developed under Article 270 of the CRR. The ITS will allow the credit ratings on securitisations assigned by registered credit rating agencies to be used for the purposes of calculating institutions' capital requirements.

The ITS specify the correspondence, or mapping, between credit ratings and credit quality steps that will determine the allocation of appropriate risk weights to credit ratings issued by ECAIs on securitisations where the standardised approach (SA) or the internal ratings based (IRB) approach are used.

The EBA is also considering developing a securitisation-specific systemic mapping methodology mainly based on the historical performance of securitisation ratings, but is delaying work due to a number of factors, including the representativeness of the data used and the ongoing review of the regulatory framework for capital requirements on securitisations.

DGSD 2: EBA publishes guidelines on cooperation agreements

The EBA has published final guidelines on cooperation agreements between deposit guarantee schemes, as provided for under the recast Deposit Guarantee Schemes Directive (DGSD 2). The guidelines specify details of the sequence of events when a local deposit guarantee scheme (DGS) performs a payout on behalf of a DGS in another Member State and the objectives and minimum content of cooperation agreements in relation to:

- repayments to depositors by a local DGS at branches of banks established in other Member States;
- transferring contributions from one DGS to another in cases where a credit institution ceases to be a member of a DGS and joins another DGS; and
- mutual lending between DGSs.

The guidelines are intended to facilitate the EBA's mediation role set out in DGSD 2, in instances where DGSs cannot reach an agreement or are in dispute.

The guidelines will be translated into the official EU languages and will apply six months after the translations are published on the EBA's website. National competent authorities will have two months following publication to inform the EBA whether they intend to comply with the guidelines.

Benchmarks Regulation: ESMA publishes discussion paper on implementation

The European Securities and Markets Authority (ESMA) has published a discussion paper (2016/288) on the technical implementation of the incoming Benchmarks Regulation. The paper seeks input to inform ESMA's future proposal on draft regulatory technical standards and technical advice to the EU Commission.

Feedback is requested in the following areas:

- definition of benchmarks;
- requirements for the benchmark oversight function;
- requirements for the benchmark input data;
- governance and control requirements for supervised benchmark contributors;
- authorisation and registration of an administrator; and
- transparency requirements regarding the benchmark methodology.

Comments on the discussion paper are due by 31 March 2016. Feedback received will be used to develop detailed implementing measures on which ESMA aims to publish a follow-up consultation in Q3 2016.

EMIR: ESMA publishes list of pension schemes exempt from clearing obligation

ESMA has published a list of 16 UK-based pension schemes that are exempt from the obligation to centrally clear over the counter (OTC) derivative contracts under the European Market Infrastructure Regulation (EMIR). Certain pension schemes were granted a transitional exemption from the clearing obligation under EMIR and the 16 in the list have now been granted an extension from the Financial Conduct Authority (FCA), their national competent authority.

EMIR: ESMA publishes updated Q&As

ESMA has published updated questions and answers on the implementation of EMIR. The update provides guidance on how the clearing obligation should apply to swaps resulting from the exercise of a physically-settled swaption, including during the frontloading period.

PRA and FCA publish policy statement on rules for senior managers regimes

The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have published a joint policy statement (PRA PS5/16, FCA PS16/5) setting out final rules relating to executive accountability in banking and insurance. The policy statement sets out feedback on relevant consultations and final rules relating to:

- regulatory references for deposit takers, insurers and PRA investment firms;
- the SIMR, which is relevant to Solvency II insurers and large non-Directive firms (NDFs);
- the application of the SIMR to Swiss general insurers; and
- the SM&CR, which is relevant for all banks, building societies, credit unions and PRA-designated investment firms.

Most of the rules come into effect on 7 March 2016, with certain rules taking effect from 15 February 2016.

PRA consults on amendments to loan to income ratio rules for mortgage lending

The PRA has launched a consultation on proposed amendments to the Housing Part of the PRA Rulebook in respect of second and subsequent charge mortgage contracts. As part of the UK implementation of the Mortgage Credit Directive (2014/17/EU - MCD) from 21 March 2016, the definition of regulated mortgage contract will include second and subsequent charge mortgage contracts. The PRA is consulting on proposed amendments to its rules in order that second and subsequent charge mortgage contracts are excluded from the loan to income (LTI) flow limit on regulated mortgage contracts. The LTI flow limit was adopted following a Financial Policy Committee (FPC) recommendation in June 2014.

The PRA intends to consult on including second charge mortgage contracts in the LTI flow limit when loan level data becomes available during 2017.

Comments on the consultation are due by 11 March 2016.

CRD 4: PRA publishes approach to identifying other systemically important institutions (O-SIIs)

The PRA has published a policy statement (PS6/16) on its approach to identifying other systemically important institutions (O-SIIs). The policy statement sets out feedback on the PRA's consultation launched in October 2015, the PRA's final statement of policy and a list of UK firms designated as O-SIIs, whose distress or failure would have a systemic impact on the UK or EU economy, or financial system due to due to size, importance (including substitutability or financial system infrastructure), complexity, cross-border activity and interconnectedness.

The criteria for identifying O-SIIs set out in the statement of policy is based on methodology set out in Article 131(3) of the Capital Requirements Directive (CRD 4) and is intended to be consistent with European Banking Authority (EBA) guidelines. The 2015 list of O-SIIs has been prepared on the basis of the methodology and the PRA has designated 16 firms as O-SIIs based on data as at 31 December 2014. The PRA is required to identify O-SIIs on an annual basis.

The policy statement is relevant credit institutions, investment firms and EEA parent (mixed) financial holding companies incorporated in the UK. The proposals do not apply to EEA and third-country branches operating in the UK.

FCA consults on proposed guidance on enforcing security under the Consumer Credit Act 1974

The FCA has published a consultation paper (GC16/2) on proposed guidance relating to enforcement of security under the Consumer Credit Act 1974.

The proposed guidance relates to the requirement under section 87 of the Consumer Credit Act to serve a default notice before taking certain actions following breach of a regulated agreement, in particular for guarantor loans under which an individual other than the borrower provides a guarantee or indemnity (or both) in relation to a regulated credit agreement or a regulated consumer hire agreement. The consultation also sets out an update to the FCA's views on the need for a default notice in certain circumstances as set out in the FCA's rules on consumer credit rules and guidance (PS15/23), which were published in September 2015.

Comments on the consultation are due by 18 March 2016.

Dutch Central Bank opens whistleblowing desk

The Dutch Central Bank (DCB) has announced the opening of a whistleblowing desk. The whistleblowing desk provides employees working in the financial sector with a platform to (anonymously) report instances of public interest subject to the DCB's supervision, such as fraud, corruption or other serious breaches of law and regulations at financial institutions. Before approaching the whistleblowing desk, employees are expected to report the wrongdoing internally within the financial institution first.

The whistleblowing desk is part of the DCB's broader supervision regarding the integrity of the financial sector. The goal of the whistleblowing desk is to make it easier for employees to report breaches of law and regulations at financial institutions.

At the whistleblowing desk, specialised DCB employees will process the reports received. Where necessary, DCB employees can start an investigation. The DCB has announced that six serious breaches have already been reported since the opening of the whistleblowing desk on 12 February 2016.

Italian Government announces possibility for Italian and foreign investment funds to engage in direct lending on primary market with Italian borrowers

The Italian Government has presented a set of measures including, among others, a long awaited law decree (Banks' Law Decree) which introduces, amongst other things, the possibility for Italian and foreign investment funds to engage in direct lending on the primary market with Italian borrowers.

The Banks' Law Decree adds a new chapter to the Italian Financial Act (Legislative Decree no. 58/1998) dealing with 'credit collective investment schemes' (OICR di credito). The new provisions stipulate that, subject to certain conditions, funds can engage in lending activities in Italy.

Amongst other things, pursuant to the new rules:

- Italian alternative investment funds (AIFs) can invest in loans 'granted to non-consumers by using the fund's resources'; and
- EU AIFs can invest in loans 'granted to non-consumers by using the fund's resources' subject to certain conditions (e.g., the AIF is authorised to extend financing by using the fund's resources in its home Member State, the rules governing risk mitigation and diversification to which the AIF is subject in its home Member State are comparable to those applicable to Italian AIFs, etc.).

The Banks' Law Decree will enter into force on the day after its publication in the Official Journal of the Republic of Italy and will then have to be converted into law by the Italian Parliament.

BaFin consults on draft circular on minimum requirements for risk management

The German Federal Financial Supervisory Authority (BaFin) has published a draft proposing amendments to the circular on Minimum Requirements for Risk Management (MARisk).

The draft focuses on three main topics:

- firstly, it implements the Basel Committee paper BCBS 239 on effective risk data aggregation and risk reporting. This entails adjustments of the IT structures of systemically relevant credit institutions;
- secondly, it further articulates the risk culture – following proposals from, amongst others, the Financial Stability Board (FSB) and the EBA in this respect as well as reasoning in recital 54 of CRD 4 – which aims

at a better recognition and visibility of risks, including its limits among the personnel of a credit institution; and

- finally, it provides further details of the administrative practice on outsourcing, especially regarding risk control, compliance and internal audit, which may not be outsourced entirely (and, in the case of risk control, also not partially).

The draft is open for consultation until 4 April 2016.

BaFin publishes note on German agents of EEA payment services providers

BaFin has published a note on inland agents of EEA payment services providers under the German Payment Services Supervisory Act (Zahlungsdiensteaufsichtsgesetz). The note contains details of the prerequisites to be followed by a natural or legal person acting as an agent pursuant to section 1, para 7 of the Act.

Among other things, the note sets out that an agent should:

- have a written agreement with the payment services provider;
- have been notified to BaFin by the home regulator;
- be registered with the foreign regulator;
- openly operate in the name of the payment services provider; and
- comply with AML provisions.

Agents will not have their own licence but will be required to register with the local authorities. Non-compliance may lead to criminal and administrative sanctions.

PBoC publishes measures on over-the-counter business in nationwide inter-bank bond market

The People's Bank of China (PBoC) has published the 'Administrative Measures on Over-the-Counter Business in the Nationwide Inter-bank Bond Market', in order to boost the development of the bond market and increase the proportion of direct financing. The following key points are worth noting:

- financial institutions conducting OTC business shall satisfy certain requirements stipulated in the Measures and submit relevant documents for filing with the PBoC;
- 'Bond OTC Business' includes bond transactions traded by way of spot trade, pledge-type repo, outright transfer type of repo and other trading models approved by the PBoC. Permissible traded bonds include: (i) existing treasury bonds, local government bonds, bonds issued by the China Development Bank and policy banks, all of which have been confirmed by the issuers to be traded under the Bond OTC Business, and (ii) newly issued bonds which permit trading under the Bond OTC Business; and
- investors under the Bond OTC Business include financial institutions, licensed investment companies or asset managers and their investment products or schemes, and qualified corporates and individuals – investors who fail to meet the requirements can only purchase and sell bonds whose issuer rating and bond rating are higher than Grade AAA, and trade bond repos.

SGX consults on changes to derivatives rules and contract specifications

The Singapore Exchange (SGX) has launched a consultation on proposed amendments to the Futures Trading Rules, SGX-DC Clearing Rules and various contract specifications arising from the introduction of its next-generation derivatives trading and clearing system, SGX Titan, and proposed revisions to the price limits for SGX CNX Nifty Futures and SGX MSCI India Index Futures.

The proposed amendments and enhancements include:

- use of the previous day's price limits for the initial part of the T+1 session, until the daily settlement price for the preceding T session becomes available;
- enhanced functionalities, including the ability for trading members to set pre-trade risk controls and a tool to prevent inadvertent self-trading where both sides of the trade belong to the same party; and
- revised price limits for SGX CNX Nifty Index Futures and SGX MSCI India Index Futures.

Comments on the consultation paper are due by 10 March 2016.

CLIFFORD CHANCE BRIEFINGS

European Court finds directors of English company may be liable for breach of German company law

In a recent case (Kornhaas v Dithmar C-594/14), the European Courts of Justice have held that the managing director of an English company is liable to reimburse the company's liquidator for failing to file for German insolvency proceedings within a 21 day time limit imposed by German company law. This was in accordance with the provisions of the European Regulation on Insolvency Proceedings (EUIR), which provides a framework for allocating

insolvency jurisdiction amongst Member States and then decides which law applies to those insolvency proceedings. So because the English company was subject to German insolvency proceedings, certain aspects of German corporate law which were closely linked to the insolvency law also applied.

This briefing paper discusses the case.

http://www.cliffordchance.com/briefings/2016/02/european_court_findsdirectorsofenglishcompan.html

SOCIMIs – Relevant new MAB developments

On 10 February 2016, the MAB's Daily Bulletin published a modification of the General Regulations of the Alternative Equity Market (Mercado Alternativo Bursátil or MAB), and approved eleven new Circulars implementing the same.

In practice, these changes oblige SOCIMIs (either already included in the MAB and to be included shortly) to implement a series of measures on a short- to medium-term basis.

The aim of the new rules is to adapt the MAB regulations to recent legislative amendments introduced by, among others, the Business Financing Promotion Act (Ley 5/2015, de 27 de abril, de Fomento de la Financiación Empresarial) and the Audit Act (Ley 22/2015, de 20 de julio, de Auditoría de Cuentas).

This briefing paper discusses the new rules.

http://www.cliffordchance.com/briefings/2016/02/socimis_relevantnewmabdevelopments.html

Public State guarantee to secure securitisations of non-performing loan receivables – the Italian 'bad bank' solution?

On 16 February 2016, a set of measures presented by the Italian Government entered into force following the publication of the long awaited Law Decree no. 18 of 14 February 2016 aimed at fostering the disposal by Italian banks of their portfolios of non-performing loans accumulated during the recession period. Although the new measures are nothing like the bad bank structures introduced in some other European countries over the past few years, they represent a significant (and apparently the only possible) step to allow Italian banks to reduce their exposures and clean up their balance sheets, with a view to enhancing economic growth.

Going in the same direction are also the measures aimed at allowing non banking institutions, and in particular Italian and EU 'alternative investment funds' (AIFs), to grant financings to Italian companies, on certain conditions.

In addition, the Italian Government has issued a bill of law to be discussed and approved by the Italian Parliament, providing new features to speed up the judicial enforcement procedures and to reform the Italian insolvency regime.

The Banks' Law Decree includes also special tax provisions to ease the judicial sale of properties subject to enforcement proceedings, by setting a flat tax of EUR 200 due on account of mortgage, land-registry and stamp taxes (as opposed to a 9% ordinary tax) on the condition that the purchaser re-sells the property within the following 2 years. This measure is expected to incentivise significantly the pro-active participation of investors in public judicial auctions and the consequent realisation of enforced claims, with the 'side effect' of speeding up enforcement procedures.

This briefing paper discusses the set of measures enacted by the Italian Government.

http://www.cliffordchance.com/briefings/2016/02/public_state_guaranteetosecuresecuritisation.html

Alternative financing sources – EU and Italian 'funds' now allowed to engage in direct lending to Italian businesses

On 16 February 2016, a set of Italian Government measures became effective following the publication of the long awaited Law Decree no. 18 of 14 February 2016. In particular, these measures cover the disposal of non-performing loans by Italian banks and provide new rules outlining for the first time the ability of Italian alternative investment funds (AIFs) and EU AIFs, subject to certain conditions, to engage in direct lending in Italy.

This has been hailed as a real breakthrough, which could potentially open up the Italian direct lending market through credit funds.

This briefing paper discusses the new rules.

http://www.cliffordchance.com/briefings/2016/02/alternative_financingsourceseuanditalia.html

Expedited route to Europe for Turkish issuers

On 8 February 2016, ESMA published an opinion which will make it easier for Turkish issuers to access the European equity capital markets.

This briefing paper discusses the opinion.

http://www.cliffordchance.com/briefings/2016/02/expedited_route_toeuropeforturkishissuers.html

UAE Commercial Companies Law – What have we learned?

The UAE Commercial Companies Law (Federal Law No. 2 of 2015) (CCL) entered into force on 1 July 2015, replacing Federal Law No. 8 of 1984. A number of key changes were brought about by the enactment of the CCL, which introduced new legal concepts into the UAE's corporate framework and impacted established market practices.

This briefing paper provides an update on legislative and practical developments in the UAE market following the introduction of the CCL.

http://www.cliffordchance.com/briefings/2016/02/uae_commercial_companieslawwhathavew.htm