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EU Commission and MAS agree common approach on certain derivatives trading venues

The EU Commission and the Monetary Authority of Singapore (MAS) have agreed a common approach for EU and Singapore derivatives trading venues.

The common approach aims to facilitate EU financial counterparties' ability to comply with the EU derivatives trading obligation under Article 28 of MiFIR by executing swaps transactions on organised markets in Singapore, and likewise allow Singapore counterparties to engage with EU counterparts on the EU's multilateral trading facilities (MTF) or organised trading facilities (OTF) in compliance with Singapore's derivatives trading obligation. The trading obligation would cover interest rate swaps denominated in several currencies including the US dollar, Euro and Pound Sterling.

EU Commission Vice President for Financial Stability, Financial Services and Capital Markets Union Valdis Dombrovskis intends to propose that the EU Commission adopt an equivalence decision recognising a list of organised markets in Singapore as platforms eligible for the execution of derivatives subject to the EU on-venue trading obligation, providing the requirements of MiFIR have been met.

The MAS intends to propose the adoption of regulations to exempt EU MTFs and OTFs from the requirement to be an authorised exchange or recognised market operator under Section 7(1) of the Securities and Futures Act.

The list of venues covered by the MAS exemptions and EU Commission equivalence decision may be amended or updated depending on changes or developments in the markets, including future authorisation of trading venues on both sides.

The Commission and MAS plan to work together to implement the common approach and will monitor its impact to assess whether any further action is appropriate.

EMIR: ESMA to recognise three UK CCPs in the event of a no-deal Brexit

The European Securities and Markets Authority (ESMA) has announced that three UK CCPs will be recognised to provide their services in the EU in the event of a no-deal Brexit: LCH Limited, ICE Clear Europe Limited and LME Clear Limited. The recognition decisions were adopted in order to limit the risk of disruption in central clearing and to avoid any negative impact on the financial stability of the EU.

ESMA has assessed the applications submitted by the three UK CCPs and consulted the relevant authorities in accordance with the European Market Infrastructure Regulation (EMIR) and determined that the conditions for recognition under Article 25 of EMIR have been met by the three CCPs in the event of a no-deal Brexit. The recognition decisions would take effect on the date following Brexit date in a no-deal scenario.

ESMA publishes 2019 work programme for credit rating agencies, trade repositories and third country CCPs and CSDs

ESMA has published its 2018 annual report and 2019 work programme for trade repositories (TRs), credit rating agencies (CRAs), and third-country central counterparties (TC-CCPs) and central security depositories (TC-CSDs).

Key 2018 achievements highlighted in the report include:

- improvement of the quality of TR data through the Data Quality Action Plan;
- investigation into the rating process and methodology of CRAs;
- a thematic review of fees charged by CRAs and TRs;
- analysis of the potential risks posed to the EU by TC-CCPs; and
- preparatory work for the recognition of UK CCPs and CSDs.

In 2019 ESMA intends to focus on, amongst other things:

- TR data quality and access by public authorities;
- TR business continuity planning, IT reliability and information security;
- CRA portfolio risk and quality of the rating process;
- CRA cybersecurity;
- recognition of UK CCPs in a no deal Brexit scenario; and
- assessing the pending applications for recognition as TC-CCPs and TC-CSDs.

MiFIR: ESMA extends binary options prohibition for further three months

ESMA has decided to renew the prohibition of the marketing, distribution or sale of binary options to retail clients from 2 April 2019 for three months.

The prohibition, in effect since 2 July 2018, will be on the same terms as the previous renewal decision of 9 November 2018 that has applied since 2 January 2019.

SRB publishes valuation framework

The Single Resolution Board (SRB) has published a framework for valuation in resolution.

The objective of the framework, which is based on Level 1 and Level 2 legal texts, is to provide an indication of the SRB's expectations regarding principles and methodologies for carrying out valuations. The SRB also considers the document useful for banks in the context of resolution preparedness.

The framework covers:

- the main types of valuation methodologies, including the discounted cash flow method (DCF), the market multiples method and the adjusted book value method;

- specific considerations regarding the valuation approach for each resolution tool, i.e. bail-in, bridge institution, asset separation and sale of business;
- the conduct of provisional valuations prior to resolution informing the choice of resolution action, the extent of any eventual write-down or conversion of capital instruments and other decisions on the implementation of resolution tools;
- valuations after resolution to determine whether the 'no creditor worse off' principle has been adhered to; and
- general considerations regarding the treatment of specific assets and liabilities, including performing and non-performing exposures, specific and contingent liabilities, and securities, derivatives and other tradable assets.

The SRB does not intend the guidance to replace or supersede any applicable regulatory or accounting requirement, nor to develop or define a framework for information requirements.

However, it does expect it to provide an indication of the information valuers may need to conduct valuations.

A Q&A is published alongside the framework.

BRRD: EBA publishes valuation handbook

The European Banking Authority (EBA) has published a handbook on valuation for the purposes of resolution.

The handbook follows the recent publication of the framework for valuation in resolution by the Single Resolution Board (SRB) and is intended as a non-binding support document for resolution authorities.

Based on Level 1 and Level 2 texts, the aim of the document is to provide a non-exhaustive outline of the main steps in which valuations may be articulated and of the valuation process, including:

- horizontal issues common to valuations before resolution;
- a high-level illustration of valuations for assessing whether the conditions for resolution or write-down and conversion are met;
- considerations of operational costs and the determination of the buffer for additional losses in provisional valuations;
- asset valuation under hold and disposal value assumptions, as well as considerations relating to the application of cash flows and discount rates;
- the assessment of liabilities and of contingent assets and liabilities;
- equity valuation of the institution itself;
- the implementation of resolution tools; and
- the appointment of an independent valuer, and potential content of the valuation report.

The handbook also provides guidance on specific aspects of valuations after resolution to determine no creditor worse off.

The final chapter of the handbook on the enhancement of institutions' valuation preparedness is not yet finalised as the EBA and SRB are still carrying out work in this area.

Brexit: SIs under the EU (Withdrawal) Act for 18 – 22 February 2019

HM Government published new draft statutory instruments (SIs) under the EU (Withdrawal) Act 2018 last week.

The draft Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No. 2) Regulations 2019, concerning the US Privacy Shield framework, were withdrawn due to an error in the explanatory memorandum and a corrected version re-laid for sifting. The draft Electronic Communications (Amendment etc.) (EU Exit) Regulations 2019 were also laid for sifting.

The draft Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 were laid before Parliament.

The following statutory instruments were made:

- the Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/328);
- the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/325);
- the Interchange Fee (Amendment) (EU Exit) Regulations 2019 (SI 2019/284);
- the Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019 (SI 2019/341);
- the Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019 (2019/336);
- the Market Abuse (Amendment) (EU Exit) Regulations 2019 (SI 2019/310);
- the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019 (SI 2019/335);
- the Social Entrepreneurship Funds (Amendment) (EU Exit) Regulations 2019 (SI 2019/343); and
- the Venture Capital Funds (Amendment) (EU Exit) Regulations 2019 (SI 2019/333).

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

Brexit: FCA publishes statement on onshoring retail binary options and CFDs restrictions

The Financial Conduct Authority (FCA) has published a statement informing firms that ESMA's temporary restriction on contracts for difference (CFDs) and temporary prohibition of binary options being sold to retail clients will form part of UK law on 29 March 2019 in a no deal scenario.

Firms are therefore required to comply with ESMA's decision notices until they expire.

The FCA is still considering feedback to its two consultation papers on proposed rules aimed at addressing concerns about investor protection in relation to binary options (CP18/37) and CFDs (CP18/38), and intends to publish a Policy Statement and any final Handbook rules in March 2019 for binary options and in April 2019 for CFDs and CFD-like options.

The FCA expects rules to apply very shortly after publication to coincide with the expiration of ESMA's restrictions. Should the domestic approach not be finalised by that time, the FCA will consider adopting temporary measures replicating those issued by ESMA.

EMIR: HM Treasury issues guidance on pension scheme arrangements clearing exemption

HM Treasury has published guidance on its intended approach to UK and EEA pension scheme arrangements in the event of a no-deal Brexit.

In October 2018 HM Treasury confirmed that in the event the proposed regulation to amend the European Market Infrastructure Regulation as regards the clearing obligation, reporting requirements, risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, and the supervision of trade repositories (EMIR REFIT) came into force before exit day in a no-deal scenario that the EU temporary exemption for pension scheme arrangements would be brought into UK law under the European Union (Withdrawal) Act 2018.

In November 2018, the Treasury introduced draft legislation that would allow the UK to domesticate changes brought under EU law by EMIR REFIT should it be finalised by the EU in the two years after exit day in a no-deal scenario.

Through introducing amendments to incorporate the temporary EU exemption for pension scheme arrangements, the Treasury intends that the exemption will apply to UK and EEA pension scheme arrangements.

French regulatory authorities officially confirm their position regarding interdealer market in the context of a no-deal Brexit

The Autorité des Marchés Financiers/Financial Markets Authority (AMF) and the Autorité de contrôle prudentiel et de résolution/French Prudential Supervision and Resolution Authority (ACPR) have published a joint letter addressed to the Association française des marchés financiers/French Financial Markets Association (AMAFI) regarding the interdealer market in the context of a no-deal Brexit. The letter confirms that, if the only investment services or activities provided or carried out in France by a third-country firm are OTC transactions in financial instruments on own account (excluding execution of transactions on behalf of clients) with credit institutions or investment firms no permission in France is required.

An English version of this letter will be published soon.

CSDR: BaFin publishes information on internalised settlement reporting under Article 9

The German Federal Financial Supervisory Authority (BaFin) has published information on internalised settlement reporting under Article 9 of the Central Securities Depositories Regulation (CSDR) on its website.

As of 1 July 2019, settlement internalisers in Germany will be obliged under Article 9 paragraph 1 of the CSDR to report to BaFin on a quarterly basis the aggregated volume and value of all securities transactions that they settle outside securities settlement systems. The reports must be submitted within 10 working days from the end of each calendar quarter, i.e. for the first time on 12 July 2019. BaFin will transmit the information received to ESMA.

For reporting purposes BaFin provides the Reporting and Publishing Platform (Melde- und Veröffentlichungsplattform, MVP-Portal). To be able to submit notifications, a registration both on the MVP-Portal (recommended to be made promptly) and for the forthcoming specialised procedure 'Reporting procedure for settlement internalisers' (anticipated to be available from 4 March 2019) is required.

The reporting obligation applies to all settlement internalisers within the meaning of Article 2 paragraph 1 no. 11 of the CSDR. The data to be reported is specified in Article 2 paragraph 1 of Commission Delegated Regulation (EU) 2017/391 and in ESMA's guidelines on how to report internalised settlement.

To answer technical and content-related questions, BaFin plans to host a workshop with direct and third-party reporters in May 2019. Further details will be published on BaFin's website in April 2019.

BaFin consults on treatment of certain liabilities of CRR institutions under insolvency law

BaFin has published a consultation paper on a guidance note on the treatment of certain liabilities of CRR institutions under insolvency law.

With effect from 21 July 2018, section 46f of the German Banking Act (Kreditwesengesetz, KWG) was revised to implement Article 108 paragraph 2 of the Bank Recovery and Resolution Directive (BRRD) as amended by Regulation (EU) 2017/2399 and allows CRR credit institutions and CRR investment firms to issue two types of senior unsecured debt obligations, senior preferred and senior non-preferred debt. In order to qualify as senior non-preferred debt, the relevant instruments must have a contractual maturity of at least one year and their terms and conditions must make explicit reference to the lower ranking in insolvency proceedings.

The guidance note provides clarification on the type of instruments that are in scope and is intended to replace the interpretation guidelines issued in respect of the previous version of section 46f KWG.

Comments on the draft guidance note are due by 19 March 2019.

German Parliament adopts Tax Act relating to Brexit

The German Parliament (Bundestag) has adopted the Act on taxation and other provisions concerning the withdrawal of the UK from the EU (Brexit, Brexit-Steuerbegleitgesetz). The version adopted includes certain amendments to the draft law (see our Brexit briefings of 14 December 2018 and 23 November 2018 on the original drafts). The law still needs to be approved by the German Federal Council (Bundesrat) to be enacted.

These are the main regulatory amendments to the draft law:

- transitional regime for proprietary business of UK firms requiring banking license if the relevant UK entity conducts such activity as member or

participant on a German regulated market or MTF or accesses the markets via DEA;

- BaFin may apply transitional regime now also for UK payment and electronic money institutions;
- empowerment of BaFin to apply transitional regime to markets in financial instruments based in the UK that offer German market participants direct electronic access; and
- continued eligibility of UK assets as coverage for German covered bonds (Pfandbriefe) post-Brexit by including the UK in the existing group of third countries where eligible assets may be based.

PSD2 Implementation Act enters into force

The Dutch Payment Services Directive 2 (PSD2) Implementation Act, which was published in the State Gazette on 27 December 2018, become effective as of 19 February by publication of a decree. The Dutch Central Bank (DNB) has confirmed that it will now process formal PSD2 license applications. In June 2018, DNB had already invited interested parties to submit a draft PSD2 license application with a view to speeding up the final application process once the actual date of entry into force was known.

Brexit: Bank of Italy calls on UK-based financial institutions to provide information to Italian customers

In view of the UK's withdrawal from the European Union, the Bank of Italy has released a communication addressed to all UK-based banks, payments institutions and e-money institutions that provide services in Italy.

In particular, the Bank of Italy has requested UK financial institutions to inform Italian customers about the measures that will be implemented and the consequences of those measures on the contractual relationships in place.

The aim of the communication is better to indicate which information should be provided. UK financial institutions are required to give specific and personalised information concerning the following aspects:

- the effects of Brexit on existing contractual relationships;
- the consequences of any corporate restructuring related to Brexit;
- the possibility to resort to ADR mechanisms and the effects on deposit insurance guarantee schemes coverage.

The Bank of Italy has specified that the same information should be published on the financial institutions' websites, in both Italian and English.

In the event significant effects on contract continuity or on customers' rights are expected, the communication prescribes that financial institutions should promptly inform the competent supervisory offices of the Bank of Italy.

MAS issues Notice 654 and related guidelines on recovery and resolution planning

The MAS has issued a new Notice 654 on recovery and resolution planning pursuant to section 42 of the MAS Act. The Notice applies to a bank to which a direction has been issued by the MAS under section 43(1) of the MAS Act in relation to the preparation of recovery and resolution plans.

The Notice sets out the requirements that a notified bank has to comply with in its recovery and resolution planning and has been effective since 30 January 2019. The requirements applicable to a notified bank under the Notice include the following:

- preparing a recovery plan;
- establishing a framework to regularly test the feasibility and effectiveness of its recovery plan;
- maintaining data and information for the purposes of resolution planning, resolvability assessment and the conduct of resolution; and
- informing the MAS in the event of any material change to the bank's business or structure, so as to facilitate resolution planning.

In addition, the MAS has issued related guidelines to the Notice, which provide further guidance and elaboration on the recovery and resolution planning requirements set out in the Notice.

Amongst other things, the guidelines set out the following:

- in relation to recovery planning, requirements that banks should take into consideration when putting together the recovery plan, formulating recovery triggers, and designing the communication plan with relevant stakeholders, including shareholders, employees, key group entities, customers, regulators and the media;
- in relation to resolution planning, guidance on the information requirements for local and foreign banks. The resolution plan is expected to include, amongst other things, information on: (a) functions for which continuity is critical; (b) resolution options to preserve these critical functions or wind them down in an orderly manner; (c) data requirements on the bank's business operations, structures, and critical functions; (d) potential barriers to effective resolution and actions to mitigate those barriers; (e) actions to protect insured depositors and ensure the rapid return of segregated clients assets; and (f) options or principles for the bank's exit from the resolution process;
- the requirement for banks to maintain management information systems that are capable of producing information necessary for recovery and resolution planning, resolvability assessment and the conduct of resolution; and
- the requirement for banks to have in place appropriate contingency arrangements that enable their critical functions and critical shared services to continue to operate while resolution or recovery measures are being implemented.

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Australian Parliament passes Treasury Laws Amendment Bills on strengthening corporate and financial sector penalties and enhancing whistleblower protections

The Australian Parliament has passed the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 and the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018.

The bill on corporate and financial sector penalties is intended to implement certain recommendations of the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce by amending the Corporations Act 2001, the ASIC Act 2001, the National Consumer Credit Protection Act 2009 and the Insurance Contracts Act 1984 to introduce a stronger penalty framework for corporate and financial sector misconduct and make miscellaneous technical and consequential amendments.

The bill on whistleblower protections is intended to amend the Corporations Act 2001 to consolidate and broaden the whistleblower protection regime for the corporate and financial sector, and the Taxation Administration Act 1953 to create a whistleblower protection regime for disclosures of breaches of tax laws and tax avoidance, as well as repeal the financial sector whistleblower protection regimes in the Banking Act 1959, the Insurance Act 1973, the Life Insurance Act 1995 and the Superannuation Industry (Supervision) Act 1993. The amendments are effective from 1 July 2019.

ASIC provides update on implementation of Royal Commission recommendations

ASIC has provided an update on its planned actions in relation to the recommendations of the Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The update highlights ASIC's work to date, including creating a functionally separate Office of Enforcement.

ASIC has indicated that it stands ready to work with the Australian Parliament, the Australian Government, and the Australian Prudential Regulation Authority to implement the reform agenda. ASIC said that the Royal Commission's recommendations reinforce, and will inform the implementation of steps ASIC has been taking as part of a strategic program of change that commenced in 2018 to strengthen its governance and culture and to realign its enforcement and regulatory priorities. The update also provides a report of progress on those changes.

ASIC's update notes that there are twelve recommendations that are directed at ASIC, or where the Government's response requires action now by ASIC, without the need for legislative change. ASIC stated that it is committed to fully implementing each of these recommendations.

RECENT CLIFFORD CHANCE BRIEFINGS

EIOPA recommendations offer some clarity for the Insurance sector in case of a Hard Brexit

On 19 February 2019, the European Insurance and Occupational Pensions Authority (EIOPA) issued recommendations for the insurance sector if the UK withdraws from the EU without a withdrawal agreement. The recommendations are addressed to national competent authorities and apply on a 'comply or explain' basis, with two months given to explain non-compliance. In line with previous EIOPA recommendations, we anticipate that Member States will comply.

UK insurers have for a long time been calling for clarity as to their ability to service existing contracts after Brexit, with EIOPA only acting after some national governments, including Germany, France, Spain, Italy and Ireland,

began to put their own laws in motion and started to deviate from the tightly controlled Brexit withdrawal negotiation process.

The recommendations are broadly speaking helpful for UK insurers but the situation for the UK intermediaries that introduce the vast bulk of risks into the London market and for EU based insurers who seek to source EU business via UK intermediaries remains uncertain.

This briefing paper discusses the recommendations.

https://www.cliffordchance.com/briefings/2019/02/eiopa_recommendationsoffersomeclarityforth.html

Hong Kong Court clarifies individuals' right against self-incrimination under section 181 and SFC's power to assist foreign regulators

On 11 February 2019, the Court of First Instance finally handed down its final decision in AA & EA v The Securities and Futures Commission (HCAL 41/2016). This important decision clarifies two issues:

- the right against self-incrimination of the recipients of the Securities and Futures Commission's (SFC's) section 181 notices, which are issued by the SFC in its preliminary enquiries for obtaining trading information; and
- the SFC's power to give investigatory assistance to overseas regulators pursuant to section 186 of the Securities and Futures Ordinance (SFO) and the International Organization of Securities Commissions' Multilateral Memorandum of Understanding (IOSCO MMOU).

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2019/02/hong_kong_court_clarifiesindividualsrigh.html

US Federal Trade Commission Announces Annual Revisions to the HSR Act's Thresholds and Thresholds Pertaining to the Prohibition Against Interlocking Directors

On 15 February 2019, the US Federal Trade Commission announced the annual revisions to the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. Barring an exemption, parties to a transaction exceeding specified dollar thresholds must make pre-closing notifications to the US antitrust authorities and abide by a mandatory waiting period. The revised thresholds also affect the relevant HSR filing fee parties must pay when notifying their transaction. The HSR Act's new thresholds are applicable to any transaction closing 30-days after the new thresholds are published in the Federal Registrar, meaning the thresholds are likely to take effect mid-March. Along with revisions to the HSR Act's thresholds, the FTC also announced an increase to the jurisdictional thresholds of Section 8 of the Clayton Act, which places restrictions on interlocking directors between corporations with capital, surplus, or assets above a specified dollar value.

This briefing paper discusses the revised thresholds.

https://www.cliffordchance.com/briefings/2019/02/u_s_federal_tradecommissionannouncesannua.html

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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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