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Briefing note

International Regulatory Update

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EU Commission issues opinion supporting greater ECB regulatory powers for clearing systems

The EU Commission has issued a favourable opinion on the recommendation by the European Central Bank (ECB) that the scope of Article 22 of the Statute of the European System of Central Banks (ESCB) and of the ECB be amended to allow the ECB to regulate clearing systems for financial instruments.

The amendment would enable the ECB to perform responsibilities in the process of authorisation, recognition and oversight of central counterparties (CCPs) based both within and outside the EU.

Noting, amongst other things, the increased systemic importance of CCPs and the significant impact of the UK's withdrawal from the EU on the regulation and oversight of clearing in Europe, the Commission strongly welcomes the amendment subject to certain limited adjustments. These adjustments broadly seek to avoid parallel or conflicting rules, particularly between regulations adopted by the ECB under Article 22 (once amended) and legal acts, such as the European Market Infrastructure Regulation (EMIR) (also once amended).

The EU Parliament and Council will now consider the proposed amendment under the ordinary legislative procedure, in parallel to the pending changes to the EMIR.

Benchmarks Regulation: EU Commission adopts Delegated Regulation on conditions to assess impact resulting from cessation of or change to existing benchmarks

The EU Commission has adopted a Delegated Regulation supplementing the Benchmarks Regulation (EU 2016/1011) with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks (C(2017) 6537 final). The Delegated Regulation sets out a non-exhaustive list of conditions to be taken into account by a national competent authority when considering the permission to use an existing benchmark which does not meet the requirements of the Benchmark Regulation in the EU.

The Delegated Regulation will enter into force 20 days following its publication in the Official Journal.

Interchange Fees: EU Commission adopts RTS on application of independence requirements for card schemes and processing agents

The EU Commission has adopted regulatory technical standards (RTS) under the Interchange Fees Regulation (2015/751 - MIF Regulation), which relate to requirements to be complied with by payment card schemes and processing entities in order to ensure their independence in terms of accounting, organisation and decision making processes.

The European Banking Authority (EBA) submitted draft RTS on 26 July 2016 and the Commission notified the EBA of its intention to endorse the draft RTS following amendments on 5 January 2017. The EBA accepted certain amendments, but did not include all of the Commission's amendments in its revised draft RTS. The Commission has set out that it maintains the view that the amendments are necessary for the RTS to comply with the MIF Regulation and has therefore adopted the RTS with all of the amendments, which include:

- removing a derogation from independence of the organisation which would allow for the sharing of staff for the development of new solutions;
- removing the proposal to allow for staff to participate in all employee share plans and benefits arrangements as being incompatible with the requirement that remuneration policies should reflect the performance of either the payment card scheme or the processing entity; and
- safeguarding the independence of management bodies, requiring that, instead of a purely numerical limit to any

overlapping directorships in the respective management bodies, payment card schemes and processing entities should set clear and objective criteria specifying under which conditions directorships may be held by the same person at the same time in the respective management bodies.

The RTS will enter into force on the twentieth day following publication in the Official Journal.

PAD: EU Commission adopts Delegated Act on standardised terms and definitions of payment accounts

The EU Commission has adopted a Delegated Regulation supplementing the Payment Accounts Directive (2014/92/EU – PAD), which sets out EU standardised terms and definitions of the most representative services linked to a payment account and subject to a fee that are common to at least a majority of Member States. The terms and definitions are specified in the annex to the Regulation.

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

EU Commission refers Spain to CJEU for not transposing PAD

The EU Commission has announced its decision to refer Spain to the Court of Justice of the EU (CJEU) for failure to notify measures for fully implementing the PAD.

The PAD gives all legal EU residents the right to a basic payment account for a reasonable fee, regardless of the place of residence. It also improves the transparency of payment account fees and makes it easier to compare and switch.

The deadline for transposition of the PAD into national laws was 18 September 2016, and Member States were required to inform the Commission immediately once implementation had taken place. To date, Spain has not transposed the PAD into national law; therefore, the Commission is referring Spain to the CJEU.

ESMA consults on guidelines for non-significant benchmarks

ESMA has launched a consultation on draft guidelines detailing the obligations which apply to non-significant benchmarks under the Benchmarks Regulation (BMR).

The consultation proposes lighter requirements for non-significant benchmarks, their administrators and their supervised contributors in relation to the following areas:

- procedures, characteristics and positioning of oversight function;
- appropriateness and verifiability of input data;
- transparency of methodology; and
- governance and control requirements for supervised contributors.

The first three areas are applicable to administrators of non-significant benchmarks while the fourth one is directly applicable to supervised contributors to non-significant benchmarks.

Comments are due by 30 November 2017.

ESMA publishes 2018 work programme

ESMA has published its work programme for 2018, which sets out its priorities and areas of focus for the coming year.

In 2018, ESMA intends to focus on:

- providing guidance and promoting the consistent application of MiFID2 and MiFIR;
- ensuring the quality, integration, usability and transparency of the data it collects;
- contributing to the development of Level 2 measures in relation to the revised Prospectus Regulation (PD3); and
- enhancing the effectiveness of supervisory activities at individual credit rating agencies (CRA) and trade repositories (TR) level.

The overall budget for 2018 is expected to be EUR 42,051,386 with a projected staff of 232.

ECB consults on addendum to NPL guidance for banks

The European Central Bank (ECB) has launched a consultation on a draft addendum to the ECB guidance on non-performing loans (NPLs). The addendum supplements the guidance which was published on 20 March 2017 and is intended to reinforce the guidance with regard to fostering timely provisioning and write-off practices.

The draft addendum specifies quantitative supervisory expectations for minimum levels of prudential provisions for new NPLs. The prudential provisioning expectations will apply to all exposures that are newly classified as non-performing in line with the European Banking Authority (EBA) definition as of 1 January 2018. These take into account the length of time a loan has been non-performing

and the extent and valuation of collateral. More specifically, banks are expected to provide full coverage for the unsecured portion of new NPLs after 2 years at the latest and for the secured portion after 7 years at the latest. Additionally, banks are expected to explain any deviation from the guidance to supervisors. Based on the banks' explanations the ECB will assess the need for additional supervisory measures.

It is proposed that the draft addendum will be applicable to new NPLs.

Comments are due by 30 November 2017.

Basel Committee announces national discretion for NSFR treatment of derivative liabilities

The Basel Committee on Banking Supervision (BCBS) has announced that it has agreed to allow national discretion for the treatment of derivative liabilities in relation to the net stable funding ratio (NSFR), which is expected to begin on 1 January 2018.

The NSFR assigns a 20% 'required stable funding' factor to derivative liabilities. The Committee has agreed that, at national discretion, jurisdictions may lower the value of this factor, with a floor of 5%. The Committee is considering whether any further revisions to the treatment of derivative liabilities are warranted, and if so, will undertake a public consultation on any proposed changes.

FSB consults on unique product identifier governance arrangements

The Financial Stability Board (FSB) has launched a consultation on proposed governance arrangements for a uniform global unique product identifier (UPI) applying to OTC derivatives markets. The intended role of the UPI is to uniquely identify OTC derivatives products that authorities require to be reported to trade repositories by assigning each product a code which maps to a set of data elements describing the product in a corresponding reference database.

In particular, the FSB is seeking feedback on proposed key criteria and functions for the UPI governance arrangements and on certain issues relating to UPI service providers, cost recovery and fee models and the reference data library underlying the UPI system.

The FSB also intends to consult on proposals for the allocation of the UPI governance functions, as well as further aspects of the UPI service provider model, in 2018.

Comments are due by 13 November 2017.

BoE recommends exclusion of certain central bank claims from leverage ratio

The Bank of England (BoE) has published its record of the Financial Policy Committee (FPC) meeting held on 20 September, at which the FPC agreed to maintain the UK countercyclical capital buffer (CCyB) at 0.5% and reaffirmed that the FPC expects to increase the rate to 1% at its November meeting, with binding effect a year later. Following the BoE's annual stress test, the FPC has also announced that regulatory capital buffers for individual firms will be set so that each bank could absorb potential losses on consumer lending, alongside all of the other effects of the stress scenario on the balance sheet. Individual capital buffers will be set following publication of the full stress test results.

The FPC has also confirmed that it recommends the Prudential Regulation Authority's (PRA's) rules on the leverage ratio (LR) exclude from the calculation of the total exposure measure those assets constituting claims on central banks, where they are matched by deposits accepted by the firm that are denominated in the same currency and of identical or longer maturity, and that the minimum LR should be set at 3.25%. Alongside the record, the PRA has published a policy statement on the UK leverage ratio - treatment of claims on central banks (PS21/17), a PRA Rulebook instrument, updated its Supervisory Statement on instructions for completing data items FSA083 and FSA084 (SS46/15) and republished template FSA083. The BoE has also updated its policy statement on the FPC's powers over leverage ratio tools, published in July 2015, in light of the changes agreed by the FPC on 20 September 2017.

BRRD: BoE updates approach to resolution and consults on internal MREL

The BoE has published an update to its approach to resolution, and launched a consultation on setting internal MREL.

The BoE's second edition of its approach to resolution presents an update to the document published in 2014. It sets out:

- key features of the resolution regime;
- how the bank would likely implement a resolution; and
- the BoE's 'business as usual' responsibilities as the UK's resolution authority.

The BoE is also consulting on its approach to setting internal MREL (minimum requirement for own funds and

eligible liabilities) following a Statement of Policy focussed on external MREL published in November 2016. The consultation relates to instruments that are issued to the resolution entity from other legal entities in a group and also sets out proposals for additions and amendments to the MREL Statement of Policy that would be needed to address them. Moreover, the consultation sets out:

- proposed amendments to the Statement of Policy to address operational continuity requirements and the setting of external MREL for multiple point of entry (MPE) groups; and
- an update on how the BoE intends to develop its policy on:
  - requiring firms to disclose and report their MREL resources; and
  - on restrictions on firms investing in each other's loss-absorbing resources.

Internal MREL is intended to cover UK headquartered banking groups as well as UK subsidiaries of overseas banking groups. The consultation proposes that the transition period for internal MREL requirements should be the same as external MREL requirements.

Comments on the consultation are due by 2 January 2018.

PRA publishes policy statement on refining Pillar 2A capital framework

The PRA has published a policy statement (PS22/17) providing feedback to responses to its consultation on refining the PRA's Pillar 2A capital framework (CP3/17).

The PRA states that most respondents were supportive of the proposals in CP3/17, but a number of respondents sought greater clarity on aspects of the proposals and their implementation.

PS22/17 contains the final amendment to the Reporting Pillar 2 Part of the PRA Rulebook (Appendix 1) and updates the following supervisory statements and statement of policy:

- SS31/15 'The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP)' (Appendix 2);
- SS32/15 'Pillar 2 reporting, including instructions for completing data items FSA071 to FSA082' (Appendix 3); and
- Statement of Policy 'The PRA's methodologies for setting Pillar 2 capital' (Appendix 4).

PRA publishes policy statement on internal ratings based approach

The PRA has published a policy statement (PS23/17) incorporating responses to its consultation paper (CP5/17) on the PRA's expectations for the internal ratings based (IRB) approach. The policy statement contains the final amendments to the supervisory statement (SS11/13) on IRB approaches.

The policy statement clarifies for firms applying for IRB model approval:

- how they can demonstrate that they meet the requirements of the Capital Requirements Regulation (CRR) on 'prior experience' of using IRB approaches; and
- the use of external data to supplement internal data for estimating Probability of Default (PD) and Loss Given Default (LGD) for residential mortgages.

The policy statement also finalises two reference points for estimating Probability of Possession Given Default (PPGD) for residential mortgages for firms that lack significant possession data.

PRA consults on groups policy framework

The PRA has launched a consultation on proposed amendments to its groups policy framework.

In particular, the proposed amendments are intended to ensure the framework remains coherent and fit for purpose in light of post-crisis financial reforms, such as Basel III and UK ring-fencing legislation.

The consultation proposes the following:

- the assessment and mitigation of the risks to group resilience posed by the use of 'double leverage' (when one or more parent entities funds some of the capital in its subsidiaries by raising debt or lower forms of capital externally);
- the assessment and mitigation of the risks highlighted by prudential requirements applied by local regulatory authorities on overseas subsidiaries of UK consolidation groups; and
- improved monitoring of the way financial resources are distributed across different group entities.

To implement these proposals, the PRA intends to amend:

- Supervisory Statements, 'The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP)'

(SS31/15) and 'The PRA's approach to supervising funding and liquidity risk' (SS24/15);

- Statement of Policy 'The PRA's methodologies for setting Pillar 2 capital'; and
- the 'Internal Capital Adequacy Assessment' part of the PRA Rulebook.

Comments are due by 4 January 2018. Once the proposals are finalised, the PRA intends to implement the policy fully from 1 January 2019. The PRA also requests that, where practical and applicable, firms incorporate the consultation proposals in their 2018 ICAAP/Individual Liquidity Adequacy Assessment Process submissions in advance of full implementation.

PRA consults on large exposures framework

The PRA has launched a consultation on proposed amendments to requirements relating to intragroup transactions in the 'Large Exposures' (LE) part of the PRA Rulebook and to the Supervisory Statement 'Large Exposures' (SS16/13). The proposals, which form part of PRA's larger review of the groups policy framework, are intended to simplify the intragroup LE framework, improve the consistency of the process of granting intragroup permissions and facilitate the orderly resolution of banking groups.

Amongst other things, the PRA is seeking feedback on the following proposals:

- enhancing guidance on the application of criteria for core UK group (CUG) and non-core LE group (NCLEG) permissions;
- changing the NCLEG calibration basis for firms that have both a CUG and an NCLEG permission;
- changing how the NCLEG permission applies at the UK consolidated group level; and
- allowing firms to apply to exempt exposures identified and reported as internal minimum requirements of own funds and eligible liabilities (MREL) from the LE limit.

Comments are due by 4 January 2018.

Ordinance modernising legal framework for asset management and debt financing published

Ordinance 2017-1432 of 4 October 2017 modernising the legal framework for asset management and debt financing has been published in the Official Journal.

The aim of the ordinance is to adapt provisions of the Monetary and Financial Code with the objective of enabling certain collective investment undertakings to grant loans to undertakings, strengthening their capacity to finance and refinance investments, infrastructure or projects, modernising their operation and enhancing investor protection. The creation of easily exportable funds is accompanied by a reform of the securitisation bodies, broadening the financing capacities of companies.

The purpose of the ordinance is also to strengthen the regulatory framework and improve the accessibility of the legal regime for certain French funds and, consequently, the competitiveness of the Paris market place.

Bank of Italy consults on NPL management by less significant Italian banks

The Bank of Italy has launched a consultation on a set of proposed guidelines intended to govern the management procedures for NPLs by less significant Italian banks. The draft guidelines were conceived starting from the ECB's guidance to banks on non performing loans applicable to significant banks.

Comments need to be submitted by 19 October 2017.

Dutch Authority for the Financial Markets urges exempt managers of AIFs to reduce AML and CTF risks

The Dutch Authority for the Financial Markets (AFM) has publicly expressed a concern about the risks that exempt alternative investment fund managers (AIFMs) incur in the area of money laundering and financing of terrorism. The AFM had requested feedback from these AIFMs on how they avoid becoming involved in these activities. The results indicate that compliance with the applicable AML and CTF rules needs to be enhanced in a number of areas.

Dutch Central Bank issues new insurance guidance

The Dutch Central Bank (DNB) has published guidance on managing data quality in its September 2017 Insurance Newsletter. The guidance contains the main principles on managing data quality in light of the EU Solvency II rules.

DNB has also published its good practices for integrity risk appetite. This is aimed at those financial institutions that are screening their dos and don'ts regarding integrity risks.

Dutch Central Bank publishes its guidance on transaction monitoring

The DNB has published its guidance on transaction monitoring. The guidance is relevant for financial institutions to detect possible risks in the area of money laundering and financing of terrorism.

Dutch Central Bank consults on new regulation on sound remuneration policies

The DNB has launched a consultation on a new Regulation on Sound Remuneration Policies 2017. The draft regulation will replace the one published in 2014 and is relevant to Dutch banks, investment firms and certain pension funds.

The consultation is open until 13 October 2017.

Dutch Central Bank informs Dutch corporate service providers of certain deficiencies

The DNB has noticed that within certain corporate services providers (trust offices) that combine tax advice and corporate services, the latter are usually subservient to the tax advice. According to the DNB, this combination negatively influences their business integrity.

In addition, according to DNB, the manual screening of the sanctions list is error prone and undesirable in the high risk world of corporate service providers.

FINMA investigates ICO procedures and publishes guidance

The Swiss Financial Market Supervisory Authority (FINMA) has issued FINMA Guidance 04/2017 on initial coin offerings (ICOs). This follows a marked increase in ICOs conducted in Switzerland. FINMA has also indicated that it is investigating a number of ICO cases to determine whether regulatory provisions have been breached.

FINMA recognises the innovative potential of such technology and has been supporting efforts in developing and implementing blockchain solutions in the Swiss finance industry for several years.

How ICOs are structured from a technical, functional and business standpoint varies markedly from offering to offering. ICOs are currently not governed by specific regulations, either globally or in Switzerland. Swiss legislation on financial markets is principle-based; one such principle is technology neutrality. Collecting funds for one's own account without a platform or issuing house is unregulated from a supervisory perspective in cases where repayment is not required, payment instruments have not been issued and no secondary market exists.

Depending on how an ICO is structured, however, some parts of the procedure may fall under existing regulations. As specified in FINMA Guidance 04/2017, this concerns the following areas in particular:

- provisions on combating money laundering and terrorist financing;
- banking law provisions;
- provisions on securities trading;
- provisions set out in collective investment scheme legislation.

Given the close resemblance, in some respects, between ICOs/token-generating events and conventional financial-market transactions, one or more aspects of financial market law may cover ICO campaigns depending on the model chosen.

FINMA cannot rule out that ICO activities may be fraudulent, especially in light of current market developments. A few days ago, it therefore published a press release informing the general public about enforcement proceedings currently in progress and how it deals with fake cryptocurrencies. It also issued a general warning about increased fraudulent activity by fake cryptocurrency providers.

MAS amends Notice 637 on risk based capital adequacy requirements for banks incorporated in Singapore

The Monetary Authority of Singapore (MAS) has published MAS Notice 637 (Amendment) 2017, which amends MAS Notice 637 on Risk Based Capital Adequacy Requirements for Banks Incorporated in Singapore dated 14 September 2012 and last revised on 17 October 2016. The amendment notice makes amendments to the following parts of the notice:

- Part IV (Capital adequacy ratios and leverage ratio);
- Part V (Transitional arrangements); and
- Part XII (Reporting schedules).

This revised Notice is effective from 22 September 2017.

MAS consults on changes to notification requirements in relation to representatives of financial institutions serving only non-retail customers

The MAS has launched a public consultation on proposed changes to the notification requirements in relation to representatives of financial institutions serving only non-retail customers.

The MAS proposes to streamline the Representative Notification Framework (RNF) and apply the notification requirements only in respect of representatives who serve retail customers. The RNF was introduced in 2010 to allow financial institutions to lodge notifications with the MAS for their representatives conducting regulated activities under

the Securities and Futures Act (SFA) and Financial Advisers Act (FAA).

Under the proposal, financial institutions will not be required to submit notifications for their representatives who serve only non-retail customers, as such customers are generally better able to protect their own interests. The proposed procedural change is intended to reduce the administrative burden of financial institutions, by reducing the number of notifications they have to lodge.

In particular, the MAS seeks views on the following:

- the proposal not to require financial institutions to lodge notifications for representatives who serve only non-retail customers; and
- whether to consider 'expert investors' as retail or non-retail customers for the purposes of the proposed changes to the RNF framework.

Comments on the consultation are due by 27 October 2017.

MAS responds to feedback on review of competency requirements for representatives conducting regulated activities under the SFA and FAA

The MAS has published its response to the feedback it received on its December 2016 public consultation on its review of the competency requirements for representatives conducting regulated activities under the SFA and FAA.

Amongst other things, the MAS has confirmed that:

- for greater consistency in professional standards, it will work with the Institute of Banking and Finance (IBF) and Singapore College of Insurance (SCI) to incorporate relevant content from the industry codes of other professional bodies into the Rules, Ethics and Skills (RES) modules;
- instead of offering only one add-on module for trading on securities exchanges and another for derivatives exchanges, MAS will introduce an add-on exchange module for each approved exchange;
- in consultation with IBF, MAS will provide appointed representatives of non-exchange member firms the option of taking a combined RES module on securities and derivatives;
- under the proposed amendments to the SFA, appointed representatives dealing in options on equity index will be deemed as 'dealing in derivatives';
- MAS will introduce four additional combined product knowledge modules to give appointed representatives who wish to deal in multiple products the option to sit for fewer examinations;
- the IBF and SCI will provide administrative details of the revised Capital Markets and Financial Advisory Services Examination (CMFAS) examinations, including the costs and waiting time, in due course;
- MAS will be reducing the accredited continuing professional development (CPD) training hours for appointed representatives under the FAA from 12 hours to 6 hours, and will no longer prescribe a minimum number of hours for ethics or rules and regulations; and
- MAS will introduce a total of 9 hours of CPD training requirements for SFA appointed representatives, which will take effect on 1 January 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

Brexit – what next for EU nationals in the UK?

On 22 September 2017, Theresa May stated that EU citizens' rights will be enshrined in the final Brexit treaty and called on European leaders to strike a 'bold and ambitious' trade deal with Britain in two years. This briefing discusses what EU citizens can do now to prepare.

https://www.cliffordchance.com/briefings/2017/10/uk_brexit_-_whatnextforeunationalsintheu.html

New legislation regulating cyber security and the internet in Russia

This briefing discusses Russia's three new cyber-security and internet laws that introduce infrastructure security requirements (the CDI Law), regulate technologies that can be used to access restricted websites (the VPN Law) and introduce specific regulations for instant messaging service providers (the IM Law).

https://www.cliffordchance.com/briefings/2017/10/new_legislation_regulatingcybersecurityandth.html

SEC announces creation of cyber unit

Following its own data breach, the SEC recently announced a new enforcement initiative that will target cyber-related threats. This briefing discusses this new Cyber Unit and the implications it has for registered entities and publicly traded companies.

https://www.cliffordchance.com/briefings/2017/10/sec_announces_creationofcyberunit.html