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Brexit: ESMA makes further statement on MiFIR trading obligation for shares

The European Securities and Markets Authority (ESMA) has issued a further public statement on the impact of a no-deal Brexit on the trading obligation for shares (STO) under Article 23 of MiFIR.

The statement follows ESMA's guidance dated 19 March 2019, which reduced the scope of the STO under no-deal Brexit circumstances. ESMA intends the new statement to further mitigate adverse effects of the application of the STO, taking into account concerns expressed by some stakeholders about the earlier guidance.

Amongst other things, the statement discusses:

- the scope of the EU27 STO, based only on the ISIN of the share; and
- potential disruption risk from conflicting EU27 and UK STOs.

MiFID2/MiFIR: ESMA updates Q&As on investor protection

ESMA has updated its MiFID2/MiFIR questions and answers (Q&A) documents on investor protection and intermediaries.

The document, dated 29 May 2019, provides new answers on:

- best execution, including reporting for venues according to RTS 27, reporting on 'passive' and 'aggressive' orders and RTS 28 reporting and execution venues; and
- ex-ante information on costs and charges.

ESMA consults on periodic reporting guidelines for trade repositories

ESMA has issued a consultation on guidelines setting out the information that should be periodically submitted by trade repositories (TRs) to ESMA.

The guidelines set out the format and frequency of the different categories of information which ESMA expects to receive in its role as supervisor of TRs registered in accordance with the European Market Infrastructure Regulation (EMIR) and/or the Securities Financing Transactions Regulation (SFTR).

This is carried out by:

- establishing reporting schedules for TRs;
- establishing reporting calendar for TRs based on reporting schedules;
- standardising reporting templates, channels and naming conventions; and

- providing additional reporting clarifications in areas where ESMA has identified a supervisory need.

Comments to the consultation close 27 August 2019. ESMA will consider the responses it receives and expects to finalise the guidelines and publish a final report in Q4 2019.

EMIR 2.2: ESMA consults on tiering, comparable compliance and fees

ESMA has issued three consultation papers under the proposed regulation amending EMIR as regards the procedures and authorities involved for the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs (EMIR 2.2).

ESMA has received mandates for technical advice from the EU Commission on tiering, comparable compliance and fees. These mandates are provisional pending the final publication of EMIR 2.2 in the Official Journal.

EMIR 2.2 introduces a set of criteria to be considered by ESMA to determine whether a third country central counterparty (TC-CCP) is systemically important or likely to become systemically important for the financial stability of the EU or one or more of its Member States. A TC-CCP determined to be systemically important will be considered a Tier 2 CCP for the purposes of EMIR. ESMA is consulting on its draft technical advice to the Commission to further specify the criteria for tiering i.e. for the determination of whether a TC-CCP should be considered a Tier 2 CCP.

EMIR 2.2 also introduces a new system envisaging the possibility for Tier 2 CCPs to request ESMA to assess 'comparable compliance' where the extent to which a CCP's compliance with requirements set out in Article 15 and Titles IV and V of EMIR is satisfied by the CCP's compliance with the comparable requirements applicable in the third country. ESMA is consulting on how and what it should assess to apply comparable compliance and proposes minimum elements to be considered in its assessment and the modalities and conditions to carry out the assessment.

ESMA's consultation on fees sets out its proposals relating to fees to be paid by TC-CCPs relating to supervision and recognition.

ESMA will consider the feedback to these consultations and will finalise its technical advice to the Commission following the publication of EMIR 2.2 in the Official Journal.

EMIR: ESMA publishes updated Q&As and notification template for FCs and NFCs exceeding clearing thresholds

ESMA has issued an update of its Q&A document on the implementation of EMIR.

The document has been updated to include clarifications on Regulation (EU) 2019/834 amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (EMIR REFIT).

This update includes new Q&As on the implementations of the EMIR REFIT framework with regard to:

- the clearing obligation for financial (FCs) and non-financial counterparties (NFCs);
- the procedure for notifying when a counterparty exceeds or ceases to exceed clearing thresholds; and
- how counterparties should report derivatives novations and removes some obsolete references to frontloading when populating fields 'Clearing Obligation'.

ESMA has also uploaded a notification template to be used by FCs and NFCs. Under the EMIR REFIT regime, FCs and NFCs are required to notify ESMA and the relevant competent authority immediately if they do not calculate their positions against the clearing thresholds or when the results of the calculation exceeds the clearing thresholds. These counterparties will become subject to the clearing obligations for the OTC derivatives contracts entered into or novated from for four months following the notification.

ESMA has added a notification template to its webpage on clearing thresholds to be used to notify ESMA when counterparties exceed or no longer exceed the clearing threshold.

SFTR: ESMA consults on future reporting guidelines

ESMA has issued a consultation on draft guidelines for reporting under Articles 4 and 12 of the SFTR.

Under the SFTR, both parties to a SFT must report new, modified or terminated SFTs to a registered or recognised trade repository (TR), including the composition of the collateral.

ESMA's consultation seeks feedback on key elements of future guidelines on reporting under the SFTR, complementing the SFTR technical standards and ensuring consistent implementation of the new SFTR rules.

The guidelines cover:

- the number of reportable SFTs;
- the population of reporting fields for different types of SFTs;
- the approach used to link SFT collateral with SFT loans;
- the population of reporting fields for margin data;
- the population of reporting fields for reuse, reinvestment and funding sources data;
- the provision of access to data to authorities by TRs; and
- the management by counterparties of feedback from TRs in the case of:
  - rejection of reported data; and
  - reconciliation breaks.

Comments to the consultation close 29 July 2019. ESMA expects to review the feedback in Q3 2019 and publish a final report on the guidelines on reporting under SFTR in Q4 2019.

Securitisation Regulation: ESMA updates Q&As

ESMA has updated its Q&A document on the Securitisation Regulation.

The updated document:

- includes new Q&As relating to Simple, Transparent and Standardised (STS) notifications; and
- provides clarification on different aspects of the templates contained in ESMA's draft technical standards on disclosure requirements.

The Q&A document is intended to promote common, uniform and consistent supervisory approaches in the application of the Securitisation Regulation.

Securitisation Regulation: EU Commission adopts RTS on homogeneity of underlying exposures

The EU Commission has adopted a Delegated Regulation on the homogeneity of the underlying exposures for both asset-backed commercial paper (ABCP) and non-ABCP securitisations.

The Delegated Regulation sets out asset categories as well as a list of homogeneity factors available for the majority of the asset categories, reflecting market practice. Homogeneity is a key element in investors' assessment of the underlying risks and assists the investors in performing their due diligence.

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

EMIR REFIT published in Official Journal

Regulation (EU) 2019/834 amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (EMIR REFIT) has been published in the Official Journal.

The Regulation will enter into force on 17 June 2019 and will apply from the date of entry into force except for:

- provisions set out in points (10) and (11) of Article 1 of the Regulation, as regards Articles 38(6) and (7) and 39(11) of EMIR, which shall apply from 18 December 2019;
- provisions set out in point (7)(b) of Article 1 of the Regulation, as regards Article 9(1a) to (1d) of EMIR, which shall apply from 18 June 2020; and
- provisions set out in points (2)(b) and (20) of Article 1 of the Regulation, as regards Articles 4(3a) and 78(9) and (10) of EMIR, which shall apply from 18 June 2021.

EBA issues final draft implementing technical standards on supervisory reporting

The European Banking Authority (EBA) has published final draft implementing technical standards (ITS) amending the Commission's Implementing Regulation (EU) No 680/2014 on supervisory reporting under the Capital Requirements Regulation (CRR). The ITS and corresponding updated data

point model (DPM) and XBLR taxonomies form part of the EBA's reporting framework 2.9, which is intended to ensure reporting requirements are in line with changes to the regulatory framework and evolving needs of supervisory risk assessments.

The package includes:

- amendments regarding COREP to reflect the new securitisation framework;
- amendments regarding liquidity in response to the liquidity coverage requirement (LCR) Delegated Act;
- clarifications and corrections regarding reporting on COREP and additional monitoring metrics for liquidity;
- a set of XML files forming the XBRL taxonomy and a description of its architecture;
- a DPM data dictionary database, DPM table layout and data point categorisation; and
- a list of validation rules.

The final draft ITS will submitted to the EU Commission for adoption, along with the final draft ITS on FINREP changes, which were launched for consultation on 28 August 2018 and are expected to be published in early Q3 2019. The first reporting reference dates are expected to be 31 March 2020 for COREP changes, 30 April 2020 for changes regarding liquidity and 31 December 2019 for resolution planning.

IOSCO consults on guidance for regulation of crypto-asset trading platforms

The International Organization of Securities Commissions (IOSCO) has launched a consultation on its draft report on the issues, risks and regulatory considerations raised by crypto-asset trading platforms (CTPs). The draft report sets out the key risks posed by CTPs, as well as guidance intended to assist regulatory authorities in evaluating CTPs within the context of their regulatory framework. It covers topics such as:

- access to and operation of CTPs;
- safeguarding participant assets;
- conflicts of interest;
- market integrity;
- price discovery; and
- technology.

Amongst other things, the report notes that if a regulatory authority determines that a crypto-asset is a security, then the basic principles of securities regulation (such as those set out in IOSCO's Principles and Methodology) should apply.

Comments are due by 29 July 2019.

FSB reports on regulatory and supervisory approaches to crypto-assets

The Financial Stability Board (FSB) has published a report on the global work underway to address crypto-asset risks and the potential regulatory and supervisory gaps. The report is intended to update G20 Finance Ministers and Central Bank Governors in advance of their meeting on 8-9 June 2019.

The FSB notes that standard setting bodies and other international organisations are working on a number of fronts to address risks posed by crypto-assets directly. Their focus is primarily on investor protection, market integrity, anti-money laundering, bank exposures and financial stability monitoring. Activities include the monitoring and analysis of developments, setting supervisory expectations for firms and providing clarification on the application of international standards. The approaches taken on a national level vary from authority to authority due to differences in risk, market developments and underlying legal and regulatory frameworks.

The report notes that gaps may arise in instances where crypto-assets fall outside the scope of market regulation or payment system oversight or where there is an absence of international standards. It is difficult to assess the implications of such gaps, due to the rapidly evolving nature of the crypto-asset ecosystem. The FSB therefore proposes a forward-looking approach to monitoring crypto-assets and recommends that the G20 keep the topic of regulatory approaches and potential gaps under review.

HM Treasury and US Department of Treasury establish Financial Innovation Partnership

HM Treasury and the US Department of the Treasury have announced the establishment of a Financial Innovation Partnership (FIP), which is intended to encourage further collaboration and engagement on financial services innovation in both jurisdictions. The FIP will focus on two main areas, namely:

- regulatory engagement, through the sharing of information on regulatory developments and technical issues related to financial innovation; and
- commercial engagement, by facilitating opportunities for collaboration between the private sector and industry or market participants in each other's jurisdictions.

FCA publishes policy statement on Prospectus Regulation rules

The Financial Conduct Authority (FCA) has published a policy statement (PS19/12) summarising feedback and its response to the consultation (CP19/6) on changes to align the Prospectus Rules (PR) sourcebook with the EU Prospectus Regulation.

The policy statement contains near-final rules, to be finalised once changes to FSMA and relevant EU legislation come into effect, that revoke and replace the existing sourcebook.

The new sourcebook, which is to be named the Prospectus Regulation Rules (PRR) sourcebook, broadly follows the same structure by replicating key provisions of relevant EU legislation. It also:

- sets out new data submission requirements; and

- clarifies that the FCA intends to send approved prospectuses to the UK NSM after 6pm on the working after approval.

The PRR sourcebook applies to applications submitted on or after 21 July 2019, when the EU Prospectus Regulation comes into effect.

PACTE law on new regime for digital assets services providers and crypto-assets published

The PACTE law (Action Plan for Business Growth and Transformation), adopted by the National Assembly on 2 April 2019, has been published in the Official Journal. The PACTE law establishes a framework for digital assets services providers (DASPs) and fundraising via the issuance of virtual tokens (initial coin offerings, ICOs). It also strengthens the Autorité des Marchés Financiers/Financial Markets Authority's (AMF's) powers to provide investors with guarantees and reliable information.

Financial Stability Committee recommends activation of countercyclical capital buffer

The Financial Stability Committee (AFS) has adopted a recommendation to the German Federal Financial Supervisory Authority (BaFin) regarding the countercyclical capital buffer (CCyB). The AFS is the central body for the macroprudential supervision of the German financial system and strengthens cooperation between the institutions responsible for financial stability. The AFS includes representatives of the Federal Ministry of Finance, the Deutsche Bundesbank and BaFin.

The AFS has recommended that the CCyB be activated as of the third quarter of 2019 and raised to 0.25%. The CCyB, which applies to all German banks and subsidiaries of foreign banks domiciled in Germany, preventively strengthens the resilience of the financial system to cyclical risks by building up additional capital buffers. The new requirements must be met within twelve months of the date of their activation.

Ministry of Economy and Finance consults on amendments to Italian Financial Act

The Ministry of the Economy and Finance has issued a consultation document on a number of measures intended to better reflect the transposition of MiFID2 and MiFIR. These corrective measures are intended to amend the Italian Legislative Decree no. 58/1998 (the Italian Financial Act). The main amendments include a better definition and coordination of powers amongst local regulators.

Comments are due by 14 June 2019.

RAIF: Luxembourg bill amending law on reserved alternative investment funds published

Luxembourg Bill of law 7349, as initially deposited in June 2018 to implement the EuVECA Regulation, EuSEF Regulation, ELTIF Regulation, Money Market Funds Regulation and Securitisation Regulation, has been amended by the Luxembourg Commission des Finances et du Bugdet.

One of the most important amendments introduced in the revised Bill 7349 concerns the following anticipated modifications of the law of 23 July 2016 on reserved alternative investment funds (RAIF Law):

- Bill 7349 proposes to amend Article 8 of the RAIF Law to make clear that, according to the current practice, a reserved alternative investment fund set up as under the contractual form of a mutual fund (FCP-RAIF) may be managed not only by a 'Chapter 16 ManCo' (i.e. a management company governed by Chapter 16 of the Law of 17 December 2010 on undertakings for collective investment fund (UCI Law)), but also by a 'Chapter 15 Manco' (i.e. a UCITS management company governed by Chapter 15 of the UCI Law) or by a 'Chapter 18 ManCo' (i.e. a multilateral development bank which is permitted by its statutes to perform collective portfolio management services, such as the European Investment Bank, the European Bank for Reconstruction and Development and the European Investment Fund). For the avoidance of doubt, a Chapter 15 ManCo or Chapter 16 ManCo which is acting as management company of an FCP RAIF may also act as the designated external alternative investment fund manager (AIFM) of that FCP-RAIF provided that the relevant ManCo is duly authorised and licensed as an AIFM by the CSSF. If this is not the case, the relevant ManCo will have to appoint another entity, which is duly authorised as an AIFM in Luxembourg or in another EU Member State, to act as the external AIFM for the FCP-RAIF; and
- Bill 7349 proposes to correct an omission in Article 49 of the RAIF Law by including the possibility for an FCP-RAIF to convert itself into an investment company with variable capital subject to the RAIF Law (SICAV-RAIF) and to bring its constitutive documents in line with the provisions of Chapter 3 of the RAIF Law applicable to SICAV-RAIFs. Such a conversion will be subject to the same conditions as those provided by article 70 of the law of 13 February 2007 on specialised investment funds (SIF Law) for the conversion of FCP-SIFs into SICAV-SIFs, i.e. the conversion of an FCP-RAIF into a SICAV-RAIF will have be decided by a resolution of a general meeting of the FCP-RAIF's unitholders passed by a majority of two thirds of the votes of the unitholders present or represented regardless of the portion of the net asset value of the FCP-RAIF represented.

ASIC updates information for businesses on initial coin offerings and crypto-assets

The Australian Securities and Investments Commission (ASIC) has updated its Information Sheet 225 on initial coin offerings (ICOs) and crypto-assets (INFO 225) to help businesses involved in ICOs and crypto-assets to consider their legal obligations and satisfy themselves they are operating lawfully.

ASIC has updated INFO 225 based on its recent experiences with ICOs and crypto-assets, which indicate that ICOs and crypto-assets will often be financial products or involve financial products that are regulated under the Corporations Act 2001.

INFO 225, which was published in September 2017, provides information on how the Act may apply to businesses that are considering raising funds through an ICO and to businesses involved with crypto-assets.

ASIC has highlighted that, in January 2019, the Australian Treasury noted in its issues paper on ICOs that many ICOs have turned out to be scams. Businesses seeking to operate lawfully and legitimately are required to

distinguish themselves from possible scams and carefully consider the information in INFO 225.

SFC issues circular on credit rating model risk management

The Securities and Futures Commission (SFC) has issued a circular to inform credit rating agencies (CRAs) that it has identified a number of potential regulatory concerns as well as good practices during the course of its supervision of licensed corporations engaged in the provision of credit rating services regarding their model risk management.

In particular, the circular is intended to:

- specify the regulatory concerns related to model risk management identified by the SFC during its supervision of CRAs;
- provide guidance to CRAs on the expected standards for the management of risks emanating from the application of 'credit rating models' when providing credit rating services; and
- provide examples of good model risk management practices observed by the SFC.

FSC reforms business conduct rules on financial investment business

The Financial Services Commission (FSC) has proposed reforms to the Financial Investment Services and Capital Markets Act (FSCMA) to improve business conduct rules on financial investment business.

Amongst other things, the reform bill is intended to:

- ease the current requirement of information barriers, known as 'Chinese walls,' to enhance its regulatory effectiveness and flexibility. In particular, to ease the current requirement of information barriers:
- the types of information, not types of business, will serve as a basis to apply the Chinese wall rules. The FSCMA will also be amended to provide only basic principles and leave implementation details to financial investment companies to allow more autonomy and flexibility; and
- the current rules that require physical separation of offices and prohibit executives and employees from holding concurrent positions across business units or with affiliate companies will be abolished. Instead, companies will be required to strengthen their internal control on 'material non-public information' and establish business conduct rules to prevent conflicts of interest. Those who cause investor losses or disturb market orders with non-public information will be subject to punitive fines; and
- facilitate the entrustment of business or provision of concurrent or incidental business by financial investment companies – financial investment companies will be allowed to entrust a broader range of business to a third party or an information technology (IT) company in response to changing demand in their business environment. To this end:
- the FSC will abolish the current rule that separates a financial investment company's core business from non-core business and prohibits the entrustment of core businesses. Also, the scope of essential business, currently allowed to be entrusted only to a third party licensed or registered

for investment trading or brokerage services, will be readjusted to exclude receiving, transmitting, executing and confirming trading orders so that financial investment companies could entrust such business to IT companies;

- the 'designated representative' scheme, which allows financial companies to designate IT companies to entrust their essential business, will be introduced into financial investment business; and
- the current requirement of a prior report to the Financial Supervisory Service (FSS) will be replaced with an ex post report. For investor protection, however, the entrustment of essential business will require a prior report to the FSS.

The FSC plans to submit its reform bill on the FSCMA to the National Assembly in the first half of 2019.

MAS consults on regulating merchant banks under Banking Act

The Monetary Authority of Singapore (MAS) has launched a public consultation on regulating merchant banks under the Banking Act. The consultation is intended to consolidate the regulation of merchant banks under the Banking Act (BA) upon removal of the Domestic Banking Unit (DBU) and Asian Currency Unit (ACU) divide (DBU-ACU divide) and move merchant banks to a licensing regime from the current approval framework under the MAS Act.

In particular, the MAS proposes to:

- consolidate the regulation of merchant banks under a new 'Part VIIB' of the BA upon removal of the DBU-ACU divide. The proposed consolidation is not intended to introduce new requirements or modify existing ones, except for changes that have been previously communicated or under consultation with merchant banks. After the proposed consolidation, existing directives and notices to merchant banks issued under section 28 of the MAS Act will accordingly be replaced by the proposed BA provisions, as well as regulations and notices issued under the BA;
- amend provisions in other parts of the BA, e.g. the miscellaneous provisions in 'Part IX' of the BA, to make or remove references to merchant banks as appropriate; and
- move merchant banks from the current approval framework under the MAS Act, to a licensing regime under the BA. Under the proposed licensing regime, regulatory requirements for merchant banks will continue to be calibrated to reflect the different business models and activities of merchant banks compared to banks.

Comments on the consultation are due by 19 June 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

The digital future of syndicated loans

Are we at the dawn of a new era in which a syndicated loan is seamlessly negotiated, executed, recorded, funded, managed, traded and regulated entirely on one technology platform?

While this might be a little further on the horizon, financial institutions are already using or trialling a range of technology tools in all phases of the loan life cycle, from origination to secondary trading, and in key functions such as loan servicing and risk management.

This briefing paper explores the benefits and opportunities, as well as the legal, regulatory and practical challenges, of some of today's most talked about technologies in relation to syndicated loans.

https://www.cliffordchance.com/briefings/2019/05/the_digital_futureofsyndicatedloans.html

Treaty protection for Indian investments abroad – the changed landscape

India's investment treaties lower the political and sovereign risk of Indian cross-border investments by providing investors with enforceable international legal protections. Given India's recent policy of terminating its investment treaties, Indian investors must carefully consider how to best maintain or obtain these protections.

This briefing paper discusses India's investment treaties and investment treaty planning.

https://www.cliffordchance.com/briefings/2019/05/treaty_protectionforindianinvestmentsabroad.html

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