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ECON Committee reports on Commission proposals for Covered Bonds Directive and Regulation

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published draft reports on the EU Commission's proposals for a Directive and a Regulation on covered bonds.

The proposed Directive is intended to lay down the conditions that covered bonds should respect in order to be recognised under EU law, and the draft

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Regulation would amend the Capital Requirements Regulation (CRR) as regards exposures in the form of covered bonds. Both the proposals form part of the Commission's Capital Markets Union (CMU) action plan.

In both the draft report on the proposed Directive and the draft report on the proposed Regulation, the ECON Committee's rapporteur, Bernd Lucke, notes that the Commission's proposals make progress towards some of the objectives set out in the EU Parliament's 2017 resolution entitled 'Towards a pan-European covered bonds framework' (2017/2005(INI)), but warns that they fail to address certain Parliament proposals, in particular:

- a clear distinction between premium covered bonds (PCBs) and ordinary covered bonds (OCBs);
- regulatory preference for OCBs over other forms of collateralised debt; and
- a European Secured Notes (ESN) framework as a third tier after PCBs and OCBs.

The report also calls for improvements to the proposals relating to:

- PCBs and OCBs being highly liquid and close to risk-free assets;
- transparency of covered bond structures to facilitate risk assessment;
- homogeneity of cover pools;
- extendable maturities;
- rules for a liquidity buffer; and
- third-country equivalence.

Capital Markets Union: ESMA publishes final report on disclosure requirements under Securitisation Regulation

The European Securities and Markets Authority (ESMA) has published its final report on draft regulatory and implementing standards (RTS/ITS) covering disclosure requirements under the Securitisation Regulation, and providing feedback on responses received to its December 2017 consultation.

The draft RTS specify the level of information that has to be provided by an originator, sponsor or a securitisation special purpose entity (SSPE) regarding:

- underlying exposures – loans, leases and other receivables;
- investor report information;
- inside information on insider dealing and market manipulation relating to the securitisation; and
- information on significant events affecting the securitisation.

The draft ITS focus on the format and reporting templates used to make that information available.

ESMA has submitted the draft RTS/ITS to the EU Commission for endorsement.

ESMA renews product intervention measures for binary options

ESMA has agreed to renew its prohibition of the marketing, distribution or sale of binary options to retail clients under Article 40 of MiFID.

ESMA considers that a significant investor protection concern related to the offer of binary options to retail clients continues to exist and has agreed to renew the prohibition from 2 October 2018 for a further three month period.

During its review of the intervention, ESMA considered the specific features of binary options currently within scope of the measure and identified features of some products which mitigate the risk of investor detriment, namely that they:

- are sufficiently long-term – at least 90 days;
- are accompanied by a prospectus; and
- are fully hedged by the provider or another entity within the same group as the provider.

ESMA considers that a binary option that benefits from the cumulative effect of these criteria is less likely to lead to a significant investor protection concern. Additionally, products that at the end of the term have one of two predetermined pay-outs, neither of which is less than the initial investment of the client, will be excluded.

As a result, ESMA has agreed to exclude from the scope of the renewal the following binary options:

- a binary option for which the lower of the two predetermined fixed amounts is at least equal to the total payment made by a retail client for the binary option, including any commissions, transaction fees and other related costs; and
- a binary option where:
  - the term from issuance to maturity is at least 90 calendar days;
  - a prospectus in accordance with the Prospectus Directive is made available to the public; and
  - the binary option does not expose the provider to market risk throughout the term of the binary option and the provider or any of its group entities do not make a profit or loss from the binary option, other than previously disclosed commissions, fees, or other related charges.

ESMA will continue its review of these products during the prohibition period and intends to adopt the renewal measure in the coming weeks. The measure will then be published in the Official Journal and will apply from 2 October 2018 for a period of three months.

Brexit: HM Government outlines proposed framework for financial services

HM Government has published a presentation produced by the UK negotiating team for discussion with the EU on the development of the future framework for financial services.

The slides, which are dated 25 July 2018, add further detail to what was set out in the Government's White Paper and call for a mutually acceptable solution that encourages both parties to work together constructively, protecting financial stability, and respecting the principle of autonomous decision-making, under which each party would determine its own rulebook and assess whether access to its market is maintained. In particular, the presentation includes:

- an overview of the key features of the UK position;
- proposals for a bilateral agreement to overcome deficiencies in the existing third country regime;
- international precedents to build on; and
- proposals for three pillars for the new, bilateral economic and regulatory arrangement:
  - common principles for the governance of the relationship;
  - extensive supervisory cooperation and regulatory dialogue; and
  - predictable, transparent and robust processes.

Brexit: UK Government publishes first set of technical notices on a no deal scenario

The Department for Exiting the European Union (DExEU) has published a guidance note explaining the UK Government's overarching approach to preparing for a 'no deal' Brexit scenario alongside 24 technical notices setting out information to allow businesses and citizens to understand what they would need to do to make informed plans and preparations. The Government will publish more notices during September 2018.

Overall, the Government takes the view that an orderly, negotiated exit is the best outcome for all parties but notes that until both the UK Government and EU sign a Withdrawal Agreement and it is ratified by the UK Parliament and the EU Parliament, there remains the possibility of the UK leaving the EU without a deal. As such, the Government intends to increase public preparation for a potential no deal as a contingency.

In its guidance, the Government sets out its approach to prioritise stability for citizens, consumers and business, to ensure the smooth operations of business, infrastructure and public services, and to minimise any disruption to the economy. Some of the technical notices demonstrate where the government would act unilaterally to seek to provide continuity for a temporary period in order to protect and minimise disruption to UK citizens and businesses, irrespective of whether the EU reciprocates. The extent of such continuity would vary by area with change happening over time where and when it is deemed best for the UK.

Among the technical notices, the Government has set out no deal guidance on banking, insurance and other financial services, which sets out guidance for:

- UK-based customers of UK based providers;
- UK based customers of EEA firms operating in the UK;
- EEA customers, including UK citizens living abroad, of UK firms operating in the EEA;
- financial services firms and funds; and
- financial market infrastructures (FMIs).

The technical notice on VAT for businesses if there is no Brexit deal sets out guidance on:

- UK businesses importing goods from the EU;
- accounting for import VAT on goods imported into the UK;

- VAT on goods imported into the UK;
- VAT on goods entering the UK as parcels sent by overseas businesses;
- VAT on vehicles imported into the UK;
- UK businesses exporting goods to the EU
- UK businesses exporting goods to EU consumers;
- UK businesses exporting goods to EU businesses;
- UK businesses selling their own goods in an EU Member State to customers in that country;
- UK businesses supplying services into the EU;
- place of supply rules for UK businesses supplying services into the EU;
- EU Tour Operators' Margin Scheme;
- UK businesses that access EU-wide VAT IT systems;
- UK VAT Mini One Stop Shop (MOSS);
- EU VAT refund system;
- EU VAT registration number validation; and
- businesses in Northern Ireland importing and exporting to the Republic of Ireland.

The Government has emphasised that the notices are meant for guidance only.

Brexit: SIs under the EU (Withdrawal) Act for 20 to 24 August 2018

HM Government published new draft statutory instruments (SIs) under the EU (Withdrawal) Act 2018 last week, including the draft Capital Requirements (Amendment) (EU Exit) Regulations 2018. The Regulations will make amendments to aspects of the CRR in retained EU law to ensure that it continues to operate effectively in the UK once the UK has left the EU, as well as the main pieces of UK legislation that implement the Capital Requirements Directive (CRD 4 and previous CRD iterations) to ensure that they continue to function as intended post-exit, specifically:

- the Regulated Covered Bonds Regulations 2008;
- the Capital Requirements Regulations 2013;
- the Capital Requirements (Country-by-Country Reporting) Regulations 2013; and
- the Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014.

An explanatory memorandum accompanying the draft SI has also been published.

The draft instrument is still in development and is intended to provide Parliament and stakeholders with further details on HM Treasury's approach to onshoring financial services legislation. The drafting approach, and other technical aspects of the proposal, may change before the final instrument is laid before Parliament. HM Treasury intends to lay this SI before Parliament in the autumn.

For information on all draft SIs under the EU (Withdrawal) Act published last week, visit http://www.gov.uk and http://www.legislation.gov.uk.

Banking Regulation and Supervision Agency of Turkey takes further measures to ease financial markets

The Banking Regulation and Supervision Agency (BRSA) previously announced that the total notional principal amount of banks' currency swaps and other similar products (spot + forward FX transactions) with foreign counterparties where at the initial date local banks pay TRY and receive FX should not exceed 25% of the bank's regulatory capital. In this regard, unless the current excess is eliminated, no further transactions of these types could be executed and maturing transactions would not be renewed.

The BRSA has now decided to include all derivative transactions other than swaps carried out in order to buy TRY, such as forwards and options, within these restrictions.

SFC issues circular to licensed corporations on securities margin financing review

The Securities and Futures Commission (SFC) has issued a circular to licensed corporations drawing attention to its report on securities margin financing activities, which summarises the key findings of the SFC's recent review of brokers' securities margin financing activities.

Overall, the SFC has identified that total margin loans increased nine-fold between 2006 and 2017, reaching HKD 206 billion. The review also found that margin loan quality had deteriorated and risk controls were insufficient, leading to excessive concentration of exposure to individual margin clients and collateral stocks. Some brokers also failed to promptly collect outstanding margin and did not regularly perform proper stress testing.

To address these risks, the SFC has launched a two-month consultation on proposed guidelines to clarify, codify and standardise risk management practices for securities margin financing.

HKEX publishes consultation outcome on proposed exemption for aircraft leasing activities from notifiable transaction rules

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has published the conclusions from its November 2017 public consultation on a proposed exemption for aircraft leasing activities from its notifiable transaction rules.

Based on the feedback received, the SEHK has decided to adopt the proposals set out in the consultation paper with modifications to the scope of qualified aircraft leasing activities and the alternative disclosure required in announcements and financial reports.

Under the amended listing rules:

- qualified aircraft lessors will be defined as listed issuers that are actively engaged in aircraft leasing with aircraft operators as their principal activities. The issuer must also satisfy the following qualification criteria:
  - there is a clear disclosure of aircraft leasing as a current and continuing principal business activity in the issuer's latest published annual report (or its initial public offering prospectus);
  - aircraft leasing is reported as a separate and continuing segment (if not the only segment) in the latest published financial statements; and
  - the issuer's directors and senior management, taken together, have sufficient experience relevant to the aircraft leasing industry, and the individuals relied on must have a minimum of five years' relevant industry experience;
- qualified aircraft leasing activities will include acquisitions or disposals of aircraft and finance leases or operating leases of aircraft with aircraft operators that are conducted in the ordinary and usual course of business of qualified aircraft lessors; and
- qualified aircraft leasing activities will be exempt from the specific disclosure and/or shareholders' approval requirements normally applicable to notifiable transactions. Issuers are required to provide alternative disclosure by way of announcements and in their interim/annual reports.

The amendments to the listing rules (Update No. 122 and Update No. 57) will be effective on 15 October 2018.

HKMA issues guidance on online distribution and advisory platforms for non-SFO-regulated structured investment products

The Hong Kong Monetary Authority (HKMA) has issued a circular to authorised institutions to provide guidance on online distribution and advisory platforms for structured investment products not regulated by the Securities and Futures Ordinance (SFO) (non-SFO-regulated structured investment products).

Following the issuance of the guidelines on online distribution and advisory platforms by the Securities and Futures Commission (SFC) on 28 March 2018, the HKMA consulted the banking industry in May 2018 on applying the same principles to online and offline distribution and advisory platforms for non-SFO-regulated structured investment products on a risk-based basis. Taking into consideration the feedback received, the HKMA has refined the proposals and finalised the detailed requirements for online distribution and advisory platforms for non-SFO-regulated structured investment products.

The guidance covers the following areas:

- core principles for operation of online platform and specific guidance on robo-advice;
- application of the suitability requirement for non-SFO-regulated structured investment products;
- minimum information and warning statements for non-SFO-regulated structured investment product; and

- exemptions for institutional professional investors and corporate professional investors.

HKMA issues guidance note on cooperation in investigations and enforcement proceedings

The HKMA has issued a guidance note to provide an overview of how it considers and recognises co-operation in its investigations and enforcement proceedings and highlight the benefits of cooperation.

The HKMA encourages early and substantial cooperation because it assists the detection, efficient investigation and prompt rectification of statutory and regulatory breaches and misconduct and fosters a culture of responsibility and self-improvement. The HKMA highlights that cooperation generally saves time, costs and resources for all parties concerned. The HKMA recognises the benefits of cooperation and may reduce sanctions if appropriate in all the circumstances of the case. The earlier and more substantial the cooperation, the more likely a person will benefit from cooperating with the HKMA.

To encourage cooperation, the guidance note explains how the HKMA assesses cooperation and gives examples of cooperation which include proactive rectification of deficiencies, taking responsibility, providing statements of admitted facts and promptly paying appropriate compensation to customers.

The guidance note does not apply to criminal cases in respect of which the Department of Justice has sole discretion over prosecutions.

MAS responds to feedback on liquidity risk management framework for fund management companies

The Monetary Authority of Singapore (MAS) has published its responses to feedback on its October 2017 public consultation on a proposed set of guidelines on the liquidity risk management framework for fund management companies (FMCs), specifically relating to collective investment schemes (CIS) and proposed amendments to the Code on Collective Investment Schemes (CIS Code).

Among other things, MAS' feedback sets out that:

- FMCs that are sub-managers are expected to operate the CIS in line with the liquidity risk management parameters set out by the main manager, and to monitor the liquidity risks of the portion of the CIS delegated to the FMC. The applicability of the Guidelines to such delegated FMC should be determined based on the substance of the FMC's role;
- FMCs acting as representative for recognised CIS are not expected to duplicate the requirements for these CIS in Singapore. However, these FMCs should ensure that there is adequate disclosure to investors on the liquidity risk management approach applied to the CIS. They should also put in place arrangements to apprise themselves of developments that impact the CIS' ability to meet redemption requests from investors in Singapore;
- the Guidelines will be applicable to FMCs that manage all types of open-ended CIS, regardless of the investor types;
- the applicability of the Guidelines to FMCs managing closed-ended CIS and CIS with lock-up periods would be retained, but not to FMCs managing

segregated mandates and funds-of-one which are set up for a single institutional investor;

- FMCs that manage exchange-traded funds (ETFs) are expected to consider the liquidity of both the underlying assets and the liquidity of the ETFs in the secondary market as part of their liquidity risk management framework;
- FMCs can leverage on global risk management functions where relevant, and do not need to replicate the function in Singapore. FMCs that do not offer products to retail investors, and manage CIS with less frequent redemption terms, are minimally expected to designate a senior staff to be responsible for liquidity risk management;
- FMCs are expected to monitor and manage the liquidity risk of a CIS throughout its lifecycle, and assess the profile and liquidity needs of investors. Some measures proposed by MAS include actively engage key investors to divine any intention to make large redemptions, and monitor aggregated information about funds flows, overall investor profile and concentration of the CIS, such as through establishing arrangements with fund platforms and distributors; and
- FMCs (including those who act as non-discretionary representatives of recognised CIS) are encouraged to include disclosures in the CIS' offering documents to explain the general approach that FMCs may take and/or the liquidity risk management tools that may be employed, and the impact such tools may have on investors' redemption rights. Such disclosures need not be specific and detailed.

MAS has amended the CIS Code to:

- impose additional requirements for money market funds (MMFs), which are to invest at least 10% of net asset value (NAV) in daily maturing liquid assets and 20% of NAV in weekly maturing liquid assets; and
- require FMCs to notify both participants (directly or through distributors) and the MAS of any suspension and resumption of dealing in CIS units.

The Guidelines were issued on 16 August 2018 and the updated CIS Code was issued on 17 August 2018. MAS will provide a transitional period of six months for FMCs to assess and adopt the sound practices in the Guidelines, where appropriate, and for MMFs to comply with the revised CIS Code.

Australian government consults on Treasury Laws Amendment (Consumer Data Right) Bill 2018

The Australian government has launched a public consultation on the exposure draft legislation and accompanying explanatory materials which will implement the consumer data right (CDR) in line with the recommendations of the review into open banking in Australia. The Bill is intended to amend the Competition and Consumer Act 2010, the Privacy Act 1988 and the Australian Information Commissioner Act 2010.

Amongst other things, the Bill:

- establishes a new CDR framework to enable consumers to more effectively use data relating to them for their own benefit;
- empowers the Australian Competition and Consumer Commission (ACCC) to make consumer data rules, in consultation with the Office of the

Australian Information Commissioner (OAIC), determining how the CDR applies in each sector;

- includes privacy safeguards that provide an enhanced level of protection for CDR data relating to a CDR consumer that is not CDR data about a product;
- expands the Privacy Act to protect the non-CDR data held by small businesses, if the small business is an accredited data recipient under the CDR system with an annual turnover of less than AUD 3 million; and
- provides the OAIC with the function of enforcing the privacy safeguards and providing individual remedies to consumers, and the ACCC with the function of enforcing the balance of the regime and for taking strategic enforcement actions.

Comments on the consultation paper are due by 7 September 2018.

CLIFFORD CHANCE BRIEFINGS

Brexit, English law and the English courts – where are we now?

Brexit brings many uncertainties that have yet to be resolved. However, the English law used in transactions is not one of them; it will remain the same after Brexit as it was before because the EU, for all its law-making, has had minimal impact on transactional law. Similarly, the procedure, judges and practitioners in the English courts will not change as a result of Brexit. The main way in which Brexit might affect the English courts is the ease of enforceability of an English judgment in the EU, or vice versa, but that will only matter if enforcement in the EU is important and no satisfactory mitigants are available.

This briefing discusses these issues, as well as the factors that will direct a choice of jurisdiction in a transaction to be entered into before the uncertainties of Brexit have resolved themselves.

https://www.cliffordchance.com/briefings/2018/08/brexit_english_lawandtheenglishcourtswher.html

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